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Case No: FA-2023-000009
ZC20F00423 / ZC20P00931

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 October 2023

Before :

The Honourable Mrs Justice ROBERTS

- -

Between :

IJ **Appellant**

- and -

KL **Respondent**

- -
- -

Malcolm MacDonald (instructed on a direct access basis) for the Appellant
Kerry Ann Currie (instructed by Duncan Lewis) for the Respondent

Hearing date: 6 June 2023 (application for permission to appeal)

This judgment was circulated to parties on 12 October 2023.

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Mrs Justice Roberts:

1. The appellant seeks the permission of this court to appeal against findings of fact made by Her Honour Judge Gibbons sitting in the Central Family Court in London following a hearing which concluded on 7 September 2022 after 11 days of evidence and submission. The fact-finding hearing was listed in the context of private law proceedings concerning the parties' two sons, A (then 13 years old) and C (then 5 years old). On 10 August 2020 the appellant issued an application pursuant to s.8 of the Children Act 1989 whereby he sought the court's assistance in the ongoing arrangements in relation to his contact with the two children of the family. These parties were then litigating on a number of fronts following the breakdown of their marriage in 2019. They separated in July that year when the respondent mother moved out of the family home with the two children. In December 2019 she issued a petition in London seeking the formal dissolution of their marriage. By that stage the appellant had already issued his own petition in the French courts, a jurisdiction with which he has a substantial connection and where he owns property which falls to be captured by a prenuptial agreement which the parties entered into prior to their marriage in April 2010.

2. Notwithstanding that potential forum dispute, the parties accepted that the English court had, and retains, jurisdiction in relation to the arrangements for the two children of the family who remain habitually resident in this jurisdiction.

3. Her Honour Judge Gibbons had been case-managing the private law proceedings for over 12 months when she handed down her reserved judgment in relation to the lengthy fact-finding hearing which concluded on 7 September 2022. The parties were represented at that hearing by the same counsel who have appeared for the purposes of the permission hearing on the appeal.

4. The draft judgment was sent to the parties on 17 October 2022. It provoked from the appellant a lengthy request for clarification of various aspects of the judgment[1] which were addressed by the judge. Her final judgment, including her findings, was handed down on 19 December 2022. By her order of the same date, both parties were directed to file and serve further evidence in relation to progressing the case, including any proposals for family therapy. By this stage, the supported contact arrangements which had been put in place had broken down completely. Neither of the children was willing to see their father although the independent social worker's report in relation to C's initial contact with his father had been more positive. The children had been given party status in the proceedings and were represented by a NYAS guardian who had been separately represented by counsel at the fact-finding hearing.

The father's application for permission to appeal

[1] As is recorded on the face of the order made by HHJ Gibbons on 19 December 2022, the appellant's request for clarification of the judgment ran to 65 separate points of clarification and 17 corrections over 9 pages.

5. The father filed his appellant's notice on 11 January 2023. It was one day out of time but I take no point on that late filing. He had been suffering from the after effects of a recent Covid infection and was then, in his words, "managing nine strands of litigation in eight different courts in two jurisdictions as a litigant in person".

6. On 16 January 2023, I made initial directions on the proposed appeal requiring the father to serve Grounds of Appeal together with a skeleton argument setting out the basis of his challenge to the judge's findings. I gave the mother permission to file a skeleton in reply if she so wished. Following receipt of both skeletons, on 27 February 2023 I listed the matter for an oral hearing on 6 June, that hearing having been listed to consider only the permission stage of the proposed appeal. I gave the mother and her legal representatives permission to attend that hearing if she so wished. There was then an extant application by the mother in the Central Family Court. She was seeking the court's permission to take the children abroad for the purposes of a holiday. That application had been listed for 24 March this year. Because the father contended that she represented a flight risk (on the basis of a previous application for permission to relocate with the children to Dubai in the United Arab Emirates for work purposes), by my order dated 8 March that hearing was stayed pending the permission hearing in relation to the order and findings made by Her Honour Judge Gibbons.

7. I heard argument from counsel for both parties on 6 June 2023. Mr MacDonald appeared to represent the father. Ms Currie appeared for the mother. NYAS was excused from attendance at the hearing.

8. Before turning to the substance of my ruling in relation to the permission application, I turn, first, to the background to this application; second, to the judge's findings; and, thirdly, to the law which I must apply in relation to the proposed appeal.

The background

9. The parties met in 2005 at a time when the father was still married to his first wife. Four children were born during that marriage. Whilst it appears that he has maintained a relationship with his two adult daughters, the father has been estranged from his two elder sons since their adolescence. The two children at the centre of these proceedings have never met their male half-siblings.

10. They lived together from 2006 and A, their elder child, was born three years later. The mother was born in Algeria but was brought up in Paris. There is a twenty-two year age gap between the parties. The father was 66 years old at the time of the fact-finding hearing at the end of last year. He is a consultant ophthalmic surgeon and an Emeritus Professor. Following his divorce from his first wife, the parties married in April 2010. Their younger son was born seven years later in July 2017. A little over a year later, the father issued his divorce petition in the French courts.

11. Following the parties' separation, the mother and children moved into a rented flat in central London. The father remained in the former matrimonial home. When the mother's English divorce petition was served on the father, he gave notice on the rented flat. By April 2020, he had ceased paying the outgoings on the flat, claiming that his finances were stretched and he could no longer afford to support his family in that accommodation.

12. By that stage the mother had made an application for permission to relocate to Dubai where she intended to rebuild her career. Whilst she did not in that application seek to rely on specific allegations of domestic abuse, she had raised concerns with the CAFCASS officer who prepared a safeguarding letter for the court. In particular, she alleged that the father had engaged in bullying behaviour, financial abuse and alcohol misuse. In terms of concerns about the children, she told the CAFCASS officer that he had anger issues and had slapped their elder son on numerous occasions.

13. In April 2020 there was a brief rapprochement between the parties based upon what appears to have been a plan for the whole family to move to Dubai. The mother withdrew her English petition and both parties' applications for orders in respect of the children were dismissed by consent. The father agreed to attend counselling with their elder son to address the issues which had arisen in their relationship. Nothing came of these tentative plans as the parties had separated permanently by July 2020.

14. At this stage the proceedings in the Central Family Court concerning the two children were resurrected. The mother applied for non-molestation and occupation orders alongside fresh applications in relation to the arrangements for their two sons. Within those proceedings, she made a series of allegations about the father's behaviour towards her and the children. A separate report was made to the police concerning these matters. The local authority became involved with the family as a result of concerns for the children who were caught up in the midst of seemingly bitter parental conflict. On 28 August 2020, the mother made a formal complaint to the police in relation to an alleged rape by the father which she said had occurred in February 2019, on her case, some five months before their initial separation, and at a time when they were no longer having sexual relations.

15. There was an attempt to set up some contact between the father and the children in the summer of 2020 but that broke down after a matter of weeks with A demonstrating what the judge described as "immense anger related to his father". A was by that stage seeing a child and adolescent psychiatrist in order to manage these issues.

16. In March 2021, A was interviewed by the police as a result of a report which the mother had made to the police that A had told her that his father had on two occasions asked him to touch the father's erect penis whilst in the bath at the family home. A subsequently told the police that this had happened when he was about 5 or 6 years old. He had also complained of a physical assault and being locked in a cupboard by his father. When asked by the police what he thought of his father, A said, *"If I saw*

him, I would murder him, the satanic piece of shit". On 7 April 2021, the father applied for an order that the children should live with him on the basis this would be the only effective means of addressing the difficulties in his relationship with the children. Those difficulties were, on his case, the result of parental alienation on the part of their mother whom he alleged to be suffering from serious mental instability.

17. That was essentially the background against which the fact-finding hearing was listed. As the hearing commenced, the father had had no effective contact with either of his two younger sons for over two years.

18. In terms of the litigation chronology and the lengthy involvement of Her Honour Judge Gibbons in this case, I need say only that there has been an earlier appeal in this case against a discrete case management decision made by a Recorder who determined the extent to which evidence should be excluded from the fact-finding hearing. I mention it at this point in my judgment because it has some relevance in terms of the first of the father's proposed grounds of appeal which concerns the manner in which the judge approached the schedule of allegations relied on by the mother for the purposes of framing her fact-finding judgment.

19. On 28 August 2020 directions were made which required each party to file a schedule limited to five allegations against the other together with a counter-schedule in response. The fact-finding hearing had originally been due to start on 4 February 2021 before the Recorder. On that date, Mr MacDonald appeared for the father. He raised with the Recorder a preliminary objection relating to the third party evidence on which the mother sought to rely, including witness statements from the children's nanny and maternal grandmother. In terms, he complained that the evidence in dispute went beyond the scope of the five allegations she had been permitted to raise. He invited the Recorder to exclude all of the disputed evidence. As a result of this application and additional pressure on the court lists, the hearing date was lost and had to be adjourned for several months.

20. Whilst the five central allegations selected by the mother as evidence of the domestic abuse perpetrated against her and the children were those considered by Her Honour Judge Gibbons (including an allegation that she had been forced to have sexual intercourse with the father as a result of which she had contracted a sexually transmitted disease), she had in her witness statements given other examples of his 'bullying' behaviour, both towards her and others. She sought to rely on evidence to show that the father had bullied work colleagues. She exhibited a number of letters from professionals treating A, their elder son, setting out allegations he had made against his father and the mental health difficulties he was suffering as a consequence.

21. The Recorder acceded to Mr MacDonald's application to limit the scope of the mother's evidence. He directed the mother to file a new statement excluding some of her allegations. Evidence from the professionals treating A was likewise excluded. He allowed her to rely on statements from the maternal grandmother and the nanny

whilst observing that some of the matters in the grandmother's evidence went beyond the five allegations in the mother's Scott schedule.

22. The mother's appeal against that case management decision was heard by Mrs Justice Judd over two days in June 2021. The principal thrust of the mother's challenge in that appeal was that the law in relation to the approach to fact-finding hearings concerning domestic abuse was developing following the passage into law of the Domestic Abuse Act 2021 and FPR 2010 Part 3A together with Practice Direction 3AA. In particular, she relied on the decisions of the Court of Appeal in *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448[2] and of Hayden J in *F v M* [2021] EWFC 4 in relation to the limitations of Scott schedules. As the emerging jurisprudence demonstrated, a specific focus on particular allegations at the expense of identifying emerging patterns of behaviour was considered to be unhelpful. As Judd J acknowledged in her judgment on this appeal, the definitive move away from lists or schedules of specific and isolated allegations, as identified by the President of the Family Division in *Re H-N*, "risked robbing the court of the vantage point from which to view the quality of the alleged behaviour as a whole and to determine if there was an [emerging] pattern" of behaviour which could properly be characterised as abusive for the purpose of the 2021 Act: see para 31 of Judd J's judgment. She endorsed the approach to emerge from *Re H-N* at paragraph 59 that –

> "…where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary, that assertion should be the primary issue for determination at the fact-finding hearing. Any other more specific factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour and not otherwise unless any particular allegation is so serious it justifies determination irrespective of any pattern."

23. In reaching her conclusions in relation to the mother's appeal, which was allowed, Judd J said this at paragraph 37:-

> "The allegations beyond those in the Scott Schedule were not either inadmissible or irrelevant; quite the opposite. The fact that the father was alleged to have hit the older child not once but several times was plainly an allegation of a pattern of behaviour which is highly relevant to an application for contact. So too were allegations he had forced the mother to have sex on several rather than one occasion, that as well as being physically violent to him, the father treated the older child in a humiliating manner and that he was a bully. These matters are also relevant to the father's case, in particular that the mother was the one who was violent, not him, and that she was alienating the children from him. These allegations

[2] a combined appeal involving three separate cases

> (some of which are set out in the mother's initial C1A) demonstrated that strict adherence to single incidents in the Scott Schedule would have to be reconsidered."

24. She continued, in paragraph 39:-

> "In this case … not only were the allegations highly significant but the hearing had to be adjourned in any event. The fact finding hearing was relisted in September meaning there was time for the nature and scope of this to be considered at a further case management hearing listed in July [2021]."

25. At paras 33 and 34 of her judgment, Judd J acknowledged the difficulties which confronted the recorder who had come fresh to these long-running proceedings to deal with the fact finding hearing. He inherited previous case management orders which had required the parties to limit their allegations to five before any narrative statements were produced. Those orders were not appealed but, as Judd J noted, at the time of the fact finding hearing the judgment in *Re H-N*, which she described as "very much on point", was not available. In addition, she acknowledged that the mother had produced new material late in the process which left the father with little time to respond. Despite the understandable objections made on the father's behalf about the admission of that evidence, Judd J declared herself satisfied that the recorder was wrong to refuse to admit the evidence set out in the mother's latest statement and that of the maternal grandmother. It was plainly relevant and captured by the guidance provided in *Re H-N*.

26. Very unfortunately the litigation chronology did not follow its predicted path after that appeal judgment. Matters were significantly protracted for a number of reasons including the mother's ill health, a change in her legal representation and the involvement of NYAS in its role as the children's guardian. The next substantive directions hearing involving Her Honour Judge Gibbons and the mother's schedule of allegations did not take place until 15 December 2021 nearly six months after Judd J had handed down judgment on the appeal. At that point in time, there was still no effective appointment of a guardian. Detailed case management directions were made with a view to listing a fact-finding hearing on 19 April 2022 with a time estimate of 4 days, the court undertaking to find a 5th day as soon as possible. Given the nature of the mother's allegations against the father and the fact that the hearing was listed as an attended hearing, the court made specific participation directions including the use of screens whilst the parties were present in court.

27. By the time the judge came to embark upon the fact-finding hearing on 19 April 2022, she had been involved in the case and its management for several months. For a number of reasons, the hearing had to be adjourned and relisted on four occasions. It was heard over the following dates:-

(i) 19 to 21April 2022;

(ii) 8 to 10 June 2022;

(iii) 29 June 2022;

(iv) 16 August 2022;

(v) 7 September 2022 (the concluding day of the hearing).

A written judgment (dated 14 October 2022) was sent to the parties and their legal advisors on 17 October 2022. The judge's written response to the father's request for clarifications, some 65 in number, ran to 13 pages. As a result, her order confirming the findings of fact set out in her October judgment was not perfected until 19 December 2022.

28. I pause there only to make two observations as to the course which this litigation has run. It is clear that a significant element of the very unfortunate delay in this case has been the impact on the court's ability to list effectively given the considerable impact of the Covid pandemic. That impact was felt by Family courts up and down the country as they struggled to manage ever-increasing backlogs with insufficient judicial and other resources. Thankfully, as acknowledged in successive updates by the President of the Family Division, we have emerged from that period into a much more stable period which has seen the majority of those backlogs successfully absorbed. This case was undoubtedly a casualty to a greater or lesser extent of that delay. By the time the judge came to deliver her judgment in relation to the fact-finding hearing, there had been no contact between the father and either of his two younger children for almost two years. That said, until the issue of the current appeal, this case has had the considerable advantage of being overseen by the same experienced circuit judge throughout the course of some eighteen months. She has seen these parties and their legal representatives in court over an extended period of time and, at the time of the various listings in respect of the adjourned fact-finding hearings, she was fully aware of the issues. It is no part of the substance of the father's appeal that the circumstances in which the fact-finding hearings were conducted affected the procedural integrity of the process. The focus of his challenge in this respect is the manner in which the judge dealt with the allegations as they informed the basis of the mother's case.

Findings made by Her Honour Judge Gibbons at the conclusion of the 11-day fact-finding hearing

29. The judge set out her findings in a detailed 25-page written judgment which she produced in draft form some six weeks after the conclusion of the fact-finding hearing. She heard evidence from a number of witnesses at that hearing, in addition to the parents. Before dealing with the specific allegations relied on by the mother,

the judge made a number of findings in relation to the father's general credibility. These included the following:-

(i) The father had not been truthful in his evidence to the court about the circumstances of his estrangement from his two elder sons. He told the court that there had never been any welfare proceedings relating to those boys whereas it was a matter of record that litigation concerning both the children and matrimonial finances had been ongoing over a period of seven years. The judge rejected the father's explanation that he had forgotten about the litigation history. She found that he had "deliberately misrepresented the position in a bid to avoid further relevant enquiry" (paragraph 50).

(ii) In his first divorce proceedings, as in these, the father had made allegations against his first wife that she had alienated their children against him and that she suffered from mental health problems. The father accepted that he had referred to his first wife as "the mad one" when speaking or writing to his children. He denied that he was thereby suggesting that she had some underlying mental health condition. He told the judge that he had called his first wife "the mad one" simply because he regarded her wish to end the marriage to be a "mad" decision. The judge rejected that evidence preferring the evidence of the mother that the father had told her previously that his first wife suffered from poor mental health (paragraph 51).

(iii) Over the course of the current litigation and since the parties separated in the summer of 2019, the father had represented to a number of third parties including the police, health professionals and CAFCASS that his second wife suffered from paranoid schizophrenia and delusional disorder and that the allegations she was making against him were the result of those delusions. The judge had evidence from the mother's GP that there was no record of any such problems in her medical records. In the absence of any independent concerns from the many health professionals with whom the mother had worked over the past two years, the judge found it unlikely that she had been suffering from any psychological problems or serious mental health difficulties from 2018 as the father alleged. She specifically rejected his narrative descriptions of "delusional behaviour". Further, she found that his repeated references to her presentation in these terms was (a) wrong, (b) designed to undermine her confidence and belittle her, and (c) amounted to controlling and coercive behaviour (see paragraph 52).

30. As to her broader assessment of the parties as witnesses of the truth, the judge reached the conclusion that "neither was an entirely satisfactory witness" (paragraph 54). She found that the mother was prone to exaggeration and that she had, unintentionally but inappropriately, exposed A to some of the financial and other aspects of the divorce proceedings from which he should have been shielded. Because of A's

understandable desire to protect his mother and his evident alignment with her, the judge found that any allegations made by their elder son must be scrutinised with caution (paragraph 54). She further found that both the mother and the maternal grandmother had on occasions tended to attribute more weight, if not an inappropriate interpretation, to some historical events than they deserved. As to the father, she said this:-

> " … he has a manner of delivery which tends to give the impression that he considers himself superior to others and unable to accept that others may not agree with his opinions. He was dismissive of the allegations. He frequently did not give a direct answer to questions in cross examination. He was rigid and precise to the extent of being pedantic in his answers … and showed himself prone to anger, accusing M's counsel of lying and misleading the court when she was merely putting her client's case quite properly. In my assessment, he is a man who does not like to be challenged. My overall impression is that the way in which F engages with those close to him in his daily life is likely to be perceived by them as controlling and dictatorial. F plainly has high standards and expectations. I find it likely that, in part, in seeking to maintain these, his interactions can come across as exacting, superior, humiliating and bullying. ….. I find it likely that F's style of engagement is likely to account for much of the difficulty in his relationship with [A] and with M and I consider that F's ability to understand and to empathise with his children's emotional needs will require further assessment ….." (paragraph 55).

Specific findings made by the judge in relation to the father's behaviour towards the children

31. From paragraphs 57 to 84 of her judgment, Her Honour Judge Gibbons dealt with eight specific allegations in relation to the father's behaviour towards, or treatment of, the children.

32. She found as follows:-

(i) C's fall from a changing table at the age of 6 months was an accident and there was insufficient evidence to sustain the mother's allegation that the father caused or contributed to the fall whilst handling him having consumed excess alcohol (paragraph 57);

(ii) The father had put A in a small cupboard under the stairs at the French property as a punishment for some misdemeanour. The judge rejected the suggestion advanced by the father that A had been coached by the mother to repeat this allegation to the police and to his counsellor (paragraph 58);

(iii) She accepted the evidence of the maternal grandmother that the father had slapped A's face with the palm of his hand whilst staying at the French

property when he was aged 5 or 6 years old. The slap had caused a red mark to the child's cheek which faded fairly quickly (paragraphs 59 to 60);

(iv) On 21 July 2018 (being the occasion of C's birthday), whilst in a lift at the family home, A had been hit in the face by parcels which the father had thrown at him. The maternal grandmother had given evidence that the father had also slapped his face on this occasion, something which A had also demonstrated to police during his ABE interview. The judge rejected the father's blanket denial that this event happened and found that, even if the slap had not occurred, throwing parcels in C's face amounted to an abusive act (paragraphs 61 to 63);

(v) On 24 July 2020, whilst A was playing with a remotely controlled car which had been given to C as a birthday present, the father grabbed the remote control from A's hand in temper, twisting his hand or wrist in the process and causing pain. The judge did not find any intention on the part of the father to hurt his son but found that he was reckless as to whether A suffered pain and/or humiliation (paragraph 64);

(vi) The allegation that the father hit C on his nappy in the area of his genitals was not proved (paragraph 65);

(vii) The allegation that, when A was 4 or 5 years old, the maternal grandmother had witnessed a potentially sexually abusive act perpetrated by the father against A was not proven. A's grandmother had given evidence that she came into the bathroom to find A standing naked and obviously cold in the bath with his back to his father who was sitting next to him on a stool. The judge found that this did not amount to sexually inappropriate behaviour on the father's part towards A and, further, given the binary nature of establishing findings, any future assessment of either A or the father must proceed on the basis that it did not happen (paragraphs 67 to 71);

(viii) The judge rejected any suggestion that the father had sexually abused A, as he reported to the mother had happened when he was a much younger child. In this respect the judge found A's account to the police and others to be "confused, lacking in clarity and inconsistent". She exonerated the mother of having "coached" their son to make these allegations as the father had suggested might have happened (paragraphs 72 to 84).

The judge's finding in relation to marital rape in early 2019

33. On 28 August 2020 the mother reported to the police that she had been raped by the father. According to the mother she had reported this allegation earlier but was told to come into the police station for interview on that date. It followed a reference in the Form C1A dated 12 August 2020 which had been filed with her application for a non-

molestation order when it was described as a "battery" as a result of which she had contracted a sexually transmitted infection. The judge sets out an account of the detail of this allegation in paragraph 86 of her fact-finding judgment. The mother maintained that she delayed making a report to the police because the father had constantly told her that a husband cannot rape his wife. As a result of her report to the police, the father attended voluntarily at the police station where he was interviewed under caution. He maintained that he did not have a sexual disease and therefore could not have infected his wife. He further alleged to the police that the mother had created this scenario in her own mind as a result of her mental health issues in order to justify her discovery that she herself had picked up an infection.

34. The judge below had a copy of a summary of that interview which has been included in the appeal bundle. As that summary makes clear, the father denied that he had ever raped his wife or used any force to make her engage in sexual relations. When he was asked about his understanding in relation to consent, he told the police that –

> ".. he believes there is a presumption of consent in marital sex, in so much as he does not feel the need to ask permission to have sex on each occasion as he may do in a more casual relationship. However, he states that if [his wife] expresses not wanting to have sex then he stops immediately. His attitude can be summarised as presuming consent unless told otherwise and then on those occasions he states ?NO MEANS NO? and does not persist with attempts to engage in sexual intercourse.[3]"

35. In the light of the father's admission to the mother that he had indeed had sexual contact with another woman, the judge rejected the father's evidence that the mother had contracted the disease by other means. Noting that his account of the alleged rape was a bare denial that it had happened, the judge set out in paragraphs 91 to 94 of her judgment why she accepted the mother's evidence (which she described as detailed, compelling and credible) and rejected the father's bare denial. She found on the balance of probabilities that the father did have sexual intercourse with the mother without her consent and that he either knew, or from her actions ought to have known, that she was not consenting at the time (paragraph 95).

36. The balance of her findings in relation to the mother's allegations are set out in paragraphs 96 to 101of her judgment. She found that:-

(i) the father was financially controlling as the marriage broke down;

(ii) he was controlling in terms of the conduct of the divorce proceedings with the intention of securing a better financial outcome for himself and, in particular, retaining the French property at the conclusion of proceedings; and

[3] [213]

(iii) his conduct towards her was belittling in general.

37. In relation to the father's cross-allegations against the mother, the judge found that she had not deliberately manipulated the children against him (paragraphs 102 and 110). She further found that three allegations of assault, or attempted assault, against the father were not proven (paragraphs 105 to 109 and 111).

38. The judge concluded in paragraph 112 that –

> "I do, however, find that F has engaged in a course of controlling behaviour towards M and that [A's] rejection of his father has many roots. He has witnessed the belittling of his mother and her distress. At his age, he will have been acutely aware of the financial difficulties he, his mother and [C] have faced and no doubt blames his father for this. I also find, however, that [A's] own lived experiences with his father will have contributed to what I find to be a longstanding difficulty in their relationship."

39. As Mr MacDonald made clear in his opening submissions on behalf of the father, but for the judge's finding that he had engaged in sexual intercourse with the mother without her consent, he would not have brought his current application for permission to appeal the judge's findings. He acknowledges this to be a serious finding of domestic abuse. This submission is reflected in paragraph 31 of his written skeleton argument:-

> "Although the Appellant does not agree with the court's specific findings that he was abusive to the Respondent and the children, he does accept that he bears some responsibility with the Respondent for the current difficulties in his relationship with the Respondent and the children."

Grounds of appeal

40. The father seeks to rely on three separate grounds of appeal:-

Ground 1: serious procedural irregularity

41. First, he seeks to challenge the fairness of the hearing because of a serious procedural irregularity in the manner in which the hearing was conducted. For these purposes complaint is made that the judge allowed the mother to change the basis of her case as set out in her schedule of allegations. This was done, according to the father, after the evidence had concluded and without notice to him or his counsel.

Ground 2: the judge's findings were wrong in that they were contrary to the weight of evidence and/or did not meet the required standard of proof

42. This ground is relied on in respect of each and every one of the judge's findings including her finding that the father had had sexual intercourse with the mother

without her consent.

Ground 3: the findings were unsafe and therefore wrong because the judge's decision-making process was plainly defective

43. There appears to be a significant degree of overlap between the complaints made under grounds 2 and 3. The thrust of the challenge to the integrity of the judgment in relation to all nine findings appears to be that the findings were not properly supported by evidence and/or any inferences which could properly be drawn from the evidence. The father, through Mr MacDonald, complains that the judge failed to weigh and balance the evidence alongside all the other evidence in the case. Finally, it is said that she misdirected herself in relation to the *Lucas* warning she gave herself and thereafter "misapplied" the test.

44. Before considering the merits of the father's application for permission to appeal, I propose to set out the law which I must apply.

The Law

45. The rules in relation to appeals are set out in Part 30 FPR 2010. Pursuant to r.30.3(7) this court will only grant permission to appeal where either:-

    (a) the court considers that the appeal would have a real prospect of success; or

    (b) there is some other compelling reason why the appeal should be heard.

46. For the purposes of the first limb of the test, a "real" prospect of success is one that is realistic rather than fanciful.

47. Where the challenge is to judicial findings of fact, the court is placed under an obligation to exercise particular care. The court should be slow to interfere and should only do so where the decision is plainly wrong in that the conclusion or conclusions reached by the trial judge was demonstrably contrary to the weight of the evidence before the court at the time of the decision or where the decision-making process was plainly defective: see *AA v NA (appeal: fact-finding)* [2010] 2 FLR 1173.

48. In *Re A and R (Children)* [2018] EWHC 2771 (Fam), Baker J (as he then was) set out the principles which should guide appellate courts in their approach to a challenge to first instance fact-finding enquiries. These can conveniently be summarised in this way (see paragraphs 42 to 44):-

    (i) An appeal to the Family Division is a *review* of the decision below and not a rehearing.

    (ii) A court can only allow an appeal where a decision of the judge below was wrong or unjust because of some procedural or other irregularity.

(iii) An appellate court must exercise particular care and restraint when asked to review findings of fact. In this context the judgment delivered by Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, paras 114 to 115 provides contextual framework and guidance in relation to what is required of a first instance judgment –

> "114. …. 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.
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> (iv) In making his decisions a 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 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."

(iv) An error in the balancing exercise involved in the fact-finding process will only provide proper justification for intervention if it gives rise to a conclusion that the judge's determination of the facts was outside the generous ambit of reasonable disagreement afforded to a first instance judge: see *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, para 40 per Lord Wilson.

(v) An appellate court is entitled to test the judge's findings of facts against the contemporaneous documents available to the court as well as inherent probabilities. Where findings depend on the reliability and credibility of witnesses, it will generally defer to the trial judge who has the great advantage of seeing and hearing the witnesses give their evidence. The crucial question is whether the findings made were open to the judge on the evidence before him. Such findings are reflections of 'inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance ….": per Lord Hoffman in *Biogen Inc v Medeva plc* [1997] RPC 1 and Baroness Hale of Richmond in *Re B* (above) at para 200.

(vi) None of these factors mean that an appeal on the facts can never succeed. If an appellate court is convinced that the judge below was wrong or that his findings cannot stand because of some procedural or other irregularity, it has a duty to interfere.

49. These principles reflect the approach taken by higher appellate courts across a number of jurisdictions including those dealing with family appeals. There is no difference in terms of the approach adopted to appeals which relate to fact-finding determinations: see *Piglowska v Piglowski* [1999] 2 FLR 763, [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B* (above); *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477 and, most recently, *Re T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475.

50. In *Gabriele Volpi & Delta Ltd v Matteo Volpi* [2022] EWCA Civ 464, the Court of Appeal emphasised that, in approaching its task, an appellate court considering a challenge to findings of fact "should not subject a judgment to a narrow textual analysis unless there was a compelling reason to the contrary". Rather, it should assume that the trial judge had taken the whole of the evidence into his consideration.

The mere fact that a judge does not mention a specific piece of evidence does not mean that he has overlooked it. In this context it does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion: "what matters is whether the decision under appeal is one that no reasonable judge could have reached": see paragraphs 2 to 5.

The parties' submissions

Submissions made on behalf of the appellant father

51. In relation to Ground 1 of his appeal, Mr MacDonald seeks to challenge the judge's approach to her assessment of the evidence and its impact on the fairness of the hearing. That challenge arises in the context of the judge's observation in paragraph 7 of her judgment that, having now surveyed all the evidence over the course of the extended hearing as the relevance of that evidence had crystallised, the mother's final "Headline Allegations" document was not particularly helpful as a definitive route to her findings. Instead, she found that the written submissions prepared by the mother's counsel "far better address the issues in the case in accordance with the law". It is the father's case that this approach infected the proceedings in such a way that the entire hearing was unjust because of a serious procedural or other irregularity.

52. In essence, Mr MacDonald's submission on behalf of the father is that, in declining to make findings in relation to some of the allegations made by the mother as they appeared in her "Headline Allegations" document, the judge did not have a full picture of the extent to which the mother's general credibility was impugned. Because she did not consider some of the mother's specific allegations, she did not weigh them in the balance with the other evidence in the case when she reached her conclusions about the reliability of the mother's evidence. In his oral submissions during the course of the permission hearing, Mr MacDonald described this process as the judge having "side-lined a large part of the evidence". He maintains that the judge had thereby created a serious procedural irregularity which deprived his client of a fair and Article 6-compliant hearing.

53. In terms of Ground 2 and his submission that the judge's findings were wrong and contrary to the weight of the evidence before the court, Mr MacDonald dealt, first, with the specific allegation of marital rape. He acknowledged, as I have recorded earlier in this judgment, that absent this finding, the father would not have brought his current application for permission to appeal the judge's findings. Mr MacDonald submits that the judge did not properly consider (i) the absence of this allegation from the mother's earlier complaints about the father' alleged abuse; (ii) the extent to which the mother may have exaggerated her account in her statement to the police; and further that (iii) she ignored the weight of the totality of the evidence available to the court in relation to this aspect of her case.

54. As to Ground 3, Mr MacDonald's challenge to the judge's decision making process is focused on her conclusions in relation to the weight of the evidence before the court, the inferences she felt entitled to draw from that evidence and her failure to interrogate the evidence sufficiently in her path to robust and safe conclusions. He further relies on what he maintains is a defective formulation and application of the *Lucas* direction. In this respect, it is said that the judge's direction to herself was too narrow and she failed to follow the guidance provided by the Court of Appeal in *A, B and C (Children)* [2021] EWCA 451. There is a further challenge to her findings as a result of her reliance on the evidence of the mother, maternal grandmother and A without seeking additional or corroborative evidence from other sources.

55. In essence, as the thrust of Mr MacDonald's oral submissions to this court emphasised, the judge reached her conclusions and findings as to the facts without considering carefully each piece of evidence in the context of all the evidence available to the court. As a result, he submits that her findings were unsafe and should be set aside.

Submissions made on behalf of the respondent mother

56. In response to these submissions, Ms Currie contends on behalf of the mother that the mother's "Headline Allegations" document was produced at a time when the court's guidance on the proper approach to fact-finding hearings in cases involving domestic abuse was still being formulated. In adopting an approach which was informed by a focus on issues which were relevant to the welfare issues which would fall to be determined in the context of the future arrangements for these children, Ms Currie submits that the judge's approach cannot be criticised. She submits that it anticipated the jurisprudence which continues to inform the proper approach to fact-finding exercises of this nature. She criticises the fundamental inconsistency in the father's challenge to the judge's findings which accepts the legitimacy of a forensic enquiry into allegations which are relevant to welfare yet criticises the judge's failure to deal with the specifics of each of the 23 allegations set out in the "Headline Allegations" document. As the jurisprudence has developed, and in accordance with the overriding objective in FPR 2010, r.1(1), Ms Currie submits that the judge was not only entitled to take the approach which she did; she reached her conclusions based upon extensive observation of the parties and the witnesses and a careful assessment of the evidence.

57. In this context, she submits that the final written submissions presented to the court on behalf of the mother had been drafted following the approach commended by the court in *Re B-B (Domestic Abuse – Fact Finding)* [2022] EWHC 108 (Fam). That was a decision of Cobb J (it was in fact the rehearing of *Re H-N* as remitted to a judge of the Family Division by the Court of Appeal). Judgment was handed down on 20 January 2022 after the pre-trial review in this case on 15 December 2021 when Her Honour Judge Gibbons had considered the mother's Amended Headline Allegations document dated 13 December 2021.

58. Cobb J highlighted the benefit to any court charged with findings of allegations of domestic violence of considering the evidence relevant to each different form of alleged domestic abuse in 'clusters' or lists. He explained the basis upon which he had approached his task in making findings as one where he had arranged in 'cluster' (or list) form "the evidence which went to the issue of alleged physical abuse; separately to the allegations relevant to sexual abuse, separately emotional abuse, separately financial abuse and so on": see para 6.

59. In support of her client's opposition to the proposed appeal, Ms Currie submits that this was in essence the approach followed by the judge below after she had heard and considered the evidence from all the witnesses over the course of many days.

60. In terms of the second ground of appeal, Ms Currie submits that Her Honour Judge Gibbons was entitled to reach her conclusions and findings based on the totality of the evidence which had been presented to the court over the course of many days of listening to the parties and their respective witnesses. She submits that each of the judge's findings is unimpeachable in the light of the evidence.

61. In terms of Ground 3, she reminds this court that the judge gave herself a specific direction in relation to PD12J FPR 2010, *Re H-N* and *Re B-B* (cited above), *Re W (Children)(Abuse: Oral Evidence)* [2010] 1 FLR 1485 and *R v Lucas* [1982] QB 720. In all the circumstances, she submits that there is no basis upon which this court should entertain the application for permission to appeal the judge's findings.

Discussion and analysis

62. In this context it is useful to refer to the very lengthy request submitted to the judge on behalf of the father following circulation of her draft judgment. In my judgment, she went above and beyond what was required of her in her responses even in those instances where she noted that she did not consider the questions to be appropriate requests for clarification. Read as a whole, the father's document amounts to a detailed forensic interrogation of the judgment and extends way beyond what I would regard as acceptable or appropriate parameters of enquiry. In *I Children* [2019] EWCA Civ 898 the Court of Appeal gave clear guidance to practitioners who write to the court seeking "clarification" of a written judgment. King LJ made it quite clear that such requests were not an opportunity to critique the judgment or to enter into negotiations with the judge as to outcome, far less to reargue the case in an attempt to water down unpalatable findings. FPR 1020 PD30A para 4.6 provides a route to clarification where a party's advocate considers that there is a material omission from a judgment of the lower court. Absent such an omission it will rarely be appropriate to go beyond typographical and factual errors in order to clarify issues in a judgment: see, for example, *WM v HM* [2017] EWFD 25 per Mostyn J.

Ground 1: the hearing was unjust because of a serious procedural or other irregularity

63. In relation to Ground 1 of the proposed appeal, the judge was asked by Mr MacDonald to clarify her approach to the mother's "Amended Headlines Allegations" document. She was asked to identify in what way she had not found the mother's document to be helpful and when that became apparent to the court. The judge responded in this way:-

> "I do not consider [either] to be an appropriate request for clarification. I found that Ms Currie's marshalling of the findings sought was far more helpful than the schedule itself. It is a question of legal drafting at a time when the proper formulation of schedules was uncertain."
>
> "… for the sake of completeness I made it clear during the hearing that certain issues were far more relevant than others. It is the court's duty to focus on matters which are likely to be relevant to welfare."

64. In my judgment the approach adopted by the judge cannot, on any view, be said to be wrong. On the contrary, it was entirely in accordance with the developing jurisprudence as it emerged during the currency of these proceedings. In circumstances where her approach was not wrong, it is difficult to see how a court could reach a conclusion that the appeal would have a real prospect of success at the permission stage. The thrust of Mr MacDonald's complaint appears to be that, on behalf of the father, he had addressed each of the mother's allegations in his cross-examination of the witnesses and in his final submissions. Nowhere in his submissions to this court does he address how the judge's decision to follow the course she took resulted in a failure to consider evidence which was relevant to either the findings which she made or the assessment of the parties as reliable witnesses of truth. His case appears to be anchored to a submission that the father was not provided with a fair opportunity to know the case which was being advanced against him and which allegations were considered by the judge to be relevant to the issue of the children's welfare: see paragraph 25 of his skeleton argument.

65. The allegations in respect of which the judge did not make specific findings included the following:-

(i) the father had forced his own religion and culture on the children;

(ii) he had coerced and manipulated the other into colouring her hair to make it appear lighter;

(iii) he controlled A by making him feel responsible for the existence of the ongoing court proceedings and the difficulties in his parents' marriage;

(iv) he shouted at the children consistently and threatened them with physical punishment;

(v) he made denigrating and racist comments about Muslims and people of colour in front of the children;

(vi) he drank to excess in front of the children and drove with the children after he had consumed alcohol;

(vii) he was sometimes asleep while their younger child, C, was in his sole care and gave the children syrup to make them fall asleep.

66. Mr MacDonald's submissions to this court suggest that he had explored all these allegations during the course of the oral evidence. It must therefore be assumed that the judge factored into her assessment of the parties' general credibility what she heard in relation to these allegations. The fact that she did not consider it necessary to make findings in relation to each and every one of these allegations does not materially impugn the integrity of her judgment in relation to those findings which she considered relevant to future decisions concerning the children's welfare. The father was afforded the opportunity to cross- examine on these matters and to put his case before the court. I reject his argument that he did not have a fair opportunity to know the case which was being advanced against him. There is no suggestion that, in crafting her judgment, the judge made findings on matters which had not been raised before. She was fully familiar with the development of the evidential canvas in the case. She was clearly aware of the father's case that elements of the mother's case were exaggerated or misinterpreted. Her failure to recite each specific aspect of his case does not, in my judgment, compromise the fundamental soundness of the approach she adopted to the fact finding exercise she undertook. I have borne these matters well in mind in the context of this permission application. I see nothing in relation to Mr MacDonald's submissions in respect of Ground 1 which persuades me that there was a procedural irregularity, far less a serious procedural irregularity, which rendered the hearing unjust or which deprived this father of a fair hearing. The judge was required to consider whether the evidence which had been put before the court, and tested in cross-examination, established an abusive pattern of coercive and/or controlling behaviour. That was the principal issue which she had to decide. In following the course advocated in *Re B-B* as explained by Cobb J in a judgment that had been published after finalisation of the mother's "Headline Allegations" document, the judge was not only observing the latest guidelines in relation to the manner in which the court should approach these difficult and complex cases, she was also taking the course which she found the most helpful.

67. This challenge to the procedural fairness of the hearing has no real prospect of success and I decline to grant permission to appeal on Ground 1 of the proposed appeal.

Ground 2: the judge was wrong to make the findings of fact because they were contrary to the weight of the evidence and/or were not supported by the evidence to the requisite standard of proof

68. Turning to Ground 2, the father seeks to challenge the judge's findings on the basis they were wrong because they were contrary to the weight of the evidence or were not supported by evidence to the requisite standard of proof.

69. In this context, I have already observed the length of time over which the judge below had been involved in this case and the extended period over which she heard live evidence for the purposes of the fact-finding hearing which occupied 11 days of court time.

70. In terms of the judge's finding that the father had sexual intercourse with the mother without her consent (the allegation of marital rape), the father highlights two specific factors which should cause this court concern. First, he points to the timing of the mother's complaint to the police and the absence of any prior reference to an allegation of "marital rape". In this context he highlights as "unlikely" the mother's explanation that she did not realise until she had read some case law that it was possible for a husband to rape his wife. Mr MacDonald submits that the judge should have considered this evidence in the context of the wide availability of information on the internet and the mother's active involvement in these proceedings with the police, her lawyers ad CAFCASS. Second, he questions why the mother's evidence about this incident was not considered in the context of the judge's finding that the mother had been prone to exaggerate some of her evidence. The judge had made a finding that she "had not been truthful in the entirety of her evidence and that she … had a tendency to attribute more import to and a more sinister interpretation of historical events than they deserved": see para 54 of the judgment.

71. These matters were raised with the judge in Mr MacDonald's subsequent requests for clarification. With what I regard as impressive restraint, the judge addressed and dealt with each of these matters. She explained why she had believed the mother's evidence and disbelieved the father. She explained why the mother's mistaken belief that the father was having an affair did not affect her general assessment of the mother's credibility. In drawing on the wide canvas of evidence before her, the judge explained in her responses that "the fact that M has, in my judgment, at times exaggerated, does not undermine her evidence to such a degree as to call into question all of her evidence": see para 101 of the judgment.

72. The judge dealt with her findings in relation to marital rape in significant detail in paragraphs 85 to 96 of her judgment. There is no need for me to set out in this judgment the detailed analysis which she provided as to why she found this allegation proved on the balance of probabilities. Her judgment speaks for itself despite the fact that she was prepared to elaborate further when subsequently challenged by what I regard as wholly inappropriate requests for further clarification. In circumstances where the father's response to the allegation was a bare denial that it happened, the judge was entitled to reach the conclusions and findings which are recorded in her judgment. She correctly identified and directed herself in relation to the burden and standard of proof (para 16) and reminded herself that –

> "Although I will be considering the discrete allegations, I must be astute to take account of all the evidence and consider each piece of evidence in the context of the whole canvas. Findings must be based on evidence, not suspicion and speculation."

73. With regard to what is said to be a defective or inadequate *Lucas* direction, this is dealt with in paragraph 18 of the judgment. Having set out the well known formulation of the direction, Her Honour Judge Gibbons developed the self-direction by stating –

> "It seems to me that in this case I have to consider whether M and the maternal grandmother have lied in order to achieve an outcome by which the children do not have a relationship or spend time with F, because of their hostility towards him".

In this context she referenced the Court of Appeal's decision in *A, B and C (Children)* (cited above).

74. Mr MacDonald criticises the judge's failure to follow the guidance provided by Macur LJ in that case. In *A, B and C* the Court of Appeal had suggested that it would be 'good practice' when a *Lucas* direction is called for to ask counsel to identify (i) the deliberate lie(s) relied on; (ii) the significant issues to which they relate; and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. Macur LJ stressed in providing guidance that the principles of the *Lucas* direction remain undisturbed as a matter of law but they must be tailored to the facts and circumstances of the witness before the court.

75. That it seems to me is exactly the task which the judge undertook. Mr MacDonald complains that she did not explain how she factored into her assessment of the credibility of the mother and maternal grandmother what she had described as their tendency to exaggerate and attribute "a more sinister interpretation to events". He maintains that she was not entitled to reach her conclusions based simply on an assessment of overall credibility without seeking additional corroborative evidence and, in this respect, her *Lucas* direction was too narrow. The judge was pressed on this point in one of the many requests for clarification of the judgment. For example, in relation to her finding that the father had slapped A's face whilst at the family home in France, her answer was straightforward and compelling: "I believed the evidence of the maternal grandmother on this point and did not require further corroborative evidence[4]".

76. In the context of the finding she made in relation to the allegation of marital rape, the judge explained in her judgment in greater depth why she had reached her conclusions which had been based on a holistic evaluation of all the facts, including her determination in relation to the mother's credibility. In circumstances where the

[4] [53]

father's defence to this allegation was a bare denial, the outcome in terms of a finding was always likely to be binary. It either happened or it did not. The judge determined that the allegation was proved on the balance of probabilities. She did so having considered the detailed account provided by the mother (paragraph 86), her subsequent treatment with antibiotics for a sexually transmitted disease, and her finding that the mother was being truthful when she denied having sexual contact outside her marriage (paragraph 88). She addressed the issue of the delay in reporting the matter to the police (paragraph 91). She dealt with the question she had posed to herself as to why the mother would vacate the marital bed immediately after the alleged rape if sexual relations between the parties had been consensual (para 93). She explained in paragraphs 94 and 95 why she found the mother's evidence to be "detailed", "compelling" and "credible".

77. In terms of the judge's other findings, which the father accepts would probably not have justified challenge by way of an appeal, I do not propose to set out in any significant detail either the judge's analysis of the evidence underpinning her conclusions or my reasons for rejecting his current challenge on the basis of Ground 2. Much of what appears in Mr MacDonald's skeleton was reflected in the questions put to the judge in his lengthy 'request for clarification' document.

78. Each challenge proceeds from the foot of a submission that the judge failed properly to weigh the evidence.

Finding that the mother had "unintentionally" exposed A to information about her financial difficulties and the strains of the divorce

79. Mr MacDonald submits that this was a finding reached independently by the judge who was not asked by either party to make it. In my judgment, the finding is an illustration of the balanced approach which the judge took towards her task. She was required to consider whether the father's behaviour towards the mother and the children amounted to a pattern of behaviour which could properly be characterised as coercive and controlling. She found that the father was financially controlling as the marriage broke down. He had taken steps, as she found, to secure a judgment for his company against the mother's company in respect of a loan. She was entitled in her survey of the evidence to make findings which she considered relevant to future welfare decisions. There was a clear evidential basis for her finding. The social worker had provided evidence that A was aware of his mother's concerns and anxieties having overheard her speaking on the telephone. The judge found that the mother and children had experienced significant financial hardship as a result of the father withdrawing financial support at the time of the divorce proceedings. They had witnessed the arrival of bailiffs at their family home and the judge concluded that the children's experience of these matters would have made them "more vulnerable as a family unit" (paragraph 97).

Finding that the father placed A in a cupboard as a punishment

80. The judge is criticised for not investigating whether there was a cupboard, as alleged, in the family home in France. It is said that she placed inappropriate weight on the evidence she heard from Dr Donald, A's therapist, to whom this incident was reported. It is said that she failed to weigh sufficiently or at all the accepted inconsistencies in other aspects of A's evidence. As Ms Currie points out, the judge was persuaded by the undisputed evidence that A had repeated his allegation to the police on no fewer than three occasions. The judge used that independent third party evidence and the report of the same incident by A to his therapist to find that this allegation was proved on the balance of probabilities whilst rejecting the child's uncorroborated evidence in relation to the alleged sexual abuse. This was a perfectly proper finding for her to make on the evidence which was then available to the court.

The father slapped A's face in France

81. The report of this incident was made to the maternal grandmother. Mr MacDonald criticises the absence of an explanation as to why the mother had not referred to this incident in her own written evidence in circumstances where the maternal grandmother stated that A made the report in the presence of both his mother and grandmother.

82. The judge deals with this allegation and the reasons for her finding in paragraphs 59 and 60 of her judgment. As she points out, there is no room for 'mistake' on the part of the grandmother as to whether this incident happened. It either did or it did not. The father's defence was a bare denial. In concluding that the grandmother's evidence was "very compelling", the judge gave reasons as to why she had reached this conclusion. She listed a number of relevant factors which had persuaded her that the grandmother's evidence was both cogent and reliable. She weighed in the balance those aspects of the grandmother's evidence which she had rejected as unreliable. There is no plausible basis for any challenge to this aspect of the judge's fact-finding role.

Assault by the father of A in the lift at the family home on 21 July 2018

83. The challenge to this finding lies in the fact that the judge was wrong to accept the accounts provided by the grandmother and A in circumstances where A was inconsistent in his reports to the police about this incident. It s clear from her judgment that the judge was aware of these inconsistencies and had weighed them in her deliberations.

84. The judge provided a full account of her review of the evidence relating to this allegation in paragraphs 61 to 63 of her judgment. It is a careful and considered account of the various strands of evidence which were before the court which included direct oral evidence from the grandmother of what the father had said to her

in the lift after the assault occurred (*"... he is my son, I'll do what I want"*). The judge considered this to be "a strange incident to fabricate" (paragraph 61). She found the grandmother's evidence to be "convincing and had the air of truth". She weighed in the balance that A's account of this incident to the police had consisted of an account that parcels had been thrown in his face by the father whereas in his ABE interview he had clearly demonstrated the action of a 'slap'. The judge found that to be a "reactive and spontaneous demonstration" by the child. Her finding was one which she was entitled to make and it is not one with which this court can interfere.

24 July 2020: the father grabbed a remote control from A's hand in temper twisting his hand or wrist in the process and causing the child pain

85. The father's challenge to this allegation lies in its context. He maintains that this allegation was made to the police at a time when the mother was applying for a non-molestation injunction against him. It is said that the judge failed to factor into her deliberations the reliability of either the mother or A as a witness of the truth. Given the detailed consideration which the judge gave to this allegation in paragraph 64 of her judgment, the father's criticisms cannot stand. I regard them as unsustainable in the circumstances and devoid of merit.

The father was financially controlling of the mother when the marriage broke down

86. The matters relied on in respect of the father's challenge to this finding appear to be a recitation, or repetition, of his submissions to Her Honour Judge Gibbons. She took due and proper account of his litigation conduct in misleading the mother in relation to the tactical manner in which he had secured jurisdiction in relation to the divorce in France, and his withdrawal of financial support when she issued her own petition in this jurisdiction: see paragraph 98 of the judgment. I can see no basis for concluding that his actions are not captured within the definition of 'controlling behaviour' for the purposes of PD 12J.

The father's conduct towards the mother was belittling in general

87. In this context the judge accepted the evidence of the maternal grandmother which she found to coincide with her own observations of the father's overbearing and autocratic manner: see paragraph 101. It was a finding she was entitled to make and the father raises no proper basis upon which the finding can be impugned.

88. In the circumstances, I refuse permission to the father to appeal on the basis of Ground 2. His criticisms of the judge's findings and the evidence on which they are based are without any proper foundation and, in my judgment, the proposed appeal has no real prospects of success.

Ground 3: the judge's decision-making process in relation to the process by which she reached her findings was plainly defective thereby rendering those findings unsafe

89. As I have remarked already, there is a significant degree of elision or overlap between the first, second and third grounds of appeal as drafted by Mr MacDonald on behalf of his client. Insofar as he seeks to allege that -

    (a) "the judge made findings of fact and drew inferences which were contrary to the weight of the evidence;

    (b) the judge failed to consider in detail and weigh in the balance the evidence in support of her findings alongside the other evidence in the case;

    (c) the judge misdirected herself and misapplied the test in *R v Lucas*; and

    (d) the findings made by the judge were not based on a careful consideration of each piece of evidence in the context of all the evidence available to the court",

    I have already considered these challenges and criticisms under Grounds 1 and 2 above. I do not propose to add to the reasons I have already given for rejecting those grounds as a basis for granting permission to appeal. I can find no basis on which it can be said that the proposed appeal would have a real prospect of success nor do I find there to be some other compelling reason why the appeal should be heard.

90. In terms of the judge's approach to the fact-finding exercise which she was charged to undertake, I have reached a clear conclusion that it cannot be said on any basis that her findings were ones which no reasonable judge could have reached. On the contrary, I regard her judgment to be a careful exposition and analysis of a very wide canvas of evidence. She has clearly invested significant time and care in the preparation of her judgment and there is no basis upon which this court can or will interfere with her findings and conclusions. I listed the permission application for an oral hearing in the first instance in order to give the parties an opportunity to address the perceived weaknesses in the judge's findings and the manner in which she reached them. In these circumstances, this was not a case where the father was prevented from ventilating his arguments as a result of a judicial refusal of permission on the papers.

91. Permission to appeal on Grounds 1, 2 and 3 is refused.

Order accordingly