Neutral Citation Number: [2022] EWCA Civ 468

Appeal No: CA-2021-000038
Case No: PE19P01623

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT PETERBOROUGH
HH JUDGE MELLANBY
ON APPEAL FROM THE FAMILY COURT AT PETERBOROUGH
DISTRICT JUDGE CAPON

Royal Courts of Justice, Strand
London WC2A 2LL

Date: 08/04/2022

Before:
SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR ANDREW McFARLANE, PRESIDENT OF THE FAMILY DIVISION
and
LADY JUSTICE KING

B E T W E E N

K

Applicant/Appellant/Father

and

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Respondent/Mother

The appellant father appeared in person

Jessica Lee and Lucy Maxwell appeared for the respondent mother

Hearing date: 2 March 2022

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APPROVED JUDGMENT

Sir Geoffrey Vos, Master of the Rolls, giving the judgment of the court:

Introduction and summary of conclusions

1. This judgment is intended to provide general guidance on the proper approach to fact-finding hearings in private family proceedings following this court's decision in *Re H-N* [2021] EWCA Civ 448 (*Re H-N*). We should say at once, however, that we endorse *Re H-N*, and note that the District Judge in this case reached his decision before *Re H-N* was handed down. Nothing we say in this judgment on that subject can, therefore, be regarded as a criticism of him.

2. The issues in this case relate solely to whether the findings of fact made by District Judge Capon (the judge) should be over-turned. On the first appeal, Her Honour Judge Mellanby upheld those findings, but we have given permission for all the father's grounds of appeal to be re-argued. In the broadest outline, the father submits that the judge ought to have considered his case that the mother had alienated his children, and that the factual findings that the judge reached as to rape, coercive and controlling behaviour, and physical abuse of the children are unsound and failed to take into account the bigger picture. The mother argues that the high threshold needed to overturn such findings is not reached.

3. The basic facts are that the father and mother married in 2005 and separated in August 2017. They have three children: a girl (A) born on 31 May 2009 (aged 12), and twins (both now 9) born on 29 March 2013 (a boy, B, and a girl, C). The father had regular unsupervised contact with the children for some time before the logistical arrangements for that contact led to disagreements between the parents. In early 2018, A refused to see her father, but the twins continued to do so. In December 2019, the father issued his C100 application complaining of parental alienation and seeking to formalise the weekends and holidays at which he could see the children. He used the urgency of the situation as Christmas approached to claim exemption from a Mediation Information and Assessment Meeting (MIAM). There followed a C1A form (the C1A) filed by the mother on 12 February 2020 and subsequently a safeguarding letter from Cafcass produced just before the FHDRA (First Hearing and Dispute Resolution Appointment) that took place before the judge on 26 February 2020. The C1A was completed by the mother's then solicitor on her behalf and made a number of relatively minor allegations against the father, but not the main ones of controlling behaviour and rape with which the case is now concerned. The mother's C1A did not object to the father spending unsupervised time with the children. The safeguarding letter raised the alleged rape as an issue and advised the court to **consider** a fact-finding hearing.

4. At the FHDRA, Ms Jessica Lee, who also appeared as counsel for the mother before us, said that the priority allegations were what B had said at school (an allegation that has since fallen away) and in relation to the father's sexual boundaries and inappropriate behaviour in relation to the children. It was the judge who asked whether the allegations to be resolved would include the alleged rape. Ultimately, the judge directed a two-day fact-finding hearing. The issues as tried were: (i) allegations of rape during the marriage, (ii) verbal abuse and bullying exemplified by WhatsApp exchanges between

the father and mother on 18 June 2019 (the June 2019 WhatsApp), (iii) controlling behaviour, (iv) an incident on 23 January 2018 where the father had allegedly upset A by asking questions about what the mother had said about him, (v) an allegation of encouraging the children to get into bed with the father whilst he and his partner were naked, (vi) physical abuse of the children exemplified by flicking B's ear, and (vii) financial control. The judge gave no specific reasons for his decision to order a fact-finding hearing. At the 2-day hearing on 24 and 25 August 2020, the judge found each of the allegations proven except the incident concerning the children getting into bed and financial control.

5. Our conclusions may be briefly summarised as follows.

6. First, it was unfortunate that the parties in this case did not take advantage of the MIAM. Had they done so, the issues between the father and mother that concerned the logistics of the father's contact might have been speedily resolved before the inevitable trauma caused to the family by the fact-finding process. The mother had agreed to unsupervised contact and did not, at that stage, see the alleged rape or generalised allegations of controlling behaviour, bullying and physical abuse of the children as central to the resolution of the issues between them.

7. Secondly, the FHDRA is, as its name suggests, primarily an opportunity for judicially led dispute resolution. Had the mother confirmed her C1A at the hearing to the effect that she did not object to contact, the logistics might have been sorted out by agreement. This was a possibility that should have been explored.

8. Thirdly, it is important that a judge considering ordering a fact-finding hearing identifies "at an early stage the real issue in the case in particular with regard to the welfare of the child" (see [8] and [139] in *Re H-N*). As [14] of FPR PD12J provides, "[t]he court must ascertain at the earliest opportunity … whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child". [17(g)] of FPR PD12J is to the same effect. Fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare.

9. Fourthly, the finding that the father raped the mother during the marriage is unsafe because the judge failed to look at the matter in the round. He focused too heavily on the question of whether the mother had had a conversation complaining about the father's conduct, rather than considering all the available evidence including the mother's untrue assertion in her Scott Schedule that she had reported a version of the incident to the family doctor.

10. Fifthly, the judge ought to have considered all the allegations in the context of the contention that most fundamentally affected the question of future contact, namely whether the father was demonstrating coercive and controlling behaviour affecting the children's welfare after the separation.

11. Sixthly, whilst the allegations of bullying in the June 2019 WhatsApp, of chastising B on one or two occasions by ear flicking, and of upsetting A by pressing inappropriate questions, were made out, the generalised allegation of coercive and controlling behaviour was not. The judge had found no evidence of financial control, yet went on to find controlling behaviour after the separation based mainly on the WhatsApp

messages on a single day. The judge had correctly found that the ear flicking did not amount to child abuse, yet allowed his order to suggest that he had found physical abuse of all three children to have been proven (when he had not).

12. Seventhly, the appeal must therefore be allowed and the case sent back to a Circuit Judge for a decision to be made as to whether a fresh fact-finding hearing is required on the basis of the principles set out in *Re H-N* and this judgment. The court urged the parties at the conclusion of the appeal hearing to consider, whether, even at this late stage, there was room for some compromise in the best interests of their children. Successful mediation or other consensual resolution would be very much for the benefit of the children.

13. Once we have set out some further necessary factual context, we will deal with the issues we have mentioned in the order indicated by our conclusions.

Further factual context

14. After a short pause following the separation in August 2017, a regular arrangement for B and C to stay overnight with their father commenced in October 2017, and all three children spent Christmas 2017 with him. In May 2018, the father moved to live some 130 miles away. Despite this move B and C continued to stay with him each alternate weekend, including over Easter 2018. A, as we have said, had by this time refused to have any further direct contact her father.

15. By June 2019, the father had sold his car because he was short of funds. He could only transport the twins to his home for contact by using his new partner's vehicle. That vehicle was only available to him on alternate weekends, which were not the weekends when the father was booked to have the twins. Accordingly, the father asked the mother to swap the contact weekends around. The mother was unable to do this in the short-term as she had booked to work on the father's contact weekends and it was not, apparently, possible to change her work rota without a period of notice.

16. These practical difficulties set the context for the June 2019 WhatsApp, which the father put before the court. Whilst the messages demonstrate increasing frustration by the father exemplified by his threats to issue proceedings if the matter was not resolved, it is of note that the mother clearly said: "I have said I will swap weekends within the next couple of months[;] I have never denied access to the children".

17. The twins subsequently spent 10 days with their father during the summer of 2019. Thereafter, save for one weekend visit, the children's mother (possibly on the advice of social workers) revised the arrangement to restrict the father's contact with the twins to a fortnightly daytime visit by him to the twins' home town. This restriction, together with his concern that what he regarded as his turn to have the twins over Christmas 2019 was in jeopardy, led the father to issue his C100 application in December 2019. As we have said, the C100 sought findings of parental alienation. In addition, however, the child arrangements order sought under section 8 of the Children Act 1989 (the CA 1989) was that: "the court formalises the time which I spend with the children every other weekend from Friday evening to Sunday evening and a 50/50 split of holiday time; with room for flexibility as any work either of us may have requires".

18. The father also submitted a C1A, alongside his C100 application, making allegations of emotional, psychological and financial abuse against the mother.

19. The mother's C1A then made a number of allegations which were not pursued before the judge. It was, however, of note, as we have said, that it: (a) was signed by the solicitor then acting for her, (b) recorded that the mother agreed to the father having unsupervised contact, and (c) itself sought a child arrangements order.

20. The safeguarding letter, which was available shortly before the FHDRA, recorded that the mother had, in 2018, made allegations of "rape, financial, physical, mental and controlling behaviours" during the marriage, but did not wish to progress the matters with the police due to the "stress and fear" of doing so. No reference was made in the safeguarding letter to an email dated 2 August 2018, which the mother had sent to the detective dealing with the matter. In that email, the mother, whilst making allegations of financial impropriety, had emphasised the importance to the children of their relationship with their father and said that she would not prevent it unless the children were distressed or refused to see him.

21. The safeguarding letter also recorded that: (a) there had been a number of referrals to local social services in 2018/19, either as a result of the contact with the police or directly from the mother, but that no specific social work intervention had followed, (b) A had observed incidents of domestic abuse and that the police had originally been contacted by the mother to provide her with "reassurance that the police would not make her spend time with her father", and (c) "[t]his [the possibility that A had observed domestic abuse] is very relevant given [A's] reported reluctance to spend time with her father and thus [FPR PD12J] a finding of fact hearing needs to be considered".

The FHDRA on 26 February 2020

22. The father was acting in person at the FHDRA and the mother was, as we have said, represented by Ms Lee. The judge referred in the hearing to the safeguarding letter's "recommendation" for a fact-finding. Ms Lee initially suggested that one route forward was to obtain any police disclosure that existed so that either the factual background could be agreed or the court could then "reconsider if a fact-finding hearing is proportionate and will assist the court". When, however, Ms Lee was asked directly by the judge whether the mother was asking for a fact-finding hearing regarding the couple's relationship and the issue of domestic abuse, she specified just two matters: (a) a report from school that B had complained that his father had pulled his hair and flicked his ear when angry, and (b) sexual boundaries including the alleged encouragement for the twins to be in bed with their father and his new partner when both were naked and C reporting that she had seen blood in her urine after spending a weekend with her father. In respect of that latter issue, Ms Lee observed that "the court may not think that that requires a fact-finding" and suggested that the court should first obtain disclosure from the GP.

23. The judge then asked if the list of allegations would include that of rape, to which Ms Lee responded that she would need to take instructions as the safeguarding letter had just been received. The father then submitted that he had nothing to hide. The judge observed that unresolved allegations would "simply swirl around", but gave no more specific reasons for concluding that it was appropriate to list a fact-finding hearing. He made directions for the filing of a schedule and statements, and for disclosure of

relevant material from the police and social services. The case was listed for a further case management hearing in May 2020.

24. The judge then, having heard from both parties and the Cafcass officer, directed that, in the interim, the father should have supported contact during the day, once per fortnight, either with an agreed third party or at a contact centre. In the event, Covid 19 intervened and no direct contact took place. On 25 November 2021 a final order was made that the father should have only indirect contact once per month. The children have not therefore seen their father for over two years (save between January and April 2021 at a contact centre).

25. Against the background we have described, we can now proceed to explain how we reached the conclusions set out above.

1. It was unfortunate that the parties in this case did not take advantage of the MIAM

26. The twins had been enjoying alternate weekend stays with their father for two years following the parents' separation, despite some problems in late 2019. This contact only ceased due to a sequence of practical impediments that arose after the father sold his car. At that time in June 2019, the mother was prepared to swap weekends once her own arrangements could be altered and, even at the time of her C1A, she agreed to unsupervised contact.

27. It is clear from the June 2019 WhatsApp that, by then, the father was firmly focussed upon resolving the apparent stand-off by applying to the court. With hindsight, the issues between the parties at that stage, which were seemingly entirely logistical rather than an objection in principle to the twins staying overnight, could have been resolved out of court and, probably most effectively, through mediation.

28. Section 10 of the Children and Families Act 2014 (the CFA 2014) requires that "[b]efore making a relevant family application, a person must attend a family mediation information and assessment meeting". A MIAM is defined in section 10(3) of the CFA 2014 as "a meeting held for the purpose of enabling information to be provided about: (a) mediation of disputes of the kinds to which relevant family applications relate, (b) ways in which disputes of those kinds may be resolved otherwise than by the court, and (c) the suitability of mediation, or of any other such way of resolving disputes, for trying to resolve any dispute to which the particular application relates".

29. Part 3 of the Family Procedure Rules 2010 (the FPR 2010) makes provision for "non-court dispute resolution", including the following:

> 3.3 (1) The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.
> (2) In considering whether non-court dispute resolution is appropriate in proceedings which were commenced by a relevant family application, the court must take into account –
> (a) whether a MIAM took place;
> (b) whether a valid MIAM exemption was claimed or mediator's exemption was confirmed; and
> (c) whether the parties attempted mediation or another form of non-court dispute resolution and the outcome of that process.

> 3.4 (1) If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –
> (a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and
> (b) where the parties agree, to enable non-court dispute resolution to take place. …
> 3.7 An application [in private law children proceedings] must contain, or be accompanied by, a form containing, either –
> (a) a confirmation from an authorised family mediator that the prospective applicant has attended a MIAM;
> (b) a claim by the prospective applicant that one of the MIAM exemptions applies; or
> (c) a confirmation from an authorised family mediator that a mediator's exemption applies.

30. The list of MIAM exemptions in rule 3.8 of the FPR 2010 is tightly drawn and provides as follows in relation to urgency:

> (c) the application must be made urgently because –
> (i) there is risk to the life, liberty or physical safety of the prospective applicant or his or her family or his or her home; or
> (ii) any delay caused by attending a MIAM would cause:
> (aa) a risk of harm to a child;
> (ab) a risk of unlawful removal of a child from the United Kingdom, or a risk of unlawful retention of a child who is currently outside England and Wales;
> (ac) a significant risk of a miscarriage of justice;
> (ad) unreasonable hardship to the prospective applicant; or
> (ae) irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence); or
> (iii) there is a significant risk that in the period necessary to schedule and attend a MIAM, proceedings relating to the dispute will be brought in another state in which a valid claim to jurisdiction may exist, such that a court in that other state would be seised of the dispute before a court in England and Wales.

31. There is also a further exemption in rule 3.8(j) where "the application would be made without notice". Where an exemption from a MIAM is claimed, rule 3.10(1) provides that the court "will, if appropriate when making a decision on allocation, and in any event at the first hearing, inquire into whether the exemption was validly claimed". Under rule 3.10(2) the court will, if it finds that the MIAM exemption was not validly claimed: "(a) direct the applicant, or direct the parties, to attend a MIAM; and (b) if necessary, adjourn the proceedings to enable a MIAM to take place; unless the court considers that in all the circumstances of the case, the MIAM requirement should not apply to the application in question".

32. Part 3 of the FPR 2010 is supported by PD3A which provides that "the person who would be the respondent to the application is expected to attend the MIAM".

33. In the present case, the father claimed exemption from the MIAM in his C100 on the basis that delay would cause a "risk of harm to the children" and/or cause him "unreasonable hardship" (under rules 3.8(1)(c)(aa) and (ad)). He relied also on the fact

that he was applying for a without notice hearing. In relation to urgency, the father's C100 explained that staying contact was being withheld, he had not seen A for a substantial time, and that he might not see his children at all at Christmas.

34. The validity of the father's claimed exemption from the requirement to attend a MIAM was not argued on the appeal. We have, however, set out the essential elements of the statutory scheme to stress the importance of the requirement in rule 3.3(1) for the court to consider, at every stage in proceedings, whether non-court dispute resolution is appropriate. Any urgency that might have existed in the run-up to Christmas 2019 had dissipated by the following February. The transcript of the FHDRA hearing does not record any reference to the claimed MIAM exemption, or to the requirement on the court to consider non-court dispute resolution at every stage.

35. It is a matter of concern that a party can avoid the statutory MIAM requirement by simply asserting that a case is urgent and that they need a without notice hearing. Such assertions must be checked at or before the FHDRA under rule 3.10(1). They were not in this case. Had they been, it would have been clear that the case was not being dealt with as urgent and that the MIAM exemption did not in fact apply. For the statutory MIAM requirement to be effective, it must be enforced. The father ought to have been required to engage with the MIAM process.

36. Before leaving the issue of the MIAM, we draw attention to the Family Mediation Voucher Scheme, which is a time-limited scheme designed to encourage parties to consider mediation as a means of resolving their disputes. Eligible parties can, by applying for a voucher during the MIAM process, receive up to £500 towards the costs of mediation by a mediator authorised by the Family Mediation Council. We would urge all parties to private law proceedings to make use of this valuable resource. This case provides an example of a situation in which mediation would have been particularly appropriate, because there was at the start, no issue between the parents as to whether unsupervised contact was appropriate.

2. Non-Court Dispute Resolution should be considered at the FHDRA

37. As the acronym, FHDRA, makes clear, it is a First Hearing and Dispute Resolution Appointment. Its essential purpose is as an opportunity for judicially led dispute resolution.

38. Paragraphs 14.8 and 14.11 of the Child Arrangements Programme in FPR PD12B make provision for the FHDRA as follows:

> The FHDRA provides an opportunity for the parties to be helped to an understanding of the issues which divide them, and to reach agreement. If agreement is reached – (1) The Court will be able to make an order (which in many cases will be a final order) reflecting that agreement (2) The Court will assist the parties (so far as it is able) in putting into effect the agreement/order in a co-operative way.
>
> At the FHDRA the judge, working with the Cafcass Officer, or WFPO, will seek to assist the parties in conciliation and in resolution of all or any of the issues between them. Any remaining issues will be identified, the Cafcass Officer or WFPO will advise the court of any recommended means of resolving such issues,

> and directions will be given for the future resolution of such issues. At all times the decisions of the Court and the work of the Cafcass Officer or WFPO will take account of any risk or safeguarding issues that have been identified.

39. FPR PD12B sets out at [14.13] the steps that a court should take at the FHDRA when information before the court raises safeguarding issues. It provides expressly that the court should consider "[t]he nature and extent of any factual issues" and "whether a fact-finding hearing is needed to determine allegations which are not accepted … whose resolution is likely to affect the decision of the court". We would emphasise those last words.

40. Whilst recognising the time and resource pressures on both judges and Cafcass, we would also emphasise the importance of proper consideration being given to the possibility of non-court dispute resolution at the FHDRA. Had the mother been asked to confirm her C1A at the FHDRA, and re-stated that she did not object to contact, the logistics might, as we have said, have been sorted out by agreement. That possibility ought to have been explored at the FHDRA.

3. The judge considering a fact-finding hearing must first identify the child welfare issue to which the resolution of the dispute will be relevant

41. We start this section by setting out the most crucial passages from *Re H-N* (deliberately out of order) as follows:

> 8. Not every case requires a fact-finding hearing even where domestic abuse is alleged. As we emphasise later, it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take.
>
> 139. Domestic abuse is often rightly described as pernicious. In recent years, the greatly improved understanding both of the various forms of abuse, and also of the devastating impact it has upon the victims and any children of the family, described in the main section of this judgment, have been most significant and positive developments. The modern approach and understanding is reflected in the 'General principles' section of PD12J(4). As discussed at paragraphs 36–41 above that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing, so much is clear from the detailed guidance set out in paragraphs 16–20 of PD12J and, in particular, at paragraph 17:
>
> "(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court;
>
> (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case."
>
> 37. [suggesting the correct approach as follows]

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

iv) Under PD12J.17(h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance in "the Road Ahead".

42. A decision to hold a fact-finding hearing is a major judicial determination within the course of family proceedings. The process will inevitably introduce delay and postpone anything other than an interim determination of issues relating to the child's welfare, which is contrary to the statutorily identified general principle that any delay in resolving issues is likely to be prejudicial to a child's welfare (section 1(2) of the CA 1989). Further, the litigation of factual issues between parents is likely to be adversarial and, whatever the outcome, to have a negative impact on their ongoing relationship and ability to cooperate with each other as parents. It is therefore important for the court, in every case where fact-finding is being considered, to take time to identify the welfare issues, to understand the nature of the allegations, and then to consider whether the facts alleged are relevant to those issues and whether it is, therefore, necessary for the factual dispute to be determined.

43. In the present case, the judge commenced the FHDRA by referring to Cafcass's alleged recommendation for a fact-finding hearing. In fact, as has already been explained, Cafcass made no such recommendation. The Cafcass officer simply suggested that the court should consider whether such a fact-finding hearing was required. The issues concerning welfare were neither identified nor analysed at the FHDRA. Most significantly, at no stage did the court consider how such facts as might be found were relevant either to the welfare of the children or the issues that the court was being asked to resolve. We would also observe that it was not even clear at the FHDRA what factual allegations were to be litigated. Ms Lee, as we have pointed out, expressly reserved her position on the allegation of rape and, sensibly suggested that the court should await receipt of disclosure from the police and social services before deciding to hold any fact-finding process at all.

44. The judge's decision to hold a fact-finding hearing was therefore, in our judgment, at least premature. Rather than making that decision at the FHDRA, the court should have (a) identified the issues between the parents as to the children's welfare, and (b) given the mother time to decide, with the benefit of legal advice, what factual findings she wanted to contend required to be decided by the court, because they were "likely to be relevant to any decision of the court relating to the welfare of the child", always bearing

closely in mind that she was not seeking to prevent contact between the children and their father.

45. We emphasise in conclusion that, without in anyway resiling from what was said at [139] of *Re H*-N about the pernicious nature of domestic abuse, fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare (see FPR PD12J at [14] and [17(g)]).

4. The finding of rape is unsafe

46. The mother alleged in her Scott Schedule and witness statement that, in addition to the couple's regular consensual sexual relationship, there were a number of occasions when, having fallen asleep, she would wake to find that the father was engaging in sexual activity with her which would lead to intercourse (allegations 1 and 2). The mother claimed that she had repeatedly asked the father not to do this, but these requests went unheeded.

47. The father denied that any such activity had taken place. He claimed that the mother had first raised the issue after the couple had separated and after she had commenced her claim for financial relief against him.

48. Separately, the mother claimed that, during her pregnancy with the twins (2012/13), she woke to find the father trying to put his hands down her pyjama trousers. To stop him she stood up, but did so too quickly and collapsed on the floor (allegation 3). The father denied allegation 3. The mother claimed that she had "reported a version to [Dr C, her GP] at a later date" and she included Dr C as a witness to this allegation in her Scott Schedule.

49. The father's case before the judge included reliance on the following matters:

    i) the material evidence relied solely on the conflicting accounts given by each of the two parties;

    ii) there were significant inconsistencies between the mother's account to the police and her witness statement, particularly relating to identifying the year(s) during which the alleged behaviour occurred;

    iii) the mother's C1A did not contain any allegation of domestic abuse and did not make any reference to sexual matters;

    iv) oral and written evidence from the GP that the mother had never reported any such matter to her;

    v) other general inconsistencies in the mother's account.

50. The judge considered allegations 1-3 to be the most serious of the matters before him, and dealt with them together. The judge dealt specifically with the inconsistency between the dates contained in the police material. That material recorded the mother as saying that the occasions of sexual activity when she was asleep commenced in 2013 to 2014. The judge recorded that she had asserted in her evidence that it was only some 12 to 18 months after the twins were born, which was "well after the dates recorded by the police". The mother's case before the judge was that it started in 2015.

51. The judge began his analysis of the evidence by saying this:

> If I find that [the mother] had a conversation with [the father] about how unhappy she was about him initiating sex when she was asleep and that she did not want that to happen and he was to make sure that she was fully awake and that she found it uncomfortable and distressing but that it happened on occasions after that, then the allegation will effectively be made out.

52. The judge then immediately announced his conclusion:

> Having listened carefully to both parties give their evidence, I prefer the evidence of [the mother] in this regard. In my judgment, her evidence of how the sex was initiated and that detail of what was said to her at the time was compelling evidence. Her evidence is that she asked him not to do it. Again, in my judgment, her account of the conversations that she had with him and her response to what he said to her was credible and I regarded her as an accurate witness in that regard.

53. The judge went on to record that the father's responses to direct questions on this topic, which he held were unconvincing, were important elements in his evaluation. Although the judge found that, at the time, neither party regarded this conduct as rape, his finding was that penetrative sex had taken place when the mother had not consented and when the father did not reasonably believe that she was consenting (on the basis that he did not really give any thought to the issue). He therefore found the general allegation of rape proved on the balance of probabilities.

54. The father appeals on the ground that the judge failed to take account of any of the matters set out at [49] above. The only one of these mentioned in the judgment related to the dates in the police report. Whilst the judge determined that there was an inconsistency as to dates, this finding was not brought into account when assessing credibility. The father relied on Dr C's oral evidence that the mother had never complained to her about the father's sexual behaviour, and on the mother's contrary assertion in her Scott Schedule which claimed that she had given "a version" of allegation 3 to Dr C.

55. During the hearing itself, when the mother said that she had told Dr C how she had got out of bed quickly and collapsed, but without any reference to a sexual context, the judge commented: "that is not "a version" of a sexual assault, is it?" The judge did not, however, refer to this inconsistency in his judgment, merely saying: "I have heard evidence from [Dr C] (which was more in line with a personal reference for [the father])". This point is of some importance. If the mother never spoke to Dr C about these sexual matters, why did the mother include Dr C in her Scott Schedule as a witness in support of her allegation of sexual impropriety on the father's part?

56. The father submitted that it was also relevant to credibility that the judge dismissed a general allegation of financial control made against him. The mother had alleged that the father took full control over her finances, so that she did not know her online banking details and her PIN numbers. Yet the judge recorded that the mother had accepted in evidence that she "maintained the same bank account, the same PIN number, the same bankcard during the course of the marriage, as she had before", and that not only was the child benefit paid into that account but the father also paid money into her account. The judge did not think that was financially controlling. The father

submits that that issue was also relevant in that the mother had complained to the police about financial control.

57. Ms Lee rightly submitted that the court should accord respect to the judge, who saw the witnesses and was immersed in the detail over a two-day hearing. She pointed to the consistency between the mother's witness statement and oral evidence. The judge had accepted that the inconsistency with the police documentation was explained by police inaccuracies. The judge had been ahead of his time in not relying on the fact of the ongoing consensual sexual relationship as pointing against the mother's assertion of the absence of consent to allegations 1-3.

58. Allegations 1-3 were serious, but related to past sexual behaviour between two adults in private, and would only be relevant to the welfare of the children if they formed part of the basis for holding that this was a coercive and controlling relationship.

59. In considering the way the judge approached the allegations, it is important to also to say something about the standard of proof, which, as with all factual matters in family proceedings, is the balance of probabilities. Baroness Hale explained the proper approach to the standard of proof in *Re B (Care Proceedings*) [2008] UKHL 35; [2008] 2 FLR 141 (*Re B*) at [70]-[72]:

> 70. … I would … announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in section 1 of the [CA 1989] is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> 71. As to the seriousness of the consequences, they are serious either way. …
>
> 72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability.

60. Baroness Hale reinforced the point in *Re S-B* [2009] UKSC 17 at [10]-[14] where she rejected the proposition that "the more serious the allegation, the more cogent the evidence needed to prove it".

61. In this case, however, by failing to step back and take into account the whole of the evidence before him, the judge placed unjustifiable weight on the issue of whether the mother had had a conversation with the father about her unhappiness at his initiating sex when she was asleep. He elevated that issue into the determinative one, saying that if it were proved, the allegations would themselves be made out. The judge failed to bring the various points of challenge made by the father into his evaluation. Those failures meant that there cannot be said to have been a fair consideration of these important allegations from the father's perspective. At no stage did the judge step back and consider the mother's credibility in the round, bringing into account his findings that the mother had put forward false allegations of reporting to Dr C, of financial control, and (also) of isolation from her family when in fact the family had lived with her parents between 2004 and 2012.

62. In all the circumstances, we have concluded that the finding that the father raped the mother during the marriage is unsafe and must be set aside.

5 & 6. Coercive and controlling behaviour

63. We will deal with the 5th and 6th conclusions together. In *Re H-N*, the court explained the importance of focusing on whether or not there has been coercive and controlling behaviour, as opposed to specific factual allegations of abuse. This case was decided before *Re H-N*, but nonetheless provides a clear example of the need identified in that case for the court (a) to focus on the overarching issue of coercive and controlling behaviour when it is raised, and (b) to do so in this context only to the extent that is relevant and necessary to determine issues as to a child's future welfare.

64. The judge in this case did not at any stage, either in the FHDRA or fact-finding, identify the issues that arose as to the future arrangements for these three children. The judge concluded that a fact-finding hearing was required before the mother had identified the allegations she wished to pursue, and before disclosure of relevant material had been obtained.

65. A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child's future welfare. It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.

66. At the risk of repeating what has been said at [37] in *Re H-N* and at [41] above, the main things that the court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate.

67. It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As *Re H-N* explained and we reiterate here, the duty on the court is limited to determining **only** those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms.

68. In *Re H-N* at [50]-[59], the court explained the correct approach where an allegation of coercive or controlling behaviour is made. The message in those paragraphs was plain. Where coercive or controlling behaviour is alleged in this context, it is likely to be the primary matter requiring determination, provided that it is likely to be relevant to a live issue relating to a child's welfare. *Re H-N* at [56] made clear that the focus on coercive or controlling behaviour as the primary issue should make it generally unnecessary to determine other subsidiary date-specific factual allegations.

69. Re H-N at [53] included the following sentence which may inadvertently have been misunderstood. It read:

> Where however an issue properly arises as to whether there has been a pattern of coercive and/or controlling abusive behaviour within a family, and the determination of that issue is likely to be relevant to the assessment of the risk of future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error.

70. That sentence is a requirement to consider an overarching issue of coercive or controlling behaviour, where to do so is necessary for the determination of a dispute relating to a child's welfare. It is not a requirement for the court to determine every single subsidiary factual allegation that may also be raised. The court only decides individual factual allegations where it is strictly necessary to do so in addition to determining the wider issue of coercive or controlling behaviour when that itself is necessary.

71. We can deal briefly with the allegations in this case. There was here a specific allegation that the father had controlled the mother during the marriage by making her feel that she could only cope if he was with her. The court was not, however, invited to consider any more general assertion of coercive and controlling behaviour.

72. In relation to the specific allegation, the judge found that the net effect was that the father effectively took control over what was happening within the marriage – whether that was intentional or not. He found that the father persuaded the mother that he, but not she, was able to deal with those things, and that she was unable to cope on her own. There was, the judge found, controlling behaviour which effectively undermined the mother's self-esteem and her ability to function on her own. It is to be noted that all that related to what happened during the marriage, which had ended some years ago and there was no evidence that similar behaviour had been repeated following the end of the marriage.

73. The judge also found, notwithstanding that numerous other WhatsApp conversations must have been available, that the mother's allegation of verbally abusive and bullying behaviour was proved based upon the June 2019 WhatsApp, which related to just one day. Unfortunately, however, the judge's order of 25 August 2020 (the order) is inaccurate in more than one respect. The order records that verbal abuse and bullying was established and that the June 2019 WhatsApp was 'an example' of the bullying. That is inaccurate because the allegation in the mother's Scott Schedule was limited to the June 2019 WhatsApp and that was how the judge dealt with it. No other evidence of bullying was adduced. The judge made no finding that the bullying behaviour in the June 2019 WhatsApp was an example.

74. Specific allegations were made that (a) during a visit on 23 January 2018, the father had pressured A to say that she had heard her grandfather and mother speaking about him, and (b) A had telephoned the mother begging to be collected from contact sounding hysterical and in fear. The judge found these allegations proved. The judge was satisfied that A was distraught as a result, and that the father should not have acted in this way. He was also critical of the mother for conducting an adult conversation with her father in front of A. The judge rejected the allegation that the children had been encouraged to sleep in bed with the father and his partner when they were both naked.

75. The mother alleged physical abuse towards the children, and the judge found that the father had, on more than one occasion, flicked B's ear to discipline him. He also found that, to discipline B, the father would on occasions shout at him and had once slapped his leg. The judge found that to be physical chastisement of B, but said he was not satisfied that it was excessive physical chastisement or that it crossed the line into physical abuse. Nonetheless, the judge found that it caused B distress. As we have noted, the judge rejected the allegation of financial control.

76. The order is also inaccurate in recording: "Proven. Physical abuse towards the children". The order then correctly records the judge's finding about ear flicking: "the court is not satisfied that this necessarily crossed the line to physical abuse but it caused B distress". The order ought not to have said that physical abuse towards the children was proven. It was not. And the order ought to have said that the allegation only involved one child and not children. It might also be noted that the order variously described allegations as "proven" or "proven on the balance of probabilities". This variation gave the unfortunate false impression that there was more than one standard of proof. As we have explained, there is not.

77. We have set out the judge's findings in some detail so that it can be seen how they might, or might not, have been relevant to the issues raised in the proceedings concerning contact and the future welfare of the children. In the light of our overall conclusions, each of these matters may have to be reconsidered by a judge at first instance. It is, therefore, inappropriate for us to comment further upon the question of relevance.

78. As we have said in our 5th and 6th conclusions set out above, the judge ought to have considered all the allegations in the context of whether the father was demonstrating coercive and controlling behaviour affecting the children's welfare after the separation. We find it surprising that the judge found controlling behaviour after the marriage based mainly on the June 2019 WhatsApp.

7. The consequences of our determinations

79. We have concluded that the findings in relation to the most serious allegations 1-3 are unsafe. As a result of that and the other matters we have identified, the fact-finding judgment and the schedule to the judge's order dated 25 August 2020 must be set aside.

80. The matter will be remitted to a Circuit Judge for a decision to be made as to whether a fresh fact-finding hearing is required on the basis of the principles set out in *Re H-N* and this judgment.

81. We reiterate also, as we did at the end of the hearing, that the parties should now consider whether there is room for compromise in the best interests of their children.

Last word

82. Before leaving this case, we would mention the Cafcass case analysis of 24 November 2020 prepared under section 7 of the CA 1989 (the case analysis), even though it is not the subject of the appeal.

83. The judge's findings of fact are recorded in the case analysis as follows:

> [F]indings were made against [the father] in respect of allegations of:
> 1. Rape – proven on balance of probabilities
> 2. Verbal Abuse/Bullying – proven
> 3. Control – proven
> 4. Anger/manipulation towards the children – proven on balance of probabilities
> 5. Physical abuse towards the children – proven.

84. This list, as a stand-alone citation of the father's behaviour, describes high level abuse which is of a wholly different order to the limited findings that were actually made by the judge. No reference is made to the fact that the "verbal abuse/bullying" related solely to the June 2019 WhatsApp on just one day. The finding of anger and manipulative behaviour towards A on one day is not limited and is falsely extended to "the children". The erroneously recorded finding of "physical abuse" is wrongly (as in the order) said to be "towards the children", which it was not.

85. There is, in our view, a real danger in reducing bespoke, detailed and subtle findings made by a judge to one or two word headline labels, in place of the original detail. The case analysis uses the labels of rape, bullying, manipulation and physical abuse, each of which emits a neon light in an erroneous and unjustified manner.

86. The case analysis continued under the heading "any harm the children have suffered or may be at risk of suffering" by saying this:

> Given the findings made, [B, C and A] have suffered harm and are at risk of suffering harm due to witnessing domestic abuse against their mother. [the father's] behaviour as described by [the mother] would have been very frightening for the children …
>
> B has suffered physical harm although [the father] does not accept that this was abuse.

87. Without labouring the point, it should be made clear that:

i) The judge did not make any finding that any of the children had suffered harm.

ii) There were no findings that the children witnessed domestic abuse against their mother.

iii) C was not mentioned in any of the findings.

iv) Insofar as the mother was found to have been the victim of abusive behaviour, this can only have related to the findings in relation to allegations 1-3, the June 2019 WhatsApp and the more general finding of controlling behaviour.

v) In terms of the children 'witnessing domestic abuse', this could only relate to the findings of control. The judge's findings concerned the father taking charge of all aspects of married life and the mother feeling disempowered as a result. We do not underestimate the impact of such a finding, but the judge's analysis

did not include any description of its impact on the children or that they would have found this behaviour 'very frightening'.

vi) B was not found to have been physically abused and, in not accepting that it was abuse, the father was doing no more than relying on the judge's finding to that effect.

88. The case analysis concluded with a recommendation that there should be no further direct contact between the children and their father, and that, henceforth, contact should be limited to one telephone call per week, together with cards and presents on birthdays, Christmas and Easter. Following a final hearing on 28 October 2021, the judge ordered on 25 November 2021 that the father be limited to indirect contact by way of letters, cards, gifts and photos no more than once per month. These orders will need to be reconsidered in the light of this judgment and after a reconsideration of the issues in the light of it.

89. All judges hearing children cases will know that there will almost inevitably be emotional fallout following the separation of adults who have been in a close relationship. Whilst the court will not hesitate to adjudicate upon parental behaviour where this impacts upon the protection or welfare of a child, it is not for the court to hear about, much less to resolve, issues between the parents relating to their time together, unless to do so is likely to be necessary for, and proportionate to, the resolution of a dispute relating to the protection or welfare of a child.