Neutral Citation Number: [2019] EWHC 791 (Fam)

Case No: 2018/0125

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2019

Before :

MR JUSTICE WILLIAMS

- -

Between :

PR	**Applicant**
- and -	
JES	**1st Respondent**
- and –	
TER	**2nd Respondent**

(Appeal: Sexual Abuse, Fact Finding)

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- -

Lucy Hendry (instructed by **Laceys Solicitors**) for the **Applicant**
Alev Giz (instructed by **Philcox Gray**) for the **1st Respondent**
The 2nd Respondent did not appear and was not represented

Hearing dates: 14th - 15th March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE WILLIAMS

Mr Justice Williams :

1. This is my judgment on the appeal of the appellant PR in respect of a decision of HHJ Meston QC given on 11 July 2018. The respondent to the appeal is JES. They are the father and mother of a little girl, T who was born in June 2011. I shall refer to the parties throughout this judgment as the father, the mother, and the child. I hope the parties will forgive me for using this shorthand; I do it to assist in maintaining the anonymity of the parties.

2. The child was a party to the proceedings in the court below but her Guardian has chosen to play no part in the appeal on the basis that the appeal is based on legal arguments. I shall return to this point.

3. On 11 July 2018, HHJ Meston QC handed down a judgment in which at paragraphs 89 to 95 he made findings against the father. These findings cross-referred to some of those set out in a Schedule filed on behalf of the mother. Leaving aside some of the excessive detail with which the schedule was burdened the findings in headline terms are as follows:

    i) On at least 2 occasions, [15 November and 13 December 2015] F has touched the child around the area of her bottom, which was inappropriate. F knew that it was inappropriate. F's actions were sexually motivated. If not sexually motivated, such washing was clearly inappropriate and has caused physical psychological and emotional harm to T.

    ii) On one or more unspecified occasions, F has touched the child around her genital area which was inappropriate. F knew that it was inappropriate. F's actions were sexually motivated. If not sexually motivated, such touching was clearly inappropriate and has caused physical, psychological and emotional harm to the child.

    iii) On one or more unspecified occasions, F has put his finger inside the child's bottom and/or the genital area knowing that it was inappropriate or sexually motivated. If not sexually motivated, such digital penetration/touching was clearly inappropriate and has caused physical psychological and emotional harm to the child.

    iv) The child has been manipulated to 'not talk' about the alleged abuse by F. She has been told that the washing/touching did not happen, to keep it a secret, to 'zip it'.

4. The father sought permission to appeal from HHJ Meston QC which was refused on 13 July 2018. At that time the basis of the application for permission to appeal was

that the basis of the judge's assessment of the reliability and the credibility of the child and of each of the parents was flawed. [A77] The judge refused permission to appeal stating

"*I have again reviewed the material that was before the court in the 2 comprehensive hearings. I do not consider that the proposed appeal has a real prospect of success or that there is any other compelling reason to grant permission."*

5. On 1 August 2018 the father filed an appeal against those findings and renewed his application for permission to appeal. On 13 August 2018 Mrs Justice Knowles granted permission to appeal on all grounds and without conditions. A time estimate of one day was given for the hearing of the appeal which for reasons which I am unclear about was listed for January 2019; one year since the fact-finding had been undertaken; albeit only 6 months since the judgment. The delay that has plagued the parties and the child in the resolution of this litigation is staggering. In preparation for that hearing the parties filed an appeal bundle which comprised some 8 lever arch files. In addition the court was informed that an audio-visual recording of the child's ABE interview would need to be viewed by the judge hearing the appeal. The view was taken that a one-day time estimate was insufficient in the circumstances and the matter was adjourned to a two-day hearing on the 14 and 15 March. One day was allowed for judicial reading and one day for the hearing of submissions and the delivery of judgment. On 13 March a 'Suggested Reading List' was submitted by counsel. This appeared to comprise of several thousand pages of material which together with audio-visual material would have taken several days to read. I therefore directed the parties to file a list of 'Essential reading' which it would be possible to undertake in the one day allowed. Unfortunately when the document was supplied it was the same list of suggested reading now entitled 'agreed suggested essential reading list' but highlighting documents requiring somewhere between 20 and 30 hours of reading excluding the parties' Skeleton Arguments or the audio-visual material. I hardly need to say how deeply unhelpful this has been in seeking to prepare for the appeal. It is incumbent on the legal representatives of the parties to identify those documents which the judge **MUST** (hence the word Essential) read in the time allowed for reading and to provide a list which can be undertaken in that time. If the parties consider that the reading time allowed is wholly insufficient they should notify the court. Alternatively they should tailor the list of Essential Reading to fit within the time allowed. Bearing in mind an appeal is a review of the first instance decision not a rehearing and bearing in mind the appellate approach to challenges to findings of fact made at first instance it should be perfectly possible to identify a manageable list of essential reading. Belatedly the parties did agree some essential reading which I undertook along with viewing the ABE interview.

Grounds of Appeal

6. The grounds of appeal were settled by Ms Brannigan QC and Ms Hendry. They are as follows:

The learned judge has erred as a matter of principle and fact in making findings that the appellant had sexually abused his daughter […]

Ground 1

The learned circuit judge failed properly or at all to apply the relevant legal principles to the 2nd fact-finding exercise. By failing to apply such principles the court adopted an approach to its evaluation of the evidence in the 2nd fact-finding hearing which was improper and flawed.

Ground 2

The learned circuit judge failed to analyse the allegations made following the judgment of 31 January 2017 in the light of the totality of the evidence before the court and consequently placed inappropriate evidential weight on the allegations made by [the child] in her ABE interview of 16 may 2017. Specifically the court

(i) failed to set the allegations made post January 2017 in the context of all that had gone before. Such an analysis properly undertaken should have led the court to the overwhelming conclusion that no weight could be placed on the allegations made by [the child] either in her ABE interview or to the CEDAR worker in April/May 2017.

(ii) failed to make findings of fact which would have significantly informed the overall fact-finding exercise

Ground 3

The learned circuit judge undertook an evaluation as to the parents' credibility which was flawed and inconsistent with the findings previously made by the court

7. The grounds are elaborated and argued in a 19-page skeleton argument which is accompanied by a 21 page annex which comprises a chronology and analysis of the child's account. I shall turn to the arguments deployed on behalf of the appellant father in my analysis of the grounds later in this judgment.

8. The father invites the court to allow the appeal and to (I think) substitute its own decisions. Although Ms Brannigan QC and Ms Hendry recognise that it would be more usual to remit the case to a different judge for determination, they also submit that I could refuse to remit it. This is on the basis of a submission that the allegations of the child are so flawed that no court properly directed could conclude that the child had been sexually abused by the father.

9. Ms Giz had filed a skeleton argument supporting the judge's decision and on behalf of the mother invites me to dismiss the appeal. In the event that it were to be allowed she submits that it would need to be remitted for rehearing.

10. Nothing was filed on behalf of the child herself.

11. I heard submissions from Ms Hendry on behalf of the father and from Ms Giz on behalf of the mother over the course of the 2nd day of the appeal. Their submissions were focused and succinct.

12. Inevitably given the nature of the appeal, Ms Hendry had to delve in some detail into the long chronology dating from 15 November 2015 through to 16 May 2017 over which evidence had emerged from the child or other sources and which bore upon the ultimate issue. Ms Hendry produced a detailed annex in the form of an annotated chronology which she relied upon to demonstrate that the judgment of 11 July 2018

had not in fact applied the correct approach to the determination of the allegations and had not taken into account or given due weight to highly relevant evidence and had given undue weight to one specific part of the evidence, namely the child's allegations made in May 2017. She argued that the judge did not return to the reasons that he gave for dismissing the allegations in January 2017 or explain why those conclusions were now outweighed by the new evidence. She made brief submissions in support of grounds 2(ii) and 3. In respect of ground 2(ii) she argued that if the judge had focused on the events of 15 November and 13 December this would have ensured that the evidence of those 2 events was properly taken into account. She also argued that had the judge determined the issue of whether the mother was aware prior to November 2015 that the father was accustomed to washing the child after she had been to the toilet that it would have had a very significant relevance to her credibility or lack thereof. Drawing in part on this Ms Hendry argued that the judge had focused on peripheral issues which went to the father's credibility and had ignored central issues which went to the mother's credibility. As a result she argued he reached a conclusion that was inconsistent with his previous conclusions (and which was unexplained) and which was flawed.

13. Ms Giz relied on the judge's extensive exposure to the evidence in the case, he having conducted the Part I of fact-finding 1 in July 2016 and Part II of fact-finding 1 in January 2017 and he having heard evidence over 4 days in fact-finding 2 in January 2018. He was, she argued, ideally placed to see the case in its full evidential context. She referred to the fact that he had had lengthy and detailed written submissions from each of the parties at the conclusion of fact-finding Two. She submitted that both the judgment of January 2017 and July 2018 contained comprehensive reviews of the evidence, identified the relevant law and the approach that mandated and demonstrated the application of that approach to the evidence. She submitted that he had considered all of the relevant issues, that he had taken all relevant evidence into account and that he had not given undue weight to the child's account in May 2017. She submitted that the combination of the evidence from the child to the contact centre worker and in her ABE interview together with the change in the credibility of the parties was more than sufficient to justify the change in the ultimate conclusion that he reached on the allegations. She observed that he is amongst the most experienced family court circuit judges and has undoubtedly heard numerous cases of this type. Decisions on the credibility of witnesses are part of his everyday function. Ms Giz also said that many of the complaints now made about the judgment were not made at the time when clarification of the judgment was sought. She submitted that if I considered there were matters that the judge failed to address that it would be possible to invite the judge to further address those matters even at this stage.

14. In respect of this latter point Ms Hendry told me that on 11th July 2018, she was copied in to an email to HHJ Meston QC in which Ms Giz suggested that it might be appropriate for the court to invite her (Ms Hendry) to set out the flaws or deficiencies that form the basis of a proposed appeal and so provide the court the opportunity to consider whether it should address those matters. Ms Hendry told me that she liaised with Ms Branigan QC overnight and on 12 July, before she had managed to respond, both parties received a further email from the court attaching the supplementary judgment, which also contained the formal refusal of permission to appeal – backdated to 11 July. As articulated to HHJ Meston QC in response, Ms Hendry took

the view that in these circumstances Ms Branigan QC should get on and settle the appeal pleadings. In those circumstances she did not pursue further clarification.

15. At the conclusion of day, 2 I reserved my decision and judgment

Appeals: The Law

16. The FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

17. In Re F (Children) [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

> *22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they hpave won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."*
>
> *23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):*
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> > *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*
>
> *It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".*

18. Lord Hoffmann also said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

> "*If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC 1, 45:*
>
> *'... [S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*
>
> *First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva plc [1997] RPC 1:*
> *'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*

19. So far as concerns the appellate approach to matters of evaluation and fact: see Lord Hodge in *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93, paras 21-22:

> *"21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House ... Lord Reed summarised the relevant law in para 67 of his judgment in Henderson [Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600] in these terms:*
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> *"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

20. See also the Privy Council decision in Chen-v-Ng [2017] UKPC 27

> *Recent guidance has been given by the UK Supreme Court in McGraddie v McGraddie [2013] 1 WLR 2477 and Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 and by the Board itself in Central Bank of Ecuador v Conticorp SA*

> *[2015] UKPC 11 as to the proper approach of an appellate court when deciding whether to interfere with a judge's conclusion on a disputed issue of fact on which the judge has heard oral evidence. In McGraddie the Supreme Court and in Central Bank of Ecuador the Board set out a well-known passage from Lord Thankerton's speech in Thomas v Thomas [1947] AC 484, 487-488, which encapsulates the principles relevant on this appeal. It is to this effect:*
>
> *"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."*

21. In re J (vulnerable witness: sexual abuse: fact finding) [2014] EWCA Civ 875 [2015] 1 FLR 1152 the Court of Appeal emphasised the following

    i) An appellate court will exercise the greatest restraint before contemplating overturning a finding of fact made at first instance particularly where the trial judge has extensive experience in the field of child law particularly in the context of conducting a sensitive fact-finding exercise. An appellate court should only intervene to set aside a judge's findings if there were very clear grounds for concluding that a substantial error or series of errors occurred either during the process of the hearing or particularly within the judicial analysis.

    ii) No case of alleged sexual abuse where there was an absence of any probative medical or other direct physical evidence to support a finding could be regarded as straightforward. On the facts of that case (unusual as they were) the need for care and caution in assessing the testimony of the victim was at the extreme end of the spectrum.

    iii) Where significant weight was to be placed on the emotional content of a witness's evidence the court needs to conduct a reality check by having regard both to the factual content of the evidence and to the other evidence in the case in order to ensure that the dispassionate process of determining the facts was established on the balance of probabilities.

22. Thus it is clear from appellate courts of the highest level, that on an appeal from a first instance judge in relation to fact-finding this court should not interfere unless compelled to do so by the identification of clear and substantial errors in the process of the evaluation of the evidence and the drawing of conclusions of fact from that evidence. The nature and depth of the analysis to be conducted in any particular case and the level of detail that might be expected will depend upon the particular facts of

the case and the circumstances in which the judge is considering it. Allegations of sexual abuse will take place and have to be determined in very different evidential and procedural contexts. The determination of a sexual abuse allegation where that has been made by an articulate adolescent and which has been followed rapidly by an appropriate ABE interview and the court is able to proceed swiftly to fact-finding within private law proceedings might be considered at the end of the spectrum which allowed for a relatively simple and straightforward analysis. At the other end of the spectrum the case might require a far more sophisticated and nuanced analysis as was required in Re J (above).

Fact finding in sexual abuse cases

23. Mr Justice MacDonald has recently provided a comprehensive reminder to us of the approach to fact-finding in such cases in AS-v-TH and Others (False allegations of abuse) [2016] EWHC 532 (Fam). I do not intend to repeat that in this judgment, suffice to say that from paragraphs 23 through to 29 he summarises the basic principles. He draws attention to the specific risks in private law proceedings where allegations of abuse fall to be determined referring both to the observations of Baroness Hale in the Supreme Court in re B [2008] UKHL 35 and the Best Practice Guidance of June 1997.

24. He goes on to deal with particular issues which arise when dealing with allegations of sexual abuse. In paragraphs 30 to 32 he refers to the two-stage test and the Cleveland report. He goes on to consider some of the relevant statutory guidance and non-statutory guidance, which is there to assist professionals in their contacts with a child. The overarching message which emerges from the guidance is the care that needs to be taken in dealing with children who have made an allegation of sexual abuse, in order to ensure insofar as can be achieved that what they have to say is obtained in a way which makes it as reliable as possible.

25. In re J (above) at paragraph 74 the Court of Appeal emphasised by reference to what Lord Justice Hughes said in Re B (allegation of sexual abuse: child evidence) [2006] 2 FLR 1071, the great care that needs to be taken in obtaining evidence from children to ensure its reliability.

26. In Re E (A Minor) (Child Abuse: Evidence) [1991] 1 FLR 420 at 447H Scott- Baker J (a decision delivered when the messages of the Cleveland report were still very much ringing in the ears) identified 8 factors which he considered to be relevant to the determination of the weight that should be given to a child's account. I do not read his decision as identifying a discipline that should be applied in every case but rather it is an example of the sorts of issues, which might illuminate the difficult evaluation of the weight to be given to a child's account.

27. What clearly emerges from the authorities is that in relation to allegations of sexual abuse of young children the court must not only deploy the generic fact-finding approach but must in particular identify the need for special care to be taken in evaluating the reliability of the evidence of young children. The precise nature of the analysis that will need to be undertaken will of course vary from case to case. The more complex the background and evidence the more sophisticated will the analysis need to be and the more obvious the demonstration that special care has been taken.

The Judgments

28. There are 2 judgments, which are relevant to this appeal. The first was delivered in January 2017. In that the judge found that the sexual abuse allegations were not established on the balance of probabilities and thus sexual abuse had not occurred. The second judgment was that delivered in July 2018, which concluded that it had.

29. The change from one conclusion to the other lies at the heart of this appeal.

30. HHJ Meston QC became involved with the case on 19 May 2016. Directions were made for a fact-finding hearing to determine the disputed allegations of sexual and/or emotional harm. This was listed for 3 days commencing on 19 July 2016. Over 3 days the judge heard evidence and written submissions were provided thereafter with judgment being reserved. However on 2 August 2016, the mother's solicitors wrote to the court stating that the child had made further significant and detailed disclosures and requested that the evidence be reopened. The judge heard further evidence from each parent from 29 – 30 December 2016 and further documentation was submitted. Judgment was reserved.

31. At this stage it appears to me that there were some key evidential anchors which were relevant to the determination of the allegation of sexual abuse. They may not be the only ones but they are highly significant.

    i) 15 November 2015. The child returns from a day out with the father and is observed by the mother to have a red and swollen genital area. No visible sign the following morning. The father accepts washing her bottom in public toilets. The child makes no complaint about the father.

    ii) 13 December 2015. The mother asserts that the child returns from a day out with red and swollen genital area.

    iii) 18 December 2015. Child taken to GP. No visible signs on examination. No allegation made by child.

    iv) 22 January 2016. Child spoken to by social worker. Says father sometimes washes her after going to the toilet and did not suggest that anything was wrong or anything made her unhappy.

    v) 28 January 2016. Child spoken to at school by social worker. Could not remember having sore genital area. Assessment dated 18 March 2016 concludes no evidence of sexual abuse.

    vi) 7 March 2016. M meets with education and learning support assistant, Mrs Butchers.

    vii) 2 April 2016. M says child tells her daddy washes her with his hand whilst in bath.

    viii) 8 April 2016. M describes conversation with child and says, "I need you to be a really brave strong girl and talk to Mrs Butchers about what daddy has been doing to you."

ix) 12 April 2016. Child seen at school by police with Mrs Butchers. No allegation is made. Concern that child might have been given the impression she should communicate something to Mrs Butchers.

x) 15 April 2016. Conversation between child and Mrs Butchers. Child says that he washed her bottom with his hand twice.

xi) 30 April 2016. Mother questions child "...does it hurt when daddy touches you? ... Did he put his fingers inside your bottom?" Child said to have nodded.

xii) 1 May 2016. Police review concludes child has given negative disclosure to professionals and M has convinced herself her daughter has been abused.

xiii) 15 June 2016. Child and Mrs Butchers discuss secrets.

xiv) 16 June 2016. SW sees child in school. Child positive about contact. No allegation is made.

xv) July 2016. Fact-finding hearing and written submissions.

xvi) 31 July 2016. M says child makes significant and detailed allegations that when dad washed her it really hurt and his fingers hurt inside her bottom and that he told her not to tell her mother he washed her bottom.

xvii) 17 August 2016. Police and social worker visit child, no allegation is made.

xviii) 30 September 2016 mother finds child exhibiting over sexualised behaviour in front of schoolfriend.

xix) 29-30 December 2016, court receives further oral evidence from each of the mother and the father.

xx) 31 January 2017 judgment handed down.

32. In the judgment that was delivered in January 2017 HHJ Meston QC set out a very detailed exposition of the applicable legal principles to be applied when conducting fact-finding and evaluating allegations of sexual abuse in relation to a child. It is curious and may be relevant to this appeal that in that first judgment he includes from paragraphs 5 through to 11 a quite detailed summary of the approach specific to the evaluation of sexual abuse allegations made by young children which includes reference to Re E (above) and the 8 points identified by Scott Baker J, as well as the need to consider the climate in which the alleged disclosures were made and its particular importance. This includes the evolution of allegations over time, the family dynamics, the potential for false allegations, the relevance of any previous history of child abuse, the care that needs to be taken when interviewing young children and the potential for ambiguity, misrecollection or misperception as well as an appreciation of the child's age, maturity and level of understanding, the necessity for considering consistency of accounts given, the importance of corroboration and the range of possible findings.

33. He carries out a very thorough review of the evidence that was available at that time and a very detailed analysis of the parents' evidence. At paragraph 123, he states that

determination of most of the disputed issues turns on the credibility of the parents themselves. This must be because most of the evidence which was said to have emerged from the child had come via the mother and because the evidence about the 2 particular occasions when the child was said to have had redness around her labia or vagina came from the parents. She had made no frank allegations to police or social workers although had made various comments and demonstrated behaviours to them and in particular to Mrs Butchers which were potentially relevant in the determination of the sexual abuse allegations.

34. He concluded in respect of the parents that he was left with reservations about the credibility of each parent with the mother sometimes appearing to exaggerate and the father to downplay. He found it hard to gain a clear picture of the family dynamics or the parents relationship. He found the father's evidence to be persuasive although approached it with caution bearing in mind that the mother and her stepfather said the father could be deceptively convincing. He found the mother to be an intelligent and concerned parent anxious for the safety and welfare of her daughter. On occasion she became genuinely emotional. She had said she did not want to believe sexual abuse had occurred.

35. At paragraph 129 the judge identified that it was not a case where there were any clear indicators of what did or did not happen. He identified 6 particular points which he considered relevant in determining whether it was more likely than not that the father had sexually abused the child. They were:

    i) The child did not on either 15 November or 13 December make any suggestion that the father had done anything to hurt her.

    ii) There was no corroborating medical evidence and the mother's account of the redness and swelling appeared to some extent to be exaggerated.

    iii) The improbability of the father interfering with the child in December 2015 if he had been warned on the 13 November not to wash the child.

    iv) The father's emphatic denials.

    v) The role played by the mother in eliciting information from the child (this in particular would seem to relate to a leading question the mother had asked but appears to be of more general effect as well).

    vi) The probability that the child had sensed and responded to the mother's anxieties and disapproval of the father.

36. He found the father's account to have been essentially consistent and he could not find that the father's denials of sexual abuse were false. He concluded that there was insufficient material upon which the court could properly draw any inference adverse to the father. I interpret this to mean that taken in combination, the evidence was insufficient to establish on the balance of probabilities that the child had been sexually abused or that the father was the perpetrator. Having set out the binary rule earlier this conclusion amounts to a determination that the father had not sexually abused the child.

37. In March 2017, the Cedar project to whom the child had been referred to assist her with the consequences of the parental conflict and to consider contact began to explore the possibilities for progressing contact between the child and the father. The Springbourne family centre who had been supervising contact had provided a report which identified that contact was pleasant but there was a lack of physical and emotional warmth and that the child was wary of close physical contact with the father. On about 31 March, one of the Cedar workers spoke to the mother about the possibility of unsupervised contact. It appears that the mother was upset by this.

38. On 18 April 2017 the child was asked how she would feel about visiting her father at his home. She said, "that's a difficult one." Ms Taylor asked her if she would like to write down and put it in the worry jar which she did. The child wrote

"Dad washes my botm I don't lik it +am far away from mummy Dad gives me lots of sweets."

She later made another comment about the main thing when dad washes me and that it would make her happy if dad didn't give too many sweets.

39. On 26 April 2017 Ms Taylor asked the child what she meant by her not liking her dad washing her. She offered the child a doll on which to demonstrate. The child did so by washing the doll's genitals and bottom. She was asked what she did not like about it and she wrote down "*scratchy herty sorr"*

40. On 2 May 2017 the mother phoned Ms Taylor and told her that the child wished to speak to her before a contact session. During a conversation the child wrote down on a piece of paper she didn't want to see her dad "*because he does nasty stuff".* She then produced a piece of paper on which she had written some bullet points including "*this is what happened, dad put one finger in my bottom at a time."* Ms Taylor asked her to explain each of them following which the child and Ms Taylor re-enacted events. During this the child held up one finger at a time and Ms Taylor asked, "*where is the finger at front or back bottom?*" The child replied *"both.*" Ms Taylor asked if she had told anyone and she said that she had told the police. The contact centre manager referred the matter to children's services. Contact then took place within the contact centre. There was then a further session with Ms Taylor on 10 May in which there was no express discussion of the allegations but Ms Taylor discussed with her talking to the police telling, her that she was brave and she needed to be big and brave when she spoke to the police and that it was important tell the police everything; that is presumably everything that she had told Ms Taylor.

41. This was referred to the police and the child was to be ABE interviewed on 16 May 2017. This was preceded by a rapport visit on 12 May 2017 during which Mr Taylor was present and during which the child wrote down 6 notes. Some of the content includes:

i) "*he does at 3 oclock everyday"*

ii) *dad washes me [with a sad face drawn]*

iii) *I am woryd because he mght do it every time it issaw it herts"*

iv) *the washs me on my botm*

v) *Explan that a bit more? It is saw because he put his nais on it"*

vi) *Where does he put it? Mt botm. Frunt and back"*

42. The interview itself took place on 16 May 2017. I have watched the DVD of this. I offer no observation on how the child appears. During the interview the child in general did not give verbal answers to questions she was asked. In general, she wrote down the question and an answer. Some of her answers are as follows:

He washes me. I am too far away from mummy. He gives me too much swits.

Tell me about when he washes you? At 3 oclock every day

How does dad wash you? By putting 1 finger in my bum at a time.

Was that on your bum or in your bum? In, I think

Has daddy done any more things you don't like? Yes. Cook me macaroni cheese.

Where are you when this hapnd? In London

How old wer you when this hapnd? 3

How many times did this hapn? 40 times

{where di it happen?] eny where ther is toilets

How did that feel? Saw ichy

Did daddy say anything after it happened? Don't tell this.

How do you feel about seeing daddy? Bad

43. As a result of what the child had said to Springbourne and to the police, on 12 October 2017, HHJ Meston QC considered whether he should reopen the fact-finding hearing. Applying the guidance in Re ZZ [2014] EWFC 9 [2015] 1 WLR 95 he determined that the evidence of what the child had said amounted to a solid reason for reopening the enquiry. Thus a further hearing to determine the allegations was arranged.

44. The rehearing took place between the 22 – 26 January 2018. For that hearing the judge had available to him:

i) 5 lever arch files of documentation

ii) A DVD of the ABE interview

iii) The schedules of findings each parent sought; the mother's ran to 14 pages the father's to 17

iv) A 9 page skeleton argument on behalf of the father together with an 8 page chronology

v) After hearing evidence the judge was provided with written closing submissions. The father's ran to some 18 pages (60 paragraphs) the mother's ran to 36 pages (42 paragraphs or closer to 70 including subparagraphs) and the guardian's running to 12 pages (31 paragraphs).

45. The judge heard evidence from the mother and the father as well as police staff investigator Tarry and Donna Blanche, and Julie Taylor of the Springbourne family centre. At the conclusion of the hearing the parties filed their written submissions on the 12, 18, and 20 February 2018. The Guardian adopted a neutral stance in relation to fact-finding but submitted observations designed to assist the court. The Guardian identified matters, which undermined the credibility of both parents. She drew attention to the guidance from Mr Justice Scott Baker in re E in particular in relation to the number of times the child had been interviewed.

46. On 9 June HHJ Meston QC circulated a draft judgment. He provided a corrected judgment and a supplementary judgment dated 11 July, which dealt with some requests for clarification or amplification.

47. The judgment sets out an introduction (paragraphs 1 – 23) of the context in which the new allegations were made in the process which had been undertaken and which had led to an application to reopen the fact-finding and the decision to reopen. At paragraph 9, it was recorded that on 27 March the mother had been approached by the contact centre to discuss the possibility of unsupervised contact. In the mother's statement she said she was upset by this but reluctantly agreed to it. In a log of events the mother describes herself as despairing not knowing what to do. The judge records how the child then made further allegations to the Springbourne family centre on 2 May and underwent an ABE interview on 16 May.

48. At paragraph 24 the judge sets out a section entitled 'the principles applicable to fact-finding.' In this he refers back to his earlier judgment, and the judgment of Mr Justice MacDonald in AS-v-TH (above); and says it should be set out in full. He refers to paragraphs 23 to 29 (the generic fact-finding section) but not to paragraphs 30 to 32 which appear under the heading 'allegations of sexual abuse.' Nor does he repeat paragraphs 5 to 11 of his earlier judgment in which he set out the detailed exposition of the approach to determining the reliability of sexual abuse allegations emerging from young children.

49. At paragraph 25, HHJ Meston QC sets out the approach to a rehearing. His previous findings were a starting point and that he had decided there was insufficient cogent evidence to justify the findings then sought on a balance of probabilities. He reminded himself that all the evidence must be fully assessed and that there is no priority between the evidence given at the earlier or later hearing. He went on to set out the schedules of findings sought summarising some 20 odd of the findings sought.

50. He then turned to the hearing and a summary of the evidence. He set out that he had re-read the bundles from the earlier proceedings and his notes and the written submissions then provided. At paragraph 30 he said

"*there was little new or different evidence about the events that were covered during the original proceedings, although aspects of those events and of the parents' attitudes, behaviour and motives were again explored in some detail during the further hearing. The reformulated allegations (although wider in scope than I had intended or expected) did help to refocus on the detailed accounts of the surrounding events and circumstances which are of potential relevance to the assessment of credibility."*

51. From paragraphs 31 through to 79 he reviewed the evidence. It is clear from the summary that this focused largely on events surrounding the allegations made by the child in May 2017.

52. I have set out above a summary of the evidence he included about what the child said to Ms Taylor. The judge noted at paragraph 43 that Ms Taylor said she thought the child became more confident as the sessions progressed and that she had not got the impression the child was making it up. She thought the child was describing sexual abuse. She said it was not for her to disbelieve the child or to investigate. The centre manager said that there their role was not to see what the child says about her father but to build her resilience and to help children impacted by family conflict. In his conclusions he went on to identify that what the child said was carefully noted.

53. In relation to the ABE interview process the judge identified that the interviewing officer had conducted perhaps 100 such interviews. She said the child had a list of things she wanted to talk about but that did not suggest she had been coached. She considered the child had been consistent. The only question that concerned the investigating officer was the '40 times' response. In his conclusions the judge noted that there was no significant criticism made of the interview process. The judge noted that at that time the child was just under 6 and was describing events that could not have occurred later than early January 2016. He identified that the interview showed the limits of her recall and descriptive ability.

54. The judge went on to review the mother's evidence and the father's evidence. Part of the mother's evidence included entries from a log she was keeping. In January 2017 (so around the time of the judgment in the first fact-finding hearing) she recorded repeated remarks by the child about the father washing her and hurting her and being told to keep it a secret. A further entry on 17 February 2017 records the child complaining of the father washing her and him telling her not to tell her mum and him using his fingers and putting them in her vagina. Further entries appear in May, June, and July 2017. It appears much evidence was given about whether the mother knew about the father routinely washing the child after going to the lavatory. If there was evidence about the events of 15 November 2015 and 13 December 2015 it is not related in any detail. The mother confirmed that she believed there had been sexual abuse and that the child had been asked to keep it a secret. She denied encouraging the child to feel anxious and denied building a case. She alleged the child had displayed sexualised behaviour almost every time other children came around.

55. The father confirmed his previous evidence was true and there seems to have been some re-exploration of the events of 15 November. There was much focus on his assertion that he had regularly washed the child after toileting and inconsistencies in relation to that account.

56. In the section of the judgment where the evidence is reviewed it is for the very significant part simply relating the evidence that was given rather than an analysis which would later be imported into a conclusions section. Thus in order to get to the heart of the judge's reasons for making the findings he did and how he approached the analysis in order to reach those conclusions one needs mainly to look to the 'Conclusions' section.

The Judge's Conclusions: Discussion

57. The central argument made on behalf of the father is that the evidence in relation to the child's allegations was so fatally flawed that it was not open to the judge to make the findings sought by the mother. In support of this central argument it is submitted that:

    i) Given the multiplicity of allegations reported to have been made by the child before and after the first judgment, it was incumbent on the judge to undertake a proper forensic analysis of the way in which they emerged, their timing, their nature and whether the surrounding circumstances called into question the validity or quality of what she was saying. It is submitted that the judge fell into a trap of equating repetition with truthfulness.

    ii) An analysis of the progression of the child's allegations should have been the key exercise for the judge in the course of his judgment and Ms Branigan QC and Ms Hendry offer their own analysis in a 21 page colour coded annex.

58. Ground 1 asserts that the Judge failed to properly apply the legal principles and as a result reached a flawed conclusion.

    The learned circuit judge failed properly or at all to apply the relevant legal principles to the 2nd fact-finding exercise. By failing to apply such principles the court adopted an approach to its evaluation of the evidence in the 2nd fact-finding hearing which was improper and flawed.

59. Thus it is a submission that the judge was wrong in law in his judgment in that he failed to apply the relevant legal principles. It is accepted that the judge correctly set out the approach to fact-finding where allegations of sexual abuse are made by children. The summary contained within Ms Brannigan QC and Ms Hendry's skeleton argument is essentially a mirror of the approach set out by HHJ Meston QC in his first fact-finding judgment. In particular Ms Brannigan QC and Ms Hendry focus their criticism on the judge's failure to adopt the analytical method for evaluating the weight of a child's evidence which is contained in Re E (a minor) (child abuse: evidence) [1991] 1FLR 420. In that Mr Justice Scott Baker identified 8 discrete factors which needed to be borne in mind in evaluating the weight to be attached to a child's evidence.

60. One central point made on the appellant father's behalf is that in the first fact-finding judgment of January 2017 the judge did not identify in paragraph 129 (i.e. the key reasons why the mother had not discharged the burden of proof) the role played by professionals in eliciting information from or questioning the child. It is submitted that having referred to it in his summary of the law at paragraph 5 the judge ought to have identified it later.

61. Perhaps more importantly the father submits that had HHJ Meston QC applied the 8 factors identified as relevant to assessing the credibility of allegations made by a child in the judgment of July 2018 the answers would inevitably have pointed to a clear conclusion that the child's allegations to Cedar/Springbourne and in the ABE interview were unreliable.

62. In support of this at paragraph 5.4 of their skeleton Ms Branigan QC and Ms Hendry go through the 8 points.

    i) Having regard to the 6 interviews with social workers or police prior to 16 May 2017, and leaving aside the child's frequent discussions with Mrs Butcher and the Cedar worker the ABE interview is worthless.

    ii) The child was very young and the intermediary had considered she was suggestible. Both age and suggestibility militate against any conclusion that the court can rely on her account.

    iii) The care to be exercised in assessing the reliability of reporting adults. The mother was invested in pursuing the allegations of sexual abuse and the court knew that she had not accepted the court's decision and was despairing when faced with the prospect of contact moving from the contact centre. Everything pointed to the mother seeking to justify the conclusion she had reached that the child had been sexually abused. The Cedar worker interviewed the child in ignorance and breach of ABE guidelines.

    iv) The climate in which the disclosures were made. The judge failed to analyse the role played by the mother in eliciting information from the child and to evaluate the likely impact of her actions on the child and the account she was giving. Having concluded that the child sensed and responded to the mother's anxieties and distrust of the father he downgraded this in his 2nd judgment without any reasoning for his change of stance. The judgment made no attempt to assess the detail of the interaction of the child with the professionals prior to January 2017 whether standing alone or viewed in the context of the previous history.

    v) Whether what the child has said is likely to be fact or fiction. It is submitted that the lack of any analysis under this heading is notable. Ms Brannigan QC relies on the analysis carried out by herself and Ms Hendry at paragraph 4.4 FF in annex one.

    vi) The consistency of the child's accounts. It is submitted that the starting point was that on neither of the occasions when the child was alleged to have had redness and soreness in her genital area did she allege that the father had done anything to hurt her. It is submitted that it is crucial that this starting point is identified in terms of the reliability of the child's allegations.

    vii) The child's behaviour before and after allegations are made. The father submits that the judge's focus on the child's behaviour in May 2017 demonstrating it to be an experience that was for her a painful reality was to ignore all that had gone in between. It is submitted that there is a complete

failure on the court's part to evaluate the evidence surrounding the making of her allegations.

viii) Corroborative evidence was at no stage identified.

63. Ground 2 which is closely linked to Ground 1 asserts that:

'The learned circuit judge failed to analyse the allegations made following the judgment of 31 January 2017 in the light of the totality of the evidence before the court and consequently placed inappropriate evidential weight on the allegations made by [the child] in her ABE interview of 16 may 2017. Specifically the court

(i) failed to set the allegations made post January 2017 in the context of all that had gone before. Such an analysis properly undertaken should have led the court to the overwhelming conclusion that no weight could be placed on the allegations made by [the child] either in her ABE interview or to the CEDAR worker in April/May 2017.

(ii) failed to make findings of fact which would have significantly informed the overall fact-finding exercise.'

64. This is a challenge to the facts that the judge found to be established. It comprises in appeal terms a number of components which seem to me to be:

i) The judge placed inappropriate weight on one aspect of the evidence (the ABE interview of the child) in the context of all of the other evidence.

ii) Failed to make other findings of fact, which would have informed the overall evidential landscape within which the evaluation of the child's allegations had to be considered.

65. The central thrust of this ground is that the judge failed to carry out a forensic analysis of the emergence of allegations of sexual abuse and that had he done so it would have been clear that the mother's reports of allegations made by the child were closely linked to conclusions reached by professionals (GP, social worker, police, court) that were adverse to the mother's belief that the child had been sexually abused. It is implicit in this that the adverse findings prompted the mother to either fabricate allegations or to 'innocently' behave in such a way as to prompt the child to make such allegations.

66. It is submitted that the judge failed to place the allegations made to the Cedar worker or in the ABE interview in the proper context, namely in the light of everything that passed between 15 November 2015 and the 2nd fact-finding hearing. It is submitted that the judge compartmentalised the evidence and failed to place the child's allegations of May 2017 in the overall evidential picture. It is said that the allegations to the Cedar worker and in the ABE interview were valueless when considered in the light of what had gone before.

67. It is also submitted that the judge failed to engage with a number of other factual issues, which had arisen during the course of the hearing. The 2 key points identified by the appellant father are that of the mother's prior knowledge of the father regularly washing the child after she had defecated and the events of 15 November and 13

December 2015. It is submitted that these went to the core of the mother's reliability and credibility. Further factual issues were specifically identified on behalf of the father in paragraph 7 to 14 of counsel's closing submissions. I shall return to these later.

68. Ms Hendry took me through what she said were some of the critical elements of the 'the child's Account' in her Annex. I have referred to many of the critical dates when reviewing the material that was before the judge during the first fact finding and in the 2nd tranche of references to what the child said which led to the reopening of the fact-finding. She submitted that it was immediately obvious from that history if one looked at it, whether as an overview or in detail, that the path to the allegations made in April and May 2017 needed the most careful consideration and analysis by reference to the established principles for gauging the reliability of a young child's allegations.

69. Ms Giz, as I have already noted, said that with a judge of this experience who had previously set out in full the approach to allegations of sexual abuse; who had explicitly reminded himself and re-read the evidence from the first fact-finding hearing and who had carefully considered the circumstances in which the allegations were made in April 2017 and the contents of those allegations as recounted both to Ms Taylor and in the ABE interview had carried out the careful analysis required of him. She pointed out that:

i) He accepted that the allegations made to Ms Taylor were part of an 'innocent process' and that the ABE interview was appropriately carried out.

ii) He specifically referred to the child's age

iii) He dealt with the great care to be taken in assessing the reliability of adults who report. He noted the possibility of fabrication, the possibility of inadvertent creation and the possibility of them being true. In particular he identified the possible ongoing effect of the mother's leading questions. Ms Giz submitted if there was fabrication one might have expected more and florid allegations. The judge's acceptance of the accuracy of the log corroborated the absence of fabrication.

iv) He identified that the fresh allegations had emerged in relation to the progress of contact.

v) Although he did not specifically deal with whether any part of it had the appearance of being fact or fiction the allegations were not in any way unusual.

vi) He identified that the child had moved from not making allegations to making allegations. He had thus addressed consistency.

vii) He dealt with her behaviour as he had some evidence of the child exhibiting sexualised behaviour but did not rely on it. He did not rely just on her demeanour.

viii) The judge was aware there was no medical evidence.

70. Thus Ms Giz submits that within the judgment, HHJ Meston QC does consider the factors which are relevant. She acknowledged that although the judge did not specifically address the number of times the child had been interviewed or the diminishing weight it was abundantly clear that he had engaged in considering how the allegations had been communicated over time because he specifically referred to the change over time and the reasons for it. She also acknowledged that the judge had not dealt specifically with the despair that the mother had recorded in the log in respect of the possibility of unsupervised contact but submitted that in general terms the judge had addressed the mother's state of mind in relation to contact

71. The conclusions section of the judgment commences at paragraph 80 and comprises about 3 pages and 16 paragraphs. At the commencement the judge reminds himself that he had previously found there not to be sufficiently cogent evidence to justify findings on a balance of probabilities. He reminds himself that the burden of proof of sexual abuse rests on the mother. He had of course earlier set out the 'Principles applicable to fact finding' and so one can undoubtedly assume that he is expressly intending to adopt that approach.

72. What he does not do at the commencement of this section is identify the great care that needs to be taken in determining the reliability of allegations made by young children. Taken together with the absence of any reference in his 'the principles applicable to fact-finding' section to the detailed exposition he had set out in his January 2017 judgment this is slightly surprising. Given that the central evidence that had led to the rehearing and that was at the heart of the case he had just heard and given that this was clearly a case of considerable complexity having regard to it being a rehearing one might have expected a clear self reminder of the great care that needed to be taken in assessing the weight to be given to the child's evidence and some of the factors that needed consideration; the need to consider the number of times the child had been interviewed and the diminishing value of further interviews, the age of the child, the great care to be taken in assessing the reliability of adults who report what the child says, the climate in which the disclosures were made and whether they may have been influenced by adult words or behaviour, whether what the child has said is likely to be fact or fiction or a mixture of the two, the consistency of the child's accounts, whether the child's behaviour before and after the disclosures is consistent with the truth of them, whether there is any reliable independent evidence to corroborate what the child has said. Whilst I do not suggest that it is necessary for a judge to give himself a checklist and mechanistically go through it that would of course demonstrate that the issues had been considered and answered. So is it clear from the subsequent paragraphs that that cautious approach in which those markers of reliability were applied or not?

73. My initial response to reading paragraphs 83 to 93 of the judgment was that it was a very brief analysis. Of course, brevity is absolutely to be applauded. Some cases though do not lend themselves to brevity of analysis. It seems to me that this case was at the most complex end of the spectrum when it comes to analysis of the evidence as a whole but most particularly in relation to the reliability of the account given by the child. It seems to me it required a comprehensive review of the evidential trail that led from 15 November 2015 through to the ABE interviews in May 2017 in order to illuminate the process by which the child moved from neither making any allegation or demonstrating any trace of unhappiness with the father's behaviour either

to her mother, the GP or Mrs Bowles, the social worker who saw her in January 2016, through to writing down frank allegations of digital penetration in May 2017. It also seems to me that it was incumbent upon the judge to identify that whilst the process within which Ms Taylor elicited the frank allegations of abuse was an innocent one it was a process which was not compliant with the ABE process. The ABE interview whilst uncontroversial in terms of how it was prepared for and conducted has to be viewed against the backdrop of the discussions the child had with Ms Taylor and they against the backdrop of the discussions the child had with her mother.

74. At paragraph 81 the judge identifies that the primary evidence relied on by the mother is what the child said to Ms Taylor and in the ABE interview. The judge concludes that what she said was carefully noted and he acknowledges that there was no significant criticism of the later ABE interview. He reminds himself that the child was young when interviewed and recalling events when she was much younger and her recall and descriptive ability was limited.

75. Although Ms Giz can justifiably say that given his knowledge of the case and his exposure to the evidence, the judge must have had in mind the events from 15 November 2015 through to late 2016 and how the later allegations needed to be informed by those, it is not immediately evident from the judgment that his consideration of them was undertaken against that factual backdrop. It is all well and good to say one can assume it has been done but without any real evidence of it is that assumption justified? Of course, the judge was fully aware that the child had moved from not making allegations through to making allegations and hence his judgment asks why that might be. He answers it by identifying that the child has become more confident. I do not think that on the facts of this case that is sufficient. Without suggesting that the whole of the history needed to be repeated in the conclusion section I do consider that some explicit cross-checking was required to demonstrate that the child's recent allegations had not been compartmentalised and that they had been subjected to the rigorous scrutiny and contextual analysis that a complex sexual abuse allegation case of this sort required.

76. It also seems to me that the complaint that Ms Hendry makes on behalf of the appellant father in relation to HHJ Meston QC's analysis of the allegations made by the child in late April and on 2 May 2017 is well founded. The conclusion section of the judgment HHJ Meston QC does not subject that evidence to any real detailed scrutiny. The evidence is rehearsed and in general terms it is recognised that the allegations emerged in the context of a possible progression onto unsupervised contact but it does not look at that against the backdrop of the earlier history. He does say that it would be quite understandable if the child had come to realise her mother's concerns and that it was something her mother disapproved of together with the remaining impact of leading questions asked in April 2016 but that is in looking for theories which explain it rather than identifying the context in which it happened. There are many other points which either could or should have been addressed in relation to the reliability of this evidence.

77. Some of the matters which are not addressed in the judgment are:

    i) There is no detailed analysis of the circumstances in which these comments came to be made in the context of the mother's despair and the contrast this painted with some of her evidence to the contact centre and the court although

there is some consideration of the evidence of Ms Taylor and Ms Blanche that the mother remained in support of contact moving out of the centre despite the child's upset about this.

ii) The fact that what she had said on 26 April and that the meeting involved the introduction of a doll and comments ought to have alerted Ms Taylor that she was dealing potentially with allegations of sexually inappropriate behaviour and no further exploration ought to have taken place with the child.

iii) How, and why, the child had produced a ready-made note, which commenced in the way it did.

iv) There was no recognition of the possible risks of the process by which they were elicited by Ms Taylor, the re-enactment, the asking of leading questions.

v) There was no analysis of the contact that took place immediately after 2 May and whether anything could be gleaned from that as to the child's presentation in the immediate aftermath of the allegations having been made.

vi) The ABE interview itself was preceded a few days earlier by another familiarisation process, which also involved writing of notes.

78. At paragraph 82 he identifies the real question as being *"(i) whether what the child said and wrote in May 2017 are reliable statements of what has actually happened to her and, if not, to consider (ii) why she has been making these 'disclosures' in a way which has developed over time."* Apart from this reference, in the subsequent paragraphs the judge's analysis does not address the point of how many times the child had been interviewed and the diminishing value of her accounts. At paragraph 82 he refers to the evidence of Mrs Bowles, the social worker who '*described the child telling her things in a matter-of-fact manner.*' This is the only reference really to the path that the allegations took from beginning to end.

79. These 2 questions are perhaps an elision of the 'ultimate' question of reliability with one of the factors, which might inform their reliability. It does not address the other factors, which might bear upon the reliability issue. I accept Ms Giz's point that several of the considerations identified by Mr Justice Scott Baker in re E can be discerned from the conclusions section of the judgment. However there are significant omissions. They include:

i) I do not consider in a case of this history and complexity that the simple acknowledgement or recognition that the allegations had emerged and changed over time dealt sufficiently with this point. If a rule of thumb is that less weight is to be given to later interviews than to earlier interviews the ultimate conclusion that HHJ Meston QC reached was that it was the two latest interviews which were the reliable ones and that the first or earliest were not reliable. When one is inverting the rule of thumb in this way it seems to me that it needs to be supported by a clear analysis of an explanation of why the earlier are unreliable and the later are reliable. I do not think a generalised answer that the child was becoming more confident is a sufficient answer to this point. The evidence relating to what the child said (or didn't say) and her demeanour or behaviour in late 2015 and early 2016 when spoken to by her

mother, GP, social worker and police all needed to be carefully scrutinised and set against the context of the later allegations.

ii) Whilst it is true that the judge identified the possibility of the 'taint' of the mother's leading questions continuing to play a role the judge did not analyse why that no longer amounted to a real concern, particularly when it was one of the six reasons he identified for making no finding in January 2017.

iii) Although it may not be necessary to consider in detail the behaviour of the child on each of the occasions she is said to have spoken about this there were a number of occasions when either the evidence about her demeanour was agreed or was independently before the court through a social worker or other professional or the ABE interview itself. These warranted some attention. Given that sexualised behaviour might be corroborative of sexual abuse but might also arise from other sources it is a factor, which could have been considered but is perhaps not critical.

iv) The acknowledgment of the change in her account barely touches upon consistency over time. From not making any complaint on the 2 identifiable dates when she had a red and swollen genital area, to making no allegations and being comfortable with the father washing her bottom when she first spoke with the social worker, through to saying to Mrs Butchers her father had washed her twice through to referring to 40 times, through to referring to the washing happening in London or in public toilets, there was much that needed to be considered.

v) The lack of corroborating evidence received no mention albeit it was one of the features specifically identified in the first fact finding judgment and in particular where he had concluded that the mother had exaggerated her description of the extent of the redness and swelling. What does appear in the judgment at paragraph 91 (as supplemented) is a conclusion that the child's red and swollen genital area was not satisfactorily explained by the father's account of the 15 November washing or the 13 December playing. Ms Hendry submitted that this in effect reversed the burden of proof and called for the father to provide an adequate explanation. The way it is formulated does tend to suggest that there is no other innocent explanation. Whilst I do not consider that the way it is expressed does amount to a reversal of the burden of proof, in tandem with the absence of express consideration of and a specific finding as to what occurred on each of those dates it has an unfortunate tendency to suggest it is corroboration when it may not be.

80. The absence of express consideration of these points in a case of significant complexity is it seems to me a flaw.

81. It may be that the absence of consideration of one or more of these matters alone would not be sufficient to undermine the analysis of the reliability of the allegations made by the child in April/May 2017. However I consider that taken together they constitute an error in applying the principle of caution in a case of real complexity and an error in the analysis that was required to appropriately consider the weight that should be given to those allegations in the overall weighing of the evidence.

82. In paragraph 84 the judge recognised the 3 possible explanations for the child saying what she had. He explicitly rejected fabrication by the mother – as he had in January 2017. He recognised the possibility of 'innocent' creation and considered it would be quite understandable if the child had come to feel it was expected of her to say these things. However – and having regard to what I have identified as the incomplete analysis of the context - I am unable to discern how it was that this real possibility was dismissed. As he had said in January 2017 this was not a child who was thought prone to fantasy or lying and he had concluded in 2017 '*the probability that [the child] has sensed and responded to her mother's anxieties and disapproval of the father.'* In my view an explanation of why this was no longer the explanation was required. Particularly given that he had found (again) that it would be understandable in the circumstances. Was it now a combination of response to the mother's anxiety AND she was actually abused or had the latter displaced the former?

83. From paragraphs 86 – 91, the judge considers the credibility of the parties. He concluded that the mother's credibility had not diminished; thus a tendency to exaggerate (see para 123 of the first judgment). The father he found to be persuasive albeit with a tendency to downplay in the first hearing. In this judgment he considered that the father's evidence had become less credible and convincing. The basis of the change in the judge's appraisal of his credibility was largely linked to peripheral issues. However he also identified at paragraph 90 that the father's account of his practice of washing the child's bottom was undermined by gaps and inconsistencies. This did go to an issue which, was if not central at least very closely linked. Overall it altered his assessment.

84. Ground 3 asserts that:

> *'The learned circuit judge undertook an evaluation as to the parents' credibility which was flawed and inconsistent with the findings previously made by the court.'*

85. This seems to be a submission that the judge's evaluation of credibility failed to give due weight to the previous findings or conclusions on credibility. It is submitted that he did not approach the questions of credibility of the mother and father in an even-handed way. It is asserted that he identified certain issues in the father's case, which undermined his credibility but did not do the same in respect of the mother. The father goes on to argue that the failure to determine the issues of prior knowledge of washing and the events of 13 December deprive the judge of conclusions that were central to the determination of the credibility of the parents. I'm not sure that they are central to determining the credibility of the parties but I do agree with Ms Hendry that the events of 15 November 2015 and 13 December were central; of which see below. Matters of credibility are peculiarly within the remit of a trial judge who has seen and heard the parties. I do not consider that it can be said that the judge's assessment of credibility was flawed and inconsistent with the findings previously made but it is perhaps neither here nor there given that I consider that grounds 1 and 2 are established. The question of the credibility of the parties will be at large upon the remitted hearing.

86. Ground 2 (ii) asserts that *the judge failed to make findings of fact which would have significantly informed the overall fact-finding exercise*. My initial reaction to the submission that they were central was to doubt that proposition. Why were they any more central than any of the other numerous allegations within the schedules? Ms Giz

submitted that it was implicit that he made findings in favour of the mother on these issues because he rejected the father's explanations for the redness and swelling that had been observed. She also submits that it was not essential for him to make findings on every issue. On further reflection though I agree with Ms Hendry's submission. Ultimately the judge was considering allegations of sexual abuse. The Scott schedules had a tendency to obscure that central issue. It seems to me that the way the schedule was drafted did not assist the judge in identifying clearly the facts which were central to the determination of the case. Item 1 on the schedule contains the headline allegation outlined in paragraph 3(i) above. It also identified 2 specific occasions, 15 November 2015 and 13 December 2015 when it was said that the child had returned home with a red and swollen genital area. However the schedule went on to include 7 other sub paragraphs which were better characterised as evidence in support of the general allegation but were included as findings sought thus muddying the water. In relation to item 3 the findings sought were also diffused by 3 sub paragraphs and in relation to item 4 it was diffused by 8 sub paragraphs.

87. It would have been far easier for the judge to discern and determine the core facts had the schedule been clearer. I note that HHJ Meston QC describes the schedules as having helped to refocus on the detailed accounts of the surrounding events and circumstances which are of potential relevance to the assessment of credibility. Although it is easy with the benefit of hindsight, it seems to me that the factual allegations made in fact were:

(i) That on 15 November 2015 the father touched the child around the area of her bottom and or touched the child around her genital area and/or put his finger inside her bottom or genital area

(ii) On 13 December 2015 the father touched the child around the area of her bottom and or touched the child around her genital area and/or put his finger inside her bottom or genital area

(iii) On other unidentifiable dates the father touched the child around the area of her bottom and or touched the child around her genital area and/or put his finger inside her bottom or genital area

(iv) This will remain the same, albeit some might see this as part of the evidential sub-strata of the sexual abuse allegation.

88. Had this formulation been adopted it would have focused attention on the 2 specific dates and events which were the genesis of the allegations and a central (albeit not only) part of the evidence relevant to the determination of the allegations of sexual abuse. They were the seed from which all else grew and the 2 identifiable occasions, which were specifically alleged to demonstrate sexual abuse and indeed the most powerful identifiable dates on which sexual abuse was said to have occurred. In those circumstances it would inevitably have led the parties and the judge to consider those events in detail alongside the later evidence and would inevitably have led the judge to specifically determine what occurred on 15 November and 13 December.

89. The remainder of the schedules were by and large relevant to credibility which was important but not to the extent of obscuring the central facts which needed determining. It is certainly right that the judge did not make express findings on those

matters either in January 2017 or July 2018 and I consider that in the context of this case and given the evidence he had available to him and that in weighing all the evidence he ought to have made explicit findings in relation to those 2 dates. It might be arguable that his general findings implicitly find that sexual abuse occurred on those occasions. However that was not the outcome of the first fact-finding hearing and paragraph 129(a) (b) (c) and perhaps (d) all related directly to those 2 specific incidents in one way or another. If they were to be reversed those points needed to be addressed. Why were they now different or why did they weigh differently?

90. Although I have focused upon the central allegations it is noteworthy that the mother's schedule contained a total of 8 allegations with numerous sub- allegations spread over some 14 pages and the father's schedule of findings contained some 40+ findings sought spread over 17 pages. Most of those were not what most lawyers would recognise as facts requiring to be found to determine a child arrangements application. Some were evidential matters which could probably have formed part of the response to the mother's Scott schedule and many related to the mother's credibility. Some might have been formulated along the lines *of 'the mother has been obstructive in respect of the child and father spending time with each other and has not supported the relationship'*

91. It is hard to avoid the conclusion that the overloading of the respective schedules contributed to a situation where there was too much focus on what the child had said in May 2017 and insufficient focus both on the 2 identifiable events which were said to be the most powerful examples of sexual abuse and all the contextual evidence about what the child had said and done thereafter and which had contributed to the conclusion in January 2017 that sexual abuse had not occurred.

92. It is imperative in fact-finding exercises that the lawyers and judges case managing identify the central facts on which the court needs to rule. This ought to be done at FHDRA stage or otherwise prior to the commencement of the final hearing. Scott schedules can be an invaluable tool in assisting in the process of determining contested facts. However when they are imprecise or overloaded or mix 'facts' with evidence they can become a distraction and run the risk of diverging attention away from rather than upon the central facts. If a schedule is not appropriate one of the first steps that might be necessary at a fact-finding hearing will be to concentrate the minds of those involved in accurately identifying and reducing to writing the key facts which the judge is to rule upon.

93. At paragraph 92 the judge drew the threads together saying:

"*Apart from the different view of the parties and their evidence which I have reached in this hearing, I have to consider the weight to be given to the evidence of what [the child] said in May 2017. When seeking a further hearing counsel for the mother posed the question:" can this court say that had this ABE interview been conducted and available in 2016 that it would have reached the same conclusions?". My conclusion is that, on an overall consideration of all the evidence, including that of Ms Taylor and of the ABE interview and what preceded it, the evidence of what [the child] said in May 2017 is both credible and reliable. [The child] was describing an experience that was for her a painful reality. Such evidence justifies and requires revision of the earlier findings.*

94. I do not consider that importing into the final conclusion on the fact-finding a question posed at the hearing to determine whether the fact-finding should be reopened was helpful. It has a tendency to suggest that the process which is now being undertaken is whether adding into the scales the additional evidence tips the balance the other way. That it seems to me risks both compartmentalisation and an undue and inappropriate focus on only those new pieces of evidence. The process must involve an overarching consideration of all of the evidence and how each interrelates with the other. Thus what took place in April and May 2017 and the judge's views on credibility had to be woven into the overall evidential picture to create a new one rather than putting the picture from January 2017 and the picture from January 2018 alongside each other. Whilst it was open to the judge to interpret the ABE interview as demonstrating a child describing an experience that was a painful reality that conclusion could only be a reliable one if it was plainly set against the backdrop of an appropriately detailed analysis of the path to ABE. Whilst the weight that the judge placed on the ABE may not be in the realms of that which the Court of Appeal criticised in Re J (above) nor based on the presentation alone I am satisfied that because of the flawed analysis of the context in which the April/May 2017 evidence had to be assessed and the absence of focus on the 2 anchor points of 15 November 2015 and 13 December 2015 that paragraph 92 is ultimately a flawed one. Too much weight is placed on the evidence of the child when such weight could not properly be attributed to it without the detailed contextual analysis I have referred to.

Conclusion

95. I am therefore satisfied that Ms Hendry has established grounds 1 and 2 of the grounds of appeal and that the decision reached was wrong and that this appeal must therefore be allowed. The judgment does not demonstrate the application of the principles relating to allegations of sexual abuse from young children and in particular does not demonstrate the detailed contextual analysis that was required in this highly complex case. Although the allegations are not in themselves unusual or difficult the surrounding penumbra of events and the nature of the litigation made it a complex case. Further the absence of findings on two anchor point events add further substance to the appeal. They led to a situation where undue focus was placed on the recent allegations and weight was placed on them which they could not properly bear. Ground 3 is not made out but credibility will be at large at the remitted hearing.

96. Having regard to the nature of ground 1 and 2(i) and my findings on them I do not consider that any legitimate criticism can be made of the appellant's legal team for not seeking further clarification from HHJ Meston QC. He dealt rapidly with the preliminary points raised and permission to appeal and before Ms Hendry had received Ms Branigan's input. In the context of the criticism of a wholesale failure to analyse the context of the April/May 2017 evidence I do not think it could sensibly have been the subject of such a request. Still less would it be appropriate now.

97. Returning to the fact that the Guardian played no role in this complex appeal I would observe that a child is made a party to private law proceedings of this sort because the court has considered it is in their best interests to be a party. I'm afraid I do not follow why it would be considered that it was not in the child's best interests for her Guardian and lawyers to play a role in an appeal in such a critically important matter concerning the child. Assuming (as is the case in this appeal) that the Guardian is taking a neutral position and that they participated at the first instance hearing, is it

not in the child's best interests to provide such assistance to the court as they can to ensure that the appellate court is as well informed as can be achieved both about the process at first instance but also the arguments adduced on appeal?

98. It is not necessary for me to understand or explain how a flawed judgment came about. Perhaps there were many contributing factors including the over-burdened Scott Schedule, lack of time, the inability to complete the case within its time estimate and the delay in delivery of the judgment.

99. The result of the appeal being allowed has to be that the matter is remitted for further hearing. I do not consider that I am in a position to determine that the evidence from the child from April/May 2017 is so demonstrably unreliable that findings could not be made in reliance upon it. That with respect to Ms Hendry is to invite me to commit the very error that forms the basis of this successful appeal. First of all the reliability of the evidence has to be viewed in the context of how it came into existence (i.e. the Re E approach) but also it has to be placed in the overall evidential landscape. This is not comparable to Re J. It is therefore with considerable regret that I conclude the evidence must be heard again. That will mean that some 3 ½ years have passed since the events of November and December 2015 and still no conclusive answer is available and still the parties and most particularly the child are unable to progress their lives. The cost both financial and emotional cannot be underestimated but I see no alternative. All matters relating to the sexual abuse allegations will be at large at the remitted hearing. I consider that the remitted hearing should be conducted by a Judge of High Court level and I have provisionally identified a 2 week window before a Deputy High Court Judge commencing on 8 July. The time estimate for the hearing will need to be considered but I very much doubt it could be dealt with in less than 7 days. The matter will have to be listed for a PTR before the allocated judge.