Neutral Citation Number: [2023] EWCA Civ 360

Case No: CA-2022-002473

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MRS JUSTICE KNOWLES
[2022] EWHC 3089 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2023

Before :

SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE MACUR
and
LORD JUSTICE PETER JACKSON

- -

Between :

	A	**Appellant**
	- and -	
	B and C	**Respondents**

- -
- -

Mr Anthony Metzer KC and Dr Charlotte Proudman (instructed by **EH Dawson Solicitors**)
for the **Appellant**
Ms Deirdre Fottrell KC and Mr Tom Wilson (instructed by **Jones Myers**)
for the **1st Respondent B**
Ms Rachel Langdale KC and Mr James Hargan (instructed by **Pepperells Solicitors)**
for the **2nd Respondent C**

Hearing dates : 7th March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Andrew McFarlane P:

1. On 2 December 2022, Mrs Justice Knowles handed down judgment in two appeal cases that had been heard together in the High Court. In addition to factors specific to the individual cases, the appeals raised a number of overarching issues regarding the approach that should be taken in the Family Court where allegations of rape are made in the context of private law proceedings. On 6 February 2023, King LJ granted permission to the appellant in one of the two cases for a second appeal seeking to challenge Knowles J's decision in that case both with respect to the case itself and also on the more general issues. The appeal was heard on 7 March 2023 and, at the conclusion of oral argument, we announced our decision which was that the appeal was to be dismissed on all grounds. This judgment sets out my reasons for reaching that decision.

2. I propose first to consider the general matters raised before Knowles J that have been renewed on appeal, before moving on to consider the individual grounds of appeal concerning the facts of this particular case.

The general propositions considered by Knowles J

3. At the first appeal hearing, Knowles J was invited to consider the following propositions:

> a. Whether the Family Court should apply a consistent definition of (i) rape, (ii) sexual assault or (iii) consent, making clear the difference between consent and submission;
>
> b. Whether the failure to have a consistent approach to these issues was in breach of the Articles 6, 8 and 14 rights of the Appellant mother [under the European Convention on Human Rights];
>
> c. Whether the definitions of rape, sexual assault and consent used in the criminal justice system should be either a starting or finishing point for judges in the Family Court;
>
> d. What the approach of the Family Court should be to a complainant's sexual history when determining allegations of rape or sexual assault; and
>
> e. Whether, when determining allegations of rape and/or sexual assault, judges in the Family Court should give themselves a warning about rape myths. Generally, such myths concern themselves with the behaviour or experiences of a complainant.

4. In the course of a full and closely structured judgment, Knowles J considered each of these matters in turn ([2022] EWHC 3089 (Fam)). Having considered Knowles J's judgment both at the time that it was handed down and now, in more detail, for the purpose of this appeal, I am in full agreement with what is said there. There is therefore a danger that anything said in this judgment may be pored over for signs of difference of judicial opinion where, in reality, there is none. It is, however, necessary to consider the matters that have properly been raised by Mr Anthony Metzer KC and Dr Charlotte Proudman on this second appeal. I therefore propose to summarise

Knowles J's determination on these overarching issues, before considering the Appellant's submissions and setting out my conclusions on these points, but my intention is not to differ in any material particular from the more comprehensive analysis that has been provided by Knowles J.

5. Before turning to the specific propositions, Knowles J considered the overall approach that she should adopt as a judge sitting at appellate level. She concluded that it was not appropriate for a judge to step in to fill any apparent lacuna left by Parliament and that, as advised by Lord Dyson MR in *Re K and H (Children: Unrepresented Father: Cross-examination of Child)* [2016] 1 FLR 754, judicial restraint was called for. There was no legal basis, therefore, for the court to be used to construct an entirely new legal framework for the determination of factual issues in domestic abuse cases. Where, however, there was a need for guidance or observations aimed at clarification of the existing law and practice, then an appellate court was not precluded from meeting that need. The judge was 'quite clear, however, that it is not my role to construct a substantive framework for determining allegations of rape and sexual assault in the Family Court' (paragraph 12).

(a) and (c) Family Court definition of 'rape', 'sexual assault' and 'consent'?

6. In response to the submission by Mr Metzer that there should be a clear and consistent approach to rape, sexual assault and consent in Family proceedings, Knowles J concluded as follows:

> a. The Family Court must not import criminal definitions as an aid to fact-finding paragraph 23];
>
> b. At first instance, the Family Court determines allegations of rape and sexual assault without a legislative definition or framework [paragraph 24];
>
> c. A focus on seeking to characterise or establish behaviour as meeting a particular definition runs the risk of the court becoming 'unnecessarily bogged down in legal technicality' (see paragraph 29 in *F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam) [Cobb J]);
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> d. Applying criminal definitions narrows the court's focus inappropriately away from the wider consideration of family relationships at play in a fact-finding hearing;
>
> e. Application of an alternative definition for rape, sexual assault or consent created a danger of adopting too narrow a focus on the sexual relationship between two people (*K v K* [2022] EWCA Civ 468 paragraph 61);
>
> f. The focus of a fact-finding exercise in children cases should be on whether the adult relationship was/is characterised by coercion and/or control. It should be on a wide canvas but should be limited only to those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, on what terms (*K v K* paragraph 67);

g. Criticism of PD12J for failing to assist in determining specific factual allegations of sexual abuse was misplaced as PD12J sets out a **procedural** framework for case management, rather than one for evaluating evidence.

7. Knowles J therefore rejected the need for the Family Court to adopt and apply consistent definitions of rape, sexual assault and consent.

(b) Failure to apply a consistent approach to these issues: breach of ECHR, Arts 6, 8 and 14

8. Knowles J rejected the submission that failure to apply consistent definitions of rape, sexual assault or consent in Family proceedings breached the rights of complainants under ECHR, Arts 6, 8 and 14 for the following reasons:

a. Whilst domestic abuse engages a complainant's rights under Arts 6, 8 and 14, there is no domestic or international authority which supports the proposition that the State is required to adopt a definition of these matters in civil proceedings relating to the welfare of a child (paragraphs 34 and 35);

b. That there are and will be different decisions by different judges on different facts and different evidence does not establish a conflict of approach between different courts and is not a breach of Art 6 (paragraph 37).

9. For those, and other reasons set out at paragraphs 38 to 42, Knowles J was 'wholly unpersuaded' that the Appellants had established proposition (b).

(d) Approach to complainant's past sexual history

10. Knowles J, with the encouragement of all parties, accepted that there was a need for guidance on the approach that the Family Court should take to a complainant's sexual history when determining allegations of rape or sexual assault. Before offering a procedural framework to assist Family judges in their case management task in this context, Knowles J reviewed the underlying legal framework and the general approach to evidence relating to sexual history in paragraphs 46 to 57. The procedural framework then follows at paragraph 58:

a. If a party wishes to adduce evidence about a complainant's sexual history with a third party, a written application should be made in advance for permission to do so, supported by a witness statement.

b. It is for the party making such an application to persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine.

c. Any such application will require the court's adjudication preferably at a case management hearing.

d. The court should apply the approach set out by Knowles J at [45]-[49].

e. If a party wishes to rely on evidence about sexual history between partners, they do not need to make a specific application to do so unless reliance is also placed on intimate images. In those circumstances, the party must issue an

application in accordance with the guidance at [77]-[78] in *Re M (Private Law Children Proceedings: Case Management: Intimate Images)* [2022] EWHC 986 (Fam).

f. If a party objects to evidence of sexual history between parents/parties being filed, they should make an application to the court in advance, supported by a witness statement explaining why this material is either irrelevant or should not be admitted.

g. Any such application will require the court's adjudication preferably at a case management hearing.

h. The court should apply the approach set out by Knowles J at [45]-[49].

(e) Should judges give themselves a warning about rape myths?

11. Having considered the issue, Knowles J concluded that judicial awareness of rape myths was a matter best addressed during training and was, therefore, a matter for the Judicial College. She did, however, draw attention to various resources on the topic which are available to judges (paragraph 63):

'On the basis that I have found what follows of assistance in my own practice as the lead judge for domestic abuse, I draw the attention of family judges to Chapter 6 of the Equal Treatment Bench Book (July 2022) entitled *"Gender"*. Under a subheading entitled *"Sexual Offences: Who is Affected?"*, there is information about sexual offences which includes several paragraphs addressing rape myths which may feature in criminal proceedings (see [74]-[91]). Though written to assist those sitting in the criminal courts, there is much in that section which family judges may find useful. The Equal Treatment Bench Book is publicly available on the judiciary.uk website at Equal Treatment Bench Book July 2022 revision (2) (judiciary.uk). Likewise, the CPS Guidance on Rape and Sexual Offences at Annex A provides a comprehensive guide to the unhelpful stereotypes which may cloud judicial thinking in cases involving sexual assault. It too is publicly available on the cps.gov.uk website and was last revised in May 2021: Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes | The Crown Prosecution Service (cps.gov.uk).'

12. Knowles J concluded that she should not produce a list of common rape myths, or attempt to craft a standard self-direction, as no list would be complete and to do so might run the risk of creating a rigid framework, where what is needed is judicial flexibility. Secondly, any self-direction would also be inflexible as it could not encompass the great variety of stereotypical thinking outlined in the resources listed in the preceding paragraph.

The challenge to Knowles J's decision in relation to general considerations

13. In the present appeal, Mr Metzer and Dr Proudman sought to challenge Knowles J's various conclusions on these general matters by submitting that the judge's failure to provide clear definitions of rape, sexual assault and consent, or to require a consistent approach to past sexual history or rape myths, were 'errors of law'. It was further asserted that such errors of law breached the Appellant's rights under ECHR, Arts 6, 8

and 14. The submissions made to Knowles J on these general matters were repeated before this court.

14. It was submitted that Knowles J was in error in holding that it was a matter for Parliament to legislate on definitions of rape, sexual assault or consent. Reference was made to *R v R* [1991] UKHL 12 in which the House of Lords determined under English criminal law that it is a crime for a husband to rape his wife. It was said that Hayden J had defined coercive and controlling behaviour in *F v M* [2021] EWFC 4 and the current definitions of domestic abuse and its constituent parts are contained in PD12J, rather than in any Parliamentary statute.

15. Addressing this last point immediately; in *F v M*, Hayden J conducted a valuable exercise by clarifying the potential scope of behaviour which may be found to be coercive and controlling, and therefore abusive, but, he did no more than draw upon statutory guidance that had been issued by the Home Office pursuant to the Serious Crime Act 2015, s 77(1) [*F v M* paragraph 60] and upon the definitions contained in Family Procedure Rules 2010, PD12J and in s 76 of the 2015 Act [paragraphs 103 to 108]. Insofar as Hayden J added anything additional to this existing material, the judicial contribution was limited to breaking down the definitions and offering further guidance emphasising the importance of judges recognising 'the insidious scope and manner of this particular type of domestic abuse' and the need to look for repetition and patterns of behaviour. In no manner can it be said, as Mr Metzer asserted in his Skeleton Argument, that 'Hayden J defined coercive and controlling behaviour in *F v M.*'.

16. Having considered the Appellant's submissions, it is, in my view, all the more plain that Knowles J was correct in holding that the Family Court should hold back from introducing and then developing its own, free-standing, definitions of rape, sexual assault and consent. Parliament comprehensively considered the Family Court's approach to domestic abuse during the passage of the Domestic Abuse Act 2021 into law, yet that statute makes no provision for any of the propositions of law that have now been raised in this appeal. For the court now, unilaterally, to step in and introduce wholly new legal requirements would be an exorbitant step and one far removed from merely filling a lacuna within existing legislative provision. It is as inappropriate for the Family Court to develop (no doubt over a number of test cases in the coming years) its own bespoke definitions, to be applied in fact-finding cases as a matter of law, to determine whether conduct was, or was not, 'rape' or 'sexual assault', or whether 'consent' had been given by a partner in such activities, as it is to adopt criminal law definitions and requirements.

17. In a number of recent authorities, judges in the Family jurisdiction have consistently held that the Family Court should not be drawn into applying a strict definition akin to those of 'rape', 'murder', 'manslaughter' or other serious criminal activity [*Re R (Children) (Care Proceedings: Fact-Finding Hearing)* [2018] EWCA Civ 198; *Re H-N (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] 2 FLR 1116 (CA); *F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam) (Cobb J)].

18. In *Re R*, at paragraph 62 I explained that:

'In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities)

has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established.'

19. Again, in *Re H-N*, in the judgment of the court [McFarlane P, King and Holroyde LJJ] at paragraph 71 the need to avoid strict definitions was, again, plainly stated:

'Hickinbottom LJ observed during the hearing in *Re R*, 'what matters in a fact-finding hearing are the findings of fact' [paragraph 67]. The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes. Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context.'

20. In *Re R* and in *Re H-N* the Court of Appeal, and at High Court level Cobb J in *F v M* (2019) and Hayden J in *F v M* (2021), judges have been keen to prevent the Family Court becoming 'bogged down' or 'distracted', or for the true issues to be 'obfuscated', by the legal technicality that would be introduced by definitions which were then to be applied as a matter of law. Whilst the focus of those decisions was upon the proposition that the definitions in question were those applicable under the criminal law, the mischief which, it has been held, should be avoided applies in equal measure to any alternative definitions that may be promulgated.

21. A further point, in addition to those considered in the extant case law and by Knowles J below, is that the focus of the Domestic Abuse Act 2021, and of processes now in operation within the Family Court, is to support and enhance the ability of victims to achieve recognition of past domestic abuse and protection from further such abuse in the future for themselves and their children. In that context, it is very difficult to understand why, on behalf of victims, it is submitted that a new and additional legal threshold should be introduced which a complainant must satisfy before the court could find that they had been the victim of rape or sexually abusive behaviour.

22. Whilst the Appellant repeated the claim that the absence of the definitions that are sought in the Family jurisdiction amounts to a breach of ECHR, Arts 6, 8 and 14, no authority is cited in support of that claim and no direct challenge is made to Knowles J's thorough analysis between paragraphs 33 and 42.

23. For these reasons, Knowles J was entirely correct in rejecting the assertion that the Family Court should import definitions of rape, sexual assault and consent (whether drawn from criminal law or elsewhere).

24. With respect to the issue of the approach to be taken in the Family Court to a complainant's past sexual history, ground 5 of the Appellant's grounds is that 'the learned judge failed to draft a consistent approach to a complainant's sexual history in the Family courts'. Neither the ground of appeal, nor the supporting argument, indicate whether it is asserted that the judge's failure amounts to an error of law, procedure or otherwise. Mr Metzer's Skeleton Argument relies heavily upon a

passage at page 124 of the general narrative within the Ministry of Justice 2021 report '*Assessing Risk of Harm to Children and Parents in Private Law Children Cases*' ['the Harm Report']. It is submitted that there is a pressing need for the Family Court to consider guidance on the topic of cross-examination on past sexual history to ensure consistency across the Family jurisdiction.

25. The Appellant submits that guidance should be given to limit the degree to which information about the past sexual relationship between a complainant and an alleged perpetrator should be admitted in Family proceedings. Contrary to the procedural framework offered by Knowles J at paragraph 58 of her judgment (see paragraph 10 above), Mr Metzer proposed that information about the history of the couple's sexual relationship should not be filed unless a written application to do so had been submitted and adjudicated upon by the court. Further proposals were made to ensure that during the analysis and balancing exercise on such an application full account is to be taken of the vulnerability of any party and other factors including the motivation of the party seeking to introduce the material.

26. Knowles J concluded that, for evidence relating to the parties' own sexual relationship, the default position should be set so that a preliminary application to adduce evidence was not required. Other than asserting that there is a need for guidance, and putting forward their alternative proposals, counsel for the Appellant do not submit that Knowles J was in error for taking an alternative course to the one that they proposed.

27. I consider that Knowles J was correct to draw a distinction between evidence of past sexual history with a third party, and that arising from the relationship between the two parties who are before the court. The judge rightly recognised in paragraphs 53 and 57 that issues of propensity may be relevant in the former. If so, the party who seeks to rely upon such evidence should explain why the evidence of previous sexual behaviour with a third party does point to a propensity to commit that which is alleged to have occurred in the family relationship under consideration. In the latter case, I would only add, whilst otherwise endorsing the guidance that Knowles J from a party who seeks to rely upon evidence of the parties' own sexual history should give notice and sufficient particulars of the nature of the evidence sought to be adduced to enable the other to seek to disapply the default position. There is no basis, indeed none is put forward, for holding that the judge was in error or otherwise wrong to set the default position in relation to evidence of sexual history as she did. As a ground of appeal, the Appellant's ground 5 therefore wholly fails.

28. The Appellant's ground 6, in like manner, simply records that the judge failed to provide any guidance on the issue of rape myths, without asserting that that failure was in some manner contrary to the law or in some other respect wrong. The Appellant's skeleton argument emphasises the undoubted importance of judges being aware of rape myths and their potential to impact upon the process of analysis and decision-making during the exercise of fact-finding. Knowles J plainly recognised the importance of this issue. She usefully drew attention to the resources that are readily available to judges on the topic. She expressly concluded that to produce a definitive list of such myths might have the negative effect of limiting a court's focus only to those matters on the list, thereby ignoring others and preventing flexibility. Finally, Knowles J considered that developing the awareness of Family judges to the importance in this regard should be taken up through training rather than judicial

diktat or detailed guidance – over and above the general guidance given in her judgment.

29. Mr Metzer submitted that the most comprehensive and accessible document dealing with rape myths is that produced by the Crown Prosecution Service ['Annex A']. It is referred to by Knowles J at paragraph 63 as providing a 'comprehensive guide'. The point taken by the Appellant under ground 6 is simply that, in addition to referring to the guidance, 'it needs to be clear that Family Court judges are required to avail themselves of guidance on rape myths and tropes when determining allegations of the upmost gravity'. It is difficult to understand how Knowles J's judgment, which expressly draws judges' attention to the very guidance that it is suggested should be used, can be a target for criticism in this respect. In the absence of any ground based in law or other valid basis for challenge, ground 6 does not even fall to be considered as a valid ground of appeal.

30. It follows that the three general, policy based, grounds of appeal wholly fail and that the decision of Knowles J on these important matters stands and, if My Lady and My Lord agree, is endorsed by this court.

Case-specific grounds of appeal

31. The factual background and context of the case under appeal is more fully set out by Knowles J at paragraphs 67 to 81. The appeal is against a judgment given by Recorder Temple ['the recorder'] on 19 May 2022 at the conclusion of a fact-finding hearing within private law children proceedings. The recorder dismissed all of the factual allegations made by the Appellant mother. It is of note, and of concern, that the hearing was the court's seventh attempt at determining the disputed factual issues and it took place more than two years after the proceedings commenced.

32. The points now taken on a second appeal before this court are high level and relate largely to the approach of the recorder to the law and practice, rather than the detailed facts of the case. The exception is ground 3 which does involve a particular factual aspect. Save for the background to ground 3, it is not, therefore, necessary, to give a detailed account of the facts in this judgment. I will therefore turn immediately to consideration of the three grounds of appeal.

Ground 1: where a judge applies an incorrect legal test, and fails to apply the correct test, the resulting decision cannot be upheld on appeal

33. The background to this ground is set out by Knowles J at paragraph 77:

'At the start of her judgment, the judge observed that the case had been listed for fact finding in accordance with Practice Direction 12J and went on to draw specific attention to the mother's vulnerability. Having itemised the allegations she was required to determine with a brief summary of the factual background, the judge set out the general legal principles relevant to the fact finding exercise. Having done so and under the heading "The Legal Definition of Rape", the judge set out the definition of rape in s. 1(1) of the Sexual Offences Act 2003. She made no mention of other case law concerned with fact-finding in private law proceedings where domestic abuse was alleged. The judge then listed particular features of the mother's oral evidence at some length as well as, rather more briefly, features of the father's oral evidence in

response. Having done so, the judge went on to consider her findings with respect to each allegation, reminding herself that the mother had the burden of proof on each of the allegations she made.'

34. It is accepted by all parties, as it was before Knowles J, that the recorder was in error in setting out the definition of rape in SOA 2003, s 1(1). On the basis of the well established authority already cited at paragraph 17 above, the criminal law with respect to rape and other serious crimes has no direct relevance to a fact-finding process in the Family Court. Equally, it was accepted, as it had to be, that the recorder failed to make any reference to the law and practice which does apply in the Family Court. In particular there was no reference to the, then, recent authority of *Re H-N* or to the more general provisions relating to issues of domestic abuse within PD12J.

35. Knowles J regarded the judge's reference to the SOA 2003 as 'very troubling', but she went on to observe that 'to leap from that error to the assertion that the judge determined the rape allegations in this case to the criminal standard requires a more careful analysis of the judgment. It is the substance and not the form of the judgment which must be the focus of any appeal'.

36. There were two allegations of rape before the recorder. The first involved a claim that the Appellant had consented to sexual intercourse on an occasion, early in their relationship, in August 2013 on the basis that the respondent would be wearing a condom. At some stage during the intercourse the respondent removed the condom. The issue for the judge was whether that was done without the Appellant's consent. The recorder decided, having heard the evidence of both parties, that the Appellant consented to the removal of the condom.

37. The second allegation of rape was that, in January 2014, the respondent had raped the Appellant in the presence of her two year old daughter. In relation to this allegation, the recorder preferred the evidence of the respondent and concluded that the allegation had not been proved.

38. Knowles J concluded, with respect to the submission that the incorrect reference to the criminal law of rape rendered the factual conclusions unsafe, as follows [paragraph 87]:

'Thus, though I am troubled by the judge's reference to the Sexual Offences Act 2003 without qualification or explanation, I find that this error did not infect her substantive decision-making which was in accordance with the legal principles applicable to fact-finding in the family court, [which] were set out at the beginning of her judgment.'

39. Before this court, Mr Metzer submitted that, where the recorder had 'applied the wrong law' and totally failed to refer to the applicable law, 'it is an error of law to find that a judge can apply the wrong law and legal principles and yet the decision remains safe.' The contention that the recorder 'applied' the wrong test is repeated in the Appellant's skeleton argument a number of times with respect to this ground. It is also asserted that, because of her reliance upon the criminal definition, the recorder viewed the allegations through a narrow prism of rape and consent, as defined in criminal law. During the oral hearing, in reply to a question from the court, Mr Metzer accepted that he could not point to any reference in the judgment which demonstrated that the recorder actually applied the criminal law. His submission was that, after the

recorder had set out her account of the criminal law, there was a presumption that she must have applied it.

40. The recorder is criticised for forming her finding on the first rape allegations by reference to whether the condom was removed 'without her consent' and to 'the consensual removal of the condom'. It is therefore argued that the judge erred in concluding that the recorder's findings were not infected by her erroneous citation of inapplicable law. It was submitted that 'applying the wrong legal test … is plainly wrong and incapable for remedy as it goes to the substance of the decision and cannot simply be dismissed as "troubling", and still stand.'.

41. Counsel for both parties and for the child (who acted through a CAFCASS guardian, solicitor and counsel) had prepared a document headed 'Summary of Relevant Law' for the hearing before the recorder. A copy of that document was requested during the appeal hearing and has now been provided. It was not apparently available to Knowles J but is thought to have been provided to the recorder. The content of the summary is striking. Over the course of four pages, the reader is taken to quotations from a half dozen or so cases on the general topic of fact-finding. There is no mention of PD12J. The words 'domestic', 'coercion' or 'control' do not feature in the document at all. The word 'abuse' only appears twice, on neither occasion in the context of domestic abuse. Indeed, the second occasion that 'abuse' appears it is in a quotation from Baroness Hale from paragraph 29 of *Re W* [2010] UKSC 12 (a case relating to the attendance of children to give evidence in Family proceedings) which the authors of the document wrongly attribute to a different case, '*Re B* [2008] UKHL 35'. If the content of this apparently agreed summary of the applicable law is representative of the support offered to the recorder by the three counsel who appeared before her, then, whilst still a matter of real concern, it is less surprising that she did not refer to PD12J or *Re H-N* in her judgment.

42. The recorder's recital of the core components of rape under the criminal law was plainly wrong and a significant error. Knowles J was, however, correct to investigate whether that error, significant though it was, in fact had any direct impact on the two factual determinations that the recorder made on allegations of rape. In circumstances where the recorder found as a fact on the first allegation that the removal of the condom occurred with the Appellant's consent, and on the second that the incident was simply not proved, Knowles J was justified in concluding that there was no connection between the failings and the findings and, as a result, the recorder's conclusions on these two matters should stand.

43. The case put before this court by the Appellant does not, with respect, directly challenge the approach taken by Knowles J. Ground 1 is based upon the assertion that the recorder 'applied' the criminal test when reaching her conclusion. That is a misapprehension. As Knowles J observed, once the recorder had recited the criminal provisions, they were not referred to again at any stage in her judgment and her conclusions were simply based upon the factual evidence before the court without any evaluation as to the criminal law or any other legal construct.

44. Insofar as the Appellant challenges the recorder's reference, with respect to the first allegation of rape, to 'consent' and 'consensual', these are ordinary words. The pleaded allegation was that the condom was removed 'without the complainant's knowledge or consent'. Consent was what the allegation was all about. It is not

possible to conceive of the issue being determined without the judge referring to the issue of consent and using the words 'consent' and 'consensual'. To do so is not, in some way, to import the criminal law into the case. By her finding, the recorder held that the Appellant knew about the removal of the condom and agreed to continue with intercourse thereafter. In the circumstances there is no indication that the recorder 'applied' an erroneous legal test or that her specific finding is in some other respect unsafe.

45. Likewise with respect to the second rape allegation, the recorder simply found that the factual account given by the Appellant was not proved.

46. In the circumstances, ground 1 of this second appeal must fail.

Ground 2: no reference to PD12J, 'coercive and controlling behaviour' or *Re H-N*: not open to judge to assume recorder 'knew how to perform her functions and which matters to take into account'

47. Ground 2 deals more generally with the absence in the recorder's judgment of any reference to PD12J, coercive and/or controlling behaviour or to *Re H-N*. Knowles J approached the issue at paragraph 89 as follows:

'I am concerned with substance rather than form. It is unnecessary for a judge to "slavishly restate the law" or "incant mechanically passages from the authorities" (applying *Re F*). Further, I should assume that, unless the judge has demonstrated the contrary, she knew how to perform her functions and which matters she should take into account. I have taken into account in my evaluation of this ground that the evidence in this case amply demonstrated the judge's awareness and application of Practice Direction 12J in her case management of these proceedings. No party submitted otherwise. In fact, at paragraph 2 of the judgment, the judge made explicit reference to PD12J when she recorded that the matter had been listed for a fact-finding hearing "in accordance with PD12J".'

48. Knowles J went on to describe PD12J and to explain why it is a 'crucial document' for Family judges dealing with domestic abuse and harm within children proceedings. She further gives a detailed account of the relevant content and of the key messages from *Re H-N*, before noting that the Appellant's case before the recorder had been based upon the respondent exhibiting a pattern of controlling and abusive behaviour which had the effect of coercing her to remain in a relationship, to conceive a child, to have sex and to rekindle the relationship. In her judgment, the recorder stood back and assessed the quality of the parental relationship and held that she could not

'find on the evidence that [A] was being coerced or manipulated into continuing the relationship with [B]. Taking a holistic view of the evidence, it seems to me much more likely that [A] was a willing participant in her relationship with [B] in 2014, as [B's] evidence confirmed.'

49. Knowles J concluded on this ground:

'94. The judge's conclusions were based on her analysis of the evidence. For example, she observed that the mother's case as to the father's coercive behaviour was expressly based upon alleged threats made to her of blackmail by the father, of

which the judge found no evidence. Further, the judge evaluated the mother's allegation that she was pressured or coerced into having sex and rough sex at that. The mother had expressly relied upon an assertion that there was medical evidence in support of her sustaining vaginal trauma as a result. Having surveyed the wide canvas of evidence, the judge could not identify any such medical evidence. She also for the reasons articulated in her judgment found the mother's evidence about being pressured into conceiving a child and coerced into having an abortion to be internally inconsistent, preferring the evidence of the father on this issue. Thus, the judge evaluated the mother's allegations about pressure and coercion in the parental relationship by reference both to the evidence as a whole and to the evidence of each party.

95. Thus, I have concluded that ground 2 is not established.'

50. In promoting ground 2, Mr Metzer submitted that, although Knowles J identified the key matters of importance within PD12J and *Re H-N*, she failed to explain or identify how the recorder applied that guidance. It is asserted that the recorder wholly failed to address the Appellant's allegations of coercive and controlling behaviour. During oral submissions, Mr Metzer was taken to paragraph 91 of Knowles J's judgment which points out that the operative parts of PD12J concern themselves with case management, as opposed to the actual task of fact-finding. Mr Metzer confirmed that the Appellant did not take issue with paragraph 91, and he accepted my observation that there is nothing in PD12J that would have had any impact on the fact-finding process if the recorder had expressly referred to it. The complaint made by the Appellant in relation to PD12J, with respect to the judgments of both the recorder and the judge, is that no reference was made to paragraph 3 where the central concepts of domestic abuse and coercive or controlling behaviour are defined.

51. On behalf of the respondent, Ms Deirdre Fottrell KC and Mr Tom Wilson submit that Knowles J was correct to look at the recorder's judgment as a whole and to focus on substance and not its form. This court, they submit, should take the same approach. On that basis it is said to be clear that the recorder undertook a full survey of the evidence and correctly determined how the parties had behaved towards each other. Knowles J was, it is submitted, correct to reject the plea that a failure to refer to, or recite, the relevant PD or authority was a fatal flaw. The recorder was plainly aware of PD12J, as she had case managed the proceedings by reference to it and made express reference to it in that context at the start of her judgment.

52. For the purposes of this second appeal, this court has looked again at the recorder's analysis. When that exercise is undertaken, my conclusion is on all fours with that of Knowles J. The Appellant's case before the recorder was very much that her allegations formed part of a piece and that the respondent was a manipulative and controlling individual. The recorder clearly understood that that was the case and, at a number of stages in the judgment, stood back and looked at the reality of the parental relationship. Her conclusion, having done so, was that the overarching allegation, just as was the case with the more detailed specific allegations that supported it, was not made out. In the circumstances I am in agreement with the evaluation of Knowles J on this issue and I find, as she did, that ground 2 is not made out.

Ground 3: recorder in error by attributing too much weight to a resumption of sexual relations in 2017

53. The couple had separated in 2014 and had no contact with each other between November 2014 and December 2016. In January 2017, the mother asked the father for help in caring for their child and thereafter they resumed a sexual relationship until April 2017. There was an issue at first instance over the degree to which, if at all, the resumption of a sexual relationship had been consensual. On the basis of the evidence, not least contemporaneous photographs and text messages sent in 2017, the recorder found that the Appellant 'at that time, at least, … appeared to be very much in control of her role in the parties' relationship and was clear in articulating her own wants and desires to Mr [B]'.

54. Insofar as the recorder relied upon contemporaneous evidence arising from 2017 with respect to the mother's assertion that the sexual relationship at that time was not consensual, Knowles J concluded that it was difficult to see how her approach could be challenged. The important question for Knowles J, and now for this court, was the degree of weight that the recorder attributed to this finding as to the Appellant's behaviour in 2017 when considering the earlier allegations of abuse in 2013/14.

55. On that point, Knowles J's conclusions were:

> '101. The key issue was whether the judge placed improper weight on the evidence relating to the parents' 2017 relationship when assessing the allegations of earlier sexual abuse. The judge clearly took that material into account when assessing the relationship as a whole. However, it was evident that her analysis of the earlier allegations of rape and sexual coercion was based on her assessment of the parties' evidence as a whole, with appropriate self-direction as to the caution to be applied to the way in which the parties gave their oral evidence as set out in [21] - [22] of her judgment. Thus, the judge found that the mother's evidence with respect to the first allegation of rape in August 2013 was internally inconsistent whereas that of the father was consistent. Where there was a conflict of evidence, the judge preferred that of the father. Additionally, there was an absence of evidence to support the mother's account that she had been subjected to rough sex as she described. The mother had expressly claimed that there was medical evidence in support of that allegation yet the judge had been unable to find any such evidence in the records upon which reliance was placed. Further, although the mother had alleged that the father had threatened her and engaged in blackmail, the judge was unable to find evidence of this and preferred the evidence of the father. With respect to the remainder of the allegations, and in particular to allegations that the father had coerced the mother into conceiving a child and into having an abortion, the judge's evaluation of each parent's evidence led her to find the father's evidence on these issues more credible than the mother's because of the inconsistencies in the mother's evidence.
>
> 102. Having considered carefully the evaluative exercise conducted by the judge, I am unpersuaded that any of the grounds of appeal have been established. It thus follows that I dismiss this appeal…'

56. In support of this ground, Mr Metzer took the court to paragraphs 59 and 66 of the recorder's judgment where, both before her review of the specific rape allegations [paragraph 59] and after that review [66] the recorder holds that resumption of sexual relations in 2017 is not consistent with the earlier rape allegations. Mr Metzer submits that, in circumstances where the mother did not claim that the parties never had consensual sex, but complained of rape on two specific occasions, the recorder was

not justified in placing weight on the 2017 events, which were irrelevant to the question of whether she had been raped previously. He further submitted that, whilst the recorder was justified in taking the striking messages and images sent by the mother to the father in 2017 into account, too much weight was placed upon them when the recorder went on, more generally, to assess the mother's veracity.

57. Mr Metzer is, of course, correct in asserting that just because a party may consent to sexual relations on one, or many, occasion(s), that does not mean that rape did not occur at another time. But, in evaluating the approach taken by the recorder, it is important to look at her judgment as a whole, as Knowles J did. When that exercise is undertaken it can be seen that Knowles J's evaluation is valid. It is not the case that the recorder simply came to a conclusion about the parties' behaviour in 2017 and then relied on that, and that alone, to back-calculate to a conclusion on the earlier rape allegations. That is plainly not what she did, though I would accept that her use of the expression 'not consistent' was inapt, when what her reasoning conveyed was that the complainant's later behaviour was 'not supportive' of her earlier allegations. Neither was her conclusion about the Appellant's conduct in 2017 confined to a binary finding regarding consent. The judgment shows that it was the character of the mother's behaviour in 2017 which was of particular note for the recorder who, at [66], referred to 'the communications sent by text message by [A] to [B] at that time, including repeatedly and heavily sexualised photographs, language and images'.

58. In his oral submissions, Mr Metzer went further and contended that, by holding (at paragraph 100) that it was difficult to see how the recorder's approach to evaluating the 2017 material when determining whether the sexual relationship 'at that time' could be challenged, Knowles J had erred in law. The error being that it was simply not open to the appeal judge to hold that the weight attributed to that material was permissible. This submission by Mr Metzer was ambitious. Both the recorder and the judge enjoyed a substantial discretionary margin when dealing with the attribution of weight, but, in any event, it is hard to see how the recorder could be faulted for placing reliance upon such explicit and encouraging messages that were being sent to the father.

Some additional points

59. Although not an issue in the appeal, during the hearing the court asked whether the recorder had indicated why it was considered necessary to determine the rape allegations. We were told that the appellant's case was that if findings of rape were made it would increase the risk of harm to the child and the rape survivor who is the resident parent. Mr Metzer submitted that contact between a potential rapist father and the child would need to be carefully risk assessed. The parties were, however, unable to point to any decision of the recorder identifying the need to conduct a fact-finding hearing on those allegations. Where the welfare focus of the court process in 2022 was to look at future contact, there must be a question mark over the necessity for the court to determine whether, during otherwise consensual sexual relations, the removal of a condom in 2013 was of any relevance to the issue of contact 9 years later.

60. This court has been clear and consistent in holding that a fact-finding hearing should only be undertaken where to do so is necessary in order for the court to determine the particular issues regarding the child's welfare that are in dispute (see *Re H-N*

paragraphs 8 and 139). At paragraph 37 of *Re H-N* the court described the correct approach:

> '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 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".'

In *K v K* the Court of Appeal reiterated the message in firm terms (paragraph 42):

> '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.'

61. In this regard, it may also be useful to clarify what is said at paragraph 59 in the judgment in *Re H-N*:

> Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact-finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, **unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape)**.' [emphasis added]

The purpose of the highlighted passage was to indicate that there may, on the facts of a particular case, be an allegation or allegations that are so serious that, **in the context of the child welfare issues in that case**, they should be determined irrespective of any alleged pattern of coercive or controlling behaviour. It was not the intention of the court to indicate that every allegation of 'rape' must be heard and determined. The Court must analyse the relevance of the allegation/s made in the context of the specific application for a child arrangements order. To determine a single isolated

allegation of non-consensual sexual activity committed many years previously between the parents, after which the alleged abusive partner has continued to play an active and beneficial role in a child's upbringing is unlikely to yield relevant information to the ultimate question to be determined by the Family Court.

62. This judgment, which explicitly endorses Knowles J's approach in such cases, highlights the importance of what should be a closely managed and comprehensive Case Management Hearing. If the court finds it is relevant to determine allegations of sexual misconduct the supervision of evidence, both as to substance, nature and quantity should be sharply focused and not adjourned unless for good reason. Regardless that one party seeks to rely upon a shared sexual history the court will not be assisted by prurient detail. Neither party should be ambushed in the presentation or defence of their case and the prospect of satellite litigation should be determinedly curtailed.

Lady Justice Macur:

63. I agree.

Lord Justice Peter Jackson:

64. I also agree with the judgment of the President and with his endorsement of the judgment of Knowles J. I only add the following observation, arising from the reference in paragraph 41 above to the 'Agreed Summary of Relevant Law' that may have been provided to the recorder.

65. It has recently become common for legally represented parties to provide the court with an agreed summary of the relevant law. This can be of real assistance to the court as a tool that captures the parties' legal submissions in one place, saves time, and confirms that there are no areas of contention. However, it should be the right tool for the job. In the present case the summary was inadequate and in preparing her reserved judgment the recorder fell back on inappropriate criminal definitions. In other cases the opposite situation has arisen. Lengthy 'boilerplate' summaries with excessive citation from authority on every conceivably relevant topic are also problematic: in effect the court is being handed the entire toolbox. For an example, see the remarks of King LJ in Re A (Children) (Pool of Perpetrators) [2022] EWCA Civ 1348 at para. 11. This indiscriminate approach can lead to a loss of legal focus and to uncertainty about what elements are important for the resulting decision. In summary, this form of cooperation between parties is to be encouraged, provided that the summary is intelligently drafted so that it focuses as concisely as possible on the legal principles that are likely to matter in the case in hand.