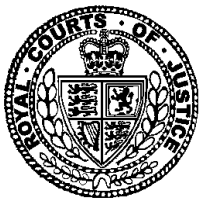

Neutral Citation Number: [2023] EWCA Civ 757

Case No: CA-2023-000862 and 000863

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HH Judge Oliver
ZC21C00130

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2023

Before :

LORD JUSTICE BAKER
LADY JUSTICE SIMLER
and
LORD JUSTICE WARBY

- -

RE T AND OTHERS (CHILDREN) (ADEQUACY OF REASONS)

- -
- -

Amanda Weston KC and Josephine Fathers (instructed by **Oliver Fisher Solicitors**) for the **First Appellant**
Gemma Taylor KC and Sharan Bhachu (instructed by **Thompson Law**) for the **Second Appellant**
Sarah McMeechan and Samuel Prout (instructed by **Local Authority Solicitor**) for the **First Respondent**
Julie Okine and Barbara Hecht (instructed by **Hecht Montgomery**) for the **Second Respondent**
Ramanjit Kang (instructed by **Creighton and Partners**) for the **Third to Sixth Respondents, by their children's guardian**

Hearing date 29 June 2023

- -

Approved Judgment

LORD JUSTICE BAKER :

1. These two appeals concern findings of fact in public law children proceedings. They are appeals by a 19-year-old man, hereafter referred to as S, and his mother against the judge's decision dated 21 March 2023, by which he made findings of fact against them. The findings came within care proceedings brought by the local authority in respect of S's younger siblings: T, a 16-year-old girl; U, a 14-year-old girl; V, a ten-year-old girl; and W, a five-year-old boy. The appeals are supported by the children's father, acting through his litigation friend, but opposed by the local authority and the children's guardian.

2. The principal issue arising on the appeals is, once again, the adequacy of the reasons given by the judge for the serious findings he made against S and his mother.

3. Although the history of the matter which led to the proceedings, and of the proceedings themselves, is complicated, it can be summarised fairly briefly for the purposes of these appeals.

4. The family has been known to the local authority for 15 years. The father has diagnoses of severe post-traumatic stress disorder with psychotic features and dependent personality disorder. The mother is often his sole carer. There have been lengthy difficulties with housing, money and immigration status which have had an effect on the mother's ability to care for the children. In November 2008, S and T were placed in foster care for a month under s.20 of the Children Act 1989 when the mother had to stay in hospital after giving birth to U. In the following years, a number of referrals and assessments were made and completed. Between July 2017 and March 2018, the children were the subject of child protection plans under the category of emotional harm. At that stage, the local authority had concerns about the mother's anxiety, her ability to prioritise the children's needs, and the speech and language development of U and V, both of whom were described by CAMHS as selectively mute.

5. Towards the end of 2020, the local authority began to be concerned about T's peer groups: she was reported missing from school on one occasion and was found with a friend who had been assessed as being at high risk of sexual exploitation.

6. On 5th February 2021, police officers were called to the family home by S as a result of an incident involving T. While they were there, T made allegations that her brother had sexually abused her on occasions when she was aged 11 and 12. She further alleged that her mother had known about the abuse and done nothing to protect her.

7. T was subsequently interviewed under the ABE procedure. She repeated her allegations and also alleged that on another occasion her mother had slapped her cheek and kicked her.

8. S was interviewed and denied the allegations. The mother also denied knowing or being told about the allegations. She raised concerns about T's behaviour and the young persons with whom she was associating at school which had led to a deterioration in her behaviour and use of illegal substances.

9. T has been the subject of an interim care order since the beginning of the proceedings. She has stayed in foster care and several different residential placements. During this

time she has suffered significant mental health crises and self-harmed on many occasions. She has absconded from the placements many times and on most occasions returned to her family home. On one occasion when she absconded, she alleged sexual assault by a stranger. At several points during the proceedings, T retracted the allegations against S and her mother, then repeated them, then retracted them again. All professionals accept that her presentation is very complex and extremely worrying. A particular practical concern is that she will reach the age of 17 in the next three months at which point she will be beyond the age at which a care order can be made.

10. Meanwhile the three younger children remained at home with their parents. By agreement, S moved out of the family home.

11. On 19 July 2021, S was joined as an intervenor to the proceedings. His lawyers applied for T to give evidence at the fact-finding hearing. That application was opposed by the local authority and the guardian. After a *Re W* hearing on 19 November 2021, the judge came to the conclusion that T would not give evidence. Participation directions were also made in respect of S.

12. The findings sought by the local authority were set out under the following headings:

(1) When T was aged around 11 to 12, S sexually abused her by anally raping her on 20 occasions and on one occasion taking a photograph of her with one of her breasts exposed.

(2A) T informed her mother that S had abused her. The mother told her not to tell anyone. Mother failed to protect T and is unable to protect the children from sexual harm from S.

(3) The mother has influenced or sought to influence T to conceal or withdraw her allegations about S.

(4) On 5 February 2021, the mother hit and kicked T, pulled her hair and choked her.

(5) During December 2020, the mother grabbed T's hair and S hit, grabbed and punched her.

(5A) At times there were heated arguments between T and the mother. These escalated into physical altercations and necessitated the police being called. On those occasions, T was beyond the control of her parents.

(5B) On 27 December 2020, S physically intervened in an argument between T and her mother and accepts restraining his sister.

13. The fact-finding hearing was originally listed in December 2021 but had to be adjourned due to a number of practical and evidential difficulties. The original time estimate given by the parties had been 13 days. The court reduced the time listed to 10 days, then reduced it again to 9. The adjourned hearing listed in April 2022 had to be adjourned again and the fact finding finally went ahead in August 2022. In the event, it continued over twelve days in August, September and October during which fifteen witnesses gave oral evidence to supplement the extensive written evidence. At the conclusion of the evidence, the court directed written submissions with the intention of delivering judgment in November 2022. A request for the matter to be listed for oral

submissions was refused. Instead, the court afforded the parties the opportunity to file supplemental submissions in response.

14. Before judgment could be delivered, however, U made allegations of a similar nature against S. It was therefore agreed that judgment would be delayed while the allegations were investigated and the local authority decided whether to seek further findings. In the event, it was decided that no further findings would be sought. The judge was then asked to hand down a written judgment (which could then be translated and explained with the assistance of intermediaries) but declined to do so because of shortage of time.

15. On 21 March 2023, the judge delivered an oral judgment in which he made substantially the findings sought by the local authority. Following the judgment, lawyers representing S initially invited the judge to clarify the judgment, but those representing the mother subsequently informed the court that they intended to appeal against the findings and the request for clarification on behalf of S was withdrawn.

16. On 9 May 2023, notices of appeal were filed on behalf of both S and the mother. On 7 June, permission to appeal was granted on both applications.

17. At the hearing of the appeal today, we have been told that the current position of the family is as follows. S is now living in independent accommodation. He does not visit the family home and has no direct contact with his siblings. T has a place allocated for her in semi-independent accommodation but is currently back living in the family home. U's circumstances have deteriorated very alarmingly. She is currently detained in a mental health unit under section. The two younger children, V and W, who were briefly removed into foster care at the end of last year after U made her allegations, are currently at home.

The judgment

18. At an early stage in the judgment, the judge explained what he was going to do in these terms (at paragraph 3):

> "This judgment can only last about an hour because I have another hearing. It cannot therefore go into every single detail of every single bit of evidence of the 12 days of hearing, otherwise we would be here for 12 days. If it needs to be expanded, it will be. But I am going to give much more of an overview than anything else."

19. He then referred to the law in these terms:

> "10. The law that I need to apply has been agreed between junior counsel in the case. I have a 14-page note dated 27 October 2022. That note will not be read in full, but I will, if necessary, read it into the judgment at a later stage.
>
> 11. Suffice it to say the burden of proof falls on the Local Authority. It is on the balance of probabilities. It is not for the person against whom allegations are made to prove they are innocent.

> 12. One has to be always aware of lies. Sitting as I have done in the last three weeks in the criminal jurisdiction, I am very familiar with the Lucas direction, based on a 1981 Queen's Bench case, which has been adopted into the family courts by, for example, Ryder LJ in *Re M* [2013].
>
> 13. The purpose of the fact finding is, as Peter Jackson LJ said in *A (no 2)* [2019] EWCA, to answer the questions what, when, where, who, how, and why. I am of course equally aware that I am dealing with allegations of sexual abuse, and Baroness Hale many moons ago said there was no higher standard of proving allegations of sexual abuse than any other. That has been reiterated by other judges over time.
>
> 14. I am aware that I need to assess the credibility and reliability of the witnesses, and in this case those who have wanted to give evidence have done so. If I am able to identify an alleged perpetrator, I should do so. In this case that is an academic question, because this is not, "Something happened, and there is a pool of perpetrators". In this case the allegations are explicitly made against S. So, the question is not who, but did he?
>
> 15. I have to bear in mind the length of time that has occurred since the allegations were made, and I have to bear in mind retractions, that is somebody making an allegation and then retracting it.
>
> 16. In addition, I have to be aware about allegations made by children, and ABE principles. Again, there is a 13-page agreed note setting out the law I need to follow. Children who make allegations should be listened to, but I should not prejudge issues at stake. I need to examine in detail what has been alleged to have happened. There has been no cross-examination of T in this case, although there was an ABE interview. That I need to bear in mind when considering her allegations.
>
> 17. I am also aware that there was no direct medical examination, and I have to make sure that I do not obtain unreliable evidence, because children can be both poor historians, and are suggestible. Indeed, that is a point made by Ms Taylor, from memory, in her submissions. Although Ms Croft makes the point that if she is suggestible to have made the allegations, she might be suggestible therefore to have been asked to withdraw them. I am aware of course of the ABE guidelines, and the details set out therein. Again, I do not intend to repeat any more of the law relating to that. It is well known by me, and can be read into the judgment if it becomes necessary."

20. In paragraphs 18 to 40, the judge set out some but by no means all of the relevant history, focusing on T's allegations. He then continued with these observations:

"41. The evidence I have just read out shows that T was inconsistent in her allegations. She would allege them, and then there would be occasions when she would withdraw them. This has led certainly S's team and perhaps mother's team to say that she is making this all up. Obviously T has been unwell mentally, and has had some periods in psychiatric support, and from what I have read out certainly there were occasions when she seemed to link going home with "if I say it's all lies", in other words wanting to go home being only capable of being achieved if she said that she was telling lies.

42. The difficulty with anyone who makes allegations and then withdraws them and then makes them again is that it is difficult to see if there is a consistent pattern in what is being alleged. But it is fair to say that over the period that T made the allegations she was always consistent that it was anal rape, not oral or vaginal; that she only ever named S; that it happened on a number of occasions; and it happened when she was in Year 6 or 7, when she was 11 or 12; and it happened in her bedroom. Those, throughout all of the discussions she had with the police officers, the video recorded interview and so on, were consistent.

43. If one looks at the two specific occasions when she withdrew the allegations, it is when something was going on, for example in April of 2021 she wanted to go home, and therefore she was saying that she had made it up all up, she hated [her residential unit] she said at that time; and also in August to October of 2021 she again was very unhappy, particularly in [another residential] unit}. Especially it was at the time when she had the phone removed from her, because she had worked out how to remove her password in August.

44. It is not unusual in a case where there are allegations of sexual abuse for the person making those allegations to withdraw them and then repeat them. One has to look at the motivation for why the person withdrew them, and it seems to me in this case that T's motivation for withdrawing them was either encouragement by her mother that by doing so she would go home, which she clearly wanted, or because she was unhappy where she was, and wanted to go home. It is of note that at one point she did complain that although it was in her words her that had been abused, she was the one who was being punished for being away from home, not unfamiliar words to those of us who have done this kind of work for some time.

45. The suggestion that in fact T was, if you like, going off the rails, and it was as part of her general behaviour, was one pursued by Ms Taylor and Ms Weston on behalf of their respective clients. Mother in her evidence made it clear that she did not believe the allegations that T had made against S, and I have already indicated that S has said that T was lying when she

> made the allegations. Both mother and S say that the reason that T has behaved like she has, and made these allegations, is because of the people she was mixing with at school, and the fact that she was under the influence of drugs."

21. The judge then made some observations about aspects of the evidence relating to T's alleged drug-taking, mixing with other young people, and exploitation. He continued:

> "53. The great difficulty for both T and her mother is that T alleges that she told her mother about the allegations prior to 5 February 2021, T says it was about two or three years before she had told her mother, and that this is denied by mother. Mother, when the police officer was in the house in February 2021 talked about T being dishonest. She does not ask any more detail, she does not say, "Well, what do you mean? What's this all about? For goodness sake, tell me, I'm horrified". In fact, mother is very much more concerned in suggesting that T is lying than that T should be believed. It came as a surprise to me, as I know it did to others, that mother did not appear to want to find out more about the allegations in 2021, she did not want to know what, why, when, where, how, the points that are raised in the caselaw for example. She says, "Well, it was because there was no interpreter", but I do not find that valid. It is something she would have, I believe, as a concerned mother, wanted to have identified, wanted to understand, wanted to find out what her daughter had allegedly suffered.
>
> 54. Of course we know that mother does not actually believe that S sexually abused T, so she starts from the premise that she believes S not T. And she found it very difficult to even accept that it was possible that this could have happened, because it is not how she brought her children up, it is not in her culture, and it only happens to people without brains. Again, mother was concerned about the way that it would present to the community if S was found to be the alleged perpetrator.
>
> 55. I have already suggested that T said that her mother had tried to influence S to withdraw the allegations by writing the letter, which mother said she never did, and by the suggestion that if S withdrew the allegation she might be able to come home. Mother denies all of that. T made it clear on two occasions that her mother had told her to withdraw the allegations, that if she did she would be able to come home, that was particularly in June of 2021.
>
> 56. There were certainly occasions when mother would go and see T at an early stage in [a medical unit] when she was able to get into the unit and to have contact with T without being overheard. And we know that on at least two occasions then, although subsequently it has been more than that of course, T

> would abscond to the family home, and have unsupervised contact."

22. The judge then concluded with his findings in these terms:

> "57. If I now return to the allegations, the first one, as I have said, is that, "When T was aged 11 or 12, S allegedly anally raped her, and took photographs".
>
> 58. I am aware that there is no physical evidence to show that this happened, the medical examination produced nothing, but I am satisfied that T is right in her allegations. I know that she made them, withdrew them, made them, withdrew them, and made them again, but I am satisfied that she was clear in what she said, and that she was telling the truth. I find allegation 1 proved.
>
> 59. Allegation 2A is that, "T informed her mother that Shad raped her at about the time this was happening, and that he had taken a photograph of her in her bra". It goes on to say that, "Mother told T not to tell anyone, including her father, or she would get in trouble, and would embarrass her, the family, and no one would believe her. Mother did nothing in respect of the allegations, and it is therefore alleged mother failed to protect T, and she is unable to protect the children from sexual harm from S".
>
> 60. We know that mother seems from answers to questions in cross-examination to be concerned about how the family would look, and therefore would be embarrassed. Mother has consistently refused to believe T. Mother has consistently said that T is lying. I cannot see why T would want to make up that she told her mother something previously if she had not. Why do it? What is the point? You tell somebody something because that is what you tell them, but to say, "Well, I told you three years ago, and you did nothing about it", I do not understand why she would have wanted to do it, what her motivation would have been, and I am entirely satisfied that paragraph 2A is made out.
>
> 61. 2B, "Mother has influenced or sought to influence T to conceal or withdraw her allegations about S".
>
> 62. This, I am afraid, I am entirely clear relates both to the letter and the suggestion that by withdrawing the allegations T can come home. That is proven as well.
>
> 63. "On 5 February 2021 mother hit and kicked T, pulling her hair and chocked her".
>
> 64. I have not dealt with this allegation so far. Clearly there was a real fight going on, if I can put it that way, at the family home,

> on 5 February. There had been a previous occasion when the police were called, we know, in December 2020. I am sure that both T and her mother, when fighting, ran at one another. I know that T told the police on 5 February that her mother grabbed her hair, and started to choke her. Mother does not accept it. She said that T should not go out. Mother says that T attempted to attack and rip her top. I had little evidence about this in fact, and my instinct is that if there had been this hair pulling and choking, it was part of a six of one, half a dozen of the other, both of them were fighting one another, and the same way that T was attempting to attack her mother and rip her top, so her mother was attempting to attack her. So, yes, it is proven, but it is part of I think a two-way street.
>
> 65. Again, allegation 4, "During December 2020 mother grabbed Ts hair, and S hit, grabbed and punched her".
>
> 66. This is another one of those fights where both of them were having a go at one another, T was being aggressive, mother was being aggressive back. So, it is a "yes, but". I am satisfied that that was just another fight going on.
>
> 67. 5A is really a continuation of the same, that, "There were heated arguments between T and mother which escalated into physical altercations, and on the occasions when this happened, T was beyond the control of her parents".
>
> 68. Yes, that is definitely clear.
>
> 69. 5B, which again is part of really 4, that, " S physically intervened in the argument between T and her mother on 27 December 2020, and restrained his sister".
>
> 70. Yes, he did, but I think that was no more than trying to stop the two of them fighting, so that is a "yes, but" again. "Yes, proven, but".
>
> 71. Those are the allegations, and those are my findings on the allegations. As I said, it is not a comprehensive tour of each piece of evidence from each of the witnesses, which I can expand on in written detail if necessary in the future. But those are my findings in relation to the allegations. The first two I found proven. The remaining three are what I would call "yes, proven but there are matters to take into account". …"

The appeal

23. The two appeal notices put forward overlapping grounds expressed in different terms. On granting permission to appeal, I directed the appellants to consolidate the grounds.

I am very grateful to their representatives for complying with that direction which has made our task much more straightforward.

24. The five consolidated grounds of appeal are:

(1) Flawed approach and inadequate reasoning – the judge's reasoning and approach to the evidence were flawed and failed to meet the minimum standard of adequate reasoning, having regard to the seriousness of the allegation and the material before the court.

(2) Failure to set out and apply key authorities – the judge failed to or did not properly set out and apply key authorities and guidance and in doing so was wrong to make findings against the appellants.

(3) Factual errors and misunderstandings – the judge made numerous factual errors and misapprehensions and relied on them as the basis of his reasoning and in doing so was wrong to make findings against the appellants which are unsustainable in law.

(4) Wrong decision that the evidence supported the findings against the mother – the judge erred in law and was wrong to find that the evidence supported the findings being made against the mother.

(5) Procedural irregularity in giving judgment – the systemic impact of failing to prepare a written judgment and instead providing an ex tempore judgment in a very limited timeframe was highly adverse and amounted to a serious procedural irregularity.

Grounds 1 and 5

25. The principal focus of the appeal has been on ground 1, supplemented by ground 5. On these grounds, the appellants have very strong arguments.

26. Perceived deficiencies in judgments in the family courts have led this Court to give guidance as to how the difficult task of judgment-writing should be approached. In *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407 at paragraphs 59 - 60, Peter Jackson LJ gave this guidance:

> "59. Judgments reflect the thinking of the individual judge and there is no room for dogma, but in my view a good judgment will in its own way, at some point and as concisely as possible:
>
> (1) state the background facts
>
> (2) identify the issue(s) that must be decided
>
> (3) articulate the legal test(s) that must be applied
>
> (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned

> (5) record each party's core case on the issues
>
> (6) make findings of fact about any disputed matters that are significant for the decision
>
> (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties
>
> (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes.
>
> 60. The last two processes – evaluation and explanation – are the critical elements of any judgment. As the culmination of a process of reasoning, they tend to come at the end, but they are the engine that drives the decision, and as such they need the most attention. A judgment that is weighed down with superfluous citation of authority or lengthy recitation of inessential evidence at the expense of this essential reasoning may well be flawed."

27. Having cited this passage in *Re C, D and E: (Care Proceedings: Adequacy of Reasons* [2023] EWCA Civ 334, I continued (at paragraph 24):

> "In suggesting this approach, Peter Jackson LJ was plainly not being overly prescriptive. Judges adopt different approaches to writing judgments. Some leave all their analysis to the end, whereas others include parts of it at various points in the judgment. There is no hard and fast rule about this. Peter Jackson LJ acknowledged as much in *Re S (A Child: Adequacy of Reasons)* [2019] EWCA Civ 1845 at paragraph 34):
>
> > "I would also accept that a judgment must be read as a whole and a judge's explicit reasoning can be fortified by material to be found elsewhere in a judgment. It is permissible to fill in pieces of the jigsaw when it is clear what they are and where the judge would have put them. It is another thing for this court to have to do the entire puzzle itself.""

28. Under ground one, it is asserted in particular that the judge failed properly to set out the evidence, or adequately analyse key features of the evidence, or record each party's key case on the issues, or give a proper explanation for his findings. A number of crucial omissions from the judgment have been identified. The summary of background facts is incomplete – in particular there is no reference to the history of the family's involvement with children's services. The judgment does not identify the witnesses who gave oral evidence, let alone summarise what they said. It is therefore impossible to determine what weight has been given to any particular part of the evidence or how the findings have been made. There is no reference to the lengthy submissions prepared on behalf of the appellants, save a statement early in the judgment that the judge had read them, nor to the core issues as identified by counsel.

29. Particular criticism is made of the judge's failures with regard to T's evidence. The following points are made about this.

(1) There is no analysis of what is described by the mother's counsel as the critical issue of the timing and context of T's allegations.

(2) There is no consideration of what the mother's counsel described as the granular detail of T's allegations. Points were made by all parties about this in detail. They did not receive any or any sufficient analysis in the judgment.

(3) There is no or no adequate explanation of how the judge has evaluated the evidence of T's lies, her retractions, and her presentation at home, at school or in care.

(4) There is no consideration of the credibility or consistency of her allegations.

(5) There is no real consideration of the evidence given by the safeguarding lead at T's school.

(6) Of particular significance, there is no reference to the alleged breaches of the ABE guidance or their impact on the reliability of what was said in the interview. These breaches received extensive attention in closing submissions on all sides.

(7) An assessment of T was carried out by a consultant psychiatrist, Dr Mohammed. He was not called to give oral evidence but produced a report which was filed in the proceedings and referred to in submissions. His report included statements made by T about the allegations and the context in which they were made. It contained information relevant to T's suggestibility, her account of the influence of other young people with whom she was associating, and her view of her relationship with S. The assessment and report are not mentioned in the judgment.

30. Furthermore, and equally concerningly, say the appellants, there is no account of the appellants' evidence and only passing references to it. On behalf of the mother, particular complaint is made of the judge's failure to mention difficulties that arose with interpretation of her evidence. On behalf of S, it is submitted that the judge erroneously described his case as being a simple denial whereas his case was much more nuanced. He accepted that something had happened to T but denied that he was the perpetrator. In his four witness statements, he set out in considerable detail evidence about his relationship with T and why it had deteriorated. Ms Weston KC on his behalf drew attention to what she described as his sympathetic and nuanced account of T's behaviour. He also provided an explanation for the photograph. He gave oral evidence for nearly a day. There is barely any mention of his written or oral evidence at all in the judgment.

31. On behalf of the local authority, it is recognised that ground 1 is the "key ground". Ms McMeechan and Mr Prout cite the well-known observations of Lewison LJ in ***Fage UK Ltd v Chobani UK Ltd*** [2014] EWCA Civ 5, in particular paragraph 114-115:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not

> only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. …
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

32. While acknowledging significant omissions, the local authority submitted that the judgment is nevertheless not devoid of reasoning and analysis and is sufficiently detailed to meet that standard and the guidance in *Re B (Adequacy of Reasons)*. Despite severe time constraints, the judge covered much ground in his judgment. It is argued that it is "not unexpected" that judges in the family court will have to give judgment in less than ideal circumstances and for that reason this Court has introduced the practice of seeking clarification of the judge's reasons. It is submitted that the appellants' complaints about the omissions from this judgment could be met by putting such a request to the judge.

33. In written submissions on behalf of the guardian, trial counsel Ms Caroline Croft, whilst opposing the appeal, put her argument rather faintly, observing that the judgment "is not devoid of reasoning". She accepted on behalf of the children that the judgment could have been fuller and that there were areas of evidence, circumstances and submissions which were not set out in the judgment. She surmised that these omissions may well be due to the fact that the judge was explicit that he did not necessarily view this judgment as the full judgment but as an overview that could be amplified if required. She accepted that "giving brief overview judgments is likely to be a practice which could not be encouraged" , but submitted that it was justified in the unusual circumstances in which this judge found himself and the practical difficulties he was facing. She adopted the same position as the local authority about clarification, submitting that the judgment is sufficiently indicative of the process the judge followed in arriving at his decision to warrant inviting the judge to give further reasons.

34. Ground five follows on from ground one. It is argued that the systemic impact of failing to prepare a written judgment and instead providing an ex tempore judgment in a very limited timeframe was highly adverse and amounted to a serious procedural irregularity. On behalf of S, it is submitted that by adopting this course, the judge was failing to comply with the clear guidance given by this court in the cases cited. On any view, it failed to meet the minimum standards required. On behalf of the mother, it is stated that she left court with little or no understanding of why the judge had reached his findings. On behalf of the local authority and the guardian, it is submitted that it is entirely normal for a judge to deliver a judgment ex tempore even in complex cases,

that the judge had little choice but to proceed in the way he did, that it was not a procedural irregularity, and that any omissions can be tackled by a request for clarification.

Discussion and conclusion

35. As Lord Neuberger observed some years ago (in the first Annual BAILII Lecture in 2012):

> "Judgments are the means through which the judges address the litigants and the public at large, and explain their reasons for reaching their conclusions. Judges are required to exercise judgement – and it is clear that without such judgement we would not have a justice system worthy of the name – and they give their individual judgement expression through their Judgments. Without judgement there would be no justice. And without reasons there would be no justice, because decisions without reasons are certainly not justice: indeed, they are scarcely decisions at all."

36. It is widely recognised that judges sitting in the family court, where the pressure of work is very great and resources limited, face enormous difficulties and challenges. Plainly the judge was short of time on 21 March. But the course he took of delivering what he intended to be a relatively short overview judgment, with a view to the parties asking for further reasons if they so chose, is plainly irregular.

37. I agree with the local authority and the guardian that the practice of giving ex tempore judgments should not be discouraged. But this was not an ex tempore judgment. According to the definition given by the Incorporated Council for Law Reporting for England and Wales, an ex tempore judgment is one given orally at the conclusion of a hearing as opposed to being reserved and delivered (usually in writing) at a later date. This was a reserved judgment given orally six months after the conclusion of the evidence and four months after receiving written submissions. An ex tempore judgment after a short hearing where the issues are straightforward can be sensible and proportionate. But giving an ex tempore judgment after a case of this complexity would have been an unwise course in any circumstances.

38. I do not accept that the practice adopted by the judge of giving what he described as an overview with further reasons to follow if requested is consistent with the clear guidance given by this Court in the cases cited above. This ought not to have been an overview of the judgment, or an outline of the judgment, or a summary of the judgment. It was <u>the</u> judgment.

39. With respect to this experienced judge, he ought to have adopted the course suggested by the parties of handing down a written judgment. Cases of this length and complexity, in which serious findings are going to be made which will have a lifelong impact of members of the family, require a much more detailed analysis. I have cited on a number of occasions, and completely agree with, Lewison LJ's observation in *Fage*, which in turn is a repetition of statements in earlier authorities, that "there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case". Nor need the judge refer to every point of the evidence. As Peter Jackson LJ

said in *Re B*, what is needed is an identification and analysis of the "key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned". Regrettably that is not what happened in this case.

40. I agree with the appellants' submissions that the omissions from the judgment are extensive and significant, in particular the absence of any analysis of the ABE interview, or any assessment of credibility and reliability, or any detailed analysis of the appellants' evidence, or the evidence of the safeguarding lead, or any reference to Dr Mohammed's report, or any real consideration of the detailed submissions made on behalf of the parties. There was some analysis of the reliability of T's allegations, but given the omissions in the judgment it was inevitably incomplete. The analysis of the evidence was manifestly insufficient, with crucial aspects of it not mentioned at all, and the judge's explanation for his findings was perfunctory. The assertion in the judgment that S's case was a bare denial completely failed to do justice to the nuanced evidence he gave both in four statements and nearly a day of oral evidence, and the lengthy submissions filed on his behalf. Anyone reading the judgment – be it the parties, the public, an appellate court, professionals working with the family, or in later years the children themselves – would have no idea how the judge assessed the complex evidence he heard, why he preferred some parts of the complex and contradictory evidence and rejected others, or why he reached his conclusions on the very serious – life-changing – allegations.

41. In *Re O (A Child) (Judgment: Adequacy of Reasons)* [2021] EWCA Civ 149 I said, at paragraph 61:

> "there are cases where the deficiencies in the judge's reasoning are on a scale which cannot fairly be remedied by a request for clarification As King LJ said in *Re I (Children)* [2019] EWCA Civ 898 (at paragraph 41):
>
> > "It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases."
>
> But where the omissions are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal."

In *Re C, D and E*, supra, I added at paragraph 31:

> "In this case, the deficiencies are on a scale which cannot fairly be remedied by a request for clarification. We would not have been asking the recorder to clarify an ambiguity or omission in part of his reasoning but to set out his reasoning in its entirety. For my part, I would not be confident that we would be asking the recorder to set out an analysis which he had in fact carried

> out but for some reason omitted to include in the judgment. Rather, where the absence of recorded analysis is on this scale, there is a danger that we would be asking him to carry out an ex post facto rationalisation for a decision he has made without proper analysis. We would be asking him to perform a task that should have been undertaken before the decision was made, namely, as McFarlane LJ described it in in *Re G* [*Re G (A Child)* [2013] EWCA Civ 965], "that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place". This would be wrong as a matter of principle and manifestly unfair to the parties, in particular the mother but also the children."

42. Although the judgment in this case does contain some reasoning, I find that it falls into the same category. The deficiencies are on a scale which cannot fairly be remedied by a request for clarification. Where the absence of recorded analysis is on this scale, there is a danger that we would be asking him to carry out an ex post facto rationalisation for a decision he has made without proper analysis.

43. For those reasons I would allow the appeal on grounds 1 and 5. The judgment and findings must therefore be set aside.

44. In those circumstances, I can deal with the other grounds very briefly. As to ground 2, I would not be minded to allow an appeal on this ground standing alone. I am not persuaded that the way in which the judge identified and set out the legal principles gives rise to a ground of appeal. He failed to apply them in the ways set out in grounds 1 and 5 but ground 2 does not add to that argument. Grounds 3 and 4 involve an analysis of the evidence. Subject to what is said below, there may have to be a rehearing of all or some of the allegations. In those circumstances, it would be better to refrain in this Court from commenting on the evidence to avoid inadvertently influencing the outcome of any rehearing.

45. What should happen now? In particular should there be a complete rehearing? As Ms Taylor KC for the mother rightly says, the factors to be taken into consideration are the same as those relevant when determining whether to hold a fact-finding hearing in the first place. They were summarised by McFarlane J (as he then was) in *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam), and approved and developed by this Court in *Re H-D-H (Children), Re C (A Child)* [2021] EWCA Civ 1192 and reiterated recently by this Court in *Re H-W (Care Proceedings: Further Fact-Finding)* [2023] EWCA Civ 149. In short terms, they are:

(a) The interests of the child (which are relevant but not paramount);

(b) The time that the investigation will take;

(c) The likely cost to public funds;

(d) The evidential result;

(e) The necessity or otherwise of the investigation;

(f) The relevance of the potential result of the investigation to the future care plans for the child;

(g) The impact of any fact finding process upon the other parties;

(h) The prospects of a fair trial on the issue;

(i) The justice of the case.

46. For my part, I have considerable doubt whether a re-trial would be justified applying those criteria to the current circumstances of this case. S and U are currently living away from home; by the local authority's interim plan T ought to be too, although she is not currently using the placement held open for her. The assessments which have been carried out so far point to the two younger children remaining at home. The threshold criteria with regard to T, and probably U, can surely be agreed on the basis that, in the somewhat archaic language of s.31(2)(b)(ii) of the Children Act 1989, at the relevant date they were likely to suffer significant harm as a result of being "beyond parental control". I think it highly likely that the threshold criteria with regard to the younger children can also be agreed without the need for a full rehearing of the fact-finding. That was the view expressed on behalf of the mother and the local authority, in the event that the appeal was allowed. In written submissions, counsel for the guardian argued for a full rehearing. In oral submissions, however, Ms Kang, who appeared in place of Ms Croft, informed us that the guardian had reconsidered the matter and would now if at all possible wish to avoid a rehearing, providing a form of words for the threshold and a detailed care plan can be agreed and approved by the court that ensures the children are protected. There may then be an issue as to the order – care order, supervision order or no order – but that plainly is a matter for submissions.

47. These are not issues which this Court is equipped to resolve. If my Lady and my Lord agree, I would therefore propose that the proceedings be remitted to the Designated Family Judge for Central London to be listed for an urgent issues resolution hearing. I hope that all issues could be agreed without any need for a re-hearing which, as all parties agree, would be likely to cause further harm to this already very damaged family.

48. I conclude by expressing my thanks to all the professionals involved in this complex and very worrying case, counsel and solicitors, social workers, the children's guardian, and also the many other professionals, some mentioned in the judgment, others not, who have worked tirelessly to help these children.

LADY JUSTICE SIMLER

49. I agree.

LORD JUSTICE WARBY

50. I also agree