Neutral Citation Number: [2024] EWCA Civ 22

Case No: CA-2023-000854 and 000963

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT EAST LONDON
HH Judge Thain
ZE22C00055

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 January 2024

Before :

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LORD JUSTICE WARBY
- -

J, P AND Q (CARE PROCEEDINGS)
- -
- -

Mark Twomey KC and Shaun Murphy (instructed by **Edwards Duthie Shamash**) for the **First Appellant**
Cyrus Larizadeh KC and Michael Bailey (instructed by **Copperstone Solicitors**) for the **Second Appellant**
William Tyler KC and Giles Bain (instructed by **Local Authority Solicitor**) for the **First Respondent**
Nick O'Brien (instructed by **GT Stewart Solicitors**) for the **Children, by their Children's Guardian**

Hearing date : 22 November 2023
- -

Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 26 January 2024.

LORD JUSTICE BAKER :

Introduction and background

1. These two appeals are brought against findings made in care proceedings. The three girls who are the subject of these proceedings are J, now aged 15, P, 8, and Q, 2. They have an older sister, Y, aged 17, who was the subject of separate care proceedings. The mother of all four girls is the second appellant. The first appellant, hereafter referred to as F, is the father of P and Q. The father of the two older girls has played no part in the proceedings.

2. In 2008, another girl, hereafter referred to as B, then aged 7, the daughter of a former partner of F, made allegations of serious sexual abuse against F which led to his prosecution on a number of charges. Later that year, following a criminal trial, F was acquitted of the rape of B. The jury were unable to agree on verdicts on twelve further counts of sexual offences. The Crown Prosecution Service decided not to seek a retrial and not guilty verdicts were subsequently entered.

3. In November 2020, Y made allegations of physical abuse against her mother and was made subject of a police protection order. Care proceedings were started in respect of her and she was placed in foster care under an interim care order. In the autumn of 2021, the mother gave birth to Q. In December 2021, J also made allegations of physical abuse against the mother and went to stay with her grandfather. On 27 December 2021, J told a friend over social media that she had been sexually abused by F for the previous three years. She then repeated the allegations to police and social services and on 29 December, she was interviewed under the Achieving Best Evidence ("ABE") procedure. F was arrested and charged with rape and sexual abuse of J. He denied all the allegations. When informed of the allegations, the mother told the police that J was lying. When Y was interviewed, she told police that she was unaware of any sexual abuse of J but said that F had insisted on shaving her and her sister in the shower.

4. Care proceedings were issued in respect of J, P and Q. On 14 March 2022, an interim care order was granted in respect of J who was placed with her grandfather with whom Y was living. P and Q remained at home with their mother under interim supervision orders. F was prevented from visiting the property by bail conditions and his contact with P and Q was professionally supervised. The local authority alleged that the mother continued to ostracise J and as a result there were difficulties in arranging contact between J and her younger sisters. It was alleged that on one occasion the mother had put the phone down when talking to J after saying that she "could not deal with this" and had prevented J collecting her belongings. Subsequently Y and J moved to separate foster placements and, although Y has now returned to her grandfather, J remains in foster care.

5. In July 2022, J made an allegation that she had been sexually assaulted by an unknown man on a bus. Examination of CCTV footage subsequently revealed that her allegations were in some respects untrue and that the acts that had taken place on the bus were consensual. When challenged, J accepted that she had lied about aspects of her account. As a result, the CPS decided not to proceed with the charges against F and the criminal proceedings concluded with no evidence being offered.

6. Meanwhile, the local authority had discovered about the earlier allegations made by B and the previous prosecution in 2008. They contacted B, by then an adult in her early twenties, who agreed to give evidence in the care proceedings.

The hearing and judgment

7. At the fact-finding hearing, the court was therefore required to determine (1) B's allegations of sexual abuse against the father from 2008; (2) J's allegations of sexual abuse against F; (3) whether the mother failed to protect J from such abuse; (4) whether J, P or Q were at risk of sexual abuse from F; and (5) J's allegations of emotional and physical abuse levelled against her mother.

8. In the course of a ten-day hearing which started on 23 January 2023, the judge heard oral evidence from nine witnesses, including B, F and the mother. Although J had at one stage indicated that she would give evidence, in the event she did not. Her allegations were therefore put before the court in the form of the recording of the ABE interview.

9. It is unnecessary to refer in detail to most of the evidence for the purposes of this appeal. The judge's approach to B's allegations is, however, central to the issues we have to consider. Before referring to the relevant parts of B's oral evidence, three important factors must be mentioned. First, as noted above, B had been interviewed under the ABE procedure in 2008. Although the judge at the fact-finding had a transcript of the interview, the video recording was no longer available. Secondly, the transcript of B's oral evidence at the criminal trial in 2008 was also unavailable, having apparently been destroyed in 2015. Thirdly, in a statement in the present proceedings, B said that, whilst she could remember some things that had occurred and comments that had been made before and after the alleged incidents, she could not remember the acts themselves. She added: "it is as if my brain blacks out the memory". B described difficulties she had experienced in the following years, including diagnoses of obsessive-compulsive disorder, post-traumatic stress disorder, emotionally unstable personality disorder, and anorexia.

10. In her evidence in chief, B said that, after signing her statement in these proceedings, she had read the transcript of her ABE interview, that this had been the first time she had read the transcript, and that it "made my memories that I had remembered more clear". She said that she was sure that everything she had said in the interview was true. Asked why she had wanted to be involved in these proceedings, she replied:

> "After the first, obviously, my trial back in 2008, I had always had it in my head that it was going to happen again because I...and I didn't...I blamed myself for letting it, because I didn't do enough the first time to stop him then. So, I always knew that there was going to be a day that it was going to come back and it was going to happen again, and I felt like it was my fault, and even though...I don't get sort of any outcome out of this, I knew that I had to do something for...I had to do something for the kids that...that it had happened to, because I know what comes, sort of, after."

11. In cross-examination on behalf of F, Mr Murphy focused initially on B's statement that she was unable to "remember the acts themselves". In answer to various questions, she said:

> "I can remember the lead-up. I can remember sitting there or standing there, but I cannot remember physically doing it …. I knew what happened, but I can't remember, like, if I sort of play it back in my brain, I can't see myself doing it, no …. I can remember the before but the acts themselves, it seems to stop, and then I can remember afterwards …. I can't remember doing the acts themselves, but I know that I did them. I can remember doing … but I can't, like, sort of replay them in my head …. Although I know that that is what I did, I can't see it."

Although Mr Murphy asked further questions about some matters mentioned by B in her statement, he did not put to her a number of points in F's statement where he disagreed with her account.

12. Following submissions, judgment was reserved and delivered on 11 April 2023. The judge started by summarising the background, the issues to be determined, and the sources of evidence put before her, which included a core bundle of over 1,800 pages. At paragraph 20, she made the following observation which I set out in full as it is relevant to one of the grounds of appeal:

> "It is worth emphasizing at the outset that my decisions on the evidence are not influenced by opinions expressed by others. The fact that F was acquitted by a jury on one count with a hung jury on the remaining counts carries neither weight nor relevance in these proceedings. Similarly, the views expressed by other witnesses, be they police officers, family members or friends, adds no value to the evidence. Those individuals do not have access to the wealth and array of evidence before me. They will not have heard that evidence tested. They do not scrutinize the evidence in the way my role requires me to, nor will they consider and apply the standard of proof required in this court."

The judge then added that her judgment would not rehearse all of the evidence and submissions put before her and that she would highlight only those matters relevant to her assessment of the allegations.

13. Over the following eleven paragraphs, the judge summarised the relevant legal principles by reference to case law. In the course of doing so, she reminded herself (at paragraph 31) that

> "with every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore contemporary documents are always of the utmost importance."

She also cited the observations of Peter Jackson J (as he then was) in *Lancashire County Council v The Children and Others* [2014] EWFC 3 about the approach to repeated accounts and possible reported discrepancies.

14. The judge then considered the evidence about the 2008 allegations. Having summarised the allegations made in the interview (the transcript of which was available to her, though not the video recording), the judge continued (paragraph 42):

> "I also heard oral evidence from B who is now 22 years old, and read a statement she prepared for these proceedings. In that statement B sets out the profound effect the alleged abuse had on her as a child and young adult. This included recurring nightmares, obsessive compulsive disorder which manifested itself through repeated hand-washing and washing her mouth inside and out, post-traumatic stress disorder and becoming hyper-sexual with feelings that she was "only good to be used." B explained that she has blocked out the most painful part of the memories of abuse, so that she can see the lead up to the incidents and the aftermath, but has blocked the acts of abuse themselves by way of self-preservation. She was able to recount clearly the lead up to further incidents of alleged abuse not outlined in her ABE interview. Crucially, when given the opportunity to read through her ABE interview, she confirmed the truth of what she told officers, telling me she was sure of its accuracy. B explained that she knew she had done the acts described in the interview, but was "unable to replay them over in her head." She also told me she was clear about the perpetrator being F, rejecting the suggestion that she may be mistaken about the identity of her abuser."

15. Having summarised the evidence given by B's mother, the judge then considered the evidence given by F about these allegations. She recorded his "detailed account" of B entering his bedroom while he was masturbating. She continued (paragraph 45):

> "He vehemently denied having abused B in the way suggested in her ABE interview. F admitted to struggling to recollect the detail of the allegations and his defence given the passage of time, although he had available to him a number of handwritten notes that he had made for his criminal solicitors which were reproduced in a statement and adopted by him."

16. The judge considered points raised by or on behalf of F – that the allegations arose out of a mistake or misunderstanding, that B may have had a motive for making false or malicious allegations, or that she merely observed that which she claimed to experience. She rejected them all, noting in particular that, with regard to what B had described in her ABE interview, she was "satisfied that the description of events by B was sensory not observational." She found B's explanation for coming forward again years after the event to be persuasive, saying

> "Her willingness to come to court so many years later adds to her credibility as I doubt she would have any motivation to

> expose herself to these proceedings, and further cross-examination, if she was unsure in her own mind about the validity of her allegations."

At paragraph 51, the judge observed:

> "B's history, which includes mental health issues and self-harming, an eating disorder and time in therapy, and her engagement in sexually risk-taking behaviour are further indications that B was the victim of abuse rather than a fantasist. Courts recognize these features as a tragic but all too common consequence of abuse."

17. As to B's inability to recall in the witness box the specific details of the alleged abuse that she said had occurred when she was a child, the judge said (paragraph 52):

> "I found B's evidence to be powerful and persuasive. I do not regard B's 'blocked memory' as undermining of her evidence. Indeed it appears to me to be an understandable reaction to traumatic events. I was struck by the detail given in B's ABE interview, which was in keeping with the perceptions and understanding of a young girl, but nonetheless being clear as to what they were references to."

18. The judge concluded her analysis of these allegations by saying that, while F's account appeared to be superficially plausible, it did not hold up to scrutiny. He had been unable to account for what could be called the experiential detail in B's account. The judge was left "in no doubt" that she preferred and accepted B's evidence, that her account in the ABE interview was truthful and accurate. She therefore found that F had sexually abused B in the way described.

19. The judge then analysed the evidence concerning the allegations made by J. She started by addressing J's allegations that F had raped and sexually assaulted her. In view of the judge's ultimate findings, it is unnecessary to consider this aspect of the judgment in any detail. As part of her analysis, the judge looked at the evidence disclosed by the police about the alleged assault on the bus, and at two other allegations made by J on which F's counsel had relied as undermining her credibility, one involving a school pupil and the other involving the maternal grandfather. She concluded (paragraph 77):

> "These three incidents highlight to me that J is capable of giving a clear and reliable account of events, but she is also capable of exaggeration and of telling lies, even when the consequences for others are extremely serious and even when faced with incontrovertible evidence which demonstrates her lies."

20. Turning to the allegations around shaving, the judge noted that J's account was supported by the separate account given by Y during her ABE interview. She observed:

> "I have considered carefully whether it is possible that the sisters have colluded in fabricating these allegations, yet Y notably denies that she was ever subjected to any other sexually abusive behaviour by F, and denies being aware of any sexual abuse of J. The two girls have not therefore given imitation accounts."

21. F accepted in evidence that he had shown J how to shave herself but said he had done so at her request. He denied walking into the bathroom uninvited while she was showering and said he had only entered the room if she called him or if she cut herself. He added that on those occasions she had been wearing a bikini. The judge found several points of concern about F's account on this issue. First, she said she was unclear why F would undertake the task of helping J shave when her mother and sisters were in the house. Secondly, she "struggle[d] with the logic that J would always be wearing her bikini." Thirdly, she noted "significant changes" in the evidence given by F and the mother about this issue. She continued:

> "They each told me, almost verbatim, that it was a standing joke that the mother always cut herself shaving which is why F showed J and Y how to do this. That it was treated as a 'rite of passage' with J, F, the mother and P all in the bathroom to watch as J was taught how to shave; and how there was only one single occasion when F helped when J was screaming because she cut herself. The mother tried to suggest that this experience was entirely normal but appeared shocked when asked if her own father had shaved her. It also ignored what both J and Y had reported about their discomfort at F undertaking this task."

22. At this point in her judgment (paragraph 86), the judge addressed an issue which has subsequently been raised on the appeal:

> "Mr Murphy [F's counsel] has suggested that I should take into consideration issues of F's good character. I take the view that the introduction of this criminal concept is misconceived in family proceedings, although I entirely accept the submission that factors which point towards or against risk and propensity to perpetrate sexual abuse are legitimate and relevant. In that respect, whilst it is correct that F has not been convicted in a criminal court of any offences of sexual abuse against a minor, I am satisfied that the local authority has proved its case in respect of those same allegations in relation to B."

23. The judge considered whether J's allegations against F had been influenced by information she had discovered about B's allegations, or by certain messages and content found on J's mobile phone, in particular certain Tik Tok screenshots. She discounted the possibility that J had read or been influenced by the limited documents kept in the house relating to investigation into B's allegations. On the content of the phone, she concluded (paragraph 93):

> "I am satisfied that there is no evidence to link these specific screenshots to J. In my view they have been deliberately generated by the mother with the purpose of undermining J's credibility. As such the messages have almost no value in relation to my determination about J's allegations, although I have considered further what they tell me about the mother's response to the allegations."

At paragraph 102, she added:

> "Whilst there is a possibility that the mother has misunderstood how the app operates, it seems more likely that she has been driven to 'find' evidence to support her husband and to call into question the reliability of her daughter's account."

24. After a detailed analysis, the judge reached the following conclusions on J's allegations. At paragraph 94, she dismissed J's allegation of physical abuse against the mother, saying that she was "unable to find it more likely than not that such an assault occurred." On the most serious allegations against F, she said (paragraph 103):

> "Ultimately, when I consider the weight to attach to the factors which support and those which undermine J's account, I am driven to the conclusion that I cannot be satisfied that J's account is more likely than not. It seems to me that the weight of evidence is so evenly balanced that it is just as likely that her account is accurate as it is to be false. As such, the local authority has not proved its case in respect of the allegations that J was raped or inappropriately touched by [F]."

25. On the shaving allegations, the judge set out her conclusions in these terms:

> "104. In relation to the allegation about F shaving J's legs and armpits, there is evidence from Y which lends considerable support to J's account. Not only that, but the admissions made by F in interview about occasions when he would enter the bathroom satisfy me that [he] saw no issue with going into the bathroom when his step-daughter was showering. The subsequent inconsistencies between that account and his oral evidence, and the tightly aligned oral evidence of the mother suggest an attempt by F and the mother to present a different picture. I reject the oral evidence of the mother and F on the issue of the shaving and showering of J. Their suggestion that what F did was normal or a celebrated landmark in J's development is not one I accept as reasonable or truthful. I prefer the accounts given by J and Y that F repeatedly insisted on coming into the bathroom when they were showering and shaved their armpits and legs when they were naked. Given my findings in respect of the abuse of B, I am satisfied that there was a sexual motive to [his] shaving J and Y.

> 105. Given my acceptance of the girls' accounts of shaving and showering, I have reflected on whether the mother was aware that this was occurring and allowed it to happen. I am conscious that neither J nor Y mention their mother when raising these allegations, and neither of them specifically allege that their mother was aware of F's actions. In light of this, I am satisfied that there is no evidence to support the suggestion that the mother was aware of this abuse occurring. Yet, where does that leave me with the account she presented to the court of a single incident of shaving? I can only conclude that the mother has deliberately lied to the court, either of her own volition, or at the request of her husband, in order to undermine J's claim."

26. Finally, the judge considered the local authority's assertion that the mother failed to protect J. Although the mother knew about B's allegations, the judge found no evidence to support the contention that the mother had failed to protect J at the start of her relationship with F. The judge continued:

> "110. However, I am deeply troubled by the mother's response at the point when J raised her allegations of sexual abuse. Given the history of an earlier prosecution, the fact that her own daughter had raised an allegation should have led, at the very least, to some curiosity about whether there may be cause for caution. The need for such curiosity and caution is heightened by the presence of P and Q in the home – two young and vulnerable little girls. Yet, the undisputed evidence is that the mother immediately rejected her daughter's allegations as lies. She has continued to maintain that they are lies at this hearing. There is no evidence of the mother pausing to reflect on whether her husband may pose a risk to any of her children. Indeed, the mother has been proactive in undermining J's account and seeking her husband's return to the family home at the earliest opportunity.
>
> 111. At no stage has the mother been prepared to consider the possibility that J's allegations may have been true. She told police officers on the day of [F's] arrest that J was lying, and maintained that stance during several discussions with the allocated social worker. She has joined forces with the father in seeking to undermine J's credibility throughout this hearing, and appears to have been the driving force in the introduction of the Tik Tok messages, the purpose of which was to cast doubt on the veracity of her daughter's account …."

27. The judge also made the following observation about the mother's demeanour during the hearing. Of her demeanour during the evidence of B and her mother, she said (at paragraph 112):

> "What struck me was that the mother appeared completely detached from the proceedings when that evidence was being heard. She sat motionless, staring into the distance during the

> evidence of both witnesses. This was in stark contrast to her attentive and animated response to the evidence concerning J's allegations, and her own direct, articulate and forthright oral evidence to this court."

28. The judge stated that, given her findings, she would require "considerable reassurance of a shift in the mother's position" before she could be satisfied that she is able to keep her daughters safe in the future.

29. The judge then addressed the evidence about the mother's conduct towards J after she made the allegations against F. She considered but rejected the mother's explanation for not having contact with J that it might be perceived as indirect contact between J and F which would breach his bail conditions. She also expressed concern about the mother's refusal to allow contact between J and her younger sisters after the allegations were made. The mother's conduct over contact demonstrated

> "either a lack of insight into the emotional needs of each of the siblings for a continued relationship or a disregard for those needs…. The mother's refusal to promote the sibling relationship would have had a profoundly detrimental impact, particularly on J and P, given what I have been told about how close they were."

30. The judge concluded that

> "the mother's desire to support and assist her husband took priority over the needs and welfare of J, with little regard or insight into the impact on her daughter."

She accepted the local authority evidence that the mother had put the phone down on J and had obstructed J's requests to have her belongings. The judge noted the "numerous reports from various sources" about J expressing thoughts about self-harm during this period, and in some instances cutting herself. She stressed that she was not being asked to determine the cause of this behaviour, but concluded (paragraph 121):

> "I have not been able to ascertain within their evidence a genuine concern for J's welfare in respect of her mental health such is their focus on undermining her claims. Rather, the picture that emerges from the evidence is that J was wholly unsupported and undermined by her mother's responses to her distress."

31. On 20 April, Mr Murphy submitted to the judge a document headed "Request for Review of the Judgment of 11 April 2023". In the index to the core bundle for this appeal, the document is described as a "Request for Clarification", but I consider the title at the head of the document to be more accurate. The opening words were "Set out below are a number of requests to the Court to review the details of the judgment". It is plain, therefore, that the aim of the document was not merely to invite the judge to clarify parts of her judgment which were unclear or ambiguous but rather to point to parts of the evidence which her legal representative asserted the judge had

omitted or misunderstood or misrepresented and, in some instances, to review her findings in the light of those alleged errors. The document identified certain points from the history of the earlier allegations made by B which had been omitted from the judgment and invited the judge to amend the judgment by including them. It asserted that there were a series of errors in the judgment about the "shaving" allegations, in particular about statements made, or not made, by Y which the judge had taken as corroboration of J's allegations. On the basis of those alleged errors, the judge was invited to review her finding at paragraph 104 that F's shaving of J in the shower had been sexually motivated. Mr Murphy also invited the judge to re-consider the finding that the mother had deliberately lied on this issue, adding that "if this finding is not maintained then this suggests that there should be an overall review of the credibility of mother in the light of this."

32. On the same date, 20 April, the mother filed an application to the judge for permission to appeal. On 23 April, F also filed an application for permission to appeal.

33. On 27 April, the judge delivered a supplementary judgment in which she (1) responded to the "Request for Review" of her judgment and (2) set out her reasons for refusing permission to appeal. With one exception, she refused the request to review or clarify her judgment. The exception was one of the issues raised by Mr Murphy about Y's account. That request was as follows:

> "10. The Court is also invited to consider that :
>
> a. The complaint made by J was that she was shaved when she was in the shower. On this detail there was in fact no corroboration from Y, contrary to that which appears in paragraph 82 of the judgment. J's evidence that she was shaved when naked was challenged by both of the parents and is subject to the finding on J's credibility as set out in paragraph 99.
>
> b. Contrary to that set out in paragraph 105 of the judgment, Y did say that her mother was aware that F shaved her.
>
> 11. The above undermines the finding that the conduct of F was sexually motivated."

The judge's response was as follows:

> "10. In relation to point 10, point 10 (a), I have found that J's account of shaving is corroborated by both Y and, to some extent, the answers given by F in his police interview, and I have found that the narrative explanation given by both parents as incredible and unworthy of belief. I prefer J's account for all of those reasons as set out in detail in my judgment.
>
> 11. In relation to point 10 (b), Mr Murphy is entirely correct to refer me to Y's account in interview … where she suggests that her mother did know about F shaving her. It is J who does not mention her mother when raising this allegation. However, this

> does not alter the conclusion I then reach about the mother having lied to the Court about a single incident of shaving. If Y is right that her mother was aware of F shaving her, then it is even more concerning that the mother would turn a blind eye to such behaviour and then tell the Court that there was only one single incident when it occurred, an account that I have rejected when weighing up the totality of the evidence. If Y is right that the mother knew, it leads to greater concern about the mother's insight and ability to protect her young daughters.
>
> 12. In relation to point 11, I do not accept that my finding that F's conduct was sexually motivated to be undermined."

34. The grounds of appeal put before the judge were in many respects similar to those subsequently advanced before us. In dismissing the applications for permission to appeal, the judge made a number of observations, some of which I cite below.

The appeal

35. Five grounds of appeal were advanced to this Court on behalf of F. They can be summarised as follows.

(1) The judge failed to give any or any adequate consideration to the disadvantage at which F was placed as a result of the delay of 15 years between the incidents alleged by B and the fact-finding hearing.

(2) The judge failed to consider the effect of the missing evidence – the video recording of B's ABE interview and the transcript of her evidence at the criminal trial in 2008.

(3) The judge erred in her assessment of B's evidence.

(4) When assessing F's evidence, the judge was wrong to effectively disregard the probative effect of his good character and the positive evidence of that good character adduced from a number of witnesses. She erred in finding that this evidence of good character represents a "criminal concept which is misconceived in family proceedings."

(5) The finding that F's conduct in shaving J and Y was sexually motivated demonstrates a confusion and/or error on the judge's part.

36. The grounds of appeal put forward on the mother's behalf can be summarised in these terms. It is said that the judge erred in

(1) finding that the mother failed to consider the possibility that J's or Y's allegations may be true and failed to take precautions to address any risks posed by F.

(2) her assessment of the mother's evidence about F's shaving of J and Y.

(3) finding that the mother is unable to contemplate even hypothetically the risk posed by F.

(4) concluding that the mother deliberately obstructed contact and her assessment of the mother's treatment of J after the allegations were made against F.

It is argued that the judge carried out an unfair assessment of the mother's credibility which was not supported by probative evidence.

F's submissions on appeal

37. On behalf of F, Mr Mark Twomey KC, leading trial counsel Mr Shaun Murphy, identified as a submission common to all his grounds of appeal that the judge failed to analyse critical evidence which went to the heart of findings which are therefore unsafe.

38. Mr Twomey took grounds 1 and 2 together. He submitted that the fifteen-year delay between the 2008 criminal trial of B's allegations and the fact-finding hearing in the care proceedings, coupled with the absence of important evidence, seriously undermined F's ability to defend himself against the allegations and the court's ability to assess their cogency and the weight to be attributed to them. Mr Twomey cited the guidance about the impact of delay given by the Criminal Division of this Court in *R v PS* [2013] EWCA Crim 992 and in the Crown Court Compendium which, he submitted, should be applied with equal force in civil proceedings where one party seeks to prove allegations of criminal conduct. It was his case that the judge had failed to recognise these disadvantages. There is no reference to them in her judgment, save for the observation at paragraph 31 about the impact of delay on memory. Having made that observation, the judge did not apply it when analysing the evidence of the three principal witnesses – B, F and the mother – nor did she consider the impact of the delay on F's ability to defend himself. She also failed to consider the impact of the absence of any objective contemporaneous details of the complainant as a seven-year-old child – there were, for example, no school records or other independent evidence as to her honesty, reliability, intelligence and understanding. The judge referred to the fact that the video of the ABE interview was unavailable but did not refer to the fact that as a consequence she was unable to gauge B's demeanour when evaluating the cogency of the allegations. That evidence had been available to the jury and must have played a part in their decision not to convict. There was also no reference in the judgment to the absence of the preparatory documents relating to the ABE interview or of a transcript of the criminal trial, in particular of B's cross-examination, which would have been highly relevant to her analysis. Far from having a "wealth and array of evidence", as the judge described it at paragraph 20 of her judgment, there were significant gaps which materially undermined the cogency of the evidence in a way that was unrecognised by the judge.

39. In respect of ground 3, it was argued that the judge's assessment of B's evidence was flawed, in particular in three respects. First, it was submitted that she failed to address or assess the difficulties faced by F in challenging B's evidence. As B was unable to remember any of the details of the alleged abuse, it was impossible for F to challenge her account. Consequently, the scope of cross-examination was perforce extremely limited.

40. Secondly, it was submitted that the judge "failed to address the illogicality of B confirming the truth of that which she could not remember". Instead, in her judgment, in particular at paragraph 42, she attached probative weight to her oral evidence when it should have attracted none. There was nothing else in her evidence that supported the threshold allegations or which altered her position, namely that she had blacked out the details. The fact that, having read through the transcript of her ABE interview, B said that it was true should have carried no weight when she was unable to recall what had happened, yet the judge (at paragraph 42) described this confirmation as "crucial". Similarly, the judge was wrong to conclude that B's willingness to come to court added to her credibility. In the absence of the recording, there would, in reality, be no case capable of satisfying the civil standard of proof. The ABE transcript considered on its own, without the ability to consider or assess any significant surrounding evidence, as part of the wider canvas of evidence then existing and relating to the seven-year-old complainant, could not be considered sufficient to satisfy the burden of proof. It was not open to the judge to conclude, as she did at paragraph 52 of her judgment, that B's evidence as a whole was "powerful and persuasive".

41. Thirdly, it was submitted that the judge erred (at paragraph 51) in attaching probative weight to B's mental health history. There was no evidence about this history beyond that given by B herself. No medical or expert evidence was adduced to entitle the judge to come to such a finding. It was a matter which went well beyond a matter in respect of which judicial notice could be taken.

42. In respect of ground 4, Mr Twomey pointed to a number of statements filed in the proceedings attesting to F's character. Now aged 58, he has had no criminal convictions for nearly 40 years. In those circumstances, he ought to have been treated as a person of good character, and, in accordance with principles established in criminal law, the judge should have directed herself that F's good character was a positive feature to be taken into account when considering his evidence and that the absence of convictions for sexual misconduct support the argument that he was not disposed to behaving in the way in which he was accused. It was submitted that the judge was wrong to assert (at paragraph 86) that evidence of good character represented a "criminal concept which is misconceived in family proceedings".

43. Under ground 5, it was submitted that the judge's finding that F's conduct in shaving J and Y was sexually motivated demonstrated confusion and/or error in considering the detailed evidence. She failed to exercise caution when considering the allegations, given the fact that neither J nor Y gave evidence, and the concerns about their credibility. She failed to give due weight to the fact that both F and the mother said that F had shaved the girls on occasions because the mother had cut herself when shaving and that the demonstrations were conducted openly with the mother and one of the younger children being present. Furthermore, she wrongly found that Y's evidence provided support for J's allegations when there were material differences between their respective accounts. Mr Twomey highlighted in particular one sentence from paragraph 104 of the judgment:

> "I prefer the accounts given by J and Y that F repeatedly insisted on coming into the bathroom when they were showering and shaved their armpits and legs when they were naked."

In fact, Y's statement had not included any references to F "insisting" on entering the bathroom, or to "showering" or "legs" or to the girls being "naked". It was Mr Twomey's submission that the judge's limited correction on this aspect of the case in her response to the request for clarification/review did not address the extent of her errors or on their impact on her assessment of F's motivation when shaving J or on the mother's credibility.

Mother's submissions on appeal

44. On behalf of the mother, Mr Cyrus Larizadeh KC and Mr Michael Bailey, neither of whom appeared at the trial, put forward the general submission that the evidence did not support findings that the mother had failed, or was likely to fail, to protect the children from the risk of sexual abuse. They cited the observation of King LJ in *Re L-W (Children)* [2019] EWCA Civ 159 at paragraph 64:

> "Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in *Re J*, 'nearly all parents will be imperfect in some way or another'."

In this case, before findings could be made against the mother, there had to be a causative link to show that she knew or ought to have known that F posed a risk to children. They submitted that the evidence did not support such a link.

45. Under the mother's first ground of appeal, Mr Larizadeh submitted that the judge erred in finding that, following J's allegations, the mother failed to consider the possibility that J's or B's allegations may be true and failed to take any precautions to address any risks posed by F. They submitted that the judge was wrong to make these findings because:

(1) J's allegations of sexual assault were made after she left home;

(2) in the event, the judge made no findings on her allegations;

(3) at that stage, there were no findings or convictions in relation to B's historic allegations:

(4) in those circumstances, given the binary nature of findings, any risk that may speculatively have existed in relation to J did not in fact exist;

(5) by the time the mother became aware of the allegations, F had left the home and was on police bail the terms of which addressed the issue of risk;

(6) the mother had made her own inquiries and formed her own views about the extent of the risk.

46. Under the mother's second ground, it was argued that the judge erred in the finding that J was at risk of sexual harm in the care of her mother in light of the 2008 allegations and following her finding relating to inappropriate shaving by F. The finding against the mother was said to be unsafe, without any solid evidential foundation, and made against the weight of the evidence. It was submitted that the evidence did not establish that the mother failed to take appropriate steps when she discovered B's allegations and that she was unaware that F's shaving of J was sexually motivated. The mother, who did not have access to all the evidence available to the judge, could not reasonably have anticipated the findings in relation to B's historic allegations nor the finding regarding the inappropriate shaving.

47. Under the mother's third ground, it was submitted that the finding that the younger children were at risk of sexual harm because the mother was unable to contemplate even hypothetically the risk posed by F was not supported by the evidence. The judge was not entitled to expect the mother to carry out a hypothetical risk assessment based on a hypothetical factual matrix which had not at the time been established. She failed to consider the mother's clear evidence that, like B's mother in 2008, she had no suspicions about F. Mr Larizadeh submitted that the judge was wrong (at paragraph 112 of the judgment) to attach weight to the mother's demeanour during the evidence of other witnesses.

48. Under the fourth ground, it was argued that the judge erred in finding that the mother refused to allow contact between J and her younger siblings because J was refusing to return home and that she thereby caused harm to all three children. The mother's evidence was that she had a genuine belief that contact could be construed as a breach of F's bail conditions. The mother contended that the local authority failed to clarify the position and that, when they did so and the mother's concerns were alleviated, supervised contact took place. The judge was wrong to conclude that the mother deliberately obstructed contact in the absence of clear and reliable evidence which undermined or contradicted her genuine belief about the bail conditions. Further, the findings that the mother had put the phone down when talking to J and impeded her efforts to retrieve her belongings were based on the interpretation of the social worker and ignored the mother's evidence that she needed to attend to her baby.

The local authority's submissions in response

49. On behalf of the local authority, Mr William Tyler KC, leading trial counsel Mr Giles Bain, made a number of general submissions. Unsurprisingly, he relied on the well-established principle, summarised by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraphs 114-115 and in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2, that an appellate court must not interfere with findings of fact by trial judges, including the evaluation of those facts and the inferences to be drawn from them, unless compelled to do so. As Mr Tyler put it in his written argument, the task of this Court is to determine whether the judgment is sustainable, not whether this Court would have come to a different conclusion. In this case, Mr Tyler submitted that the judgment was of a high quality and that the judge's process of reasoning was clear, logical and entirely appropriate. He cited the authorities which establish that it is not incumbent on a judge to recite all of the

evidence and submissions, in particular the dicta of Sir James Munby P in *Re F (Children)* [2016] EWCA Civ 546 at paragraph 22:

> "The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law."

50. Mr Tyler also argued that there is no place in family proceedings for a series of supposedly necessary 'judicial self-direction[s]' deriving from an entirely different jurisdiction. He submitted that, given the differences between a criminal trial before a jury and a fact-finding hearing in family proceedings before a judge, the rules of practice and procedure in one are unlikely to transpose well into the other. Guidance about what juries should be told by a judge in summing up a criminal trial – for example, about the impact of delay or "good character" – has no direct application to a judge at a fact-finding hearing, although in analysing the wide canvas of evidence she may have to consider the impact of delay and evidence about the character of the alleged perpetrator. In support of this proposition, Mr Tyler cited the dicta of McFarlane LJ and Higginbottom LJ in in *Re R (Children) (Import of Criminal Principles in Family Proceedings* [2018] EWCA Civ 198 (considered below). He pointed out that in care proceedings under the Children Act 1989 virtually no evidence is excluded. If relevant, it is generally admissible, its weight then being a matter for the trial judge. This stands in stark contrast to criminal trials, in which the evidence permissibly before a jury is rigorously and legalistically curated.

51. On the father's grounds of appeal, Mr Tyler acknowledged with regard to ground 1 that there are cases in which significant delay can cause real disadvantage, even prejudice, to a party. In particular, if the delay is in the context of there having been no contemporaneous complaint, it may be difficult for an accused person, years after the events in question, to scrutinize the accounts given against him with reference to the degree of material, memory and detail which would have been available to him at the time. That was not the case here. This was not a "typical" historic case where a complainant first makes an allegation years after the alleged event. B made her allegations on the same day as the last act complained of and was interviewed under the ABE procedure on that day. F was arrested later that same day and interviewed by the police the day after. The criminal trial took place within four months of the last allegation. In those circumstances, Mr Tyler submitted that it was hard to see any particular disadvantage to F resulting from the delay. In any event, it was clear from the judgment read as whole that the judge was fully aware of the potential disadvantages and took them into account in reaching her decision.

52. Mr Tyler submitted that the criticism of the judge in the second ground of appeal – that she "failed to consider the effect of the missing evidence" – was misconceived. The judge had to reach a decision on the evidence put before her. It would have been wrong if she had speculated about what might have been contained in documents that were unavailable. It was impossible to say how, if available, the video recording of

the ABE interview and a transcript of B's evidence at the criminal trial would have affected the outcome of the hearing.

53. With regard to ground three, Mr Tyler submitted that the judge had been entitled to reach the conclusion, based on the totality of B's evidence, that her allegations were true. He described the submission on behalf of F about B's current evidence as "significantly over-simplified". Although she was unable to recall the alleged acts of abuse, she gave detailed accounts in her statement in these proceedings of the circumstances immediately surrounding various of the acts of abuse. At the hearing, she had not been cross-examined on those points nor on factual matters raised in F's evidence – for example, his assertion that she had interrupted him while masturbating. Mr Tyler submitted that, while F may have chosen to conduct his case, as put to B, with reference almost exclusively to the reductive issue of the contemporary deficits in memory, the judge approached the issue from an entirely appropriate, holistic standpoint. She had considered the evidence of the 7-year-old child, noting the aspects of the complainant's contemporaneous ABE account which stood out as suggesting truth rather than invention or transposition of observation (see the passages from paragraphs 49 and 52 of her judgment quoted above). She had also considered the written statement signed by B in these proceedings and her oral evidence as a whole. She was entitled to conclude that the cumulative evidence was "powerful and persuasive".

54. In respect of ground 4 (good character), in addition to his general submissions on the application of criminal evidential concepts into family proceedings, Mr Tyler pointed to paragraph 86 of the judgment (quoted above) in which the judge, whilst expressing the view that the criminal concept of "good character" was misconceived in family proceedings, acknowledged that factors which pointed towards or against risk and propensity to perpetrate sexual abuse were "legitimate and relevant".

55. Mr Tyler described ground 5 (relating to the findings about the shaving incidents). Mr Tyler submitted that this was an issue which was classically with the territory of the trial judge's discretion. The judge had carefully subjected J's account to "the greatest and most careful scrutiny". Although she rejected J's allegations of direct sexual abuse, she found her allegations relating to shaving proved in the light of F's concession that he would enter the bathroom while J was taking a shower, perceived inconsistencies in F's various accounts, and the corroborative effect of Y's independent account. The judge had been entitled to conclude on the totality of the evidence that F's actions had been sexually motivated. The error which the judge had acknowledged about whether or not Y said that her mother was aware of the shaving had no bearing on her finding.

56. In response to the mother's grounds of appeal, Mr Tyler submitted that the judge's findings were fully supported by the evidence. At no point, from the time J made the allegations, did the mother contemplate for a moment that they, or B's, allegations might be true. It was unreasonable of her not even to contemplate that they might be true (or to question whether there had been more to B's allegations than she had been led to believe). In the light of the findings now made against the father, and the judge's assessment (which she was entitled to make) that the mother cannot even contemplate that F poses a risk, it is self-evident that J was at risk of sexual harm in the mother's care. The judge's findings about the mother's subsequent conduct

(impeding sibling contact and ostracising J) was based on her assessment of the evidence.

57. In succinct written and oral submissions on behalf of the children's guardian, Mr Nick O'Brien substantially endorsed the arguments put forward on behalf of the local authority.

Discussion and conclusions

58. Before considering the grounds of appeal, there are three general points to be made.

59. First, at the conclusion of a challenging hearing, the judge delivered a clear and comprehensive judgment in which she made nuanced findings on the local authority's allegations. She emphasised, in the passage in paragraph 21 of her judgment quoted above, that she was not seeking to rehearse all of the evidence and submissions but rather to highlight those matters relevant to her assessment of the allegations and that which was necessary to enable those reading the judgment to understand the rationale for her findings. This approach was entirely appropriate and in keeping with accepted practice. As Lewison LJ put it in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraph 115:

> "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."

In my view, the judgment in this case manifestly met the required standard.

60. Secondly, it follows that the parties will almost invariably be able to point to parts of the evidence on which they relied and submissions which they made which are not expressly referred to in the judgment. This is particularly so in complex care proceedings. The wider the canvas, the greater the likelihood that parts of the evidential picture or argument will be omitted from the judgment.

61. This may be the explanation, or at least one explanation, for the widespread practice in care proceedings of seeking clarification of a judge's reasons. I understand from colleagues that this is not a common practice in the civil courts. In several recent cases, this Court has been critical of inappropriate and excessive requests for clarification – see in particular *Re I (Children)* [2019] EWCA Civ 898, *Re F and G*

(Children) (Sexual Abuse Allegations) [2022] EWCA Civ 1002 and *Re C and Others (Care Proceedings: Fact-finding)* [2023] EWCA Civ 38.

62. In *Re A, B and C (Fact-finding: Gonorrhoea)* [2023] EWCA Civ 437, my Lord Coulson LJ observed:

> "In my experience, the practice in family cases of making oral and written requests to the judge for clarification of matters in his or her judgment can sometimes amount to no more than an illegitimate attempt to reargue the case, or to bamboozle the judge into errors or inconsistencies."

He added that, in that particular case, the clarification process was not only properly conducted but also "an extremely valuable exercise". Asking the judge to clarify reasons may be entirely appropriate, not least because it may prevent an unnecessary and time-consuming appeal. But advocates must exercise judgment and caution when making such requests.

63. In this case, the facility granted to the parties to seek clarification was largely used as an opportunity to make, or reiterate, submissions and invite the judge to review her findings. That was plainly going beyond what is permitted. As the judge herself observed in her supplementary judgment:

> "A request for clarification is perfectly acceptable if there is a lack of clarity, but a request that a judge reviews its decision is not. If you think that the Judge has got it wrong, then you appeal that decision with grounds of appeal."

I recognise that counsel may be faced with clients who want to know more about why their case has not succeeded. In the course of oral submissions, Mr Twomey acknowledged that the request in this case was too long but submitted that it is often tricky for counsel to decide whether a proposed request falls within what is permissible. But hard-pressed judges sitting in the family jurisdiction should not be burdened after delivering judgment by requests from advocates asking whether they have taken into account a particular piece of evidence and, if not, whether they would do so and review their findings.

64. The third general matter concerns the application of directions and principles applied in the criminal jurisdiction to family cases.

65. In *Re R (Children) (Import of Criminal Principles in Family Proceedings* [2018] EWCA Civ 198, this Court considered an appeal against findings made in care proceedings following an incident in which the mother had sustained fatal injuries from a knife in the course of an altercation with the father. At first instance, the father presented his case by direct reference to the criminal law relating to self-defence. All parties couched their arguments in terms derived to some extent from the criminal law of homicide. The judge concluded that the local authority had established "that it was more likely than not that the father did not act in self-defence" and found that the father "had used unreasonable force and unlawfully killed the mother". This Court allowed an appeal against the findings and ordered a re-hearing, in part because in the

words of McFarlane LJ giving the lead judgment, a "serious error occurred in the trial in relation to the relevance of the criminal law".

66. At paragraph 82 of his judgment, McFarlane LJ summarised the distinction between family and criminal procedures in these terms:

> "(a) The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a Criminal Court….
>
> (b) The primary purpose of the family process is to determine what has gone on in the past, so that those findings may inform the ultimate welfare evaluation as to the child's future with the court's eyes open to such risks as the factual determination may have established ….
>
> (c) Criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court ….
>
> (d) As a matter of principle, it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts …."

In his judgment, Hickinbottom LJ observed (at paragraph 104):

> "Of course, the same incident may give rise to proceedings in a number of different fora – the Criminal Courts, the Civil Courts, the Family Court, disciplinary tribunals. Those may each require findings of fact to be made, but restricted to the facts necessary for the determination of the issue before the particular tribunal, and then they will be subject to the particular substantial, procedural and evidential rules that apply to the determination of those particular issues in that jurisdiction, including, in Criminal Courts, technical defences. Those rules will be tailored to ensure that the issues are determined fairly and properly in the context of the particular tribunal."

67. The element of the criminal law under consideration in *Re R* was part of the substantive law – the legal principles relating to self-defence. In my view, the approach adopted in *Re R* applies equally to rules of evidence and procedure such as the directions given to juries about delay and a defendant's good character.

68. In a criminal trial, the judge is required, in appropriate cases, to direct the jury that (1) delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, (2) the longer the delay, the

more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available, and (3) when considering the central question whether the prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion: *R v PS* [2013] EWCA Crim 992. In a family case, the fact that allegations are raised many years after the event, when memories have faded and evidence has been destroyed or mislaid, is part of the evidential picture which the judge must address. But there is no obligation to give herself a formal direction in those terms.

69. The meaning of "good character" in the context of criminal trials has been a matter of extensive consideration in case law. In broad terms, what is called "good" or "bad" character in criminal cases is evidence about the defendant's behaviour in the past that may tend to show that the defendant has, or does not have, a tendency, disposition or propensity to behave in the way alleged and/or to be dishonest. In a criminal trial, a defendant with an unquestioned good character has a right to have that character taken into account in his favour when assessing the likelihood of his having committed the offence charged and, where the issue arises, his credibility. In civil and family cases, the focus is not on whether the prosecution have proved to the criminal standard that a person has committed an offence but rather whether the facts relevant to the issue in the proceedings have been proved on a balance of probabilities. In children's cases in the family courts, where the child's welfare is the paramount consideration and the court is required to have regard to any harm the child has suffered and the capacity of his carers to meet his needs, evidence about the character of those carers and others may be relevant. At the end of a complex fact-finding hearing, the judge may have heard a great deal about the character of the parents and other family members. That evidence may include the fact that the individual has no relevant previous convictions. But the judge is not obliged to give herself a formal direction about that. It is simply part of the wide canvas which the judge takes into account.

70. With those points in mind, I turn to the grounds of appeal, beginning with the first two grounds advanced on behalf of the father.

71. It is plain that the judge had well in mind the fact that B's allegations were over 15 years old and that the passage of time had a potential impact on the evidence. This was plainly a major element in the argument advanced on F's behalf at the hearing. The judge did not recite all of the detailed arguments about it but reading her judgment as a whole it is clear to me that she had his arguments in mind. In setting out the applicable law, she did not recite all of the principles to be applied at a fact-finding hearing, nor did she include lengthy citations from case law. Instead, she focused on the principles of particular relevance to this case, including, importantly, the impact of the passage of time on memory. The fact that she did not expressly refer to the potential difficulties about memory again in her judgment does not mean that she overlooked them when analysing the evidence. In summarising F's evidence, she observed that he had given a "detailed account" about being interrupted by B while masturbating, but also recorded that he had "admitted to struggling to recollect the detail of the allegations and his defence given the passage of time." In dismissing F's application for permission to appeal the judge said:

> "I do not, therefore, see that, in fact, there has been any disadvantage to F by delay which would render the proceedings

> and the pursuit of the allegations raised by B to be in any way unfair."

I agree.

72. Secondly, the fact that at one stage there had been, or might have been, other evidence relevant to the allegations did not prevent the judge proceeding to make findings on the evidence put before her. In almost every case there will be potentially relevant evidence that for one reason or another is not adduced at the hearing. One other example in this case was that neither J nor Y gave oral evidence. Had they done so, it is possible that the judge may have reached a different conclusion on J's allegations. The fact that material evidence is "missing" does not preclude a judge reaching a decision on the basis of what is available. Mr Twomey is, of course, right to say that the judge has to consider the wider canvas. There may, of course, be cases where the available evidence is so thin – where substantial parts of the canvas are empty or obscure – that, applying the burden and standard of proof, a finding cannot fairly or properly be made. But that was plainly not the case here.

73. It is correct that, unlike the judge in these proceedings, the jury in the 2008 trial had the benefit of seeing the video recording of the ABE interview. But that is but one example amongst many where the evidence in the criminal trial will have differed from that adduced in the family court hearing. Although the factual issues in the two hearings were the same, the forensic process, and the purpose behind the process, were different. In dismissing this second ground for permission to appeal, the judge observed:

> "I have the evidence available to me that I have been able to base my decision on without influence from opinions of others …. I base my opinions on the evidence available. The fact that I do not have perfect evidence does not mean that there is insufficient evidence in this case, and I am perfectly satisfied that there was a wealth of evidence, not just a transcript of an ABE interview, upon which I could be satisfied on balance that the Local Authority had proved their case in relation to the 2008 allegations."

Again, I agree.

74. In presenting the appeal, Mr Twomey took grounds 1 and 2 together, submitting that the combination of the delay and the absence of certain documents rendered the process unfair for his client. I recognise that there are cases where individual complaints taken in isolation may be insufficient to establish that a hearing was unfair but where taken together they lead to that conclusion. This is not such a case. The judge plainly had F's arguments on these issues in mind when reaching her decision. As she observed when dismissing F's application for permission to appeal, she concluded, as she was entitled to do, that there was a wealth of evidence upon which she could be satisfied on balance that the local authority had proved their case in relation to the 2008 allegations,

75. As for the judge's assessment of B's evidence, I accept Mr Tyler's submission that she was entitled to conclude on a balance of probabilities and on the totality of the

evidence that the allegations were true. The combination of B's detailed ABE interview, her statement in these proceedings, and her oral evidence was plainly sufficient to support the finding. The ABE interview of B as a child, with her description of her allegations based on sensory experience, was the basis of the finding, but it was supported by the evidence of the adult B who, though unable to recall the specific acts of abuse, could give detailed evidence of the surrounding circumstances, including what had been said and the events leading up to the acts. It was clearly open to the judge to accept B's articulate explanation of how her memory of the specific acts was now blocked.

76. There was nothing illogical in B saying that she was sure of the accuracy of her ABE interview although she could not now recall the events of which she spoke. I do not accept the submission that her evidence was unreliable because she was confirming that which she could not remember. It is not uncommon for someone, shown something they had said or written some time ago, to recall only part of what they were describing but nevertheless to be confident that they had told the truth when they made the earlier statement. The judge described this as a "crucial" piece of the evidence. Other judges might not have described it in those terms, but the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance. Similarly, having heard B's evidence and her explanation for deciding to give evidence, the judge was entitled to conclude that her willingness to come to court added to her credibility. An appeal court will not interfere with findings of fact by trial judges unless there is a very clear justification for doing so. I am wholly unpersuaded that there are grounds for interfering with the judge's assessment of B's evidence in this case.

77. In addition, there is no merit in the argument that, in the absence of expert psychiatric evidence, the judge wrongly relied on B's subsequent troubled mental health history as evidence to corroborate her allegations. I read the judge's reference to B's mental health history as an acknowledgement that it was consistent with her being a victim of abuse, not as providing significant additional weight to the reliability of her allegations.

78. In respect of the fourth ground, the judge's approach (at paragraph 86 of her judgment) to the submissions made to her about good character cannot be faulted. As noted above, the direction about good character given to juries in criminal cases has no place in family law, but aspects of F's character were potentially relevant to the assessment of risk and propensity. At paragraph 86, the judge expressly took into account the fact that F had not been convicted of a sexual offence before reaching her conclusion. In her judgment dismissing the application for permission to appeal, the judge reiterated that she had considered those factors in this case. Nothing said on F's behalf on this appeal has caused me to doubt that she did so.

79. With regard to the fifth ground of F's appeal, Mr Twomey is correct in pointing out that the judge was in error in saying that both J and Y had given an account of F coming into the bathroom while they were showering and shaving their legs while they were naked. When Y was interviewed under the ABE procedure, she referred only to F shaving her armpits, not her legs. She did not mention showering although she said that it had happened in the bathroom. She did not say she was naked when F shaved her although she did say she would not be wearing a top. In my view, however, the judge's error in saying that Y's account was the same as J's in these

respects does not undermine her conclusion that the shaving was sexually motivated. Setting aside those errors, Y's account unquestionably provided some corroboration of J's allegations. The judge's conclusion about F's motivation was based on the totality of the evidence, including her rejection of the evidence given by F and the mother on this issue and her findings about B's allegations. I accept Mr Tyler's submission that this falls within the territory of the trial judge's discretionary area of judgment.

80. Turning to the mother's appeal, Mr Larizadeh was right to remind us of King LJ's warning in *Re L-W* that, where a court has made a finding that someone has abused a child, a finding that the perpetrator's partner has failed to protect the child, or that there is a risk that they may fail to protect the child, is a serious finding which must be fully supported by the evidence. In this case, however, the judge not only cited that observation but, in my view, plainly had it in mind when considering the evidence and applied it carefully when reaching her decision.

81. With respect to Mr Larizadeh, the fact that the judge ultimately concluded on a balance of probabilities that F had not sexually abused J carries little if any weight in the assessment of the mother's conduct. The principle, expounded by Lord Hoffman in *Re B*, that the law operates a binary system in which the only values are zero and one and that, if the burden of proof is not discharged, a value of zero is returned and the fact is treated as not having happened, is of no real relevance when assessing whether the mother's conduct when the allegations were first made gave rise to a risk of harm. The judge's conclusion that, on learning about J's allegations, and knowing about B's earlier allegations, the mother had been unable to contemplate the risk posed by F and failed to take appropriate measures to prioritise the children's safety and welfare was plainly open to her on the evidence. In any event, although the judge made no findings in respect of J's principal allegations, she did make findings in respect of B's allegations and the shaving incident. Furthermore, the judge found that the mother had been proactive in undermining J's account and seeking her husband's return to the family home at the earliest opportunity. She found that the mother had deliberately generated Tik Tok screenshots with the purpose of undermining J's credibility. The seriousness of this conduct, and the potential risk it created for the children, is not lessened by the fact that the judge ultimately made no findings on J's principal allegations.

82. Reading the judgment as a whole, I do not accept that the judge's observations about the mother's demeanour during the evidence were a significant factor in the reasons for her findings.

83. Given her findings about the mother's thinking and conduct, in the context of her findings that F had sexually abused B, the judge was entitled to conclude that J was at risk of sexual harm in the care of F and the mother.

84. For these reasons, I would dismiss the mother's first three grounds of appeal.

85. Finally, there is no merit in the mother's fourth ground. It is clear from the judgment that the judge considered but rejected all of the mother's explanations for her behaviour. She reached this conclusion on the basis of her assessment of the evidence and was fully entitled to do so. The mother's conduct in ostracizing J and impeding her relationship with her siblings was plainly damaging to all three children and the

judge's conclusion that her conduct showed a lack of insight into, or disregard for, her children's emotional needs was plainly open to her on the evidence. In the circumstances, I fully understand the judge's comment that she would require "considerable reassurance of a shift in the mother's position" before she could be satisfied that she is able to keep her daughters safe in the future. Of course, one hopes for the children's sake that the expert assessments now taking place will provide the judge with that reassurance.

86. For the reasons set out above, I would dismiss both appeals.

LORD JUSTICE WARBY

87. I agree.

LORD JUSTICE COULSON

88. I also agree.