Neutral Citation Number: [2025] EWFC 40

Case No: FA-2024-000287

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2025

Before:

MR JUSTICE TROWELL

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Between:

FATHER	**Appellant**
- and -	
MOTHER	**First Respondent**
- and -	
THE CHILD	**Second Respondent**
(a child, by her 16.4 Guardian)	

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Emma Weaver (instructed by **Bank Solicitors**) for the **Appellant**

Loretta Giaimo (instructed by **Norrie Waite Slater Solicitors**) for the **First Respondent**

Patrick Bowe (instructed by **Hopkins Solicitors**) for the **Second Respondent**

Hearing dates: 6 and 7 February 2025

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Approved Judgment

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This judgment was delivered in public, but a reporting restrictions order is in force. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family and the parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

1. This judgment is prepared for delivery at the conclusion of the hearing before me on the 6 and 7 February 2025. Though in writing it has been prepared at considerable speed. I am grateful to counsel for the corrections of some typographical errors that I had made in the first draft handed down.

2. This matter is listed before me pursuant to an order of Mrs Justice Judd of the 25 November 2024 for the hearing of an appeal of a fact-finding judgment of HHJ Williscroft dated the 14 December 2023 made within proceedings brought for orders under the Children Act 1989 and an appeal of the subsequent child arrangements order dated the 5 February 2024. The Judge found at the fact-finding hearing that there had been 'touching of a sexual nature of the child by the Father that took place on more than one occasion.' The child arrangements order, made in the light of that finding, made no order for contact between the father and the child, and largely prohibited him from exercising his parental responsibility for the child.

3. Mrs Justice Judd gave permission to the father to appeal the findings, and the child arrangements order out of time, notwithstanding the application was made long out of time.

4. I have had the benefit of written and oral submissions from Emma Weaver on behalf of the Appellant ('father'), Loretta Giaimo on behalf of the First Respondent ('mother') and Patrick Bowe on behalf of the Second Respondent ('the child', through her 'Guardian',). The father submits I should allow the appeal and substitute my own findings. The mother submits that I should reject the appeal. The Guardian submits, agreeing with the father, that I should allow the appeal and substitute my own findings.

5. I note, but will not detail here, that the father contends that 5 February order should be set aside, notwithstanding my conclusions on the fact-finding judgment.

6. Ms Giaimo represented the mother at the hearings before HHJ Williscroft. The father appeared in person. Lucy Fisher appeared for the Guardian. My position has been made very substantially easier than HHJ Williscroft's position because the father has had legal representation.

7. I have had the benefit of a bundle of 138 pp containing the documents directed by Judd J. In the light of the submissions, I have asked for, and received, and read part of the father's statement of the 29 June 2023. This came in a bundle which had been prepared for the fact-finding hearing and in the course of her submissions Ms Giaimo took me to one or two other pages in that bundle.

8. I shall consider first the appeal against the finding of touching of a sexual nature, because it appears inevitable that the appeal of the child arrangements order will depend on whether or not I allow an appeal of that finding.

The Law

9. I am reminded that pursuant to FPR 2010 30.12 (3) an appeal court will only allow an appeal where the decision of the lower court was (a) wrong, or (b) unjust because of a serious procedural or other irregularity.

10. It is submitted here that the decision was wrong.

11. I am reminded that it is only in a rare case that the appeal court should interfere with a finding of a primary fact. I was referred to the judgment of Lord Neuberger in *Re B (a child)* [2013] UKSC 33, and the judgment of Baker J (as then was) in *Re A and R (children)* [2018] EWHC 2771 (Fam), incorporating an 'oft cited' passage from Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5.

12. I am reminded, in the words of Baroness Hale in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, again incorporated in the said judgment of Baker J that 'where findings depend upon the reliability and credibility of the witnesses the appeal court will generally defer to the trial judge who has the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence. As Lord Hoffmann explained in *Biogen Inc v Medeva plc* [1997] RPC 1, the need for appellate caution is 'based upon much more solid grounds than professional courtesy'. Specific findings of fact 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 qualifications and nuance'. To the same effect I am reminded that, in the words of Lord Hoffman in *Piglowska v Piglowaski* [1999] 1 WLR 1360, the trial judge had the 'distinct advantage' of having seen and heard the parties and the witnesses over three court days.

13. I shall set out the passage to which I have been referred of Lord Neuberger in *Re B* because it is by reference to that that the father and the Guardian put their case:

Where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where the conclusion was one (i) which there is 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,.

Both Ms Weaver and Mr Bowe say (ii) and (iii) apply in this case.

14. Ms Giaimo rejects this and asserts that the judge made her findings after a robust analysis of the broad canvas in the case.

The Judgment

15. The Judgment is full. It has some 118 paragraphs. It is clear that it took some time to prepare.

16. The judge heard evidence from the mother and father, and from a police officer – not the investigating officer but her superior, and from a social worker who had interviewed the child at her nursery.

17. The child I remind myself was only 4 at the time of the incident which lies behind these proceedings. That occurred on the 27 March 2022, when the child said something to her mother that caused her to be questioned by her mother as to what her father had done to her and led to her taking the child to the Police.

18. As the judge records, the proceedings did not in fact start until December 2022 when the mother made an application to the court in relation to parental responsibility and the father subsequently made an application to spend time with the child. The parents who were married had separated following the incident in March 2022. The judge records that the marriage was already in significant difficulties in March 2022 and separation was planned by the mother.

19. The judge records that the parents were both from Eastern Europe. The father had believed after the parties separated that the mother had taken the child to their country of origin and had approached the International Child Abduction Unit to try and locate her.

20. The judge appropriately records the law relevant to a fact-finding hearing and reminds herself of what for shorthand I will refer to as the *Lucas* direction, the fallibility of memory, the need to take into account the inherent probability of an event, and the requirement to look at 'the broad canvas' of the evidence.

21. The judge records in a section headed 'Generally' that what the child may have said in March 2022 and what it meant is the key focus of the court. She records that the police had felt that the mother had coached the child when she was at the police station, and the father adopts that position, and says that all the allegations made are

deliberately made by her. Mr Bowe, I record, says this is a harsh characterisation by the judge. He tells me that the father's position was that this was 'all in the mother's head'.

22. The judge concludes early in the judgment (paragraph 30) that the mother 'obviously believes something terrible has happened. Whether she has misinterpreted events, jumped to a conclusion not supported by evidence and communicated this to her daughter who then repeats it has been my concern and why I have taken so much time to consider again the written and oral evidence'.

23. There is no attack on the judge being right that this is a proper statement of her task, and I make clear I accept it.

24. The judge then turns to the history. She sets out that in December 2021 there was an occasion when the father took the child to the toilet, and, as he lent over her, the child reached out for the laces on his trousers and grabbed his penis and said 'squishy'. The father's account was he told Ariana she should not do this and told the mother, who was upset and angry with him thinking that it was funny.

25. This incident was referred to by the mother after the March 2022 incident and she in the proceedings refers to the father as being semi-erect and this occasion as an incidence evidencing grooming. The judge sets out her conclusions on this incident later in her judgment in a section headed 'My conclusions'.

26. The judge records that the father asserted in the court for the first time that it was agreed that he would not wipe the child clean after she had toileted following this event. Instead, he would just pull up her pants and not wipe her bottom. The judge finds that this is a lie on the part of the father. She says it would be odd that he would stand passively by and not dry and clean a young child after toileting.

27. The judge records that on the 27 March 2022 the mother alleges that she learnt from the child that she had been abused. Importantly the judge says that it is not clear to her what the child said to her mother. The judge gives various different account of what the mother has said she was told.

28. The judge records that the mother took the child to the police station that day. The judge says there are no proper notes of what was said at the police station. She tells us however (paragraph 51) that social service and police strategy records show the police had recorded that the child had told her mother that her vagina was sore, and the mother assumed that this was because she had been sexually abused. Further the mother related that the child had put a vitamin bottle between her leg and said that this is what dad does. The notes, the judge records, written by the police offier who gave evidenceshow a log entry of the child demonstrating a wiping motion to her genitals showing three or four quick wipes. The mother was so distressed, according to the police officer who gave evidence because she just used one quick wipe.

29. When seen on her own at the police station on that day the child said only 'daddy pushed her once and later was reluctant to talk.' (paragraph 52).

30. The judge records that the next day (which is the 28 March 2022) the child's nursery spoke to her having been told by the mother that the child had been sexually abused by the father. The nursery relate that the childa says, 'Daddy touched me here, Mummy said that bad.' The nursery observed, the judge relates, that the child had a loving relationship with her father, that she runs up to him and is happy to see him.

31. The judge records that on the 29 March the Police visit the child at the nursery. There is a handwritten note which records 'He had undressed her. Moved his finger down there many times, need to leave him, yes in pain when daddy touched me, I screamed, scratched his face.'

32. The judge records that on the 30 March a social worker visited the child at the nursery. The child said 'no no no' when she drew her dad and said that he had touched her down there – pointing at her vaginal area from underneath.

33. The judge in the next section of her judgment, headed 'the police investigation' considers at some length the failings of that investigation and indeed of the social work investigation. She expresses her concern about the repeated use of the word 'disclosure' as it implies that a truth has just been revealed. She notes that she learnt, though she would not have gathered this from the notes, that an interpreter was present

on the 30 March and that a lot more conversation went on with the child then was reported back in English.

34. The judge records that the social worker when she appeared before her said the child pointed up to her genital area rather than down and she felt 'something had happened to the child'. She expressed the view that the child had not been coached.

35. The judge records that there was an ABE interview on the 14 June. That showed that the child did not understand the difference between truth and lies. The judge does not give an account of that interview, but it appears that nothing came out of it.

36. The police took no further action.

37. The judge's conclusion on the professionals' involvement is that it is 'an investigation in which attempts to get 'the child's view' seem to me not to have followed good practice in any way.'

38. She sets out at paragraph 75, having just criticised the investigation that 'the evidence of the parents is obviously crucial'.

39. Over the next 15 or so paragraphs she considers the evidence of the parents. She sets out her finding that the mother genuinely believes the child has been abused.

40. In relation to the father, she sets out that he gave his evidence confidently, but she flags a concern about the reliability of his evidence in the light of accusations that he made that the mother beat the child. She says that his explanation as to why he did not report those allegations, namely that the child, might end up in foster care were unconvincing, and that causes her to have concerns about the reliability of his evidence generally. She further notes that he had not mentioned the agreement about not wiping the child following the December incident to the Police, and she says that his reason for not doing so, namely that he was in a rush to leave the police station was unlikely.

41. In her section headed 'my conclusions' the judge makes a finding that something did happen in December 2021, but it was an innocent occasion which the mother had now come to different conclusions about.

42. She expresses concerns about what happened on the 27 March and again goes through the different accounts that are offered.

43. She records at paragraph 99 following whatever was initially said that 'the child was …repeatedly questioned by a Mother in a very heightened emotional state who immediately felt her Father was a danger. Then at the police station…we know observers felt she was talking for her daughter.'

44. She records at paragraph 106 that 'I have been most concerned about the impact of her [the mother's] beliefs on her daughter and how her [the child's] accounts might have been affected by her Mother's questions and concerns. If all her daddy did was tickle her or wipe her after the toilet she now understands her daddy is bad and she had needed rescuing from him.'

45. She records at paragraph 107 that the social workers assessment in her nursery visit was 'that the child was convincing in affect, particularly upset when Daddy is mentioned'.

46. She sets out at paragraph 109 that the father in his evidence (by which she means his oral evidence) had accepted that he had overheard the mother asking the child what she had said rather than coaching or telling her anything. She makes a criticism of him at this point that he should have told the truth about this beforehand. That criticism is unfair. The account that the father had given in his written evidence on the 29 June 2023, I am told by Mr Bowe and was then taken to it, is that he heard the mother shouting at the daughter, 'Tell me!! What he done!! Come on tell me!!'. It was clear that the father had already given an account of the mother asking the daughter what had happened, albeit in heightened terms.

47. The judge reiterates at paragraph 112 her concern that 'a child being repeatedly asked something means in the end leads [sic] to a risk she might say something she believes the questioner wants to hear, a particular worry that ABE guidelines were designed to help with. Here was the only answer that would satisfy her Mother something that was misconstrued?'

48. The judge's conclusion is then set out at paragraph 113: 'that the mother has on balance persuaded her that the child has said her father has touched in her private parts in a sexual way and what had happened.'

49. This conclusion is somewhat startling given what has come before. It is reasoned in the next few paragraphs. It is to them I must turn in analysing my decision on this appeal.

The Judge's reasons for her decision and my analysis of them

50. First in 114:

a. The judge acknowledges that the mother has re-interpreted history since she was told about touching. *This is a perfectly sensible conclusion and justified on the evidence.*

b. The judge finds on balance the mother was told about touching, which was consistent with what was said to the social worker and police on the 29th and 30th March. She accepts the mothers account that the child had not said anything to the police at the station on the 27 March because she does not want to upset her. *This consistency rationale for believing the mother does not bear the weight put on it.*

51. I will explain why the rationale does not bear the weight put on it.

a. The judge does not here make the step necessary for her conclusion at 112 of sexual touching, only touching. The judge had already found that the father was lying when he said he had stopped wiping the child after going to the toilet. She therefore needed to consider whether or not the touching of the private parts was merely wiping after the child went to the toilet.

b. The judge does not deal with the point that she herself had just made in paragraph 112, that repeated questioning might lead the child to give an answer the questioner wanted to hear.

c. The judge does not deal with the criticisms that she has made of the police visit on the 29th and, in particular the unrecorded and untranslated exchanges with the interpreter, or the social work visit on the next day.

d. The judge does not consider whether the evidence on the 27th should have been given more rather than less weight because it came closer to the incident, and before repeated questions were put.

e. As Mr Bowe points out, the evidence is only consistent because the judge ignores the 27 March interview (albeit she gives a reason for that), the ABE interview and does not refer to the Nursery worker on the 28th in which we were told that the child said 'Daddy touched me here, Mummy said that bad.' - an account that might be entirely consistent with wiping after the toilet not sexual touching.

52. I appreciate that it can be said that the judge must have had many of the points made above in mind because they are points that she has herself taken at earlier points in the judgment but what is needed here is a clear route from the acknowledged problems to the conclusion reached. That route is absent.

53. The second limb supporting the judge's finding is her conclusions as to the father's evidence set out in paragraph 116 and following. The judge says she is influenced by his oral evidence in paragraph 117. She repeats her criticism that the father admitted in oral evidence that he heard the mother ask questions of the child, having 'said throughout' she has coached her. It is without doubt clear that the father had in his written evidence recorded above that he heard the mother ask questions. So, this criticism cannot be sustained. The judge then says she is troubled by what he said about not assisting the child after she went to the toilet 'both at the police station and differently in court'. The criticism here is that she had found that the father's position was a lie, and he did assist the child with toileting beyond just pulling pants up. (The difference between the police station and court is that he did not tell the police about the agreement following the December incident, he just said he didn't wipe the child.) The judge then reasons:

Considering what explanation there might be for these lies I have concluded that there is no other explanation but they were designed to hide the truth.

54. The first so called lie is not a lie at all. The judge has misconstrued the evidence. The second lie, is properly called a lie on the judge's conclusions, and of course, as Mr Bowe points out any lie is designed to hide the truth, but the *Lucas* direction which the judge had set out earlier in her judgment is not whether the lie is designed to hide the truth but that if someone has lied about one thing it does not mean that person has lied about everything, and the reasons for lying need to be considered. One explanation here might have been that the father said he did not wipe the child's private parts after she went to the toilet because he was scared that might lead people to believe that he had sexually interfered with her when he hadn't; another might be because there had been an agreement between the parents following the incident in December 2021 as he said, even though the agreement was not one he kept to, and he knew he would be criticised by the mother if he said he did in fact wipe the child's private parts after she went to the toilet.

55. The judge does not consider the reasons the father might be lying at all. The judge has misconstrued the evidence in relation to the first so called lie. I must therefore similarly conclude that this leg of her reasoning cannot bear the weight put on it.

My conclusion on the appeal of the fact-finding hearing

56. I pause to ask myself should I step back here and consider that it might be the case that I am following too close a linguistic analysis and should in fact consider that this judge had heard the evidence and broadly had all the points in mind even though they were not expressed in the reasoning in the judgment.

57. I conclude I cannot take that step. This is a serious finding which will prevent the child seeing her father, with whom she had a good relationship. The reasons the judge has given cannot sustain the conclusion and therefore it needs to be reconsidered.

58. For the reasons I have set out above I therefore conclude that as Ms Weaver and Mr Bowe contend points (ii) and (iii) as set out by Lord Neuberger in *Re B* are made out. There is a misunderstanding of the evidence, and no reasonable judge could have reached the conclusion that was reached. Lest there be a temptation to overread my

conclusion on point (iii), I want to make clear that I do not make a positive finding that there was no sexual abuse but that this judge's reasons do not sustain that finding.

59. So, I conclude the decision of the lower court was wrong and allow the appeal.

60. I am asked by both Ms Weaver and Mr Bowe to substitute my own decision for that of the trial judge. As I have already said to them, I am in no position to do so. I have not read the written evidence of the parties (save for one part of the father's statement referred to above), I have not got a transcript of evidence, I have not heard the parties give evidence. I am therefore sadly, going to have to make provision for a fresh fact-finding hearing. I acknowledge that this will just add to what has been a very long time during which the child has not seen her father.

The Child Arrangements Order

61. Based as it is on the finding of fact, the child arrangements order of the 5 February 2024 will also need to be set aside. I will hear argument as to how the interim situation until the matter can be reheard should be dealt with. It may in fact be that the order of the 5 February in effect needs to remain in place.

Future Hearings

62. I will discuss with counsel the future conduct of this case on handing down this judgment.

Mr Justice Trowell

7 February 2025