Neutral Citation Number: [2021] EWCA Civ 149

Case No: B4/2020/1976

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NOTTINGHAM
HH Judge Lea
NG19C00293

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LORD JUSTICE NUGEE

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF O (A CHILD) (JUDGMENT: ADEQUACY OF REASONS)

Between :

FD	**Appellant**
- and -	
A LOCAL AUTHORITY (1)	**Respondents**
MD (2)	
O (by her children's guardian) (3)	

- -
- -

Beryl Gilead (instructed by **Rotheras Solicitors**) for the **Appellant**
James Cleary (instructed by **Local Authority Solicitor**) for the **First Respondent**
Helen Knott (instructed by **Hawley and Rodgers**) for the **Second Respondent**
The Third Respondent was not represented at the hearing

Hearing date : 26 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 16 February 2021.

LORD JUSTICE BAKER :

1. This is an appeal against findings made against the appellant father that he sexually abused his daughter O.

2. At the conclusion of the hearing of the appeal, this Court indicated that we would be allowing the appeal and remitting the matter to be reheard by a different judge to be allocated by the Family Division Liaison Judge. This judgment sets out my reasons for agreeing to that outcome.

Background

3. O was born in January 2016. By then, her parents had already separated, on the mother's case because of domestic abuse. O lived with her mother and had some contact with her father, although the judge later found that, despite her assertions to the contrary, the mother had never been supportive of the father's contact.

4. In November 2018, the mother stopped contact alleging that O had made comments and gestures which indicated that she had been sexually abused. The father denied the allegations and himself reported the matter to the police. After the mother and maternal grandmother had informed the NSPCC about the allegations, the local authority instigated an assessment under s.47 of the Children Act 1989 alongside the police investigation. They concluded that O showed no signs of anxiety or distress when talking about her father, that some of the information provided by the mother had been contradictory, and that there was "very little evidence to suggest that O is experiencing sexual abuse in [the father's] care". According to the social worker, the mother and grandmother were not reassured by the outcome of the investigation. The social worker expressed concern that that they may be projecting their anxieties onto O.

5. The father made an application for contact. At the first hearing on 19 February 2019, the court made a child arrangements order for O to live with her mother, granted the father parental responsibility, and directed interim contact at the local contact centre. On 30 April, the Cafcass officer reported that this contact had gone well and recommended that it move into the community. In her report, the Cafcass officer recorded that the mother appeared to have a genuine belief that the father had sexually abused O. She reported that staff at O's nursery had observed that the mother could be anxious about O and needed reassurance. Echoing the earlier comment by the social worker, the Cafcass officer expressed concern that her anxieties "may be transferred to O and cause her emotional harm".

6. Following a further hearing, contact moved into the community. Between 11 May and 27 July, the father saw O on eleven occasions in a variety of locations. Save for two occasions, 22 June and 27 July, they were accompanied by other members of the family, although there were points during the visits when the father took O to the toilet alone. According to the mother's evidence, after a contact visit in May, she found what she believed to be a pubic hair on O's buttocks. On 27 July, the father took O swimming on his own. According to the mother, six days later, on the evening of 2 August, she noticed blood on the toilet paper after wiping O's bottom. The following morning, she telephoned the GP's surgery. The record of her call reads: "blood from back passage, ongoing case re dad sexually abusing her, has had sore

vaginal [sic] and bottom recently, has visit with dad today". An appointment was made with a GP, Dr T, later that day. I shall consider below the GP's account of her examination of O.

7. O then left the room and sat with her grandmother while the doctor spoke to the mother. She said that O had been complaining of a sore bottom for two weeks and had been refusing to wear her underwear to avoid irritation and had asked for Sudocrem to be applied. The mother said that after O had used the toilet the following evening, she had noticed a small amount of fresh blood on the tissue. O had said that she had a "pain inside my bum". She then told the doctor about the allegations of sexual abuse and the outcome of the previous investigation. She said that she had been told by her lawyer that, if she did not comply with the contact arrangements, she would be perceived as being obstructive and could risk losing custody of O. She also alleged that, after contact had resumed between May and July, O had said things like "Mummy, eat my did-did and I will give you a sweetie", did-did being the word O used for her genital area. On another occasion, O had been playing and said "Mummy, do you want to dive in my bum, like daddy?"

8. Following the examination, Dr T referred the matter to the local children's sexual assault service and two days later, on 5 August, O was examined again by Dr McLeod, a paediatric forensic physician, who concluded that O had signs indicative of penetrative anal abuse. Again, I shall consider Dr McLeod's evidence about the examination later in this judgment.

9. In the days following the examination, there were several conversations between O and her mother in which, according to the mother, O made further allegations about her father hurting her. The mother made notes about these conversations which were later submitted in evidence. On 24 August, when O asked why she could not see her father, the mother (according to her notes) replied that he had been a bad man. It was the mother's case that in saying this she had been following advice given by a counsellor. When O said "no, he buys me treats", the mother replied that "people can still do bad things even though they buy you treats". Later that day, when O asked "why Daddy had been a bad man", the mother asked if she remembered what she had told her about Daddy smacking her. O replied yes and said he "whacked" her head and grabbed the back of her knees. The mother asked if she remembered what she had told her about what Daddy did to her bum. O said: "Daddy does dive in my bum and he does this to my did-did and dives in very, very much and it hurts". When the mother asked her when the last time had been, she said that it had been when they went swimming, and in answer to a further question said it had happened when they were getting dressed.

10. By the time of this reported conversation on 24 August, the mother knew that the police had arranged a formal interview for O under the procedure set out in "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses and guidance on using special measures" ("ABE"). That interview took place six days later on 30 August. It is common ground between the parties (except the mother) that no material statements were made by O during this interview.

11. On 6 September, Dr McLeod examined O for a second time. Her evidence about that examination is considered below.

12. Despite the very serious concerns raised as a result of Dr McLeod's medical examinations, the local authority did not take immediate action to protect the child. An initial child protection case conference was not convened until 10 October 2019. As a result of that conference, O was placed under a child protection plan under the category of sexual abuse. The conference chair recorded "grave concern that the person or persons who has or have sexually abused O are not yet identified and therefore nobody could be ruled out as being the perpetrator. She is at risk of ongoing sexual harm." Following the conference, the local authority decided to start care proceedings, but before its application was filed a further hearing in the private law proceedings took place on 15 November 2019 at which the court made an interim child arrangements order providing for O to live with her paternal grandmother, with each parent to have contact over the following weekend supervised by the grandmother. At a further hearing three days later, the court ordered the local authority to file a report under s.37 of the Children Act 1989 and made an interim care order under s.38 on the basis of a care plan for O to remain living with her grandmother, with contact thereafter to be supervised by the local authority.

13. On 21 November, O had supervised contact with her mother. During the visit, the mother took O to the toilet. She later alleged that she had found liquid whilst wiping O's bottom which she suspected to be semen. The mother subsequently presented the tissue to the police and suggested that O had been sexually abused by her father during contact supervised by the grandmother over the previous weekend. As a result, a further medical examination was arranged for the following day but O was deemed too distressed for the examination to proceed. Analysis of the tissue subsequently revealed no semen and that the liquid had come solely from O's body. The police had arrested the father following the mother's allegation but took no further action.

14. On 25 November 2019, the local authority finally issued an application for a care order. At an initial case management hearing, the interim care order was confirmed and O remained living with her grandmother, with her contact with each parent supervised by the local authority. Further directions were given at a series of case management hearings, including an order for an expert report from Dr Margaret Crawford, a consultant paediatrician. On 2 January 2020, O made an allegation which was interpreted as suggesting her maternal grandfather might have sexually abused her. As a result, he was joined as an intervenor to the proceedings.

15. A fact-finding hearing took place before HH Judge Lea over eight days, starting 29 June 2020 and finishing on 19 August 2020. The local authority sought findings that the child had sustained injuries observed on 5 August as a result of penetration of her anus on several occasions which had been perpetrated by (a) the father or (b) the mother or (c) the father or the mother. In closing submissions to the judge, Mr Cleary on behalf of the local authority submitted that the court could find that either parent could have inflicted the injuries, adding that the local authority was not in a position to say which of them was the perpetrator, given that this would involve an assessment of credibility which was a matter for the court. Mr Cleary put forward detailed submissions in support of alternative findings that, on the one hand, there was a "clear case" that the father had inflicted the injuries and, on the other hand, there was a "clear case" that the mother was the perpetrator. His submissions drew on the totality of the evidence from 2018 onwards. The mother sought findings that the father had

sexually abused O during or before November 2018 and again between March and July 2019. The father sought findings against the mother in the following terms:

(a) in the event that the court concluded that the mother was not the perpetrator of the sexual abuse, that she had failed to protect O from that abuse;

(b) that the mother had failed to appreciate that a person other than the father could pose a risk to O;

(c) that she had encouraged O to think that she has been abused by the father;

(d) that she had asked O leading questions in relation to the father perpetrating the injuries;

(e) that she had caused O emotional harm by suspending contact when there had been insufficient evidence to suggest that the father had harmed the chid;

(f) that she had caused the father to be arrested twice for alleged sexual abuse based on fabricated or exaggerated disclosures the child was said to have made, and

(g) that she had thereby acted to alienate O from her father.

No party sought any findings against the maternal grandfather.

16. At the conclusion of the hearing, the judge adjourned for written submissions which were filed on 1 September. Judgment was reserved and handed down on 16 November 2020, some 11 weeks later. In his judgment, the judge apologised for the delay and explained that it stemmed "from pressure of work and the listing of back to back cases with no time set aside for judgment writing". This Court is well aware of the acute pressures on judges in the family court which have greatly increased during the Covid-19 pandemic.

17. The findings made by the judge were in the terms sought by the local authority and the mother, summarised as follows:

(1) On 5 August 2019, O had the following injuries:

(a) severe perianal venous congestion, that was markedly swollen and extended right round the anus;

(b) dilatation of the anus;

(c) a laceration within the anal canal.

(2) The injuries were caused by the penetration of O's anus on several occasions by either a penis, more than two fingers or some other large object forcefully inserted.

(3) The injuries were perpetrated by the father.

(4) The father behaved in a sexually inappropriate way towards O as follows:

(a) During or before November 2018, he touched O's clitoris and/or vagina with his fingers or mouth.

(b) During or before November 2018, he touched O's anus by inserting his finger(s), penis and/or an object into it.

(c) Between March and July, he touched O's clitoris and/or vagina with his finger(s) and/or mouth.

(d) Between March and July 2019, he touched O's anus by inserting his finger(s), penis and/or an object into it.

18. At a case management hearing on the afternoon of 16 November, the father applied for permission to appeal. The judge initially refused the application but on reflection he directed that trial counsel prepare a written document setting out grounds of appeal by 4pm the following day. Those grounds (which are in essence the same as those presented to this court in due course) were duly filed and on the following day the judge responded in writing refusing permission. He explained that he had taken the course of inviting written grounds because he thought it possible that the matters raised might include matters by way of omissions, errors or additional findings on which he could give additional reasons in an addendum judgment. He added that he was anxious to avoid the situation where counsel was "asked in another place why she had not sought clarification from the trial judge". Having read her grounds, however, he noted that counsel was not seeking any clarification but simply seeking permission to appeal, which he refused. He added one further paragraph by way of amplification, which I shall consider below. There followed an exchange of emails between the father's solicitor and the judge who declined to add to or amend his response to the application for permission to appeal.

19. At a further hearing on 27 November, the judge made an interim child arrangements order providing for O to live with her mother, and an interim supervision order in favour of the local authority. Having been informed that the father's solicitor intended to file a notice of appeal to this Court, however, he stayed the orders until 30 November. An appeal notice was duly filed and permission to appeal granted by my Lord, Peter Jackson LJ, who extended the stay of the orders pending appeal. Thus O remains living with her paternal grandmother where she has been for the past 14 months.

The medical evidence

20. Dr T, the GP who examined O on 2 August, filed a statement in which she described the examination as follows:

> "I asked O 'where does it hurt?', she then pulled her knees up but left her feet on the couch and separated her knees, she then pointed with her right hand towards her vagina. I then examined her vagina externally, without touching. I could see no redness, no bruising, no skin changes and no discharge. However, I observed a large bruise at the top of her inner left thigh which was dark purple. I have noted my impression that the bruise appeared to be caused by a grip …. I did ask the

> mother about the bruise and recall that she then suggested it may have been caused by playing. I believe I did mention 'grip mark' when describing the bruise in this conversation … I then said something like 'is it okay to look at where it's sore' and O rolled onto her left-hand side, placing her knees together and tucking her knees up into a foetal position, O then looked over her right shoulder to look towards her anus and also looking toward me. I was, again, surprised that O assumed this position …. O's anus appeared to be dilated and purple in colour with what looked like bruising. I cannot now. confidently describe the extent of the dilation. There was no sign of bleeding, fissure or cuts."

21. On 5 August, O was examined again by Dr McLeod, a paediatric forensic physician. The note of her examination reads:

> "O is normally fit and well …. She has no history of constipation and passes soft stool daily …. She has a linear greyish yellow bruise on the back of her left thigh measuring approximately 8cm. Her mother reported that this was sustained when slipping from her booster seat …. On anogenital examination she was erythematous in her vulval area and appeared sore. Her hymen was sleeve like with a smooth hymenal edge and no evidence of injury. Anal examination showed venous congestion around the anus and static dilatation of the internal and external sphincters with no stool visible in the rectum. There was a laceration in the anal canal measuring approximately 2cm at the 3 o'clock position."

Dr McLeod concluded:

> "The anal findings are concerning particularly in view of the disclosures made by O. Anal dilatation is associated with anal penetration, particularly in the absence of a history of constipation."

22. In a statement for the court, Dr McLeod said that in a child of O's age she would expect the anus to appear in a closed position during examination. Ordinarily, the external sphincter would close upon separation of the buttocks as a clench reflex and the internal sphincter would not be visible. On this examination, the dilatation of the external sphincter was about the size of a 2p piece and the internal sphincter was dilated to about the size of a 20p piece. She was certain that the laceration was not a fissure because it was located on the inside of the anal canal rather than a fissure of the sphincter. She was clinically satisfied that O's anus had been penetrated by an object, although she was unable to say whether it was a penis, a finger or another instrument. Dr McLeod recorded details of a conversation with the mother and grandmother who had expressed concern that they would not be believed that O was being sexually abused by her father. She described mother is appearing very anxious and frustrated and the grandmother as being more assertive and saying, amongst other things, "we need people to believe us".

23. At the follow-up examination on 6 September, Dr McLeod noted:

> "There was slight dilatation of her external sphincter. This was much improved from the previous examination when the dilatation of both internal and external sphincters was very marked. There was no evidence of any laceration …. She has bilateral venous congestion on both sides of her anus; however this is much improved …."

24. In her oral evidence, Dr McLeod was asked by Mr Cleary on behalf of the local authority how the anal laceration could have been caused. She replied:

> "Laceration is normally caused by stretching of the skin, so for example if something penetrated the anus that was larger than the anal canal would normally stretch to, a laceration could occur."

When Mr Cleary asked whether it could have been caused by a fingernail or nails, Dr McLeod replied:

> "That would be an abrasion. It's possible that what I saw was an abrasion, so – they look very similar, they're both a tear in the skin. So yes, a tear in the skin could be caused by a fingernail or nails."

Mr Cleary referred Dr McLeod to photographs taken by the mother of blood on the toilet paper with which she had wiped O's bottom on 5 August. Dr McLeod commented:

> "I was surprised by the amount of blood. That was a large amount considering the size of the laceration that I saw."

After giving her oral evidence, Dr McLeod was sent clearer photographs of the blood on the tissue. She responded:

> "on viewing the clearer images the amount of blood is not as large as I originally thought. I would not be surprised to see this amount of blood as a result of the laceration I saw."

25. In her report in the proceedings, Dr Crawford, the jointly-instructed expert witness, expressed concern at the manner in which O adopted positions for the examination by Dr T. It was her experience that non-abused children do not know what the examiner wants them to do whereas children who have been sexually abused "often do seem to know how you want them to lie to expose their genitalia". In oral evidence she explained that she had been able to watch video recordings of Dr McLeod's two examinations and agreed with her interpretation. Although perianal venous congestion occurs in abused and non-abused children, the degree of congestion in this case was much greater than is found in non-abused children. The type of anal dilatation observed was also strongly associated with penetration. She was unable to see the laceration on the recording but agreed that if present it was an unusual finding,

26. In her report, Dr Crawford said that, after a single episode of abuse, she would expect signs to disappear quickly. In this case, she would have expected the signs to have healed completely between 5 August and 6 September if there had been only one episode. In a supplementary report, she agreed with Dr McLeod that she was unable to say whether the anal dilatation and laceration were caused by penile penetration, digital penetration or penetration by an instrument, but added that objects can be passed through the anus without causing any damage and that if it had been digital penetration it would require more than two fingers to cause the degree of damage seen. In oral evidence she confirmed that she would have expected one episode to have resolved within a few days. It is repeated penetration that tends to lead to anal dilatation.

27. In her oral evidence, Dr Crawford agreed with Dr McLeod's evidence that the laceration could have been an abrasion caused by a fingernail. She said that, in the absence of hard stools or constipation, she could think of no natural reason for a healing laceration of the anal canal to start bleeding again. A large laceration could be re-opened by a little trauma, but, if the laceration was caused on 27 July, she thought it surprising that there was no bleeding between that date and 2 August. If it had been caused on 27 July, she would have expected it to have healed to the extent that it would not have started bleeding again with minimal aggravation by 2 August. If the laceration was big enough not to have healed completely by 2 August, she would have expected it to bleed when she opened her bowels. If the laceration was "well on its way to healing", then it would have taken a large hard stool to cause the bleeding. She described the location of the laceration, inside the anal canal, as an "odd injury … an unusual sight even with sexual abuse" and thought that in that location ordinary wiping of the bottom would not necessarily have caused re-bleeding "unless you were really stretching that area".

28. At the conclusion of her evidence, in answer to a question from the judge, Dr Crawford summarised these aspects of the evidence in this way:

> "I think it was the anal laceration that I found particularly unusual not to have presented with some signs of bleeding before 2 August, and certainly if this had been one injury on 27 July I would have expected there to be a lot more healing by 5 August, I'd have to postulate that something had happened on many occasions for the changes to have been so obvious on 5 August."

The judgment

29. The judge started by outlining the three medical examinations conducted in August and September 2019 by the GP and Dr McLeod. He then summarised the history of the private and public law proceedings. Next he set out the findings sought by the parties. He then dealt briefly with the allegation concerning the maternal grandfather, concluding that he was satisfied that he was not the perpetrator of the anal injuries and noting that "O's evidence is unreliable when she makes allegations against both [her grandfather] and the father of a friend at nursery. She is capable of saying things that are not true."

30. The judge then summarised in conventional terms the law to be applied when conducting a fact-finding hearing. His summary of the principles included a citation of the decision of this Court in ***Re T*** [2004] EWCA Civ 558 and the well-known observation of Dame Elizabeth Butler-Sloss P at para 33 that:

> ""Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

He noted, by reference to the ABE guidance, that care must be taken not to focus attention on statements made by the child at the expense of other evidence, particularly where the allegations arose in the context of private law disputes.

31. Turning to the medical evidence, the judge recorded that there had been no dispute about what was seen in Dr McLeod's two examinations, and proceeded to set out his findings at paragraph 42 of the judgment in these terms:

> "(a) The injury seen within the anal canal was either a laceration or an abrasion as both are tears in the skin and look very similar.
>
> (b) When the laceration or abrasion was first caused there would be bleeding.
>
> (c) There would be more bleeding when the laceration or abrasion was first caused than would result from an opening up of the laceration or abrasion caused by the passing of, for example, a hard stool.
>
> (d) It would have been very surprising if the laceration or abrasion was caused on 27 July for there to be no further bleeding until 2 August: if that was the case then the bleeding on 2 August would have to be triggered by something such as the passing of a hard stool.
>
> (e) Normally lacerations or abrasions with the anal canal would heal quite quickly because of the nature of the lining of the anal canal. I draw a conclusion that if the laceration or abrasion was caused on 27 July it would not have spontaneously started to bleed again on 2 August without something triggering a further bleed.
>
> (f) If the anus is penetrated by a large object or penis one would expect to see any injury on the verge, the skin right at the entrance to the anus rather than a little way inside as was seen here. It is not however impossible for the injury to be only on the inside.

> (g) Repeated penetration over a period of time would be likely to lead to a reduction in pain felt by a child.
>
> (h) The venous congestion is more likely to be caused by a penetrative act; if a parent adopted a practice of frequently checking a child's bottom by using excessive force and prising the buttocks apart this could create the appearance of venous congestion but would not cause it.
>
> (i) The penetrative act did not have to be by a penis, it could be a number of fingers at least two and possibly three, or a penis-shaped object but with sufficient force as to cause the laceration and venous congestion.
>
> (j) If there had been a single episode of penetration the physical signs would disappear quite quickly. So the anal dilatation, venous congestion and laceration within the anal canal may all have occurred at the same time and on only one occasion. If there had been only one episode of abuse the injuries would be likely to have healed completely between 5th August and 4th September. The fact that they had not suggest there must have been several episodes of abuse.
>
> (h) Distress and pain would have been caused when the anal injuries were inflicted."

32. Under the heading "The wider canvas", the judge then recorded that there was "absolutely no love lost" between the two sides of the family, that despite her assertions to the contrary, the mother had never been supportive of the father's contact, and that "the comments made and explanations given by the opposing sides have to be interpreted through the prism of their negativity." He then considered the evidence about O's alleged statements in November 2018, under the heading "The disclosures made by O". He recorded that O had shown no sign of worry when talking about her father and that it had been felt at the time that the mother had provided contradictory evidence about O's statements. The judge then went through the alleged statements in some detail. It is noticeable that in the course of this analysis he identified a number of factors which cast doubt on the reliability of the mother's allegations. For example, the mother alleged that O had rubbed her finger over her nappy in the area of her vagina and said "Daddy massages it". The judge questioned whether a two-year-old would use the word "massage". On another occasion, it was evident from the mother's account that O's statements had been made in response to her direct questions. On a third occasion, the mother had stated that there was a similarity between O's manner of touching herself and her own experience of how the father had touched her intimately. On considering the evidence about this, the judge found it difficult to identify any similarity. He noted further evidence from school staff about statements made by the child, including allegations about being abused by staff members, which were untrue. He also recorded how the mother had not been reassured by the conclusion of the first investigation and that professionals had been concerned that she and the maternal grandmother had been projecting their anxieties onto O.

33. Having referred briefly to the ABE interview, and concluded that no weight could be attached to it, the judge turned to the parents' evidence. His assessment here is notably brief:

> "The father
>
> 50. Presented himself in evidence as a man seriously wronged, falsely accused of raping his daughter by the mother who is in his eyes manipulative and vindictive. His approach was not child-centred: he was far more concerned about the impact upon him of the allegations made than the impact upon his daughter. It is noticeable that he showed no concern for O in his police interview when told about her anal injuries. I did not accept his account that the mobile phone that he threw at the mother "bounced" off the sofa and was not thrown with an aimed intent. He did not make an impressive witness.
>
> The mother
>
> 51. The mother is very protective of O and feels that no one is listening to her. She believes that O has been abused and refuses to accept any innocent explanations for O's behaviour. How far would she be prepared to go to prove her case? That is the question at the heart of this case when looking at the possible outcomes."

34. The concluding section of the judgment, headed "Analysis", is also notably brief. It reads as follows:

> "52. I have found this a most troubling case. The evidence is capable of supporting either of 2 outcomes. Mr Cleary in his written submissions argues in paragraphs 14 – 23 that there is a clear case that that the father was the perpetrator of the anal injuries sustained by O and in paragraphs 24 to 40 argues that there is a clear case that the mother perpetrated those injuries. Similarly, when I read Miss Knott's carefully drafted submissions on behalf of the mother, I can see much force in most of the arguments she makes. I then read Miss Martin's comprehensive and detailed submissions and can see a clear basis for the findings that she seeks. Yet they cannot both be right. I go back to basic principles and ask myself the two questions that need to be answered. Is there evidence of sexual abuse? Is it possible to identify the perpetrator? I must not strain to do so but it would be plainly a better outcome if I could do so.
>
> 53. Ultimately this case turns on my assessment of the parents in the light of the medical evidence. I make the first finding sought by NCC. Both parents agree that it is made out, namely on 5th August O had

> (a) severe perianal venous congestion, that was markedly swollen and extended right around the anus
>
> (b) dilatation of the anus
>
> (c) a laceration in the anal canal.
>
> The medical evidence as to this is clear. I make the second finding that these injuries were caused by the penetration of O's anus on several occasions by either a penis, more than 2 fingers or some other large object forcefully inserted.
>
> 54. The mother does not have a penis. She may of course have access to a large object similar to a penis. The mother has many faults. She is very anxious and over-protective. She is convinced that the father has sexually abused O. I can accept that after contact she might on occasions check O's genital area or her bottom. I do not accept that in order to check O for signs of abuse that she would put her fingers into O's anus so forcibly as to cause venous congestion. I also do not accept that not once but on more than one occasion she would insert a large object into O's anus so forcibly as to cause the injuries that it is agreed were present. It is my assessment of her as O's mother that she would not do that to her daughter. It would cause O considerable pain, and on the medical evidence it would have been done by her on several occasions.
>
> 55. The father has provided details of all his contacts. However even on his account there were occasions when he was alone with O. And O has said that he has dived into her bum. O loves her Dad. She loves the treats he gives her. She would be very confused, but I am satisfied that she did complain about what he was doing. I find as a fact that the father has caused the injuries to O. In light of that finding I look again at the allegations made in November 2018. If those things happened as alleged by O then there was a progression of sexual abuse from rubbing of the genitals when nappy changing to fingering, a process in effect of grooming of O which led ultimately to anal penetration. I therefore make the findings sought by Miss Knott."

35. In his short decision setting out his reasons for refusing permission to appeal, having noted that the father's counsel was not seeking clarification of the reasons for his decision, the judge added this concluding paragraph:

> "I make only this response. Ms Martin [trial counsel for the father] asserts that the local authority conceded in light of the medical evidence that '*it is highly unlikely that the anal laceration was caused by the father*'. It is not my recollection that this concession was made. Indeed, in the written submissions of the local authority it is asserted … '*there is a*

> *clear case that [the father] perpetrated the injuries to O*'. Those injuries would have included the anal laceration."

Following receipt of the decision refusing permission to appeal, the father's solicitor emailed the judge drawing attention to paragraph 30 of the local authority's closing submissions in which counsel had written:

> "[The father] would have had to have caused the laceration no later than 27 July 2019, when he last saw O before identification of the injuries to her. The absence of bleeding between 27 July and 2 August, the lack of a natural reason for it starting bleeding on 2 August – particularly in the context of the time it would have had to heal – all show that it is highly unlikely the laceration was caused by [the father]. The opinion of Dr Crawford that the position of the laceration – in her forty-eight years' experience – was surprising, also shows that it was unlikely the injury was caused by penile penetration. The opinion that the laceration could have been caused by a fingernail would support the suggestion that the laceration could have been caused by [the mother] examining O."

The judge replied that he noted the passage but did not seek to amend his response.

Submissions to this Court

36. The grounds of appeal are in these terms:

(1) The finding that the father was responsible for the anal laceration seen on 5 August 2019 was wrong and contrary to the medical evidence and lay evidence which appeared to be accepted by the court.

(2) If the court accepts this finding was erroneous the findings made in respect of any earlier assaults are fatally undermined.

(3) The Judge placed too much weight without proper analysis on the father's limited opportunity to cause the injuries.

(4) The Judge failed to properly analyse the evidence and make key findings about the credibility and reliability of the parents.

(5) The Judge placed weight on statements allegedly made by O without first reaching a conclusion about the reliability and credibility of the mother who was reporting the same.

(6) The Judge placed reliance on statements allegedly made by O without giving proper consideration to the factors in the evidence that detracted from the weight that he could attach to those statements."

37. On behalf of the appellant father, Ms Beryl Gilead, who did not appear below, submitted that the analysis in the judgment fell far short of what was required for a case of this complexity. The assessment of the parents' evidence amounted to thirteen lines in total and did not include any real assessment of their credibility. The judge

failed to engage with the father's case that the evidence demonstrated that the mother had set out to exclude him from O's life. Having identified inconsistencies and implausibilities in the mother's evidence, the judge failed to include any assessment of the reliability of her account when reaching his conclusions. Similarly, having noted a number of factors that suggested that O's alleged statements and actions were unreliable, he failed to take those factors into account when arriving at his findings. Given the extensive history and the number of allegations and counter-allegations, and the fact that the local authority had concluded that the case turned on the reliability of the parents' evidence, the analysis was wholly inadequate.

38. With regard to the medical evidence, Ms Gilead submitted that the judge's finding that the father was responsible for the anal laceration was contrary to the evidence apparently accepted by the court. This was an unusual injury to find in the context of abuse, being some way into the anal canal rather than on the edge. The judge accepted the medical evidence that there would have been bleeding, distress and pain when the laceration occurred. No symptoms of this sort were noted during or after the father's contact on 27 July 2019 and, if it had been inflicted on that date, it would have required something to trigger a re-bleed on 2 August, such as constipation or the passing of a hard stool, neither of which occurred in this case. In the absence of such a trigger, the laceration must have been an acute injury on 2 August or at least inflicted after 27 July which was the last date on which O had contact with her father. If the injury had been inflicted during an earlier contact visit, it would have healed completely by 2 August. The finding that the father caused the anal laceration was therefore contrary to the medical evidence assessed in the context of the totality of the evidence. The judge did not explain how he arrived at this finding, given his acceptance of both the medical evidence and the mother's account. The finding about the laceration could not be isolated from the judge's other conclusions. If the father did not cause this injury, this fact had to be weighed in the balance when considering the other findings sought by the parties.

39. On behalf of the local authority, Mr Cleary's principal submission was that the judgment sufficiently identified those matters which were critical to the findings. In reaching his conclusion as to the perpetrator of the injuries found on 5 August, the judge accurately summarised the medical evidence at paragraph 42 of the judgment, and in doing so specifically acknowledged the evidence that, if the laceration was caused on 27 July, it was very unlikely that there would be no further bleeding until 2 August. Mr Cleary pointed out that the evidence was that such an event was very unlikely, rather than impossible. It was accepted by the local authority that the judge did not expressly explain the reasons for his finding that the father caused the laceration, but it was submitted that this was sufficiently encompassed within the overall finding that the father was the perpetrator. The judge specifically identified a number of matters that supported that overall finding, including the improbability of the mother penetrating O's anus with an object on a number of occasions, the apparent lack of concern for O displayed by the father during his police interview, the self-focused attitude of the father during his evidence, and the comments reportedly made by O at various times. Even on his own account, there had been occasions when the father was alone with O and the fact that the father could point to evidence that O had enjoyed those contact visits did not preclude the judge from finding that the father had abused her during those occasions. The analysis of credibility, though brief, was

sufficient and the judge was plainly aware of the factors which undermined the reliability of O's alleged statements.

40. A central feature of Mr Cleary's argument was that the father's complaint was essentially a challenge to the sufficiency of the reasons and that his remedy in those circumstances, following the approach prescribed by this Court in *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605 and in subsequent family cases including *Re B* [2003] 2 FLR 1035 and *Re A and L* [2011] EWCA Civ 1205, reported as *Re A and another (Children) (Judgment: Adequacy of Reasons) (Practice Note)* [2012] 1 WLR 595 (hereafter "the Practice Note"), the right course would have been to invite the judge to provide additional reasons for his decision. Mr Cleary's principal submission was that the judge's reasoning was sufficient to explain how he had arrived at his findings. In the alternative, if the Court reached a contrary conclusion, it should remit the matter to the judge to allow him to expand on the reasons for his decision. In the event that the Court decided to take that course, Mr Cleary identified the following matters as being points on which further reasons could be invited:

    (a) an analysis of the evidence around the lack of anal bleeding between 27 July and 2 August 2019, or an apparent cause for the laceration to bleed on 2 August, and how this is consistent with a finding that the father caused the laceration;

    (b) an analysis of the evidence around the presentation of O during and after the unsupervised contact sessions and the impact of this on the finding that the father perpetrated the abuse during those sessions;

    (c) a fuller analysis of the credibility of the parents;

    (d) a consideration of the specific credibility of the mother in respect of her reports of statements and actions by O against the father;

    (e) an analysis of the other factors that would detract from the weight given to the comments made by O against the father.

41. On behalf of the mother, Ms Knott also submitted that the findings of fact should stand as they were not insupportable and therefore cannot be said to be wrong. Neither Dr McLeod nor Dr Crawford ruled out the possibility that the laceration seen on 5 August had been caused on 27 July. The question of timing was equivocal and even if it was unlikely that the laceration had been re-opened without some stimulation, it was entirely open to the judge to find that the father was the perpetrator. There was evidence that the father had the opportunity to abuse the child on several occasions during contact visits between May and July 2019 and, given his findings that repeated penetration would lead to a reduction in pain and his finding that O could have been groomed by the father, it was open to the judge to conclude that the abuse could have occurred during contact visits without the knowledge of other family members. There was ample evidence on which the judge was able to draw in conducting his assessment of the parents. In the circumstances, he was entitled to conclude that the mother would not injure her child in the way alleged and his analysis of the father in paragraph 50 of the judgment, whilst admittedly short, contained the key points on which he based his assessment.

42. In the alternative, Ms Knott, like Mr Cleary, submitted that if this Court was not satisfied that the judge's reasoning was adequate, the next stage should be to ask for clarification in accordance with the established case law.

Discussion and conclusion

43. I recognise the very great pressure under which the judge, and all his colleagues in the family court, have been working during the past eleven months. The volume of children's cases coming to court was increasing before the Covid-19 pandemic struck and the well-known difficulties faced by courts since the first national lockdown in March 2020 have greatly added to the delays and other pressures. The judge himself alluded to the pressure of work when explaining the delay in handing down the judgment in this case. Drafting a judgment in a complex case always presents challenges even for an experienced judge. It is a demanding task to draw the threads together when various aspects of the evidence point in different directions. The problems are compounded where, as is almost invariably the case in the family court, no time is allocated for judgment writing.

44. In the circumstances, it was with considerable regret that I reached the conclusion that the judge's findings cannot stand, not because they are necessarily wrong but because of the way in which he arrived at his conclusions. There are, it seems to me, three overlapping problems with the judgment. First, the reasoning is, in a number of respects, insufficient. Secondly, in reaching his ultimate conclusion, the judge failed to take into account some material factors. Thirdly, he looked at the evidence in compartments and did not have regard to each piece of evidence in the context of the totality of the evidence before reaching his conclusions.

45. The judge started his analysis by considering the medical evidence about the injuries found in August 2019. He dealt with this complex evidence relatively briefly, noting that there had been "no dispute" about what was seen during the examinations on 5 August and 4 September. Whilst it was correct that there was no challenge to Dr McLeod's reports of what she saw, the interpretation of her observations was more difficult and could only be completed in the context of all the other evidence. The judge's summary of the medical evidence is substantially correct, although he did not mention the evidence given by Dr McLeod and Dr Crawford that the laceration or abrasion could have been caused by a fingernail. There are, however, more troubling aspects of the treatment of the medical evidence. I accept Ms Gilead's submissions that in his final analysis in paragraphs 52 to 55 of the judgment the judge failed to address the fact that the medical evidence indicated that the anal laceration was inflicted after 27 July 2019, the last occasion on which O had unsupervised contact with her father. In his summary of the medical evidence in paragraph 42 of his judgment, the judge noted that it would have been "very surprising" if the laceration or abrasion was caused on 27 July for there to be no further bleeding until 2 August and that if that was the case then the bleeding on 2 August would have to be triggered by something such as the passing of a hard stool. As the mother's account was that there had been no such occurrence, that aspect of the medical evidence pointed to the laceration being inflicted while O was in the mother's care. Given the local authority's closing submission (presented in the context of its alternative submissions as to the perpetrator of the abuse) that it was "highly unlikely" that the laceration was caused by the father, it was incumbent on the judge to explain in his final analysis why he reached a contrary conclusion.

46. Having summarised the medical evidence, the judge then referred, under the heading "The wider canvas", to the antipathy between the parents, including the mother's longstanding opposition to the father's contact. He then set out in some detail the evidence about O's alleged statements in 2018 and August 2019, noting a number of factors which undermined the reliability of that evidence. Once again, having identified these points, the judge did not bring them back into consideration when conducting his final analysis.

47. After considering but dismissing the evidence about the ABE interview, the judge then made some very brief observations about the parents' evidence before embarking on his final analysis, starting with the identification of the perpetrator of the injuries found in August 2019. There are several striking features about this passage in the judgment. First, as I have already observed, it is notably brief. Secondly, although the judge noted that counsel for the local authority had put forward extensive arguments in support of both alternative findings as to the perpetrator and that counsel for the father had made what the judge described as "comprehensive and detailed submissions" as a result of which the judge was able to "see a clear basis for the findings" she was seeking, he gave no explanation of his reasons for rejecting those arguments and submissions. Thirdly, on the specific issue of the anal laceration, the judge did not explain why he was reaching a conclusion contrary to the aspects of the medical evidence which led the local authority to submit that it was "highly unlikely" that the laceration was caused by the father.

48. Fourthly, the judge did not refer to the extensive evidence given by the father, in two statements in these proceedings and oral evidence, supported by evidence from other members of his family, about the contact visits between May and July 2019 in which he sought to demonstrate that he did not have the opportunity to commit acts of sexual abuse on the number of occasions that would have been required to inflict the injuries on the scale identified by the medical evidence. In closing written submissions, the father's counsel identified all the evidence about the contact visits and made a series of relevant and pertinent submissions. She accepted that the father had taken O to the toilet during the contact visits, but she submitted that it was implausible that the father could have taken advantage of such occasions to penetrate the child anally without O showing any signs of distress to members of the paternal family who were present on the visits. The judge listed the occasions on which contact took place during that period but did not analyse the father's evidence about them or the submissions made on his behalf about this aspect of the case.

49. Fifthly, it was submitted to the judge and to this Court that the mother's conversations with the child between 5 and 30 August 2019, in particular the conversation on 24 August, were an attempt to coach the child as to what she should say in the ABE interview. The judge made no findings about this issue, nor about the incident in November 2019 when the mother wrongly alleged that liquid found on toilet tissue after wiping O's bottom consisted of semen.

50. Taken together, these errors and omissions undermine the reliability of the judge's conclusion that the father had inflicted the injuries identified during Dr McLeod's examinations of O on 5 August and 4 September 2019.

51. Having found that that the father had caused the injuries observed in August 2019, the judge then in two sentences proceeded to "look again" at the allegations made in November 2018:

> "If those things happened as alleged by O then there was a progression of sexual abuse from rubbing of the genitals when nappy changing to fingering, a process in effect of grooming of O which led ultimately to anal penetration. I therefore make the findings sought by Miss Knott."

As I read this passage, I understand the judge to be saying that his finding that the father had committed acts of penetrative abuse in May to July 2019 added weight to the allegations that he had touched O sexually before or during November 2018. But it is plain that in reaching his findings in this way he was not complying with the principle emphasised in ***Re T***, supra, that "a judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence". It is notable that in ***Re T*** the judge had, as the former President observed in paragraph 33 of her judgment, wrongly "rejected the medical evidence in isolation from the non-medical evidence". In the present case, the judge wrongly reached a finding as to the perpetrator of the August 2019 injuries in isolation from the evidence about the November 2018 allegations. He should have considered all the evidence about the 2018 and 2019 incidents together before making any of his findings. The evidence about the 2018 allegations was relevant to his findings as to the perpetrator of the 2019 injuries as well as to the veracity of the 2018 allegations.

52. Furthermore, the reasoning at this point in the judgment is again far too insubstantial. Having set out at some length earlier in the judgment an exposition and analysis of the evidence about the 2018 allegations, in which he had drawn attention to several factors which undermined their credibility – the mother's contradictory statements, the implausibility about some of the language allegedly used by the child, the fact that O's statements had on occasions been made in response to direct questions by the mother, the evidence about O's untruthfulness at nursery, and the mother's evident anxiety which, in the local authority's view, she projected onto O – the judge failed to assess the weight to be attached to these matters when conducting his ultimate analysis. Similarly, having reminded himself of the need for caution when assessing allegations of abuse that arise in the context of private law proceedings, and having noted the mother's longstanding opposition to contact, he failed to weigh those matters in the balance when reaching his conclusion that the 2018 allegations were true.

53. For these reasons, I concluded that the judge's analysis was insufficient and flawed.

54. Counsel for the local authority and the mother submitted that, in the event that this Court reached that conclusion, the remedy would be to ask the judge to clarify the reasons for his decision. In my view, that would be the wrong course to take in this case. When considering the adequacy of the reasons, it is instructive to consider the list of matters identified by Mr Cleary as points of analysis on which the judge could be invited to give further reasons. That list, set out at paragraph 40 above, is sufficient to demonstrate the very extensive gaps in the analysis contained in the judgment. But

there is a more fundamental objection to taking the course proposed by the local authority and the mother in this case.

55. The principal reason underpinning the practice of inviting a judge to give further reasons for a decision was identified by Lord Phillips MR in *English v Emery Reimbold*, supra, at paragraph 24:

> "We are not greatly attracted by the suggestion that a Judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the Judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the Judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a re-hearing will involve a hideous waste of costs."

The practice is well established in the family court – see the decisions of this Court cited by Mr Cleary, *Re B* and the *Re A* Practice Note, and, most recently, *Re I (Children)* [2019] EWCA Civ 898. In the Practice Note, Munby LJ emphasised two points:

> "16. First, it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.
>
> 17. Second, and whether or not the advocates have raised the point with the judge, where permission is sought from the trial judge to appeal on the ground of lack of reasons, the judge should consider whether his judgment is defective for lack of reasons and, if he concludes that it is, he should set out to remedy the defect by the provision of additional reasons."

56. In *Re I*, King LJ (at paragraph 35) explained the importance of this procedure in family cases, in particular public law cases involving children:

> "Judgments in care cases are often given by a judge under immense time pressure whether extemporary or reserved. It is right that issues of the type identified in the Practice Note should be raised with the judge if appropriate and, in so doing, avoid the necessity of an appeal and therefore further delay for the child the subject of care proceedings."

57. The practice is now expressly authorised in Family Procedure Rules Practice Direction 30A, supplementing Part 30 of the Rules which applies to appeals in family

proceedings to the High Court and the family court. Under the heading "Material omission from a judgment of the lower court", the Practice Direction provides:

> "4.6 Where a party's advocate considers that there is a material omission from a judgment of the lower court or, where the decision is made by a lay justice or justices, the written reasons for the decision of the lower court (including inadequate reasons for the lower court's decision), the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is an omission and should not immediately use the omission as grounds for an application to appeal.
>
> 4.7 Paragraph 4.8 below applies where there is an application to the lower court for permission to appeal on the grounds of a material omission from a judgment or written reasons (where a decision is made in the family court by a lay justice or justices) of the lower court. Paragraph 4.9 below applies where there is an application for permission to appeal to the appeal court on the grounds of a material omission from a judgment or written reasons (where a decision is made in the family court by a lay justice or justices) of the lower court.
>
> 4.8 Where the application for permission to appeal is made to the lower court, the court which made the decision must –
>
> (a) consider whether there is a material omission and adjourn for that purpose if necessary, and
>
> (b) where the conclusion is that there has been such an omission, provide additions.
>
> 4.9 Where the application for permission is made to the appeal court, the appeal court –
>
> (a) must consider whether there is a material omission; and
>
> (b) where the conclusion is that there has been such an omission, may adjourn the application and remit the case to the lower court with an invitation to provide additions to the judgment."

58. The practice is, however, subject to two important qualifications.

59. First, it must never be used as an opportunity to re-argue the case. As Mostyn J observed in ***WM v HM*** [2017] EWFC 25 (at paragraph 39):

> "I would observe that the demands by [Counsel] for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming

> commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed "material omissions" within the terms of FPR PD 30A para 4.6."

60. That observation was made in a financial remedies case but it applies with equal force in children's cases. Mostyn J's observations were endorsed by King LJ in ***Re I*** (at paragraph 40) subject to the proviso:

> "that the term "material omission" found in paragraph 4.6 is taken to embrace the totality of the matters included in paragraph 16 of Munby LJ's Practice Note …."

61. Secondly, there are cases where the deficiencies in the judge's reasoning are on a scale which cannot fairly be remedied by a request for clarification. As King LJ said in ***Re I*** (at paragraph 41):

> "It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases."

But where the omissions are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal.

62. The present case falls clearly into the latter category. On receiving the application for permission to appeal submitted on behalf of the father, the judge very properly considered whether the application was, in reality, an application for clarification of his reasons. In doing so, he was complying with good practice as stipulated in the case law and, within the family court, PD30A paragraph 4.8. It is notable that he did not consider the grounds of appeal, which closely mirrored those relied on before this Court, as amounting to a request for clarification. They amounted to a more fundamental challenge to the reasons for his decision.

63. This is not a case where a few pieces of the jigsaw are missing. Accordingly, this is not in my view a case where the judge should be invited to expand on the reasons for his decision. I regret to say that the only fair course is to remit the matter for re-hearing.

64. For those reasons, I concluded that this appeal should be allowed.

LORD JUSTICE NUGEE

65. I agree.

LORD JUSTICE PETER JACKSON

66. For the reasons given by Baker LJ, my conclusion was also that the appeal should be allowed. It is regrettable that there must be a rehearing, but it fortunately seems unlikely that the medical evidence will need to be reheard. It has been transcribed and can now probably be agreed.

67. This was and remains a difficult case. The question was not whether O had been assaulted, but when, by whom and why. On the evidence, the answer was the mother, the father, or one of them. Any one of these grave findings has huge repercussions for O's future, but unfortunately, the judgment does not contain the solid reasoning needed to underpin the finding arrived at by the Judge. He relied on statements by O, as reported by the mother, without adequately assessing the reliability of either the mother or of O; he did not weigh the relative opportunities of each parent to cause this unusual injury, or their possible motivations; he made findings of earlier grooming and abuse without assessing whether there was dependable evidence to support them; he relied on the father's demeanour in interview and in evidence without explaining how his reaction to a false allegation of such extreme seriousness might be expected to differ from his reaction to a true allegation.

68. Nor did the judgment address the inherent probabilities, or in this case improbabilities, of either parent having assaulted O in circumstances where it seems that one of them must have done. To take one example, the closing submissions on behalf of the father concerning the final contact visit on 27 July read as follows:

> "97. It is accepted that the father took O swimming on this day at the [X] Gym in [C]. The father was a member at this gym and at that time, was attending around 3 times per week. On the morning of 27 July 2019, the father sent a text message to his friend [L] to inform him that he will be there around 11, if he was going to be there [C341]. Had the father any plans to sexually abuse O, he would not have invited his friend to join them. Nor would he have chosen to carry out the abuse at a gym he regularly frequents as a member.
>
> 98. The father has been entirely consistent in his accounts provided within his statement and to the police. O got changed in the open part of the changing rooms and was able to get her swimming costume on herself only requiring a little help with the straps (consistent with O being described as 'independent' at nursery [C119]). There were lots of other children and people in the changing rooms as it was the family swim session at the gym held between 10am-12noon on a Saturday morning. The mother has obtained a photo showing what she considers is a cubicle in the corner of the changing room – it remains unclear how the mother obtained this photo or how she knew it was there. The father states that he was not aware that was a cubicle, supported by the police who did not include the cubicle in the drawing [I344]. Following swimming, the father went in the shower cubicle with O but left the door open. He changed whilst O was not looking and was washing her hair. There are a number of showers next to each other which were being used by other fathers and children.

> 99. Father was questioned as to why he would choose to take O swimming in light of the allegations the mother had made: at that time there was no ongoing investigation nor any findings made and taking a daughter swimming is an ordinary father-daughter activity. In any event, [MGM] reported that the mother felt swimming "was a good ideas as [F] was doing something productive with her" [I46].
>
> 100. The suggestion that the father would anally penetrate his daughter in a busy public changing room with other children and men present, either in a cubicle surrounded by lockers and an open changing area (mother's case) or in one of a number of communal showers, at a gym he regularly attends, having asked his friend to join is desperately farfetched.
>
> 101. Following that the father and O went to McDonalds on the same retail park. There are photos of this which are time, date and location stamped at [C571-C574]. At 12:01 is seen as very happy: smiling and laughing and in no way presents as a child who has been anally penetrated in the immediate time preceding these photos. The police confirmed that the father then took O to [Y] in the [Z] Centre followed by Costa Coffee – the court has seen a video from Costa at the end of the contact that day. O is happy and joking with the father, playing with her toys and chatting with her father, she said she had a nice time swimming and it was *'so much fun'*. CCTV confirmed that the father and O entered the leisure suite at 10:51am on 27 July, entered McDonalds at 11:48am and left at 12:13pm [I64].
>
> 102. O was collected from the contact centre by her mother and taken to a BBQ with a large number of people present. There were no concerns about O's presentation, no suggestion she was uncomfortable or in pain and certainly no suggestion of blood or other discharge in her underwear. She was described as *'perfectly fine'*."

It was material of this kind that led the local authority to describe an assault perpetrated by the father that day as highly unlikely. The court therefore had to assess these known events alongside the medical and other evidence in order to determine whether the father had nonetheless taken this narrow opportunity to assault O. It was also highly unlikely that the mother would assault O out of over-anxiety or malice, but it was equally necessary to assess what was known about her behaviour in order to reach a conclusion about that. That did not happen in either case.

69. I also agree with what Baker LJ has said about the circumstances in which it will be appropriate for the parties or this court to ask for further reasoning. Before granting permission to appeal in this case in December, I considered whether the Judge should be asked to give additional reasons, but rejected that course. It would not have been fair to the parties or to the Judge himself to ask him to revisit a decision based on a hearing that had by then taken place four to five months earlier. The process would

probably have taken some considerable time in itself and would have been unlikely to avert the appeal.

70. It is of course the responsibility of the trial judge to give sufficient reasons. But all judgments are capable of improvement and where there has been what the Practice Direction refers to as "a material omission from a judgment" the court is required to "provide additions", either on its own initiative or on request. That will be particularly suitable where an issue has escaped attention or where a part of the reasoning is not fully clear or needs amplification. Where the line is to be drawn will depend on the circumstances, but there will come a point where what would be required would not be additions but foundations. In those circumstances, the difficulties in returning to the trial judge were explained by Wall LJ in ***Re M-W (Care Proceedings: Expert Evidence)*** [2010] EWCA Civ 12, [2010] 2 FLR when, speaking of that case, he said:

> "47. The difficulties about the ***Emery Reimbold*** solution are, in my judgment, legion. I put on one side the fact that this was a reserved judgment. What strikes me with greater force – if my analysis is correct – is that the judge has made up his mind without properly considering the evidence of Dr. T, Messrs M and F and the guardian. Were we thus to invite him to reconsider, he would be bound to reject their evidence. To put the matter another way, the conclusion which he has reached would render impossible a proper judicial discussion of that evidence. Equally, were the judge to change his view and find the threshold satisfied, neither the mother nor the father would have any confidence in the judge's final conclusion."

71. Finally, I would emphasise that the outcome of this appeal is not intended to influence the outcome of the rehearing in any way whatever. We have inevitably focused on the issues raised by the appellant, but they are not the only issues. We have directed a rehearing so that all matters can be considered afresh.
