{

Neutral Citation Number: [2021] EWHC 3225 (Fam)

Case No: FA-2021-000047

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2021

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

- -

Between :

K	**Appellant**
- and -	
L	**Respondent**
and	
M	**Second Respondent**
(by her rule 16.4 Guardian)	

- -

- -

Deirdre Fottrell QC and Charlotte Proudman (instructed by **Cramp & Mullaney LLP**) for the **Appellant**
Will Tyler QC and Emily James (instructed by **The International Family Law Group LLP**) for the **Respondent**
Lynn McFadyen (instructed by **Goodman Ray**) for the Child

Hearing dates: 3 November and 5 November 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE JUDD DBE

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.

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives and any litigants in person by email. The date and time for hand-down will be deemed to be 10:30 am on 1 December 2021. A copy of the judgment in final form as handed down will be automatically sent to the advocates and any litigants in person shortly afterwards.

THE HON MRS JUSTICE JUDD :

1. This is an appeal following a fact finding hearing as to allegations of rape and domestic abuse in the course of private law proceedings relating to a two year old girl.

Background

2. The mother and father met online in about 2015 when the mother was a 'cam girl', providing sexual services via webcam to paying customers, and the father was a client. The mother was living in Eastern Europe and the father in England. After their first online encounter they continued to have frequent meetings and virtual sex. They met in person for the first time in 2016 when the father travelled all the way to the mother's home city as a surprise. Following this the mother gave up her sex work straight away in favour of the developing relationship. They spent time together in the UK and the mother's home country. After a few months, the father called a halt to the relationship. He says he told the mother; she says he abruptly stopped responding to her messages leaving her wondering what was going on. The mother was very distressed and sent him (and members of his family) many messages asking him what had happened.

3. In the spring of 2017 the mother messaged the father to say she was being blackmailed by her ex-husband, and this led to the father offering to help her and a reconnection between them. The relationship rekindled and later that year the mother moved over to this country to live with the father. In the summer they went on holiday to Spain.

4. In 2018 the mother became pregnant. It is common ground between the parties that the father was dismayed about this at first, and suggested that she have an abortion, or alternatively that she return to live abroad and look after the baby without any assistance from him. In the event the mother decided she wished to continue with the pregnancy and the baby was born in 2019, with the father by then wishing to be fully involved in the child's life. The father and mother lived together during the pregnancy although the father's evidence was that he had already decided he could not continue in the relationship but did not want to cause additional stress to the mother at that point because of her condition.

5. Four weeks after the baby was born the father told the mother that he did not wish them to be a couple and the parties made arrangements to separate their accommodation.

6. The mother was very distressed about the father's wish to terminate the relationship and his move to the flat above where they had been living (the father owns both). Over the next few months they tried to agree arrangements for the baby, which led to substantial tensions about overnight contact (the father was strongly maintaining he should have the baby overnight and bring her down to be breastfed by the mother when needed), and the standard of care that he was giving her during the time she was with him. There were also arguments about money. Between September and November 2019 the parents and baby went to the mother's home country to refurbish a property she had there.

7. In December 2019 the mother removed the baby to her home country without the father's consent. He commenced proceedings under the Hague Convention and the Children Act, which led to an order for the mother to return the baby, which she did in February 2020. The mother then issued an application for leave to remove, and the father for child arrangements. The mother alleged domestic abuse. There followed directions hearings and an order for interim contact which was the subject of a successful appeal (by consent) by the mother to the Court of Appeal. The mother later alleged the father had raped her.

8. On 16th March 2020 there was a hearing with directions made for the filing of Scott schedules of allegations and witness statements. A further directions hearing was listed and an order that a fact finding hearing be listed for four days not less than two weeks after the directions hearing. Police disclosure was ordered.

9. There were some difficulties with the mother's legal aid, so that the directions hearing did not take place until 20th July 2020. The fact finding hearing was listed in August. There were detailed directions made about the hearing, including reading time, and the days for evidence and submissions. After the order recited 'Upon the court being able to accommodate only 4 people on an attended basis at any one time and the following preliminary arrangements being proposed for attendance which shall be confirmed by the advocates in advance of the hearing' it was set out that the mother would attend on day 2 with her counsel, interpreter and father's counsel, with the father attending remotely, and on day 3 the father would attend court in person with his counsel and the mother's counsel whilst the mother attended remotely.

10. There was nothing in the order which referred to Rule 3A and PD3AA, either on 20th July, or at another hearing on 30th July when the case was re-timetabled to December. The fact finding hearing took place from 30th

November for four days and then on 8th December for judgment. There was no application for participation directions at any time during that hearing, and no ground rules hearing. The mother, father, maternal grandmother, paternal grandmother and the father's adult son gave evidence. The parents were both represented.

11. There was a very substantial amount of evidence produced by the parents for the fact finding hearing. The judge noted at the start of her judgment that she had watched and listened to a large number of videos and recordings and in excess of 1000 pages of documents. The videos included extensive and explicit recordings of the parties having sex.

12. At the conclusion of the hearing the judge reserved judgment which she handed down on 8th December. She rejected the allegations of rape and sexual abuse made by the mother and found that she had set about making allegations to malign the father and improve her application for leave to remove. She rejected the allegation by the father that the mother had sought to control his time with the child, saying that it was the actions of an anxious first time mother. The judge did state that her actions in removing the child from the jurisdiction had the potential to cause harm to the child as a result of a lack of contact with her father.

The appeal hearing

13. This took place in court, with the mother and some legal representatives attending remotely by CVP. I read and heard submissions on behalf of both parents and the child. I also read all the documents in the appeal and the original bundle, whilst bearing in mind that I am not acting as a fact finder in this case.

14. There were a large number of video recordings produced by each of the parties, which included a great deal of explicit material of the parties' sexual relationship. On behalf of the father I was invited to view it all, as had the trial judge. On behalf of the mother it was submitted that I should decline to watch it on the basis that the videos were intensely private and in themselves could not and would not provide the court with a balanced view of the evidence. Indeed one criticism of the judge is the extent to which she relied on the evidence from the videos in coming to her view that the mother's allegations were false.

15. Having heard the submissions on behalf of both the parties, I decided that I would only watch one set of recordings, and that was that of the alleged rape in Spain. The other two alleged rapes were not recorded. I did not view the remainder of the videos because I consider that consideration of

the appeal could not depend upon my assessment of the videos largely depicting consensual sex. In making this decision I entirely accept that this court cannot go behind the judge's own assessment of the videos I have not seen, namely that they depict both parties willingly engaging in the sexual relationship. As to the video in Spain, I noted that the mother appeared very drowsy throughout.

The law

16. I am extremely grateful to both parties for their detailed submissions as to the law which I have read and bear firmly in mind.

Fact finding

17. The first and most important point in an appeal against a fact finding decision is that the function of a court sitting on appeal is distinct from the court of first instance. The task of this court is to determine whether the judgment is sustainable, nothing less. This principle is enunciated in a number of cases, the best known of which is *Piglowska v Piglowski* [1999] 1 WLR 1360. In that case, 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".*

18. As Lord Hoffman went on to say, the exigencies of daily courtroom life as such that the reasons for the judgment will always be capable of being better expressed;

> "*reasons should be read on the assumption that unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account".*

19. Lewison LJ stated in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, paras.114 to 115:

> *"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

i) 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."

Points not taken at first instance

20. In *Jones v MBNA Bank* [2000] EWCA Civ 514, May LJ stated, when considering an appeal brought upon a matter which was not taken at first instance:-

> *"[52] Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."*

Domestic Abuse

21. PD12J of the Family Procedure Rules 2010 applies to any case where it is alleged, admitted, or there is reason to believe that a child or party has experienced or is at risk of experiencing domestic abuse. Paragraph 3 sets out the definitions of domestic abuse which includes 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 or family members. It encompasses a wide range of behaviours which includes psychological, physical, sexual, financial or emotional abuse.

22. PD12J sets out the process the court should adopt as to the determination of disputed allegations of abuse. In an appropriate case, the court may decide that it is necessary to conduct a separate fact finding hearing in order to provide a factual basis for any welfare report and/or assessment of risk. That is what happened in this case.

23. This case was heard before the Court of Appeal handed down judgment in the case of *Re H-N and Others (Domestic Abuse: Finding of Fact hearings)* [2021] EWCA Civ 448. Amongst other things, the Court of Appeal stated that where one or both parents asserted that a pattern of coercive and/or controlling behaviour existed, that should be the primary issue for determination unless any particular factual allegation was so serious that it justified determination regardless of any alleged pattern of coercive and/or controlling behaviour. All parties acknowledged the need for the court to focus on the wider context of a pattern of behaviour as opposed to a list of specific factual incidents, often set out in Scott Schedules.

24. At paragraph 71 of the judgment, the Court observed that the Family Court should be concerned how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not come within the definition of rape, murder, manslaughter or other serious crimes. Behaviour which falls short of establishing rape, for example, may nevertheless be profoundly abusive and if so should not be ignored in the family context.

Vulnerable witnesses

25. An important issue raised in this appeal is the treatment of vulnerable witnesses in the family court. Since the hearing at first instance in this case, Parliament has passed the Domestic Abuse Act 2021, which includes s63 which 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 diminished by reason of vulnerability. This triggers arrangements for participation directions or special measures, and is formally adopted into the Family Procedure Rules 2010 as rule 3A2A.

26. Although that provision was not in force at the time of the fact finding hearing, there were extensive provisions governing vulnerable witnesses in

place which the court was bound to follow. These are set out in rule 3A and PD3AA. Rule 3A provided as follows:-

a. 3A.3:
(1) 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.
(2) Practice Direction 3AA gives guidance about vulnerability.

b. 3A.4:
(1) 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.
(2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings.

c. 3A.5:
(1) 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.
(2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

d. 3A.7.
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.

27. 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.

The allegations

28. There were 14 allegations in the Scott Schedule. The mother made three allegations of rape against the father (a new allegation of rape had been

added to the two the mother had alleged in March). She also alleged that he had 'an obsessive sexual compulsion/disorder which he is unable or unwilling to control and has desires towards young looking girls, including school girls'. She said that he had displayed controlling, manipulative and intimidating behaviour towards her throughout the relationship, that he was financially controlling, and that he had been physically violent. She said that displayed inappropriate behaviour towards the baby by encouraging her to suck his toes, and to watch him urinate. She also said that he had referred to the baby abusively, referring to her as a 'cunt' and a whore'.

29. For his part the father alleged that the mother caused the child emotional harm by removing her from her settled home, that she was controlling of the time the father spent with the child, and that she too referred to the child by abusive names, 'fat pig', 'heavy pig', 'whore'.

The judgment

30. The judgment started with an introduction, brief background and then the law. There was then a section as to credibility and the witnesses. The judge noted that the mother had been married when she first met the father, but had not told him for some time, and that she had pursued the relationship when the father tried to end it. There followed a number of paragraphs where the judge set out some features she considered were notable, including, for example, that the mother had not told her mother she was a cam sex worker, that she had untruthfully said she did not know it was wrong to remove the baby to her home country in 2019, and that she had transferred an apartment from her name to that of her mother whilst claiming she was virtually destitute.

31. The judge said that the maternal grandmother had given evidence in a very partisan way, but that the father had sought to assist the court and came across as fatigued by the court proceedings.

32. The judge then turned to what she described as the overarching allegations. In paragraphs 35 and 36 she noted that the parties met when the mother was working in the adult sex industry and the father was a client. She said 'that in itself could give rise to potential power imbalance and abuse of vulnerable individuals….it is important however not to make an assumption that all those who work in the adult sex industry are always vulnerable and do so without choice'. After noting that the mother's fragilities were not the father's doing, she said that 'the evidence in this case points strongly to a man supporting and encouraging M during their time together to become more confident and believe in

herself'. In the next paragraph the judge said 'Having considered all the evidence I am satisfied that although the parties first met when F made contact whilst pursuing a sexual interest, the parties soon developed a rapport both ways that expanded to a relationship that was not controlling, manipulative or abusive'. She then went on to consider the timeline of the parties relationship, and set out what she had seen in the videos, and concluded that this had been a consensual sexual relationship throughout. She also set out how the mother had had access to money, and the father was, if anything, indulgent to her.

33. Having watched extensive videos of the parties having sex (including the video of sex between the parties in which the mother alleged she was unconscious and therefore not consenting), the judge concluded that sexual relationship between the parties was consensual throughout with both parties having the freedom and capacity to make the choice to consent.

34. The judge then turned to the allegations of rape. She said there was no credible evidence that sexual acts during the relationship were anything other than consensual with both parties having the capacity to consent. She described the mother as 'relaxed' in the Spanish video and said that a suggestion she had been drugged was fanciful. She deprecated what she considered was the mother's deliberate attempt to mislead the court by only providing the first part of the video of the sex but not the second. She accepted the father's evidence that the mother had recovered from being sedated when they had sex on the way back from the dentist and that she had in fact initiated it. Of the allegation of anal rape, the judge said it was fabricated. She also rejected the mother's allegations the father had been physically abusive to her. She came to the overall conclusion that the mother's motivation in making allegations was to malign the father and improve her application for leave to remove the child from the jurisdiction.

35. As to the allegations made that the father had an obsessive sexual compulsion/disorder which he is unable to control and has desires towards young looking girls or schoolgirls, the judge found 'the searches presented do not suggest…that F has a disorder which leads to a desire in school girls. There is no evidence he has accessed anything other than adult sites. The searches are not for teens although sites that have come up when he searches for 'shy girls' do occasionally have the word teen in it. F makes no secret of the fact he finds younger women than himself attractive, however by younger he clarified mid 20's to 30's – indeed the age of the mother (34). That is not something which is a disorder but a

legitimate preference. M barrister describing F choice of partners as a welfare concern due to their age is unfounded'. She then went on to say that 'F is of course entitled as an adult to access legal sex sites in the privacy of his own home. It may well be that F needs to explore the frequency with which he is doing this and the impact this may have on his ability to parent properly going forwards, fully focussed on his daughter'. The judge considered that the pictures the mother provided which she said were shirts stained with semen were another desperate attempt to present the father as an unfit parent. She said there was no credible evidence that the father accessed sex sites when the baby was in the flat.

36. The judge rejected allegations that the father was behaving in a sexualised or inappropriate way by encouraging the child to kiss his toes, or watch him urinate. She described the latter (which the father had filmed and sent to the mother) as another example of poor judgment at humour. She particularly criticised the mother for sending the picture of the 'toe kissing' event as a still, which was misleading when the entire video was viewed. As to the use of abusive language to describe the child, she rejected the mother's evidence that to the extent she had used the words she had copied the father without realising how bad it was, and concluded that each of the parents had used inappropriate language when it came to their daughter. She rejected allegations that the father had been financially controlling of the mother.

37. During the course of her judgment the judge referred to 'concerning conversation both on video and in written messages' about maintaining certain body weight. Reference to body weight is made in regard to both parties'. Commenting upon the suggestion made on behalf of the mother that the reference to body weight was a further example of control by the father, the judge said that she noted the mother had chosen to file Facebook images post separation which focussed on her obvious good looks and figure for others to comment on, that physical looks and body shape were important to both parties, and that she did not accept it was an element of control by the father. She did say that the father should be alive to such issues for the baby's sake, having given evidence that one of his past girlfriends had suffered from anorexia.

38. The judge rejected the father's allegation that the mother was overly controlling of his time with the child, saying that her concerns were not more than an anxious first time mother. She concluded her judgment by stating 'I conclude that M when she finally realised the relationship was not going to be resurrected between them and they were not going to live as a family following her return to the converted flat in November 2019,

that she made her plan for wrongful removal of [the child] to [x] and set about making allegations on her return to malign the F and improve her application for leave to return..'.

The mother's appeal

39. The first document filed by the mother contained 5 grounds of appeal. Following an oral hearing for permission to appeal on 22nd April permission to appeal was granted on two grounds. Ground 1 was the absence of special measures sought or implemented for the mother at the fact finding hearing and Ground 2 whether or not the judge balanced the evidence properly looking overall at the allegations. The appeal took some time to be listed and has taken place before me at the beginning of November.

40. In their written and oral submissions on behalf of the mother, Deirdre Fottrell QC and Charlotte Proudman who did not appear in the court below, argue first that the failure by the judge to implement any special measures rendered the hearing unfair. It was acknowledged (contrary to what had been asserted in the original skeleton argument) that the parents, by arrangement, never came to court on the same day. It was also accepted that those then representing the mother had at no stage made any application for special measures or suggested that there should be any ground rules hearing. They submit, however, that it was the duty of the court as well as the parties to ensure that there were proper directions to ensure the mother could give her best evidence and participate fairly in the hearing.

41. Ms Fottrell did not point to any specific point during the course of the hearing where it was apparent that the mother was affected by the lack of any particular measure, but she argues that it is not always possible to deduce how a vulnerable witness is being affected in the evidence that they give.

42. One matter Ms Fottrell particularly drew to my attention was that at the beginning of the trial the father (who was joining remotely that day) spoke directly to say that he couldn't see the mother on his screen (if everyone had been in court he would almost certainly have spoken through counsel). The judge told him that he ought to be able to see her when she was in the witness box, but if he could not, he should raise his hand and it would be dealt with. This had the effect that the mother knew right from the beginning of the case that the father was concerned to watch her, and that the judge was going to intervene if he was unable to do so.

43. It is very common for the complainant to ask for her face to be hidden from an alleged perpetrator. If the court had properly considered the issue of special measures, Ms. Fottrell submits, particular thought would have been given as to whether the mother's ability to give her evidence would have been diminished as a consequence of the father watching her whilst she did so. As things happened in this case, she was reminded of this early on.

44. Ms Fottrell and Dr. Proudman further submitted that there should have been a ground rules hearing for the trial judge to in advance of the mother's cross examination what topics could be covered. This was highly material in a case where the mother had acted as a 'cam sex' worker for several years, and there were allegations of rape within a relationship. There was a clear risk here that questions would be asked of her which emphasised her sexual history with the potential for humiliation and trauma that that could bring with it.

45. In support of her submission that this led to the mother being cross examined as to her sexual history, Ms Fottrell took the court to a number of places in the transcript where she was asked about whether she was having unpaid video time with other men at the same time as she was building a relationship with the father, where she was asked about having sex with the father once or twice a day every day at one point, and where she was asked about being videoed.

46. Ms Fottrell argued that the mother was being retraumatized by being asked about private sexual acts between her and the father, and also about her sex work. None of this, she said, 'crossed the judge's radar' because there had been no ruling or consideration as to what topics were and were not suitable. This, asserts Ms Fottrell, led to an approach whereby it was being suggested to the mother that because she consented to a variety of sexual acts with the father that she was giving a blanket consent to everything. Further, Ms Fottrell argues, the judge wrongly failed to distinguish between the ordinary or normal sexual encounters between the parents and the holiday incident of which the mother had no recollection.

47. Turning to the second ground, Ms Fottrell submitted that the judgment was brief and lacking in analysis. She criticised the judge for compartmentalising the evidence and failing to put it into context. First, the judge set out a number of matters relating to credibility which she said that she found to be notable. These included matters such as a

hearsay comment in the police documents that she appeared to be a person with a sense of entitlement, the fact that she had abducted the child to her home country when she knew that this was wrong (and falsely claimed the child was habitually resident there), and that she had maintained a lengthy deception to her mother by not telling her about her cam sex work.

48. Ms Fottrell particularly emphasised what she said was the judge's failure to address the question of the mother's vulnerability. The references in the judgment is at paragraphs 35 and 36 where the judge notes that the fact that the parties met when the mother was working in the adult sex industry and the father was a paying client. She states 'That in itself could give rise to a potential power imbalance and abuse of vulnerable individuals…..It is important however to not make an assumption that all those who work in the adult sex industry are always vulnerable and do so without choice. It is of course far more complex than that'. In paragraph 36 the judge stated that 'having considered all the evidence I am satisfied that when the father made contact whilst pursuing a sexual interest, the parties soon developed a rapport both ways that expanded to a relationship which was not controlling, manipulative or abusive'. Ms Fottrell submitted that the judge had come to this conclusion without giving any or any sufficient reasons. In particular the judge had focussed on the mother wanting to continue the relationship, whereas this does not mean of itself that it was not coercive or abusive.

49. The judge, it was submitted had considered the mother's evidence from a very superficial point of view, and failed to explain why key parts of it had been rejected. She had relied heavily on the videos, many of which depicted consensual sex between the parties, in order to form her decision to reject the mother's case. This had a domino effect, so that she rejected the mother's case in its entirety.

The father's case

50. On behalf of the father, Mr Tyler QC and Ms James first of all state that many, if not most of the points taken on appeal, particularly as to the absence of some special measures, were not taken at first instance, despite the fact that the mother was represented by expert counsel and solicitors at all material times. At no point before the mother gave evidence or during her evidence was there any complaint that she was feeling distressed or intimidated. On the contrary, she was extended every courtesy and facility to give her evidence and no request made on behalf of the mother was refused. Most importantly, it had been arranged at a

previous hearing that the mother and father would never be present at court at the same time.

51. They further pointed to the difficulty that the change of counsel but not a change of solicitors caused those acting for the father. In a criminal case where there had been a change of plea, there would normally be a waiver of privilege along with a change of lawyers, which would enable the court to scrutinise the reason for a new forensic course. In a case such as this, any barrister will always speak to their clients about the process of giving evidence and it is therefore of note that no point was raised. In addition, Mr Tyler points out that allowing an appeal in this case on the issue of special measures will set a dangerous precedent. Given there is no specific evidence that the fact the father was able to see the mother had any effect on her or the way she gave her evidence, and there was no ground rules hearing, this would amount to applying a standard of strict liability to cases such as this.

52. They also submit that a number of the submissions made on behalf of the mother, particularly at the permission stage, were simply inaccurate. They point out that the mother was the first to file explicit videos in the case, (some of which the judge found to be actively misleading). She was not (as suggested by those representing her), cross examined repeatedly on her sexual history, but was properly asked about her use of language when working as a sex worker, asked about the timeline of the sexual relationship set against the father's attempts to leave it, the fact that she was an equal participant in the sex including the filming, and that in the videos she was (at times) directive to the father.

53. The appeal put on behalf of the mother, they say, has shifted repeatedly.

54. In both written and oral submissions, Mr Tyler emphasised that this court is sitting on appeal. The question for me is not what decision I think I would have come to, but whether or not the findings are sustainable. Judges simply do not have time to produce perfectly crafted judgments and it is important not to hold a busy circuit judge to an impossibly high standard. Looking not only at the well known case of *Piglowska* [1999] 1 WLR 1360 but also at *Re M (Children)* [2013] EWCA Civ 388 and *A & L (Children)* [2011] EWCA Civ 1611 he drew attention to the dicta of Munby LJ as he then was in paragraphs 34 and 35 that the judges reasons 'should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. An appellate court…should resist the temptation to subvert the principle that they should not substitute their

own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself'. Additionally, there is no requirement for a judge to give 'reasons for reasons', and the fact that the judge does not refer to a matter in the judgment should not be taken as meaning that this point was not considered, unless it underlies a fatal logical inconsistency.

55. In this case, the judge at first instance carried out extensive reading of the material. She watched all the videos (and there were many). She heard the parties, she appraised the evidence, and she did not believe the mother. This, Mr. Tyler submitted, was exactly the function of a judge.

56. In this case the judge had every reason to doubt the credibility of the mother. The chronology and history of the relationship was different to the one that the she, ex post facto, gave in evidence. This was a crucial factor. Also, she positively tried to mislead the court by disclosing partial material, namely a video of sexual activity which left out the crucial part where she was clearly consenting, and a still of a video where the child was said to be sucking the father's toes. The full video demonstrated that there was nothing sexual or suggestive at all in that activity. When it came to the account of the alleged anal rape, the judge had positive evidence which demonstrated that the event could not have happened, for the date and time the mother ascribed to the event was the very time the parties had been corresponding about hypno-birthing. Photographs that the father was able to time showed the mother giving oral sex to the father in a plainly consensual way in what would have been the aftermath of the rape that the mother claimed, which (along with other evidence) permitted the judge to say that this allegation was deliberately fabricated. This was a case where the judge's assessment was grounded in evidence, not demeanour, nor a vague assessment of whose evidence that she preferred.

57. As to the submission that the judge placed too much reliance upon the video evidence, Mr. Tyler stated that she was entitled to look at the material to consider where the dynamic of the relationship with the father lay. The videos demonstrated her interacting with the father, pausing, laughing, and being relaxed. At other times she is able to be demanding of the father, and to show her annoyance that he is not doing what she wants. Because of the videos, the judge could see a significant portion of the picture of the relationship which was entirely inconsistent with what was described to the police. This was not a case where the judge fell into the trap of assuming that because the mother consented to some sexual

activity she must have consented to everything, but where her conclusions were firmly grounded in the evidence.

58. Finally, Mr Tyler submitted that the judge had every reason to reject the mother's allegation that she was financially controlled by the father. The father was criticised for controlling the mother by money if he provided for her, and equally for controlling her if he did not. In fact the father had comprehensively demonstrated that he had provided the mother not only with free accommodation with all bills paid, but funding for herself and the child too.

Discussion and conclusions

Failure to comply with rule 3A and PD3AA Family Procedure Rules

59. It does not appear from any of the orders that the question of participation directions was considered or determined by the court. The provision that the mother and father should attend court on different days to give evidence appears from the wording to have been made in order to meet the restrictions on too many parties being in one room as a result of Covid.

60. The provisions of rule 3A and PD3AA are mandatory. The word used is 'must' and the obligation is upon the court, even though the parties are required to cooperate.

61. Rules 3A.4 and 3A.5 required the court to consider whether the mother's participation in the proceedings was likely to be diminished by reason of vulnerability both when giving her evidence and otherwise. There can be no doubt that the mother came within the category of those who might be vulnerable, as someone who was alleging domestic and sexual abuse.

62. The mother was fully represented throughout the proceedings, but the obligation to consider vulnerability is upon the court. I entirely accept Mr. Tyler's submission that counsel for the mother (and possibly the father too) would be expected to remind the judge(s) of this, and that (as privilege has not been waived) we cannot know whether or not there was a conscious decision not to ask for special measures. These points do not, however, relieve the court of the responsibility it has been given under the rules. Whilst I also take note of the the dicta of May LJ in *Jones v MBNA Bank* [2000] EWCA Civ 514, as cited to me, there is a fundamental difference between the situation there and this one.

63. This was a very sensitive case where there were allegations of the utmost seriousness. They were of two rapes whilst the mother was under the influence of sedation and either drink or drugs respectively, and a third of anal rape when she was eight months pregnant. She also made overarching allegations of controlling, manipulative and intimidating behaviour on the part of the father.

64. The mother produced some explicit videos in support of her allegations of rape. In response the father filed a witness statement setting out detailed evidence of the mother's sexual activities, including numerous screenshots of her naked and masturbating with him watching. He produced a large number of explicit videos of their consensual sexual activities, and argued that her activities as a 'cam girl' demonstrated that, far from being intimidated into sexual acts by him, (including being videoed) she was confident, adventurous and open about her body. The court bundle for the trial contained several large pornographic photographs of her and several more small 'stills' exhibiting videos. She was asked about these matters extensively as part of the father's case that the sexual relationship between them was an equal one. Her case was that she was doing this to please him and keep him.

65. There was evidence, that the judge referred to, that the mother had some long term underlying fragilities, and that she was anxious. In one of his statements the father said that he ended the relationship because the level of emotional and psychological support she needed was very frustrating and emotionally exhausting.

66. It must be clear from the matters I have set out above that this was a case which cried out for participation directions and a ground rules hearing, not just for the sake of the mother, but for the integrity of the court process itself. The purpose of the rules and Practice Direction is to avoid the quality of the evidence being diminished. Here, the need for directions went beyond the need to consider whether the parties should not come into physical contact in the court room or building. Matters, such as whether the mother should be visually shielded from the father as she gave her evidence, and what topics should be covered in cross examination, were highly relevant.

67. It was inevitable that the mother would have to answer very personal questions, but the questioning should have been restricted to what was necessary for a fair trial. An example of a line of questions which may not have been necessary is apparent from the start of her cross examination. She was taken to explicit material from her days six years

earlier as a 'cam girl' to demonstrate she knew the meaning of some swear words. There might have been a different way of achieving this goal. At the start of the hearing there was a discussion about the possibility of playing some excerpts of the explicit videos to the parties in court if the need arose although this did not actually happen. It does not need much imagination to think that this might have had a deleterious effect on someone who was a victim of intimidation and/or abuse. I say all this to illustrate that it is not an academic point but wish to be absolutely clear that counsel is not to to be criticised. Cross examining on such matters is difficult yet very important, and counsel benefit from a ground rules hearing as well.

68. The other point to be made is that the father raised the fact he could not see the mother just before her evidence, and directly with the judge, who said he was entitled to see her and should raise his hand at any time if he could not. It is true the mother was in court, and speaking to the judge rather than directly to the screen where his face appeared (along with at least one other person), but she was made aware that he was watching. If there had been a proper process, this would all have been organised in advance.

69. Mr Tyler and Ms James properly state that those representing the mother are not able to point to any part of the hearing or the evidence where it is clear that the mother became distressed or unable to give her evidence. She did show herself able to contradict counsel and to put points across. Neither her counsel or the judge intervened at any stage because they were concerned about this, as might be expected. This point was not raised, during or after her evidence, or indeed at any stage until the appeal.

70. I accept, however, the submissions of Ms Fottrell that it is not possible to know how the lack of special measures may have affected the mother. Not everyone reacts to being watched by someone they are accusing, or being questioned about distressing or embarrassing material in the same way. Some people may become distressed or silent, but others might become defensive, voluble, avoidant or even angry. What can be said in this case is that the judge did not find the mother a credible witness and that she intervened on several occasions to ask the mother to answer the question she had been asked. She preferred the father who she found to be much a more impressive witness.

71. I further accept Ms Fottrell's submission that on the facts of this case the failure to abide by the procedural rules in this case was so serious that the decision of the court cannot stand. I do not accept that the decision here amounts to the court imposing a test akin to that of strict liability.

72. I should make it clear here that whilst there is a continuing obligation upon the court to apply the rules, this judge came to the case fresh at the fact finding hearing. The matter was not raised by anyone including counsel at earlier hearings before different judges. What happened here is a stark reminder to us all that these matters need to be addressed to avoid the risk that the integrity of the trial will be undermined.

73. In all the circumstances I will allow the appeal on Ground 1.

Ground 2

74. Given my findings on Ground 1, it is not strictly necessary for me to consider Ground 2, but in deference to the argument I heard about it and the issues involved I have decided to do so. I will avoid saying more than necessary about the evidence as the matter will be remitted to another judge for directions and rehearing.

75. This case demonstrates the very great challenges faced by family judges in considering allegations of domestic abuse. There are equal challenges for the parties and their legal representatives. Patterns of behaviour, which are crucial to piece together to understand a relationship dynamic may be hard to discern. Additionally, the parties will often wish to produce large amounts of written material to support their own case, evidence which may necessarily go back many years.

76. In this case, the judge was presented with thousands of pages of documents, including pages and pages of exhibits of messages and photographs. There were hours of video evidence, much of it extremely explicit in nature, all of which the judge watched. That she carried out her task diligently and conscientiously is beyond any doubt.

77. I am also acutely conscious of the strain on the family courts where judges are overloaded with cases and there are increasingly delays. It is simply not right or feasible for judges to be expected to produce lengthy and beautifully crafted judgments dealing with every point. As Mr. Tyler says, the point of a judgment such as this is to enable the parties to understand the judge's decision and basic reasoning. It will then go on to inform the next stage of the case.

78. I also bear in mind, as Mr. Tyler and Ms James submit, that this judge is well versed in dealing with allegations of rape and sexual assault. She said herself that she had been assisted by her cross jurisdictional knowledge on important issues including freedom and capacity to make a choice, and the importance of avoiding stereotypes and assumptions. The criminal jurisprudence and understanding of context of relationships commencing between client and a person working in the adult sex industry was beneficial to her, she said, in her task of assessing the evidence and inferences that can properly be drawn.

79. Despite these points and the very great deference to a judge who heard and saw all the evidence, I have come to the conclusion that I should allow the appeal on the second ground as well.

80. The reasons for this is linked to Ground 1, in that I do not think the judge gave sufficient consideration to the possibility that the mother might have been vulnerable in or over-dependent on the relationship. Her assessment is somewhat limited and mostly confined to comments in paragraphs 35 and 36, repeated in paragraph 45.

81. I entirely understand that a busy judge should not be expected to set out all the evidence that she has weighed in the balance, or even to refer to the mother's case, but the judge's reasons as to this important point required some more reference in the judgment. It is right there should be no assumptions that a relationship that developed in the way this did leads to a power imbalance, but it is equally important to realise that sometimes it does. There were aspects of this case which made this a possibility. Although she was educated to degree level the mother was 20 years younger than the father. She gave up the sex work as soon as she met the father in person, moved to this country and became financially dependent upon him. She was obviously trying to escape the previous life she had had. The father was in a stronger position financially than the mother. He and his family own numerous properties in the area in which they live, and the father's three older children were all privately educated. Although there was evidence of the father encouraging the mother there was evidence of his behaving in a demeaning way to her as well.

82. The reason it was so important for the judge to give very careful consideration to the question of vulnerability in this case is because a vulnerable person may not act in the same way as someone more independent or confident if they are exploited or abused in a

relationship. Such an individual may be so anxious for the relationship to succeed that they accept treatment that others would not. They may be easy to exploit. They may not even realise what is happening to them, and will cling to the dream of a happy family and relationship. From my reading of the judgment I cannot see that the judge gives this possibility serious consideration, nor do I think the videos of sexual activity would have been a reliable guide to the relationship more generally. I know that the judge referred to her cross jurisdictional experience, but her reasoning as to the allegations of rape focusses closely on the issue of consent and capacity rather than abusive behaviour in the wider sense.

83. Here it is quite clear from reading the transcript of the hearing and judgment that in rejecting a number (although not all) of the mother's allegations against the father the judge relied very much on the fact she wanted to be in a relationship with the father, she tried to get him back when he rejected her, and that she engaged in sex with him after occasions when she said he had raped or abused her. These reasons may well hold good in many cases, but most definitely not all. In some cases it is a very unsafe premise upon which to base findings of fact, especially if the alleged victim is vulnerable or dependent as the mother said she was here. Further, it seems to me that the judge's disbelief that the mother would have remained in an abusive relationship led her to conclude the mother was lying about it. This tainted the whole of her evidence, and was a thread which ran throughout the case.

84. Ultimately the judge rejected the mother's evidence on almost every point, and for the most part exonerated the father of any wrongdoing. At times when it was clear the father had behaved in demeaning way (eg saying to the mother that she should be '49.5 kg please….you advertised yourself as 48 to 49kg…fat bitches I can get here'), or had referred to the baby as a 'whore' or a 'cunt' she said the mother had done similar and found that there was an equivalence between them.

85. I also consider there is some force in the submission that the judge looked at the evidence in a compartmentalised way, without considering the possible relevance that the evidence on some allegations had with respect to others, but I do not think it necessary for me to add to the length of the judgment by elaborating.

86. I must emphasise that allowing the appeal on Grounds 1 and 2 I am not for one moment saying that there will be a different outcome at a retrial. That I do not know and will have to await another day and a different judge.

87. This is a case where the court will have to decide whether it is in the best interests of the child to allow the mother to take her to the country she comes from or to be brought up here by both parents in a shared care arrangement. This will be a difficult decision where a number of competing factors will have to be assessed. Any new consideration of the facts or framing of the case will have to take place with a clear eye as to the evidence the court will need to come to a decision on the applications before it.

88. I know that the fact there will have to be a retrial in this case will cause further delay, expense and distress to these parties and the child, but in the circumstances it is impossible to avoid. I consider that this case should be heard by a Family Division Judge, and have established that a directions hearing can be listed in the second week of December.