



Neutral Citation Number: [2021] EWHC 819 (Fam)

Appeal Reference: FA-2020-000233

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

On appeal from an order made by Recorder Armitage
sitting in the Family Court at Leeds on 30 October 2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date of formal hand down: 30/03/2021

Covid-19 Protocol: This judgment was handed down by Mrs Justice Roberts remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be on Tuesday, 30th March 2021, at 9.30 am.

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

Between :

AB (a father)

Appellant

- and -

CD (a mother) (1)

Respondents

A (a Child) (2)

Ms Hannah Markham QC (instructed by John Delaney & Co) for the Appellant
Ms Sarah Morgan QC (instructed by Irwin Mitchell) for the First Respondent
Ms Catherine Mason (instructed by Ridley & Hall) for the Second Respondent through her
Guardian

Hearing date: 12 March 2021
(Draft Judgment sent to counsel on 22 March 2021)

APPROVED JUDGMENT

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

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.

Mrs Justice Roberts :

1. This is an appeal against findings made against the appellant in the Family Court sitting in Leeds by Recorder Armitage following a four-day hearing which resulted in an order dated 30 October 2020. Her findings, as recorded in that order, included two occasions on which the appellant had ‘aggressively raped’ the respondent whilst she was in bed with their young child. There were further findings of emotional abuse and threats to remove the child from the respondent’s care in order to abduct her to Pakistan. It is against these findings and others that the appellant now appeals, permission to appeal having been granted by Poole J on 14 January 2021.
2. Permission to appeal was granted because of concerns which flowed from the judgment delivered by the Recorder at the conclusion of the substantive fact-finding hearing. In the context of the substantive appeal, those concerns have been fully ventilated during the course of the submissions which I heard over a full day of argument. I am grateful to each of Ms Markham QC and Ms Morgan QC for the care which was taken in their forensic analysis of the judge’s conduct of the original hearing and the reasoning process which underpinned her decisions in relation to the facts. Neither leading counsel appeared at the original fact-finding hearing but each has presented their respective clients’ cases with a full command of both the written evidence which was before the court below and the voluminous transcripts of the oral evidence which has since been made available. On behalf of the appellant, Ms Markham QC submits that the judge’s reasoning process was fundamentally flawed and, for this and other reasons, her findings cannot stand. Ms Morgan QC, who represents the respondent mother, submits that the findings are reliable when considered in the context of all that is recorded in the judgment. Ms Mason, who represents the child through her guardian, has adopted a neutral stance in this appeal. It is agreed that, if the findings are set aside, a rehearing is inevitable.

The context

3. The fact-finding hearing was listed in the context of the appellant’s application in private law proceedings for contact with his child, A, who is now eight years old. The parties are both doctors who met at medical school some sixteen years ago. They married in 2011 but separated the following year at a time when the respondent was pregnant with their first, and only, child. A was born the following month and has lived with her mother ever since. Over the course of the ensuing years, and despite their formal separation, there were times when the parties spent time together with A as a family. The appellant was living abroad for much of this period. Ms Markham QC submits, with

some force, that the extent, quality and nature of that contact between the parents lay at the heart of the factual dispute which was before the judge at the fact-finding hearing. Whilst I need say little about the background of the ongoing contact dispute for the purposes of this appeal, it is clear that both parents had made attempts to set up a pattern of arrangements in order that A might establish a relationship with her father. Those attempts broke down and, in November 2019, the appellant issued a formal application for contact. It is his case in those proceedings that the respondent has increasingly sought to put distance between him and his daughter. He maintains that the catalogue of complaints which she has raised in the contact proceedings, including the allegations of rape, are entirely fabricated. His evidence to the judge was that his former wife was quite capable of lying to the court. He relied on the fact that the allegations against him had not surfaced before he issued his application when CAFCASS became involved at the request of the court in the context of safeguarding checks. Those allegations, which he maintained to be entirely false, prompted him to issue a further application in which he sought an order that the child should move to live with him. Before the judge at the fact-finding hearing was a series of counter-allegations which he subsequently made against the respondent, only one of which the judge accepted to be true.

4. The judge had been required to determine the facts from the foot of two separate *Scott* schedules. The respondent mother's schedule of allegations had been settled by counsel. By way of preface to her schedule, she included the following narrative:

“The respondent mother has suffered extreme domestic abuse including sexual abuse, physical abuse and emotional abuse from 2006 and continuing. ... The domestic abuse is ongoing, and the father uses the fear of continued violence and abuse to coerce and control the respondent into allowing contact between him and the subject child. The abuse is used deliberately to undermine the respondent's mental health the result of which would put [the child] at risk of emotional harm. ... The respondent cannot trust the applicant not only because of his continued abuse but because this continues against a background of dishonesty.”

5. That latter reference finds traction in this case and the fact-finding exercise which the judge undertook because, in 2013, the appellant stood trial on criminal charges involving the unauthorised and illegal provision of prescription drugs. He was convicted and received a nine-month custodial sentence which resulted in the loss of his practising certificate following a ruling of the General Medical Council. The respondent alleges that his personal misuse of drugs has drawn him into “areas of criminality and dishonesty” including a prior involvement with drug dealers. The mother relies on what she refers to in her pleadings as a “history of dishonesty” as a

reason why the court cannot trust the appellant's evidence in these proceedings.

6. In terms of the respondent mother's specific allegations, the summary below provides an overview of the matters which the trial judge was required to consider:-

(i) *Sexual abuse*

- a. an allegation that, on 29 December 2013 whilst staying overnight at the home of the appellant's family, she was "aggressively raped" whilst in bed with the child;
- b. a further allegation of "aggressive rape" on 23 January 2015 whilst the appellant was attending her home for the purposes of contact with their daughter;

(ii) *Physical abuse*

- a. in July 2012, (i) she was punched in the face whilst 7 months pregnant; (ii) she was pulled from a car by her wrist and her head was held from the back causing pain, maximum embarrassment, public shame and degradation;
- b. in October 2012 the appellant held a knife against her throat and made threats;
- c. in July 2017 the appellant threatened to throw acid in her face;

(iii) *Emotional abuse*

- a. from August 2011 and ongoing the appellant criticised and demeaned her through insults and belittling behaviour;
- b. in 2012 to 2013 she was humiliated by the appellant who pulled down items of her clothing when family or friends were nearby;
- c. in 2012, the appellant suggested on two occasions (one of which was her birthday) that she should eat dog food. On one occasion he provided her with dog food on a dog bowl and on the second he threw a can of dog food at her and offered to open it for her birthday meal;
- d. in December 2014 he threatened to remove the child from her care and take her to Pakistan;

- e. in October 2015 he threatened again to remove the child and cause her professional embarrassment if she stood in the way of contact;
 - f. he told her on one occasion that she would be tied to a railway track and stoned to death. He said on another occasion that women living in Pakistan are killed for taking the same actions as the respondent mother;
 - g. he pestered and harassed her and members of her family with social media messages and other forms of communication which were designed to put pressure on her and cause shame, degradation and embarrassment in order to ensure that contact with the child took place;
7. The appellant's counter-schedule makes a number of allegations against the respondent which can be summarised thus:-
- (i) *Sexual abuse*
 - a. over two days in December 2015, and despite their separation, he was forced by the respondent to have sexual intercourse against his wishes. This allegation is made against the background that the respondent had previously made hotel reservations and brought with her an ovulation kit;
 - b. an allegation of non-consensual oral sex was subsequently abandoned.
 - (ii) *Physical abuse*
 - a. in January 2012, she threw a mobile telephone at his head, and hit his forehead after going through his phone and accusing him, wrongly, of having an affair with a female doctor with whom he worked;
 - b. in March 2012, whilst his father was present in the room, she threw a remote control device at him;
 - c. in the summer of 2012 she attempted to snatch from him a new bank card and, when he refused to give it to her, she threw the contents of her dressing table onto the floor.
 - (ii) *Parental alienation*
 - a. the respondent mother had manufactured false allegations against him in order to prevent contact with their daughter;

- b. she had changed the child's surname in order to exclude him from the child's life.
8. The judge heard oral evidence from both parties over the course of two and a half days. Counsel made their submissions on the afternoon of the third day. Judgment was delivered on the afternoon of the fourth day of the hearing.

The judge's findings

9. As the judge's order dated 30 October 2020 records, she found that the following allegations to be proved:-
- (i) the applicant father on two occasions sexually abused the respondent mother: on 29 December 2013 whilst she was in bed with the child and on 23 January 2015 whilst attending her home to visit the child;
 - (ii) the applicant emotionally abused the respondent;
 - (iii) from 2011 and ongoing the applicant would insult, criticise and demean the respondent;
 - (iv) from 28 December 2014 and ongoing the applicant has threatened to remove the child with a view to travelling with A to Pakistan. Specifically, in December 2014 the applicant said to the respondent, 'good luck finding her in the mountains of Kashmir';
 - (v) such threats of removal were made in the context of threats to embarrass her professionally;
- and in relation to the appellant's complaints:
- (vi) in the summer of 2012, the respondent had tried to snatch his credit card and had subsequently thrown the items from the top of her dressing table to the floor.
10. By way of a specific recital to her order, the judge included these words on the face of her order:

"7. Upon the court making no finding in relation to allegations of physical abuse suffered by the respondent despite acknowledging in judgment the strength and power of those allegations". [The italics are mine.]

The Grounds of Appeal

11. The appeal launched by this father is focussed on what is said to be the failure by the judge to consider the allegations in their totality. Criticism is made of

her decision not to consider and weigh the evidence in respect of, or to balance in her decision-making, the evidence relating to a number of core allegations made by the respondent. Complaint is made that she compartmentalised the evidence and that she failed to consider properly or with sufficient scrutiny the appellant's case that the allegations against him had been fabricated. In particular, eight separate grounds are articulated in support of the submission made by Ms Markham QC that the judge's findings are unreliable and flawed and cannot stand as the basis for the future decisions which will be taken in relation to this child. To an extent, there is a degree of elision between several of them but I summarise each of the eight grounds below.

Grounds 1 and 2: In a case where the appellant was advancing a case of deliberate fabrication against the respondent mother as part of a course of conduct designed to navigate him out of their daughter's life, the judge erred in maintaining her focus on parts only of the evidence and in excluding from her consideration a number of other serious allegations which she was making against him. It is said that her selective approach which involved the omission from an holistic overview of all the evidence some very serious matters (e.g. the allegations of threats to kill, throwing acid in her face) led her into error.

12. In this context, Ms Markham QC submits that the decision which the judge made that she did not need to consider or determine some of the allegations raised by the mother demonstrated not only a closed mind but left her in a position where she was driven to treat those specific allegations as not having been proved. She considered the specific allegations of rape without folding this evidence into the wider canvas before her and thereby gave insufficient, if any proper, consideration to the important question of whether the respondent mother was capable of fabricating some very serious allegations against the appellant father.

Ground 3: In respect of the specific allegations of rape and her assessment of the truth or otherwise of these allegations, the judge erred in her approach to the evidence. She failed to take into account a number of matters raised by the father in a fair, balanced and contextual examination of all the facts.

13. Ms Markham QC submits that there was within the material before the court a wealth of evidence about the appellant's lack of desire to have sexual relations with his wife from the outset. It was an acknowledged problem within their marriage which the respondent herself had raised in evidence. The appellant was prevented by the court from putting third party evidence before the court in relation to the property where the rape was alleged to have occurred. It is said that the judge failed in her judgment to address, far less weigh in the balance, the evidence of the paternal grandmother that she and her two sons

(the appellant and his brother who was also in the home on the evening when the rape is alleged to have occurred) had stayed up talking together until the early hours of the morning.

Ground 4: The judge failed to address or consider properly the allegation made by the appellant that the respondent had changed the child's name without his consent.

14. In terms of an assessment of overall credibility in relation to the evidence which both parties gave, Ms Markham QC submits that it was wrong for the judge to have announced in her judgment that this was one of the factors she did not need to determine whilst, at the same time, allowing the allegation to feature as a factor in the course of her analysis.

Ground 5: The judge fell into error by failing to consider or have any regard to the sexual difficulties which had arisen within the parties' relationship and the allegations which the appellant made that he had in the past been sexually abused by the respondent. It is said that she focussed too much on the respondent's evidence and upon parts only of the evidence without taking sufficient care to balance fairly or at all other aspects of the evidence. In so doing she adopted a 'compartmentalised' approach.

15. Ms Markham QC points to a failure on the part of the judge to explore all the documentary evidence which was placed before the court which had the potential to undermine the allegations of rape. She failed to balance and weigh the unchallenged evidence which the appellant had placed before the court in relation to (i) his aversion to sexual relations with the mother; (ii) the respondent's own evidence that he was not a violent man; and (iii) there had been no evidence at all of any previous complaint about his conduct prior to the report which she made to the CAFCASS officer when he launched his formal application for contact. In particular, Ms Markham QC identifies what appears to be a failure on the part of the judge to include within her judgment a summary of the oral evidence she heard, or an account of her impression of the witnesses as truthful or otherwise, and/or an account of the weight which she had attached to any of these matters. In summary, Ms Markham QC submits that, aside from her specific findings, there is no evidence on the face of the judgment that the judge had weighed the parties' evidence in order to reach a conclusion that the respondent's evidence was to be preferred in the context of the specific allegations of rape.

Ground 6: In her failure to carry out a proper analysis of 'certain critical evidence', the judge's conclusions as reflected in her findings are unsafe; and

Ground 7: The judge failed to give herself an appropriate *Lucas* direction in respect of the father’s evidence and appears to have determined his credibility in relation to the separate rape allegations within the context of other allegations of a different nature.

16. In this context Ms Markham QC relies in particular of her analysis of unpleasant messages and emails which he sent to the respondent as the basis, or part of the basis, for her findings in relation to rape.

Ground 8: The judge was plainly wrong to have included Recital 7 on the face of her approved order. Having decided to make no findings in relation to allegations of physical abuse made by the respondent, she nevertheless referred to these allegations as both ‘strong’ and ‘powerful’.

17. Ms Markham QC relies on this ground as a demonstration of a confused approach to the evidence. Further, she submits that it makes it impossible for any reader of that judgment, including the appellant, to understand whether, and if so, to what extent, those allegations had coloured or influenced her approach to credibility and/or her assessment of the rest of the evidence.
18. I have set out these grounds of appeal in full because the decision of Poole J to grant permission to appeal was based upon his Lordship’s view that all the grounds should inform the substantive appeal. In recording his reasons for granting permission, Poole J said this:

“Whilst the appellate court will be slow to interfere with a judge’s findings of fact, the grounds of appeal identify concerns that:

- (i) In making findings that allegations of rape were proved, the Recorder failed to give herself a *Lucas* direction or to act in accordance with the principles of such a direction, placed excessive weight on findings that the Appellant had been emotionally abusive of the Respondent, and failed to assess the credibility of the parties by reference to all the evidence, and the allegations that each had made in their Scott Schedules.
- (ii) The Recorder was wrong to choose not to consider some serious allegations made in the parties’ Scott Schedules.
- (iii) Having made no findings in relation to certain of the First Respondent mother’s allegations, nevertheless recorded them as having “strength and power” in the Order, giving rise to concern that she took the allegations into account without having made findings about them.

Whilst the Recorder had the great advantage of seeing and hearing the parties give evidence, which, in the context of the allegations made, has to be regarded as a particular advantage, I am just persuaded that the Appellant's criticism of the "compartmentalism" of the judgment has some merit for the reasons set out above, and there is a real prospect of the appeal succeeding."

The case advanced by the appellant father

19. The appellant's case is reflected fully in his grounds of appeal and in the submissions made on his behalf by Ms Markham QC. Distilled to their essence, she submits on his behalf that her client was deprived of a full and fair hearing on all of the issues and allegations which were being made against him. She submits that the judge clearly 'took a view' that the mother was a more reliable witness without explaining from the foot of a careful and detailed analysis of the evidence why she had reached that conclusion.

The case advanced by the respondent mother

20. Ms Sarah Morgan QC on behalf of the respondent has put before the court a full and detailed skeleton argument which seeks to address each of these grounds of appeal. The over-arching thrust of her submissions is that each of the findings made by the judge fell well within the ambit of the discretion entrusted to her. They cannot be considered perverse or inconsistent with any of the evidence she heard. Her findings were underpinned by the significant advantage of having seen and heard the parties as they were giving oral evidence. Ms Morgan QC points to the fact that none of three counsel instructed in the case sought further amplification or qualification of the judgment prior to the findings being captured in the order which the judge approved at the conclusion of the hearing. In the absence of a procedural irregularity or error of law, she invites this court to find that there is no justification for disturbing those findings.
21. Before returning to consider the competing submissions advanced in this case, I turn, first, to the legal framework and the law which has shaped and developed the role of the appellate court in appeals which seek to overturn specific findings of fact by an individual trial judge.

The Law: when and in what circumstances is an appellate court entitled to intervene in circumstances such as these ?

22. Rule 30.12(3) of the Family Procedure Rules 2010 provides that a court exercising an appellate jurisdiction will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other

irregularity. R.30.12(4) enables an appellate court to draw any inference of fact which it considers to be justified on the basis of the evidence.

23. Before a court can interfere in findings such as these based on a conclusion that either the lower court was wrong or there has been unfairness or some other procedural or other irregularity, it will need to consider the following:-
- (i) has the judge in the court below made an error of law ?
 - (ii) has the judge reached a conclusion on the facts which was not open to him or her from the foot of the evidence which was before the court ?
 - (iii) did he or she fail to take into account, or give proper weight to, a significant piece of evidence or matter and/or given inappropriate or undue weight to another aspect of the evidence ?
 - (iv) did the judge adopt a process which was procedurally irregular and unfair so as to infect or contaminate his/her decision to the extent where it is unjust ?
 - (v) did the judge exercise his or her discretion in a manner which was outside the boundaries within which a reasonable disagreement is possible and permissible ?
24. It is axiomatic that a judge must explain in clear terms his or her reasons for any decision, particularly in the context of a dispute between parties as to the facts which will inform the next stage of the proceedings. This is crucial in the context of family proceedings and welfare decisions for the child or children at their centre. The fact-finding process informs those welfare decisions which can have far-reaching, and often life-changing, consequences not only for those children but for their parents and others affected by the intervention of the state, through the court, in family life. Fundamental rights of both children and their parents are engaged in these cases. That is why the facts matter and why it is essential that parties to a fact-finding exercise understand clearly the basis upon which a court has reached its decision.
25. That principle is easy to state. Its delivery as a fundamental aspect of family justice does not require a judge to deal with, and address, every single point raised on the evidence or in submission. The need to balance the principle and the counsel of perfection with the exigencies of what are often over-burdened court lists is, perhaps, best encapsulated by the former President of the Family Division, Sir James Munby. As Munby P, he provided the following well known guidance in *Re F (Children)* [2016] EWCA Civ 546:

- “22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to “incant mechanically” passages from the authorities, the evidence or the submissions, as if he were “a pilot going through the pre-flight checklist”.
23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Pigłowska v Pigłowska* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

“The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account..... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of a judge by a narrow textual analysis which enables them to claim that he misdirected himself.”

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann’s phrase, the court must be wary of becoming embroiled in “narrow textual analysis”.”

26. It is not suggested here that the judge made any error of law. The challenge to her judgment, and thus her findings, is grounded in the criticism of the judge’s assessment of the evidence and the manner in which she approached the task of weighing and balancing various aspects of it, including her decision that it was not necessary as part of that process to make specific findings in relation to some aspects of the evidence. At the heart of Ms Markham QC’s challenge

on behalf of the appellant lies a submission that the terms of her judgment do not provide a sufficiently transparent line of sight into how far aspects of the evidence which she claims to have found unnecessary or unhelpful in reaching her conclusions did indeed colour or influence her deliberations in relation to key findings. In relation to the most serious allegations of rape, Ms Markham QC identifies what she describes as a wholly insufficient analysis of either evidence or reasons on the face of the judgment.

Discussion and conclusion

27. The transcript of the judgment runs to 14 pages. I was informed by counsel at this appeal that it had been sent to the judge for approval and that she had confirmed it to be an accurate record of the oral judgment she delivered.
28. The judge commenced by setting out the background facts. She noted that, whilst judicially separated by April 2013, “that was not the end of the marriage”. She recorded the fact of the appellant’s conviction and subsequent incarceration in October 2013. An unsuccessful appeal against the removal of his licence to practice as a doctor in this jurisdiction resulted in the appellant spending much of his time thereafter in Pakistan and Saudi Arabia, as she records in the judgment.
29. In paragraphs 17, 18 and 19, the judge records the fact that there was plainly an issue in relation to the parties’ sexual relationship from the early days of the marriage. The respondent wrote to the appellant seven months into the marriage to address these issues. The substance of her message to him confirms that, whilst she was anxious to become pregnant, he was very reluctant to engage in sexual relations. That same communication also confirmed her love and affection for the appellant in the later part of 2011. She wrote, “*You are the most caring and loveliest husband*” and that she felt “*Loved and safe and cared for*” although “*unwanted, inadequate and insulted*” by his apparent rejection of her as a sexual partner. The judge accepted that, in this aspect of their relationship as spouses, the appellant felt under pressure from the respondent.
30. The judge next set out the respective cases which the parties were presenting to the court. She recorded that, by December 2014, the respondent was alleging that the appellant had become “persistently abusive”. He had been demanding a copy of the child’s birth certificate and was requiring the respondent to put in place a timetable for his contact with her.
31. Of the mother’s acknowledged psychological frailties in the early days of their relationship, the judge recorded as a fact that the respondent mother had been emotionally dependant upon the appellant. There had been episodes when she had self-harmed and provoked in the appellant accusations that others might

perceive her as “psychotic and strange” as a result of her self-harming. The judge described that behaviour as a form of “gaslighting”. She contextualised the respondent’s accepted failure to make any complaint prior to the formal application for contact as resulting from the control which he exercised over her.

32. In relation to the appellant’s case, she recorded his insistence that the allegations against him were entirely false. She acknowledged the positive averments he was making that these allegations had only arisen as a result of the fact that the court was now involved in the arena of decisions about his contact with their daughter. She notes that, in the context of the allegations of rape, it was the respondent who had made arrangements for booking the family accommodation they were to share despite the circumstances of their formal separation. In this context the judge recorded the appellant’s evidence that the respondent had continued to facilitate contact arrangements whenever he was in the country despite the fact that she now alleged she was a victim of rape and sexual assault.

33. The judgment deals with the applicable law in one three-line paragraph in these terms:-

“36. The law can be briefly stated. It is for the person making an allegation to prove it to the civil standard of a balance of probabilities. There being no dispute of the law, I propose to say no more about it.”

34. The judge went on to analyse the evidence she had heard.

The criticism of the judge’s analysis of the two allegations of rape

35. Ms Markham QC relies on an early exchange between the judge and counsel as indicative of her fundamental approach to the analysis of the two allegations of rape. As the transcript of this exchange demonstrates, the judge said this:

“I think there are some allegations made [in the Scott schedule] which will be he said she said and there will be very little more and the court will make a determination one way or the other or consider it’s not possible to make a determination as long as everyone understands that that is the case.”

36. This exchange is relied on by the appellant as an indication that the judge misdirected herself from the outset. Ms Markham QC submits that this remark is a reflection of the judge’s failure to appreciate, or reflect in her judgment, the need to consider the specific allegations against the wide canvas which represented the totality of the evidence which was by then before the court. Instead of standing back following her survey of *all* the evidence and

assessing the credibility of each of the parties on the various issues and the manner in which each impacted on the other, she separated the allegations of rape into a separate compartment or ‘silo’.

Credibility

37. At no stage in her judgment does the judge explain in clear terms how she has reached her conclusions in relation to issues of credibility. She sets out her finding in relation to the appellant having made a ‘clear and deliberate threat’ to remove the child to Pakistan in April 2015. That finding was made on the basis of the judge’s analysis of the content of some heated WhatsApp exchanges between the parties in the early hours of the morning and from the foot of subsequent telephone calls and emails. Given the evidence available to the judge which went beyond the oral evidence of the parties themselves, it is not difficult to see why she was able to reach that conclusion. Further emails and WhatsApp communications between the parents to which the judge refers in paragraphs 53 to 60 of her judgment provided the evidential basis for her conclusion and finding that the appellant had threatened the respondent with both the removal of the child and professional embarrassment and that he had used those threats to control and intimidate her. She appears to have used those findings to reach a further conclusion that the appellant had said to the respondent that ‘women in Pakistan get killed’ for what she was doing.
38. In paragraph 68 of the judgment, the judge stated that these findings which she had made went to the nature of the relationship between the parties, “that is to the dynamic between them”. In the light of those findings she specifically declined to consider other allegations made by the respondent, including the serious allegation that the appellant had threatened to throw acid in her face. That particular allegation was consigned with several others (such as the allegations about publicly humiliating the respondent by pulling down her clothes in public and offering her dog food, assaulting her in a petrol station and threatening her with a knife held to her throat) to evidential territory into which the judge did not feel it necessary to tread. In the context of overall credibility and her assessment of these parties as witnesses of the truth, she plainly considered it unnecessary to explore these allegations and/or to consider whether such an assessment might have any impact on the allegations of rape.
39. The judge’s decision to ignore these allegations in her overall assessment of credibility and the likelihood or otherwise of the respondent having invented these allegations against the appellant was a case-management decision which she was entitled to make. Having declined to consider them, the position as a matter of law was that they were never proved and both parties were entitled to proceed on the basis that they played no part in her analysis or deliberations. That clear position has to be juxtaposed with the specific recital

which she approved at paragraph 7 of her subsequent order. That recital recorded the absence of any findings against the appellant in relation to the respondent's allegations of physical abuse suffered by her at the hands of the appellant "*despite acknowledging in judgment the strength and power of those allegations*". This recital in terms raises two issues. First, it is not entirely clear from the face of the judgment which of the respondent's allegations was intended by the judge to be captured within the generic description of "physical abuse". A purposive reading of the judgment suggests that the allegation relating to throwing battery acid in the respondent's face and threatening her with a knife held to her neck might fall within that description of abuse. Secondly, and perhaps of greater concern, the reference in the recital to the judge's clear view that those allegations could be properly characterised as having "strength and power" suggests on any objective view that, in the judge's mind, they might be true. Having earlier in her judgment refused to consider them as relevant to the fact-finding exercise on which she was embarked, the presence of this recital in the order inevitably leaves the parties, their advisers and this court in some doubt as to the extent to which these matters featured in the analysis of credibility which the judge undertook in preferring the account given by the respondent.

40. Ms Markham QC highlighted during the course of her oral submissions these and several other aspects of the evidence which received little, if any, consideration by the judge in the context of her findings. She points to the judge's dismissal of the paternal grandmother's evidence in a single sentence in paragraph 101 of the judgment without citing any reasons for rejecting her description of the physical layout of the property where the first rape was alleged to have occurred. The respondent herself had accepted in cross-examination that, apart from a single occasion very early on in the marriage, the parties had declined to have sexual relations at the property because of the lack of privacy in that accommodation. That lack of analysis is said to permeate through the judgment to the second allegation of rape. In paragraph 102, the judge found the respondent's allegation proved on the basis of, first, the underlying dynamic of their relationship and, second, the appellant's angry email sent some days before.
41. I accept Ms Markham's submission that there is an absence of analysis in the judgment in relation to the issue of the appellant's credibility. Having expressed a 'preference' for the evidence given by the respondent, the judge proceeded to accept that the allegations of rape were made out. Whilst she deals in paragraphs 104 to 118 with the appellant's allegations against the respondent, there is in my judgment no, or no sufficient, analysis of the appellant's case that what he was facing as a result of his contact application was a series of escalating and false allegations manufactured by the mother in

order to subvert any prospects of success in that application. In paragraph 119 of her judgment, the judge deals with those allegations in this manner:

“Point three, the mother’s allegations of sexual, physical and emotional abuse against the father are false. The mother has made false allegations against the father in order to deliberately prevent contact between the father and the child. I reject those allegations in the light of the findings that I have made in the course of this judgment.”

42. In circumstances where there is a solid challenge to the absence of a structured analysis to support her previous findings, this brief and somewhat summary dismissal of a significant plank of the appellant’s case seems to me insufficient for the purposes of enabling the parties, and the appellant in particular, to understand why his evidence was rejected by the court.

The absence from the judgment of a specific Lucas direction

43. As I have indicated, Ground 7 of this appeal relies on the judge’s failure to give herself an appropriate *Lucas* direction in respect of the appellant’s evidence. The appellant was cross-examined extensively on the circumstances of his conviction. That conviction involved offences of dishonesty. The judge was plainly aware of the implications of such a self-direction. During an earlier exchange with counsel, she referred to the fact that the appellant was found by a jury to have told untruths and was convicted despite his denials. She said this:

“RECORDER: There will be a Lucas direction but it seems to me that whilst it is something you will point up it has to be seen in the light of the Lucas direction, does it not ?”

MR ROWE: Of course it does, yes.

RECORDER: And so that is how I shall deal with it” [Transcript at B103]

44. There is no specific *Lucas* direction in the judgment although the judge deals with the appellant’s previous conviction in paragraph 98 of her judgment where she says this:

“Well, first of all, on behalf of Father, I make clear that despite his conviction after trial and his admitted dishonesty in relation to the conduct of his appeal against erasure, heard by the court in March 2015, I have placed no reliance on that for the purposes of this hearing.”

45. The standard or classic *Lucas*¹ direction involves a more nuanced approach than that suggested by the judge. A judge is not required to expunge from his or her mind or from an analysis of the evidence the fact that a witness has been

¹ *R v Lucas* [1981] QB 720

dishonest or untruthful on a previous occasion. That would be to ignore what might in any particular case prove to be a significant element in the evidential landscape. What is required of a judge is a self-direction that a person can lie for a number of different reasons including shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. Lies or dishonesty in the past do not of themselves prove the existence of lies now. Having given himself or herself such a direction, a judge must then reflect in the judgment how that direction has shaped his or her approach to relevant issues of credibility. In cases involving previous dishonesty or inconsistent statements, that is inevitably an essential part of the analysis in relation to the general credibility of the witnesses from whom the court receives evidence. Where, as here, a judgment lacks clarity in relation to that assessment, it is difficult to determine the extent to which this point was shaping or influencing any internal analysis or thought process conducted by the judge. It operates in the context of her assessment of credibility of each of these parties. In relation to the appellant's evidence and the fact of his previous conviction for dishonesty, the judge's apparent solution was to put it from her mind completely. In the case of the inconsistent statement which the respondent provided in the form of a character reference for him in the context of those criminal proceedings², the judge said this:

“.....I propose to say nothing more about it It is written in the context of Father's difficulties; she is his wife, she has plainly written it, I do not regard it as evidence that she is lying now or as evidence that she was lying then. In my judgment, it is a document written by a wife in support of her husband and I decline to make findings adverse to her, based on that.”

46. I accept that the judge asked herself many of the right questions in paragraphs 87 to 97 of her judgment in order to provide the foundation for a subsequent analysis of whether the evidence which each of these parties was putting before the court was reliable and credible. The difficulty which remains is the absence thereafter of any analysis which might enable a reader of the judgment to understand her response to those questions.
47. On behalf of the respondent, Ms Morgan QC invites me to stand back and take a much broader view from a survey of the exchanges which took place between the judge and counsel, the transcripts of the evidence which the parties gave, and the terms of the judgment itself.
48. She submits that, from the foot of that holistic exercise, it is possible to see that the judge must have reached her conclusions from an assessment of the parties informed by a *Lucas* direction. I was taken to the detailed written

² The statement which the respondent put before the court in 2015 referred to the appellant in these terms: “[He] has never treated me badly and is a very caring person”.

submissions which were put before the court (and which the judge must be taken to have read and absorbed). These contain a detailed and thorough exposition of the law and the approach to be adopted to the assessment of both the evidence and the reliability or otherwise of the accounts given by the parties. Ms Morgan QC properly reminds me that the judgment was delivered ‘hot on the heels’ of all the evidence and the written and oral submissions which the judge heard. There would have been neither the time nor the opportunity for the judge to craft the sort of judgment which addressed all of the many challenges now raised by Ms Markham QC with the benefit of forensic hindsight. She accepts that there are instances of “shorthand” in the judgment. By way of example, she points to paragraph 36 and the judge’s abbreviated approach to the law as implicit recognition that this was a case where a *Lucas* direction was required. She submits that her failure to refer in the judgment to a specific direction in this context is remedied by the fact that the judge treated the appellant as a man of good character. In adopting this approach she ensured that he was not disadvantaged in her assessment of his general credibility.

49. In relation to the specific allegations of rape, Ms Morgan QC submits that Ms Markham QC has overplayed the significance of the judge’s remarks at the outset in respect of her ‘he said, she said’ remark. That has to be seen against the background of the circumstances in which the alleged rapes occurred. On both occasions the parties were physically sharing a bed. There was no issue about that fact and thus the judicial determination was inevitably binary: it either happened as the respondent recounted or it did not. Her acceptance of the mother’s account, delivered as it was with a description in one instance of her head making physical contact with a windowsill, carries with it a rejection of the appellant’s case that her allegations were fabricated. She was well aware of the sexual difficulties within the marriage. The judge’s conclusion that the sexual relations which the respondent described had nothing to do with sex and intimacy and everything to do with violence and power is relied upon by Ms Morgan QC as evidence of the extent of the analysis which the judge undertook.
50. Ms Morgan QC conducted a careful analysis of several passages of the oral evidence extracted from the transcripts upon which she relies in support of a submission that the judge heard a great deal of detailed oral evidence, much of which is not recorded in her judgment. In relation to each of the alleged rapes, she took me to aspects of the cross-examination where the respondent was able to provide the court with a detailed exposition of exactly what had happened to her. Small otherwise inconsequential details of her physical surroundings on both occasions were presented to the court as what Ms Morgan QC describes as “compelling pieces of evidence” on which the judge was entitled to rely. It is accepted that there is little analysis in the judgment

of the appellant's case in relation to 'fabrication' but, in circumstances where the judge plainly believed the respondent, Ms Morgan QC submits this lacuna cannot be considered fatal to the reliability of her overall conclusions.

51. I recognise the significant pressures under which this judge was operating, in common with so many others in her position. She did not reserve her judgment and it is a challenging and demanding task for any judge to draw together within a limited time frame (here, overnight) the threads of various aspects of the evidence he or she has heard, often over several days of a fact-finding hearing.
52. It is therefore with regret that I have reached the conclusion that her findings cannot stand. I do not reach that conclusion because she was wrong but because of the manner in which she appears to have reached those conclusions. In my judgment there is substance in Ms Markham QC's challenge to the reasoning which is insufficient to explain how she conducted her assessment of credibility and which matters she did, or did not, weigh in the balance when reaching her conclusions. In this context, I regard it as a mistake to have included within her approved order the recital about the "strength and power" of the allegations which she claims to have ignored in her survey of the evidence. The inevitable inference to be drawn from that recital is that, despite having elected to make no findings in relation to them, she nevertheless brought them into account to one degree or another and further that she had carried out an evaluation of evidence which she claimed she had ignored in reaching her conclusions. In the absence of any clear analysis in relation to the means by which she had approached the assessment of credibility, the presence of this recital in her order signals a clear impression that matters which she claims to have left out of account have, on the contrary, informed her conclusions. I take the view that, in a case where one party is alleging that allegations have been fabricated as part of a course of conduct designed to marginalise a parent from the life of a child of the family, it is incumbent on the fact-finder to explain carefully why that case is rejected. That did not happen in this case. The appellant has been left with an impression that his case has not received the careful consideration which it deserved. Recognising the pressure of time on the judge on the final day allocated to this hearing, I have reached a conclusion that she did fall into error in compartmentalising much of the evidence. She did not have sufficient regard to how each piece of evidence fell to be considered against the totality of the evidential canvas before the court.
53. In the circumstances, I intend to allow the appeal. I have referred to the degree of elision which exists between the various grounds of appeal. Mr Justice Poole granted permission to appeal on the basis that each of the grounds supported the 'real prospects' of the appeal succeeding. To the extent

that it is necessary to identify which grounds have succeeded in this court, I propose to allow the appeal on all grounds pleaded.

54. The matter will be remitted for an early rehearing. Whilst I have significant sympathy with each of the parties in terms of the ordeal which I know this direction will create, I see no alternative in this case. The findings of the Recorder will be set aside. Whether or not they will be reinstated after a rehearing is a matter on which I cannot, and do not, speculate.
55. That is my order.

Order accordingly