Neutral Citation Number: [2019] EWHC 1447 (Fam)

Case No: ZC16C00911

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2019

Before :

THE HONOURABLE MR JUSTICE HAYDEN

- - - - - - - - - - - - - - - - - - - -

Between :

A Local Authority	**Applicant**
- and -	
M	**1st Respondent**
- and -	
F	**2nd Respondent**
- and -	
E	**3rd Respondent**
- and -	
W	**4th Respondent**
- and -	
X Y Z (by their Children's Guardian)	**5th – 7th Respondent**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr N Goodwin QC & Mr Tim Parker (instructed by **A Local Authority**) for the Applicant
Ms A Ball QC & Ms Gemma Kelly (instructed by **Freemans Solicitors**) for the Respondent Mother
Mr A Bagchi QC & Ms Rebekah Wilson (instructed by **Imran Khan & Co Solicitors**) for the Respondent Father
Mr J Tughan QC & Ms Rebecca Foulkes (instructed by **Harris Temperley Solicitors**) for the Respondent (E)
Mr M Twomey QC & Ms Sarah Tyler (instructed by **Miles & Partners**) for the Respondent (W)
Mr G Bain & Ms Laura Harrington on behalf of the Children's Guardian (instructed by **Steel & Shamash Solicitors**) for the Respondents (X,Y and Z)

Hearing dates: 21 January 2019 to 22 March 2019

- -

Approved Judgment

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

....

THE HONOURABLE MR JUSTICE HAYDEN

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.

The Honourable Mr Justice Hayden :

1. This is a finding of fact hearing investigating the cause of death of S, a ten-year-old girl. S died in the early hours of a Sunday in November 2016. The case is being re-heard following the judgment of the Court of Appeal [2018] EWCA Civ 1718. In that Judgment King LJ made the following observations as to the errors of approach in the earlier Judgment which require to be identified at the beginning of my analysis:

> *"In my judgment the judge fell into error, not only by the use of a "pseudo- mathematical" approach to the burden of proof, but in any event, he allowed the 'burden of proof to come to [his] rescue' prematurely. In my judgment the judge had failed to look at the whole picture. Not only did he fail to marry up the fact that S sustained two sets of injuries (one of which was fatal) but the judge, faced with the incontrovertible evidence in relation to the genital injuries, carried out no analysis of the available evidence in order to see whether an accident (for example) was a likely cause. Whilst in other circumstances I might have identified, or highlighted by way of example, certain evidence which I believe merited consideration by the judge, given my view that the appeal must be allowed and the matter remitted for rehearing, it would not be appropriate for me to comment further."*

2. In addition, King LJ endorsed the helpful and succinct guidance of Dame Butler-Sloss (P) in ***Re T* [2004] EWCA Civ 558, [2004] 2FLR 838**

> *"33. evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."*

3. This hearing occurs in the context of the Local Authority's application for Care Orders in respect of four children: W (a boy now aged 15 years); X (a girl now aged 9 years); Y (a boy now aged 6 years) and Z (a boy now aged 2 years). The Local Authority no longer seeks a Care Order in respect of their older brother (E), a boy now aged 17 years. X and Y were removed from M's care for three weeks at the start of the proceedings. Z remained throughout with M. All the children were reunited with both parents following the earlier judgment. The Local Authority's case is that S was killed by strangulation and that she had, prior to death, sustained serious genital injuries both externally and internally. It is axiomatic that the court has a responsibility to investigate what happened to S in order appropriately to protect the subject children.

4. Each of the parties, with the exception of the children's guardian, is represented by leading and junior counsel. The paperwork is voluminous (18 lever arch files) encompassing that which has been generated by the Children Act proceedings both in this court and in the Court of Appeal. Following the judgment in the Court of Appeal there has been far more rigorous cooperation by the police with disclosure of material

from their investigation. The extent of the disclosure can now properly be described as extensive.

5. I have, over the course of three weeks of evidence, heard from a variety of medical experts, senior police officers and various other professionals. Most importantly, I have heard evidence from the family, extended family members and friends. The two older boys have both been joined as parties to the proceedings. At a late stage Mr Tughan QC, on behalf of the eldest boy, informed me that his client now wished to give evidence, which he did.

6. Partly in consequence of the history of this case but chiefly because of the unusual and tragic circumstances of S's death, the enquiry has been both extensive and protracted. The wide ambit of the hearing may conveniently be illustrated by noting that Ms Ball QC and Ms Kelly, on behalf of M, have presented a closing submission document of some forty-six pages with lengthy accompanying appendixes. In addition, Mr Twomey QC has reprised an interesting legal argument (advanced at the now overturned fact-finding hearing) as to whether the Children Act 1989 is apt to permit findings against a child, having regard to the wording of section 31 (2) and, by way of supplement, whether, if it is, the delay and the particular circumstances of his young client render it unfair to do so within the principles protected by Article 6 ECHR.

7. It is important therefore, that I focus on the scope of the Court's task clearly and from the outset. The issues can be honed to four key questions:

   i) How did S die?

   ii) What was the cause of S's genital injuries?

   iii) If either S's death or her genital injuries were caused in consequence of human agency, who was responsible?

   iv) Has there been collusion within this family to conceal the true circumstances of S's death?

8. Inevitably, these questions branch out more widely but it is, to my mind, important in a case such as this for the judge firmly to resist the siren calls of counsel to enter discursive peripheral debate however forensically stimulating, where it ultimately casts little, if any, light on the central issues. Juries in a criminal trial are always advised by the trial judge that they do not need to resolve every issue that has arisen during the case, but only those issues that will enable them to come to a verdict, applying the requisite standard of proof. This applies, by parity of analysis, to the fact-finding exercise here. I do not intend, nor is it feasible to address every issue that has been raised. I propose to confine myself only to those matters that require to be addressed in order to answer the questions that I have crafted and which must be resolved in order to achieve fairness to each of the parties.

9. Junior counsel have, at my request, during the course of this hearing, prepared an agreed chronology, for which I am grateful and which provides the framework to my summary below.

BACKGROUND

10. Both the parents were born in an overseas country (OC). They came to live in the United Kingdom, as children, with their respective families. The couple met in 2000, they married within a few months. Their first child E, was born in October 2001. As I have identified in paragraph 3 above there were six children. The family lived in London and kept strong, indeed daily, links with the OC community and extended family members. The children attended school conscientiously and each of them worked hard at their studies. It requires to be noted that their good manners and polite behaviour have been the subject of comment by their teachers.

11. In the early years of their marriage the couple had some matrimonial difficulties. F had fallen into a habit of regularly 'chewing Khat'. Khat is a plant, native to the Horn of Africa and the Arabian Peninsula. It contains the alkaloid cathinone, a stimulant, which is said to cause excitement, loss of appetite, and euphoria. Among communities from the areas where the plant is native, Khat chewing has a history dating back generations as a social custom. It is analogous to the use of coca leaves in South America or betel nut in Asia. Some of this information was referred to during the course of the hearing but where it was not, it is uncontroversial and I take judicial notice of it. M strongly disapproved of F's use of Khat. She considered it rendered him generally ineffective and unproductive. He was not motivated to work or to provide for his large family. M eventually gave F an ultimatum and they separated for a while. This plainly had a significant impact on F. He was able to break his dependency and find employment. The couple resumed living together and for the past nine years they appear to have been happily married.

12. F works, as he has done for 8 years, at a local restaurant. M is the primary carer for the children. However, I have been told that the older children, including the boys, contribute very significantly to a wide range of household chores. There have been no previous child protection concerns in respect of the family.

13. On a Sunday morning in November 2016 S was found dead at her home. She was discovered in the bedroom she shared with her sister X and her brother Y. She was reported to have been found by W that morning, with a length of decorative netted lace, which had adorned her bed, wrapped around her neck. F reported that he removed the netting, but she was already dead.

14. M dialled 999 at 10.13am. She was, however, too distressed to leave any message. Nonetheless the emergency services were able to make contact. At approximately 10.17am, PC Bridget Tottman-Shaw and PC Boughton, who were on duty in a marked police armed response vehicle nearby, received a radio communication in respect of an abandoned 999 call. The London Ambulance Service arrived at the property at 10.20 - 10.22am. Having entered the property the officers, accompanied by paramedics, found S laid on the floor, covered with a white sheet. S was noted to have a thin, dark mark encircling her neck and her knees and right arm were bent. PC Tottman-Shaw, who gave evidence before me, told me that initially she thought the mark around S's neck was a strand of hair.

15. Although the paramedic crew attempted to resuscitate S using a defibrillator, it was abundantly clear to all present that S's body was cold and that she was beyond help. PC Tottman-Shaw told me that she had tried to reposition S's tongue back in to her

mouth, I think to give her some dignity, but had been unable to do so as the body was so rigid. The officer was manifestly distressed as she recounted the events. She told me that following the radio message, she was anticipating a choking accident, she was first aid trained and, given the time of day, had contemplated a child choking on breakfast cereals or something of that kind. I formed the very clear view that the officer had been genuinely traumatised. Her senior officer, I note, released her from duty for the remainder of the day. S was pronounced dead at 10.29am.

16. Alongside PCs Tottman-Shaw and Boughton, a number of police officers attended the property in November 2016. PC Rein arrived shortly afterwards, followed by PCs Blue and Marriott. PS Scott arrived at around 10.35am and was briefed by PC Blue. At 11.45am, Trainee DC McDonald arrived with DS Bediako, Trainee DC Edwards and PC Cozma. E informed PC Marriott that X had found S in the bedroom in the night after she had fallen out of bed but hadn't told anyone because she was worried she would get told off for waking her mum and dad. X was then spoken to by several police officers in the presence of her mother and freely confirmed this account. M asked why she did not tell someone. X replied that she had "*shouted out but no-one came*". DS Purvis, PC Rein and PC Blue were satisfied with this account.

17. DI Dean Purvis attended the property, and was briefed by DS Bediako. DI Purvis stated that though he considered the circumstances suspicious it was not clear to him that a criminal offence had been committed. He sought advice, in the procedurally correct way, from the Homicide Advice Team (HAT), at 1.52pm. DI Purvis recalls that his concerns were allayed because of the information received from PC Rein, regarding what X reported as having heard during the night. DI Purvis examined the scene at 2.45pm. He concluded that: there was no sign of disturbance; the netting appeared in its 'normal position'; there were no injuries noted beyond those to the neck; the father appeared cooperative; the house was in good order, raising no concern and there was no previous intelligence about the family, he concluded that *'foul play was not a factor at that time'*. He resolved that the family should be treated as 'significant witnesses' rather than suspects.

18. DI Purvis was, later in the day, to review this decision, due to the concerns of his colleague, DS Bediako. However, it seems clear that DI Purvis's views of the case had not really changed.

19. At 12.31pm trainee DC (TDC) Edwards and DS Bediako re-entered the bedroom in fresh protective suits. TDC Edwards noted the circumferential nature of the ligature mark. DS Bediako observed no signs of forced entry. There appeared to be biscuit crumbs on the top bunk-bed. They observed, again, the netting hanging between the two bedposts of the top bunk. DS Bediako telephoned DI Purvis to advise that he would like the Homicide Advice Team (HAT) to consider attending, with a Crime Scene Manager (CSM) to inspect the scene further. At 2.53pm, TDC Edwards and DS Bediako again re-entered the bedroom further to examine S's body for injuries. They observed slight grazing on her neck, checked under her clothing and rolled her body over.

20. At 3.30pm, the police again contacted HAT for advice. At 4.26pm, DS Bediako, TDC McDonald, PC Edwards and PC Cozma left the property, having heard from DI Purvis that there would be a delay before HAT and CSM could attend. At 6.15pm the HAT team met DI Purvis at the Police station. HAT DS Tracey Knevett agreed that

the most credible explanation was accident; the hypothesis appeared to be that S had fallen out of bed, become entangled with the lace netting around her throat and had choked to death.

21. At around 6.30 - 7.00pm DI Purvis spoke to CSM Mark Bailey regarding the need for a special post-mortem and for a forensic strategy to be put in place. The strategy in question was forensically to recover S's body, to seize the netting, the bed clothes and S's clothing, to take photographs of the scene. DI Purvis did not request and CSM Bailey did not recommend the taking of DNA or fingerprint evidence. CSM Bailey recommended a 'standard' post mortem.

22. At 8pm, CSM Mark Bailey attended the property with assistant Matt Duffy, DS Hurst and DC Griffiths in order to take photographs of the body and the house, to seize bedding and lace netting and forensically to recover the body. The lace netting was removed without accurate records being taken of the way in which it was secured around the bunk beds. I should emphasise that all these facts are agreed by every party in the case.

23. The following day, Monday, DS Bediako recorded, as I have foreshadowed above, that the working hypothesis was that S *"became tragically tangled in the netting during the night"*. He noted that there were still unexplained circumstances that made '*this hypothesis difficult to accept'*. An alternative hypothesis was identified, namely deliberate infliction by another person.

24. On the Wednesday following S' death, at a strategy meeting, the police recorded that they considered all evidence pointed towards a tragic accident, and that there was '*no evidence of abuse or neglect in the home'*. The following day, Home Office pathologist Dr Cary, accompanied by paediatric forensic pathologist Dr Marnerides, carried out a 'special' post-mortem examination. Dr Cary reported that, in his view, this was not an accident, but a *'sexually-motivated homicide'*. The reasons identified were twofold: firstly, the largely horizontal, circumferential mark around S's neck was considered to be indicative of ligature strangulation; secondly, there was evidence of what appeared to be sexual interference, as evidenced by injury to both external and internal genitalia.

25. On the Friday officers executed a search warrant at the home address, seizing smart phones and 'tablets' from the family. By this stage a new Crime Scene Manager (CSM) had been appointed, Mr. Jason Weetman. Mr Weetman attended the family home with Andrew Bell, Sarah Khera and Adam D'Arcy (all from MPS Forensic Services), accompanied by two police photographers to execute a search warrant.

26. Later the same day F was arrested on suspicion of murder; rape of a girl under the age of 13 and/or sexual assault by penetration. He was released without charge. E was also interviewed as a 'significant witness'. It is important to note that E was never viewed as a suspect by the police and was never arrested.

27. The local authority initially sought removal of all of the children from the home address the same day. However, it was eventually agreed that Z should remain with M. X and Y were removed into foster care, pursuant to a Police Protection Order. E and W were accommodated with family members.

Proceedings

28. On the following Monday, the Local Authority issued proceedings, and applied for Emergency Protection Orders (EPO). These were granted by HHJ Cox in respect of X and Y.

29. On the Tuesday, the Local Authority applied for Interim Care Orders. HHJ Cox made interim care orders in respect of X and Y on 5th December 2016, predicated on the risk of physical, sexual and emotional harm. I interpolate here the observation that the injury to the genital area was assumed to relate to unidentified sexual assault.

30. On 13th December 2016, at 8.45am W was arrested at his school by five police officers on suspicion of the sexual assault and murder of his sister. The arrest took place in the school car park, where W might well have been seen by other pupils. He was driven, unaccompanied, to Sutton Police Station, a journey which took over an hour. He asked whether his parents were aware he had been arrested and was told they were not. During the journey W became upset and tried to distract himself with his homework. W gave a 'no comment interview' on 13th December 2016 and again on the 14th December 2016. W was interviewed under caution on 14th December 2016 and was given conditional bail. W was thirteen years old at that time. Having had sight of the Senior Investigating Officer's Decision Log it is clear that the arrest was made in these circumstances in order to bring pressure to bear on the child. Such thinking requires to be deprecated in unambiguous terms. It offends fundamental concepts of modern policing. It was simply disgraceful. W found the experience profoundly upsetting. I also record that I have been unable to identify any coherent investigative thinking which justified the arrest in the first place. This criticism is, in every way, as serious as those made by Francis J at paras 43 - 46 of his judgment **[2017] EWHC 3707 (Fam),** indeed probably more so. It is however, a condemnation of an entirely different complexion. I have been invited, by those acting on W's behalf, to confirm the criticisms that Francis J made. In the light of my reasoning generally and my specific observation at paragraph 73 below, I am unable to do so. I emphasise that I consider my own criticisms of this police investigation to be, at very least, equally serious.

31. On 16th December 2016, Bodey J discharged the ICOs in respect of X and Y returning them to the care of M, subject to strict undertakings. The children were made subject to Interim Supervision Orders (ISO) until further order or the conclusion of proceedings. From 24th May 2016, these family members lived close to the family home, with the maternal aunt and her children. On 9th March 2017, Francis J. approved E and W's placement with their Paternal Grandfather, subject to undertakings.

32. On 4th June 2017, F and W were further interviewed under caution. Both again made no comment in their interviews. The day after the interview W suffered from a Bell's palsy. This is a facial paralysis that results in an inability to control the facial muscles on the affected side. The condition involves muscle twitching, weakness, or total loss of the ability to move one or rarely both sides of the face. This, I have been told, has been extremely distressing to W. It is self-evident that, as a teenage boy, he will have found it embarrassing. His parents tell me and I accept that he is 'a different person', often very quiet. It has also had a detrimental impact on his self-confidence. They consider, as do I, that this is all likely to be stress related.

33. On 7th June 2017, the police made the decision to take no further action against W or S's father. A number of interim hearings took place before Francis J which focused on the scope and ambit of expert evidence, whether the children should give evidence and the failure to disclose documents by the Metropolitan Police.

34. From 13th November 2017, Francis J heard a finding of fact hearing which lasted 15 days. Francis J handed down judgment on 22nd December 2017. The conclusion in the judgment was that the Local Authority had not established that S's fatal injuries were inflicted as opposed to accidental. Accordingly, Francis J considered that the 'threshold criteria', pursuant to S.31 (2) Children Act 1989 were not met. The proceedings were dismissed. The family was reunited and returned to live at their home in London where they remain.

35. The Local Authority sought permission to appeal the decision of Francis J on 26th January 2018. Permission was subsequently granted and the application was heard on 3rd July 2018. The appeal was allowed on 25th July 2018 and the case remitted for re-hearing.

36. The application was initially listed for a fact-finding hearing in November 2018, but it was not possible for that hearing to proceed, for a variety of reasons relating in part to the availability of expert evidence and the need to consider afresh whether any of the children should be required to give evidence. The latter application, made by the Local Authority, was considered on 2nd November 2018 when permission to cross-examine the older boys E and W was refused by me.

37. I have heard evidence and submissions at this re-hearing over a period of 18 days.

The medical evidence

38. I begin my analysis with the medical evidence. Civil Procedure Rules (CPR), Part 35 has evolved, giving judges more flexibility as to how expert evidence is delivered in court. In this case I decided that it would be constructive to hear the key experts together. The process has become known as "hot-tubbing", the colloquial term for the process of calling expert witnesses to give evidence and be cross-examined concurrently. In other jurisdictions it is known as Concurrent Expert Evidence (CEE). It also involves the parties' experts engaging in discussion together while in the witness box. The findings of the Civil Justice Council's consultation on hot-tubbing have been published: **Concurrent expert evidence and "hot-tubbing" in English litigation since the "Jackson reforms": a legal and empirical study.** The report emphasises that "the overarching purpose of expert evidence (as stated in CPR 35.3) is for those experts 'to help the Court on matters within their expertise' (page 13). It also explains the various forms of concurrent evidence available such as:

- Sequential, back-to-back evidence, which is counsel led and involves one expert then the other giving evidence, being examined, then cross- and re-examined on one issue at a time.
- Hot-tubbing, which is described in Practice Direction (PD) 35.11 and led by the judge, who acts as a chair of proceedings in leading the oral examination of the expert witnesses.
- Hybrid forms of hot-tubbing, which have arisen as a result of the judge's power to modify the hot-tubbing procedure set out in PD35.11. The

variants relate to how the experts are allowed to interact while in the hot-tub, differences in judicial practice in leading (or not) the discussion and differences in counsel's role.

- The "teach-in" approach, which involves the parties appointing and paying for a neutral expert adviser to provide a tutorial (or teach-in) to the judge to improve understanding of the technical issues.

39. At the risk of breaching my own edict, at paragraph 8 above, I would comment that the committee reflected on whether the process saved time, improved the quality of the evidence, assisted the court and saved costs. Recommendations included: training for all civil judges; amending the directions and listing questionnaires to ensure that hot-tubbing is at least considered at the Case Management Conference stage; adopting an amended version of PD35 and guidance for the judiciary and practitioners; preparing an information note for expert witnesses and helping the Academy of Experts to create a training video; ensuring references to hot-tubbing and concurrent evidence in the various court guides are more consistent. The committee's comments are predominantly directed towards civil litigation but the research included examples of 'hot tubbing' in the Court of Protection. I would not wish to be prescriptive but experience in this case has shown that the practise is likely to be useful where there are, as here, significant numbers of experts. In my judgement I consider that it will, at the very least, be helpful to consider at an Issues Resolutions Hearing (IRH) whether 'hot tubbing' might be a constructive way forward.

40. Mr Goodwin QC and Mr Parker, who appear on behalf of the Local Authority, make the following written submission in respect of the process the court adopted:

> *'The hot-tubbing exercise proved to be a model of its kind, allowing the clear expression of consensus and difference amongst the three forensic pathologists. Their differences were of emphasis, not substance. There were very clear deferrals to Dr. Lipetz regarding the genital injuries. All agreed that neither set of injuries could be considered in isolation.'*

41. Whilst the other parties' advocates agree that the procedure was constructive, they seek to place a different emphasis on the extent of the consensus that the Local Authority's submission identifies. The key doctors involved in the investigation are: Dr Clare Lipetz, Specialist in Obstetrics and Gynaecology; Dr Stephen Leadbeatter, Forensic Pathologist; Dr Cary, Forensic Pathologist; Dr Marnerides, Paediatric Pathologist; Dr Kolar, Forensic Pathologist; Dr Roger Malcomson; Consultant Paediatric and Perinatal Pathologist.

42. It is judges, not experts who decide cases: (**R (A Child) [2011] EWHC 1715 (fam)**). Rarely will an expert opinion be determinative. Miss Ball QC, on behalf of M, has adopted my characterisation of Dr Leadbeatter's approach as being 'healthily quizzical'. He pursued an almost dialectical approach to the hot tubbing process, which very much contributed to its efficacy. Ms Ball selects a number of his observations which illustrate the approach:

> *"I am uncomfortable with using the terms "likely" and "unlikely" when talking about things which are unusual in the first instance. I would regard this (homicide) as initially something to*

> *investigate, I could not exclude the alternative explanation. Phrasing in terms of likelihood is a personal matter and I am not comfortable about using such statistical terms."*

As to the role of the expert, Dr. Leadbeatter makes the following observations:

> *"There comes a point where there has to be more than pattern recognition-where there is a pattern there will be exceptions, then one has to take the view that pathology is only a part of the investigation – then the remainder of the evidence may assist"*

Later, Dr Leadbeatter comments:

> *"whether it* [strangulation by a third party] *is the most tenable of the three (alternatives) is a matter for all of the evidence"…. "Ranking it is putting it in terms of culpability. I do not like to do that and certainly one could only say if looking at the neck alone there is no distinction other than that it is ligature pressure. Have to look at it in context."*

43. It requires to be said, though Ms Ball does not include this remark in her submissions, Dr Leadbeatter repeatedly emphasised that he *'would investigate the case as homicide'.* By this I took him to be saying that even from the pathology of the neck, taken in isolation, homicide must be considered to be prominent amongst the possible causes. Dr Cary approaches the same point in a different way. He considered *'if one took a hundred cases that looked like this, with these markings… the majority would be homicidal ligature strangulation'.* Having expressed himself in these terms Dr Cary inevitably found himself in agreement with Dr Kolar who considered the pathological signs in respect of the neck injury to be *'extremely worrying'.* Dr Kolar was clear that there were many features which he regarded as typical third-party ligature strangulation. Some of the features were, he considered, *'text book'.*

44. In his report of 11th April 2017 Dr Cary identifies some key findings which are, at this hearing, uncontroversial as between all the doctors. They require to be identified: the post-mortem findings and all subsequent tests indicate no evidence of any natural disease that has caused or contributed to death; there are no positive toxicological findings; death is due to ligature compression; there are prominent asphyxial changes above a ligature mark which encircle the neck. Dr Cary emphasises that these encircling characteristics are not those typically seen in hanging, where a ligature mark rises to a point of suspension. In some circumstances a low-level hanging may produce a largely circumferential mark. Fatal self-harm (suicide) is extremely rare in a child of S's age. I am very clear that none of the pathologists nor indeed any other witness disputes the accuracy of Dr Cary's description or those of his opinions which I have highlighted. It is equally clear that even whilst some of the post morbid anatomy can properly be described as atypical, the preponderance of the evidence points towards a strangulation. It is not determinative but it is an important piece of a much broader canvas.

45. The cumulative impact of the features Dr Cary identified led him to the conclusion that they *"pushed the case towards third party involvement".* Dr Malcomson

contemplated a double folding of the netting around the neck but struggled to conceive how this could have occurred accidentally in sleep. It is indicative of his open mindedness to the possibilities and the objectivity of his enquiry that he was able to posit the possibility of S having gone to bed with the netting wrapped around her neck, only for it to be wound a second time in sleep. Dr Marnerides more explicitly concluded that inflicted ligature strangulation was the most likely explanation for the neck injuries.

46. Ms Ball is entirely right to emphasise that the experts unequivocally acknowledge there are features of the pathology of the neck which are atypical. Mr Goodwin highlights Dr Kolar's careful observation that '*atypical hangings do lead to atypical complex marks'* which is not to undermine his view that the marks were, as I have already recorded, 'very, very unusual'. Ultimately however, there was no doubt that the pathologists considered that the preponderant evidence, tempered by appropriate caution, was that the injury to the neck was in consequence of third party ligature strangulation. It does not require to be said but nonetheless I repeat, the approach of the Court is to evaluate the evidence cumulatively, weighing expert opinion on any issue alongside other features of the evidence.

47. There is quite simply no evidence at all pointing towards suicide by partial suspension. I do not understand any party to be advancing this as a cause of death.

48. I turn now to the genital injuries. Dr Clare Lipetz was instructed to provide an opinion on the post-mortem, concerning the genital findings. From the outset Dr Lipetz drew to the party's attention that her expertise is in examining 'live patients'. In her report she specifically advised that her conclusions be considered with those of the forensic pathologists. She emphasised this in her oral evidence too. It is very important to highlight that in addition to her NHS work Dr Lipetz is a Forensic Medical Examiner (FME) investigating sexual offences. She has held this responsibility for twelve years. Dr Lipetz has undertaken specific training in Clinical Forensic Medicine at the National Police Intelligence Agency. She was a founding examiner for the Society of Apothecaries and she trains Forensic Medical Examiners in sexual offence work. She summarises her findings in this case as follows:

> *"Based on my findings I can confirm that there is genital bruising of the hymen and surrounding area consistent with blunt trauma caused by penetration. The specific details that I can see on the photographs provided and I consider significant are: An irregular hymen; A disruption to the hymenal tissue at 7 o'clock; Extensive hymenal, introital and paraurethral bruising; Petechial haemorrhages on the vaginal wall.*
>
> *All these injuries occurred when the child was alive and not post mortem. They are acute injuries. I cannot specifically time the injuries relative to the time of death they are likely to have occurred the same day and not longer than 72 hours before death. I cannot confidently comment on the anal injuries from the photographs provided."*

49. Dr Lipetz considered potential mechanisms of injury that might explain her findings. She discounted physical exercise, cycling etc., she thought that it was extremely unlikely that the bruising and injury was self-inflicted. There was no suggestion of a foreign body that could have been inserted and removed by the deceased. The following opinions require specifically to be set out:

> *"Straddle injury can injure the genitalia but without the evidence of penetration that is seen in this case. Penetration by accidental injury is rare and there is no proposed causation. Cycling penetration has been reported but in bicycles without a saddle.*
>
> *In considering the mechanisms of injury I have looked at the layout of the bedroom and the bed. I do not think a fall from the bed could have caused this injury. I do not think this injury was caused through the pyjama bottoms that were on the body nor could it have been caused when moving the body and disentangling the lace around her neck."*

50. Dr Lipetz identified blunt trauma and penetration which she considered could be caused by an object, finger or a penis. She considered that any could be possible and specifically declined to propose a specific cause. She observed as follows:

> *"Dr Cary states the injuries are typical of forceful digital insertion. This is one mechanism that is plausible. I cannot confirm (and do not think the pathologists could confirm) if this is an isolated acute incident or if there could be a previous episode or episodes of penetration with healed injury."*

51. The final paragraph in Dr Lipetz's report also requires to be recorded because it illustrates her forensic care and her determination, voluntarily, to highlight both the limits of her interpretation and the parameters of her expertise:

> *"I am limited in my interpretations as I was not present at post mortem and can therefore only interpret the photographic findings. I have therefore responded to those findings that I can observe myself. I agree with Dr Cary's opinion that a sexual assault has caused genital injury. The description I have given varies slightly and I am unable to confidently interpret the anal findings. I have had a meeting with Dr Stephen Leadbeatter to view the photographs of the scene and the post mortem. I am unable to give any opinion on the histological findings or the post mortem findings within the neck as these are outside my field of knowledge and expertise."*

52. All the experts deferred to Dr Lipetz's conclusion that the constellation of vaginal injuries was consistent with blunt trauma. Recognising that Dr Lipetz based her views on observations of the photographs rather than direct examination post-mortem and acknowledging that the photographs were less than optimal, all the experts nonetheless accepted the force and logic of her analysis. To this I add that I found her

to be a balanced, careful and impressive witness. Sensibly and inevitably Dr Lipetz did not regard a straddle injury, contended as most likely on behalf of the family, as impossible or capable of being completely ruled out. In this case we are simply not in that territory. What Dr Lipetz did however, was carefully to work through the range of possibilities that could conceivably be contemplated before reasoning her conclusion that the likely cause of the genital injuries was '*blunt trauma by penetration or **attempted** penetration between the labia minora*' (my emphasis).

53. In her oral evidence Dr Lipetz was clear that the introitus and hymen were bruised with *'sparing of the vestibule'*. On the photographs available in court she pointed to the introital and hymenal bruising, highlighting very clear differences in bruised tissue which she described as extending over the urethral area. In her report, she noted that the clitoris is below the clitoral hood and that the upper margin of bruising was not possible to define. In respect of the vaginal petechiae, seen on the dissected blocs, these were inevitably outside Dr Lipetz's experience as they cannot be seen in life. Entirely properly, Dr Lipetz deferred to the pathologists as to the applicable differential diagnosis in respect of the vaginal petechiae seen on the blocs. At risk of repetition, I consider the care Dr Lipetz took to stay tightly within her own area of expertise reinforces her authority as a witness and supports the force of her analysis. It shows real forensic integrity.

54. Dr Cary, when considering the vaginal petechiae, indicated that there was no evidence of hypostasis or post-mortem lividity to the vulva or surrounding area. There was not a sudden demarcation around the circumference of the hymen but bruising extended to the introitus. When challenged by Ms Ball as to whether there could be petechial haemorrhaging, in consequence of congestion arising from asphyxia, Dr Cary was clear that could be discounted because such would be confined only to the upper venous system. Dr Leadbeatter added to this general picture his view that if the haemorrhaging had been due to a post-mortem lividity, there would likely have been localised residual hypostasis. It is not necessary for me to identify each of the different shades of opinion. I have highlighted the fundamentals of the consensus. Dr Marnerides considered the petechiae were 'very unlikely' to be hypostatic in origin. Dr Malcomson was attracted to the explanation but deferred to the pathologists.

55. What is important to emphasise, in the above, is that nobody is suggesting that the vaginal petechiae are diagnostic of trauma. The emphasis given to them is contextual, that is to say, their appearance and significance is interpreted in the context of the genital findings as a whole. Given that the vulval and introital bruises are most likely to have been inflicted by blunt trauma, penetration or attempted penetration, the vaginal petechiae become, logically, more likely to have been caused by the same traumatic mechanism.

56. Ms Ball and Ms Kelly properly emphasise the importance of correct nomenclature here. In their closing submissions they remind me of the nuances of terminology used in evidence:

> *'Dr. Malcomson described it cogently when he said that "external" referred to the labia minora and clitoris – outside the hymen. "Internal" referred to the vagina; that the hymen was the border and inside the hymen was "internal". Dr Lipetz made the point that anatomically this was right but in criminal cases the*

> *hymen is considered as internal - anything between the labia minora is internal in criminal cases which explains her use of the word penetration in this case. This may explain why Dr. Malcomson in his report described the genital injuries as "predominantly if not exclusively external"'.*

57. It is also important that I record their concessions:

> *'"It is conceded that Drs Cary and Marnerides found bruising as follows:*
> *a) Naked eye (Dr Cary): Confluent purple bruising around introitus and anterior to it. Hymen on right side of introitus is slightly ragged looking. Most intense bruising is peri-urethral. Bruising superior to the introitus runs on to the labia minora and up to clitoris superiorly;*
> *b) Pelvic dissection (Dr Cary): External urethra not disturbed. Intense haemorrhage surrounding it. Intense haemorrhage around hymen and further superiorly as described previously. "Unlikely to be caused by penile insertion as the nature and extent of injury would tend to be more severe";*
> *c) Naked eye (Dr Marnerides): Injury to vaginal introitus including hymen and clitoris;*
> *d) Internal examination (Dr Marnerides.): Confirms haemorrhage "around hymen and clitoris";*
> *e) Histology (Dr Marnerides.): Sections from introitus (sampled at 12, 3, 6, 8 and 9 o'clock) and the clitoris showed significant fresh haemorrhage. From mucosa down to sub-mucosa/musculature and in some locations down to the deep adipose tissue;*
> *f) In answer to questions by DC Weetman on 18.5.17 Dr Cary said that the hymen was intact although it was bruised "which leads Dr Cary to favour digital rather than object or penile penetration"'.*

58. During oral evidence Dr Cary coloured in a diagram of the genital area, identifying where he found the bruising. This was a crude exercise with a highlighting pen. It came at my suggestion and was, I hope, useful in so far as it went. Dr Lipetz coloured in a similar diagram which although not identical, is, at least to my mind, broadly similar. Ms Ball emphasises the differences. Based on these differences and notwithstanding Dr Cary's deferral to Dr Lipetz, Ms Ball invites me to conclude that I should prefer the observations of the pathologists at the post-mortem to those of Dr Lipetz. Dr Cary was relying on naked eye dissection and histology; Dr Lipetz on photography which was less than optimal. Ms Ball submits that nothing is shown on Dr Cary's diagram which would indicate bruising or injury identified at 'six, eight or nine o'clock' and I should conclude that there was no damage in this area.

59. I accept the appropriateness of Dr Cary's cautious approach to the interpretation of the hymenal irregularity, as did Dr Lipetz. There is always the potential, as Dr Cary says for the appearances (on the photographs) to be artefactual, given the four-day post-

mortem interval. However, this caution must be placed in the context of two other important features of the evidence. Firstly, and logically, the naked eye observations of the wider genital injury, set out in the concessions in paragraph 57 above, render the hymenal signs more likely to be similarly traumatic in causation, the unifying explanation being inherently more probable. Secondly, Dr Cary properly drew to my attention the fact that in his post-mortem report, he had also described the hymen on the right side of the introitus as *'looking slightly ragged'*.

60. Dr Cary hesitates definitively to exclude the artefactual, but acknowledges that his remark above is generally the *'same sort of observation'* as Dr Lipetz's and defers to her far more specialised experience in evaluating genital injuries. His deferral to Dr Lipetz is, therefore, not merely based on recognition of her specialism, it is a reasoned comparison between his own observations and her expertise. In so far as Ms Ball suggests that there has been an *'eagerness in some cases for doctors to defer to others'* I do not recognise that as in any way a feature of the evidence in this case. Indeed, for all the reasons I have identified above, I consider that there has been a healthy and vibrant dialogue in which the experts have shared the benefit of their individual specialisms and yielded when and only when, it was appropriate to do so to the views of others.

61. In their closing submissions Ms Ball and Ms Kelly highlight an extract from Dr Cary's evidence at the hearing in 2017 before Francis J:

> *'In, my view, there is genital trauma and I very properly take the point that you can only say "trauma", you can't say "sexual assault", because it does depend on the circumstance, but, I mean, we've got a naked eye appearance, we've then got microscopy, and, in my view, that equals genital trauma'.*

62. As I have indicated above I consider that Dr Lipetz entirely agrees with this point. Properly analysed, her conclusions go no further than *'blunt trauma and penetration or attempted penetration by an object, finger or a penis.'* She says in terms *'I would not propose a specific cause'*. In addition, Dr. Lipetz specifically highlights that Dr. Cary stated that the injuries were typical of forceful digital insertion. These views represent the reasoned consensus.

63. To the extent that there was an assumption that the genital injuries were sustained in consequence of a sexual assault, that is entirely predicated on the location of the injuries. In the extract from the transcript, highlighted above, Dr. Cary is recognising his lack of precision in permitting the concepts of *'sexual assault'* and *'trauma'* to elide. Genital injuries, of this nature, to a ten-year-old child are not, ipso facto, sexual. Whether they are caused during a sexual assault needs to be evaluated in the context of the evidence as a whole. As I read the submissions on behalf of each of the parties, I do not detect that there is any disagreement with this proposition. Indeed, those acting on behalf of the parents have placed emphasis on the point.

64. During the enquires, prefacing this rehearing, expert evidence has been obtained from Dr. Susan Pope and Mr Andrew Bell who both specialise in the field of genetics and DNA. The evidence relating to this issue is complicated, reflecting the fact that it is based on a ratio of possibilities which are inevitably circumscribed by the available samples and the shared DNA profile within the family. There were very weak

individual DNA components on the lace netting, S's underwear and on her body (under the nails and her face). I do not draw from this that there is any correlation between the weakness of the profile and the extent of the contact. Both experts advised me this is a false assumption. It was confirmed in evidence, as indeed it emerges from the reports, that the DNA material here should be regarded as having a forensic return of nil.

65. Mr Twomey, on behalf of W, was keen to explore a wider understanding of the DNA sampling. His forensic objective was to provide instances of police failings in the investigation, in order to give credibility to his hypothesis that some unknown third person might, in the course of the night, have broken into the home, sexually assaulted and strangled S.

66. Prior to the 2017 hearing, the police had not undertaken any DNA database searches. They considered that to be an unrealistic line of enquiry. Whatever criticisms might legitimately be made of their investigation, I am bound to say I do not consider that to be one of them. However, for this hearing, searches have been undertaken and it transpires that there is one match for one sample and fifty matches for another. Any significance in this is entirely illusory. I repeat, it has no statistical forensic value. As both experts confirmed, the genetic material amounted to something *'weaker than a trace'* i.e. it was not a profile or even a partial profile. It follows, axiomatically, that there is no purpose at all served by interrogating the National Database. There is not the core information from which to do so in any sensible way.

67. For completeness and in context of the DNA samples above, it requires to be noted that there was no evidence of any semen or spermatozoa detected in the swabs taken at the post-mortem. Dr. Cary makes the obvious point, in his report, that this would be unlikely if the genital injuries were in consequence of digital insertion. It is clear, as he has frequently repeated and as I have recorded above, that this is the causation he considers provides the most likely explanation.

68. I consider the elision of the phrase *'sexual assault'* and, the more accurate word, *'trauma'* extends beyond the report of Dr. Cary. Indeed, a great deal of the enquiry has been predicated on an assumption that there has been a sexual assault. This is most conveniently illustrated by reference to the case summary provided for this re-hearing by the Local Authority where it is stated as follows:

> "*A range of competing theses has been explored:*
>
> *(a) Sexual assault by a family member involving coercive ligature restraint resulting in accidental fatal strangulation;*
>
> *(b) Sexual assault by a family member followed by a homicide, either by the assailant or by another family member, in order to prevent disclosure of the assault;*
>
> *(c) Sexual assault and homicide by an unknown third party intruder who entered the property in the night undetected;*
>
> *(d) Sexual assault by an unknown third party (possibly a member of the extended family) outside the home on the Saturday,*

followed by an accidental hanging caused by [S] falling out of bed onto the netting or falling out after sleeping with the netting wrapped around her neck;

(e) Sexual assault by an unknown third party outside the family home followed by an unknown third party intruder entering the property at night to kill [S];

(f) Suicide with or without a previous sexual assault;

(g) An accidental 'straddle injury' to the genitals whilst out of the home on the Saturday, alternatively during the course of accidentally falling from the top bunk, coupled with an accidental hanging."

69. The above really needs no further amplification or comment.

70. In my survey of the medical evidence it is important that I consider the likely time scales involved. Dr. Jennifer Miller, Senior Lecturer in Forensic Science, undertook an analysis of stomach contents in order to attempt to assist with timing of death and injuries. Dr Miller recognises that this is a very *'imprecise science'*. Dr Cary noted that it can be helpful *'where there is a very wide range of timings possible'*. Self-evidently that is not the case here. We are considering the late hours of Saturday in November 2016 through to the morning of the Sunday in November 2016 in relation to the strangulation and a probable window of between twelve and twenty-four hours in relation to the genital injuries. Nonetheless it is important to record what Dr Miller says:

> *"Collectively, the assemblage supports the interpretation of a meal of white poultry (chicken/turkey) type meat with rice as indicated by [S] mother, although with peas, onions and some spices also present. The evidence also strongly supports the witness statement of pancakes consumed subsequently. The consumption of crisps and biscuits is feasible but not definitive.*
>
> *The relative volumes of the foods and liquid present within the stomach would imply ongoing digestion. Different food types are broken down and/or pass through the stomach into the small intestines at varying rates, with soft carbohydrates and well chewed, cooked protein sources often being amongst the first solid items to leave. Given the close similarity to intelligence known regarding the range of foods consumed and timings thereof, this would suggest strongly that death or trauma leading to death has occurred within only a few hours of consumption of the pancakes at 21.00hrs. This interpretation reflects the fact that pancakes are a soft carbohydrate source that disaggregate and transit from the stomach relatively quickly. Furthermore, rice and meat from the meal eaten around 17.00hrs were also still present in moderate quantities. There was a moderate fat content in the stomach and regular top up with carbohydrates, both of which would slow transit rate somewhat. Nevertheless, based on*

> *intelligence known and the evidence presented, I consider it more likely that the assault leading to death occurred in the early part of the night. If [S] had slept all night under normal circumstances then died shortly before she was found, her stomach would have been practically or entirely empty.*
>
> *Digestive transit of food from the stomach ceases immediately upon death (Madea 2002).”*

71. In respect of timing of death, the pathology does not strike me as controversial. Having read the parties’ written submissions carefully, I do not see any substantive disagreement. Based on the observations post-mortem, there was a consensus that the genital injuries were sustained up to twelve to twenty-four hours before death. With what was plainly an abundance of caution, the pathologists considered the time window could potentially be extended to seventy-two hours. In relation to time of death all that can be said is that rigor mortis had set in by the time the police and ambulance services arrived. Accordingly, death occurred sometime during the course of the night, probably in the earlier hours of the morning.

THE LAY EVIDENCE

72. It is important that I begin my analysis of the lay evidence by identifying what have emerged as the competing hypotheses advanced by the parties. The Local Authority contend that this is a case of sexual assault and homicide perpetrated by a family member or members. Ms Ball and Mr Bagchi QC, who appear on behalf of the parents, contend that the strangulation was in consequence of an accident involving a fall from the top bunk during which the injuries to the genitals were also sustained. Mr Twomey advances a case of an intruder in the night, unheard and unseen by any family member. He refines that case to include both the complete stranger and a Mr B who, at some time, resided with the family and is thought, at least potentially, to have access to keys to the house.

73. As this case is being re-heard, following the judgment of the Court of Appeal, because it is manifestly sensitive and, I am told, has excited a great deal of attention in the local community, I have extended to the parties the widest opportunity to advance their respective cases. With great respect to Mr Twomey, who has presented his case with characteristic skill, I have found the theory of the stranger/intruder ultimately to be redundant of coherent argument. Fact finding hearings have an investigative, dynamic complexion to them. The consequences of adverse findings against parents or carers may be profound and life changing. It is for these reasons judges frequently permit great latitude in the presentation of these difficult cases. That does not extend to the unarguable. Even in this investigative, non-adversarial, sui generis jurisdiction there must be parameters.

74. Though I have not intervened I consider that the intruder theory crossed that boundary. To contemplate it in the context of this case requires a complete suspension of disbelief. Whilst I have no doubt at all that there were significant failings by the Metropolitan Police in the investigation of this case, I am entirely satisfied, as I have alluded to above, that their failure to investigate this issue was not one of them. Mr Goodwin has referred to this as a *‘marginal theory’* and has addressed it in his closing submissions as *‘unrealistic’*. I agree.

75. Notwithstanding my unambiguous observations I propose to address the theory a little more extensively. I do so in part to give some context to the circumstances in which the family lived and some appreciation of the home in which S died. It is a three-storey modern town house. The living room and one bedroom are on the first floor, there are two further bedrooms upstairs. S shared a room with two siblings. The father and the two older boys slept in the next-door room. On the night S died, M was sleeping on the first floor with the new baby Z (aged six weeks).

76. On the family's account, which I accept, F and the two older boys had stayed up late watching the football. E, the eldest son, who I emphasise again, is not subject to these proceedings, went to bed earlier than F and W. He saw his own team play on Match of the Day and then left his father and W to watch the remainder of the programme. E had been out most of the day and had been to a party. I accept he was tired.

77. The girls and Y had gone to bed as the football started. M was awake, as she told me, for most of the night. The baby was not a good sleeper. M spent fifty minutes on the telephone from 1.33am to 2.23am. At very most there was in the region of seventy minutes where she could have had a sleep. Thus, the intruder would have had to have been quite extraordinarily opportunistic.

78. Although it is self-evident that this is a small, modern, crowded home in which noise would quickly be heard, there is, in fact, as Mr Goodwin points out clear evidence demonstrating the extent to which sound carried. W has referred to the wooden floorboards making a noise. M recognised in her oral evidence that *'you can hear things'* in the house *'when it is quiet'*.

79. Perhaps the most striking feature is that S shared a room with two siblings. F and the two boys were no more than a few feet away. Additionally, there were no signs of disturbance or forced entry. There is no reason to believe the house was unlocked.

80. Though the 'intruder' scenario is advanced on behalf of W, it is important to remember that he was aged thirteen on the night his sister died. Everybody has described him as young for his age… *'a young thirteen'*. The intruder/stranger theory does not emanate from him. It is a forensic hypothesis created by his lawyers. There is nothing inherently wrong in this in an investigative forum. Here however, it simply strains credibility and can properly be discarded as unrealistic. In relation to Mr B there is not a scintilla of evidence to support the suggestion that he was the intruder. It does not require to be engaged with further.

81. I turn to the hypothesis advanced on behalf of the parents, namely that S strangled herself accidentally and suffered genital injuries during the fall. It is important that I emphasise that in appraising this case, as with that advanced on behalf of W, I am conscious that there is no burden on these parties to establish their own innocence or even to advance a creditable theory or explanation. The Local Authority bears the burden of proof at all stages.

82. The phrase *'straddle injury'* has been used throughout this case, both at this hearing and in the hearing before Francis J. I am bound to say I do not find it to be entirely helpful, not least, because it has, as far as I can see, never really been defined. As the theory is advanced it is suggested that S sustained the genital injuries by physical contact with some part of the bunk bed as she accidentally strangled herself and fell

off the top bunk. The closest analogy is the straddle injury which generally encompasses genital trauma by accidental injury of some sort. Nobody has challenged Dr Lipetz's assertion that such injuries are rare and that they are not characterised by penetrative injury.

83. Ms Ball, as I have set out above, has sought to challenge the existence of the internal (i.e. hymenal) injuries. During her oral submissions, I extended to her the opportunity to clarify whether, if I found that the injuries to the hymen were real as opposed to artefactual, it was her case that they too were sustained during the course of the fall. I recognise that this is a challenging question and that it really can only permit of one answer in the light of the case advanced. Ms Ball confirmed this is her case. In making that concession Ms Ball must logically confront the fact that the expert evidence indicates that penetrative injuries are not seen in such accidents. Notwithstanding this evidence and because I consider the phrase *'straddle injury'* has been used without appropriate precision, I have tried to envisage how a penetrative injury could have occurred by the mechanism Ms Ball suggests. I have been unable to do so. It strikes me, largely as a matter of common sense, that this is highly improbable. I do not find it difficult to see why Dr Lipetz discounts penetration in straddle injuries so unequivocally and it seems equally as unlikely in the mechanism contemplated here.

84. In cross examination Ms Ball elicited from Dr Lipetz the apparent concession that she could not completely exclude a *'straddle type injury',* causing penetration, even though she had never encountered one. Ms Ball, with great respect to her ambitious submission on this point, well knows that this amounts to no more than an assertion of a general proposition in medicine that one should never say never. This is of course entirely different to a reasonable possibility. In my assessment Dr Lipetz was entirely prepared to engage in the proposition canvased by Ms Ball but, like me, she was simply unable to imagine a scenario which would explain a penetrative injury. I note also, that there were no relevant injuries other than in the genital region.

85. I have, to this point, analysed the cases advanced on behalf of the family with the objective of testing the preponderant conclusions in the medical evidence. Experience has shown, over the years, that in medicine, as elsewhere, today's orthodoxies may become tomorrow's heresy. It is pseudo-logical merely to conclude that because the family cannot offer a coherent alternative explanation to that contended by the experts, it follows that the expert view must prevail. Lawyers, doctors, judges must have the intellectual humility always to factor in the possibility that there may be cases where, following the surveillance of the broad canvas of evidence, there may, ultimately, be insufficient to establish a probable cause of injury or death.

86. Here however, the individual medical opinions have been scrupulously tested, in the way that I have sought to demonstrate above, by reference to a wide panoply of other professional opinion and expertise. The experts involved have, without exception, displayed an eagerness to engage open-mindedly in enquiry by highly experienced counsel, over a wide range of possible hypotheses. Their reasoning has been, in my assessment, entirely free from dogma, nor has it been characterised by any defence of amour propre. I have, ultimately, for all the reasons set out in my summary above, come to the clear conclusion that S died in consequence of strangulation inflicted by another person. In addition, I am, with very little difficulty, satisfied that the medical

evidence establishes that the genital injuries were sustained in consequence of blunt trauma and penetration, caused by an object, finger or a penis.

87. Having determined, by separate analysis, that both the strangulation and the genital injuries were inflicted by trauma caused by another person, I permit myself, at this stage and I emphasise only at this stage, to conclude that my findings in respect of each serve to reinforce the other.

Perpetrator

88. At the conclusion of the hearing the Local Authority submit that it remains impossible to identify a perpetrator of the assaults on S. They contend that the pool of perpetrators is limited to four individuals: M, F, W and E. As I understand the position advanced on behalf of the guardian, she supports the Local Authority's analysis on this.

89. Counsel helpfully drew my attention to a very recent decision of the Court of Appeal: ***Re: B (Uncertain Perpetrator) [2019] EWCA Civ 575***. I do not propose extensively to rehearse the erudite summary of the evolution of the relevant case law, set out there, in the judgment of Jackson LJ. I confine myself to the following: in ***Re: O and N (Minors); Re B (Minors) [2003] UKHL 18*** the House of Lords confirmed the applicable test, in respect of identifying a perpetrator where injuries have been caused, as: *'is there a likelihood or real possibility that A, B or C was the perpetrator or a perpetrator of the inflicted injures?'* The test was more recently approved by the Supreme Court in ***Re: S-B (Children) [2009] UKSC 17*** where Baroness Hale stated:

> *"40. ... [If] the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability" criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.*
>
> *41. In North Yorkshire County Council v SA [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility".*
>
> *42. Miss Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in Re H this test*

was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators.

43. That may be so, but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for the harm suffered. This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case."

90. Jackson LJ analysed the case law in the context of the competing rights and interests in play:

"46. Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one."

91. Later, in what strikes me as a very important passage, he observes:

"48. The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the

> *pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof."*

92. In order specifically to avoid reversing the burden of proof and requiring evidence that 'exculpates' a party from a 'potential pool of perpetrators' Jackson LJ suggested that there should be 'a change of language':

> *"49. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is, should A or B or C be placed into the 'pool'."*

93. This structured three-staged process of analysis strikes me as providing an important and timely restatement of the existing case law. To my mind, it provides a correction to the rather too casual practice of *'leaving potential perpetrators in the pool'*. It emphasises, entirely unambiguously, that a finding may only be permitted, in this context, if there is a likelihood or real possibility that an individual is the perpetrator or a perpetrator of the inflicted injuries. Inevitably therefore, inclusion within the pool requires proof and on the balance of probabilities. It cannot become a finding by default. The fact that an individual was living with or may have visited a child within a window of opportunity should not easily be regarded as sufficient to discharge the relevant standard of proof. Whilst the Court should never strain the evidence to identify a perpetrator, neither should it resile or flinch from its obligation to do so where the evidence, properly analysed, requires it.

94. As I have foreshadowed, I consider the elision between genital injury and sexual assault has, both at this hearing and at the hearing before Francis J, had an unfortunate impact on the focus of the enquiry. Whilst I am entirely satisfied that there has been both internal and external blunt trauma genital injury, I can find no evidence, at all, that this was a sexual assault. Accordingly, I also find no evidence that the subsequent strangulation was sexually motivated.

95. In the light of the way the Local Authority has advanced its case (see para. 66 above) I caused enquires to be made of the pornographic images on E's phone. Some of the descriptions of the content sounded rather dark and disturbing but when it was investigated by Mr Parker and Mr Tughan, my concerns were allayed. Society's attitude to pornography is by no means as censorious as it once was and the courts must recognise that access to pornography by teenagers on smart phones and tablets is widespread.

96. In the light of the way that the Local Authority put its case in relation to the genital injuries (see para 66 above) and in view of my concerns relating to the pornography on E's smart phone Mr Tughan decided to confer with his client (who has not been present at Court) with a view to revisiting the question of whether E gave evidence. E is only a few months short of his 18th birthday. If I may say so, I consider Mr

Tughan's decision to re-evaluate this issue was a sound one. E decided, very quickly, that he was happy to give evidence. I say at once that I found him to be an impressive and essentially honest young man. He is hard working, focused on his studies and respectful to his parents. I did not find him to be in any way intimidated by the court process. Indeed, he appeared rather to welcome the opportunity to speak. It also requires to be said that whilst he was courteous to the advocates and to me, he was not in any way deferential. He had adopted the family narrative that they, the family, were in some way the victims here. It is important that I signal that I find that to be a false narrative. The victim is S.

97. I asked E about his family. In particular, I enquired as to how traditional he considered them to be in their religious and cultural practices and beliefs. On a scale of 1 to 10, with 10 as the most observant he told me that they were probably a 7. E's mother had told me that E and S were close and quite similar in temperament. E's evidence confirmed this impression. In common with every other family member, from whom I heard, E confirmed that M was the dominant adult in this household, who ensured that he participated fully in household chores. E was obviously close to F and it was equally clear that this was reciprocated. In his evidence F told me, with what I found to be a mixture of bewilderment and genuine delight, that E sometimes called him "mate". They share a common passion for football, though they support different premiership teams.

98. I am aware that many might consider this household to be overcrowded. F shares the boy's bedroom. He has a double bed; the boys have a bunk bed. They are almost literally cheek by jowl. It is impossible to see how anybody in this cramped space could leave the bedroom without disturbing the others. I asked E if he found this lack of privacy to be awkward or burdensome in any way. He told me, with manifest and, to my mind, rather touching sincerity that he found it to be comforting and reassuring. The impression he created of his father was that of a kind, unassuming rather gentle and somewhat passive man. This entirely confirmed my own impression of him. Though E was respectful to M he did not convey anything like the same closeness or intimacy.

99. It is manifest that there were clear boundaries between the male and female members of this household, in which the girls' modesty was vigilantly respected. Later in the case, when discussion of female circumcision took place (female genital mutilation as it should properly be called) I permitted the male members of the family to leave the court room at the request of the women. Such matters I was told and accept, are simply not discussed in front of the men. It is a fact of this case that every adult female member of this family has been subjected to this barbaric practice.

100. It cannot have been easy for E to discuss the pornography on his telephone in a court room, in front of his parents and uncle but he did so with maturity, indeed with a degree of sangfroid. Like many young teenagers in modern Britain, it is clear that E has learned to negotiate different and often conflicting cultural norms. He told me that he would quite like to marry a European girl, a fact that unbeknown to him, his father had told me earlier in his evidence. I did not have even the slightest sense that E had been in any way exposed to loose sexual boundaries or that he had ever been subjected to any violence by his father. Indeed, my impression was quite the reverse. This is a healthy, loving and mutually respectful relationship which in some ways

might properly be described as evolving into a friendship or to use E's word, becoming "mates".

101. I accept E's evidence that, during that day the Saturday he had been to a party, he came home and watched the Manchester United football match on the television with his father and then retired early. I see that in interview he said, *'I only watched the interesting games at the start'* His life revolves around his studies, his friends and his football. With the characteristic self-absorption of a 17-year-old boy, he expressed little interest in what his mother, sisters and other family members had been doing that day. Having found him to be entirely reliable in his account of the Saturday, including the late evening, I also accept that he slept in his bed until the following morning. There is congruency and consistency to E's evidence.

102. I note that Ms Foulkes, junior counsel for E, was, during the course of this hearing, able to track down the order in which the various matches were screened on Match of the Day that evening. It confirmed that the United match that E wished to watch had been one of the earlier matches, confirming his account that he went to bed earlier than F and W, who watched the remainder of the programme. I do not see any great significance in his telling the police, in interview, that he watched the Bournemouth match, which was the seventh of the eight matches screened that night. As Mr Tughan says he may have seen the start of the match but have lost interest having heard the score in the barbers earlier that day (as he related). Ultimately, the significance of all this is that it reveals E's timings to the police to be inaccurate and it supports his assertion that he went to bed earlier than the others. In relation to the identified inaccuracies I was impressed that E did not seek in any way to gainsay or dispute the accuracies of the record.

103. It is a very striking feature of the evidence that notwithstanding the genital injuries, S did not show any behavioural sign of having suffered the serious penetrative sexual assault, contended for by the Local Authority. As Mr Goodwin puts it *'there was no emotional affect'* nor was there *'manifestation of the physical pain to be expected of her injuries'*. She ate her evening meal of chicken, rice and pancakes. Sadly, this is confirmed by Dr Miller's analysis of the stomach contents. Though I do not put any great emphasis on it, I note that Dr Miller considered the meal would have been consumed at around 9pm on the Saturday night. F describes how S kissed him goodnight as she went to bed and he settled down to watch the football. All of this is uncontentious within the family, it has consistency and congruity to it and I accept it as reliable evidence.

104. What is unusual about Saturday is that it was the first time M had left the house, for any social reason, since Z was born. I was told that it is traditional within the OC community for a mother not to leave the house for several weeks after the birth of her child. I note, again, that this broadly coincides with E's characterisation of his family as culturally traditional. Z was born on 6th October 2016. M described him to me as *'a baby who rarely slept'*. She told me that he would sometimes cry for hours and she was unable to stop him. She described those first few weeks of his life as 'hard'. I sensed that she had found it a real struggle. She told me that she spent most of her time in her bedroom with Z trying to calm him, snatching sleep when she could. M has been very clear both in her statements and in her evidence, at this and in the earlier hearing, that Z would rarely sleep until about 2 or 3 o'clock in the morning and even then, fitfully and for short periods.

105. It is plain that F and the children bore a significant amount of responsibility for keeping the household going. I have already commented on the extent to which all the children participated in the household chores, but I had a strong impression that S played a very significant part. M said that *'S loved looking after us'*. Everybody agreed that S was great fun, she loved dressing up and, according to her mother, enjoyed helping her with the baby. I note that on the Saturday morning it was S who brought M her breakfast in bed. She then started getting the house ready, clearing and tidying it up. M told me in her evidence that S performed these chores with greater care and diligence than she had requested. The boys helped. In her evidence M told me that E and S were of *'a similar nature'* by which she explained that they were '*quick to help, not having to be asked'* and *'always kind'*. F took the younger children to school every day. M told me that he was *'a good father'* who *'loved his children'*. Everything that I have related so far indicates, to me, that this is an accurate assessment.

106. F has been employed at a local restaurant for eight years. It is entirely obvious that he very much enjoys that job. I note that after S was discovered dead and the police arrived, F was preoccupied with telling his employers that he would not be able to come into work that day. Whilst I am sure this was a facet of F's distress he nonetheless gave me the impression that he had formed friendships at work and enjoyed the camaraderie. Like all the others in this family F is vigilant about dietary observance and prays frequently.

107. On the Saturday in November 2016 F went to work at around 11am. E was going to the barbers to get his hair cut. Later he was going to a party. I suspect he wanted to create a favourable impression. M eventually left the house, she told me, at around 4pm, to drive to see her husband's cousin N, with whom she is plainly very close. According to M she and the younger children stayed at N's until quite late. I was told that a lot of food had been prepared and that the day was full of laughter and joking. In contrast to the detailed evidence I have recounted above I have found the account of that afternoon to be vague, generalised and ultimately unconvincing.

108. In the light of my findings, both in relation to the family's accounts and the medical evidence, it is likely that the genital injuries occurred during the late afternoon. Mr Twomey has explored the possibility that S may have been sexually assaulted during the forty minutes that she left the house with her cousin to buy Shawarma, a type of bread. Nobody has suggested that S was distressed on her return or made any complaint at any stage. I discount it as entirely improbable that S was sexually assaulted on her visit to the shop.

109. Even though M had barely left the house for weeks and had a baby who was keeping her awake most of the night, she told me that when she left N she decided she would go on to visit her husband's aunt SO, who lived close to N. It was already past 9pm. When F telephoned her, he, having finished work, M told me that she deliberately concealed from him the fact that she was going to SO's house. SO is older than M and obviously respected by her. In her evidence M told me that she had perpetrated this deception because she thought F would be displeased at her still being out so late at night. I found this entirely unconvincing. It attributes to F an authority in the household that I find he simply did not hold. M was the dominant personality, she would have felt no need at all to explain herself. I consider there is some more sinister reason why she lied about her whereabouts to her husband.

110. M stated that she arrived back home at 1020pm. E, dutifully, was already home. F arrived shortly afterwards. M took to her bedroom with Z. In her statement of 15th August 2017, M describes how E came in to say goodnight on his way to bed and that F and W did the same but *'much later'*. It requires to be highlighted that this, once again, entirely reinforces E's own account.

111. There are phone calls to the landline after 2230hrs, including a 26-minute unattributed call at 2302hrs and a sixteen-minute unattributed call shortly before midnight. These remain a mystery. What is not in dispute however, is that M had a telephone call with SO between 1.33am and 2.23am. This phone call, at this extraordinary hour, M seeks to pass off as normal behaviour. I have found this, again, to be entirely unconvincing. I note that this was omitted from M's account to TDC Edwards when she was asked by her for a 'time-line' on the morning when she attended the home. As I understand M's evidence the baby was awake during the course of it. For the first time, at this hearing, M also stated that Z was awake between 3.30 and 4am when she fed him. Despite being interviewed by the police, notwithstanding the statements she has filed and the evidence she gave at the first hearing M had never mentioned this detail before. By 6am, on her own account, M was awake again feeding Z.

112. What is significant about this is that the mother was awake for most of the night in this modern, modestly sized house when her daughter was, as I have found, strangled to death. It is equally clear that M had been with S the entire day, excluding the short visit to the shop.

113. Ms Ball was eager to cross-examine the foster carer, (Mrs G) with whom X and Y lived during the early stages of these proceedings. This proved to be quite difficult as Mrs G had been travelling overseas. Ms Ball, I think, suspected that she had been trying to evade coming to court. In fact, nothing could have been further from the truth. Although Mrs G had been a foster carer with the Local Authority for eighteen years, she told me that they persisted in sending all her letters to an address further down her street. She told me she had repeatedly complained about this but to no avail. Whilst she was away her daughter went to visit the house. The neighbour gave her the missing letters and the daughter forwarded them on to her mother. Mrs G told me that she immediately realised it was important and decided to fly back at once.

114. X and Y were placed with Mrs G on Friday following S' death, Y was three years of age at the time. It was plain that Mrs G took to him immediately. She told me he was a delightful little boy and beautifully well-mannered. It was obvious that Y felt comfortable with Mrs G too. She told me that he would come into her bedroom for a cuddle. However, she had been advised that this was no longer regarded as appropriate by social services and she was required gently to encourage him back to his own room. Mrs G was advised by social services to record daily events in a diary. I am bound to say that having seen the diary I regard her records as rather chaotic. For example, events are sometimes recorded on the wrong day in the diary. She may not be a good record keeper but in my assessment, she struck me as an outstanding foster carer.

115. Ms Ball put a wide range of criticisms to her. '*She had taken these Muslim children to church'*. Mrs G readily acknowledged that she had and plainly could see no harm in it. *'She had taken the children to McDonalds'*. Mrs G accepted this too. She said the children had told her that there were certain things they were allowed to eat and that

their parents sometimes took them to McDonalds. The mother shook her head at this evidence. It is, I suppose, possible that the children were telling fibs to Mrs G but I am bound to say, that my instinct is that they were telling the truth. I note for example that whilst some of the pizzas at the restaurant where F works are not regarded as Halal, others are. I think I was told, for example, that tuna and sweetcorn pizza was acceptable and that F would occasionally bring some home after work. Ms Ball criticised Mrs G regarding a cut to Y. Mrs G did not for a moment seek to conceal anything. *"Yes,"* she said, there were a number of other children in the household. *"I did not see it happen and I don't know how it happened."* I found Mrs G to be very impressive both as a witness and as a foster carer.

116. On the Saturday after S' death Mrs G made the following entry in her diary. [Y] said *"I don't understand, if a girl don't have 'barelly'…. how can they be circumcised?"* Mrs G explained that this question emerged from nowhere when Y was playing with his toys and suddenly stopped and became thoughtful and puzzled. Mrs G said she asked him what a *"barelly"* was and he pointed to his private parts and said *"willy"*. Mrs G said that she thought that this was '*significant'*. She did not explain why. My impression was that it was the instinct of a woman who had spent most of her life looking after children, many of whom would, inevitably, have been troubled in some way. Mrs G had also formed the clear impression that X saw her role as monitoring what Y had to say. Before Y had the opportunity to ventilate his anxieties any further, X walked into the sitting room, having plainly overheard the conversation. Mrs G reports that X said, "*you do not know what you are saying".* Sensibly, Mrs G did not press the conversation further.

117. An entry for the Sunday after S' death records that X spoke with her mother about her interview with the police. Mrs G noted that X had told her mother all the people who were present and at one point reverted to her mother's own language. Her mother responded, *'good girl'* (in English). The social services had required Mrs G to listen in, on loud speaker, to these conversations. There are two further entries in Mrs G's diary which require to be considered. On the following Wednesday Mrs G was alone with Y. He was playing on the floor with toys and chattering to himself. The note records that he said, *"I don't know what happened again".* Mrs G thought he was trying to remember something. He said *"I woke in the night, went to the toilet,* Attoy (an affectionate name for his mother) *and the baby was downstairs. Me, [X] and [S] was in our room. I was on the toilet calling someone to wipe my bottom and Attoy was calling [S] but she didn't answer.*

118. Mrs G records that Y then said that when he went to the room, someone was slapping S's face but she didn't wake up. Mrs G did not catch the name of the person slapping S though she is clear that Y mentioned it. She records that Y said, *"my mum called the ambulance and police".* This last point is corroborated by M herself (and the recording of the emergency services). It serves to add credibility to Y's earlier comments. At this point X walked into the room, heard Y's chatter and told Mrs G *"don't take any notice of him, he doesn't know what he is saying"*. Y did not remonstrate with his sister at all at this rebuke but he became immediately silent. Though it is not obvious from my necessarily anonymised description above, Y had used a term of affection in relation to S. Mrs G had not heard this name before and asked X who this referred to. X told her that it was her sister who had died. Mrs G

tried to reach out to X at this point. She asked her if she missed her sister, her parents or her home. X said *"no"* to each. Y recovered his voice *"I miss my mum and [S]"*.

119. The final significant entry in the diary refers to Sunday 4th December. Confusingly the space for Saturday 3rd December is also used. Mrs G had a house full that day. Her grandchildren had come to visit, she had twins, a baby in the play pen, a four-year-old and a six-year-old. Y was in the sitting room with her. X was in the hallway. In the middle of the chaos Y said to one of the other children *"do you want to know how my sister died?"* the child responded *"yes"* he said to her *"do you know that thing that goes on the bed, it was round her neck"*. The child asked, *"what thing?"*. At this point X came into the room and interrupted the conversation. Mrs G had formed the strong view that X saw it as her role not to let her brother out of her sight, she considered that she actively prevented Y *"opening up"*.

120. As I have indicated I found Mrs G impressive. I considered her evidence to be moderate, reflective, entirely unpartisan and honest. Her account of the sibling dynamic I evaluate as carefully analysed and supported by the evidence she collected. There is no suggestion from Ms Ball that Mrs G pressed the children for information or questioned them in any way in appropriately. It is clear that Mrs G's approach was to listen, with sensitivity, to what the children had to say and record it as effectively as she could. Indeed, I note that in her statement to the police prepared on 8th December 2016 Mrs G says, in terms *"I did not want to ask any questions, I just wanted to listen."*

121. Given that the focus of the evidence had, until E was called, been centred on the premise of a sexual assault, I permitted the mother's team to recall her and to file such further evidence as she wished. Additional statements were filed by M, N.O., M's brother, SA, SO, SR and F. When M gave evidence on the second occasion I was struck by the change in her demeanour which was, in my assessment, notably flatter. This time she presented as rather sad but her emotions were kept in check throughout the whole process. She did not permit herself to cry, despite the incredibly distressing nature of the enquiry, the evidence and the photographs of S as a happy child in the months before her death. The family, generally, have been conspicuously able to control their emotions throughout this hearing. I am, of course, conscious that this is a re-hearing and that they will all be exhausted by the process. That said, I noticed that both F and M's brother became visibly, indeed intensely distressed, towards the end of the hearing.

122. M disavowed, in trenchant terms, the practice of FGM. This she maintained was the *'custom of an older generatio*n' which she would never contemplate. She told me, in her evidence, that she was born in OC in the 1980's. She is the youngest of four sisters. She lived with her mother and sisters whilst her father worked in Saudi Arabia. The male members of the family were excluded from the court room whilst she told me of her own experience of FGM. Her statement, filed specifically to address this issue, requires to be highlighted:

> *"I underwent FGM when I was three years old. My memory of this is slight but I have since found out the following. My mother arranged for me and my elder sister N.O. to have FGM, at that very young age (my sister was only 5 years old) because she was leaving us to visit my father who was working in Saudi Arabia.*

> *She wanted to ensure that we were "done" before she left. Later she described it to me that she felt she "had to do her duty by us" before she travelled. Usually it was carried out on girls at around the age of 7 or occasionally a little older. My three sisters… and I all suffered FGM, as probably did most of the women of our generation in OC.*
>
> *A woman/nurse came to the house and performed the operation on N.O. and me. I have been told that my legs were held open, one on each side by two women and the 'nurse' carried out the cutting, that is the slicing of the skin. Once she had cut the labia and vulva she stitched us up. The whole of the vagina is sewn up leaving only a tiny hole to "pee" through. Once stitched up we were cleaned up, and then tied with a rope from our hips to our toes in order to keep everything in place. They tie you in a "zig zag" motion and the rope is to be held in place for two weeks to let the stitches heal. They carry you around, feed you and take you to the toilet whilst your injuries heal. Urine starts to come out in a certain way. You are not given too much fluid because they don't want the stitches to become 'wet'. During this time you are very reliant on your family members. I was very young when it happened to me and my mum told me later that I was too young so I had no idea what was going on and therefore I tried to walk. I was so distressed my mum untied me and the stitches were torn. This caused me to not heal properly."*

123. M also described the impact of her FGM in her teenage years:

> *"When I was around 12 or 13 my mum said that I had to be stitched up 'in the middle' as I had never properly healed. I was stitched again. This was a lot easier and a lot less painful but it still hurt."*

124. M described the impact on her married life:

> *"I came to the United Kingdom in 1996, I was 16 years of age. I married [F] in 2000. Intercourse was extremely painful for me and I did not enjoy it and there was some blood. I became pregnant very quickly. I went to see my GP, there was a temporary doctor and he was shocked at the mutilation that had happened to me. He could not understand how I had got pregnant. He said that everything was very difficult due to the FGM. In March 2001 he referred me to Kings College Hospital and I was on the waiting list for a few months. I refer to page 1 of 'LA3' for a copy of the referral from my GP. My Solicitors have requested of Kings College Hospital administration my hospital records but they informed my Solicitors that it takes 40 days to get the records without a Court Order.*
>
> *I was over 5 months pregnant when I had the operation in May 2001 'to open me up'. I had 6 stitches one side and 6 stitches on the other side. I would refer to page 2 of 'LA3'. It was terribly painful. The operation caused me also a great deal of distress. I was worried about the child I was carrying and what was happening to my body. I was told not to have intercourse for 6 weeks and so was able to heal.*

125. M did not discuss this in her oral evidence in anything like the detail of her statement. It was not necessary to do so. There is no doubt that the descriptions given by M are harrowing and graphic. They express the full barbarism of this practice, in uncompromising terms. M asserts that her own experiences cause her unequivocally to condemn the practice. She says the following:

> *"I could never let any girl go through what I went through. I have since had a recurring cyst that eventually had to be removed again following the birth of [Z].*
>
> *FGM had a serious impact on my early relationship with my husband because when we first married I found intercourse extremely painful and uncomfortable. We had a love match and it was really so sad. It was only after I had the operation at Kings College Hospital that I was ever able to heal. I know I will never have a normal sex life.*
>
> *I went to visit my mother in OC in 2004, I took [E] and [W]. This was the first time I had seen my mother since we fled due to the war in 1996. She told me that she understood what she did to me and sisters was wrong. She begged my forgiveness. She blamed "the culture". At that time a lot of parents were asking for forgiveness from their daughters because they realised what they had done was wrong. I am aware that FGM has become illegal in OC and that is good. When I was there in 2004 my mother said they had all stopped doing the full FGM and were doing a lesser version. However, I still think that is barbaric, it is not right and I would lay down my life to prevent my children having to go through anything like this. My mother died in 2014. She did not get to see my beautiful daughters."*

126. The force of all this impresses the Local Authority as sincere. I have no doubt that aspects of it are true. This said, truth and verisimilitude are, self-evidently, conceptually different.

127. M's younger brother (AM), who has a very dominant role in her household, also gave evidence. He is a social worker and has organised seminars within the OC community to speak against FGM. His young wife had also been subjected to it. He had invited M to attend one of the seminars but she had been unable do so.

128. In her evidence, M told me that, in relation to the circumcision of the boys, it was she who made the arrangements. She recalled that E had an infection following his procedure. It was not a doctor who performed the circumcision, I would not have expected it to be, nor was it a cleric. The person performing the circumcision had been identified within the OC community. Given the infection that E sustained, M found a different man to undertake the procedure for W. It is at least fifteen years since E suffered that infection. That M recalls it so clearly and without having anticipated being questioned about it, signals to me that she is a mother who was both appropriately concerned and I strongly suspect distressed. She took appropriate actions to prevent a repetition.

129. I emphasise that each of the children in this family is loved and cared for and I have not the slightest doubt that S was too. All the evidence in the case points towards it.

Indeed, it plainly created such an impression on the investigating police officers that they initially discounted non-accidental cause almost entirely on their favourable impression of the family. There is abundant and compelling evidence of disciplined behaviour, good manners and self confidence in respect of these children, testifying to the quality of care they received.

130. M was asked about circumcision of the boys. M is a bright and articulate woman, she has had the benefit of a translator throughout, in a supportive rather than a primarily facilitative role. M told me, without a moment of hesitation, that male circumcision was the *'will of Allah'*. It was, in my judgement, an entirely honest and spontaneous response. It reflected M's strong and devout faith. In my assessment this was not a question M had anticipated.

131. The force with which M expressed this view rather surprised me. I expected that she might say, in her own terms and idiom, that male circumcision did not carry with it the life-long physical and emotional consequences that she told me can result from FGM. I expected that she might say that male circumcision is intrinsic to male Muslim identity and perhaps also that many consider there are hygiene benefits to the practice. I emphasise that I did not expect her to express herself in quite these terms but I did expect her to have analysed the distinction in some way. Her rationalisation of the practice, in this context, as an article of faith, troubled me and served, in my assessment, to weaken her articulate disavowal of FGM.

132. As I indicated at the very beginning of this judgment, it is both impossible and unnecessary to address every nuance and dispute of evidence. I note that Y has described M as hitting E and making him cry. He gave this description during his interview but he also described E as hitting S. Mrs G took the view that Y was struggling to make sense of what had happened to his sister and to understand what he saw. I agree.

133. The evidence relating to the morning when it is said that S's body was discovered, is fretted with inconsistency and serious discrepancy. By way of illustration I record that W says that S was discovered facing the cupboard; F says that S was facing the bed and has described her in evidence as being in a *'kneeling position'*, this he also told the police. X describes S, in her interview, as *'laying'* or *'sitting'* on the floor.

134. In his first interview F stated that W had called out to him on that Sunday morning, *'dad look she's struggling, she's been smacked, she is struggling'*. F now specifically denies that W said these things. The evolution of this change can be tracked through his statements within these proceedings where he asserts *'I do not recall precisely what he [W] was saying'*. Thus, every option is covered. The effect is seriously to damage F's credibility in his account of what happened that morning and more generally. Mr Bagchi has expressly invited me to consider F's responses, on this point, in his first interview to the police. He highlights the following passages:

> *'I wake up, say, 9:00, 9:10, 9 o'clock, something like that. I wake [E] and [W] up. [W] went to the toilet, and [E] went downstairs once she-, The next thing I heard when [W] came out from the toilet is, like, 'Dad, look she is struggling, she's been smacked. She's struggling.' So, I run. I didn't know where he was. Were they in her room, were they in the toilet? I went all the way downstairs, then he told me that it's upstairs, 'Dad it's upstairs,' and he was*

> *shouting, and there were other kids crying at that time, as well. I run back to the room, and then she has got a white (? 07.00) that, CID have seen it, I don't know how to explain in English.*' and

He later says in that same interview that W called out the following:

> *'[W]: [W] told me. [W] was shouting it out from the room, 'There's something wrong with [S].'*
> *DC Forbes: Okay. Do you remember exactly what he was shouting?*
> *[W]: Yes. He said, '[F], [S's] smack-,' or, did he say-, I said words, he said, 'There's some white cloth round her neck.' That's when I ran. 'She's not breathing,' so I ran.'*

With respect to Mr Bagchi these passages serve only to illustrate the extent to which F's credibility has been compromised. The detailed accounts in this early interview are plainly lies. They cannot be reconciled with the medical evidence relating to the timing of S's death; the compelling description of the condition of S's body, given by PC Tottman-Shaw (see para 15 above) or indeed, I reiterate, F's own statements within these proceedings.

135. Whilst there is consistency in the accounts of Saturday (subject to my observations in para 104 above) the family's accounts of the Sunday morning are disjointed and difficult to reconcile. I extract the following examples, which emerge most clearly. X told PC Rein, on the Sunday morning, that she had found S *'laying'* on their bedroom floor during the night, had '*shouted out'* but had not wanted to disturb anybody in case she '*got in to trouble'*. This appears to have been a free-flowing account. X did not repeat it again. By the time of her first interview (on the following Sunday), she insisted *'I can't remember what happened in the night'*. It is however, important to note that E confirmed what X had said to the police, also on the Sunday when S died. PC Marriott's statement of 14th December 2016 provides a useful insight in to the morning:

> *"I asked PC Rein what he needed me to assist with to which he identified a young black male to me as the girl's brother, whose full details I now know to be [E]… PC Rein asked me to stay with the male whilst PC Rein and PC Blue went upstairs to where the LAS were. [E] was very quiet, I asked if he was ok and if he knew what had happened. [E] stated that his younger sister [X] had found their other sister [S] in the bedroom in the night after she had fallen out of bed but hadn't told anyone because she was worried she would get told off for waking her mum and dad up. Whilst I was talking to [E] I could hear lots of crying and wailing coming from upstairs."*

136. It is important that I clarify that this conversation was taking place in the ground floor of this three-storey home. Thus, I understand that upstairs here refers to the first floor and not to S's bedroom, which was on the top floor. E was fifteen at this stage. PC Marriott plainly felt sympathy towards him and he asked him if he wanted to go upstairs to be with his family. He said *'no'* and stayed downstairs, even when PC

Marriott left him to speak with the other family members. PC Marriott met F who he described as upset and stunned. He had *'curled himself up in to a ball on the sofa and was saying things to himself (not in English) whilst rocking backwards and forwards.'* Such was F's level of distress that PC Marriott stayed with him. He also asked him if he wanted to be with other members of the family and he too said '*no'*.

137. By way of completeness, I highlight one further fact. It is M's position that throughout all this chaos and distress she did not feel able to go upstairs at all to be with her daughter or to try and help. Her case is that she felt too weak and distressed to be able to do so.

138. In their closing submissions the Local Authority state:

> *"Drawing together the various evidence addressed above, we make the following submissions about collusion and each individual's potential culpability for [S's] death. Where a family have colluded in circumstances such as this, the line between collusion and perpetration is thin. What reliance can be placed on any of the four individuals' insistence of innocence when there is strong evidence on which the court can find collusion? Any finding of collusion is so damaging to individual credibility as to make such reliance problematic."*

139. It is certainly the case that a finding of collusion is damaging to individual credibility. However, I am focusing here on minors as well as adults. There is an inequality of bargaining power. An important distinction must be drawn between adults who conspire to defeat the truth and children who are told to do so. Thus, I do not accept that the line between collusion and perpetration is necessarily *'a thin'* one. Nor does a finding that an individual has colluded inevitably negate the whole of his evidence. As the Local Authority submit it does make reliance on it *'problematic'*. It is perhaps important to note that notwithstanding the extent and sophistication of the *'collusion'* the Local Authority identify they nonetheless are persuaded by M's denouncement of FGM.

140. The closing submission continues:

> *"Identifying a perpetrator is particularly challenging here because, first, there is no firm evidence about the motive for the killing and, second, there is no clarity about whether the person responsible for her sexual assault also killed her. Was she sexually assaulted by one of her brothers then killed by her parents to avoid bringing shame on the family? Was she sexually assaulted then either deliberately killed by the same person or accidentally killed during an act of ligature restraint? We do not know the answers to these questions and would be speculating if we sought to base a decision on perpetration on either hypothesis."*

141. It is unnecessary to set out, in any detail, the framework of the applicable law. It is, subject to my observations at paras 86 – 91 above, well established. However, the

following passages from the speech of Baroness Hale in ***Re: B [2008] UKHL 35*** provide indispensable guidance:

> *"31. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.*
>
> *32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."*

142. As I have emphasised and at some length, the finding contended for (re the genital injuries) must, on a proper construction of the evidence be limited to 'blunt trauma, internally and externally'. Ms Ball's predecessor at the first trial, Janet Bazley QC, laid the groundwork for this at the hearing before Francis J. It is now settled. In the paragraphs above, I have taken care to emphasise the many positives in this family. This is an important feature of the broader canvas of the evidence and I have it in mind when I consider the hypothesis that S may, in this essentially loving household, have been a victim of a sexual assault by one family member and killed by another. It is inherently improbable. The speculation that the killing might be motivated by the 'shame' of the sexual assault has absolutely no root at all in the evidence.

143. The Court is not required to exclude every speculative hypothesis at the parameters of possibility. This would have the effect of imposing upon those deemed to be within 'the pool of potential perpetrators' an almost impossible evidential burden to be excluded. The test is not who can be 'ruled out' or 'exculpated', both words should be expunged from the lexicon of these investigations, the exercise, as Jackson LJ has stated, must be framed in a way which reflects the fact that the burden of proof remains, throughout, on the Local Authority to identify whether there is a likelihood or real possibility that A or B was the perpetrator of the inflicted injuries. No lesser test permits the finding.

144. Framed in this way, the investigation, though challenging, becomes clearer. From my summary of the oral evidence and the documents the following key features require to be identified:

i) S, was in M's care throughout the 24 hours prior to her death;

ii) On her own account M was asleep for, at most, 1 ½ hours in this period;

iii) Excluding the physical evidence of strangulation, there were no other relevant injuries identified to S, beyond those to the genital area as described;

iv) There is no extrinsic evidence suggesting that a sexually motivated assault took place in the night in S's bedroom where two other siblings were sleeping. Nobody reports any noise or disturbance, notwithstanding their close proximity and, of course, the fact that M was awake for most of the night. What is postulated therefore is an apparently silent and brutal sexual assault (having regard to the extent of the genital injuries) followed by a strangulation. On this factual matrix the explanation is simply not credible;

v) There is no physical evidence of a struggle within the bedroom, generally and none, particularly, relating to S's body or clothing;

vi) Notwithstanding that the Saturday in November was the first time M had been out of the house, at least socially, since the birth of the baby, who was a poor sleeper, she was out until very late in the evening;

vii) M admits that she lied to F about her visit to SO. For the reasons stated above I reject her rationalisation of this lie;

145. It follows from this that the genital injuries were unlikely to have been inflicted after S returned home but, as the forensic evidence establishes, they would have been sustained during that day. There is, accordingly, no realistic opportunity for S to have sustained the genital injuries at a time when she was not in M's care. The hypotheses of a sexual assault on S during her visit to the shop and about which she made no complaint or exhibited any distress, lacks any coherency or cogency. It can properly be discounted.

146. The accounts of F and E of the evening of the Saturday are credible, essentially consistent and corroborated by other evidence (e.g. the football schedule as shown on the television and the fact that M confirms both E went to bed earlier and that W went to bed with F later). It is important that I state that whilst I do not consider that this family has been open or cooperative with this investigation or that conducted by the police, I nonetheless found E to be an honest witness in his account of his movements throughout the day and the late evening of Saturday.

147. I found F to be similarly reliable in his account of his movements that day and late evening. I am however, unable to accept the accuracy or indeed the honesty of F's account of the morning of Sunday. Some of his inaccuracies can be attributed to the extremity of his distress, which was profound, but the period between finding S's body and the telephone call to the ambulance services is fretted with inconsistencies and contradictions. On any view of events there is a period of forty minutes unaccounted for between F getting up and the telephone call to the emergency services. In his evidence F presented as flat and rather distant. I agree with Mr Goodwin that F's responses frequently obscured rather than assisted the Court's

enquiry. He was avoidant and rather casual in his weak attempts to rationalise his change of accounts, particularly those in his interviews. Mr Goodwin, I note, contends that this was motivated by a wish to *'protect himself or his wife and sons'*

148. In their closing written submission Mr Goodwin and Mr Parker submit that the unaccounted period before telephoning the emergency services was spent colluding *'to mask the true circumstances of [S's] death'*. One passage requires to be highlighted

> "… one of the stand-out features of this trial has been the apparent lack of curiosity within the family about how [S] might have died. Nobody appears to have questioned anyone else, at least no more than superficially. M had never discussed with F what he did when he woke up on the Sunday – this answer (in her eyes) allowed her to avoid confronting the '40-minute discrepancy' head-on. M had not asked F about W shouting "*she's struggling*', indeed she said she had not even read his police interview. M had not read her sons' statements. F had not discussed with E what he had done upstairs after MOTD and whether he had been looking at pornography."

149. I agree with this and would add that it is entirely discordant with the family's mantra that they would leave 'no stone unturned' in their quest to discover how S died.

150. Having come to the clear view that the genital injuries were inflicted during the day and having entirely discounted a stranger assault occurring during the short visit to the shops, I must logically conclude that they were sustained whilst S was in M's care and/or in the company of the other women who attended N's home that day. Whilst I must not discount, entirely, the possibility of a sexually motivated assault in these circumstances, I consider it to be highly unlikely.

151. As I have set out above (para 113) I consider the foster carer's evidence, relating to Y's concern about female circumcision, to be significant. Y's remarks were said in the context of different observations made by him at a time when Mrs G considered that he was trying to make sense of his sister's death. For all the reasons I have set out above I agree entirely with the foster carer's analysis which I consider to be well reasoned, objective and insightful. I also consider that her description of X as determined to keep her younger brother silent concerning the circumstances of S's death is accurate and objective. I remind myself that I was told on behalf of the family that talk of these matters would be between the women and in the absence of the men. The suggestion advanced by M's counsel that Y had become confused with male circumcision is unconvincing given the context and detail of Y's remarks.

152. When the mother returned to the witness box, specifically to address my concern that the genital injuries might be related to an attempted FGM, she revealed (see para 125) that she had taken responsibility for the arrangements for the circumcision of the boys and that she regarded her obligation as complying with *'the will of Allah'*.

153. I find M's account of her voluble conversation with SO between 1.33am to 2.33am as a *'normal'* event to be unlikely. She had not been able to speak with SO as she had hoped earlier in the evening and had lied about her unsuccessful visit to SO to her

husband. I have been told that an older generation is more likely to continue the practice of FGM and I note that SO falls in to this category of respected older woman.

154. Having accepted the evidence of F and E to the degree that I have, I consider both were likely to have been asleep when S was killed. I do not consider that, on a proper construction, there is any evidence to suggest that there is a real likelihood or a real possibility that W could have been responsible for his sister's injuries and subsequent death. Though both the Local Authority and the Guardian contend that he should remain in the pool of perpetrators I cannot identify any evidential basis upon which they invite me to do so. Thus, the only person in the household likely to have been awake when S was killed was her mother. Drawing all the above strands of evidence together I consider that it was she who, on the balance of probabilities, caused the genital injuries earlier in the day and strangled S during the night.

155. Mr Goodwin describes M's evidence variously as *'disingenuous'*, *'not to be trusted as truthful'* and to be treated with *'great caution'*. Nonetheless, I am told the Local Authority evaluate her denouncement of the practice of FGM as convincing. I am not prepared to make this exception to my assessment of her damaged credibility. Whilst her criticism of FGM was articulate, I was not persuaded of its authenticity. Following the discovery of S's body M told me she was too distressed and weak to go upstairs to see her daughter for herself. Certainly, when the police and paramedics were present she made no attempt to do so. She told me that she accepted what F had seen. I consider that she had no need to go upstairs to find out what had happened - she already knew.

156. I reiterate, every single adult female member of this family has been subjected to the abhorrent practice of FGM. I note that E described his family as being towards the *'traditional'* end of the cultural spectrum. Despite M's denial, I consider that the genital injuries are more likely to be in consequence of some failed attempt at FGM. By this I mean, the genital injuries were sustained in a manner which was not sexually motivated. It was either an intimate investigation by way of preparation or, more likely, an actual attempt at FGM, in which S was successfully able to resist. I consider the latter to be more likely because this assault is, for all the reasons I have set out, intrinsically linked to the strangulation that followed. I am not prepared to speculate about the actual circumstances. S made no complaint of what were quite significant genital injuries nor, I am told, did she exhibit any distress at home later that evening. Had it been a sexual assault I am convinced she would have done.

157. I am not prepared to draw any inferences as to what M was speaking to SO about during her lengthy telephone call. On the forensic evidence, S's death is likely to have occurred at some point after the conclusion of that conversation. The two may or may not be linked. Neither am I prepared to draw conclusions as to why M caused her daughter's death. What is evident is that M had not been sleeping properly since her baby was born, a period of some six weeks. She may not have been thinking clearly. It may be that she was angry with S or that she felt her family had been dishonoured by S in some way. What is clear, is that from the discovery of S's body this family has closed itself off to any investigation and has been determined that the full facts should not come to light. The collusion of silence is between the parents, the children are, to differing degrees, caught up in it.

158. It follows from my reasoning above that there is a real risk of serious harm or death to the children in this family and most particularly to their one remaining daughter, who is now aged nine. I have been told that the Local Authority intend to reassess the situation. I consider that it is necessary for them to do so.