Neutral Citation Number: [2022] EWCA Civ 1002

Case No: CA-2022-000987

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT DERBY
Recorder Evans
DE21C00093

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2022

Before :

LORD JUSTICE BAKER
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WILLIAM DAVIS

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F and G (CHILDREN) (SEXUAL ABUSE ALLEGATIONS)

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Lorraine Cavanagh QC and Stephen Brown (instructed by **Howells LLP**) for the **Appellant**
Kate Burnell QC and Kerrie Broughton (instructed by **Local Authority solicitor**) for the **First Respondent**
Patrick Bowe (instructed by **Family Law Group**) for the **Second Respondent**
Karl Rowley QC and James Cleary (instructed by **Bakers Solicitors**) for the **Third Respondent**
The Fourth and Fifth Respondents (the children) were not represented at the hearing of the appeal

Hearing date : 13 July 2022

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Approved Judgment

This judgment was handed down by the Judge 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 25 July 2022.

LORD JUSTICE BAKER :

1. By a notice of appeal dated 19 May 2022, an intervenor in care proceedings appeals against findings that he sexually abused the five-year old daughter of his former partner.

2. The proceedings concern two girls, F, now aged 5½, and her half-sister, G, now aged rising two. They share the same mother but have different fathers. G's putative father (paternity has not been confirmed by DNA testing) has not been involved in the proceedings. F's father, on the other hand, is strongly involved in her life and has played an active part in the proceedings.

3. Following the breakdown of the relationship between her parents, F remained principally in her mother's care but has had regular staying contact with her father. At the time of the incidents which led to these proceedings, F was spending six nights a fortnight with her father and his current partner, with whom he has one child and who has three older children herself. Prior to the events with which we are concerned, F's parents were on reasonably good terms.

4. In October 2020, when F was rising four and G a few weeks old, their mother started a relationship with another man, D, who lived in the neighbourhood. Thereafter, they regularly spent time in each other's homes, although the evidence seems to have been unclear about precise living arrangements.

5. On 21 January 2021, the local authority received a referral from a GP to whom F's father had reported that she had had soreness in her vaginal area and that the reason was that D had touched her. That evening, a social worker and two police officers (one male, the other female) visited the father's home where the social worker and female officer spoke to F. According to notes taken by the officer, they arrived at 21.13 and left at 23.00. In the course of the conversation, F repeated the allegation. The notes taken of the conversation by the social worker were as follows:

> "Myself and [the officer] was in the room alongside, [father's partner] and dad. I asked what she had told daddy she said she was " sore ", I asked where, she pointed to her genital area, I asked what she called it, she didn't answer at first, I said I call mine my " foo foo " F said she calls hers a " flue" I asked how her Flue got sore ? no answer, I asked if anything or anybody has hurt her, F said "D " I asked what he has done she said touched her, I asked what she had on she said a dress, pants and tights on. I asked where she was when this happened she said in the kitchen in the morning. I asked who else was in the kitchen, she said X [D's daughter] and mummy. I asked if this was the first time D had hurt her, she said " no " I asked what D had hurt her with she said with "G's toy ", I asked what the toy looked like she said a "spinning toys and it was hard " dad told me that mummy said to D " Stop", F said she cried and mum gave her a cuddle."

After a break, the officer had another conversation with F who substantially repeated what she had said to the social worker.

6. On the following day, 22 January, F underwent a medical examination. The doctor noted that she had normal pre-pubescent genitalia with no evidence of acute injury. The hymen appeared slightly swollen and inflamed. According to the medical notes, when the doctor touched the genital tissue near the hymen when collecting forensic samples, it was painful for the child.

7. An ABE interview was arranged for 30 January. On the day before, the interviewing officer met F in the presence of an intermediary. During that meeting, the so-called "rapport" stage of the ABE interview was conducted but not recorded. The interview on 30 January started with an attempt to establish whether F understood the difference between truth and lies. Subsequently in his judgment, the recorder (at paragraph 25) summarised this section of the interview in these words:

> "The strategy adopted related to the colour of the chairs in the room. F was asked whether describing the colour as red was a truth or a lie. She said a lie. When asked if saying it is blue was a truth or a lie she also said lie. She correctly identified the colour as blue when asked what colour it is in fact. The intermediary clarified that calling it blue is a truth and explained the importance of telling the truth."

8. According to the notes, the interview continued:

> "DC: Right tell me why we're here today.
>
> F: Cos D has played with my flue.
>
> DC: D played with your flue?
>
> F: And X.
>
> DC: And X, X. What did D do:
>
> F: Played with it?
>
> DC: OK tell me what he did.
>
> F: (non verbal – F put her right hand between the top of her legs on her private area) Pressed on it, on it (stet) first and then played with it."

F then demonstrated on a doll and by reference to a diagram of a girl where she had been touched.

9. Later in the interview, F said that D had used a blue stick. Asked to demonstrate what he had done, she placed it between the doll's legs and moved it up the doll's back. She said that "he got his finger in." Further on in the interview, she referred to mummy being angry and when asked why said "because D was touching my flue."

10. After watching the video recording of the interview, the recorder observed that F had been very active and at times had not engaged with the questions. He also observed

that most of the information she had given had come through direct questions seeking clarification.

11. From that point, F lived with her father and her contact with the mother took place on a supervised basis. Because of the swelling seen during the first medical examination, a further examination was arranged and took place on 26 February. The examining doctor recorded:

> "The edge of F's hymen was very irregular and still slightly swollen, although the amount of swelling had improved since she was seen in January 2021. Her hymenal tissue appeared pale and there appeared to be evolving shallow notches in the 3 o'clock, 5 o'clock and 9 o'clock position."

The doctor concluded:

> "These clinical findings together with F's very clear disclosure of penetrative sexual abuse are very worrying. The clinical findings support F's allegation of penetrative abuse."

12. In the following weeks, F was reported as making other allegations that she had been touched in the genital area. The reports were made by different members of the respective paternal and maternal families, in particular her two grandmothers. On 6 May, the mother made a recording on her phone of F saying that her flue had been hurt by her daddy. This was reported to social services and a further ABE interview arranged during which F did not repeat any allegation.

13. On 8 May, a third medical examination took place. F was apprehensive and distressed during the examination which as a result was curtailed. The doctor recorded:

> "There was an area of localised redness adjacent to periurethral bands in the 2 o'clock position of the vulva. The hymenal margins were opposed and not clearly visualised. No acute injury to the hymen was seen – no bruising, bleeding or lacerations seen. The hymen was not oedematous or red. There was no vaginal discharge."

The doctor concluded:

> "The observed vulval redness could be caused by local physical irritation including digital penetration, chemical irritation or infection as seen in vulvitis."

14. On 10 May 2021, the local authority filed an application for a care order in respect of F, and a few days later a separate application in respect of G. Interim care orders were made and both girls placed in foster care. Thereafter contact between F and her parents has taken place separately under local authority supervision. At subsequent case management hearings, D was joined as an intervenor and a fact-finding hearing listed before the designated family judge in December 2021. In the event, police disclosure was not completed in time and the hearing was relisted before Recorder Evans in March 2022.

15. On 9 November 2021, while travelling back from a contact visit, in a conversation with her social worker F repeated her allegation against D and said that her father had never hurt her and no one had hurt her except D.

16. The hearing took place over five days. The recorder watched the video recording of the first ABE interview. Oral evidence was given by ten witnesses, including the social worker and police officer who had visited the father's home and spoken to F on 21 January 2021, the police officer who conducted the first ABE interview, the mother, the father, both grandmothers and the intervenor.

17. At the conclusion on the hearing, judgment was reserved and handed down on 13 April.

18. The recorder began his judgment by summarising the background and the history of the case. He then set out details of the factual investigation, reciting relevant parts of the notes from the initial conversations between the social worker and police officer with F on the evening of 21 January and from the detailed note of the ABE interview (for which no complete transcript was available). He made observations about F's manner and behaviour during the interview and about the "truth and lies" section of the interview as set out above. He then gave details of other statements made by F in the following months suggesting that other people had touched her in the vaginal area and recited the evidence about F's comments on 9 November 2021 that D had hurt her, that her father had hurt her and that no one had hurt her except D. Having summarised the medical evidence as set out above, he then set out the findings sought by the local authority and a short summary of the law (a longer summary of the case law was added in the form of an agreed appendix to the judgment). Between paragraphs 35 and 42, the recorder recited relevant passages from the ABE guidance. At paragraph 41, he identified a number of "significant principles" about the ABE guidelines derived from some of the cases quoted in the appendix of case law.

19. Between paragraphs 43 and 48 of his judgment, the recorder summarised the positions of the parties. He recorded that the submissions on behalf of the intervenor referred to the following factors – the child's young age; the history of acrimony within the family; the fact that F had had a sore genital area for a long time; a number of inconsistencies in the father's statements; F's incomplete understanding of truth and lies; the fallibility of memory generally; what the recorder described as "significant and detailed criticisms of the conduct of the initial interview and the ABE interview"; the fact that the medical evidence was inconclusive and only suggestive of penetration; and the fact that F had made too many untrue allegations against others for those against the intervenor to be cogent.

20. At paragraph 49 of the judgment, the recorder began his summary of the evidence, including the evidence given by the social worker and police officer who had attended the father's home to speak to F on the evening of 21 January, the officer who conducted the ABE interview, and F's current social worker who gave evidence about F's comments during the car journey on 9 November 2021 and her behaviour in foster care. He summarised the evidence given by the mother, noting that she had been incoherent and inconsistent in her account of the amount of time that D had spent with F which led the recorder to conclude that she was "clearly attempting to minimise the occasions". He found that she was unable to provide a coherent explanation as to why she had remained in a relationship with D after F had alleged that he had sexually abused her. When summarising the father's evidence, the recorder said he had been struck by the

straightforward manner in which he answered the questions. He recorded, without giving details, that the father had been cross-examined about discrepancies in his various accounts and about the circumstances of F's first statement on 21 January. The recorder then referred briefly to the evidence of the maternal and paternal grandmothers. The recorder said that he did not consider their evidence to be particularly useful, save for positive comments about the father by the maternal grandmother. The recorder summarised the intervenor's evidence, noting that he too had "rather minimised the time he spent with the mother …overnight".

21. No expert witness was called to give oral evidence, but the written evidence included a report from Dr Morrell, consultant paediatrician, which was summarised in the judgment. Dr Morrell, who had access to all medical records but did not himself examine the child, had prepared a report and answered supplemental questions. The recorder noted his opinion that there were a number of potential causes of genital or perineal soreness, none of which involved abuse and his agreement that the hymenal swelling was likely to be attributable to vulvovaginitis which he said was common in young children. The recorder then summarised Dr Morrell's opinion about the hymenal notches:

> "He describes the notches seen in her hymen as defects that do not completely transect the hymen and could be shallow or deep. He refers to a research article which notes that notches in the hymen have been noted in prepubertal girls with a history of penetrative abuse and in those without such a history but deep clefts in the hymen are associated with penetration. His conclusion is that the notches observed in F appeared relatively deep, although that is subjective, and were suggestive of penetration. It is not possible to determine precisely how or with what the penetration occurred."

By "research article", I think the recorder was probably referring to the publication by the Royal College of Paediatrics and Child Health "The physical signs of child sexual abuse – a evidence-based review and guidance for best practice", which was cited in Dr Morrell's report. The recorder concluded that the medical evidence was "not definitive" but "reasonably strongly corroborative that F was penetrated and that this is the cause of the damage to her hymen".

22. In the final section of his judgment, the recorder analysed the evidence and explained the reasons for his conclusions. I shall set out passages from this analysis when considering the grounds of appeal. In short, the recorder concluded, having regard to F's "cogent and clear allegation", supported by the medical evidence and her changed behaviour, that she had been sexually abused. As to the identity of the perpetrator, he said:

> "68. There are a number of persons potentially in the frame as the perpetrator of the abuse. The clear effect of the totality of the evidence is that Father is not one of them. The others mentioned by F apart from the Intervenor are not, in my view, credible candidates. The reports are from family members and mostly not repeated more than once. The circumstances were such that the family dynamics render the reports unreliable. It

> may well be the case that F did say what has been reported and it may be that she has a perception of being hurt in some way, …. None of the allegations are corroborated….I do not consider that any of the persons mentioned by F, other than the Intervenor, are likely to have abused her.
>
> 69. The Intervenor is in a different position. In his evidence he acknowledged that there were times when he may have had the opportunity. His evidence about effectively avoiding F is not consistent with his evidence that they had a close relationship and he tickled her. F's allegation is repeated and reasonably consistent in its essence. In the circumstances I do conclude that he was the perpetrator of penetrative abuse of F and that it was not just one occasion."

23. The judge's findings, as recorded in the subsequent order, were as follows:

> "1. F suffered physical, sexual and emotional harm by way of sexual abuse including penetration. In particular as described below F suffered pain and was exposed to sexual abuse and emotional harm as a consequence.
>
> A. On a date or dates prior to 21 January 2021 F was sexually assaulted by the intervener on a number of occasions
>
> B. The intervener used a blue object and his finger to penetrate F.
>
> 2. The evidence is not sufficient on a balance of probabilities to find that first respondent mother was present and aware of the abuse described above.
>
> 3 There is no detailed evidence before me on which I can find a history of acrimony between the maternal and paternal sides of F's family or what was the manifestation of such acrimony. It is, however, the case that both mother and father accepted in evidence that there was acrimony and there is reference to [it] in the evidence of other witnesses. Acrimony would be likely to show that the parents were unable to prioritise F above their own acrimonious difficulties but their acknowledgement of the acrimony may ameliorate that effect. Such acrimony would have been likely to cause F emotional harm.
>
> 4. The first respondent mother is unable to prioritise her children's needs above those of her own to protect them and keep them safe from harm, she did not identify the potential risk of sexual harm posed to her children from the intervener by indicating that she sought to resume her relationship with him and continued it for some time. The first respondent mother is unable to act upon and intervene when made aware of significant

> risks to F and G. Her failure to protect places the children at risk of significant sexual abuse and emotional harm.
>
> 5. The second respondent father has not abused F in any way."

24. On 19 April 2022, D's solicitors submitted to the recorder a document raising 13 'points of clarification' of the reasons for his decision. The recorder replied by email declining to expand upon or clarify the judgment. At a further hearing on 26 April, the recorder refused an application by the intervenor for permission to appeal.

25. On 19 May 2022, a notice of appeal was filed on behalf of the intervenor to this Court. The grounds of appeal are:

> "The learned judge erred in giving weight to certain factors whilst ignoring others in his analysis of the evidence and as a consequence was wrong to make findings that the applicant sexually abused F. In particular the learned judge did not conduct any adequate weighing or analysis of the following factors:
>
> (1) The context in which F's allegations were made and reported including the potential for influence upon her narrative and a distortion of the allegation by her father's role in it.
>
> (2) The fact that multiple professionals, including the officer conducting the ABE interview, concluded that F did not have an understanding of the difference between truth and lies.
>
> (3) The maternal grandmother's evidence that F said 'her daddy has told her to tell' professionals that D and her maternal step-grandfather had hurt her.
>
> (4) The credibility and consistency of F's allegations.
>
> (5) The significance of F's reported behaviours.
>
> (6) The appellant's credibility."

26. On 9 June, permission to appeal was granted by King LJ who observed:

> "There is a real possibility of the applicant succeeding on an appeal on the ground that the Recorder failed adequately to analyse the evidence and failed to deal with significant evidential matters prior to making findings against the applicant.
>
> Further it is arguable that the Recorder fell into error in declining to respond in its entirety to the request for clarification of his judgment."

27. At the hearing of the appeal, the appellant contended that, if the appeal was allowed, there should be a rehearing of the fact-finding hearing before another judge. The only

party opposing the appeal was F's father. The local authority did not oppose the appeal, but supported the appellant's proposal that, if it was allowed, there should be a rehearing at which the authority would invite the judge to make the same findings again. The mother neither supported nor opposed the appeal but in his skeleton argument on her behalf her counsel reserved her position as to whether, if the appeal was allowed and a rehearing ordered, she would seek to challenge the findings against her. At the hearing, Mr Bowe on behalf of the mother indicated that in that event the mother would not seek to challenge the findings that by continuing the relationship with D after F had made her allegations she had failed to identify the risk of abuse and prioritise the children.

28. The appeal was presented by Ms Lorraine Cavanagh QC, leading trial counsel, Mr Stephen Brown, who had prepared a clear and comprehensive skeleton argument. I shall consider their arguments on the various grounds in turn.

29. Ground (1) - The context in which F's allegations were made and reported including the potential for influence upon her narrative and a distortion of the allegation by her father's role in it. Ms Cavanagh and Mr Brown relied on the circumstances in which the allegation was first made by F sitting in a car with her father while they waited outside the GP's surgery when the father's partner was attending an appointment. It was accepted by the local authority that F had a history of a sore vagina pre-dating the start of the mother's relationship with D, and that the father had challenged her for touching herself to which F had replied "I'm not supposed to tell you but D's been playing." They drew attention to evidence that F used the phrase "I'm not supposed to tell you" in other, innocent, contexts. At that point, the father had taken F into the surgery and spoken to the receptionist in F's presence saying that he thought "his ex-partner's partner had been abusing the child" and asking F to tell her what she had told him about being sore below, whereupon the child pointed to her vagina.

30. On behalf of the appellant, it was argued that the judgment failed to address several important elements in this evidence which undermined the reliability of F's allegation – specifically, the fact that it had been prompted by the father asking F why she was touching herself, that F said that D had "been playing", and that F had been present when her father told the receptionist that he thought D had been abusing her. Ms Cavanagh and Mr Brown also pointed to differences in the details of the accounts given by the father about this incident and by the fact that for several months after making her first allegation F had continued to live in the care of her father who had convinced himself that she had been abused.

31. In the course of his judgment (at paragraph 56), the recorder said of the father:

> "He was also cross examined about some discrepancies between his description of the initial statement by F and the receptionist at the doctor's surgery. Insofar as there was some discrepancy he maintained his evidence. The receptionist did not give oral evidence. The circumstances of that first statement by F were generally explored and in essence he said that he did not seek to influence her and it was spontaneous. He had telephoned his mother to speak to her about it but F was in the car and at that point he was out of it."

32. The recorder did not spell out the discrepancies in detail nor the circumstances about F's first statement which were explored in evidence. He did, however, refer to the parties' submissions in his judgment, and I am satisfied from his reference to the intervenor's submissions which I have summarised above that he had the arguments about those matters in mind.

33. Ms Cavanagh and Mr Brown then particularised the ways in which there was a failure to comply with the ABE guidelines, both in the initial conversation on 21 January and at the ABE interview on 30 January.

34. With regard to the initial conversation, they highlighted the absence of any planning prior to the first conversation; the fact that the social worker told F that she wanted to talk to her about something she had told daddy that day; the use of the word "disclosure"; the fact that the police officer had not received any ABE training; flaws on the note-taking process; the use of leading questions, and the fact that the father had been present for at least part of the conversation.

35. In his summary of the evidence, the recorder made a number of observations about deficiencies in the investigation. Of the initial conversation between F and the social worker and police officer at the father's home on the evening of 21 January, the recorder noted that "neither was very sure about precisely how the interview was conducted and which of them took the lead in asking questions but each believed it was them"; that "neither could provide much detail about the whole episode except what is in their notes; that "the interview was conducted in a manner which was not compliant with the ABE Guidelines"; that "the actual period of time the questioning lasted, within the couple of hours, is unclear"; that the social worker "said that she had been trained in conducting ABE interviews, although the interview at the house did not purport to be one"; that her training was probably about 7 or 8 years ago ; and that the police officer was not trained to conduct ABE interviews and was aware that put her at a disadvantage.

36. Later in the discussion section of his judgment, the recorder made further reference to the initial conversation at the father's home on 21 January. He observed that by itself the allegation made during that conversation would not be sufficient because

> "the conditions in which her answers were given were not such as to be confident that it was entirely her evidence and was an accurate description of an event".

He described the organisation of the interview as "chaotic" and noted that there had been no planning, that the officer and social worker had been with F for a long time, and that it had been late in the night for her. He observed that the social worker's knowledge of the ABE guidelines "seemed inadequate" but added that that was perhaps unsurprising given the time that had passed since her training. He concluded, however:

> "Nonetheless the allegation made by F was at the beginning of the questioning and without undue prompting. That should have been sufficient to determine that a full investigation was warranted."

37. Although the judgment did not contain a comprehensive list of the deficiencies in the initial conversation between the social worker and police officer and F on 21 January,

I am satisfied that it demonstrates that the recorder was fully aware that the conversation was not compliant with the ABE guidance which he had recited at length earlier in the judgment and the importance of which had been emphasised in a series of reported cases quoted in the appendix to the judgment. Earlier in the judgment he had referred to the submissions made on behalf of the intervenor and, although he did not set out every point, I am satisfied that he did have them all in mind. It is well established that a judge is not obliged to refer to every point made on behalf of the parties. What is needed is an analysis sufficient to demonstrate that he has engaged with the issues and arguments and an explanation of the reasons for the decision. The analysis of the initial conversation set out in the recorder's judgment meets this test.

38. In his skeleton argument in support of this appeal, Mr Brown then listed a number of ways in which the ABE guidelines had not been followed during the preparation for and conduct of this interview. These included the absence of any record of any planning; a positive decision not to follow the conventional four-stage approach recommended in the guidelines (rapport – free narrative – questions – closure); the absence of any free narrative stage; the failure to terminate the interview to seek professional assessment once it became clear that F had difficulty distinguishing truth and lies; and a failure to clarify apparent differences between what F said in the interview and her earlier allegations at the initial conversation on 21 January. It was argued that the recorder failed to carry out any proper analysis of the impact of such breaches on the content of the allegations made during the interview. In support of this submission, Ms Cavanagh and Mr Brown cited the dicta of MacDonald J in *Re P (Sexual Abuse: Finding of Fact Hearing)* [2019] EWFC 27 at paragraph 860:

> "Where it is alleged that the principles set out in the ABE guidance have been breached, the court is required to engage with a thorough analysis of the process to evaluate whether any of the allegations the child has made to the police can be relied upon …."

39. Again, although the judgment did not contain a comprehensive list of the deficiencies in the ABE interview, it is clear that the recorder was fully aware that there had been significant departures from the practice recommended in the ABE guidance. Earlier in the judgment he had quoted at length from the guidance in a way which demonstrated that he was attuned to the specific provisions that were relevant to the case before him. As noted above, the case citations from case law included references to reported cases in which the importance of the guidelines had been highlighted. During his summary of the evidence, the recorder referred to some of the deficiencies in the ABE interview on 30 January, in particular the fact that F had appeared not to understand the concept of a lie. He recorded the evidence of the interviewing officer who had agreed that the guidelines suggested that in such circumstances consideration should be given to stopping the interview at that point to consider obtaining a professional assessment of the child and that this had not occurred in this case. In the later discussion section of the judgment, he referred again to the fact that there were "some deficiencies with the ABE interview", but added that the guidelines could not be followed in every case and that engagement of the child may make it difficult. The recorder concluded that, despite the deficiencies, the interview contained significant evidence on which he was entitled to rely. I am not persuaded that he was wrong to do so. Although his analysis of the interview was relatively short – certainly shorter than that set out in the closing

submissions on behalf of the intervenor – it is sufficient to satisfy me that he fully engaged with the criticisms and considered the extent to which it undermined the reliability of F's reported allegations.

40. Ground (2) – The fact that multiple professionals, including the officer conducting the ABE interview, concluded that F did not have an understanding of the difference between truth and lies. Ms Cavanagh and Mr Brown submitted that, although the recorder acknowledged the caution required where a child shows a lack of understanding of truth and lies, he failed to weigh or analyse properly the fact that the child did not have a clear understanding of the meaning or importance of telling the truth; that the method chosen to establish whether she had such an understanding (a question about the colour of the sofa in the room) was inadequate; the failure to adjourn for a professional assessment, and the fact that later events indicated that F made untrue statements about other people touching her.

41. There is no doubt, however, that the recorder grappled with this issue. He plainly took account of the issue about F's understanding of truth and lies in the final analytical section of his judgment. As mentioned above, he had previously referred to it when summarising the evidence. He returned to the issue in the final discussion section of the judgment, saying at paragraph 62:

> "It is clear that F has difficulty with the concept of truth and lies and that has been noted in various situations by a number of professionals. That does not automatically invalidate anything that she may say, however. Taking the interview as a whole and particularly the allegation at the beginning against the Intervenor it does seem to me that F makes a cogent and clear allegation. Later in the interview when she is less engaged and more prompted she makes allegations that Mother was present. Those are less coherent in themselves and the circumstances of their making is such that it is not so clear whether she is really talking about Mother being aware of abuse."

42. It is plain from the passages I have quoted from the judgment that the recorder engaged with the issue and took into account the difficulties which F had expressing an understanding of truth and lies. His conclusion that this did not oblige him to disregard everything she said was open to him on the evidence. His reasons for attaching weight to her allegation against the intervenor – that taking the interview as a whole it was a cogent and clear allegation, that it came at the beginning of the interview and that it was in contrast to statements later in the session when F was less engaged and had to be prompted more and her statements were less coherent – were clear and legitimate. In the circumstances, I do not accept the assertion in the grounds of appeal that the recorder failed adequately to weigh or analyse the fact that F did not demonstrate an understanding of the difference between truth and lies.

43. Ground (3) - The maternal grandmother's evidence that F said 'her daddy has told her to tell' professionals that D and her maternal step-grandfather had hurt her. The evidence included emails sent by the grandmother to a social worker, including one in which the grandmother said that F had told her that her daddy had told her to tell the social worker that D and the maternal step-grandfather had hurt her. The judgment

contained no reference to this specific piece of evidence which suggested that F had been coached to make the allegations.

44. I agree that this is an omission from the judgment which might have been filled by a response to the request for clarification (as to which generally, see below) in which the point was raised. The three points in the judgment which touch on the issue are the fact that the judge plainly accepted the father's evidence, having commented on the "straightforward manner" in which he gave his evidence, the fact that he said in evidence that he did not seek to influence the child in what she said, and the fact that he did not consider the evidence of the maternal grandmother to be particularly useful, save for her observation that he was a good father who would not have abused the child. But these points do not expressly address the piece of evidence to which counsel for the intervenor draw attention. The question is whether this omission is sufficient to justify allowing the appeal. I shall return to this question after considering the remaining grounds of appeal.

45. Ground (4) The credibility and consistency of F's allegations. Ms Cavanagh and Mr Brown drew attention to other statements made by F which were plainly untrue. Foremost amongst them were statements made to the father and later to a social worker that D had been present at a contact visit after the allegations were made. These statements were noted by the recorder in the judgment but were not, it was submitted, brought into consideration when he evaluated the overall reliability of F's allegations against D. Similarly, it was argued that, having concluded that the mother was not present when D was said to have abused F, the recorder failed to take F's statements to the contrary into account when deciding whether the principal allegation against D was true. Having concluded that F's subsequent statements to the effect that other people had touched her were unreliable, the recorder failed to take that finding into account when considering the principal allegation against D. It was also submitted that he failed to carry out a sufficient analysis of the inconsistencies in F's various statements about the alleged abuse.

46. On behalf of the father, Mr Karl Rowley QC, leading Mr James Cleary (neither of whom appeared below), cited the observation of Sir Mark Hedley in *Re AA (Children) and 25 Others* [2019] EWFC 64 at paragraph 216:

> "A lack of reliability may obscure truth, but it does not altogether eliminate its perception. So long as the judge remains alert to the dangers arising from unreliability and exercises the caution due to that, it may be possible to discern flashes of truth or incidents that have about them the ring of truth. Where the judge meets that, and, having exercised all due caution, is convinced of it, then the court has not only the right but the duty to act upon it."

47. Mr Rowley and Mr Cleary submitted that the recorder was entitled to distinguish F's statements about being touched by D from her statements about being touched by other family members because she did not repeat the other allegations away from the family environment, whereas the allegations about D were made on several occasions to professionals – in the initial conversation on 21 January 2021, at the start of the ABE interview on 30 January, and to the social worker during the car journey on 9 November 2021. With regard to this last piece of evidence, summarising the evidence of F's current social worker, the recorder set out what she had reported about F's comments

during the car journey on 9 November when they drove past the office where she had been interviewed on 30 January and F repeated her allegation that D had hurt her. In cross-examination, the social worker said that this had been an entirely spontaneous expression by the child. Mr Rowley submitted that the consistent identification by F of the intervenor as someone who had touched her vagina was a matter to which the recorder was entitled to attach weight.

48. I accept Mr Rowley's submission. In his final analysis, the recorder made the following observations (at paragraph 64):

> "There are differences in the detail, particularly where and in what circumstances, in F's description of the abuse. They could indicate that the allegation against the Intervenor is not reliable. On the other hand she is remarkably consistent with the basic facts of the allegation to a number of different people in very different circumstances over a remarkably long period of time."

This is a short, succinct summary of the differences in the child's various accounts. The recorder does not descend into the detail. But in my view he provides a sufficient explanation of his reasons for concluding that the core allegation made by F against the intervenor is reliable.

49. Ground 5 – The significance of F's reported behaviours. Counsel for the appellant also criticised the recorder's treatment of evidence about F's reported behaviours. The social worker expressed the opinion that F had been exhibiting certain behaviours such as wariness of males other than the father, bedwetting and nightmares which "indicated that she had probably been abused". There was also evidence that F had become "clingy" and, as mentioned above she had a history of touching herself. In his concluding analysis, the recorder said:

> "There is also corroboration of abuse having been perpetrated on F in her changed behaviour. It seems to me that Mother's description of her being clingy is in fact a change in her behaviour rather than the way she behaved before the Intervenor came into her life. [The current social worker] points to a number of factors which cause her to conclude that F was exhibiting typical signs of a child who had been abused. Father describes troubling incidents, some very proximate to when the abuse is likely to have occurred."

50. Ms Cavanagh and Mr Brown submitted that in a number of respects it could be demonstrated that the behaviours cited pre-dated the arrival of D in the family. Before concluding that there was behaviour which amounted to "corroboration of abuse", the recorder ought to have analysed the extent to which there was evidence of a change in behaviour which could be attributable to any abusive behaviour by D. In the event, the judgment contained no consideration of what weight could be placed on that assertion when the factual premises underpinning it were flawed.

51. The behaviours described by the social worker are not specific to victims of abuse and could be attributable to other causes. It is, however, axiomatic that 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. This Court will not interfere with findings of fact by trial judges unless there is a very clear justification for doing so. Surveying the whole cloth, as Mr Rowley put it, the recorder was entitled to conclude that the reports of F's behaviour provided corroboration of the allegation that she had been abused. In any event, as I read the judgment, the recorder's decision turned ultimately in his acceptance of the child's allegations as reliable, supported by the medical evidence. His conclusion about the interpretation of the observed behaviours was not essential to his decision. I do not consider that the judge's treatment of this aspect of the evidence gives rise to a sustainable ground of appeal.

52. Ground (6) – The appellant's credibility. Finally, it is said that the recorder's assessment of the appellant's credibility was inadequate. It was not treated with the importance which his role in the proceedings warranted. In my view there is no merit in this ground of appeal. The recorder's summary of the appellant's evidence was relatively brief but clear and his explanation for concluding that he was the perpetrator, whilst again being brief, is a sufficient explanation of the reason for his finding. In oral submissions Ms Cavanagh set out a number of pieces of evidence which she argued pointed away from the intervenor as the perpetrator of any sexual abuse. She submitted that the recorder did not refer to that evidence in the context of assessing the intervenor's case. This is a complaint about form rather than substance. The recorder referred at different points of his judgment to the relevant evidence. He plainly had it fully in mind in reaching his conclusion in relation to the intervenor. The fact that he did not set out in one place in his judgment and explain how it affected his view of the intervenor cannot undermine the recorder's conclusion

53. Although it did not feature as a ground of appeal, the case advanced on behalf of the appellant by Ms Cavanagh and Mr Brown drew attention to the recorder's refusal to respond to the request for clarification. In granting permission to appeal, King LJ observed that it is arguable that he fell into error in declining to respond entirely to the request.

54. The approach to be adopted by advocates and judges to requests for clarification of judgments has been considered by this Court on a number of occasions since the decision in *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605. In the family law jurisdiction, the two key authorities are *Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205 ("the Practice Note") and *Re I (Children)* [2019] EWCA Civ 898. The procedure to be adopted is set out in the Family Procedure Rules 2010 Practice Direction 30A paragraph 4.6 to 4.10.

55. In the Practice Note, Munby LJ emphasised two points at paragraph 16 and 17:

> "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 (with whom the other members of the court agreed), considered the use of this process in detail between paragraphs 25 and 41 of her judgment. At paragraph 36, she drew attention to the perception of this Court that

> "requests for extensive clarification, going well beyond the perimeters identified in the authorities, have become commonplace in both children and financial remedy cases in the Family Court. It has become, as we understand it, almost routine for a draft judgment to be followed up with extensive requests for 'clarification' which in many cases can be regarded as nothing other than an attempt to reargue the case or, as here, water down the judge's judgment."

At paragraph 38, she observed:

> "The family court is overwhelmed with care cases. Judges at all levels often move seamlessly from one trial to the next without judgment writing time between them. Routine requests for clarification running to a number of pages are not only ordinarily inappropriate, but hugely burdensome on the judges who have, weeks later, to revisit the evidence and their judgment when their thoughts and concerns have long since moved onto other cases. This is not conducive to the interests of justice."

57. In the three years since the judgment in *Re I* was handed down, there has been little if any discernible restraint in the practice of seeking clarification of judgments. Meanwhile the pressures on the family justice system have grown ever greater and King LJ's observations about the burdens imposed on judges having to deal with such requests are of even greater relevance than they were in 2019.

58. In the present case, counsel submitted carefully crafted and detailed "points of clarification raised on behalf of the intervenor". It is neither necessary nor appropriate to set them out in full in this judgment. I make it clear that counsel was manifestly not seeking to reargue the case nor water down the judgment. But in my view the points of clarification raised went beyond what is intended by the authorities and the recorder was not obliged to answer them. The recorder's refusal to respond to any of the points of clarification was not a ground of appeal raised on behalf of the intervenor. In my view, had it been raised, it would not have led to a successful appeal.

59. When giving judgment in a complex children's case, no judge will deal with every point of evidence or every argument advanced on behalf of every party. The purpose of permitting requests for clarification to be submitted is not to require the judge to cover every point but rather, as the Practice Note emphasised, "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." It is therefore rarely if ever appropriate for counsel to enquire as to the weight which the judge has given to a

particular piece of evidence. If, as frequently happens, a judge draws together various strands of the evidence in giving reasons, it is neither necessary nor appropriate for counsel to separate out each strand and enquire what weight the judge has or has not attached to each piece, unless it can be said that in giving his reasons in a general way the judge has failed to address material parts of the evidence, or has created an ambiguity, or failed to provide sufficient reasons for his decision.

60. In the present case, as set out above, it is arguable that the recorder ought to have expressly addressed the evidence of the maternal grandmother that F had told her that her father had told her to say that D had hurt her. One of the points of clarification raised on behalf of D enquired as to the weight which the court attached to that evidence. It would therefore have been in order for D's representatives to draw attention to the fact that this piece of evidence was not cited in the judgment and to enquire whether it was taken into account by the court in reaching its decision. Considering the judgment as a whole, however, I do not consider that this omission in the recorder's reasoning provides sufficient justification for this Court to overturn his decision. Although in some respects he expressed his reasons in general terms without descending to the particulars, I see no reason to doubt that he failed to consider all the evidence or the extensive submissions put before him at the end of the hearing.

61. In oral submissions, Ms Cavanagh argued that the recorder ought to have followed the framework identified by Peter Jackson LJ in *Re S (A Child: Adequacy of Reasons)* [2019] EWCA Civ 1845 at paragraph 3. That case involved allegations that a child had sustained non-accidental injuries. The framework suggested is an invaluable model which can and should be followed in similar cases. But it is not necessarily applicable to every case of child abuse and it certainly will not invariably amount to a ground of appeal if a judge chooses a different approach. In this case, which concerned a very different set of facts, the recorder delivered a well-structured judgment in which he set out the reasons for his decision succinctly – in Mr Rowley's phrase, with economy – but in my view with sufficient clarity.

62. I would therefore dismiss this appeal.

LADY JUSTICE ELISABETH LAING

63. I agree.

LORD JUSTICE WILLIAM DAVIS

64. I also agree.