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Neutral Citation Number: [2020] EWHC 1086 (Fam)

Case No: ZC19C00351

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

A LOCAL AUTHORITY

Applicant

and

MOTHER

First Respondent

and

FATHER

Second Respondent

and

SX
(By his Children's Guardian)

Third Respondent

- -
- -

Mr Nick Goodwin QC and Ms Gayle Bisbey (instructed by **A Local Authority**) for the **Applicant**
Ms Sam King QC and Mr Julian Hayes (instructed by **Berris Law**) for the **First Respondent**
Mr John Tughan QC and Mr Greg Davies (instructed by **HarrisTemperley LLP**) for the **Second Respondent**

Mr Alex Verdan QC and Ms Sally Bradley (instructed by **Eskinazi & Co**) for the **Third Respondent**

Hearing dates: **15 April – 5 May 2020**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LIEVEN

Mrs Justice Lieven :

1. This judgment concerns the decision as to whether to proceed with the lay evidence in this case remotely or whether to adjourn the case having heard the medical evidence. I have heard five days of medical evidence remotely through the Zoom platform and, as is explained in more detail below, I adjourned the trial at that point to hear submissions as to whether the hearing should continue with evidence from the parents and other lay witnesses via Zoom. An issue then arose as to the Father's mental health and, ultimately he asked for an adjournment on the grounds of ill-health rather than specifically the remote hearing aspect of the case. I will deal with that adjournment application later in the judgment.

2. The local authority (LA) has been represented by Mr Goodwin QC and Ms Bisbey, the Mother by Ms King QC and Mr Hayes, the Father by Mr Tughan QC and Mr Davies, and the Guardian by Mr Verdan QC and Ms Bradley.

3. The background to this matter is an application by the LA for a care order in respect of SX, a four year old child. In April 2019 his two month old sister, AX, died at home of unknown causes. When a post-mortem and subsequent investigations were carried out it was established that AX had sustained 65 fractures to various parts of her body including ribs and long bones, as well as a subdural haemorrhage, axonal injury to the brain and retinal haemorrhage. The local authority were granted an Interim Care Order and SX has been living with foster carers since then.

4. For reasons that are not relevant to this judgment there have been considerable delays in getting this matter to a full hearing. It was listed for a three week fact finding hearing commencing on 15 April 2020. Because of the delays in obtaining some of the forensic reports the LA decided not to seek findings in respect of cause of death but to proceed on the basis of the specific injuries shown in the medical evidence. The LA threshold document alleges that the injuries were inflicted by one or both of the parents and that each parent knew that the other had caused injury or was likely to have caused injury to AX. No other person is in the pool of alleged perpetrators and neither parent has suggested that any other person looked after AX for a period which would have allowed them to inflict the injuries.

5. Both parents have filed a number of statements and both deny inflicting the injuries. The Mother through Ms King has not disputed the medical evidence in respect of the injuries or that they were inflicted non-accidental injuries. Her position is that she did not cause the injuries and thus they can only have been caused by the Father. She says that she had no knowledge of AX having suffered any injuries. She alleges that she suffered domestic violence from the Father.

6. The Father does argue that the injuries were not non-accidental injuries. Mr Tughan has cross examined the medical witnesses to that effect.

7. The timetable of hearing was set for the medical witnesses to go first. I have heard evidence from Professor Al-Sarraj, Professor Mangham, Dr Marnerides, Dr Oates, Dr Fitzpatrick-Swallow and Dr Cartlidge. I heard that evidence with all parties and witnesses appearing via Zoom. In my perception those hearings, over 5 days, worked reasonably smoothly. There were some technical problems but all the days' hearings went ahead with a limited need for breaks or gaps. On the first day both parents were

present and I was told that both had followed the hearing satisfactorily. However, on the second day I was told by Mr Tughan that the Father had been to hospital on the Tuesday night saying that he was suicidal and that he had decided not to participate for the rest of the week. I will return to this below. The Mother has heard and seen all the medical evidence (except that which she found too upsetting) and I was told by Ms King that she had been able to follow it to a satisfactory degree. I note here that some of the medical evidence was extremely technical and any lay person, whether in court or remotely, was at times going to find it hard to follow.

8. At the start of the hearing on Tuesday 21 April 2020 I indicated that I would consider the issue of whether the whole fact finding hearing could be completed remotely at the end of the medical evidence. It was subsequently agreed that I would hear submissions on that issue on the afternoon of Monday 27 April and then reserve any decision until 28 April given that the Court of Appeal was due to be giving a judgment on another case concerning remote hearings on the 28th April.

9. Through the course of the first week of the hearing all parties urged me to continue with the lay evidence remotely. Mr Tughan on behalf of the Father said that the Father was "desperate" to continue and to tell his side of the story. However, over the weekend the Father's position changed. He informed his lawyers by email that he had gone to A&E on the night of 21/22 April feeling suicidal and that since then he had felt unable to participate in the hearing.

10. At the hearing on 27 April I permitted the Father to file a psychiatric report due to be prepared by Dr McEvedy on 29 April, both to consider his capacity to litigate, but also his mental state in terms of whether he could continue to participate in the hearing. I received Dr McEvedy's report on the morning of 4 May. I am very grateful to Dr McEvedy for producing the report so quickly. He has been a consultant psychiatrist for 23 years and is a member of the RCP. He interviewed the Father for 2.5 hours by Zoom video call and considered an agreed set of papers from the court bundle which included the Father's medical records.

11. It is Dr McEvedy's opinion that the Father has capacity to litigate within the meaning of the Mental Capacity Act 2005. He understands the information that he is given, can consider and balance it, and can communicate his views and decision. On the basis of the report, I have no doubt the Father has the relevant capacity.

12. Importantly Dr McEvedy also says;

> *47. In my opinion, [Father]is aware of the matters involved in the current proceedings. He was able to engage productively in a lengthy (2½ hour) interview with me, providing informative responses to all questions asked, including the many allegations made against him in the schedule of allegations of his ex-partner, [Mother], dated 16 April 2020, for example.*
>
> *48. Although he describes low mood and some anxiety, particularly in recent weeks in the context of these proceedings, he was able to attend satisfactorily throughout out interview, and his concentration appeared reasonable.*

> *49. Inevitably, the proceedings will be stressful for [Father], and for example he told me that he was only talking to me, "gritting my teeth, because I have to".*
>
> *50. In my opinion, [Father] is able to participate in these proceedings, to instruct his legal advisors, to follow court room proceedings, and to give witness evidence and submit to cross examination if called on to do so."*

13. In terms of his emotional state, the Father records that he has been suffering from low mood and anxiety, has been having suicidal thoughts and has undertaken some self-harm, though this appears to be of a relatively low scale. Dr McEvedy records that it may be appropriate for the Father to be placed on some anti-anxiety medication, although it is important that this does not impede his ability to concentrate and give evidence. The Father records that he has been able to communicate with his lawyers, but has not felt able to participate in the hearing in the previous week. My understanding of what he said to Dr McEvedy was not that the Father was not capable of participating, in terms of the technology, but rather that he felt too emotionally stressed by participating at all.

14. Importantly, when Dr McEvedy asked the Father what measures could be taken to help him participate in the hearing given his emotional state, he said that it would help "enormously" to give evidence by video and Dr McEvedy endorsed this.

15. The Covid 19 pandemic has come upon the world, and the UK judicial system in particular, in a sudden, unexpected and entirely unplanned manner. Courts and users have had to adapt very quickly to a totally unexpected situation. There have had to be extremely difficult judgements made about the importance of proceeding with cases in order to achieve the welfare of children whilst protecting the fair trial and broader interests of the parties and witnesses.

16. Two months ago it would have been almost inconceivable that a hearing such as this would continue entirely remotely. However, there would be significant disadvantages to many children if all such cases were simply adjourned. This is particularly the case where it is becoming increasingly apparent that the impact of Covid 19 is likely to continue for many months, and this may make it very difficult to hold some of these cases in a normal court setting for a significant period of time.

17. The first reported case dealing with the approach to take in deciding whether to proceed with a hearing in a complex Family Court case is Re P (A Child Remote Hearing) 2020 EWFC 32. In that case the President was considering a case involving a 7 year old child whose mother was alleged to have caused harm to the child by fabricated or induced illness (FII). It had been set down for a 15 day hearing. The child had been under an interim care order for 11 months. Initially all parties had accepted the need for remote hearing [8] in the light of the advice produced by MacDonald J on remote hearings.

> *8. I have been assisted by counsel at the hearing this afternoon, who have explained that at the hearing on 3 April all parties, and the judge, effectively accepted that this hearing would now have to go ahead and be conducted remotely. I was told that all parties and the court had been influenced by the publication, shortly before 3 April, of advice produced*

> *by Mr Justice MacDonald on the conduct of remote hearings which gave an account [at paragraph 2.2.1] of a number of remote hearings that had been successfully accomplished in the early days following the lockdown. It would seem that those involved in this case read that advice as indicating that all hearings must now proceed as remote hearings and, I was told, the discussion during the hearing was about how the remote hearing would be conducted and not whether it should be heard remotely. If that was the understanding of MacDonald J's document, it was a misunderstanding. MacDonald J's document is firmly aimed at the mechanics of the process; it does not offer guidance, let alone give direction, on the wholly different issue of whether any particular hearing should, or should not, be conducted remotely. Establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.*

18. The President then set out the arrangements that had been made for the Mother to engage with the hearing. She was alone at home and it was intended that internet access would be arranged. It is of some relevance that her leading counsel had only been relatively recently instructed. At [11] the President referred to the national situation and said;

> *"It is a type of hearing which, certainly at first blush, seemed to be well outside the categories of hearing which could be contemplated as being appropriate for remote hearings before the Family Court. I make that observation in the narrow context of this being an allegation of FII. That category of case is a particular form of child abuse which requires exquisite sensitivity and skill on the part of the court. Dr Evans, the paediatrician instructed as an expert witness in this case, at p.E31 of the bundle, describes this as"*

19. The position of the parties in Re P was that the local authority and the Guardian wished to proceed, in particular because of the impact of further delay on the child. The Father supported that position. The Mother's counsel argued that the case must be adjourned. She did that largely on the basis that the Mother was not well enough to proceed. Given the nature of the case this was obviously a particularly problematic situation. The President at [20] referred to the possibility in some cases of the parent going to another place such as local authority offices to give evidence. However, this was not an option given that the Mother believed she had Covid 19.

20. The President then said;

> *22 In a letter from the Lord Chief Justice, Master of the Rolls and President of the Family Division to judges on 9 April 2020, rather than giving formal guidance, a number of parameters were suggested to assist a court in deciding whether or not to conduct a remote hearing. The following three factors were identified as being of particular relevance to Family cases:*
>
> *"e. Where the parents oppose the LA plan but the only witnesses to be called*

are the SW & CG, and the factual issues are limited, it could be conducted remotely;

f. Where only the expert medical witnesses are to be called to give evidence,

it could be conducted remotely;

g. In all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing."

23 In addition, in guidance that I issued on 27 March I said:

"Can I stress, however, that we must not lose sight of our primary purpose as a Family Justice system, which is to enable courts to deal with cases justly, having regard to the welfare issues involved [FPR 2010, r 1.1 'the overriding objective'], part of which is to ensure that parties are 'on an equal footing' [FPR 2010, r 1.2]. In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."

24 The decision whether to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner. The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

25 Turning to the particular case now before the court, although I am extremely aware of and sensitive to the position of this young girl and the negative impact that a decision to adjourn will have on her wellbeing and the potential for it to cause her emotional harm, I am very clear that this hearing has to be adjourned. I make the decision also being aware of the impact that this will have professionally on all of those who have had this fixture booked in their professional diaries for a long time and who are now ready for the hearing to take place. That cannot be a factor that weighs very significantly in the decision-making process but it is one of which I am aware.

26 The reason for having the very clear view that I have is that it simply seems to me impossible to contemplate a final hearing of this nature,

where at issue are a whole series of allegations of factitious illness, being conducted remotely. The judge who undertakes such a hearing may well be able to cope with the cross-examination and the assimilation of the detailed evidence from the e-bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment. I do not consider that a remote hearing for a final hearing of this sort would allow effective participation for the parent and effective engagement either by the parent with the court or, as I have indicated, the court with the parent. I also consider that there is a significant risk that the process as a whole would not be fair.

27 The observations that I have made in the preceding paragraph apply equally to the options for dividing the hearing process up that have been helpfully suggested by Mr Taylor as, with each option, the judge would not have the opportunity to engage fully with the parent during the whole of the hearing as would be the case in a courtroom.

28 Given the wealth of factual detail that is to be placed before the court in relation to this mother's actions over the last three or four years, for her to have a full real-time ability to instruct her legal team throughout the hearing, not just by a phone call at the end of each witness's evidence, seems to me to be a prerequisite for her to be able to take an effective part in a fair process at the trial of issues such as this.

29 For those shortly stated basic reasons, I consider that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, I would hold that this hearing cannot properly or fairly be conducted without her physical presence before a judge in a courtroom. Now that the mother is in fact opposing the remote hearing, the case for abandoning the fixture is all the stronger.

21. The Court of Appeal has now issued two judgments relating to Family Court cases being heard remotely, Re A (Children) (Remote Hearing : Care and Placement Orders) [2020] EWCA Civ 583 and Re B (Children) (Remote Hearing: Care and Placement Orders) 2020 EWCA Civ 584.

In Re A the Court of Appeal (the President, Peter Jackson LJ and Nicola Davies LJ) said at [3];

> *3. Against that background we wish to stress the following cardinal points with the utmost emphasis:*
>
> *i) The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.*
>
> *ii) Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case.*
>
> *iii) The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.*

22. At [9] the Court of Appeal said;

> *9. The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:*
>
> *i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?*
>
> *ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;*
>
> *iii) Whether the parties are legally represented;*
>
> *iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote*

> *proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;*
>
> *v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;*
>
> *vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;*
>
> *vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?*
>
> *viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;*
>
> *ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;*
>
> *x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.*
>
> *10. It follows from all that we have said above that our judgment on this appeal should be seen as being limited to the determination of the individual case to which it relates. Each case is different and must be determined in the light of its own specific mixture of factors. The import of the decision in this case, in which we have held that the appeal must be allowed against a judge's decision to conduct a remote hearing of proceedings which include applications for placement for adoption orders, is that, on the facts of this case, the judge's decision was wrong. As will be seen, one important and potentially determinative factor was the ability of the father, as a result of his personality, intellect and diagnosis of dyslexia, to engage sufficiently in the process to render the hearing fair. Such a factor will, almost by definition, be case-specific. Another element, and one that is likely to be important in every case, is the age of the children and the degree of urgency that applies to the particular decision before the court. The impact of this factor on the decision whether to hold a remote hearing will, as with all others, vary from child to child and from case to case.*

23. One important factor in a decision whether to proceed, particularly in a fact finding case, is the question of whether the judge will be in a less good position to judge whether or not the witnesses are telling the truth if the case is conducted remotely. This was clearly an issue of particular concern to the President in Re P at [26] where he refers to

the benefits of seeing the witness in court. The issue of the weight that a judge should give to the demeanour of witnesses is an intensely complex one and has been the subject of considerable judicial debate. Mr Goodwin referred me to the consideration of the approach to witnesses' demeanour by Leggatt LJ in R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department 2018 EWCA Civ 1391;

> *36.Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:*
>
> *"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."*
>
> *"Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, The Judge (1979) p63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging p9).*
>
> *37.The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. ...*
>
> *38.Ms Jegarajah emphasised that immigration judges acquire considerable experience of observing persons of different nationalities and ethnicities giving oral evidence and suggested that this makes those judges expert in evaluating the credibility of testimony given by such persons based on their demeanour. I have no doubt that immigration judges do learn much in the course of their work about different cultural attitudes and customs and that such knowledge can help to inform their decision-making in beneficial ways. But it would hubristic for any judge to suppose that because he or she has, for example, seen a number of individuals of Tamil origin giving oral evidence this gives him or her a privileged insight into whether a particular witness of that ethnicity is telling the truth. That would be to assume that there are typical characteristics shared by members of an ethnic group (or by human beings generally) which can be relied on to differentiate a person who is*

lying from someone who is telling what they believe to be the truth. I know of no evidence to suggest that any such characteristics exist or that demeanour provides any reliable indication of how likely it is that a witness is giving honest testimony.

39.To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows:

"Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."

OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

40.This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

41.No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content

> *of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.*

24. Mr Goodwin and Mr Verdan also referred me to the fact that it is by now fairly common in Family and Criminal courts for lay witnesses of fact to give evidence remotely by video link where those witnesses are considered to be vulnerable. The procedure for doing so is dealt with extensively in PD3AA. It therefore must follow that the giving of evidence in this way does not undermine the fairness of the process either for the individuals concerned or other parties. I do however inject a note of caution here. If it were a case that a vulnerable witness were likely to be subject to complex cross examination, perhaps with references to a large number of documents, it is highly likely that they would have the assistance of an intermediary to assist them in managing the process. Therefore, the fact that evidence is given remotely is not itself sufficient to necessarily protect that witness.

25. There is also a balance to be struck. One of the reasons that vulnerable witnesses often give evidence remotely is to protect them from the stresses of the courtroom. It may therefore be that a compromise is made for that category of witness, in order to balance fair process with the interest of the individual. However, as Mr Goodwin argued, it may also be the case that the vulnerable witness is more likely to give truthful and complete evidence if allowed to give it remotely, rather than in the witness box. So the benefit is not simply to the witness, but also potentially to the judicial process.

Adjournment application

26. Mr Tughan applied to adjourn the case on the basis of the Father's mental state. He accepted that the Father has litigation capacity. However, he says that the Father is suffering from low mood and, as Dr McEvedy has said, does on his self-reporting qualify as suffering from a major depressive episode. He said that the Father sought an adjournment so that he could "get himself right". However, no time period was put on the period of the adjournment sought. Mr Tughan stressed that the adjournment was not sought on the basis of the hearing proceeding remotely, and accepted Dr McEvedy's report that the Father would prefer to give evidence remotely than in court.

Conclusions

27. I start by considering my general approach to whether to proceed, before considering the ***Re*** A factors. Having considered the matter closely, my own view is that is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from ***Re A*** that the Court of Appeal is not saying that all fact finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating.

28. I was concerned that a witness might be more likely to tell the truth if they are in the witness box and feel the pressure of the courtroom, but having heard Mr Goodwin and Mr Verdan I do now accept that this could work the other way round. Some witnesses

may feel less defensive and be more inclined to tell the truth in a remote hearing than when feeling somewhat intimidated in the court room setting. In the absence of empirical evidence, which would in any event be very difficult to verify, I can reach no conclusion on what forum is most likely to elicit the most truthful and/or revealing evidence.

29. For these reasons I do not think that it is possible to say as a generality that a remote hearing is less good at getting to the truth than one in a courtroom. I am aware that the Nuffield Foundation are currently carrying out research into remote hearings and it may be that this will cast more light on this topic. However, I do not feel it is appropriate to adjourn for this research to be produced. I would be very surprised if it was sufficiently definitive as to give one correct course.

30. In terms of deciding whether a fair hearing can go ahead, I will go through the various factors set out in Re A at [9];

31. Firstly, the importance and nature of the issue to be determined. This is a final fact finding hearing and the subject matter could not be more important both in terms of the findings that I am being asked to make in respect of both parents; the long terms implications of those findings for the parents; and most importantly the impact those findings are likely to have on SX. However, the fact that this case is of the utmost gravity does not mean that it is in a category of case that cannot go on remotely. It is clear from Re A that in every case there is an individual decision to be made, the importance and nature of the issue is but one factor.

32. Secondly, the need for urgency. On the facts of this case that is a complicated factor. SX is four years old and is due to start school in September. It is of the utmost importance to him that the next steps for his future be determined as soon as possible and it would be highly beneficial if he was settled somewhere, whether back with his parents or in a placement, when he starts school. However, on the other hand, the need for urgency will arise in many, if not most, care proceedings concerning children. SX might be said to be at a particularly crucial age, but one could probably put forward a serious argument on urgency in most Children Act proceedings. I am conscious that in both Re A and Re B the first instance judges considered the cases to be urgent, and in both cases there plainly was some urgency.

33. In deciding what weight to give urgency in this case I have closely in mind that it is particularly important for SX to be settled at the point he starts school. It has already been a year since he was placed in foster care and after the fact finding hearing, if I make any of the findings sought, there will need to be a welfare hearing which will further delay any final decision.

34. If the case is adjourned at this point then it will be by no means straightforward for it to be re-listed quickly. This again is a factor which is going to arise in a very large proportion of the cases being adjourned because of Covid 19. It is unfortunately inevitable that there is going to be a significant backlog of cases in the Family courts, quite apart from the new cases arising.

35. One factor that I view as particularly important is the position of the Mother. She has asthma and takes medication for it. It is not possible for me to assess how serious her asthma is but she is on prescription medication and I am told she has only been out of

the house four times during the lockdown. She also says that she is concerned for the health of her 63 year old father who she is isolating with. I had considered whether one possible course was to hear the evidence of the lay witnesses other than the Mother and Father by video, and then adjourn the Mother and Father's evidence to a date, probably in June, when it would be possible to hear the evidence in the Royal Courts of Justice with appropriate safeguards in place. However, the Mother's position makes that course very difficult. She has indicated that she is not prepared to leave home and come to court at the present time. It is simply not possible to know how long the Covid 19 lockdown will continue, in what ways it will be lifted and over what timespan and when the mother will be prepared to come to a court to give live evidence. I appreciate that I could order her to do so. However, to order someone who has a health condition and is particularly concerned therefore about Covid 19 to come to court against their wishes is not a course I would take lightly. I would also be concerned that if the Mother was very anxious about the risk to her health if she came to Court, then that would be likely to compromise her ability to give evidence.

36. There is also the additional factor of availability. If the case is adjourned it will require another 6 days of hearing time. Although it might be possible to put this in the list before August that is not going to be straightforward.

37. In those circumstances I think it is reasonable to assume that if I do adjourn the case I may well be adjourning it for many months.

38. Thirdly, is the question of legal representation. All parties in this case are represented by highly experienced and highly competent QCs. I have not the slightest doubt that the parents are getting the best possible advice and that their interests will be fully protected at all times.

39. Fourthly, is the ability of the parents to engage with the proceedings. Both parents are native English speakers, neither has any language or communication problems. There is no suggestion that either is of anything other than normal intelligence. The Mother has been listening and watching each day of evidence. I understand that she has access to two screens, although I think one is her phone, but she has been able to find documents in the electronic bundle. The evidence has at times been complex and must have been emotionally very upsetting for her. I am told by Ms King that she has followed the evidence, has been able to give instructions and has felt fully engaged with the hearing.

40. The position of the Father is more complicated. I was told on day one that he had listened to the evidence and had been able to follow it. I believe initially that he only had access to the hearing via a phone but he had been able to borrow a computer. I made clear that I would not proceed if the parents could only follow proceedings via a phone. The hearing is too lengthy and too complex for that to be an appropriate course.

41. Fifthly, it is obvious from everything I have said above that this is not a case proceeding on submissions alone.

42. Sixthly, the issue now involves lay evidence of fact. That evidence is strongly contested and both parents will be subject to cross examination from three QCs. The impact of the nature of the evidence on the decision as to whether a remote hearing is appropriate is perhaps the most complicated element of the assessment. It is in my view relatively

straightforward to proceed remotely with professional evidence, here the medical evidence. It is very common to hear such evidence via video link in court. I note here that the technology in the courts, certainly in the Royal Courts of Justice, is less high quality and less reliable than my experience of proceeding with 5 days of remote evidence, by Zoom in this case. As long as the lay parties could follow the evidence, which they could in this case, I was entirely satisfied that it was fair to all concerned and met principles of natural justice to proceed with the professional evidence.

43. In respect of the lay evidence there are a number of different factors. The first and most important must be whether it is just to the parties to proceed with them giving their evidence remotely. They must be able to follow the questions and be able to give their best in the answers. If the technology works, and they are in a position to understand the documents, then in principle a remote hearing is capable of being fair. As Mr Goodwin and Mr Verdan have pointed out, vulnerable witnesses routinely give evidence remotely in the family and criminal courts. Subject to all the protection in PD3AA, the assumption must be that such a process is capable of being fair and meets the requirements of Article 6. A judge will have to be astute in a remote hearing to ensure the witness is following the question and where appropriate has the relevant document. It is easier to do this in a live hearing because one can see more easily what the witness has in front of them, and sometimes tell by their body language if they are completely lost. However, it is perfectly possible with a little sensitivity to do the same task remotely.

44. On the facts of this case I have no reason to doubt that the Mother will be able to follow the questions. I would necessarily keep the matter under close review and would stop proceedings if I felt it was becoming unfair.

45. I was concerned about whether the Father would be able to follow references to documents in cross examination. However, it has already been agreed that all documentary references will be read out to him. I note that the documents in this case are largely text messages and surveillance transcripts, and the references are likely to be fairly limited. I have ordered that a schedule of references should be prepared so that it is possible to know what documents are to be referred to. This is not a commercial type case with extensive relevant documents.

46. Seventhly, the length of the hearing. This hearing was listed for nearly 15 days, although in normal circumstances it would not have needed to take that long. The Mother and Father are both likely to be giving evidence for at least a day. If they give evidence remotely it will undoubtedly be necessary to give a number of breaks. This will be a gruelling process, and I have little doubt that they will both find it difficult. It is important however to bear in mind that parents being accused of very seriously harming their child are likely to find giving evidence in the courtroom also intensely gruelling. My concerns in this regard divide into two parts. Firstly, whether the process would be fair, in terms of seeing the documents, understanding the questions and having breaks when needed. In this case I have reached the conclusion, for the reasons set out above, that there can be a fair hearing. Secondly is the issue of whether the psychological impact of giving evidence can be properly managed in a remote hearing. For a parent giving evidence about severe injury to their child, particularly where she has ultimately died, must be an extraordinarily upsetting experience whatever the cause of the injury. I was very concerned about the parents potentially not having support if giving evidence remotely, particularly during a time of lockdown. I would describe this

as the humanity of the situation, being somewhat different from the consideration of a fair trial. The Mother is isolating with her father and sister and thus has some support. The position of the Father is different. He is isolating on his own, but I am told is receiving support from his mother. I consider the Father's emotional state below in respect of the adjournment application, but overall the view I have taken is that the Father is likely to find the whole process intensely stressful whatever course is undertaken. It seems likely that he has relatively little support, only as I understand it having his mother as a close family member, whenever he gives evidence. I therefore do not consider this to be a factor which prevents proceeding with the hearing at this stage.

47. Finally, on this factor, I do note the Court of Appeal's concern in Re A and Re B about the increased strain placed on the court by remote as opposed to courtroom hearings. There is an intensity to a remote hearing and the concentration on a close screen which is different from sitting in a courtroom. It is necessary to be conscious of this and again take breaks as needed. However, I do not consider the position of the judge in a case such as this, as being as stressful as that of the Judge in ***Re B*** who had to face some 10 hours of different hearings, and a very urgent case with multiple late papers. I have had the luxury of considerable time to prepare, as well as excellent counsel.

48. Eighthly, the hearing is being conducted via Zoom. We have had five days of evidence to test the technology and so far it has worked reasonably smoothly. All participants have largely retained connection and the quality of video and sound has been very good. It is easy to forget that courtroom hearings have their own logistical problems including the exigencies of public transport, the challenges of poor heating systems and uncomfortable courts. One advantage of Zoom is the facility for private breakout rooms so it is easy for the parties to speak to their legal advisors during the hearing in a way roughly comparable to being able to give instructions whilst sitting behind a solicitor or going into a conference room. In my judgement the technology itself has not, at least so far, impeded a fair trial.

49. It is much more difficult for the judge to watch the reactions of other witnesses to the evidence. Although inevitably as a judge one does do that, I am not sure it is of much forensic value. So although this is a disadvantage of the remote hearing, I do not consider that to be a major issue.

50. Overall, I consider the technology to be capable of providing a satisfactory hearing.

51. Ninth, is the closely aligned issue of the ability of the court and the participants to manage the technology. The court, so far, has managed the technology to an acceptable level. There is an overly large electronic bundle (over 5000 pages), but all parties have managed to find the relevant pages surprisingly easily, largely thanks to the hard work of counsel, including the juniors. The ability of the parents to manage the technology whilst giving evidence has not yet been fully tested. The only way to deal with this is to be astute to the potential for difficulties and to be prepared to review the situation as the hearing continues.

52. Tenthly, is whether there are any safe alternatives that would allow some parts of the evidence to be heard in court. As I have indicated above this was my initial preferred approach. However, the fact that the mother has asthma and has indicated her unwillingness to come to court, even with precautions in place, makes this a difficult

and very unpredictable alternative. I asked whether the Mother had access to a car so that she did not need to use public transport or go out onto the streets, but apparently neither she nor anyone in her household has a car. I cannot tell when she would consider it safe for her to come to court, nor can I assess at what date it would be reasonable for me to make an order for her to attend. I am also now faced with the report from Dr McEvedy saying it would be better for the Father's mental health to be giving evidence remotely.

53. Taking all these factors into consideration, I have come to the conclusion that it is appropriate to continue with this case remotely and not to adjourn by reason either of the remote hearing or of the Father's mental state. I have carefully considered all the Re A factors set out above. To summarise the position, the technology has been proven to work in this case and I am confident that the Mother can use it effectively. The Father has the technology available to him, and on the day that he was in the hearing he seemed to cope with it fine. I will keep this matter under very careful review. In terms of managing documents, it has already been agreed that all references will be read to the Father.

54. In terms of the Father's mental state and the technology, it is important that the Father has expressly said that he wants to give evidence remotely and this will decrease the stress on him. Therefore, the remote nature of the hearing is not the impediment to the Father's participation.

55. There is serious detriment to SX from further delay. This is not an overriding factor but it is an important one. Given the Mother's asthma, if I adjourn to have a court based hearing it is wholly unclear how long I might have to adjourn for, and it could be many months.

56. I am extremely conscious of the gravity of the case but in my view, taking the facts of this particular case into account, this is a case where it is appropriate to proceed remotely.

57. I turn to the separate, though related, issue of whether or not to adjourn by reason of the Father's mental state. The starting point is that Dr McEvedy conducted a 2.5 hour Zoom interview with the Father. His report says; "F was an appropriate and cooperative interviewee who was not noticeably anxious or depressed at interview. He spoke coherently, and was able to provide informative responses to all questions asked." This provides a good, though not perfect, guide to how the Father will cope with cross examination, although I am likely to give breaks more often than 2.5 hours.

58. I appreciate the Father will find giving evidence stressful, and he is suffering from stress and low mood now. Most parents in the situation these parties find themselves in would find the prospect of giving evidence and being cross examined extremely stressful. That alone cannot be a reason for not going ahead with a trial such as this. Also, there is no guarantee, indeed it is quite likely, that if I were to adjourn and the trial resumed in some months, the Father would again find the situation highly stressful. Adjourning this case is not going to make the causes of the stress and probably the low mood disappear. Equally, the Father's mental fragility is something that emerges from the papers over a period of time, and may well recur.

59. For these reasons, the Father's ill-health is not in my view a good ground to adjourn this matter. I will however very carefully monitor both parents' ability to participate fully in the hearing and to give their evidence to the best of their ability. The fact that I have decided to go ahead today, starting lay evidence tomorrow, does not mean that I will not continually revisit the issue of the fairness of the proceedings.