IN THE FAMILY COURT

Sitting at PORTSMOUTH Case No: PO19P01295

IN THE MATTER OF S 8 OF THE CHILDREN ACT 1989

AND IN THE MATTER OF AN APPEAL

ON APPEAL FROM DISTRICT JUDGE MILES

AND IN THE MATTER OF TWO GIRLS, AGE 9 AND AGE 7

B E T W E E N:

Ms B

Appellant

-and-

Mr P

Respondent

Hearing Before HHJ Levey: 4 and 9 February 2022

The Law Courts, Portsmouth

Representation

Dr Proudman for the appellant

The respondent in person (with assistance of interpreter)

Judgement

This judgment was delivered in private. 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 must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HHJ Levey:

1) This is an appeal from a decision of District Judge Miles in proceedings relating to 2 children, A aged 9 and B aged 7. The hearing was heard over 2 days, 17 and 18 August 2021, and judgement was handed down on 12 September 2021. The purpose of the hearing was to establish a number of disputed facts, alleged by each parent against the other, in order to set a factual matrix for the subsequent proceedings.

Representation

2) I will call the parents M and F, or appellant and respondent, respectively, in order to minimise the risk of identification of the children. M was represented by Dr Charlotte Proudman, who did not appear before the District Judge. F represented himself, as he did at the original hearing. He was assisted by an interpreter, Ms Leconte who assisted at both hearings, and I am very grateful to her for her considerable assistance.

3) Dr Proudman provided a helpful and detailed skeleton argument. F was not able to secure representation, although the court file suggests that he had contacted the Pro Bono unit. It is unfortunate that he was not able to be represented as the task of representing oneself at an appeal is not at all straightforward, and all the more so given that English is not his first language.

4) I have read the appeal bundle which includes a transcript of the evidence as well as a transcript of the judgement. Additionally, the original bundle for the hearing was produced. I have had regard to that as necessary, although this task was not straightforward as it was not compliant with the requirements for electronic bundles, not being book marked from the index and navigation was therefore extremely difficult. Additionally, the judgement did not set out a history of the relationship and I have attempted to piece that together from the bundle.

Background – History

5) The application was made by the father for enforcement of a child arrangements order made on 3 October 2019. The mother responded by applying for variation of that order, making allegations of domestic abuse.

6) The parents had met in 2009, M then being 18 years old, and F 26. F is not a UK citizen and did not have the necessary visa, so the parents returned to live in his country of origin to enable him to make the necessary application to return. They did return to the UK the following year, until F was deported. Once again M returned with him to his home country.

7) She alleged that the relationship became an abusive one in about 2011, the abuse consisting of violence at times, as well as allegations that he denigrated her. She alleged that this behaviour continued through the relationship.

8) M alleged that she became pregnant with A only after F suggested that this would help him obtain entry clearance into the UK. She was reluctant but agreed. She returned to the UK, and F followed before A was born.

9) In 2016 M told F that the relationship was finally over. He refused to leave however, and M alleged that he moved his girlfriend into the house and said that his girlfriend would look after the children, and that M should leave. However, F moved out of the home after an incident in 2016, leaving M with the children.

10) In 2018 M left the children with F after obtaining a job in the midlands. She alleged that F had refused to return them to her, and that there was an incident of violence. The children told M that F hit them, and M made an application to the court for a prohibited steps order and a child arrangements order. The application was resolved by agreement with an order providing for the children to live with M and have regular contact with F.

11) Despite that order, the disagreements continued to which the children were clearly exposed. M alleged that F was violent and abusive towards her, and a non-molestation order was made on her application against F.

12) A further allegation was that A had been sexually abused by the son of one of F's friends. M alleged that this commenced in 2016, when the boy in question, then aged 8, touched her genitals. M stated that F agreed that A would not come into contact with the boy, but she later found that F had allowed him to come into contact with her, and that the boy had abused her again.

13) The local authority became involved and there were a number of child and family assessments through 2019 and 2020. The local authority concluded that there was no current risk and closed the case – it is not clear from the summary that I have read why the local authority concluded that there was no risk – whether that was an absolute conclusion on their part or whether it was on the basis that M would not allow contact with this boy.

14) In late 2020 A made further allegations at school which prompted another local authority assessment. At some point it would appear that M stopped contact between the children and F, although it is not entirely clear when, on my reading of the bundle.

15) The present application was made as long ago as December 2019. The FHDRA took place on 30 March 2020 and the parents were ordered to file statements. The next hearing was to consider whether a s7 report was needed.

16) On 28 May 2020, at a hearing before District Judge Wilson the father was ordered to file a schedule of alleged breaches and for statements to be filed.

17) On 10 July 2020, DDJ Humphreys repeated the direction for the filing of a schedule of alleged breaches and statements. Cafcass were ordered to report as to availability of unpaid work. At the end of July 2020, a further Child and Family assessment was completed by the local authority.

18) On 7 October 2020 DJ Miles decided that a fact-finding hearing was not necessary. M was deemed to have applied to vary the child arrangements order. A s7 report was directed. A one-day final hearing was listed.

19) There was an incident at the end of October 2020 when F came to M's address and was abusive to her. On 6 November a non-molestation order was made against him ex parte. On 20 November 2020 M applied to vary the child arrangements order. This came before the court on 8 December 2020. Direct contact was replaced with indirect contact, and F gave undertakings about his behaviour. On 11 December the non-molestation order was continued at the return hearing of that application.

20) On 13 January 2021, the final hearing was not effective. The Father had not filed his schedule of breaches or statement in support. Directions were made for disclosure from the local authority, and for M to file her schedule of allegations with evidence in support.

21) On 16 April before District Judge Miles, the decision was made that a fact-finding hearing was necessary. A hearing was listed to consider the question of contact between F and the children pending the fact-finding hearing. The fact-finding hearing was listed on 17 and 18 August.

22) At the hearing the judge heard evidence from the parents, M's brother and a social worker. She had schedules of allegations from both parties. There was no ground rules hearing, and from the transcript, no consideration of special measures. The hearing was fully remote, taking place as it did within the Covid 19 pandemic. The appellant was represented, the respondent was not. The submissions made on behalf of the mother did not address the procedural issues raised in this appeal. As far as I can tell, the judge was not referred to the need for a ground rules hearing, Part 3A of the FPR, practice directions 3AA or 12J; she was not referred to the definition of domestic abuse and she was not reminded of the decision in Re H-N (see below).

23) The judge broadly found most of the mother's allegations not proved. In respect of the father's allegations of breach, she found some proved, some not proved, and others that M had a reasonable excuse. The mother appealed.

History Of The Appeal

24) Notice of appeal was lodged on 4 October 2021, and directions were given by me on 14 October. The first listing of the hearing was to have been 2 December 2021, but this was adjourned by consent as the transcripts were not available.

25) When the matter came back before the court on 11 January, it was still not possible to proceed, as the bundle contained no material from the original proceedings and an interpreter had not attended to assist F.

26) The hearing was listed on 4 February with a time estimate of 2 hours. Dr Proudman took the whole of that time in making her submissions and the matter had to be adjourned part heard. Fortunately, it was possible to list the appeal during the following week.

27) It will be clear from reading the above that this application has been going on for far too long, though clearly not helped by failures to comply with directions. There has been a lack of judicial continuity throughout.

The Law

28) In relation to the law on appeal, FPR 30.12(3) provides that an appeal may only be allowed where the decision was wrong or unjust for serious procedural irregularity.

29) The court may conclude that a decision is wrong or procedurally unjust where

a) an error of law has been made;

b) a conclusion on the facts which was not open to the judge on the evidence has been reached: Royal Bank of Scotland v Carlyle [2015] UKSC 13, 2015 SC (UKSC) 93.

c) the judge has clearly failed to give due weight to some very significant matter or has clearly given undue weight to some matter: B-v-B (Residence Orders: Reasons for Decision) [1997] 2 FLR 602.

d) a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: Re S-W (Care Proceedings: Case Management Hearing) [2015] 2 FLR 136.

e) a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible: G v G (Minors: Custody Appeal) [1985] FLR 894.

30) The judge hearing an appeal has to decide whether the judgement is sustainable. In Piglowska v Piglowski [1999] 1 WLR 1360 Lord Hoffman quoted his words from another case; Biogen Inc. v Medeva Ltd [1997] RPC1;

"The need for appellate caution in reversing a trial judge's evaluation of the fact 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".

31) In Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5, paras.114 to 115, Lewison LJ stated:

"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…. The reasons for this approach are many. They include

The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed. ii) The trial is not a dress rehearsal. It is the first and last night of the show. iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case. iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping. v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence). vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

Domestic Abuse

32) If in any case it is alleged, admitted or if there is reason to believe that a child or party has experienced or is at risk of experiencing domestic abuse, PD12J Family Procedure Rules 2010 applies. Domestic abuse is defined in paragraph 3 as including any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners of family members. The range of behaviour addressed is wide and includes psychological, physical, sexual, financial or emotional abuse. Under PD12J, the process to be adopted by the court where there are disputed allegations of abuse is considered. The court may hold a separate hearing to decide what has happened in order to provide the basis for a welfare report or risk assessment. Among the matters to which the District Judge was not referred (and should have been) was the decision of the Court Of Appeal in *Re H-N and Others (Domestic Abuse: Finding of Fact hearings)* [2021] EWCA Civ 448. The Court held in that case that if either or both parents asserted that there was a pattern of coercive or controlling behaviour then that should be the primary issue for determination unless any particular factual allegation was so serious that it justified determination regardless of any patters of coercive and/or controlling behaviour. In that hearing all parties acknowledged the need for the court to concentrate on the wider context of a pattern of behaviour as opposed to a list of specific factual incidents, which are often set out in Scott Schedules. The court in that case observed that the Family Court should be concerned with how the parties behaved and what they did with regard to each other and their children, rather than whether that behaviour falls within a definition of rape, murder, manslaughter or other serious crimes. In other words, it is what they do with regard to each other as opposed to what it might or might not be called. Serious behaviour might not amount to the equivalence of a serious criminal offence but might still be profoundly abusive. Such behaviour should not be ignored.

Vulnerable Witnesses

33) In this appeal as with others, a significant issue is the treatment of vulnerable witnesses in the Family Court. The hearing before the District Judge took place before the Domestic Abuse Act 2021 was passed into law. Nevertheless, s63 provides that where a person *'is, or is at risk of being, a victim of domestic abuse'*, the court must assume that their participation and evidence will be reduced by reason of vulnerability. Rule 3A2A of the Family Procedure Rules 2010 adopts this, although it was not in force at the time of the hearing. The court is required to consider special measures.

34) At that time there were measures in place for vulnerable witnesses which the court was obliged to follow, set out in rule 3A and PD3AA:

35) When considering the vulnerability of a party or witness as mentioned in rule 3A.4 or 3A.5, the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7.

36) Practice Direction 3AA gives guidance about vulnerability.

> The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
>
> Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings.
>
> The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
>
> Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

When deciding whether to make one or more participation directions the court must have regard in particular to—

(a)**the impact of any actual or perceived intimidation**, including any behaviour towards the party or witness on the part of—

(i)any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or

(ii)any members of the family of the party or witness;

(b)whether the party or witness—

(i)suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;

(ii)has a physical disability or suffers from a physical disorder; or

(iii)is undergoing medical treatment;

(c)the nature and extent of the information before the court;

(d)the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

(e)whether a matter is contentious;

(f)the age, maturity and understanding of the party or witness;

(g)the social and cultural background and ethnic origins of the party or witness;

(h)the domestic circumstances and religious beliefs of the party or witness;

(i)any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act( );

(j)any characteristic of the party or witness which is relevant to the participation direction which may be made;

(k)whether any measure is available to the court;

(l)the costs of any available measure; and

(m)any other matter set out in Practice Direction 3AA.

37) Paragraph 2.1 of PD3AA makes clear that when considering the question of vulnerability, the abuse referred to in rule 3A.4 includes, inter alia, domestic, sexual, physical and emotional abuse. In circumstances where the court is satisfied that a vulnerable party or witness should give evidence, PD3AA requires a ground rules hearing (or ground rules component of a hearing) before that person gives evidence (PD3AA, para. 5.2). The sorts of things the court should consider during that ground rules component include e. The conduct of advocates / parties and any support for the person giving evidence (PD3AA, para. 5.2);

f. The form of the evidence, "*for example whether it should be oral or other physical evidence, such as through sign language or another form of direct physical communication*" (PD3AA, para. 5.3);

g. The way in which the evidence is taken, including "*whether the person's oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made*" (PD3AA, para. 5.4); and

h. Directing the manner of any cross-examination: In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider whether to make participation directions, including prescribing the manner in which the person is to be cross-examined.

38) These are obligations imposed upon the court, by use of the words "*must*" and "*duty of the court*".

The Judgement

39) The judge correctly identified the standard of proof and that the burden fell upon the mother in relation to the fact-finding element of the hearing, and the father in relation to his application for enforcement. She reminded herself of the relevant standard for each aspect of the judgement. She gave herself a "Lucas" direction and reminded herself that she must consider all of the evidence. She also referred to a document lodged by counsel for the mother as to the law. I have not seen this document, so I do not know whether the judge was referred to Re H-N [above], or the respective practice directions that I have set out in this judgement. There is no mention of either the Court of Appeal decision or the practice directions in the judgement, and so I can only assume that the judge was not referred to them.

40) The judge does not set out a history of the relationship or a chronology of the events relied upon. She sets out each of the allegations made by either of the parents and considers whether it is proved or not proved. It appears to me that she did not follow the approach endorsed in Re H-N, of stepping back from the precise allegations and considering the behaviour as a whole. She did not rule on whether the father's behaviour was coercive or controlling.

41) Her conclusions were that most of the mother's allegations against the father were not proved, and most of the father's allegations against the mother on the enforcement application were proved.

42) After the hearing she was asked to clarify aspects of her judgement, which she did. The failure to consider special arrangements or to take account of Re H-N was not put to her.

The Grounds of Appeal

43) There are eight grounds of appeal, most of which to some extent overlap. I take the first two together:

Ground 1: The Judge was wrong in failing to implement special measures pursuant to PD3AA and PD12J

Ground 2: The Judge erred in failing to apply PD12J of the FPR 2010 in particular the correct definition of coercive and controlling behaviour and domestic abuse

44) It is clear from my review of the hearing, taken in conjunction with the law, that there was no ground rules hearing, and therefore no consideration of whether any special measures needed to be in place. It is submitted on behalf of the appellant and I accept, that the obligation to consider whether special measures are necessary and if so, what they should be, lies with the court. It is clear that it does not matter that the appellant was represented and that it appears that the court was not asked to consider special measures, even though one would hope and expect that the appellant's counsel would have raised these matters before the hearing started.

45) Dr Proudman submitted on behalf of the appellant that the appellant could see the respondent throughout the hearing as his camera was on, and that they could see each other while each gave evidence. There were other aspects of the hearing that were unsatisfactory: criticism is made of the respondent's demeanour and appearance. It is said that during cross examination, which the judge had directed previously should be by written questions read out by the judge, that at times the respondent interrupted to address the appellant directly which she found upsetting. All of these are matters which I accept could and should have been addressed in a ground rules hearing. These are all matters which go to the manner in which the Appellant gave evidence and participated in the hearing.

46) The forthcoming changes in legislation which ensure that a respondent in a case such as this has a barrister assigned to put questions to an applicant may ameliorate some of these issues. Some of them clearly relate to the conduct of remote hearings during the pandemic and would simply not have occurred in a courtroom setting, where screens are more routinely used to protect vulnerable witnesses and parties.

47) The judge made no reference to Part 3A, PD3AA or PD12J in her judgement. She did not consider the definition of domestic abuse. These are significant omissions in a judgement where these issues are critical.

48) Arrangements should have been made to address the question as to what the appellant could see during the hearing, and what the respondent could see. These would have been addressed in a ground rules hearing.

49) These factors may have contributed to the way in which the appellant gave evidence and are significant in a case where the judge made findings against the appellant. The risk that the appellant may have been a vulnerable witness should have been addressed and measures could have been taken.

50) These are all factors that in my judgement render the decision unsafe, raising, as they do, significant concerns as to whether the appellant was able to participate effectively in the hearing. I uphold the appeal on this ground alone.

Ground 2: The Judge erred in failing to apply PD12J of the FPR 2010 in particular the correct definition of coercive and controlling behaviour and domestic abuse

Ground 3: The Judge failed to apply leading case law of H-N and Others and failed to stand back and consider whether there was a pattern of coercive and controlling behaviour

Ground 4: The Judge minimised the findings and the evidence that amounted to

domestic abuse and CCB instead referring to threats of harm and verbal abuse as "not ideally worded" and failed to address the impact of such abuse on M and the children

Ground 5: The Judge failed to address that the children are victims of domestic abuse pursuant to Section 3 of the Domestic Abuse Act 2021

51) The judge did not follow the approach suggested in Re H-N, and instead approached the allegations one at a time, without standing back to consider the overall picture and the nature of the behaviour as a whole. She did make some significant findings against the father which should have led her to consider whether or not his behaviour was coercive or controlling. She found that he called the mother a number of abusive names:

i) "*I do find, and the father accepts, that he has called the mother names, such as "fat", "lazy", "pig", "donkey", "slut", "bitch", and that on one occasion certainly, this was in front of the children".*

ii) "31 of October 2020; the father came to the mother's home to see the children despite the mother asking him not to come and there being a requirement that contact be supervised by a third-party. The father was verbally abusive to the maternal grandmother. The mother obtained a non-molestation order as a result of this."

52) However, I do accept that the judge did not then go on to consider whether this was a pattern of behaviour, and whether given those findings the respondent was more likely to have abused the appellant in similar ways as she alleged.

53) I also accept that having made the findings the judge minimised their impact upon the appellant. She refers to him saying "*unpleasant things*" but does not make any finding that this was verbal abuse and thus domestic abuse under PD12J.

54) I also accept that the judge did not consider the impact of the admitted verbal abuse upon the children even though it was accepted to be in their presence, contrary to PD12J.

55) The judge found that the father had sent messages to the mother during the relationship which clearly included threats made against the appellant, for example "*I won't sit here and wait. If you want war with me, you will find it"* and "*you are playing with my feelings. You won't have a happy ending with this*". These messages are clearly threatening, but the judge found as follows:

i) "36*.... it is clear to me that the father has been focused on seeing his children, but he has not sought to control the mother in terms of the relationship other than in terms of trying to secure arrangements to see the children. However, some of his messages are not ideally worded.*

ii) 37. ...His messages come across as forceful, assertive, and often directive. I

iii) do not consider them to be aggressive but the father does need to

iv) consider more carefully how his messages are sent…"

56) While acknowledging that the district judge heard the evidence and was in a position to form a view as to the nature of the evidence that she heard, these messages are threatening on their face, and had the judge stood back to consider the evidence as a whole and whether there was evidence of a pattern of abusive behaviour she would surely have seen that the respondent's behaviour could have been characterised as forming such a pattern. Her response to this evidence, characterising it as "*not ideally worded*", "*forceful*" and that he "*does need to consider more carefully how his messages are sent…"* is dismissive and minimises the behaviour. This is especially so had the judge considered the father's use of abusive language referenced above and considered his behaviour as a whole as she was required to do.

57) There was evidence of other messages sent which the judge failed to deal with: *"you will regret doing this to me for sure", "I will make sure you have what you deserve", "you will face consequences"*, and others of a similar nature. These were messages that in my judgement the judge should have considered in relation to the exercise of standing back and looking at and for a pattern of behaviour.

58) Similarly, there were admissions made in evidence by the respondent which were relevant, but which were not considered:

59) The respondent admitted that he created a new account on Facebook which he then used to send personal material to a colleague of the mother, in which he told the colleague to send the appellant home to him

60) The respondent admitted throwing the appellant's belongings out in the street in front of the children and then calling her (additionally) "*fat*", "*bitch*" and "*slut*", when the children would have been present.

61) The respondent accepted that he had not allowed the children to see the appellant because she had not paid him some money. The judge found this to be not child focussed but did not consider this as part of a wider pattern of behaviour.

62) The respondent admitted that he told the children in a phone call that he would be reporting the appellant for being in Portugal during the period of Covid restrictions.

63) The respondent accepted in evidence moving his girlfriend in to the family home while the mother and children were present without her consent.

64) The respondent accepted that he had told the children that it was the appellant's fault that they could not see her and that she was a liar.

65) The respondent accepted that he had breached his undertakings regarding safeguarding, and that he was ordered not to make promises to the children about future contact or that he would provide presents in the future.

66) These are all examples of behaviour that the judge should have considered in the context of the respondent's behaviour as a whole, as she was required to do following the decision in Re H-N. In not considering this behaviour she fell into error and I uphold the appeal under grounds 2,3,4 and 5.

Ground 6: The Judge was wrong in making findings which did not reflect the oral evidence given by the father and without taking into account all of the evidence in the round

Ground 7: The Judge failed to give adequate reasons for the findings made

67) Many of the matters that I have referred to fall in under these grounds. Dr Proudman deals with them in context of each allegation: I will summarise my conclusions rather than deal with each in the same detail.

68) In paragraph 13 of the judgement, the judge held:

i) Counsel for the mother says that the mother was not challenged on her evidence, that the father did not ask questions relating to a number of these allegations. This is a matter where the father is not legally represented and was required to submit his questions to me in order that I put them to the mother. I cannot proceed on the basis that because he did not ask questions, he does not dispute the evidence. He has made his position in his response to the schedule and his statements clear. It is one of the difficulties in these types of proceedings where the alleged victim can obtain legal aid, but the alleged perpetrator cannot. I will therefore assess the evidence I have heard and read but I will not assume that because the father did not cross-examination the mother that he therefore agrees with her evidence. I will look at the other evidence available to the court. Otherwise, it would not be fair and just".

69) Dr Proudman submits that this approach is wrong because it allows the court to make findings on matters that were not put to the appellant, and accordingly the appellant was not able to respond, breaching her right to a fair trial. This is a point well-made but does demonstrate how unsatisfactory it is that a judge has to put questions on behalf of one of the parties, and how difficult is the balance of fairness. While I accept the point, it is a difficult tightrope for a judge to enable fairness between the parties. I do not think that counsel for the mother at the hearing below asked for her client to be recalled so as to deal with any points not put to her.

70) There are examples given of the judge recalling the evidence wrongly or in error:

a) The judge found that when interviewed by the police in August 2018 the mother had not referred to historical incidents of violence, and when asked about whether the respondent had been violent, said "no". The police however asked her about this one incident rather than the history. Certainly, in later discussions with the police she made her allegations as to the history clear. Accordingly, the judge's conclusion was wrong on the evidence.

b) Allegation 4 was that the father verbally abused the mother and drove a car with the children in the car while drunk. The judge noted that there was a previous conviction for drink driving but did not consider whether this lent any weight to the mother's allegations. Similarly, the judge found the allegation not proved because it had not been reported to the author of the s7 report or the police. Dr Proudman submits that this is the wrong approach, and that in any event this was not put to the mother in order that she could respond. I agree with the submission that there is no obligation to report to the authorities – this is a point that goes to weight to be attached to the evidence. The judge did not consider other evidence in relation to this and thus was wrong to conclude as she did on the basis of the failure to report.

c) In the incident in summer 2016 the judge found that the respondent had not entered the appellant's bedroom, when in both his oral and written evidence he admitted that he had, in order to gather up her clothes and throw them outside. Again, the judge was clearly wrong on the evidence to make this finding.

d) The judge made no findings of verbal abuse by the respondent when as already noted he accepted that he had called the appellant words such as "*slut*", "*bitch*", "*lazy*" and "*fat*".

71) Ground 8: The Judge finding that M breached the child arrangements order is wrong

72) The respondent had filed a schedule of allegations that the mother had breached the child arrangements orders. At paragraph 11 of her judgement the judge directed herself correctly as to the law: that the respondent must prove the allegations to the criminal standard, and that it is then for the appellant to prove to the civil standard that she had reasonable excuse.

73) It follows from the findings that I have already made that the decision made in respect of these allegations cannot stand. In any event, it appears that none of the allegations in the schedule was put to the appellant in cross examination, and so she did not respond to them. I accept Dr Proudman's submission that it is a procedural irregularity to make findings to the criminal standard with the allegations not having been put to her. This was not fair process. The findings cannot stand.

74) This hearing was a minefield for any judge, and I have real sympathy for her in this case. She appears not to have been directed to the law as she should have been and was beset by a case where I can see from the transcript there were initial difficulties with documents, the bundle and the interpreter. I am sure that all of this was compounded by the fact that the hearing was remote rather than attended, which took away some of the control that the judge would have exercised had the hearing taken place in a court room. However, for the reasons that I have given, the findings cannot stand, and I uphold the appeal.

75) I will list the application for further directions as to listing. This will be before a Circuit Judge. Unfortunately, this decision will occasion delay, and I hope that the application can be heard again in the near future. I hope that hearings will be able to be attended going forward which will assist the judge.

76) I express no view as to the outcome of any further hearing. I have dealt with the appeal and the question as to whether the orders can stand. I do not know what the final decisions will be once evidence has been heard. Nothing in this judgement should influence in any way the outcome of the further hearing.

HHJ Levey
31 March 2022
Portsmouth