



Neutral Citation Number: [2023] EWCA Civ 475

Case No: CA-2023-000399

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL**  
**HH Judge Greensmith**  
**LV21C50015**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 5 May 2023

Before :

**LORD JUSTICE SINGH**  
**LORD JUSTICE BAKER**  
and  
**LADY JUSTICE FALK**

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T (FACT-FINDING: SECOND APPEAL)  
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**Nicholas Goodwin KC and Sarah Watters** (instructed by **Local Authority Solicitor**) for the  
**Appellant**  
**Deirdre Fottrell KC and Robert Povall** (instructed by **Paul Crowley and Co**) for the **First**  
**Respondent**  
**Shaun Spencer KC and Chuba Nwokedi** (instructed by **Broudie Jackson Canter**) for the  
**Second Respondent**  
**Jonathan Sampson KC and Elizabeth Brennan** (instructed by **Morecrofts**) for the **Third**  
**Respondent**  
**Barbara Connolly KC and Jonathan Jackson** (instructed by **Hogans**) for the **Fourth, Fifth**  
**and Sixth Respondents, by their children's guardian**

Hearing date : 4 April 2023  
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**Approved Judgment**

This judgment was handed down by the judges 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 2pm on 5 May 2023.

## **LORD JUSTICE BAKER :**

1. This is a second appeal from a decision by a circuit judge allowing an appeal against findings made by a deputy district judge in care proceedings involving four children, hereafter referred to as T, U, V and W.

### **Summary of background**

2. The family are originally from a country in Africa. T was born in that country in 2005 to the father and his then wife. In 2010, after their divorce, the father married his present wife, hereafter referred to as “the stepmother”, and in 2013 she gave birth to their first child, U. In 2015, the father arrived in this country and two years later was joined by the stepmother, T and U. Subsequently, the stepmother gave birth to two further children, V and W, in 2018 and 2020 respectively. In December 2020, all members of the family were granted indefinite leave to remain in the UK.
3. On 6 May 2021, T, then aged 15, made allegations at school, at a meeting with her head of year and her father, that the stepmother had, over the course of around three years, been waking her up in the middle of the night and taking her to a car outside occupied by two male family friends, X and Y. T alleged that X would kiss her in the front of the car and that Y would have sexual intercourse with the stepmother in the back of the car. She alleged that the men had threatened her with violence if she said anything about it. A joint visit between the police and social services took place and the parents agreed to all the children being accommodated under s.20 of the Children Act 1989.
4. The local authority started care proceedings and all four children were made subject to interim care orders. On 15 May 2021, T was interviewed by the police under the Achieving Best Evidence (“ABE”) procedure.
5. In the course of the proceedings, various directions were given in preparation for a fact-finding hearing. Initially all four children were jointly represented by a children’s guardian, but it was then decided that T should be separately represented by her own lawyers who she instructed directly. A “*Re W*” hearing was arranged to determine whether T should give evidence, but in the event it was agreed by all parties that she would not be called.
6. In March 2022, a fact-finding hearing started in front of Deputy District Judge Hornby, in which the local authority sought findings in line with T’s allegations and, in addition, findings against the father and stepmother of failure to protect T, physical and emotional harm of T, and a likelihood of significant harm to the younger children. In the event, the hearing, which was being conducted partly via video link, was adjourned part heard for various reasons including technical problems. During that adjournment, the second child, U, made allegations of physical abuse by her father which the local authority started to investigate. In view of the delays which had already occurred, the judge decided not to extend the adjournment while those allegations were investigated but rather to consider them at a later date, if appropriate.
7. As a result of the various delays, the hearing was not completed until July 2022 and the final version of the deputy district judge’s judgment was not handed down until 27 September. In the judgment, he made findings substantially in line with those sought

by the local authority. Subsequently, he responded to requests for clarification of the judgment on behalf of the stepmother, the father and T.

8. The father and stepmother filed notices of appeal against the findings. On 9 December 2022, a final care order was made in respect of T who remained living in foster care. On the same date, permission to appeal against the findings was granted by HH Judge Brandon.
9. On 7 February 2023, the appeal hearing took place before HH Judge Greensmith. On 8 February, he delivered an oral judgment in which he allowed the appeal on all grounds, set aside the deputy district judge's findings, and reserved the case to himself for a welfare hearing. The order made following the hearing provided that the existing interim care orders in respect of the three younger children would remain in force until the conclusion of the proceedings.
10. On 28 February 2023, the local authority filed a notice of appeal to this Court. On 1 March 2023, Moylan LJ granted a stay pending determination of the permission to appeal application, stating that this was "with the consequence that the current interim care orders and the current arrangements for the children must remain in place pending determination of the application for permission to appeal". On 8 March, Moylan LJ granted permission to appeal and extended the stay until the determination of the appeal. On 16 March, the stepmother and the father each filed respondent's notices inviting this Court to uphold the appeal judge's decision on different or additional grounds.

### **The ABE interview**

11. Before considering the judgments in the lower courts, I shall summarise the ABE interview, which featured significantly in both judgments.
12. T was accompanied by an interpreter, although in the event she answered most of the questions in English herself. At an early point in the interview, the following exchange took place:

O: Okay, so telling the truth and telling a lie do you know what the difference is?

T: I'm not sure.

O: Okay. So, what do you think would happen if we told a lie?

T: It won't go back to us.

O: Okay. What do you think the consequences would be?

T: I'm not sure about that.

O: Okay. Do you need any assistance from [the interpreter]?

T: No.

O: No? Are you sure? Okay. So, if we tell a lie, do you think it's good to tell a lie?

T: No.

O: No. Okay. And if we do tell a lie about someone else, do you think that person could get into trouble?

T: No. For now will get in trouble but then in the back, it would be back to you.

O: Yes, because you told the lie about someone else.

T: Yes.

O: So, initially that person could get into trouble, couldn't they?

T: Yes, for now. Tomorrow it would be your turn.

O: But then if we find out that it was the other person, like yourself telling the lie, then it would come back. Yes?

T: Yes.

O: So, to tell the truth is a good thing. It's positive, isn't it?

O: Yes.

O: So, in this room everything we say have to be the truth and that's for me, you, [the interpreter] and also [officer's colleague] next door because I will be going after the interview to speak to [her] to see if she's got any questions she wants me to ask. So, it's important we all tell the truth, okay?

T: Okay."

13. The officer then said "I know you've come here to talk to us about something you've disclosed". She asked T to give as much detail as she could. T then gave an account in what the deputy district judge described as a "lengthy narrative". At some points the transcript of this narrative is difficult to follow but it includes statements by T that her stepmother had taken her outside to the car where two men were sitting, one in the front, the other in the back; that she had sat in the front where the man "was trying to kiss me and I was like what are you doing?"; that the men had said that if she told her dad they would kill her and her dad; that she had told her dad who was shocked; and that she was afraid to tell the police because she didn't want to lose her family.
14. Following this narrative, the officer asked T a lengthy series of questions, the transcript of which extends to over sixty pages. It is accepted that some of the questions were leading or closed. During this process, T gave more details about the two men, including their names and type of employment, and that they were regular visitors to the property.

She gave more details of how the stepmother had got her to get into the car, of how the man in the front had tried to kiss her, and the threats made by the two men. Asked how often this had happened, she replied “it was every night”, at different times, but always when her dad was asleep. When asked where her stepmother would be, T replied that she had been in the back of the car and sometimes she had sex with the other man there. With the assistance of the interpreter, T gave some details of how her stepmother and the other man had had sex. When asked how long this had been happening, T replied “three years ... every night before. If I didn’t make excuses or say something.” Asked how long her dad had known about what was happening, she replied “about two years or something ... two years and a half”. She described a conversation she had had with the priest at the family’s local church. Towards the end of the interview, she described how the man in the front of the car had touched her breast.

### **The deputy district judge’s judgment**

15. After outlining the background briefly and the history of the proceedings, the deputy district judge, who had watched the video recording of the ABE interview, set out what had been said in some detail. He then summarised the evidence given by those witnesses who had given oral evidence – two social workers, T’s foster carer, the head of safeguarding and the head of year at T’s school, the officer who had conducted the ABE interview, the stepmother and the father.
16. In setting out his summary of the evidence, the deputy district judge stated that the social worker had described the street where the alleged abuse took place in the parked car as “narrow”, with properties facing onto the street with no front gardens. He also recorded that the police officer had said that there were approximately 80 houses in the street, that the police had approached other houses in the street but had only spoken to one neighbour, that the street was “quite narrow”, and that there were cars parked outside the home although there were some gaps between them.
17. The judge then set out his evidential analysis. He considered first T’s credibility:

“130. My overall impression of T from what I’ve heard from a number of witnesses, including the stepmother and the father, is that T is well liked, is a studious young woman, who had a good relationship at school and at home with her stepmother and father. Both stepmother and father describe T as being a truthful child with whom they both had a good relationship. Neither of them have been able to point to any incident between either of them and T which may have been a trigger for her making up the allegations against them. I accept, of course, that it is not for them to prove that the allegations are false but seems to be a significant feature in this case that a child who is described as having a good relationship with both stepmother and her father, is said to then be making up what are extremely serious allegations.

131. I have to weigh in the balance when considering T’s credibility the issue about her dishonesty raised by the initial foster carer .... She had indicated to the guardian that T had been dishonest on occasion. She had for example said to the family

support worker that W was her child which, as I've already indicated led to there being DNA testing of the family establish the true maternity of the children. That would appear to be a matter upon which T was dishonest, but on consideration of wider information, it is my view that the comment was made in an isolated conversation and when it was discussed with her she found the suggestion that she may be the mother funny and [the foster carer] also said that she would refer her other siblings as "her babies". I also take into account the issue of T accessing pornography on the school computer and that she was dishonest about why she was doing so. However, she did then tell the truth and did not maintain any falsehood.

132. Having taken the above into account I am satisfied that there is nothing that I have heard in the evidence during the course of this hearing nor that I have read in the extensive papers within the bundle, which paints a picture of T other than as a bright, intelligent, sensible and truthful person."

18. Turning to the allegations, the deputy district judge noted that T had been able to describe the two men in a way that the father and stepmother had not challenged, that she knew about the men's employment and was able to describe the car. He continued (at paragraph 134):

"The evidence I have seen points to T having provided a consistent account of what occurred to her to her school, to the police and to the social worker. Whilst that account has developed as she has been spoken to by various professionals, I am satisfied that such development has come about as the result of appropriate questions and challenges being put to T by professionals during the course investigation. In addition, she has told her father what occurred and it does not form part of the stepmother's or the father's case that there is any significant difference between what she has said on numerous occasions."

19. In contrast, the judge referred to examples of inconsistencies and lies in the statements and evidence of the father and stepmother. One example was as to when they had first heard about the allegations. In her interview, T had said that she had told the father two or two and a half years before the meeting at the school. The father had denied this, but this was contradicted by what he was recorded as saying on a police bodycam on an occasion when they visited the family home after T's initial allegation. The stepmother had been present and had not challenged what the father said. Another example was the inconsistency in the stepmother's accounts about how often she had seen the two men. A third example was the father's evidence about his HIV status. The father had said that it was known in the community that he was HIV positive and for that reason no other man would have had sexual intercourse with the stepmother. Medical tests conducted during the proceedings, however, had demonstrated that he was HIV negative, although the father insisted that they were wrong.
20. The judge also referred to the fact that, although it was accepted that T had correctly identified the two men in terms of their description and their employment, the father

and stepmother had asserted that they no knowledge of where the men lived or worked. He observed (at paragraph 154-5):

“I find it difficult to understand [why] the parents not been able to identify either of these two men so that they could be interviewed by the police ... It is also something of a peculiarity that two men who were close friends, something accepted by both parents, stopped visiting the parents’ home without any apparent reason for that. I bear in mind, of course, that it is not for the parents to produce evidence that disproves the allegations made against them, but it is a peculiarity that in this close-knit community and the two men being close friends, that they have disappeared from the family.”

21. The deputy district judge then returned to the ABE interviews:

“156. Mr Povall, in his cross-examination of [the officer who conducted the interview] on behalf of stepmother, quite properly spent a significant amount of time dealing with the format of the ABE interview. It was clear that [the officer] was unfamiliar with the guidance which has been issued in respect of how such interviews should be carried out. It was perhaps an unfortunate turn of phrase by [the officer] when she said that the guidance regarding such interviews did not need to be followed. It is quite clear that the guidance was not followed and the questions on behalf of the stepmother were entirely appropriate. I was disappointed in the evidence given by [the officer] which appeared to be both defensive and combative. She is an officer who has experience in carrying out such interviews and that should have led her to have a proper investigation as to truth and lies and to avoid using terms such as “disclosure”.

157. It is right that in closing submissions counsel for both the stepmother and the father have criticised the ABE interview and I am invited attached little or no weight to the interviews carried out with T.

158. I share the concern about the quality of the interviewing of T and the lack of compliance with the guidance which is available to all police officers who are engaged in carrying out such interviews. However, it is also right that I should look at the quality of what was said by T during the course of the interview and attach to it such weight as I feel is appropriate. I bear in mind that this is not the only evidence that is provided for the allegations made by T, there is the evidence from school, from the social worker and, indeed, by the father himself. The interview is of course the lengthiest process that T went to in respect of providing an account of the allegations which she makes. It has more detail attached to it, but it is consistent with what she has said elsewhere. Despite the failure to comply with the guidance in respect of conducting such interviews, I am

satisfied the interview can and should be taken into account by me when coming to make my decision about the allegations which are raised against both the stepmother and the father.”

22. The deputy district judge then set out the relevant legal principles in some detail by reference to the reported case law. Of these references, the following four passages are of particular relevance to this appeal. First, he cited from recent authorities of this Court in cases about departures from ABE guidance – specifically the observations of Underhill LJ in *Re JB (A Child) (Sexual Abuse Allegations)* [2021] EWCA Civ 46 at paragraph 48 and my observations in *Re C (A Child) (Fact-Finding)* [2022] EWCA Civ 584 at paragraph 21. Secondly, he stated that:

“it is for the local authority to prove its case and the burden of proof always lies on the local authority.”

Thirdly, he directed himself as to the approach to lies told by the parties in these terms:

“I should come to a clear assessment of the credibility and reliability of the parents and I should bear in mind that it is not uncommon for those in cases of this nature to lie and I should bear in mind that there are many reasons why a witness may lie and such lies do not mean that a witnesses lied about everything, the direction given in *R v Lucas* [1981] QB 720 remains relevant and I have given myself the appropriate direction.”

Finally, he stated that:

“the inherent probability or improbability of an event remains a matter to be considered when weighing up the probabilities and deciding whether, on balance, the event occurred”.

He cited a passage from Lord Hoffmann’s speech/opinion in *Re B* [2008] UKHL 35 paragraph 15:

“Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.”

He then added:

“The fact that an event is common or frequent does not lower the standard of probability to which it must be proved, nor does the fact it is very uncommon or infrequent raise the standard of proof.”

23. Finally, the deputy district judge set out his conclusions and findings in these terms:

“164. Having considered all of the evidence before me, written and oral, my conclusion is that the local authority has been able to prove its case against both stepmother and the father.



165. I am satisfied that I should attach weight to the ABE interview of T. I do so because it is consistent with the other accounts she has given, as I have set out above. Furthermore, whilst I accept that there was a failure to follow the guidance fully, the departure does not undermine the account given by T in that interview. She was able to speak freely and my impression of her within the interview was that she was giving a detailed account of the events which took place and was able at an early stage to give such an account. I accept that there was a less than perfect approach to issues such as “truth and lies”, but in my view the officer did conduct an exercise, though I also bear in mind also T’s age when she was interviewed. She was not a young child she was a bright and intelligent teenager who knew what the consequences of making the allegations were likely to be.

166. In addition, I take into account that these allegations had been made to professionals since May 2021, and a consequence of those allegations is that T has been separated from her stepmother and father and her siblings since that time and yet she has remained steadfast in respect of the allegations. I also take account of the fact that she has been reported as being upset that the allegations were not being pursued rigorously enough and that she was not being believed. There is also no indication that at any time she sought to retract any of the allegations which she has made.

167. I also take into account the evidence given by stepmother, the father, school and the foster carers that T is a bright, intelligent and on the whole, truthful person. No reason has been put forward as to why T would make these allegations. And while I bear in mind the burden of proof rests with the local authority, when the parents’ evidence is that T had a good relationship with both of them and both described her as being a truthful person, the absence of any malicious motive to make these allegations must weigh in the balance against the parents and points to T’s credibility.

168. I found evidence by the stepmother and the father to be inconsistent and on crucial matters I could not accept their evidence. I struggle with the evidence that the identity and whereabouts of [the two men] was unknown to the parents, that an apparently close friendship came to an end without any reason (though it may be significant that the time when the parents say they no longer saw those two men coincides with the time T says she told her father of the abuse which she says was taking place).

169. The clear evidence given was that the [community] was a close community and in light of the evidence given I would anticipate that it would not be difficult to be able to locate both of those men.”

24. The deputy district judge described the father’s evidence about when he first knew about the allegations as “wholly unsatisfactory”. He then said that the father’s account of disbelieving that either of the men would have had sexual intercourse with the stepmother was “wholly lacking credibility”. The judge found that the father had falsely claimed to be HIV positive to provide a reason why no man would have sexual intercourse with the stepmother.
25. He concluded by making findings, including:
- (1) that on a date in or about November 2017, the stepmother had taken T in the middle of the night to a car occupied by two men where she was sexually assaulted by being kissed on the mouth;
  - (2) that similar behaviour had occurred on numerous occasions over the next three years, although he was not satisfied that it occurred on a nightly basis;
  - (3) that the stepmother had engaged in sexual intercourse with the other man in the car while T was present;
  - (4) that T had reported the allegations to her father three years earlier and that he took no action to protect her and adopted a course of denial and blaming her;
  - (5) that the stepmother had also failed to protect T from further abuse;
  - (6) that T had been threatened by the two men that she would be killed if she told anyone about the abuse;
  - (7) that the parents accusing T of lying about these matters was emotionally abusive;
  - (8) that as a result of the parents’ abuse of T, the younger children were at risk of significant emotional and physical harm.
26. The lawyers acting on behalf of the father, stepmother and T all submitted lengthy requests for clarification of the judgment, to which the deputy district judge responded. It is unnecessary to consider these requests or responses for the purposes of this appeal. I observe, however, that the requests were manifestly excessive. Many of them asked the judge to indicate the weight he had attached to specific pieces of evidence. This Court has repeatedly said that requests on this scale and of this nature are inappropriate – see my observations in *Re C and Others (Care Proceedings: Fact-Finding)* [2023] EWCA Civ 38 at paragraphs 41 to 43 and the earlier cases cited there.

### **The first appeal**

27. The stepmother put forward four grounds of appeal against the deputy district judge’s findings:
- (1) his analysis of T as a reliable and credible witness was flawed;
  - (2) he omitted evidence that undermined the reliability and credibility of the allegations;

- (3) he failed to apply the *Lucas* direction properly and wrongly placed disproportionately significant weight on the stepmother's inconsistency;
- (4) he gave inadequate reasons as to why the findings were made.
28. We were told that, at the start of the hearing of the first appeal, HH Judge Greensmith made observations about the improbability that a child could be taken to a car parked in the street where sexual activity involving three adults took place on many nights over a three-year period without any reports from neighbours. He told counsel that he had conducted a Google search and looked at the property and that the description of the street in the deputy district judge's judgment as "narrow" was correct. In response, counsel for the local authority said that the police had conducted only limited house-to-house inquiries, to which the judge replied that he did not think it would require any such inquiries for the activity complained of to be reported to the police.
29. During the hearing, Judge Greensmith also referred to an apparent inconsistency in T's accounts on which the stepmother and father relied. The records of a strategy meeting and the initial statement filed by the social worker in the proceedings had stated that in her initial conversation with the social worker and police officer, T had alleged that she had been taken to a park to be abused by two men, whereas in her ABE interview T had denied that this had happened. The judge expressed concern at what he perceived to be a change in the allegations. Counsel for the local authority responded that none of the professionals who had been present during the initial conversation with T had attended the strategy meeting, and the police officer who had been present had no recollection of T saying that she had been taken to a park.
30. The hearing continued with all parties making submissions, after which the judge reserved judgment overnight.
31. The judge started his judgment on the appeal (in which the paragraphs are not numbered) by setting out the findings made by the deputy district judge. He noted that following a *Re W* hearing T had not been called as a witness, observing:
- "No one sought to call T despite her age. The rationale for this decision is not clear. T's evidence consisted of her ABE interview."
- He continued:
- "There is no explanation within the judgment as to why the two men who are named and identified were not called or made parties considering the seriousness of the allegations against them. During counsel's submissions at the appeal hearing I was told that the local authority was unable to locate the men involved. I am unclear as to what lengths the local authority went to, to track the men down so they could play a part in the fact find process."
32. The judge continued by referring to various points of law, including the court's powers on appeal under the Family Procedure Rules. He cited the following passage from the

judgment of Peter Jackson LJ in *Re S (A Child: Finding of Fact)* [2020] EWCA Civ 1382:

“It is well-established that an appeal court may only interfere with findings of fact in limited circumstances, for example where there has been a material error of law, or where there has been a serious flaw in the evaluation of the evidence, or where it has been shown that the conclusion cannot reasonably be justified.”

He cited a passage from the judgment of Lord Reed in *Henderson v Foxworth* [2014] UKSC 41 (paragraph 62), and passages from judgments of this court as to the weight to be given to evidence from ABE interviews and as to the treatment of lies.

33. The judgment continued with a section headed: “This court’s analysis of the reliability of the findings made by the deputy judge”.

“If it was true that the stepmother ... encouraged T into a car to engage in sexual activity on a nightly (or even frequent) basis over a three-year period this must have occurred on up to several hundred occasions. The street where the parents live is a narrow street of terraced houses. The front doors of the houses on each side of the road open directly onto the street which is so narrow that it would be difficult for two cars to pass comfortably. It seems to me that the likelihood of the alleged abuse taking place in the manner described without any complaint or report being made either to the police or to the local authority is implausible in the extreme. I accept it is appropriate to assume the judge took this into account but the manner in which he did so is not clear. It is such a feature of this case that it sits like a cloud over the question of credibility of T.”

34. The judge quoted from the deputy district judge’s conclusion that he should attach weight to the ABE interview. Having quoted passages from the ABE Guidance and the passage from the interview in which T was asked about truth and lies (quoted above at paragraph 12), the judge continued:

“In my judgment this exchange between the police officer and T does not satisfy the test of establishing that the child knows the difference between telling the truth and telling a lie.”

He added:

“Without reciting every departure from the Guidelines throughout the course of the interview it is sufficient to record that it is peppered with leading questions and suggestive language.”

35. He then noted the deputy district judge’s references to inconsistencies in the stepmother’s evidence and to the father’s lies and continued:

“The difficulty I am faced with is that the deputy judge does not explain how he quantifies the relevance of these lies in accordance with the application of the authorities on the interpretation of *Lucas* and the recent Court of Appeal guidance as set out above. The difficulty that this court faces is being unable to correlate the parents’ lies to the burden on the local authority to prove its case. In the absence of a clear explanation by the deputy judge as to how he has dealt with this issue the deputy judge has reversed the burden of proof of the parents by either expecting them to disprove their guilt or to prove that the allegations are not true.”

He noted that the deputy district judge had reminded himself of the *Lucas* principle and observed:

“Such a formulaic direction is not of itself a ground of appeal but, unfortunately the deputy judge does not say how he has applied it in the context of the parent’s evidence. This is particularly important in a case which relies upon the child’s evidence, given during a wholly defective ABE interview, and there being no corroborative evidence of an independent nature to support those allegations.”

36. The judgment then concluded in these terms:

“To summarise my findings in relation to each of the grounds of appeal can be briefly summarised as follows:

Re Ground 1

The deputy judge’s analysis of T as a reliable and credible witness is flawed.

The deputy judge failed to have sufficient regard to the established requirements for the ABE Guidelines to be followed and to understated [sic] the consequences that they were not. The deputy judge attached significant weight to the ABE evidence when in my judgment he should have attached no weight at all.

Re Ground 2

The deputy judge has omitted evidence that undermines the reliability and credibility of the allegations.

The deputy judge failed to attach sufficient weight to the possibility that the presence of a car on a narrow street occupied by three adults and a teenager, all engaging in sexual activity on many occasions over a three year period was not reported to any official source as being highly improbable.

Re Ground 3

The deputy judge has failed to apply the *Lucas* direction properly and has wrongly placed disproportionately significant weight on the [stepmother's] inconsistency.

The deputy judge failed to be clear as to how he had applied his self-direction in relation to the *Lucas* principle and in failing to do so gives the impression that he had allowed the burden of proof to be reversed against the parents.

Re Ground 4

The deputy judge has given inadequate reasons as to why the findings were made.

The deputy judge gave reasons; unfortunately, the reasons he gave were misguided and they significantly failed to accord with the evidence.”

37. Under the final heading “Order on appeal”, the judge concluded:

“I am setting aside the findings made by the deputy judge as I am satisfied that on the evidence as presented no court could properly make any of the findings made by the deputy judge. My order is that the appeal is allowed on all grounds and the matter proceed to the welfare stage. I will assume further conduct of this case and preside over the welfare stage for which I will give directions.”

38. After delivering his judgment, the judge added two “postscripts”. A note of his observations was agreed by counsel. The matters mentioned have no bearing on the issues arising on this second appeal. In the following exchanges, counsel argued that as there was now “essentially no threshold”, the interim care orders should be discharged. The exchange continued:

“Judge: don’t think that is strictly true, the fact is that the ICO was made on basis of the original threshold and it is made on the basis of reasonable grounds to believe, I have made an order which makes the specific findings to be set aside, that doesn’t mean that the proceedings are necessarily ended. That is not a natural consequence, until the court makes a decision on the application and dismisses the application, which I certainly won’t do today, the actual ICO remains in place. I think you’re jumping the gun. I don’t agree that the proceedings have been dismissed at this stage.

Counsel: I am in the court’s hands in that regard, but I believe that this is a single issue case and the threshold comprised of those findings.

Judge: It doesn't mean to say that the proceedings are dismissed."

39. In further exchanges, counsel for the local authority informed the judge that her intention had been to seek a care order pending appeal under s.40 of the 1989 Act. The judge replied that he was "not going to do that". When counsel observed that she was "struggling to understand what there is left for the court to determine", the judge replied:

"what I am determining now is the welfare of the children, under ICO that remains, is it right for ICO to remain, probably it won't be unless LA know something the court doesn't, or comes up with more facts, the likelihood is no, but it doesn't mean that the ICO terminates automatically, what there is for court to decide is the children's welfare, how the children, if the right thing is going to be rehabilitation with parents, how to manage that, could have situation where we leave court and the parents go and collect the children, LA could only exercise PR under ICO or CO, no power to remove children without court power, if not ICO and I am not making any further order, and if parents don't agree s20 they could go and collect the children ... there is no question, and nor should there be, we can't have the children just being collected by the parents, there is a lot to explain, as for the FCO, it was made at the time, I don't see, I don't know the actual threshold for the FCO [in respect of T] but it has been made, how old is she, 17, there would have to be an application for the final care order to be discharged, and a care order can only be discharged if it serves the welfare of the child, I can't see how, can't be discharged because suddenly found out that the facts upon which it was made no longer happened, that can't be the reason, can only be discharged if the welfare of the child is served by it."

He then addressed the parents directly, stating

"The children have to be given time to be given explanation and information and you have to be given time to prepare for what is going to be the future. It would be unthinkable, simply, to pick the children up and put them back in your care. That in itself, in my view, would potentially cause emotional harm to them."

### **The second appeal**

40. The local authority's grounds of appeal to this court are:

(1) The judge was wrong in law to allow the appeal:

- (a) he failed properly to direct himself as to the role of an appellate tribunal in an appeal against findings of fact, or to apply such directions as he gave himself;

- (b) he was wrong in his approach to the lower court’s assessment of the ABE evidence;
    - (c) he was wrong in concluding that DDJ Hornby had failed to be clear as to how he applied his *Lucas* self-direction and thereby gave the impression of reversing the burden of proof;
    - (d) he was wrong to conclude that DDJ Hornby’s reasons were ‘misguided and significantly failed to accord with the evidence’.
  - (2) In the alternative, he was wrong not to remit the matter for rehearing.
  - (3) He misapprehended the consequences of his decision.
41. Under ground 1(a), Mr Nicholas Goodwin KC, leading Ms Sarah Watters who had appeared in the court below, submitted that Judge Greensmith had adopted the wrong approach to the hearing of an appeal against findings of fact. The deputy district judge had delivered a granular judgment in which he conducted a detailed analysis of the evidence from across the wide canvas, looked at it critically, engaged with the contrary arguments, identified and applied the correct legal principles, and carried out a properly balanced evaluative exercise. It is an established principle that an appellate court must not interfere with findings of fact by trial judges, unless compelled to do so. Yet in this case the circuit judge on the first appeal had adopted the role of the primary assessor of facts, going so far as to undertake his own research on Google and thereby crossing the line between a mere review and a *de novo* assessment. He concluded that T did not understand the difference between truth and lies simply on the basis of the passage in the ABE interview quoted above (at paragraph 12) without acknowledging that the deputy district judge had reached a conclusion about T’s credibility after considering other evidence, none of which was mentioned by the circuit judge at all. Mr Goodwin further submitted that the judge was wrong to speculate as to the reasons why T did not give evidence. No one had asked for T to give evidence and the fact that she did not was not a point raised on appeal. It was also submitted that the judge was wrong to comment on the fact that the two men allegedly involved in the sexual activity did not intervene in the proceedings.
42. Under ground (1)(b), Mr Goodwin pointed to paragraphs 156 to 158 of the deputy district judge’s judgment (quoted above) as demonstrating that he was fully aware of the deficiencies in the process and the failure to follow the guidance, about which he expressed concern. He had acknowledged the difficulties with the truth and lies discussion. In this case, however, the interviewee was not a young child but an intelligent teenager, and in assessing her credibility the deputy district judge had taken into account evidence from the wider canvas, including the parents’ own statements about her truthfulness as well as evidence from the foster carer of untruths T had said. The deputy district judge’s analysis of the ABE interview had been extensive and careful, focusing on contextual detail given by T.
43. Mr Goodwin cited the following passage from paragraph 23 of my judgment in *Re C*, supra, quoted in the trial judge’s judgment:
- “Significant departures from the Guidance are likely to result in reduced, and in extreme cases no, weight being attached to the



interview. It is for the judge to consider the interviews, and the extent to which they comply with or depart from the Guidance, in the context of all the other evidence. The approach of the appellate court to this exercise is no different from every other appeal against findings of fact. The assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance. An appeal court will only interfere with findings of fact by trial judges where there is a very clear justification for doing so.”

Mr Goodwin submitted that, given the very careful analysis undertaken by the deputy district judge in this case, the circuit judge on appeal had been wrong to interfere.

44. Under ground 1(c), Mr Goodwin submitted that, having reminded himself of the principle in *Lucas*, the deputy district judge had been entitled to take into account the inconsistencies and lies in the various accounts given by the father and stepmother when arriving at his findings. He accepted that, in referring to and relying on the father’s lies about his HIV status, the judge did not at that point remind himself that there may have been other reasons for the lies. It was Mr Goodwin’s submission that this did not provide a reason for impugning the judgment. The judgment has to be read as a whole and there was no reason to think that the judge had overlooked a legal principle which he had cited earlier. There was equally no basis for thinking that the deputy district judge had reversed the burden of proof. In addition to the reference in his summary of the law, Mr Goodwin drew attention to three other points in the judgment where he had reminded himself about the burden of proof.
45. Under ground (1)(d), it was submitted that the judge on appeal failed to identify how the trial judge’s findings had failed to accord with the evidence. The deputy district judge had painstakingly recited the relevant evidence and carefully explained his analysis and findings. In contrast, Judge Greensmith’s treatment was partial and superficial and failed to take into account the totality of the evidence. On behalf of T, Mr Jonathan Sampson KC, leading Ms Elizabeth Brennan supporting the appeal, endorsed this submission and described the judge’s treatment of the issues as no more than broad brush strokes on the canvas.
46. Under grounds 2 and 3, Mr Goodwin submitted that if, contrary to his principal argument, the judge had been right to allow the appeal, his consequential decisions had been wrong in two alternative respects. First, instead of simply setting aside the findings, he ought to have remitted the matter for a rehearing. Unlike the deputy district judge, he had neither watched the ABE interviews nor heard any live evidence. He was in no position to say that “on the evidence as presented no court could properly make any of the findings”. Secondly, in the alternative, if he had been entitled to set aside the findings without a rehearing, the consequence was that there was no basis on which any order could have been made under s.31 so that either (a) the proceedings should have been dismissed rather than adjourned for a welfare hearing or (b) on the local authority’s indication that it was intending to seek permission to appeal, further interim care orders could have been made pending appeal under s.40. The judge’s perplexing approach to the consequences of his decision undermined confidence in his understanding and exercise of his role when hearing an appeal.

47. On behalf of the respondent stepmother, Ms Deirdre Fottrell KC, leading Mr Robert Povall, accepted that the first appeal judgment was brief but described it as focused and very strongly engaged with the procedural and substantive deficiencies of the investigation and the trial judgment, in particular (1) the trial judge's failure to give any or any sufficient consideration to the improbability of the allegation, (2) the way the ABE interview had been conducted and the trial judge's reliance on it, and (3) his analysis of the credibility of, respectively, T and the parents.
48. With regard to improbability, the deputy district judge had given no or no adequate consideration to the implausibility of the central allegation that sexual activity took place in a car in a narrow street on numerous occasions over a three year period without being noticed or reported. The appeal judge had been right to identify this as a magnetic feature of the case.
49. As to the ABE interviews, Ms Fottrell relied on statements in previous judgments in this Court about the importance of following the ABE Guidance – in particular *TW v A City Council* [2011] EWCA Civ 17, *Re W; Re F (Children)* [2015] EWCA Civ 1300, and *Re Y and E (Children: Sexual Abuse Allegations)* [2019] EWCA Civ 206. When the guidance is not followed, there must be a careful analysis of the ways in which the investigation departed from it and their impact on the reliability of the evidence. In this case, the deputy district judge had failed to identify the ways in which the interviewing officer had departed from the guidance.
50. With regard to T's credibility, Ms Fottrell pointed to what she described as the red flags raised by the foster carer – her lies about small matters, the fact that she watched pornography on her phone, her statements about the youngest child being “my baby”. The deputy district judge's analysis of these issues had been too brief and he had failed to weave it together with the issues arising out of the ABE interviews, in particular the problems with the inquiry as to her understanding of truth and lies. Ms Fottrell pointed out that the deputy district judge had reached his conclusion about T's credibility at paragraph 132 of his judgment before undertaking his analysis of the deficiencies of the ABE at paragraph 156. As to the credibility of the stepmother and the father, the appeal judge had been right to describe the trial judge's approach to the *Lucas* principle as “formulaic” – he had given himself the standard warning but failed to apply it to their evidence. This was completely at variance with his approach to T's credibility which had been to strain to excuse or explain inconsistencies and falsehoods.
51. Ms Fottrell submitted that the judge had been entitled to refuse to remit the matter for rehearing on the basis that there was no prospect of a judge making findings on the evidence filed. In the respondent's notice filed on behalf of the stepmother, reliance was placed on FPR 30.12(4) entitling an appeal court to draw any inference of fact which it considered justified on the evidence. The appeal judge had been entitled, upon a review of the trial judge's analysis, to draw inferences which vitiated the sustainability of the findings made. In the respondent's notice, it was further argued that the appeal judge was only seised of an appeal against the findings of fact. The parents had not applied to discharge the interim orders, nor did the local authority apply to withdraw the application for a care order. Furthermore, there remained the other allegations made by the second child U which had not been investigated. In those circumstances, it was contended in the stepmother's skeleton argument that the appeal judge had been entitled to decide it was consistent with the children's welfare for the status quo to be preserved until final decisions could be taken. At the hearing before us, however, Ms Fottrell

accepted that there were problems with the appeal judge's consequential decision to prolong the proceedings after the dismissal of the local authority's threshold case. She argued that it was open to this Court to uphold his principal decision to allow the appeal but to set aside his decision to adjourn for a welfare hearing and instead dismiss the proceedings entirely.

52. In his address to this Court, Mr Shaun Spencer KC leading Mr Chuba Nwokedi on behalf of the father, adopted the arguments put forward by Ms Fottrell and concentrated his own submissions on points raised in his respondent's notice. First, he argued that the deputy district judge's findings had been rationally insupportable because they failed to have regard to the inherent unlikelihood of a number of matters of significance. In addition to the points relied on by Judge Greensmith, Mr Spencer cited a number of factors which he characterised as making T's allegations unreliable, including the implausibility of the stepmother repeatedly leaving small children in the house while she engaged in sexual activity in a car in the street and of T repeatedly leaving the bedroom she shared with her sister without attracting her attention.
53. Secondly, Mr Spencer submitted that the deputy district judge had been wrong to attach significant weight to the ABE interview for reasons over and above the breaches of the guidelines. He had been wrong, at paragraph 165 of this judgment, to conclude that T had given a detailed account in her ABE interview. Mr Spencer pointed in particular to what he submitted was a lack of detail in T's description of what happened in the car despite her contention that she was taken to it on many occasions. He further submitted that the deputy district judge had been wrong to conclude that consistency of account was a counterweight to deficiencies in the interviewing process. He pointed to the significant inconsistency, raised by the appeal judge in argument but not mentioned in the judgment, between T's initial allegation that she had been taken to a park to be abused and her subsequent allegation in the ABE interview that the abuse had occurred in a car outside the house. He also submitted that the deputy district judge had been wrong (at paragraph 167) to find that the credibility of T's allegations was supported by the fact that "no reason has been put forward as to why T would make these allegations". Mr Spencer pointed to passages in the ABE interview where T stated that she wanted to be reunited with her own mother and that her stepmother had said that she was making a false allegation to get her father to divorce the stepmother and bring her own mother to this country. Mr Spencer submitted that the stepmother had never advanced that explanation and that therefore this could demonstrate T's motive for inventing the allegations.
54. Thirdly, Mr Spencer submitted that the deputy district judge had erred in holding against the parents, as opposed to the local authority, the fact that there was no evidence from either of the two men involved in the alleged abuse. In doing so, he had reversed the burden of proof. It was the local authority that was under the duty to ensure that the relevant evidence was put before the court but here the authority had taken no steps to obtain evidence from the two men, an omission that amounted to a procedural irregularity. At no stage were the father or stepmother asked to assist in locating them. Had they been asked to provide assistance and failed to do so, it might have been reasonable to draw inferences from that refusal. But as no such request had been made it was wrong of the judge to include the absence of the two men from the proceedings as a factor of relevance to the credibility of the father and stepmother.

55. In reply, Mr Goodwin drew attention to a passage in the deputy district judge’s summary of the legal principles (cited at paragraph 22 above) in which he had referred to the inherent probability or improbability of an event. Mr Goodwin accepted that there was no express discussion of the improbability of the allegations in the deputy district judge’s judgment but submitted that it was such an integral feature of the case that it cannot be said that he did not have it in mind. Mr Goodwin also drew our attention to a passage in the stepmother’s police interview in which, contrary to Mr Spencer’s submission, she had suggested that T had made up the allegation so that she would be able to bring her mother to this country. Finally, on the issue of T’s consistency, Mr Goodwin submitted that it was clear from a careful study of the documents that the reference to T being taken to “a park” had been a mistake drawn from an erroneous statement during a strategy meeting. He drew our attention to a series of documents which clearly demonstrated that this was indeed the case. He submitted that the judge’s comment during the first appeal hearing, and the argument advanced by the respondents before us, that there had been a significant change in the allegation (from “park” to “car”), was therefore mistaken.

### **Discussion and conclusion**

56. The most-frequently cited exposition of the proper approach of an appellate court to a decision of fact by a court of first instance is in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many.

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

(ii) The trial is not a dress rehearsal. It is the first and last night of the show.

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2022] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135.”

57. More recently, Lewison LJ summarised the principles again in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2:

“i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”

58. In the present case, whilst Judge Greensmith correctly identified the proper approach of an appellate court to findings of fact by a court of first instance, he regrettably failed to follow it.
59. The deputy district judge’s judgment contained a comprehensive analysis of the evidence and a detailed explanation of his reasoning. Of course he did not refer to every part of the evidence nor every point made in submissions. But he dealt with both the evidence and the arguments in a way which leaves no room for doubt that he took everything of relevance into account. In contrast, Judge Greensmith alighted on only a few aspects of the evidence in a way that could not unfairly be described as “island-hopping”.
60. This is illustrated by a comparison of their respective treatments of three aspects of the case – the ABE interview, the approach to credibility, and proportionality – which formed respectively grounds 1, 3 and 2 of the appeal against the deputy district judge’s findings.
61. The deputy district judge had watched the video recording of the ABE interview which he subjected to a detailed analysis. In contrast, Judge Greensmith, who had not seen the recording, dismissed the interview and the deputy district judge’s treatment of it in just four sentences:
- (1) the exchange between the police officer and T “does not satisfy the test of establishing that the child knows the difference between telling the truth and telling a lie”;
  - (2) “without reciting every departure from the Guidelines throughout the course of the interview it is sufficient to record that it is peppered with leading questions and suggestive language”;
  - (3) he “failed to have sufficient regard to the established requirements for the ABE Guidelines to be followed and to [understand] the consequences that they were not”;

(4) he “attached significant weight to the ABE evidence when in my judgment he should have attached no weight at all”.

62. Each of these sentences is at least debateable and in some respects wrong.
63. As to his first point, it is important to bear in mind precisely what the ABE Guidance says about “truth and lies”:

“3.18 Toward the end of the rapport phase of an interview with a child witness, when ground rules have been explained to the child, the interviewer should advise the witness to give a truthful and accurate account of any incident they describe. There is no legal requirement to do this, but since the video may be used as evidence, it is helpful to the court to know that the child was made aware of the importance of telling the truth.... [my emphasis]

3.19 It is inadvisable to ask children to provide general definitions of what is the truth or a lie (a task that would tax an adult); rather, they should be asked to judge from examples. The interviewer should use examples suitable to the child’s age, experience and understanding. Secondary school-age children can be asked to give examples of truthful statements and lies, while younger children can be offered examples and be asked to say which are true and which are lies. It is important that the examples chosen really are lies, not merely incorrect statements: lies must include the intent to deceive another person....”

64. In this case, the passage in the ABE interview concerning truth and lies (quoted above at paragraph 12) is admittedly not straightforward. It was, in the deputy district judge’s words, “less than perfect”. But for my part, unlike Judge Greensmith, I would not be prepared to say, on the basis of the transcript alone, that the exchange does not satisfy the test of establishing that T knew the difference between telling the truth and a lie. The officer introduced the issue by asking T whether she knew the difference between telling the truth and telling a lie. This is akin to asking for a definition of the truth and a lie which the guidance discourages. In the circumstances, as the guidance anticipates, it was unsurprising that T was “not sure” how to answer that question. A few questions later, however, she said that, if you told a lie about someone, “for now [they] will get into trouble, but then ... it would be back to you ...tomorrow it will be your turn.” The officer then emphasised the importance of telling the truth in the interview, to which T responded “Okay”. That exchange could be read as indicating that T understood the consequences of not telling the truth. It was certainly open to the deputy district judge, who, unlike Judge Greensmith and unlike this Court, had seen the video recording of the interview, to conclude that the imperfections in the way the issue was dealt with did not preclude him from relying on what was subsequently said by T during the interview.
65. It was insufficient for the judge sitting on appeal simply to say that the interview was “peppered with leading questions and suggestive language” and it was incorrect to say that the deputy district judge “failed to have sufficient regard” to the requirement to follow the guidance. As is clear from paragraphs 156 to 158 of his judgment quoted above, which followed on from the extensive citation from the interview at paragraphs

9 to 25, the deputy district judge was plainly aware of the guidance and the ways in which it had not been followed. He received extensive submissions about the guidance from counsel and about the failure of the interviewing officer, (who, he noted, had not read it), to comply with it. He shared the concern – expressed by all counsel – about the quality of the interviewing. He cited passages from judgments of this Court which specifically addressed the consequences of departing from it. But, unlike the appeal judge, when assessing the ways in which the investigation departed from the guidance and how this affected the reliability of the evidence, he took into account “the quality of what was said by T during the interview” which included, as he had recounted earlier, a lengthy passage of free narrative. He considered it in the context of the other evidence, noting that it was consistent with and more detailed than her other accounts. The mere fact that the officer asked a number of closed or leading questions was not a sufficient reason for the appeal judge to interfere with the deputy district judge’s thorough analysis.

66. I respectfully disagree with Judge Greensmith’s view that the deputy district judge failed to have regard to the requirement for the ABE guidelines to be followed. On the contrary, it is to my mind plain from the deputy district judge’s judgment that he was aware that the guidelines should be followed and understood the consequences if they were not. In the circumstances, it was to my mind wrong for the appeal judge to conclude that no weight should have been attached to the ABE evidence. The deputy district judge, who had had the benefit of watching the video, went to considerable trouble to analyse what was said in the context of the totality of the evidence and to explain why he was attaching weight to it. The fact that he did not refer to every issue or point made in submissions about the interview does not undermine the reliability of his analysis. That analysis included the evidence of the father and stepmother that T was a truthful child as well as the foster mother’s evidence of occasions when T had not been honest. This was manifestly within the province of the trial judge and precisely the sort of analysis with which an appeal court ought not to interfere.
67. For my part I see nothing about the deputy district judge’s approach to the issue of the adults’ credibility with which it would be appropriate for an appellate court to interfere. He was in the best position to assess whether their evidence was credible and entitled to take the inconsistencies in their evidence into account in conducting his overall evaluation. It is correct, as Judge Greensmith observed, that a judge must not merely recite the *Lucas* principle but should apply it as appropriate to the evidence. But for my part I can see no point in the deputy district judge’s analysis of credibility where it can be demonstrated that he failed to take into account the reasons why someone may lie. In particular, he did not wrongly fail to consider other reasons why the father may have falsely said that he was HIV positive and that this was widely known within his community. It is difficult to think of any reason why the father might have told this lie save for that identified by the deputy district judge, namely to provide a reason why no other man would have intercourse with his wife. As Singh LJ observed during the hearing, courts decide cases living in the real world and making a false assertion that one is HIV positive is not something one does out of embarrassment or for the other reasons identified in *Lucas*.
68. Furthermore, the father’s lie about his HIV status was not the only part of his evidence which was untrue. The lie about when he had first heard about the allegations, exposed by the police bodycam footage, was equally if not more relevant to the deputy district



judge's assessment of credibility. That assessment was based on the totality of the evidence which included matters on which he found the accounts given by the father and stepmother to be inconsistent or implausible, such as their assertions that they did not know the whereabouts of the two men who had previously been friends and regular visitors to their house. I reject Mr Spencer's submission that the deputy district judge was reversing the burden of proof at this point. He was not saying that the onus was on the father and stepmother to locate the two men, but rather that their assertion that they did not know their whereabouts was implausible and added to their lack of credibility.

69. It is correct that the deputy district judge did not expressly address in his judgment the probability or improbability of sexual activity taking place in a car parked outside the house on a regular basis over three years. But as Mr Goodwin observed in submissions to this Court, this was the central allegation in the case. In summarising the legal principles, the judge cited Lord Hoffmann's dictum in *Re B* cited above. In his written closing submissions at first instance, Mr Povall on behalf of the stepmother wrote "M's main submission is simple – if one applies common sense, it is clear the allegations are untrue" and cited the evidence of the social worker and police officer about the narrowness of the road. Although the deputy district judge did not expressly refer to this submission, he did refer to the evidence about the narrowness of the street and the limited nature of the police investigation. Similarly, he did not refer to the other features cited by Mr Spencer as implausible, but they were cited by Mr Nwokedi in his detailed closing submissions at first instance. As Lewison LJ said in *Fage*, a judge is not obliged to deal with every argument presented by counsel in support of his case. Overall, there is no reason to doubt that the matters which the respondents rely on as improbabilities were in his mind.
70. On appeal, Judge Greensmith accepted that the judge had taken the implausibility of what was alleged into account, but added that "the manner in which he did so is not clear" and concluded that he "failed to have sufficient weight" to the fact that it was "highly improbable". Judge Greensmith's assessment was, however, based in part on information that was not before the judge at first instance and not evidence that any party had asked to be admitted on the appeal, but rather the results of his own investigation on Google. It is wrong for any judge to carry out his own investigations and doubly wrong for a judge to do so on appeal when the issue is whether the judge at first instance was wrong to make the findings on the evidence before him. Putting aside the Google search, however, it is clear that the probability or improbability of what was being alleged was in the deputy district judge's mind when he carried out his comprehensive and careful analysis of the totality of the evidence. The weight to be attached to it was a matter for him.
71. For these reasons, I conclude that Judge Greensmith was wrong to allow the appeal on the first three grounds advanced before him. As to the fourth ground, contrary to the judgment on appeal, the deputy district judge's reasons were neither inadequate nor misguided. They accorded with his assessment of the evidence. Accordingly, I find that it was not open to the judge on appeal to set aside the findings.
72. For those reasons, I would allow the appeal and restore the findings made by the deputy district judge.
73. In those circumstances, it is unnecessary to deal with the points raised in grounds 2 and 3. I am, however, unclear as to the basis on which Judge Greensmith allowed the

proceedings to continue following judgment. He dismissed all the findings sought by the local authority and made by the deputy district judge, adding that no court could properly make any of them. He was therefore rejecting the basis on which the local authority was asserting that the threshold criteria for making a care or supervision order under s.31(2) of the Children Act 1989 were satisfied. In those circumstances, there was no basis on which he could continue the proceedings, or list the matter for a welfare hearing, or extend the interim care orders. They had been made on the basis prescribed under s.38 of the Act that there were reasonable grounds for believing that the circumstances with respect to the children were as mentioned in s.31(2). If it was correct, as he found, not only that the deputy district judge was wrong to make the findings sought by the local authority but also that no court could properly have made them, the test under s.38 was manifestly no longer satisfied. Furthermore, as the final care order in respect of T was made on the basis of the findings that were being set aside, that order should also have been discharged immediately. There was no basis on which the court could exercise any “welfare” jurisdiction in respect of any of the children. I appreciate that the judge was concerned about the prospect of the children returning home immediately without preparation, but for my part I do not consider that it was lawful to continue the care orders for that reason. If the local authority considered that the additional allegations made by U amounted to evidence of a risk of significant harm, a fresh application under s.31 would have been necessary. As Ms Watters submitted, however, as the local authority was considering an appeal, it was open to Judge Greensmith to make interim orders under s.40 and in my view the right course would have been to make orders under that section for a short period while the local authority reached a decision on that question.

**LADY JUSTICE FALK**

74. I agree.

**LORD JUSTICE SINGH**

75. I also agree.