



Neutral Citation Number: [2021] EWCA Civ 46

Case No: B4/2020/1833

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL
HH Judge Greensmith
LV19C02663

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 January 2021

Before :

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE NEWAY
and
LORD JUSTICE BAKER

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF JB (A CHILD) (SEXUAL ABUSE ALLEGATIONS)

Between :

KB	<u>Appellant</u>
- and -	
A LOCAL AUTHORITY (1)	<u>Respondents</u>
JW (2)	
JB (by his children's guardian) (3)	

Ruth Henke QC and Carl Gorton (instructed by **Quality Solicitors Jones Robertson**) for the
Appellant

John Tughan QC and Megan Gilchrist (instructed by **Local Authority Legal Services**) for
the **First Respondent**

Nicola Turner (instructed by **Hogans Solicitors**) for the **Third Respondent**

The Second Respondent was not represented at the hearing

Hearing date : 13 January 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 22 January 2021.

LORD JUSTICE BAKER :

1. This is an appeal in care proceedings concerning a child, J, now aged 17 months. The appeal is brought by his mother against findings made in the proceedings that she sexually abused J's older half-sisters.
2. This is regrettably another case in which the guidance set out in "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses and guidance on using special measures" ("ABE") was not followed by those investigating the allegations. Notwithstanding those failures, which were in many respects recognised and accepted by the judge, he proceeded to make the findings against the mother. The issue for this Court is whether he was right to do so.

Background

3. J's older half-sisters are E, born in 2009 and now aged 11, and C, born in 2010 and now aged 10. Their parents' relationship was characterised by drug taking, excessive drinking and domestic abuse. In 2012, their father and their mother's brother, PB, were both convicted of a serious offence of violence and sent to prison for nine years. By this stage, the local authority was involved in providing assistance for the children who were made subject to child protection plans. In August 2013, the local authority started care proceedings in respect of the two girls and they were placed with foster carers, Mr and Mrs W, under interim care orders. They have not lived with their mother since that date.
4. In July 2014, the proceedings concluded with special guardianship orders being made in favour of Mr and Mrs W. Thereafter, the girls had occasional contact with their mother, but this came to an end in 2016 following an altercation in the street between the mother and Mrs W. Following this incident, there was a serious deterioration in E's behaviour. In a note later sent to the local authority in 2018, when E was aged nine, Mrs W described E's conduct as including lying, damaging and stealing other people's property, falsely accusing people of hurting her, and dramatising injuries for attention. Mrs W described her in these terms:

"She needs to be always in control. She will never do what you ask, she will lie because she knows you want the truth, she refuses to answer questions She shows no remorse for anything she does From the minute she wakes up to the minute she goes to bed she tests me to see my reactions. She will do or say anything to get a reaction She doesn't see anything wrong in lying and being nasty to get what she wants."

Mrs W concluded: "we have three different Es - naughty E, fake E, and E".

5. In 2017, Mrs W informed the local authority that E had been sexually abusing her sister, injuring the family pet and urinating on property. A further allegation that E was sexually abusing her sister was made to the school a few weeks later. In December 2017, Mrs W informed the local authority that E had alleged that she had been sexually abused by her mother when she had been living in her care. This set in train an investigation which I will describe in more detail below but which can be summarised as follows. On 8 December 2017, E was seen by a social worker and police officer at school for just under an hour. Following that conversation, it was decided to conduct

an interview under the ABE procedure. In the days leading up to that interview, E wrote a series of notes in which she described acts of abuse said to have been committed on her by her mother. On 22 December 2017, the ABE interview took place. In March 2018, the mother was interviewed under caution and denied all allegations of sexual abuse. In June 2018, E alleged that she had been sexually abused by the mother's brother, PB, whilst living at home with her parents. As a result, a further ABE interview took place in August 2018. Following this investigation, the police decided to take no action against either the mother or PB.

6. In 2019, the mother, by that stage in a volatile relationship with another man, JW, became pregnant. As result, the local authority prepared to start proceedings following the birth of the child. On 5 August 2019, the mother gave birth to J. The local authority immediately started proceedings and obtained an interim care order. Drug and alcohol testing carried out over a period of time repeatedly demonstrated that the mother was taking drugs. Initially, the mother and J were placed together in a residential placement and then moved to the maternal grandparents' home, but because of ongoing concerns about the mother's behaviour, J was removed from her care in March 2020 and placed in foster care. At a later date, he was moved to live with relatives where he has remained to date.
7. After a series of case management hearings, a fact-finding hearing took place before HHJ Greensmith over 13 days in September and October 2020, which because of the restrictions imposed as a result of the Covid-19 pandemic was conducted remotely via Microsoft Teams. In its threshold document, the local authority set out the findings it sought to meet the criteria in s.31(2) of the Children Act 1989. It relied on the findings which had been agreed by the mother in the course of the earlier proceedings concerning E and C, including her failure to meet the children's health and development needs, exposing them to domestic violence, alcohol misuse, and chaotic lifestyle. The authority also relied on further concessions made by the mother, including her history of drug abuse; her ongoing alcohol misuse; the fact that J's father had a criminal record for offences including supplying drugs and was a fugitive from justice; and the fact that she had continued a relationship with him, contrary to earlier assertions.
8. In addition, the local authority sought findings against the mother and PB in respect of E's allegations in the following terms. In the case of the mother, E alleged:
 - (1) The mother had put her fingers in E's "private parts" and it "really hurt". The mother was "drunk and mad" at the time.
 - (2) The mother made E wash her with her hands because she was drunk. This included her "private parts". The mother became angry with E when E did not wash her vagina with her fingers.
 - (3) The mother left E alone and returned home drunk.
 - (4) E witnessed her parents having sex.
 - (5) The mother told E to put her fingers inside the mother's vagina. The mother pulled a funny face. E had to do this for a few minutes. The mother threatened E not to tell anyone. This occurred in the shower.

With regard to PB, E had alleged that he had sexually assaulted her in the family bedroom and that the mother had come into the room and pulled his hand away. The local authority asserted that the allegations were true and that either the acts alleged amounted to sexual abuse or that the chaos in the mother's life, including alcohol abuse, "led to the absence of normal boundaries".

9. The principal focus of the hearing was therefore on E's sexual allegations. PB was given leave to intervene in the proceedings. No application was made for E to give oral evidence at the hearing. At the conclusion of the hearing, the judge reserved judgment until 15 October. On that date, he delivered a judgment in which he made the findings of abuse against the mother as sought by the local authority but refused to make the findings in respect of PB who as a result was then discharged from the proceedings. I shall consider the judgment in detail below. The judge extended the interim care order and made a series of case management directions, including providing for assessments of the cousins with whom J is living who have offered to care for him permanently under a special guardianship order. At the appeal hearing, we were informed that the mother, having accepted that the threshold criteria under s.31 are satisfied on the various grounds excluding the contested sexual allegations, now agrees that, whatever the outcome of this appeal, J should remain in his current placement. The next hearing is listed at the end of January 2021 when it is anticipated that a final order may be made.
10. At the hearing, the judge refused an application for permission to appeal made on behalf of the mother. Her representatives sought clarification of some of the findings which the judge provided on the same day. On 3 November 2020, the mother filed a notice of appeal to this court. On 27 November, I granted permission to appeal on all grounds and listed the hearing for 13 January 2021.

The ABE guidance

11. The importance of complying with the ABE guidance, which is directed at both criminal and family proceedings, has been reiterated by this Court in a series of cases including *TW v A City Council* [2011] EWCA Civ 17, *Re W, Re F* [2015] EWCA Civ 1300, *Re E (A Child)* [2016] EWCA Civ 473, *Re Y and F (Children) Sexual Abuse Allegations* [2019] EWCA Civ 206 and in the judgments of MacDonald J in *AS v TH and others* [2016] EWHC 532 (Fam) and *Re P (Sexual Abuse: Finding of Fact Hearing)* [2019] EWFC 27. It is unnecessary to repeat at any length the extensive comments set out in some of those judgments. For the purposes of this appeal, the following points are of particular relevance. (Save where indicated, the paragraphs cited are from the ABE guidance.)
 - (1) "The ABE guidance is advisory rather than a legally enforceable code. However, significant departures from the good practice advocated in it will likely result in reduced (or in extreme cases no) weight being attached to the interview by the courts." (*Re P (Sexual Abuse: Finding of Fact Hearing)*, supra, paragraph 856)
 - (2) Any initial questioning of the child prior to the interview should be intended to elicit a brief account of what is alleged to have taken place; a more detailed account should not be pursued at this stage but should be left until the formal interview takes place (paragraph 2.5).

- (3) In these circumstances, any early discussions with the witness should, as far as possible, adhere to the following guidelines.
 - (a) Listen to the witness.
 - (b) Do not stop a witness who is freely recalling significant events.
 - (c) Where it is necessary to ask questions, they should, as far as possible in the circumstances, be open-ended or specific-closed rather than forced-choice, leading or multiple.
 - (d) Ask no more questions than are necessary in the circumstances to take immediate action.
 - (e) Make a comprehensive note of the discussion, taking care to record the timing, setting and people present as well as what was said by the witness and anybody else present (particularly the actual questions asked of the witness).
 - (f) Make a note of the demeanour of the witness and anything else that might be relevant to any subsequent formal interview or the wider investigation.
 - (g) Fully record any comments made by the witness or events that might be relevant to the legal process up to the time of the interview (paragraph 2.6, see also AS v TH, supra, paragraph 42).
- (4) For all witnesses, interviews should normally consist of the following four main phases: establishing rapport; initiating and supporting a free narrative account; questioning; and closure (paragraph 3.3).
- (5) The rapport phase includes explaining to the child the “ground rules” for the interview (paragraphs 3.12-14) and advising the child to give a truthful and accurate account and establishing that the child understands the difference between truth and lies (paragraphs 3.18-19). The rapport phase must be part of the recorded interview, even if there is no suggestion that the child did not know the difference between truth and lies, because “it is, or may be, important for the court to know everything that was said between an interviewing officer and a child in any case” (per McFarlane LJ in Re E, supra, paragraph 38).
- (6) In the free narrative phase of the interview, the interviewer should “initiate an uninterrupted free narrative account of the incident/event(s) from the witness by means of an open-ended invitation” (paragraph 3.24).
- (7) When asking questions following the free narrative phase, “interviewers need fully to appreciate that there are various types of question which vary in how directive they are. Questioning should, wherever possible, commence with open-ended questions and then proceed, if necessary, to specific-closed questions. Forced-choice questions and leading questions should only be used as a last resort” (paragraph 3.44).
- (8) Drawings, pictures and other props may be used for different reasons – to assess a child’s language or understanding, to keep the child calm and settled, to support the child’s recall of events or to enable the child to give an account. Younger children with communication difficulties may be able to provide clearer accounts when props are used but interviewers need to be aware of the risks and pitfalls of using such props. They should be used with caution and “never combined with leading questions”. Any props used should be preserved for production at court (paragraphs 3.103 to 3.112).

- (9) “The fact that the phased approach may not be appropriate for interviewing some witnesses with the most challenging communication skills (e.g. those only able to respond "yes" or "no" to a question) should not mean that the most vulnerable of witnesses are denied access to justice”. It should not be “regarded as a checklist to be rigidly worked through. Flexibility is the key to successful interviewing. Nevertheless, the sound legal framework it provides should not be departed from by interviewers unless they have discussed and agreed the reasons for doing so with their senior managers or an interview advisor" (paragraph 3.2).
- (10) Underpinning the guidance is a recognition “that the interviewer has to keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else” (per Sir Nicholas Wall P in TW v A City Council, supra, at paragraph 53).

The allegations and investigation

12. According to Mrs W, the first occasion when E made an allegation against her mother was on 1 December 2017. Thereafter, she made further allegations on 2, 3 and 5 December. The earliest evidence of what was said is in an email sent by Mrs W on 18 January 2018. As to the allegations made on 1 December, she wrote:

“1 December 2017. E disclosed that K [her mother] had sexually abused her and C. She said she would pinch the front of her vagina and also put her fingers inside her vagina. She said it was either one or two fingers. They would be kept inside for quite a few seconds. K would smile or laugh when she was doing it because it hurt E. She would hurt them first by pushing them over or into things like the bed before she hurt their vagina. E says they were usually naked when K hurt them.”

Mrs W recorded E as saying on 3 December:

“E said that she used to shower K a lot. She would have to wash her ‘flu and bottom’ with her hands because there were no sponges. K got C to do this on few occasions but if E found out she would stop her and do it herself.”

13. At the hearing before the judge, Ms Ruth Henke QC, who represented the mother at that hearing as she did before us, asked Mrs. W in cross-examination how E had come to make the allegations on 1 December. Mrs W said that E had assaulted C again and so Mrs W asked her whether anyone had ever touched her in that way. E replied yes, adding that it had been K. The cross-examination continued:

“Counsel: When she is talking on 1 December, does she use the word ‘vagina’ or is that your word?

Mrs W: That’s my word.

Counsel: Does she actually say: put her fingers inside her vagi-

Mrs W: Used the word ‘flu’.

Counsel: Used the word ‘flu’. Does she actually say the word ‘fingers’ or does she describe the action, which you then put in here?

Mrs W: She actually ... she said that, well, it had happened to her. K had done it, and I said – she couldn’t explain it at first, and then she said there was a Minions onesie hanging at the end of the bannister, and the hood was, sort of, hanging down, so it was shaped like that. And I said, ‘Can you show me on there?’, because she was struggling to explain it, and then she did, she got her fingers and put them in as if she was putting them inside.”

14. Following the conversation on 1 December, Mrs W informed social services and as a result E was seen by a police officer and social worker at school on 8 December. The meeting lasted for 50 to 60 minutes but the only record of it, in the police officer’s log book, is extremely short:

"Attended at St Margaret 's School, which is the school that E attends. E is a lovely young girl, who was chatty and happy to speak to me. We spoke about music, singing, school and friends. She was very comfortable talking to me about this sort of thing. She introduced family members to me and I engaged her some more about family. She told me about her other mum she said her name was K. She told me that she wasn't a nice person. E has clamed up [sic] and started crying. She looked at mum [Mrs W] for reassurance and wouldn 't look at me. She didn't want to talk about anything else. Her mum gave her a special purple stone from her grandma. I suggested that she write things down. She has then wrote two paragraphs. The first one is in blue and she explained that this was a dream that she has. The second is in red and this is a memory she has. I have then asked her few questions about what she wrote. In red she says, 'mum hurt me and C'. I asked her what she meant by this. She began crying. She said that mom hurt her private parts. And she also hurt C 's private parts and she watched this. She said that she had to look after C and her mum. She has had to shower her mum touch her private parts. I asked, she would speak to me again about this and she said yes."

15. Following this meeting, arrangements were made for E to be interviewed formally under the ABE procedure. In the intervening sixteen days, E wrote four notes in which she made statements about her mother’s behaviour. It was Mrs W’s evidence that she had encouraged E to write the notes, that she had written them without any input from Mrs W, and that she had then put them in a “special box”. The notes included statements that her mother “had put her fingers in my privet places”, that “she did it when she was drunk and mad or just to hurt us”, that her mother had made her wash her in the shower including her “privet parts”, and that “her face was angry because I was slow, I was slow because I didn’t know what to do”. E also wrote that her mother had left her alone

in the house and returned drunk, and that she had been mean to C, shouting at her and hitting “her privet parts”.

16. Mrs W was questioned about the notes by Ms Henke at the hearing. The following exchange took place:

“Counsel: ... she went to the interview with a special box, didn't she?

Mrs W: Yes.

Counsel: Whose idea was the special box?

Mrs W: That was mine.

Counsel: The special box contained notes, which contained allegations, didn't they?

Mrs W: Yes, so that she could – because she said she was forgetting stuff, and that would just jog her memory, so...

Counsel: So correct me if I am wrong, between the discussion that had been had at the school and the ABE interview –

Mrs W: Yes.

Counsel: - she said she was worried she would forget, or something like that, or get it wrong?

Mrs W: Yes, because obviously when you're under pressure, it's – it can be quite difficult, can't it? She was, like, dreading the interview.

Counsel: So before 8 December, she appears to have told you about allegations using words, and now she is writing them down. So, the first note that goes in the box, how does that come about?

Mrs W: (Pause). It's just because they'd said, like, 'if you want to write things down, if it's easier', so I said that to her, you know, 'if you want to just write it down', so she was in her room, and she just wrote a couple of lines ...

....

Counsel: Were you with her in the room?

Mrs W: No.

Counsel: But you suggested she puts them in a special box?

Mrs W: Yes.

....

Counsel: Okay, so had you seen the contents of the notes before she went into the interview?

Mrs W: Yes, I'd read them, but I ... I just knew it was a few lines, she didn't write a lot.

Counsel: So, if she had written a few lines, would she come and show you what she had written?

Mrs W: Yes."

17. E's first formal interview by the police officer took place on 22 December 2017. The interview was recorded on video and transcribed. In his judgment, the judge said that he had watched the video recording twice. We have not seen the recording and my analysis is therefore based on the transcript alone. It is undeniable that the interview departed from the ABE guidance in a number of respects.

18. It is immediately obvious from the transcript that the interview did not include a rapport phase as recommended in the guidance. There is no detailed exploration of the child's understanding of truth and lies. It seems from the transcript that there may have been an earlier conversation between the officer and E in which this issue was discussed. At an early point, the officer said:

"Now just before I ask Vicky [another officer] to turn the recording on, we did truth, or tell the truth in the rules didn't we? And we also did, if you don't understand something, that you can just tell me that you don't understand."

There is, however, no recording or transcript of this earlier conversation.

19. After a brief introduction, the officer introduced the reason for the interview by saying:

"... we're here to talk about somebody else today. Can you tell me who we're here to talk about?"

E immediately replied by saying her mother's name. After the officer asked some questions to establish who K was, the interview continued:

"Officer: Tell me what it is that we've come to talk about today.

E: The stuff that she did.

Officer: The stuff that she did. Tell me about the stuff that she did then.

E: It's in one of these notepads."

The rest of the interview consisted of the officer reading the four notes which E had written and stored in her special box and asking E questions about what she had written. There was no free narrative. In the course of her short answers to the officer's questions, E added no significant experiential detail to her allegations.

20. In the months following the interview, there were various further conversations between E and Mrs W in which E referred to the allegations. On one occasion, in July 2018, she described how the mother had told E to put her finger inside her vagina for a few minutes and had pulled a funny face when she did this. In another conversation, she had alleged that she had been sexually assaulted by her uncle, PB. As a result of this latter allegation, a second formal interview took place on 14 August 2018. During that interview, E again produced a note in which she had written allegations about PB. Contrary to the ABE guidance, that note was not retained. On this occasion, E was reluctant to answer questions about what she had written. The officer invited Mr and Mrs W, who were observing the interview remotely, to come into the room. Mrs W and the officer proceeded to encourage E to speak. Amongst other things, Mrs W said:

"Just think, you wanted to come here, you said that you was well, that you wanted to come and what it is you want when you come ... Imagine, the other side of this, go walking out the door having said everything you need to say and how you'll feel when you go out that door. How you felt last time. You remember? You've just got to get through this difficult bit and then the other bit ... You'll feel wonderful. You felt so much better last time, didn't you? Imagine that, think of that, sometimes you have to do hard things, don't you? So you get better."

The officer and Mr W added their encouragement:

"Officer: ... Come on, I need you to be brave.

Mr W: Go on, be brave. Go on.

Officer: It won't be too much longer, it's just these words that I need you to say"

E then continued by answering questions from the officer based on the note she had written about PB.

The judgment

21. After an introduction and brief summary of the legal principles to be applied when conducting a fact-finding hearing, the judge set out what he described as the essential chronology, in the course of which at paragraph 12 he made this observation:

"At this point I pause to make comment upon the evidence of Mrs W. I say without hesitation that I found Mrs W to be a credible and honest witness. I have no doubt that having committed her family's lives to the welfare of E and C she has acted entirely consistently with her love for the children and her

desire to parent them in the best way possible. There are elements of Mrs W's conduct which could be open to criticism; I have no criticism for Mrs W, or, indeed Mr W. Everything that Mrs W has done in respect of the children, and particularly in respect of E, has to be regarded in the context of caring for a child displaying behaviour which would test any parent's ability to provide consistent and safe care.”

22. When he reached the stage in the chronology when E made her allegations, the judge reminded himself of the ABE guidance and referred to some reported cases in which the importance of adhering to the guidance has been emphasised. He noted that there had been “clear breaches” of the guidance during the initial conversation between professionals and E on 8 December 2017. Turning to the period between that conversation and the formal interview, he said:

“30. During the period between the initial meeting and the first ABE, E wrote four notes. How these notes came to be written must be put into the context of Mrs W taking certain actions in a well meant but potentially misguided way to support her child.

31. Mrs W has a history of caring for others and a genuine interest in matters of a psychological nature. Further to this interest Mrs W is advanced in her training to be a counsellor. For specialist lawyers and other trained professionals, it would be easy to criticise Mrs W for helping E in a way which might contaminate or prejudice E's future evidence. For example, Mrs W bought dolls for E to help her express herself around this period. Mrs W introduced child friendly books on attachment to E. In order better to understand E, Mrs W attended a course regarding attachment and bonding. E was and remains a highly vulnerable child and a well-informed professional may question, not the motive of Mrs W, but her actions. Turning to the context however this was a Special Guardian who had committed herself and her family to the care of a child who was demonstrating behaviour of the most challenging nature and, as is often the case, was receiving little by way of practical support from the local authority. This was a woman who was at her wits end in trying to maintain a stable and safe environment for E and C whilst protecting the safety of her natural children. Rather than Mrs W being criticised she should in my judgment be applauded for persevering with such a caring nature in the circumstances.

32. Returning specifically to the four notes used during the first ABE interview, it is Mrs W's evidence that she encouraged E to write down what she wanted to say to [the police officer] during her interview to ensure that she said everything she wanted to say. Mrs W was adamant that the notes were written by E and without any direct or indirect input into the content of the notes from Mrs W or anyone else. Having heard Mrs W give evidence on this point I am entirely satisfied that this is the case.”

23. Turning to the formal interview, the judge said (at paragraph 33):

“The notes were used during the first ABE interview largely as a way of [the officer] reading the notes out loud to E and then asking her to expand what she had written. The notes were used as an aide memoire. Once the notes had been used to help E say what she wanted to say E then went on to confirm and elaborate, freely, in a way which was consistent with her age and stage in life.”

24. The judge then turned to the second formal interview in August 2018. He summarised what occurred during the interview, noting that the circumstances in which the note was written were “far less clear than the previous four notes” and that, unlike those earlier notes, the note concerning PB had not been retained. He noted that Mrs W had been unable to recall whether she had been present when E wrote this further note. He added, however, (at paragraph 36):

“Unlike the previous note, however, having heard Mrs W’s evidence I am not satisfied that E [wrote] this note whilst she was alone. It is my view that that Mrs W was present whilst E wrote the note and that it is more likely than not that she prompted E to include details which E had previously relayed to Mrs W.”

At paragraph 37, he summarised the second interview, noting the intervention of Mr and Mrs W and observing:

“The frustration of Mrs W is palpable; during her evidence Mrs W confirmed that she was indeed frustrated. In order to secure E’s cooperation there follows about five minutes of dialogue between the adults who talk across E. Anyone watching the video would be forgiven for concluding that E was being put under pressure to repeat her allegations against PB. The interview continues with only E present for a further 20 minutes. During the remainder of the interview, E makes two allegations against her uncle PB. The first involves digital penetration while [he] removed her from the bath and the second during a chance encounter in the street, while she was running an errand (aged three years). The first explanation raises issues with inconsistencies as to how E was being held while the alleged penetration took place. The second lacks overall [credibility].”

25. The judge then considered the evidence of other witnesses. Included in this section is a paragraph about a report from a psychologist obtained by the local authority in 2018 in which he expressed the view that E’s conduct was consistent with, though not diagnostic of, sexual abuse. The psychologist did not in fact give evidence and the local authority did not rely on his opinion. The judge added, however:

“That said, the report is not mentioned by either leading counsel for the respondents and neither therefore have attempted to explain away the psychologist’s stated opinion that the reported

behaviour is consistent with (but not diagnostic of) the child who has been sexually abused.”

26. The judge dealt briefly with the mother’s evidence. He noted that she had lied on many occasions regarding her alcohol abuse. He expressed concern about her sense of appropriate boundaries for children, citing the fact that she had encouraged E and C to call PB by the name of “Uncle Knob-head”. He concluded:

“Overall, I find [the mother] to be unreliable as a witness except where she confirms matters which are provable by other means.”

In contrast he described PB as a straightforward witness who gave his account in a credible manner.

27. The judge then set out his analysis in the following paragraphs:

“49. The key element of this case is the interview evidence with E. I have to consider in the first instance whether the breach of the guidance during the initial interview at school was so manifest as to contaminate the integrity of the subsequent interviews so as to reduce their value to a point where their evidential value vanishes.

50. I will deal firstly with the allegations against the mother. The initial interview is concerned with allegations against the mother, not PB. Having carefully considered the interview I am sufficiently satisfied that it stands alone and is not fatally damaged by the initial [conversation] as to render it of no value.

51. The ABE interview conducted on 22 December is notable in that E does not initially volunteer a free expression of what she wants to say. Instead E refers to notes she has brought with her. I accept Mrs W’s account the notes were the work of E. E was nearly nine when being interviewed. She was recalling events she said happened five years previously. The interview was conducted calmly. E showed no signs of stress and was quite happy to confirm her written allegations. The manner in which E conducts herself within the first interview has an air of authenticity. The descriptions that E gives as to life with her mother paints a picture that is corroborated by what we know, that the mother's life was chaotic and that she lacked boundaries.

52. E's descriptions of her mother's behaviour has details which further the sense of credibility, such as her mother pulling a funny face when E inserted her fingers into her mother's vagina. It also, however, has details which Miss Henke describes of smacking of fantasy, such as the mother using a drawing pin. As we know, the way the memory works is not like a filing cabinet where things get lost, but what remains maintains a constancy. Memory works as reconstructions where things can get altered every time recall is required. No-one recalls everything perfectly

every time they are asked to do so. In the case of E, I can see that there are elements of her recall which might not make immediate sense, but there is sufficient of an overall picture for her recollection to have good potential to be reliable.

53. Around the time the allegations are said to have occurred [the mother] was drinking to great excess. I have particular regard to the mother's propensity to lie which is conceded by her counsel, and the mother's demonstrated lack of boundaries.

54. E's behaviour leading up to the allegations includes acting out in a sexualised way. Her extreme behaviour is not, however limited to sexualised acting out. The behaviour is that of a troubled child.

55. I have considered the weight to be attached to the undisputed fact that the mother does not have any previous history of sexually abusing any child. This case is not about a parent who has consciously set out to abuse her daughter. As I see it, this is about a parent who has allowed inappropriate conduct of a sexual nature to occur and who has not had the proper sense of boundaries to stop it. Indeed, even if the mother understood what was happening her ability to stop the events would have been fatally compromised by her state of intoxication.

56. Much of the touching of E and E's touching of the mother was of a sexual nature thereby rendering the abuse sexual. Whether [the mother] has a memory of what is alleged to have happened I am unable to ascertain as I find her evidence inherently unreliable.

57. As I have stated, I have great respect for Mrs W and the quality of her evidence. I am aware that she has probably fallen victim to an understandable element of confirmation bias. Having decided that she believes E, she is prone to believe everything that E says. Mrs W's evidence of what happened to E is hearsay. and I approach it as such, giving it the weight I consider appropriate. I see Mrs W's role in this process as a collator of evidence. In this context she is an accurate historian of E's behaviour and in my view, accurately relays the content of what E has said to her.

58. I have considered whether E may have been motivated to make the stories up about her mother in an attempt to secure her position with Mrs W. I am concerned that E would have been deeply affected by seeing her two mother figures fight at the contact centre. I am equally concerned as to what the state of E's knowledge was about the possibility of the placement coming to an end. If this was E's motivation all she had to do was to alter her behaviour. If she was that calculating, she would have known that. Her IQ is lower than average but does not suggest an

inability to see things how they are and to react accordingly to avoid undesirable outcomes ... [In] my judgment, having regard to all the circumstances and what we know about E, I have reached the conclusion that it is improbable that this would provide an adequate explanation for her making up such detailed allegations against her mother and being prepared to repeat them to a police officer.

59. It is suggested that E was acting out behaviour she had witnessed via the television or internet. None of us can be sure what children experience from sources external to our homes. E was eight when she made the allegations, not a teenager. Mr and Mrs W are experienced and responsible carers of their own three children of mixed ages and, of course the two girls. With the exception of a comment made by Mrs W that E had provided an explanation for her own sexualised behaviour from the TV there is no evidence to support a contention that E has behaved the way she has or made up such specific allegations by watching pornography. Further her behavioural concerns are not limited to sexualised behaviour, far from it.

60. E's behaviour, overall is alarming. I refer to the email from Mrs W. In my judgment behaviour of such an extreme nature has to weigh heavily in the balance when considering the facts as pleaded.

61. Looking at all the evidence in the round I am satisfied that the Local Authority has proved its case on the balance of probabilities against [the mother].”

28. Having made that finding, the judge then considered the allegations against PB. He again noted the deficiencies in the August interview, returning to Mrs W's involvement in the writing of the note:

“Having pressed Mrs W on the point I have reached the view that Mrs W was present when the note was written and it would be a short step from there to conclude that elements of the contents of the note have been prompted. If this did happen, and I think it probably did, this does not in any way detract from my respect for Mrs W.”

The judge added that the failure to retain the note written by E was “a significant failing on the part of the local authority and the police”. He concluded that there was insufficient evidence to lead to a finding against PB on a balance of probabilities.

29. In their request for clarification, the mother's legal representatives asked the judge *inter alia* to clarify in relation to the December ABE interview what weight if any he gave to the lack of any free recall, the lack of detail and the use of leading and closed questions. The judge replied that:

“insofar as the guidance had not been followed, the breaches were not of sufficient magnitude as to discredit the process of the evidence collected thereby which formed part of the overall picture”.

30. The order made at the conclusion of the fact-finding hearing included, in Annex 1, the findings made by the court. These included (1) a recital of the findings made in the earlier care proceedings in 2014 concerning E and C; (2) further findings agreed by the mother as to her lifestyle, including findings as to alcohol and drug abuse and her dishonesty about that abuse, and (at paragraph 11 of the order) (3) findings based on E’s allegations to Mrs W, namely that the mother had abused E in that:
- (i) She put her fingers in E’s “private places” and it “really hurt”. The mother was “drunk and mad” at the time.
 - (ii) She made E wash her with her hands because she was drunk; this included the mother’s “private parts”. The mother became angry with E when E did not wash inside her vagina with her fingers.
 - (iii) The mother left E alone and returned home drunk.
 - (iv) E witnessed her parents having sex.
 - (v) The mother told E to put her fingers inside her vagina. E had to do this for a few minutes. The mother threatened E not to tell anyone. This occurred in the shower.

The arguments on appeal

31. In their grounds of appeal, the mother’s representatives contend that the judge’s reasoning in support of the findings against their client was unsustainable and fundamentally flawed for the following reasons:
- (1) he failed to consider whether E was a reliable and credible witness;
 - (2) he wrongly accepted the evidence of the psychologist about E’s behaviour and failed to give proper consideration to evidence that provided a different explanation;
 - (3) he omitted evidence that undermined the reliability and credibility of the allegations;
 - (4) he failed to apply the *Lucas* direction properly and wrongly placed significant weight on the mother’s dishonesty;
 - (5) his analysis of the context in which the allegations were made was substantially flawed;
 - (6) he failed to consider the relationship between the allegations made against the mother and those made against PB.

32. In her oral submissions, Ms Henke focused on the first and fifth grounds and took the Court carefully through the process of the investigation. It was her principal submission that the whole process failed to comply with the ABE guidance in a number of crucial respects and that, as a result, the evidence was insufficient to justify the findings made against the mother.
33. In reply, Mr John Tughan QC for the local authority accepted that there had been significant departures from the guidance but submitted that it was nonetheless open to the judge to make the findings having carried out a careful analysis of the evidence. He understandably relied on the principle that it is the trial judge who is best placed to evaluate the evidence. In this case, the judge was well aware of the deficiencies in the investigation but nonetheless, in the light of all the evidence and in particular that given by Mrs W, he was entitled to make the findings. The local authority's case was principally based on the notes written by E. Having accepted Mrs W's evidence as to how those notes came to be written, the judge was entitled to conclude that they contained a truthful account. Mr Tughan submitted that the notes written by the child fell into the category of "props" to assist a child giving an account during an interview permitted by the ABE guidance. The second interview carried out in August 2018 had been qualitatively different because of E's reluctance to engage with the process and the fact that E's note containing her allegations against PB had disappeared. Although the judge had concluded that Mrs W had prompted E to write the note, her intentions had been benign and this incident did not undermine the weight which the judge properly attached to her evidence concerning the allegations against the mother.

Discussion and conclusion

34. Family proceedings involving allegations of sexual abuse of children often present very difficult forensic challenges. In this case, the judge set about his task conscientiously and diligently. I have, however, reached the clear conclusion that his finding that the mother abused E cannot be sustained.
35. An important feature, which does not appear to have featured strongly in the judge's analysis, is that the alleged incidents occurred when the child was, at most, 4 ½ years old, the age at which she was removed from her mother's care. According to Mrs W, E first made her allegations in December 2017, shortly before her ninth birthday, 4 years 4 months after she last lived with her mother. As MacDonald J observed in *Re P (Sexual Abuse: Finding of Fact Hearing)*, supra, at paragraph 577 (and again at paragraph 854):

"Memory is prone to error and easily influenced by the environment in which recall is invited Delay between an event recounted and the allegation made with respect to that event may influence the accuracy of the account given."

Although it is of course possible for a child rising 9 to recall events that occurred when she was much younger, particular care is required when investigating such allegations. Regrettably the investigation in this case did not meet anything approaching the required standard.

36. Little if any forensic weight can attach to the initial conversation between E and Mrs W on 1 December. There is, of course, no full record of the conversation but it is plain from the answers elicited in Ms Henke's cross-examination of Mrs W that the email

sent on 18 January contains only a summary of the conversation, that the initial allegation came as a result of a leading question from Mrs W, and that her evidence about the conversation was to some extent based on her interpretation of what E was demonstrating with the onesie.

37. As the judge correctly observed, the conversation between the police officer and social worker and E on 8 December did not comply with the ABE guidance in a number of respects. It was a much longer conversation than recommended in the guidance. The officer's note of the conversation is extremely short and manifestly is nothing like a full record. There is no verbatim record of the questions and answers. It is plain that E was reluctant to talk and only made the allegations after interventions from Mrs W, who gave her a "special stone from her grandma". The absence of a full record makes it impossible to assess the extent to which the conversation contaminated or influenced E's subsequent allegations, but the length of the conversation and the few details which are provided in the short note give rise to real concern that it went beyond what is recommended in the guidance. The judge plainly recognised that this amounted to a serious breach of the guidance but in my judgment failed to give sufficient consideration to the question whether this breach undermined the reliability of the subsequent allegations.
38. It is plain that between the conversation at the school on 8 December and the recorded interview on 22 December there were several conversations between E and Mrs W in which the allegations were discussed and in the course of which the four notes were written. The judge accepted that Mrs. W was an honest witness and this court is in no position to overturn that assessment. To my mind, however, he did not sufficiently address the question whether, notwithstanding her honesty, her words and actions may have influenced E's allegations. In paragraphs 30 and 31 of his judgment, he acknowledged that Mrs W had acted in a "well meant but potentially misguided way" to the extent that "a well-informed professional may question, not the motive of Mrs W, but her actions". In my judgment, however, he did not sufficiently address the implications of this conduct on the reliability of the allegations. His conclusion at paragraph 31 that he accepted Mrs W's evidence that E's notes were written without any direct or indirect input from anyone else does not absolve him from the obligation to consider whether Mrs W's actions may have inadvertently influenced the allegations. The police officer was also a truthful witness, but the way in which she conducted the investigation undermined the reliability of what E is recorded as having said. Although there is no reason to think that Mrs W may have consciously influenced E, there is plainly a risk that this may have happened. Indeed, on Mrs W's own account, E's first allegation against her mother was made in response to Mrs W's inquiry whether anyone had touched her in the way she had touched C. Although the judge acknowledged (at paragraph 57) that she had "probably fallen victim to an understandable element of confirmation bias", his description of Mrs W's role as a "collator of the evidence" illustrates that he did not give sufficient consideration to her impact on the reliability of the allegations.
39. As for the formal interview on 22 December, the extent to which it departed from the guidance is on such a scale that it seems wrong to describe it as an ABE interview at all. The transcript of the interview does not include any rapport phase in which the "ground rules" for the interview were explained nor any discussion in which it is established that E understood the difference between truth and lies. It seems from the

transcript that there had been an earlier discussion between E and the officer which had covered the ground rules for the interview and explored the child's understanding of truth and lies, but there is no recording of that conversation. This Court has stressed in a number of earlier cases (including *Re E*, supra) that the rapport phase must be part of the recorded interview. That is the case even where there is no suggestion that the child does not understand the difference between truth and lies. In the present case, according to Mrs W, E was unfortunately a child who regularly lied about anything and saw nothing wrong in doing so.

40. The most important part of any ABE interview is the free narrative phase. The interview on 22 December did not include any free narrative at all. Instead, it consisted of the officer reading through E's four notes and asking questions about the contents. There could not be a more blatant example of the practice deplored by Sir Nicholas Wall P in *TW v A City Council* when he stressed that "the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else". In submissions to this Court, Mr Tughan submitted that the use of notes in this way was permitted under the category of "props" discussed in paragraphs 3.103 to 3.112 of the ABE guidance. I do not read that section of the guidance as endorsing the practice of using pre-prepared notes to prompt the child's account. On the contrary, the use of such notes in an interview should be avoided if the interview is to have any forensic value. They are certainly not an acceptable alternative to initiating an uninterrupted free narrative account.
41. In those circumstances, the weight which could be attached to what E said during the interview is extremely limited. I do not agree with the judge's observation (at paragraph 33) that, "once the notes had been used to help E say what she wanted to say, E then went on to confirm and elaborate." His further observation (at paragraph 51) that E's conduct during the interview had "an air of authenticity" was made without any reference to Mrs W's evidence that E was a habitual liar who cried on cue, dramatised injuries for attention and "would do or say anything to get a reaction". He did not consider whether the E he was observing on the video was the "Fake E" described by Mrs W. His discussion and dismissal (at paragraph 58) of a possible motive for E to fabricate the allegations is to my mind not sufficient to address the evidence about E's extensive dishonesty. The detail to which the judge referred at paragraph 52 as supporting the authenticity of the allegations (the mother pulling a funny face when E inserted her fingers in her vagina) was never mentioned in the interview but only emerged in an email from Mrs W seven months later.
42. It is axiomatic that, when considering cases of suspected child abuse, the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in *Re T* [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:

"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

43. In this case, the judge stated his conclusion about the allegations against the mother before completing his consideration of the evidence about the allegations against PB. The second interview in August 2018 plainly contained information of some relevance to the first interview on 22 December 2017, including demonstration of the encouragement given to E by Mr and Mrs W and the content of the allegations, which bore some similarity to aspects of the allegations made against the mother. Furthermore, the judge's findings about Mrs W's involvement in the writing of the note containing the allegations about PB (at paragraph 36), and that she had probably prompted E to write elements of the note (paragraph 65), together with his findings about the pressure put on E by the officer, Mr and Mrs W during the August interview (paragraph 37), and about the implausibility of the allegations against PB (also paragraph 37) were all plainly relevant to his analysis of the provenance and reliability of the earlier allegations against the mother. It was incumbent on him to consider the totality of the evidence before reaching any conclusions. Instead, he reached his conclusion that the allegations against the mother were true without reference to the evidence about the allegations against PB.
44. In these circumstances, I have reached the clear conclusion that the appeal against the findings recorded in paragraph 11 of the order of 15 October 2020, recited in paragraph 30(3) of this judgment above, must be allowed.
45. The remaining question is what should now happen to the allegations. In many such cases where an appeal against findings of child abuse are set aside on appeal, it is appropriate to remit the matter for a rehearing. In this case, however, having regard to all the circumstances, including the child's very young age when the incidents were said to have occurred, the period of several years between the alleged incidents and the child's allegations, and the evidence as to the child's history of lying and manipulative behaviour, I consider that the deficiencies in the investigation were on a scale that no court could properly make the findings of abuse against the mother sought by the local authority. I also bear in mind that, in the light of the other serious findings conceded by the mother, she has accepted that J cannot return to her care and should remain with the relatives with whom he is placed under a special guardianship order.
46. If my Lords agree, I would therefore propose that the findings in paragraph 11 of the order of 15 October 2020, as recited in paragraph 30(3) of this judgment, be set aside. At the hearing before us, all parties agreed that, in the event that the Court reached the conclusion at which I have now arrived, it would be appropriate for the hearing listed at the end of this month to go ahead so that decisions about J's long-term future, including contact, can be made on the basis of the other findings recorded in the order of 15 October 2020 which are undisturbed by this appeal.

LORD JUSTICE NEWEY

47. I agree.

LORD JUSTICE UNDERHILL

48. I also agree. Even a substantial failure to observe the requirements of an ABE interview will not necessarily mean that a judge cannot properly rely on hearsay statements made by a child. But I agree with Baker LJ that for the reasons which he gives that is the only possible conclusion in the circumstances of the present case.