Neutral Citation Number: [2022] EWHC 986 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2022

Before:

MRS JUSTICE KNOWLES

- -

Between:

K	**Applicant**
and	
L	**Respondents**
and	
M	
(by her children's Guardian)	

(Re M: Private Law Children Proceedings: Case Management: Intimate Images)

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Mr Tyler QC and Miss James for the Applicant father
Miss Fottrell QC and Dr Proudman for the Respondent Mother
Mr Woodward-Carlton QC and Miss Claridge for the child

Hearing dates: 29 and 30 March 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on Friday 29 April 2022

Mrs Justice Knowles:

1. This judgment addresses a variety of case management issues prior to the rehearing of a fact finding hearing within private law proceedings concerning a little girl, M, now aged three years. The outcome of a previous fact finding hearing was the subject of a successful appeal by the mother. The judgment on the appeal is reported under neutral citation M (A Child) [2021] EWHC 3225 (Fam) (referred to herein as "the appeal judgment"). The rehearing is listed before me for ten days commencing on 3 May 2022.

2. The parties to the proceedings are the father represented by Mr Tyler QC and Miss James, the mother represented by Miss Fottrell QC and Dr Proudman, and M represented by Mr Woodward-Carlton QC and Miss Claridge. I am very grateful to all the advocates for their written and oral submissions in what is highly emotive and difficult litigation. As may be apparent, the issues detailed in this judgment have necessitated close scrutiny of the court bundle.

3. This judgment may be of interest in that, in part, it concerns the use of intimate images within private law proceedings and makes suggestions for how such images should be admitted into and managed within private law children proceedings. Anecdotal evidence suggests that the use of intimate images is becoming increasingly common in private law proceedings where allegations of domestic abuse (including sexual abuse) have been made and where the court has decided to determine the truth or otherwise of those allegations by holding a fact finding hearing. No previous reported judgment concerned with private law proceedings has, to my knowledge or those of the advocates, addressed this issue.

4. In paragraph 9 below are listed a number of matters requiring the court's determination at this case management hearing. I have addressed these, together with some other matters, issue by issue, later in this judgment.

Background

5. Unsurprisingly given the litigation history but unhelpfully, the case management documents prepared by the mother and the father were not in agreement as to the factual background giving rise to the proceedings. Rather than attempt to construct a narrative myself for the purpose of what is a case management judgment, I have decided to rely on the summary of the background set out by Judd J at paragraphs 2-12 of her appeal judgment which, by reference, I incorporate into this judgment. No party made submissions to me that her summary was inaccurate.

6. Following the fact finding judgment at first instance, the mother applied for permission to appeal which was granted in April 2021. The appeal hearing took place in November 2021 and the judgment of Judd J was handed down on 1 December 2021. The mother's appeal was allowed on two grounds.

7. The first ground was that the mother did not have the benefit of participation directions. There was a duty on the court to ensure that a party's vulnerability was addressed by the use of participation directions to enable that party to

give their best evidence to the court. In coming to her conclusion, Judd J highlighted the sensitive nature of the case where there were allegations of the utmost seriousness, including two alleged vaginal rapes and one alleged anal rape when the mother was eight months' pregnant. She also noted that there was evidence that the mother had some long-term underlying frailties and suffered from anxiety. Those matters *"cried out for participation directions and a ground rules hearing, not just for the sake of the mother but for the integrity of the court process itself"* (paragraph 66 of the appeal judgment).

8. The second ground was that the judge had given insufficient consideration to the possibility that the mother may have been over-dependent on the relationship with the father or vulnerable in that relationship. The judge's analysis of that issue was found to be limited and Judd J accepted that there was some force in the submission that the judge had looked at the evidence in a compartmentalised manner.

9. Having allowed the mother's appeal, Judd J remitted these proceedings to me for case management and rehearing. On 8 December 2021, I conducted a case management hearing and listed both a rehearing of the factual allegations made against each other by the mother and the father and a case management hearing on 24 and 25 February 2022. My order itemised the matters which the court would consider in February 2022 as follows:

A) The admissibility of video and photographic evidence adduced at the fact finding hearing in December 2020 (the intimate image evidence). The mother and the father were to include in their respective skeleton arguments a schedule of this material explaining why it was relevant;

B) The mother's application for participation directions pursuant to Rule 3A and Practice Direction 3AA ("PD 3AA") of the Family Procedure Rules 2010, including those for physical distancing of the mother and the father, those in respect of how her oral evidence might be received by the court, and those requiring any questioning of her to be provided in advance;

C) Whether there should be cross-examination of the parties' sexual history and behaviour;

D) Whether the first-instance judgment should be included in the court bundle;

E) Whether the transcripts of evidence should be included in the court bundle; and

F) Witness requirements.

10. I also gave directions for the determination on the papers of a Part 25 application by the mother for a jointly instructed expert adult psychologist to report on (a) whether the mother had any underlying psychological disorder which might impact on her ability to give oral evidence at the fact finding hearing and (b) if she did, what participation directions were required to assist her to give her best evidence in court. Shortly before Christmas 2021, I permitted the instruction of Dr Hannah Jones, a clinical psychologist, to

prepare a report upon the mother. Regrettably, given the dispute as to the precise nature of Dr Jones's instructions, I was required both to descend into the minutiae of what documents should be disclosed to Dr Jones and, because the questions in the draft letter of instruction were unfocussed and repetitive, to draft the questions for Dr Jones myself.

11. The case management hearing listed in February had to be adjourned to 29 and 30 March 2022 because of illness in the mother's legal team.

The Parties' Allegations

12. What follows is a very bare outline of the parties' allegations set within the context of the applications made to the court.

13. By an application dated 7 January 2020, the father seeks a child arrangements order in respect of M, inviting the court to order that she live with each parent on a shared care basis. The proceedings originated in the High Court when the mother wrongfully removed M from this jurisdiction to Romania. On 22 January 2020, Mostyn J found that M had been wrongfully removed from this jurisdiction and ordered her return. The mother had returned here with M by the time of a hearing on 18 February 2020 before HHJ Watson (sitting as a judge of the High Court). By an application dated 28 October 2020, the mother sought permission to remove M from this jurisdiction to live in Romania.

14. At the first fact finding hearing in November 2020, the mother made three allegations that the father raped her. She stated that he had an obsessive sexual compulsion/disorder which he was unable or unwilling to control and had desires towards young looking girls, including school girls. Additionally, the father was said to have shown controlling, manipulative and intimidating behaviour towards the mother throughout their relationship. He was alleged to be financially controlling and physically violent on occasion. The mother alleged that the father had behaved inappropriately with M by encouraging her to suck his toes, by watching him urinate, and by using abusive language to M such as calling her a *"whore"* and a *"cunt"*.

15. The father, for his part, alleged that the mother had wrongfully removed M to Romania and had caused M physical and emotional harm by frequently removing her from her settled home and her father. He alleged that the mother was controlling with respect to the time the father spent with M and had also called M *"a fat bitch"*, a *"moaning pig"* and so on.

16. At the commencement of this case management hearing, the allegations originally made were – for the most part – still pursued. However, the mother now alleged a further specific occasion of sexual assault in 2016, alongside multiple rapes when she was sleeping. She also alleged violent conduct by the father during sex including non-fatal strangulation. The father pursued an additional allegation that the mother had subjected M to unnecessary surgery on her labia in Romania without the father's consent and against the advice of M's GP. He also asserted that the mother had fabricated increasingly

serious allegations of abuse in order to obstruct the father's relationship with M.

The Report of Dr Jones

17. Dr Jones' report was dated 6 February 2022. It provided a detailed insight into the nature and the extent of the mother's vulnerabilities. What follows is a summary of those matters relevant to the case management exercise.

18. First, Dr Jones was of the opinion that the mother was experiencing symptoms characteristic of Complex Post-Traumatic Stress Disorder (Complex-PTSD) and that she had a Depressive Disorder with comorbid anxiety. Dr Jones was confident that the mother did not have difficulties with her cognitive functioning.

19. Dr Jones reports that Post-Traumatic Stress Disorder (PTSD) is a psychological disorder that may occur in people who have experienced a traumatic event. People with PTSD have intense, disturbing thoughts and feelings related to their experience that last long after the traumatic event has ended. They may relive the event through flashbacks or nightmares; they may feel sadness, fear or anger; and they may feel detached or estranged from other people. People with PTSD may avoid situations or people that remind them of the traumatic event, and they may have strong negative reactions to something as ordinary as a loud noise or an accidental touch. Symptoms of PTSD fall into four categories: Intrusion; Avoidance; Alterations in cognition and mood; Alterations in arousal and reactivity. The mother described each of these symptoms to Dr Jones.

20. Complex-PTSD has been described as typically associated with chronic and repeated traumas and includes not only the symptoms of PTSD but also disturbances in self-organisation reflected in emotion regulation, self-concept and relational difficulties. In Complex-PTSD, the expression of emotion regulation difficulties predominantly includes emotional sensitivity, reactive anger, and poor coping responses. Again the mother described each of these symptoms to Dr Jones.

21. The mother's reported symptoms of Complex-PTSD were likely to impact upon her ability to provide her best evidence. Traumatic stress can influence engagement with court processes in a diversity of ways, with the impact having a positive correlation with exposure to trauma related material and exposure to increased stress (each being typical within court hearings). Research indicates that for those individuals experiencing trauma related symptoms, attempting to relay their experiences can produce memories that are fragmented, lacking in specific details, and difficult to position within a linear narrative. Those who experience trauma are more likely to produce inconsistent or incomplete accounts, and accounts may shift as an individual comes to terms with their experiences. Trauma memories are more likely to be partial, and fragmented into key moments. The impact on memory that trauma survivors experience means they are at raised risk of being susceptible to suggestive influences and vulnerable to court proceedings, most significantly within a cross-examination where there is opportunity to

use suggestive, misleading questions in an attempt to find inconsistences and inaccuracies in a witness's testimony to imply unreliable evidence.

22. High levels of negative affect may predispose the mother to intense maladaptive emotional responses and dysfunctional cognitive processes such as selective attention to negative or threatening cues and hypervigilance to threat. Such maladaptive cognitive processes can result in emotional dysregulation and impaired social functioning. Moreover, an increased perception of threat accompanied by elevated emotional states might exacerbate negative responses to ongoing stressors or serve itself as a source of chronic stress, with the resulting stress-related co-morbidities. As a result of this, trauma related distress is often obscured by seeming innocuous behaviour or response. Within a courtroom setting, it is often challenging to identify when traumatic stress has been induced (or 'triggered'), and the resulting behaviour can appear confrontational, defensive, bizarre, or evasive, and thus can give the impression that an individual is not in distress. According to Dr Jones, the mother recognised this to a certain extent, highlighting the severe impact that cross examination regarding the intimate video material by the father's barrister had had. She said that, in response to feeling extremely *"intimidated"*, she became *"defensive"* rather than expressing the fear and shame that she was experiencing. The mother said that *"I try to be strong, I try not to cry, I didn't want him to see me crying"*. Complex-PTSD related shame and guilt may also cause vulnerability to negative insinuations during cross-examination, with factors such as the tone of voice used acting as potential cues for feelings of powerlessness and stigmatisation.

23. The mother's medical records detailed a depressive disorder, ongoing hypervigilance, adrenergic symptoms, panic attacks, and fluctuating mood. She is currently prescribed anti-depressant medication. Dr Jones suggested that the mother's experiences of symptoms associated with a depressive disorder and comorbid anxiety were most appropriately interpreted within the context of her wider symptoms of Complex-Post Traumatic Stress.

24. Dr Jones recommended that the mother should have the benefit of an intermediary with specific expertise in working with individuals who had experienced trauma. The mother should also have the services of a consistent interpreter because, although her comprehension of English was good, at times of stress her ability to source words and convey meaning was likely to be impaired.

25. With respect to participation directions, Dr Jones recommended that the mother should not come into direct or indirect contact with the father during her evidence and he should not be able to see her when she was giving her oral evidence. She should be given frequent breaks with additional breaks should she show signs of trauma related distress. Further, the mother should be exposed to areas of questioning in advance and there should not be unnecessarily intrusive questioning regarding traumatic experiences. Finally, the mother should not be unnecessarily exposed to trauma related material.

26. The mother told Dr Jones that the past proceedings *"put me in a depression"* and that she felt *"broken"* as a result. She described finding cross-examination regarding the intimate videos and images particularly difficult to manage. The mother said that she continued to experience trauma related distress as a result of this experience, including physiological symptoms, flashbacks, nightmares, and low mood. It was evident that the inclusion of the *"large number of explicit videos…several large pornographic photographs of her and several more small 'stills' exhibiting videos"* (as described in paragraph 64 of the appeal judgment) in addition to questioning which *"may not have been necessary"* (para 67) including material from prior to the mother's relationship with the father had acted as a significant trauma for the mother. The mother told Dr Jones that she had been *"forever damaged"* as a result of this, and discussed that she *"didn't know how to manage"*. She described extreme physiological symptoms associated with this experience, in addition to panic attacks, re-experiencing, and depressed mood. Dr Jones was of the opinion that subsequent inclusion of this material within a further court setting was likely to have a compounding traumatic impact on the mother. The exposure to the intimate images and videos or other trauma related material was likely to impact on the mother's ability to give her best oral evidence.

27. With respect to such material, Dr Jones recommended limiting the number of people who viewed the same with, ideally, the judge alone seeing the intimate images which were considered relevant. Further, the judge alone should ask the mother questions about it. If there were to be cross-examination by any of the advocates, Dr Jones recommended that only one advocate ask the mother about this material.

28. The conclusions of Dr Jones' report were accepted by the mother and the children's Guardian, the latter noting that Dr Jones' analysis was congruent with her own observations of the mother's vulnerabilities set out in her report dated 21 January 2021. The father drew my attention to the fact that Dr Jones' report was based on self-reporting by the mother but accepted that, in the light of PD3AA, the mother was deemed to be vulnerable because she had made allegations of domestic abuse against the father. Mr Tyler QC submitted that the father was sceptical as to the extent of the mother's actual vulnerability and he suggested that the mother now had a significant tactical advantage within the proceedings. However, Mr Tyler QC accepted many of Dr Jones' recommendations as to how the mother's evidence should be facilitated by the court.

The Law

Case Management

29. The Family Procedure Rules 2010 ("the FPR") contain the procedural means by which the family court deals with cases justly, having regard to the welfare issues involved ("the overriding objective"). FPR Rule 1.1(2) states:

"Dealing with a case justly includes, so far as practicable –

a) ensuring that it is dealt with expeditiously and fairly;

b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

c) ensuring that the parties are on an equal footing;

d) saving expense; and

e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

30. In order to give effect to the overriding objective, FPR Rule 22.1 gives the court power to control the evidence the parties may seek to adduce in support of their respective cases. FPR Rule 22.1(1) states that the court may control the evidence by giving directions as to (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court. Ultimately, the court has the power to exclude evidence that would otherwise be admissible (FPR Rule 22.1(2)) and the power to limit cross-examination (FPR Rule 22.1(4)).

31. Allied to these general case management powers are the requirements of PD12J which applies in any private law proceedings where allegations of domestic abuse have been made or admitted. Where the court has determined that a fact finding hearing is necessary to determine disputed allegations, paragraph 19 of PD12J directs the court to consider a variety of matters in order to ensure a fair and effective hearing. Of relevance to the issues in this case, those matters include:

A) identifying the key facts in dispute (paragraph 19(a));

B) what evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse (paragraph 19(d)); and

C) what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence (paragraph 19(j)).

32. In 2021, the Court of Appeal offered further guidance to judges making what are often difficult case management decisions in private law children proceedings where domestic abuse is alleged. Paragraph 58 of Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448 stated as follows:

" ...We offer the following pointers:

a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements orders and contact orders'; it does not establish a free-standing jurisdiction to determine

domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;

b) PD12J paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:

i) Provide a factual basis for any welfare report or other assessment;

ii) Provide a basis for an accurate assessment of risk;

iii) Consider any final welfare-based order(s) in relation to child arrangements; or

iv) Consider the need for a domestic-abuse related activity

c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination;

d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other."

33. In Re H-N, the Court of Appeal suggested that, where a pattern of coercive and controlling behaviour was alleged, that assertion should be the primary issue for determination at the fact finding hearing. Additionally, *"any other more specific, factual allegations should be selected for trial because of their potential probative relevance to that alleged pattern of behaviour and not otherwise unless any particular allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape)"* (paragraph 59).

34. At the conclusion of its discussion on the relevance of criminal law concepts in cases of this type, the Court of Appeal said this in paragraph 74 of Re H-N:

"The distinction between a court having an understanding of likely behaviour in certain highly abusive settings and the tightly structured requirements of the criminal law will not, of course, be clear cut. That is particularly so when the judge in the Family court must conduct their own analysis of issues such as consent, and must do so in the context of a fair hearing. In this regard the procedural manner in which the hearing is conducted and, in particular, the scope of cross-examination of an alleged victim as to their sexual history, past relationships or medical history, justify consideration separately from the general prohibition on family judges adopting criminal concepts in determining the substantive allegation. Nothing that is said in Re R, or endorsed in this judgment, should inhibit further consideration of such procedural matters. They

are beyond the scope of this judgment and are more properly to be considered elsewhere."

35. The appeals in Re H-N did not address either the admission of intimate images into private law proceedings or whether an individual's sexual history was relevant to the determination of any specific allegations of sexual abuse.

Vulnerable Witnesses: Allegations of Domestic Abuse

36. Following the passage into law of the Domestic Abuse Act 2021, FPR Part 3A together with Practice Direction 3AA have been extensively revised to incorporate the relevant provisions of that Act which have a bearing on the manner in which the family court should make provision for (a) the involvement of an alleged victim of domestic abuse in the proceedings and (b) receiving the evidence of that person.

37. As amended with effect from 31 January 2022, FPR Part 3A concerns vulnerable persons and their participation and evidence in family proceedings. Rule 3A.1 defines a participation direction as either a *"general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings"* and *"a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8"*. Rule 3A.2A is headed *"Court's duty to consider making participation directions: victims of domestic abuse"* and states as follows:

(1) Subject to paragraph (2), where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in the proceedings, the court must assume that the following matters are diminished –

a) the quality of the party's or witness's evidence;

b) in relation to a party, their participation in the proceedings.

(2) The party or witness concerned can request that the assumption set out in paragraph (1) does not apply to them if they do not wish it to.

(3) Where the assumption set out in paragraph (1) applies, the court must consider whether it is necessary to make one or more participation directions.

38. FPR Rule 3A.7 sets out a list of matters to which the court must give consideration when deciding to make one or more participation directions. These are as follows:

a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of (i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or (ii) any members of the family of the party or witness;

b) whether the party or witness (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social

functioning; (ii) has a physical disability or suffers from a physical disorder; or (iii) is undergoing medical treatment;

c) the nature and extent of the information before the court;

d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

e) whether a matter is contentious;

f) the age, maturity and understanding of the party or witness;

g) the social and cultural background and ethnic origins of the party or witness;

h) the domestic circumstances and religious beliefs of the party or witness;

i) any questions which the court is putting or causing to be put to a witness in accordance with section 31(G) of the 1984 Act;

j) any characteristic of the party or witness which is relevant to the participation direction which may be made;

k) whether any measure is available to the court;

l) the costs of any available measure; and

m) any other matter set out in Practice Direction 3AA.

39. The measures referred to are listed in Rule 3A.8 and include those preventing a party or witness from seeing another party or witness, provision for a party or witness to participate in the proceedings with the assistance of an intermediary, and provision for a party or witness to be questioned in court with the assistance of an intermediary.

40. Practice Direction 3AA entitled "Vulnerable Persons: Participation in Proceedings and Giving Evidence" sets out the procedure and practice to be followed *"to achieve a fair hearing by providing for appropriate measures to be put in place to ensure that the participation of parties and the quality of the evidence of the parties and other witnesses is not diminished by reason of their vulnerability"* (paragraph 1.2). Significantly, paragraph 1.4 requires all parties and their representatives to work with the court and each other *"to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings"*. Paragraph 2.2 makes plain that, as provided for by FPR Rule 3A.2A (where it is stated that a party or witness is or is at risk of being a victim of domestic abuse carried out by certain third parties), it is to be automatically assumed for the purposes of FPR Part 3A that a party or witness is vulnerable where they are or are at risk of being a victim of domestic abuse. For such parties

and witnesses, the court should proceed directly to a consideration of whether a participation direction is necessary.

41. Paragraphs 5.2 to 5.7 of Practice Direction 3AA make provision for ground rules hearings prior to any hearing which evidence is to be heard. The purpose of such hearings is to consider any necessary participation directions about the conduct of the advocates and the parties in respect of the evidence of a vulnerable person and to put in place any necessary support in place for that person. The ground rules hearing should address the matters set out in paragraphs 5.3 to 5.7 but does not need to be a separate hearing to any other hearing in the proceedings.

42. Relevant to these proceedings, paragraph 5.4 states that the court *"must consider the best way in which the person should give evidence, including considering whether the person's oral evidence should be given at a point before the hearing, recorded if the court so directs, transcribed or given at the hearing with, if appropriate, participation directions being made"*. Paragraph 5.5 states that a court must consider whether to make participation directions - including the manner in which the person is to be cross-examined - in all cases in which it is proposed that a vulnerable party is to be cross-examined (whether before or during a hearing). The court must consider whether to direct that:

    a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;

    b) questions or topics to be put in cross examination should be agreed prior to the hearing;

    c) questions to be put in cross examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and

    d) the taking of evidence should be managed in any other way.

43. Finally, paragraph 5.6 requires the court to consider, for example, if use can be made in family proceedings of evidence (including pre-recorded evidence) given by a vulnerable party in connection with any criminal proceedings or whether a vulnerable party has given an interview which was recorded but not used in previous criminal or family proceedings. Paragraph 5.7 states that all advocates, including those who are litigants in person, are expected to be familiar with and to use the techniques employed by the toolkits and approach of the Advocacy Training Council.

44. The provisions of FPR Rule 3A and of Practice Direction 3AA have been described by the Court of Appeal in Re S (Vulnerable Party: Fairness of Proceedings) [2022] EWCA Civ 8 as being of *"fundamental importance to the administration of family justice"* (paragraph 38). I note that the version of the FPR Rule 3A and of Practice Direction 3AA cited in Re S predate the amendments made in consequence Domestic Abuse Act 2021. In paragraph 40, the Court of Appeal went on to give some practical direction to courts when making participation directions as follows:

> *"These rules are well established and understood by judges and practitioners. Usually, where a ground rules hearing is convened, experienced advocates will agree on the correct process for which they will seek judicial approval. Of particular importance to many vulnerable witnesses will be the need for frequent breaks and also the need for straightforward questions, rather than several questions wrapped up in one. The judge will be careful to ensure that recommendations made in respect of a vulnerable witness are followed. Intermediaries will sit with the vulnerable witness and will interrupt if a question is considered to be too complicated, and will ask for breaks if deemed necessary. Judges will be careful to ensure that the ground rules established are adhered to. Advocates and judges, for whom digesting large amounts of documents quickly, and sitting for two or more hours without a break are commonplace, must be alive to the fact that most witnesses have never previously experienced the court process and that vulnerable witnesses may become overwhelmed by it."*

Matters Requiring Determination

Schedule of Allegations

45. At the directions hearing I conducted on 8 December 2021, I made specific provision for the mother and the father to respond to each other's case management document describing their respective allegations. The parties produced a composite schedule of allegations for the March hearing which contained responses by the father to the mother's allegations but no responses by the mother to the father's allegations. I raised that deficit with Miss Fottrell QC, but did not receive a satisfactory response. As will be apparent later in this judgment, I invited the parties – in fulfilment of their duty to the court to co-operate with it – to review and simplify these documents (alongside other matters). On 6 April 2022, I received a revised schedule of allegations made by the mother. As I had directed in December 2021, that document provided an overview of the mother's case and signposted the court to the matters she sought to prove under each broad category of alleged abuse. I note that the father disputes each and every one of the allegations made. However, by 6 April 2022, the mother had still not complied with my December 2021 direction to respond to the father's schedule of allegations. On 7 April 2022, I asked my clerk to enquire why the mother had not responded to the father's schedule of allegations and she was told by Miss Fottrell QC later that day that the failure to do so had been an oversight and that a response was in hand. On 11 April 2022, Miss Fottrell QC emailed my clerk to apologise for the continuing delay and eventually, I received the mother's response to the father's schedule of allegations on 12 April 2022.

Whilst the tenor of this litigation might lead the court to the ready assumption that the mother also disputed each allegation made by the father, a direction for a response to a schedule of allegations is to be complied with however obvious the mother's position might seem. A direction is a court order - it is not an optional extra. The purpose of this direction was to define clearly the issues which required determination at the fact finding hearing so that each party knew the case it had to respectively either meet

and/or prove. Regrettably, that has not happened in the manner I envisaged either at the December 2021 hearing or as a result of March hearing.

Intimate Images

46. I will address this issue by (a) offering a tentative definition of the term *"intimate image"*; (b) describing how this material came to be deployed within these proceedings; (c) explaining the positions advanced by each party both prior to the hearing in March 2022 and after that hearing and following the discussions I directed them to have; (d) explaining my decision on the use of such images in this case; and (e) providing some tentative guidance as to the use of such images in private law children proceedings.

Definition

47. For the sake of clarity, when I use the term *"intimate image"* in the context of private law proceedings, I am describing an image of a person, whether an adult or a child, naked or partially naked. Such an image can include part of a person's body, clothed or unclothed, such as breasts, genitalia or the anus, which are generally regarded as private. Intimate images include those of a person engaged in what is normally regarded as private behaviour such as washing, urinating, masturbating or engaged in other sexual acts either alone or with another being. The images with which I am concerned are both still and moving images. None of the parties sought to define what an intimate image was but it struck me that this might be helpful for courts and practitioners. In offering my suggested definition, I have deliberately not made reference to definitions contained in the criminal law as those did not seem to me to meet the needs of the family court.

History

48. Turning to the history of how such images came to be disclosed into these proceedings, the first statement of the father focused exclusively on the wrongful removal of M to Romania and his desire for a relationship with his child. There was no mention of how he came to meet the mother or of their sexual relationship. On her return from Romania, the mother produced at court a number of documents which alleged *"deviant behaviour"* by the father, including watching pornography involving very young girls, and compulsive masturbation several times a day. She alleged that the father had emotionally abused her and had *"humiliated the baby by asking her to suck his big toe"*. Other allegations were made which it is not necessary to detail here but the mother stated that she had documentary evidence including *"photographic exhibits"* and *"audio video recordings"*. She produced a still image of M with her mouth on the father's toe and appended what Mr Tyler QC contended were covertly obtained recordings of conversations which had taken place between her and the father.

49. In response, the father produced a 31 page statement plus 158 pages of exhibits in which he described the relationship and his response to the mother's allegations. That statement referred three times to how the mother and father met online but not in a great deal of detail. There was a fleeting

reference to the mother working online and another to her working as a webcam model. He made no reference in this statement or the exhibits to the couple's sexual history which, at that time, had not been put in issue by the mother. Thereafter, the mother's second statement on 6 March 2020 repeated many of the allegations made in the earlier material. However, by 16 March 2020, the mother had made allegations of domestic abuse, including an allegation of rape, to the police.

50. The mother's schedule of allegations dated 28 April 2020 contained ten allegations, including three of rape, and was supported by a statement which made very serious allegations about the father's conduct towards her. A bundle of documents and a bundle of digital exhibits were appended which contained graphic and intimate video content including material relating to an alleged rape. The intimate material included 6 videos of the mother and father engaging in sexual activity on four separate occasions and two videos of the mother following sedation for dental treatment. The mother alleged that, following one of four occasions of dental treatment, she was raped. Additionally, there were two audio recordings taken covertly by the mother of a conversation between her and the father. In her statement, the mother acknowledged how embarrassed she felt at showing and discussing this material with her legal representatives though she recognised that *"it is important that I show true information"*. There was no warning to the father or to the court that material of this nature had been filed. Thus, the mother was the first in time to produce and rely on intimate videos and recorded content.

51. The mother's case was, in essence, that she had been treated by the father as a possession and a toy to use for his sexual pleasure. The father had inflicted pain on her and this apparently increased his sexual arousal. His sexual behaviour and coercion (including during their sexual relations) meant that the mother felt unable to refuse his demands.

52. In rebuttal, the father exhibited 32 videos to his statement. Seventeen of these videos were concerned with the four occasions about which the mother had produced video material. Mr Tyler QC contended that these seventeen videos demonstrated an entirely different perspective on the couple's sexual relationship to those chosen by the mother. A further three videos were submitted to allegedly show that the mother was either discussing in positive terms or masturbating to the very videos which the mother claimed were abusive. Ten of the videos exhibited by the father were in fact filmed by the mother and were produced to rebut her assertion that she did not consent to being filmed and that she had only filmed sexual intimacy with the father on one occasion. The remaining video material was produced by the father to show that the sexual relationship between the parties was not characterised by coercion and control throughout as the mother alleged. Once more, the court was not told about the nature of this intimate material before it was filed on behalf of the father.

53. Despite the deployment of this material, the mother's fifth statement dated 23 November 2020 and some 200 pages long exhibited yet more intimate material. This included intimate pictures allegedly relating to the time when

she worked as a prostituted woman in Romania; and a further video of her and the father engaging in sexual activity. In a statement made in consequence of my December 2021 directions, the mother made further serious allegations about the father's sexual conduct towards her, including that he forced her to perform oral sex, that he strangled her during sex, and that he regularly raped her whilst she slept. The father's statement in reply appended one further video of the mother allegedly laughing about an incident of oral sex which he said was relevant to the mother's new allegations.

54. In a statement filed in June 2021 to explain the effect on her of the court hearings and, in particular, of the first fact finding hearing, the mother said at paragraph 21: *"I cannot believe [the father] was allowed to upload videos of me masturbating for example, how is that relevant to the issues in the case? [The father] tried to make me look like a woman who is always up for it or asking for it. Nobody asked my permission at all, it was shocking so many people to see those videos and to have everyone else watching them. I lived through the trauma and was being made to do so again. I felt sick to see the father had added videos of me, which I had no knowledge of. I am sure that [the father] added those videos to humiliate me. I feel that he abused me all over again with those videos. I am deeply ashamed. I want [the father] to give an undertaking to the court to destroy all the videos and images he has of me. I cannot cope with knowing he probably still masturbates over it. …"*. I note that the mother described similar feelings to Dr Jones.

55. At no stage did the parties consider seeking the guidance of the court about the huge numbers of intimate images, both still and moving which had been produced as exhibits. This matter was case managed in advance of the first fact finding hearing by HHJ Jakens on 20 July 2020 when the fact finding hearing was listed for August 2020 and again on 30 July 2020 when the fact finding hearing listed in August was adjourned to November 2020. Apart from a mention of time being set aside for the viewing of the video material, no other directions were given with respect to the profusion of intimate images in this case. At the first fact finding hearing, HHJ Henson QC viewed the videos containing intimate material and inspected the still intimate images. I was not told that any party raised objection to her doing so.

The Parties' Positions

56. My direction for the parties to address the use of intimate images in this case required the mother and the father to append to their respective skeleton arguments a schedule of this material and to identify why this material was relevant. The father produced a detailed schedule of the intimate images on which he relied, briefly describing each item, why it was necessary and its relevance to the issues for the fact finding hearing. He also responded to the intimate material produced by the mother in similar form. I observe that the father's legal team alone had viewed and considered all this material. For her part, the mother produced a schedule which listed all the video material produced by the mother and the father, highlighting all the intimate material which she said should not be admitted. That document was of limited assistance to me for, though it identified briefly the nature of the intimate

material, it did not engage with whether each item was necessary or relevant. However, it was common ground that intimate images and videos relating to an alleged rape in Spain were relevant and should be viewed by the court.

57. After I heard counsel's submissions about the intimate images, I indicated that the parties should reconsider the relevance and necessity of the court needing to view all of this material at the fact finding hearing. They should ask themselves whether there were alternatives to its use such as agreed transcripts of videos or admissions as to certain facts, for example, the timing of the alleged anal rape. If it was necessary to rely on some of this material, what was proportionate (there being a limit to the material deployed in rebuttal of any allegation)? Above all, the parties were asked to consider the relevance of this material to the schedules of allegations. Following those observations, the parties produced on 6 April 2022 a document entitled an *"amended compromise schedule to the applicant father's photographs and video exhibits"*. There was no comparable schedule prepared in respect of the mother's own material.

58. Turning to the **mother's position**, Miss Fottrell QC submitted in her written and oral submissions that the intimate images submitted by both parents should not be disclosed into the proceedings because these were irrelevant. Material relating to the mother's sexual activities and conduct prior to meeting the father was of no relevance. She alleged that the use of such images by the father was intended to humiliate and re-traumatise the mother. The only intimate images the Court should view were of the alleged rape in Spain. She suggested that the father appeared to be running a *"sexual history"* defence that, because the mother was sexually experienced and adventurous and available to him and others for sex, she could not possibly have been raped or sexually abused as she contended. Finally, she suggested that the father had not sought the mother's consent before taking intimate images of her and, in those circumstances, that behaviour amounted to a potential criminal offence. Its deployment in these proceedings by the father was intended to traumatise and humiliate the mother – a form of *"revenge porn"* – and therefore the court should not admit this material into the proceedings.

59. Following the submission of additional case management documents on 6 April 2022, the mother's position had undergone some revision. She now accepted, in complete and stark contrast to her earlier case, that there were on occasion mutually enjoyable sexual relations between her and the father. According to Miss Fottrell QC, that meant that intimate images depicting this mutually enjoyable and consensual behaviour were irrelevant. The court should balance relevance against (i) the impact on the mother of the intimate images being viewed/used at the fact finding hearing; (ii) the father's motivation; and (iii) proportionality as to volume and consequences. Miss Fottrell QC submitted that any decision I made with respect to this material should be kept under review before and during the hearing.

60. **On behalf of the father**, Mr Tyler QC submitted that the mother was seeking to rewrite the narrative of the proceedings by arguing that none of the disputed intimate images should be admitted into the proceedings as

evidence. That material had been deployed first in time by the mother and included explicit images of both M's parents together with photographs of a private nature of the father's son and his girlfriend, all of which were used by the mother without the consent of those depicted. There was no suggestion of the need for prior application to the court in respect of such material. When the father rebutted the mother's allegations, the mother now sought to withdraw her exhibits of intimate images and to prevent the father from relying on his, while standing by her original allegations, to which, on her own (original) case, the exhibits were relevant. Mr Tyler QC vigorously rebutted the suggestion that he was running a *"sexual history"* defence case. It was the mother who first produced sexual material in order to suggest that the father's sexual behaviour was inappropriate. The father filed evidence in response to the mother's extremely serious allegations which the mother, by producing the explicit material she exhibited, sought to prove. In fact, the mother was running an equivalent sexual history case against the father by suggesting that he preyed on young vulnerable foreign women, another allegation which he strenuously disputed. The video material produced by the father was not intended as a form of *"revenge porn"* or to traumatise the mother. The father did so in order to defend himself against very serious allegations. Mr Tyler QC asserted that the material was relevant and that the balancing exercise in respect of other rights being asserted to militate against such evidence being admitted fell in favour of the father. Each piece of evidence served a specific and legitimate evidential purpose and the cumulative effect of the intimate image evidence, including that produced by the mother, was vital to the father's *"defence"*. The father was entitled to reduce such relevant evidence as he chose in rebuttal to that produced by the mother.

61. On 6 April 2022, it was plain that, having reflected on the court's observations and on the views of the children's Guardian that some of the material may be managed by alternative means, the father had reduced the intimate material he invited the court to review from 32 videos to 16 and the overall explicit material by more than 50%. Nevertheless the father submitted that the mother should not be permitted to withdraw any of the exhibits previously relied upon by her. It was important that all this evidence was viewed as the mother now sought to withdraw material once the deficits in her case had become apparent. Mr Tyler QC submitted that the mother sought to remove evidence which either did not support her case or supported the father's case that she had exaggerated, misled, or manipulated the evidence before the court. In summary, he asserted that the mother should not be permitted to sanitise her case at this stage of the proceedings.

62. **On behalf of the child**, Mr Woodward-Carlton QC adopted a more nuanced position. He submitted that the evidence needed to be relevant and probative. Even if it satisfied both these requirements, a proportionality evaluation should include, amongst other things, the vulnerability of the parties and the effect on them and on the fact-finding exercise as a whole. He suggested that there may be a range of alternatives to the viewing of sexually explicit material such as agreed transcripts of videos or data as to the timing of an individual image. Should the father be permitted to rely on intimate images

to rebut the mother's allegations, the court should consider the proportionality with respect to the amount of material or the type of material relied upon. Thus, how many examples/types of what father purported to be the mother's sexual enthusiasm were required to make father's point about the absence of coercion and control within the couple's relationship? Mr Woodward-Carlton QC suggested that the court retained the option to review its initial decisions regarding admissibility depending on the way in which the hearing proceeded. What might seem to be unnecessary and undesirable at this stage may, in all the circumstances, turn out to be required after all albeit handled sensitively.

Analysis

63. The deployment of intimate images, both moving and still, in these proceedings has been wholly un-boundaried and disproportionate. The mother instigated the use of such material and continued to do so until shortly before the first fact-finding hearing in November 2020. Faced with extremely serious allegations about his conduct as a parent and as a partner, the father responded in kind by deploying a vast swathe of such material, some of which was intended to provide context to the couple relationship and some of which was intended to correct what he described as the misleading impression created by the mother's use of excerpts from longer videos or of videos taken out of context. At no stage until the hearing before Judd J did the advocates or the court consider the relevance and probative value of this material let alone the proportionality of using it within private law children proceedings. The first time on which the use of intimate images was raised with the court was in the skeleton argument filed by leading and junior counsel for the mother once permission to appeal had been granted by Judd J. At the mother's request, neither counsel nor the appellate court viewed the still or video intimate images save that Judd J viewed the video of the alleged rape in Spain.

64. Turning to the detail, it is disappointing that, despite the exercise I invited the advocates to undertake, I was left unclear until 12 April 2022 as to the mother's final position with respect to her own intimate image material. The mother's written submissions on the revised table of explicit images relied upon by the father only dealt with that material rather than also addressing her own use of intimate images. It was also equally unhelpful that the mother's responses to many of the individual items in the revised schedule did not engage with the factual matters which the father sought to demonstrate and which were spelled out in the schedule. The repetition of the phrase *"the Guardian has raised this as an exhibit which should not be viewed and the mother is in agreement with this"* was a response which failed to engage with the issues which I had asked the parties to address. Mr Tyler QC's written submissions suggested that the mother maintained the position that every explicit image on which she had previously sought to rely should be withdrawn and, by email on 12 April 2022, Miss Fottrell QC confirmed this to be the case.

65. I was also told in the father's further written submissions accompanying the amended compromise schedule on 6 April 2022 that the mother had made

proposals for the reduction of other exhibits relating to her criticism of the father's parenting. I do not know what those proposals were as I did not receive a schedule which addressed these exhibits. I make it clear that my consideration is limited to the intimate images relied on by each party. The material relating to allegations about the father's parenting remains in the bundle subject to any submissions made to me during the fact finding hearing.

66. In approaching this exercise, I have had firmly in mind the court's powers to control the evidence the parties may seek to adduce in support of their respective cases. The relevance of the material to the allegations made by both parties and its probative value have been my starting point. I part company from Mr Tyler QC in that I do not accept that it will be rare for relevant evidence to be excluded. It will be excluded if it is deployed in great amounts without justification or addresses the same issue repeatedly and without bringing anything of forensic value to what has already been submitted. For example, to persuade a court that a couple's sexual relationship was mutually satisfactory does not require the admission into the evidence of numerous still and moving intimate images of the couple having sex. However, I accept his submission that the relevance test must – of necessity – be generously applied at a pre-hearing stage but that is not an open door to permit everything including the proverbial kitchen sink being deployed to bolster a case.

67. If material is relevant and has probative value, other factors may come into play in both the court's assessment of proportionality and the ultimate control of its process. Put simply, the court must - in this case - undertake a balancing exercise between the father's right to a fair hearing when faced with extremely serious allegations and the mother's need to have a fair process which does not impact adversely on her ability, as a vulnerable witness, to give her best evidence to the court. The introduction into the proceedings of intimate material which is likely to be distressing to the mother and also embarrassing for the father is one of the considerations relevant to that exercise.

68. At what is a case management hearing, I am in no position to determine Miss Fottrell QC's submissions either about the father's motivation for his deployment of intimate images or about his *"sexual history"* defence. Those matters are likely to be relevant at the fact finding hearing. Still less am I able to address the mother's submission that much of this material was taken without her consent. However, I agree with Miss Fottrell QC that the mother's sexual history and relationships with others is of no relevance when the focus of this hearing is her relationship with the father. I also accept that there may be limited value in viewing a still intimate image in order to be able to determine any issues of fact. However, a small number of such images may still have relevance and probative value, for example, to demonstrate that evidence may have been manipulated or to contradict an account given in a witness statement. Whether it is necessary for them to be viewed is another matter entirely.

69. Turning to the detail of the material in dispute, these are my preliminary conclusions. I emphasise that the court can revisit these matters as the hearing progresses if it proves necessary to do so. All references are to the father's revised schedule.

70. The following relates to the still images relied on by the father:

A) AMB4: the father can rely on this image to counter the allegation made by the mother of sexual control. I doubt it is necessary to view it if the mother accepts that which is set out in the father's revised position;

B) AMB6: relevant but not to be viewed;

C) AMB7: the probative value of this image is poor and on that basis it should not be admitted in evidence or viewed;

D) AMB9: relevant but need not be viewed if the mother accepts the first two factual issues in the schedule. It will be for the court to assess whether the mother's account of a sexually coercive relationship is accurate, having considered the evidential canvas as a whole;

E) AMB17: relevant but need not be viewed;

F) AMB20: relevant but need not be viewed;

G) AMB23: relevant but need not be viewed;

H) AMB49: relevant in that it relates to the alleged rape in Spain but need not be viewed;

I) AMB120: the relevance of this image is doubtful given that the mother now accepts consensual sexual behaviour took place within the couple relationship. It should not be admitted into the evidence;

J) AMB121 and 122: relevant to the father's case that the mother has sought to manipulate the evidence. The material does not need to be viewed to make that point.

71. The following relates to the video evidence relied on by the father:

A) AMB3V: this is irrelevant and thus inadmissible;

B) AMB5V: given the mother's admission that she has used sexual language, this image is both irrelevant and thus inadmissible;

C) AMB18V/AMB19V: this material is in rebuttal of a video relied on by the mother. Given that the mother now accepts consensual sexual behaviour in the relationship, I doubt this material is relevant but it may be if the mother continues to rely on her own video. For the time being, it is relevant but will not be viewed;

D) AMB21V: given the mother's concession that she videoed the father more than once, this is irrelevant and need not be viewed;

E) AMB22V/AMB24V: given the mother's concession about consensual sexual relations, the relevance is doubtful but should remain in the bundle to rebut the mother's video evidence/account if she continues to rely on the same. These videos do not need to be viewed;

F) AMB26V: relevant but need not be viewed;

G) AMB27V: relevant but need not be viewed unless there is dispute about its contents. The parties should agree a description and transcript;

H) AMB28V: irrelevant given the mother's concession about consensual sex;

I) AMB29V: relevant and it is accepted that a transcript can be agreed;

J) AMB30V: it is said that this video is relevant to the father's sexually compulsive behaviour and his controlling behaviour. I struggle to see that it is given the material in the schedule. If the mother continues to rely on her video evidence, this material might be relevant in rebuttal;

K) AMB31V: relevant to show the alleged manipulation of the evidence by the mother but need not be viewed. The parties are to agree a description and transcript;

L) AMB32V: see above in relation to AMB31V;

M) AMB33V: relevant in rebuttal of mother's video evidence but I doubt it need be viewed if the mother does not rely on her relevant intimate videos;

N) AMB34V: this material relates to the same sexual encounter as AMB33V. It is irrelevant and need not be viewed;

O) AMB35V: irrelevant and need not be viewed given the mother's concessions;

P) AMB36V: relevant but need not be viewed. The parties should agree a description and transcript;

Q) AMB37V: this is irrelevant given the concession about consensual sex;

R) AMB38V: irrelevant given the concession about consensual sex;

S) AMB39V: relevant but, as it is the language used which is said to be important, it can be dealt with via a transcript rather than being viewed;

T) AMB40V: relevant but can be dealt with by an agreed description;

U) AMB41V/AMB43V: irrelevant given the concession about consensual sex;

V) AMB44V: the mother has accepted filming sexual encounters with the father on more than one occasion. I doubt it is necessary to view what is consensual sexual activity but accept that this material is relevant. A description can be agreed;

W) AMB46V and AMB47V: relevant given these are recordings of an alleged rape. They will need to be viewed;

X) AMB48V: irrelevant given the concession about a consensual sexual relationship;

Y) AMB51V: relevant but need not be viewed. It can be dealt with by an agreed description;

Z) AMB52V: irrelevant given the concession about a consensual sexual relationship;

AA) AMB53V: irrelevant given the concession about a consensual relationship

BB) AMB54V: relevant but a description can be agreed. It is not necessary to view this;

CC) AMB55V: this is irrelevant and need not be viewed;

DD) AMB111V/116V: relevant and should be viewed as it relates to M;

EE) AMB9-V3: this can be dealt with by means of an agreed description.

72. The mother has filed intimate images but, after the hearing on 29-30 March 2022, it was unclear to me whether she maintained that this material should also be excluded. By an email from my clerk on 8 April 2022, I asked Miss Fottrell QC if she now contended that all the intimate images the mother had introduced into this litigation should be excluded. Irrespective of the mother's position, Mr Tyler QC submitted that this material should remain in the bundle, not least to demonstrate that the mother had exaggerated and manipulated the evidence in this case. I received a response from Miss Fottrell QC on 12 April 2022, confirming that the mother no longer sought to rely on the intimate images produced by her and listed in the schedule prepared by Dr Proudman (appended to the skeleton argument produced for the hearing in late March 2022). She requested that this material should not form part of the evidence and should not be viewed by the parties or by the court.

73. The difficulty with Miss Fottrell QC's position is that the mother's schedule only lists moving images and not still images so it is unclear to me whether she continues to rely on still images of an intimate nature. However, her submissions in the skeleton argument are couched in respect of both still and moving intimate images (see paragraph 30 of her skeleton argument). This lack of clarity in her position makes it exceptionally difficult for the court to adjudicate on the mother's application with respect to intimate images

produced by her. I have – with regret – decided that it would be unfair to either parent to do so at this stage.

74. Because the detailed exercise – like that undertaken with respect to the father's intimate images - which should have been undertaken in relation to the material produced by the mother has not been done, I have decided that the intimate material produced by the mother should remain in the bundle and form part of the evidence, but that I will not view the material unless it is essential to do so. I direct that the parties collaborate to produce a schedule identifying these images together with a brief description and explanation of each item's relevance to the issues I am required to determine and whether there are alternatives to viewing the images. This schedule should be available at the start of the fact finding hearing.

75. I also direct that, unless it is essential to do so, no intimate images – be they still or moving - which are to be viewed will be viewed in the courtroom with all the parties present. Further, this material will only be viewed by the advocates acting for each party together with instructing solicitors. The parties are to co-operate in the production of an agreed, password protected bundle of such material and to agree transcripts where I have indicated they should do so.

The Use of Intimate Images: General Observations

76. It will be apparent to readers of this judgment that I have grave concerns about the use of intimate images in private law children proceedings where allegations of abuse, specifically domestic abuse, are made. I perceive it to be a problem which is already present in a growing number of private law children cases and one which is likely only to increase given the growing use of still and/or moving images to document intimate relationships. In this case, the volume of intimate images previously admitted without any scrutiny is itself a strong argument for guidelines to encourage the court to control this type of evidence in private law children proceedings. However, there is a further compelling reason for such guidelines, namely the emotional and psychological harm which may be caused to the parties, and particularly to an alleged victim of abuse, by the indiscriminate use of this material.

77. During the hearing on 29-30 March 2022, I made a number of observations as to how intimate images should be managed within the context of private law children proceedings and invited counsel to collaborate to produce some agreed guidelines. I am grateful to them for doing so. What follows is drawn from their written document which incorporated the observations I made during the hearing:

A) Sexually explicit or intimate videos and photographs should not be filed as part of evidence without a written application being made to the court in advance.

B) Any such application will require the court's adjudication, preferably at an already listed case management hearing.

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

D) The court should carefully consider the relevance of the evidence to the issues in the case together with the likely probative value of any such evidence.

E) As part of its analysis and balancing exercise, the court will need to consider all the relevant factors including (i) any issues as to vulnerability in relation to any of the parties and the likely impact on any such parties of the admission of such evidence and the manner in which it is used in the proceedings; and (ii) if it is able to do so at a preliminary stage, whether the application/use of such images is motivated, in whole or in part, by a desire to distress or harm a party.

F) The circumstances in which a court will permit the inclusion in evidence of sexually explicit or intimate videos or photographs of any person are likely to be **rare**, in particular, in circumstances in which that person does not consent to such material being admitted.

G) Where the court is being asked to admit such material, the court should consider whether there may be a range of alternatives to the viewing of such material, for example but not limited to:

i) seeking an admission/partial admission in respect of the alleged conduct

ii) agreed transcripts and/or descriptions of any videos

iii) playing only the audio track of any video recordings

iv) using a still image rather than a video or a short excerpt from a longer video

v) editing images to obscure intimate parts of the body

vi) extracting meta data as to the timing and location of the evidence

vii) focused and specific cross examination on the issues

viii) consideration of the use of other evidence to prove the particular fact in issue instead.

H) If the court decides to admit any sexually explicit or intimate images/videos for any purpose, care should be taken to limit the volume of such evidence to that which is necessary to fulfil the purpose for which it is admitted;

I) The court should determine who can view the material that is to be admitted and limit this where necessary, bearing in mind its private character and the humiliation and harm caused to those both depicted and involved in the proceedings;

J) If the evidence is considered relevant, a starting point should be to say that it should incorporate the lowest number of images, seen by as few people as necessary, and viewed in the least damaging way;

K) It would be helpful to consider how best to ensure that the evidential security of such material can be maintained (for example, by using only password protected files) both within the hearing itself and outside it, and how the material is deployed within the proceedings;

L) Likewise, specific consideration should be given to the protection and safeguards necessary in respect of any video evidence relied upon (for example, such evidence being made available on a single laptop and brought to court, or the distribution being limited to a core specified legal team on behalf of each party).

78. I recognise that judges dealing with private law children proceedings in which allegations of domestic abuse are made already face significant difficulties stemming both from the volume of such work within the family justice system and from the reality that many parties are unrepresented. My suggestions for the management of intimate images in such proceedings are intended to be straightforward and to discourage their use save where strictly necessary to the issues which the court needs to resolve.

Participation Directions

79. Following receipt of the report of Dr Jones, there was happily a large measure of agreement as to the participation directions which the court should make for the mother's benefit as a vulnerable witness. I should point out that the father does not accept that the mother has been traumatised by anything to do with their relationship, their sexual relationship or his behaviour. His belief is that the mother is very angry with him and is maliciously motivated. As Mr Tyler QC put it in his skeleton argument, the mother *"has had many months to perfect a narrative which suits her objectives but which the father refutes in its entirety"*.

80. All the parties were agreed that the mother should have the benefit of an intermediary throughout the hearing (including when she is giving her oral evidence). An intermediary with experience of working with those affected by trauma has been identified and she is available to support the mother during her oral evidence. She may not be available throughout the hearing due to other commitments but can arrange cover so that the mother is appropriately supported by an alternative intermediary. All are also agreed that the mother should have the services of a consistent interpreter and arrangements will be made with HMCTS for this to happen.

81. The mother met with the intermediary and a report was produced by that person which is dated 31 March 2022. The suggestions of that report are agreed by the advocates save for one matter which I address below.

82. Additionally, the following participation directions were accepted by the father:

a) The mother not coming into direct or indirect contact with the father during the hearing or in the court precincts;

b) The father not being able to see the mother whilst she gives her oral evidence;

c) The mother being afforded regular breaks during her oral evidence including additional breaks if the mother should display signs of *"trauma related distress"*;

d) Exposure to areas/topics of questioning in advance of cross-examination;

e) The avoidance of unnecessarily intrusive questioning regarding allegedly traumatic experiences;

f) And the avoidance of unnecessary exposure to trauma-related material.

83. Miss Fottrell QC sought additional participation directions which were not agreed and I deal with each of these in turn. In doing so, I have been mindful of the need to ensure that the mother's participation in the proceedings is not diminished by reason of her vulnerability.

84. First, she sought a limit on the time available to the father to cross-examine the mother. Mr Tyler QC accepted that, with allowances for many breaks, he thought the mother's evidence would take some three days to complete. I thought that time estimate was realistic given the agreed participation directions and the vulnerabilities identified by Dr Jones. To go further and impose a time guillotine runs the risk of unfairness in that the father may not be able to advance his case fully, for example, by responding to developments in the mother's oral evidence. I refuse this participation direction sought on behalf of the mother.

85. Second, Miss Fottrell QC invited me to require that the father's advocate should submit written questions in cross-examination in advance to the intermediary who would then have an opportunity to consider these with the mother. I understood Miss Fottrell QC to suggest that, each evening prior to being cross-examined on behalf of the father, the father's advocate would submit to the intermediary written questions to be used during cross-examination at the next day's hearing. The intermediary would then consider these with the mother. It was submitted that this process would assist the mother in managing her emotions and enable her to give her best evidence.

86. Mr Tyler QC objected strongly to this proposal and it was not supported by Mr Woodward-Carlton QC. Both pointed to the recommendations of Dr Jones' report which did not recommend that the mother had advance knowledge of the questions she was to be asked. Such a process provided no leeway for the father's advocate to respond to the mother's answers and the reduction of every question to writing in this manner was an almost impossible exercise. Further, it was an artificial exercise if the mother was effectively to rehearse her oral evidence with the intermediary the night

before. Doing so ran the risk that the mother would be doubly traumatised by this process, once by thinking about and discussing the question the night before and then by answering it the following day. Providing the mother with topics/areas of cross-examination in advance coupled with the avoidance of exposure to trauma related material or unnecessarily intrusive questioning about allegedly traumatic experiences gave her a sensible route map for what she was to be asked on behalf of the father.

87. Where a vulnerable witness is to give oral evidence, advocates should adapt to the needs of that witness and not the other way round, as long as a fair process is maintained. Here, the mother will have considerable support available to her from an intermediary who will be able to intervene if a question is confusing or complex and who can monitor the mother's demeanour as she gives her evidence. It is also agreed that the advocates asking questions of the mother will conduct themselves in a way which does not cause the mother unnecessary upset, for example, by asking unnecessarily intrusive questions about allegedly traumatic experiences. She will also know the topics/areas of questioning in advance. Those participation directions address the mother's vulnerabilities whilst permitting a fair exploration of the father's case. I note that Dr Jones has not recommended that the mother be shown written questions in advance by her intermediary.

88. Leaving aside the objections raised by the father and the children's Guardian, the course recommended by Miss Fottrell QC would have the effect of significantly elongating the mother's time in the witness box. It is trite to say that the questioning of witnesses is a dynamic process but every advocate and judge recognises that reality. In order to respond to the mother's answers and then compose or adapt written questions, the father's advocate would need to be given extra time to do so during the court day and at the conclusion of the mother's evidence. Time would also need to be allowed for the intermediary to consider and then discuss questions with the mother at a sensible time so that the mother could rest after the court day. Realistically, the court would only hear evidence in the morning and then adjourn for the rest of the day. In that scenario, the mother would likely spend at least 6 days giving her evidence which I cannot envisage would benefit her emotionally or allow her to give her best evidence to the court. The effect on the court timetable would be significant and result in this case likely taking 13 or 14 days to complete rather than the 10 days presently allotted. It would result in an adjournment either for many months before I could accommodate it part-heard or force the adjournment of other cases which have been waiting a long time for their determination. That would not benefit M or her parents who need this fact finding hearing to take place as soon as possible and it would disadvantage other children and their families who require scarce High Court judge time. Whilst certain aspect of the process suggested by Miss Fottrell QC may well be needed in cases involving a witness with cognitive limitations or a young child, this case does not, in my view, require participation directions of that type.

89. Given the concerns set out above, I accept the submissions made by Mr Tyler QC and Mr Woodward-Carlton QC and refuse the application made by Miss Fottrell QC. I make it plain that I will be astute to ensure that the participation directions I endorse are adhered to at the trial. In that regard, I add that there will be a direction that the mother will not be asked the same questions in cross-examination by more than one advocate without both justification and my express permission. If questions are convoluted and not straightforward and depart from the suggestions made in the intermediary's report, I will intervene to ensure they are reformulated in a manner understandable by the mother. The person who is to take the lead in cross-examination will be the father's advocate.

90. The intermediary suggested that the advocates who plan to question the mother should *"review their questions"* with the intermediary in order to reduce the linguistic processing required by the mother. The intermediary made some helpful suggestions for the manner in which questions should be adapted. Having considered the proposal for questions to be reviewed, this appears to involve the same reduction of questions to writing in advance of cross-examination together with time being required for the intermediary to review this material with the advocate concerned (though not apparently with the mother). This strikes me as cumbersome in circumstances where the intermediary has provided helpful suggestions for how questions are to be formulated and where she can intervene to ensure a question is asked in a manner which assists the mother to respond clearly.

91. Miss Fottrell QC also asked me to direct that the mother should not be referred to as a sex worker or *"cam girl"* but instead as either a prostituted woman or as a woman formerly subjected to the sex trade. It was submitted that referring to the mother as a sex worker legitimised a highly abusive sex trade. I did not hear specific objections to this use of language by either Mr Tyler QC or Mr Woodward-Carlton QC and so I am content for the mother to be described in either of the ways she suggests.

92. Finally, Miss Fottrell QC submitted that the mother should not be questioned about her sexual experiences with or abuse by other men or her involvement in the sex trade. She drew attention to Judd J's observations in paragraph 67 of the appeal judgment to the effect that cross-examining the mother about explicit material from her time in the sex trade merely to establish she knew the meaning of some swear words may have been unnecessary. She submitted that, in those respects, the mother's sexual history was irrelevant to the allegations in this case. Miss Fottrell QC submitted that PD12J did not adequately address the disclosure of a complainant's sexual history or behaviour and did not support a modern approach to the consideration of a complainant's sexual history. Miss Fottrell QC noted the provisions of section 41 of the Youth and Criminal Justice Act 1999 which prohibits the use of a complainant's sexual history without the court's permission and suggested that the unqualified use of a complainant's sexual history in the family court could have the effect of discouraging victims from raising allegations which may be central to a child's welfare.

93. In this case, I am persuaded that questioning about the mother's previous sexual history or behaviour is irrelevant to the allegations which the court has to determine and thus direct that this topic is not to be pursued in cross-examination. I decline to accede to what I think was an invitation to provide some bright lines guidance on this topic as there may be some very limited circumstances in other private law children proceedings in which previous sexual history may be an issue of relevance.

Transcripts of the First Instance Decision

94. The father contended that the judgment from the first fact finding hearing should be included in the trial bundle. Mr Tyler QC submitted that, even though this court must undertake the fact-finding exercise afresh, unencumbered by a previous judge's findings, it could not be ignored that the process took place; that evidence was given by various witnesses; or that the entire proceedings were comprehensively described in writing by the first instance judge. In essence, he contended that it would be entirely artificial to remove from this court the advantage of knowing what was said and done during a previous trial.

95. Both Miss Fottrell QC and Mr Woodward-Carlton QC submitted that, given the conclusions of Judd J as to procedural unfairness during the first fact finding hearing, together with her comments about the mother's vulnerabilities and the implications arising from the lack of participation directions, the judgment given in the first fact finding hearing was tainted by the failings found on appeal and should not form part of the trial bundle before me.

96. The appeal judgment contains information about the conduct of the first instance hearing together with a detailed analysis of the findings in paragraphs 30-38. Though there is presently no agreed case summary, that deficit will be rectified by a direction from me in the case management order resulting from this hearing. The appeal judgment together with an agreed case summary will provide all the necessary factual information about the first fact finding hearing. Further, I accept the submission made by the mother and the children's guardian that the judgment in the first fact finding hearing was vitiated by reason of procedural unfairness. Given those considerations, it is difficult to see any circumstance in which it would be appropriate for the first fact finding judgment to form part of the trial bundle before me. Hence, I direct that the first fact finding judgment should not form part of the future trial bundle.

Transcripts of Evidence from the December 2020 Hearing

97. I understand from the submissions made by Mr Tyler QC that the witness evidence given at the first fact finding hearing has been transcribed and is available for inclusion in the future trial bundle. Oral evidence was given by the mother, the father, the maternal grandmother, the paternal grandmother and the father's adult son.

98. The father submitted that, although a successful ground of appeal was the procedural unfairness caused by the failure to make participation directions in respect of the mother's evidence, it could not possibly be said that none of could be treated as relevant. If, at the second fact-finding hearing, the mother gave inconsistent evidence on any important factual matters, the father was entitled to explore any inconsistency during cross-examination. Whilst it would be open to the mother to seek to explain any inconsistency by reference to the procedurally compromised nature of the first fact finding hearing, it would be unfair to the father to exclude the transcripts of evidence. Mr Tyler QC submitted that the transcripts of evidence should be included and referred to as necessary. Any party should be able to object to or to seek to explain any particular issue arising from the transcript material as it arose during the course of the second fact-finding hearing.

99. Both the mother and the children's Guardian opposed the inclusion of the transcript evidence into the future trial bundle. In circumstances where an appellate court had concluded that the trial process had been tainted by the failure to consider and make participation directions for the mother's benefit, both submitted that the transcript evidence as a whole could not be relied upon during any rehearing.

100. The mother did not have the benefit of participation directions during the first fact finding hearing. In circumstances where an appeal judgement found that the failure to abide by the procedural rules with respect to the management of the mother's evidence was so serious that all the court's findings could not be maintained, it is difficult to accept that the transcript of the mother's evidence has anything to offer a court rehearing the allegations in dispute. My concerns about the inclusion of the transcript of the mother's evidence are reinforced by the expert report from Dr Jones. Not only does her report highlight the linguistic difficulties the mother may have had – in immensely stressful circumstances whilst in the witness box and when assisted by an interpreter – in spontaneously sourcing words and conveying meaning but it also highlights the manner in which her then unrecognised vulnerabilities may have impacted on her oral evidence. Dr Jones proposed a wide ranging suite of participation directions, the vast majority of which are agreed by all the advocates as necessary for the mother to give her best evidence. If those measures are necessary now, their absence at the first fact finding hearing emphasises the caution with which this court should approach any consideration of the transcript of the mother's evidence.

101. I recognise that, as Mr Tyler QC submitted, it is part and parcel of the forensic process to compare and contrast an earlier account of an incident with one given later for, in so doing, inconsistencies and evasions may become apparent and so inform the court's assessment of a witness's credibility. Indeed, the father will have ample opportunity to undertake precisely that exercise by reference to the mother's written evidence (amounting to some 10 statements). Reference to the transcript of the mother's evidence either to highlight inconsistencies in submissions or to put inconsistencies to her during cross examination is of marginal benefit given the difficulties with that evidence to which I have already referred. Further,

there is a real danger that any second hearing would be derailed by submissions as to probative weight and fairness on each and every occasion that the father's advocate sought to deploy material from the transcript of the mother's evidence at the first hearing. Thus, for all of those reasons, I direct that the transcript of the mother's evidence should not be placed in the trial bundle as little if any probative value can be ascribed to it.

102. What of the transcripts of the evidence given by the other witnesses at the first hearing? The appeal judgement made no criticism of the arrangements made in respect of the other witness evidence and so it may be thought that transcripts of that evidence should be available to this court at the future fact-finding hearing. However, that is to misunderstand the effect of the profound procedural unfairness relating to the mother's evidence on the evidence of all the other witnesses. The evidence given by the mother, contaminated by procedural unfairness, will have impacted upon the questions put to other witnesses and the answers that other witnesses gave. The entire process has thus been contaminated by the unfairness occasioned by the failure to take account of the mother's vulnerabilities and to make the necessary participation directions. If it were otherwise, there would be no need to hear the witness evidence of most of the other witnesses, save in respect of any new allegations now advanced. Were the transcripts of the other witness evidence to be contained in the trial bundle, the same danger of derailing the hearing with submissions as to probative weight and fairness which I identified with respect to the mother's evidence would also apply to the transcript evidence of the other witnesses. Hence, I direct that the transcript evidence given by the other witnesses should not be placed in the trial bundle.

Statement from the Father's Former Wife

103. The father submitted that he should be permitted to file a statement from his former wife as to their sexual relationship to counter the allegations made by the mother of coercion and control, sexual violence and the father's arousal from non-consensual sexual activity. With the greatest respect to Mr Tyler QC, I cannot see how such a statement would assist the court to come to a view about the dynamics of the sexual relationship between the father and the mother. A person may behave very differently with one partner than he or she does with another and, furthermore, sexual experiences/behaviour after a relationship has ended may shape the sexual experience with a new partner in a manner quite different to that in a former relationship. In his statements, the father does not seek to lay the foundation for the admission of a statement from his former wife by, for example, explaining that his sexual conduct or experiences with his former wife was similar to those he allegedly had with the mother. The probative value of evidence from his former wife struck me as limited and I thus decline to direct the statement sought by Mr Tyler QC.

104. For the avoidance of doubt, the father is permitted to file a further statement from his other adult son who was said to have been present in the house when the mother was allegedly raped and screaming in pain.

Conclusion

105. The timely delivery of this judgment has been hampered by the need for counsel to assist the court by scrutinising the schedules of intimate images; and by waiting for a response from the mother's legal team. When that response was eventually forthcoming on 12 April 2022, I was on leave out of the jurisdiction.

106. That is my decision.