



Neutral Citation Number: [2019] EWCA Civ 206

Case No: B4/2018/1108

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NORTHAMPTON
HH Judge Handley
NN17C00160

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
SIR PATRICK ELIAS

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF Y AND E (CHILDREN) (SEXUAL ABUSE
ALLEGATIONS)

Between :

A FATHER	<u>Appellant</u>
- and -	
A LOCAL AUTHORITY (1)	<u>Respondent</u>
Y'S MOTHER (2)	
E'S MOTHER (3)	
Y and E (by their children's guardian) (4) and (5)	
Y'S MATERNAL GRANDMOTHER (6)	

Frank Feehan QC and Kathryn Korol (instructed by Farleys LLP) for the Appellant
Alicia Collinson and Kate Ferguson (instructed by Local authority solicitor) for the First
Respondent
Damian Garrido QC and Elizabeth Walker (instructed by Sills Betteridge) for the Second
Respondent
Rachel Watkins (instructed by HCB Solicitors) for the Sixth Respondent
The Second, Fourth and Fifth Respondents were not represented at the hearing of the appeal

Hearing dates : 29 November 2018

Approved Judgment

LORD JUSTICE BAKER :

Introduction

1. This is an appeal against an order dated 8 January 2018 and a judgment by HHJ Handley dated 20 December 2017 in which he made findings in care proceedings under Part IV of the Children Act 1989 that the appellant had sexually abused his daughter, hereafter referred to as “Y”.
2. This is a very troubling case. The findings made against the appellant are of the utmost seriousness and, if upheld, will affect the whole family for the rest of their lives. At one stage, courts hearing care proceedings followed the principle identified in a number of authorities and expressed by Lord Nicholls of Birkenhead in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at p586 that “the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability”. For the last 10 years, however, since the decision of the House of Lords in *Re B* [2008] UKHL 35, judges have been enjoined to apply the civil standard of proof without qualification. The guiding principle was stated by Baroness Hale of Richmond at paragraph 70:

“I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

3. Not everyone is comfortable with this principle. Given the life-changing consequences of findings of sexual abuse within a family, there are some who advocate a higher standard of proof. The law, however, is clear – it is the unqualified civil standard of proof that must be applied. But many judges hearing these difficult cases find that the balance of probabilities is not always an easy standard to apply. In most cases, there will be no physical evidence of sexual abuse, and the evidence will often consist only of statements made by the child. Evaluating that evidence can be extremely challenging, especially where the child is very young, and/or if, as in most cases, he or she is not called to give evidence in court and therefore not subjected to cross-examination. Frequently, there will be concerns that the child may have been influenced by other people when making the allegations, particularly if they arise in the context of disputes between parents. Unpicking what exactly the child said when and to whom, often through layers of hearsay, can be very difficult.
4. To assist courts in reaching decisions in cases involving these issues, the government has provided expert guidance, “Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses and guidance on using special measures” (Ministry of Justice, 2011). Notwithstanding its title, the guidance applies to civil as well as criminal proceedings. The guidance is, however, extremely detailed and often very challenging for police officers and social workers to follow. In many cases, the investigators fail to comply with the guidance in one way or another, and

the judge (or the jury in criminal cases) has to assess the extent to which those failures undermine the reliability of the evidence.

5. The challenges facing judges dealing with allegations of this sort are therefore very considerable, particularly in the context of the pressures currently experienced in the family courts. But it is of the utmost importance that these cases should receive careful and thorough scrutiny, both at first instance and, where the circumstances justify the granting of permission to appeal, by the appellate court.

Background

6. Y was born in 2007. Her parents had started a relationship in 2005 and were married in 2008. The following year, however, they separated. Thereafter, Y lived with her mother but had regular contact with her father. Both parents formed new relationships and had other children – the mother has two further children by her present husband and the father another daughter, E, born in 2012, by his current partner.
7. It is alleged that in 2010, when she was still under the age of three, Y started making statements to her mother and grandmother suggesting that her father had sexually abused her. The mother alleges that on one occasion Y returned from contact with her father with very red anal and vulval areas which the mother photographed. The next day, she showed the photographs to her GP. She in turn arranged a child protection medical examination. That examination did not, however, identify evidence of abuse.
8. The mother reported Y's alleged statements to the local authority who started an assessment. When speaking to social services, the mother stated that she did not believe that the father was capable of sexual abuse. The father claimed that the mother was using the allegations of sexual abuse to undermine his relationship with Y and as a result was causing the child emotional harm. The social worker allocated to carry out the assessment, CG, spoke to Y and, as she recorded in her subsequent report dated 27 October 2010, "did not press Y for any answers, but invited Y to talk about things she likes or dislikes." Y did not repeat any allegations to CG who concluded that, "as both parents are alleging abusive behaviour from the other parent, Y has been exposed to considerable animosity between the parents".
9. On CG's recommendation, a child protection conference was convened and Y was made subject to a child protection plan under the category of emotional harm. Contact between Y and her father, which had been suspended during the investigation, resumed and continued thereafter with no further complaints or incidents of significance. Private law proceedings started by the mother were resolved without a contested hearing. At the end of 2011, the local authority closed the file and were not involved with the family again for several years.
10. Thereafter, Y continued to have contact with the father for several years without any incident or allegation.
11. It is the mother's case that, in May 2016, Y made a further allegation against her father. On the following day, the mother took a video recording of a conversation with Y in which she repeated the allegation. It is alleged that Y also repeated it to the mother's husband and to the maternal grandparents. The mother did not, however, report the further allegation to the police or to social services for several weeks.

Meanwhile, contact between Y and her father continued. In July 2016, some two months after the alleged disclosure, an incident occurred at school involving an altercation between the father and the maternal grandmother. The police were involved in this incident and it was at this point that the maternal grandmother reported the alleged disclosure made by Y two months earlier. The local authority convened a strategy meeting which authorised a s.47 assessment. Y was spoken to by a social worker (who also did not give evidence at the fact-finding hearing). In the course of the conversation, Y said that her father put his finger in her back bottom. According to the social worker's record, Y also told her that her father had done this before when she was a baby. When the social worker asked how she got this information, Y replied that her grandmother had told her. Y also told the social worker that her grandmother had shown her pictures of what her father had done to her when she was a baby.

12. Y was then interviewed by the police on three occasions – 2 August, 24 August and 20 September 2016 – in the course of which she made further allegations that she had been sexually abused by her father. These interviews lie at the heart of this appeal and are considered in detail below. The father was arrested and released on bail subject to a condition that he should have no contact with Y and no unsupervised contact with any other person under the age of 18. As a result, he was obliged to leave his home and his contact with his younger daughter, E, was supervised by his partner. A case conference was convened and Y again made subject to a child protection plan under the category of emotional harm. E, who had made no allegations, was made subject to a child in need plan.
13. In November 2016, the Crown Prosecution Service decided to take no further action arising out of the allegations. Meanwhile, the mother had started further private law proceedings under the Children Act seeking an order restricting the father's contact. The proceedings were listed for a fact-finding hearing to consider the mother's allegations that the father had sexually abused Y and the father's cross-allegations that the allegations had been fabricated. Before that hearing could take place, however, the local authority started care proceedings in respect of Y and her half-sister E, which in due course were listed for a fact-finding hearing before HHJ Handley in December 2017.
14. At the conclusion of that hearing, the judge made the following findings:
 - (1) Between 2013 and 2015, the father had anally raped Y on multiple occasions.
 - (2) In 2011/12, father masturbated and ejaculated in front of Y.
 - (3) On at least one occasion, the father has vaginally raped Y.
 - (4) On multiple occasions from 2010, the father has inserted his thumb or finger into Y's vagina and/or anus. Specifically, in late 2015 and around 20 May 2016 the father inserted his finger into Y's vagina.
 - (5) In 2011/12, the father made Y stroke his penis.

- (6) On 14 July 2016, Y was dragged by the neck by the father who then assaulted the grandmother in front of Y by stepping on her foot.
 - (7) The mother was emotionally abused and controlled by the father during their relationship. She was bullied by him, called “fat”, put down, told what to wear and not allowed to go out with friends. He made her check emails in front of him and threatened her with violence.
 - (8) The mother was physically abused by the father during and after their relationship. On more than one occasion, he threw her across the room. On one occasion, he grabbed her by the neck leaving marks. On 3 June 2010, she was pushed by the father in front of Y.
 - (9) The mother failed to protect Y by not properly informing social services or the police of the allegation made on 20 May 2016 and by allowing contact between the father and Y to continue.
 - (10) The maternal grandmother failed to protect Y by not reporting the allegation until 14 July 2016, despite having been aware of it since the end of May/early June 2016.
15. A number of other findings initially sought by the local authority were either not pursued or not made by the judge. In particular, having considered the evidence about the incident when the maternal grandmother showed Y the photograph taken of her genitalia some years ago, the judge accepted the grandmother’s explanation that she had been unaware that the photograph was stored on her computer, that it was shown to Y inadvertently, and that Y only had a fleeting glimpse of the image.

The judgment at first instance

16. The judgment started by identifying the key family members and summarising their respective cases. When summarising the father’s case, the judge recorded his argument that Y had been coached by the maternal family, principally the maternal grandmother. He also recorded at this early stage in the judgment that
- “the father made reluctant concessions that the nature and content of Y’s evidence indicated personal experience of abusive behaviour and when pressed robustly on the issue, allegations [sic] that Y must have been exposed to actual abuse, effectively to inform and add detail to her allegations”.
17. The judge then summarised the history of the case. When dealing with the 2010-11 allegations and the investigation carried out by CG, the judge stated (at paragraph 14) that it was “clear from the reports that CG did not believe Y and considered that she had been coached” but, noting that CG had not been called to give oral evidence before him, he added “in my judgment, the reports of CG prove only that she did not believe Y”.
18. The judge then set out the legal principles to be applied. His summary of those principles is strongly criticised on behalf of the appellant. I shall consider those criticisms below.

19. The judge then set out a summary of the evidence, starting with the three ABE interviews. At the end of the passage in the judgment in which he considered those interviews, but before specifically considering the other evidence, he said:

“Having considered the evidence in its totality, including Y’s presentation in her interviews and in the light of my observations in respect of other witnesses and recognising that if the father’s denials are accurate Y would have been lying throughout her three interviews, I find on the balance of probability that Y was providing an honest and accurate account of her experience within her ABE interviews and generally.”

20. He then summarised in turn the evidence of the eleven witnesses who gave oral evidence before him, including the mother, maternal grandmother and father. At paragraph 35, he was extremely critical of a teacher who gave evidence and who had failed to report to a core group meeting about concerns noted in Y’s school record. In the course of her evidence she had accepted that her statement had been inaccurate and misleading, and he concluded that he could attach no weight to it. At paragraph 37, dealing with the evidence of the police officer who had conducted the three interviews of Y, he observed that she had not been challenged on her role during the interviews. He also recorded her evidence that it was not unusual for allegations to develop over time as the complainant gains confidence in the process. In the section of his judgment dealing with the officer’s evidence, the judge also said that, having considered the evidence in its totality, he was not persuaded that the ABE interviews were undermined or compromised by the actions of the maternal family.

21. When he came to deal with the mother’s evidence, he described her as “a consistent witness who accepted criticism when fair and made concessions when appropriate”. He accepted her evidence that she had taken photographs of Y’s bottom in 2010 to show to the doctor rather than to gather evidence against the father, and that she had then overlooked the fact that the photographs had been saved onto her mother’s computer. He accepted that the mother had decided to record what Y was saying in May 2016 because of her concerns that Y had not been believed in 2010 and that the mother had subsequently accepted that this had been wrong. He accepted her explanation for not reporting the allegations immediately in May 2016 – that she was in a dilemma because Y had not been believed in 2010 and she was worried about losing Y on grounds of emotional abuse. He accepted that she genuinely regretted her decision to allow contact to continue for some weeks after Y’s allegations in May 2016 and that, if the allegations were true, this exposed Y to the risk of further abuse. He concluded (paragraph 43) that the mother was an honest witness who gave an accurate account of matters within her knowledge.

22. Turning to the maternal grandmother, the judge recorded the father’s contention that she was the main driving force behind the alleged conspiracy against him. He stated that he accepted her explanation about the incident when she had shown Y the photograph taken of her bottom when she was a baby, saying at paragraph 46:

“She had forgotten that mother had copied her mobile phone data, including the photographs, to her computer and that it had innocently popped up some years ago and that Y saw the image. I accept her evidence that she had no idea that it was there, that the viewing was unintentional, brief and concluded with a simple dismissive comment and that the incident had been forgotten by her.”

The judge proceeded to accept the grandmother's account of her reasons for the delay in reporting the May 2016 allegations, and her expressions of regret at this decision. He then said that he rejected the allegation that the grandmother had instigated or led a conspiracy to coach Y, adding that in his view such a conspiracy would have had to include actual abuse to instil in Y the knowledge and experience necessary for the disclosures she subsequently made. He concluded that the grandmother was an honest and accurate witness.

23. The judge then addressed the father's evidence. He reiterated the father's acceptance that aspects of Y's evidence confirmed that she had had physical experiences of abuse (for example, her description of ejaculation). He then particularised a number of aspects of the father's evidence which he said caused concern. He challenged the genuineness of his distress when giving evidence. He criticised the father for calling as a witness a teacher whom the judge found to be an unreliable witness. The judge observed that the father must have known that the teacher's evidence was false and misleading. He described the father as an evasive and self-serving witness, criticising in particular his evidence about the incident in July 2016. He concluded:

“As I consider father's evidence in its totality and in the context of the total evidence, I find that he was an unimpressive witness who gave dishonest evidence in respect of the allegations in issue”

24. In conclusion, the judge asked himself the following questions:

- “(a) whether, on the balance of probability, the maternal family would engage in and support contact for a number of years then submit Y to a regime of coaching to actual sexual abuse at a time in her life when she would know the difference between truth and lies and be equally capable of making allegations against an abuser in the wider maternal family, and
- (b) why would the maternal family coach Y to make historic allegations at a time when contact was taking place without any apparent issues, and
- (c) why would the maternal family coach Y to the extent alleged and expose Y to actual sexual abuse in view of the detail within her evidence to destroy the father when far fewer ‘coached allegations’ would achieve the same end result and without the need to expose Y to sexual abuse in view of my finding that Y is a child who has been sexually abused, and
- (d) why, if the maternal family were so determined to ruin father's life, were they so reluctant to report the May 2016 allegations to the police”

He concluded:

“Having reflected on all of the available evidence I find that I am driven to the finding that Y is a truthful witness and with that finding in mind I believe her evidence in preference to her father's denials.”

The parties' cases on appeal in outline

25. On behalf of the appellant, Mr Frank Feehan QC and Ms Kathryn Korol contend that there had been a number of procedural failures in the case:

- (1) the judge failed to direct himself correctly or adequately as to the applicable law;
- (2) as a consequence, he failed to analyse the evidence of the previous social worker, CG, which he wrongly rejected as merely her opinion as to the child's veracity rather than primary evidence to be weighed in the balance;
- (3) on the other hand, he wrongly accepted without criticism the opinion evidence of a subsequent social worker and a police officer;
- (4) he failed to address the evidence that the child had been shown photographs of her anogenital region as a baby and told that this represented evidence that her father had abused her;
- (5) he failed to consider a chronological inconsistency as to when and to whom the child first made her allegations;
- (6) he failed to address what Mr Feehan and Ms Korol described as serious problems with the ABE process.

In addition, they contend that the judge made a number of material errors in his assessment of the evidence which led him wrongly or improperly to add weight to the case against the father.

26. The respondents to this appeal – the mother, local authority, and grandmother, all of whom were represented at the appeal hearing, and the guardian, who was not represented but who filed a response to the notice of appeal – all invite the court to reject those arguments. In particular, it is submitted by Mr Damian Garrido QC and Miss Elizabeth Walker on behalf of the mother that this is substantively an appeal against the judge's findings of fact with which this court should not interfere save in the circumstances identified in previous appellate decisions. It is pointed out that, when coming to his judgment, Judge Handley had many advantages not available to this court, in particular the opportunity to watch the video recordings of Y's interviews on two occasions, seeing and hearing the evidence of the lay parties, and watching their reactions to the other evidence. It is submitted that transcripts only give a flat, one-dimensional impression of evidence that ignores the nuances appreciated from observing the impact of delivery as the evidence unfolds. Further reliance is placed on the point acknowledged in many appellate cases that a judgment is not required to be perfect or an extensive recitation of every legal principle, submission and contested fact. What is required is an explanation of the judge's reasoning for his findings. It is submitted that a designated family judge, such as Judge Handley, with all the experience that such an appointment requires, is entitled to a margin of appreciation to reflect that, in all likelihood, he knows how to discharge the functions assigned to him.
27. I shall consider the issues raised on behalf of the appellants under the following headings: (1) legal principles; (2) the ABE interviews; (3) other alleged errors in the judge's analysis.

Legal principles

28. Under the heading “Legal Principles”, the judge repeated the summary of the principles to be applied in fact-finding hearings in family proceedings set out in my judgment in *Devon County Council v EB and others* [2013] EWHC 968 (Fam). Mr Feehan and Ms Korol submit that this is wholly inadequate for the task facing a judge when assessing allegations of sexual abuse. They assert that the judge was given no assistance to a full understanding of this aspect of the law by any of the advocates who appeared before him. They submit, however, that he failed to have any regard to the guidance given in reported cases as to the treatment of evidence of such allegations, including evidence derived from interviews conducted under the ABE procedure. They identify a number of cases in which guidance has been given, including judgments of this court in *TW v A City Council* [2011] EWCA Civ 17, [2011] 1 FLR 1597, *Re W, Re F* [2015] EWCA Civ 1300, and *Re E (A Child)* [2016] EWCA Civ 473, [2017] 1 FLR 1675, and the judgment of MacDonald J in *AS v TH and others* [2016] EWHC 532 (Fam). They rely in particular on the extensive analysis in the last-named judgment at paragraphs 22 to 51. They submit that the fact that the judge failed to refer to any of these cases or the guidance contained therein was a material omission and led him into error when analysing the evidence in this case. His approach to the law, as to other aspects of the case, was insufficiently rigorous.
29. In reply, Mr Garrido and Miss Walker submit that to describe the judge’s self-direction on the law as “wholly inadequate” is to misunderstand the obligations placed on a trial judge. They submit that the citation of the summary of the law in *Devon v EB* was comprehensive and not a matter for criticism. They add that, at a later point in his judgment, the judge reiterated the importance of considering the totality of the evidence, which is one of the key principles identified in that case. They submit that it is clear that the judge was alive to the importance of the ABE guidance, to which he referred at several points in his judgment. They point out that, contrary to Mr. Feehans’s submission, the judge was referred to the decision in *AS v TH* by several of the advocates, including the advocate who appeared on behalf of the father and who, we were told, supplied the judge with a copy of the case at the pre-trial review hearing. Although that authority is not cited in the section on the legal principles, it is mentioned later when the judge was considering the ABE interviews. In the circumstances, they contend that it cannot be fairly argued that the judge was not aware of the case law in which the ABE guidance is considered.

The ABE interviews

30. The principal focus of the appellant’s argument was directed at the judge’s treatment of the ABE interviews. In order to analyse the submissions on this issue, I shall refer, first, to the relevant part of the guidance, secondly to the key passages in the three interviews and, thirdly, the judge’s treatment of the interviews in his judgment and, finally, the parties’ respective submissions to this court on the issue.

The Guidance

31. The ABE guidance document contains a large number of detailed instructions, guidelines and points of good practice. The paragraphs which are perhaps of particular importance in family proceedings are set out in my judgment in *Re W and E*, supra, at paragraphs 33 to 42. It is unnecessary to repeat that exercise here. Equally, it is unnecessary to set out extensive citations from the earlier reported cases.

32. The points of particular relevance to this appeal, including the matters identified in behalf of the parties, seem to me to be as follows (the reference to paragraph numbers relate to the ABE Guidance, save where otherwise indicated):
- (1) A well-conducted interview will only occur if appropriate planning has taken place. The importance of planning cannot be overstated (paragraph 2.1).
 - (2) Any initial questioning of the child prior to the interview should be intended to elicit a brief account of what is alleged to have taken place; a more detailed account should not be pursued at this stage but should be left until the formal interview takes place (paragraph 2.5).
 - (3) In these circumstances, any early discussions with the witness should, as far as possible, adhere to the following guidelines.
 - (a) Listen to the witness.
 - (b) Do not stop a witness who is freely recalling significant events.
 - (c) Where it is necessary to ask questions, they should, as far as possible in the circumstances, be open-ended or specific-closed rather than forced-choice, leading or multiple.
 - (d) Ask no more questions than are necessary in the circumstances to take immediate action.
 - (e) Make a comprehensive note of the discussion, taking care to record the timing, setting and people present as well as what was said by the witness and anybody else present (particularly the actual questions asked of the witness).
 - (f) Make a note of the demeanour of the witness and anything else that might be relevant to any subsequent formal interview or the wider investigation.
 - (g) Fully record any comments made by the witness or events that might be relevant to the legal process up to the time of the interview (paragraph 2.6, see also *AS v TH*, supra, paragraph 42).
 - (4) During the course of an investigation it may be necessary to ask a witness to explain a significant evidential inconsistency between what they have said during the interview and other material gathered during the course of the investigation. Explanations for evidential inconsistencies should only be sought where the inconsistency is a significant one and after the witness's account has been fully explored, either at the end of the interview or in a further interview, as appropriate. Questions intended to elicit an explanation for evidential inconsistencies should be carefully planned, phrased tactfully and presented in a non-confrontational manner (paragraphs 2.161-3).
 - (5) A full written record should be kept of the decisions made during the planning process and of the information and rationale underpinning (paragraph 2.222).
 - (6) For all witnesses, interviews should normally consist of the following four main phases: establishing rapport; initiating and supporting a free narrative account; questioning; and closure (paragraph 3.3).
 - (7) The rapport phase includes explaining to the child the "ground rules" for the interview (paragraphs 3.12-14) and advising the child to give a truthful and accurate account and establishing that the child understands the difference between truth and lies (paragraphs 3.18-19). The rapport phase must be part of

the recorded interview, even if there is no suggestion that the child did not know the difference between truth and lies, because “it is, or maybe, important for the court to know everything that was said between an interviewing officer and a child in any case” (per McFarlane LJ in *Re E*, supra, paragraph 38).

- (8) Underpinning the guidance is a recognition “that the interviewer has to keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else” (per Sir Nicholas Wall P in *TW v A City Council*, supra, at paragraph 53).

Y’s three interviews

33. With those points in mind, I turn to the interviews conducted in this case. We have not been asked to watch the video recordings of the ABE interviews, but we have been provided with full transcripts. The following features of the interviews are of particular relevance to this appeal. As is often the case when considering an appeal concerning challenges to ABE interviews, extensive quotation from the transcripts is unavoidable.

The first interview on 2 August 2016

34. For the first interview, an intermediary was present. (She did not attend the following interviews.) At the start of the interview, the intermediary read out her formal declaration. The officer then said:

“Okay so before we came in here I said there were a few ground rules, didn’t I?”

In reply, Y nodded, and the officer then repeated some of what they had discussed. In doing so, she said that they “also went through something about telling truth and lies” and asked Y if she could remember what the story was about. Y then recounted a story about a child telling a lie about breaking a window.

35. There was no “rapport” phase of this interview. Instead, the officer immediately said:

“So I’ve asked you to come here today to meet me and I wanted you to tell me some stuff, and I understand you wanted to talk to me about some stuff. Do you think you feel ready to talk?”

Y replied yes and proceeded to describe how her father had “put his finger up my privates”. In my judgement, this part of the interview constituted free narrative in a form recommended in the ABE guidance. Y gave a description of what she said had occurred, with some experiential detail – for example, that she had been lying on her bed, that she was waiting to get into her bath, that she had said “ouch” and added:

“and then when I went to the toilet, because I always go to the toilet before bath, just really hurted when I did it and it was front privates.”

Y said she had been lying facing the wall when her father had come in. A little later, she added:

“And it scratches me inside because he has really sharp nails and he hardly ever cuts them.”

The following exchange then took place:

“Q: ... And you said your front bottom.

A: Yeah [in fact, Y had said ‘front privates’]

Q: Yeah. So where on your front bottom did he put his finger

A: Like the, like, where we pee and then, um, it was also like in the middle-ish, like ... but it was like ... it was in the middle but then it was touching my front bum as well so it was like – it was like that up my middle bit, and then his knuckle was in my front bit where we pee and it was like nudging it up. So it was kind of hurting as well.”

36. The officer asked who else was in the house at the time, to which Y replied that the father’s girlfriend and her daughter had been there. The officer asked whether anything else had happened after that, to which Y replied no but added “but there’s another time when he’s done it”. About this incident, she gave the following account in free narrative:

“Where I was lying on the bed and he was reading me a story ... And he touched me again in my front, but this time it was with the actual nail in the front like, (*gesturing*) like it was in the middle but this time it was on the front, just like the front bit of the front, and he just scratched a little bit of it and then took it away and that was it.”

37. The officer then asked some questions about the two incidents. In the course of answering the questions, Y added more detail, including that on the first occasion

“it didn’t hurt as bad as the last one because it actually went (*demonstrates*) really scratch because he had sharp nails.”

When asked what she had been wearing, she replied she was in her pyjamas but had pulled her pyjama bottoms down because it had been hot in bed.

38. When the officer asked if there was anything else, Y described an incident on a sports field when the father had allegedly dragged her roughly so that she was starting to suffocate. Asked again if there was anything she wanted to tell the officer about her dad, she replied “it’s just really frightening” and then asked to say more about that, described her father’s voice as being really loud and said that “he comes right in your face”. Towards the end of the interview, she was asked whether there were any other times when her father had done anything like that that has made her feel scared, to which she replied “not that I remember”. She said that the first person she had told about it had been her mum and said that she had told her “as soon as I saw her”, adding that she had also told her nan.

The second interview on 24 August 2016

39. Y was interviewed by the same officer. No intermediary was present on this occasion. Once again, the ground rules conversation took place before the interview started. The question of “truth and lies” was dealt with in this way:

“Q: Okay, and we’ve already previously talked about truth and lies and you understand the difference between telling truth and lies.

A: (*Nods*)

Q: Yeah?

A: (*Nods*).”

Again, there was no “rapport phase”. Instead, the officer immediately asked “what have you come here to talk to me about?” Y replied: “I’ve got more information” and then gave the following passage of free narrative:

“Um, well, once my dad, um, well, I am frightened of going in my bedroom on my own and I think once my dad, he sort of put like, I think it was a knife, but like I think it was metal so like a knife and like ... like soft and - not soft, but hard, softish, flat and smooth like a knife, um, um, and he dragged me down the field and strangled me before. Um, and he touched me in my front and back bottom before, and he’s ... oh E [the father’s partner’s child], um E, I think E is getting touched as well because once it was him and E and you could hear him - her shouting ‘No’ and ‘Stop it’ and ... and I think this has been going on since I was three, but E comes up to me, points to her front and back bottom and says ‘Touch’, and it’s weird, I get confused about it.”

40. Shortly afterwards, Y said that “when I was four he made me stroke his private bits”. She said that he had done this when she was lying in bed with him, that it had happened only once, at 5 o’clock in the morning. The officer asked, “what did his privates look like and what did they feel like?” Y replied:

“it’s got layers skin ... And then it felt soft but then a little bit bumpy. The top was soft at the end The top is bumpy and it’s all soft at the end ... It’s weird looking at ... smooth ... wobbly ... it was going up and down.”

The officer asked her about the knife. Y described it as big and having a curvy shape which she drew on a notepad. She said that she had been asleep and when it scratched her she woke up and “saw a tiny bit of metal”. She said that she had been lying on her bed facing the wall and that she had been “nude”. The interview continued:

“Q: And what did your dad do with the metal?

A: He put it inside me and then - and when it was inside it was like that (*demonstrates*) and scratched me, and then he closed my door, a little, I knew I was awake because it scratched inside, and I pretended to be asleep and turned over.”

She said that he had put it in her on two occasions, once in her front and once in her back, explaining that she meant in her “front and back bum”. She said that it had felt “weird” and that “it’s sore to sit down sometimes”. When asked where it was sore, she replied “like in the middle”.

41. The officer then reminded her that in the previous interview she had told him that her father had put his finger in her front. Y said “I’ve got another thing”, adding that “it

might have been a full finger” and “sometimes I think it went like up to there on a thumb”, indicating what she meant. When asked in what part of her privates had been touched, she replied “the thumb I think was in the back, the finger it was in the front”. Asked how she knew it was his thumb, she replied “because it was bigger than a finger and it was fatter than a knife”. Asked how often her father had touched she replied “most times I go to his house but not every time”. She then gave further details of the occasion she had seen her father touch E, and repeated that she thought “he might be doing it to her” because “she’s coming up to me and saying ‘touch’, I could see him doing that”. She said that she had sometimes seen squares of blood in the bed, sometimes dots of blood, and sometimes blood in the toilet. She said that this had happened at her dad’s house and once at her mum’s, adding “but not like she touches me, but it like comes up because my dad touches me”. She said that she had kept quiet about it but had eventually told her mum. Asked if she had told any other family members, she shook her head and then said that her mum “doesn’t know about the blood thing”.

The third interview on 20 September 2016

42. The third interview took place 27 days after the second interview. Once again, only the officer was in the room with Y. On this occasion, the officer did explore with Y during the interview whether she understood the difference between truth and lies. Once again, however, there was no “rapport phase” and on this occasion no free narrative. Instead, the officer immediately asks “shall we start with this picture?” This was a reference to a picture which the mother had given to the officer on which was written “drawn by Y on 6th of 9th 2016”. Asked to describe what she had drawn, Y replied:

“that’s his bum and that the willy coming out and then there’s things coming out but there’s only one drop and it’s going down”.

She stated that it was her dad and gave his name.

43. When the officer asked what she had come to talk to her about, Y said she was embarrassed and was initially reluctant to talk. The officer encouraged her to talk during the following exchange:

“Q: So what else have you got to tell me?”

A: Er ... er ... er ... er (*points*).

Q: You can’t remember?

A: (*shakes head*)

Q: I think you can. I think you can. Why don’t you want to say?

A: Er ... I’m embarrassed.

Q: You’re embarrassed.

A: Really don’t want to say.

Q: No? But we've talked about a lot already, haven't we?

A: Yeah.

Q: We've talked about loads in this room so far in the last couple of weeks and you've told me loads, so you can – you can feel at ease telling me whatever you need to tell me.

A: I've said so much I'm not sure there is anything else.

Q: I did not hear any of that. Say it all again.

A: I've been here so many times and I think I've said everything.

Q: I know you've been here so many times, you're probably sick of seeing me, aren't you?

A: No.

Q: So I know you've told me a lot but I understand that there is other stuff you haven't told me and it's really important for me to know that".

A: Mm. I'm embarrassed.

Q: I know you're embarrassed.

A: Talking about his willy is (*inaudible*).

Q: Talking about his willy is gross. So is that what it's about?"

Y then said:

“once I woke up to a mad pain and I saw him in the corner of my eye like this (*demonstrates*), it's embarrassing, like this (*demonstrates*), standing over my bed like this (*demonstrates*) putting his willy in my back bum.”

In answer to further questions she described her father had “pulled his pants down” and later added “then I think he saw me a little bit and he ran away”. The officer told her “you're doing really well, you're doing very well”. A little later in the interview, the following exchange took place:

“Q: What was he doing with his willy?

A: He was getting it right up like this (*demonstrates*).

Q: He was sticking it out?

A: Yeah, I can't do it very well, but he was like ... like that (*demonstrates*). Like ... (*laughs*). It's hard to do, but a little bit, you know, like that, sticking out (*demonstrates*).

Q: So what was hurting?

A: When he put it in, like - it's like - it's like only a tiny bit up.

Q: What was only a tiny bit up?

A: His willy.

Q: And what was it up?

A: My back bum.”

44. In answer to further questions, Y said that she had felt pain, that she was eight or eight and half at the time, and that it had happened three or four times. She added “sometimes he says ‘don’t wake up, don’t wake up’.”

45. The officer then returned to the picture and established that Y had drawn “things coming out”. Following further questions, Y said “the willy was sticking out and then the wet stuff came out”. Asked to describe this, Y said:

“it was wet, obvious. It looked a bit like raindrops but it was – it was like the shape of raindrops... it was all blobby.”

Asked to describe its colour she replied “whiteish”. Asked where did it go, she replied “on the floor”. She said that it had happened on one occasion when she was four years old.

46. Towards the end of the interview, the following exchange took place:

“Q: Right, there’s one more thing I wanted to ask you, Y. Do you remember when you told your mum and your Nan, a long time ago, and then the police started investigating? Do you remember when you first told them?

A: Yeah.

Q: Around that time did your mum or Nan or anybody show you any pictures on a computer?

A: My Nan.

Q: Can you tell me more about that?

A: Well, we were just looking at cousins.

Q: Yeah.

A: And this picture came up of my bum and Nanny just – I said ‘what’s that?’ and Nanny said ‘your bum’ and turned it off.

Q: Oh, okay. So she – you were looking at pictures of your cousins and it just came up?

A: Yeah. Just randomly.

Q: What did it look like?

A: It was like my bum cheeks and it was – it was like my back bum.

Q: Your back bum. Did she tell you anything about it?

A: No.

Q: Why they had a picture like that on the computer?

A: (*shakes head*).”

The judge’s treatment of the ABE interviews

47. The judge described Y’s allegations as being at the centre of the case. He said that he had viewed the three ABE recordings on two occasions. He noted that the father had never challenged the police officer on issues relating to allegations of breach of accepted good practice, and added that it had not been put to the mother in cross examination that Y had been coached in advance of the ABE interviews following her earlier allegations in May 2016.
48. The judge noted that much of Y’s account was given by way of free narrative rather than in response to questions. He described her as presenting as careful, thoughtful and considered, noting that she often paused before giving her detailed accounts. He added that her accounts developed over time, suggesting that this was perhaps as she gained confidence in the process. On specific details, he observed, with regard to her reference to seeing blood in her bed, that “she would have had to have been coached in great detail about this as she may not have appreciated that the alleged behaviour could have resulted in bleeding”. He noted that she was able to describe a male penis, and ejaculation and semen, in child-like but accurate terms and had produced a simple but corroborative drawing. He concluded that she had witnessed ejaculation and recorded that the father had accepted this in cross examination. He noted that she had described her feelings from the alleged abuse, that she had given a clear demonstration of her father’s pose as he approached the bed.
49. Within his analysis of the ABE interviews, the judge included a number of further points of evidence which supported the veracity of the allegations, namely:
 - (1) the fact that Y had made allegations to a number of people, in addition to her mother and grandmother, in 2010 and 2016;
 - (2) her fear of her father when he shouted, her nightmares and difficulty in sleeping;
 - (3) her allegations to her mother that he had threatened her not to tell anyone, and warned her that her mother and grandmother would be hurt if she told anyone;
 - (4) her description of feeling dirty and needing to bathe, and an incident in October 2016 when she had been seen scrubbing out her private parts;
 - (5) the fact that, in the judge’s words, “Y is a child who would have known that she was telling lies to a number of people including the police and school

friends over a long period of time ... and in my judgment would have known that such lies would be very serious for her father”.

Submissions on the ABE interviews

The appellant’s submissions on the interviews

50. Mr Feehan and Ms Korol make a series of submissions about the planning and conduct of the interviews. Their overarching submission is that there were many breaches of the ABE process which were neither brought to the attention of the judge or considered by him in his judgment.

51. As to the preparation and planning of the interviews, they submit that, contrary to the ABE guidance endorsed by MacDonald J in *AS v TH*, there is no record of any planning carried out by the police prior to any of the interviews in this case, apart from the social worker’s visit to the child on 18 July 2016 and the fact that an intermediary was asked to attend the first interview. It is submitted that, given the history of this case and the suspicions that the maternal family had coached or encouraged the allegations, a careful planning process was imperative. There is no evidence that such a process took place here. In addition, Mr Feehan and Ms Korol rely on the fact that the initial allegations were made to family members at various points in the first half of 2016. These conversations were not properly recorded, nor reported at the time to the police or social services.

52. With regard to the first interview on 2 August 2016, it is submitted that, contrary to the ABE guidance endorsed by McFarlane LJ in *Re E*, the rapport phase, including the discussion about truth and lies, took place prior to the recorded interview. This is said to be a serious omission, particularly in a case where there have been previous investigations leading to a conclusion that the child’s allegations were unreliable and the child had already given a social worker reason to believe that she had been influenced by her maternal family. Criticism is also levelled at the interviewing officer for her preliminary remark to Y:

“I’ve asked you to come here today to meet me and I wanted you to tell me some stuff, and I understand you wanted to talk to me about some stuff. Do you think you feel ready to talk?”

It is submitted that this indicates that the officer, contrary to the underlying principles of the guidance and the dicta in *TW v A City Council*, did not have an open mind throughout the process and might have been understood by the child to have been encouraging her to repeat what she had said before. None of these procedural breaches or criticisms was identified to the judge or considered by him.

53. It is further contended that the allegations made by Y during the first interview were vague and lacking in detail.

54. With regard to the second interview, once again the rapport phase, including the discussion of truth and lies, took place off-camera before the recorded interview started. Mr Feehan and Ms Korol submitted that this was again a serious omission, given the concerns about the possibility that the child was being influenced by the maternal family who had been on holiday with her in the intervening fortnight. Mr

Feehan contended that the officer's preliminary question – "what have you come here to talk to me about?" – was again an attempt to get the child to repeat what she had said or written before.

55. With regard to the third interview, Mr Feehan and Ms Korol accept that, for the first time, the discussion of truth and lies was recorded, although they contend that it was inadequate and that there was nothing else which could be described as rapport. Once again, they rely on the fact that there have been frequent discussions between the child and her mother in the intervening period. Their principal criticism of this interview is about the manner in which the officer encouraged Y to speak – "I know you've told me a lot but I understand there's other stuff you haven't told me and it's really important for me to know about that", and later "you're doing really well, you're doing very well". It is submitted that the allegations of anal rape and the description of a penis and ejaculation all arise from serious and improper pressure from the officer. Once again, they say that none of these procedural failings were put to the judge nor addressed by him in his judgement.
56. It is submitted on behalf of the appellant that the judge's findings cannot stand in the face of what is described as the wholesale failure to abide by proper processes.

The respondents' submissions on the ABE interviews

57. The respondents make common submissions in response to the appellant's arguments about the interviews. They point out that all of the advocates and lay parties were well aware during the trial that Y's allegations made during interviews lay at the heart of the case. Although the father's advocate had referred to the guidance of MacDonald J in *AS v TH* in a position statement filed at the earlier issues resolution hearing, it was not the father's case at the fact-finding hearing that deficiencies in the ABE process had caused Y to make unreliable or false allegations. Rather, it was contended on his behalf that Y had been coached or coerced by her mother and grandmother into lying.
58. We were told on behalf of the mother that, at the outset of the hearing before the judge, Miss Walker had invited the father's representative to particularise any criticisms of the interview process. In the event, however, no particular criticisms were put to the police officer. It is submitted that, if there is a concern that an interview has not been conducted properly, it must be raised at trial during the interviewing officer's evidence. In the event, no substantial arguments about breaches of the ABE guidance were advanced before the judge at the hearing. In submissions to this court, Mr Garrido and Miss Walker on behalf of the mother submit that the criticisms now made on behalf of the father about compliance with the ABE guidelines cannot bear the weight the father seeks to place upon them. There is no evidential basis for the criticisms because the alleged deficiencies in process were simply not elicited from any of the witnesses at trial.
59. It is submitted that the reason why no such argument was put forward was that it was accepted that the interviews, although not by any means perfect, were not sufficiently deficient to undermine the veracity of the child's account. A breach of the guidelines does not *per se* render evidence gained from the interviews automatically worthless. As is clear from the legal authorities, including *A v TH*, each case is fact sensitive and it is for the judge to evaluate the weight to be attached to the interviews. Notwithstanding the fact that no express challenge to the conduct of the ABE

interviews was advanced on behalf of the father at the hearing, the judge did take the trouble to watch the recordings on two occasions. It is submitted that he plainly had the guidance in mind when analysing the interviews. His impression was that the important allegations made by Y in the course of the first two interviews took place in the “free narrative” sections and that, in doing so, Y had given “careful, thoughtful and considered” evidence. The judge’s observation that “the father’s criticisms bear no resemblance to the concerns identified in *AS v TH* ... and the resulting guidance” demonstrates that he assessed the interviews critically with guidelines in mind.

60. In his oral submissions to this court, Mr Garrido conceded that, on any view, there had been minor infractions of the guidance, but they were insufficient to undermine the importance of the free narrative accounts. It is submitted that the judge was entitled to find that Y’s repeated and detailed factual observations and recollection of her own feelings were more likely to be consistent with experiencing abuse.

Other alleged errors in the judge’s analysis

61. Mr Feehan and Ms Korol submit that the judge committed a cardinal error in his approach to the earlier report by CG into the 2010-11 allegations. They contend that, in deciding that CG’s report proved only that she did not believe Y, he failed to have regard to relevant information within the report and failed to analyse that information in the context of other evidence, both contemporaneous to her report and arising later. In oral submissions, Mr Feehan conceded that CG’s report was not determinative of the truth of the 2010 allegations, but submitted that the whole of her report should have been taken into account. In the event, the judge failed to deal with the issue with sufficient particularity.
62. A particular aspect of CG’s report of relevance to the issues before the judge was her concern that the mother and maternal grandmother were discussing the allegations of sexual abuse in Y’s presence. Mr Feehan and Ms Korol identify a number of entries in the written evidence from the period 2010-11 – in the health visitor and social services records – which, they argue, show that Y had been subjected to unrestrained conversation discussing the possibility of abuse and as a result may have been prompted to say things by the knowledge that such comments caught the attention of her maternal family. They submit that the judge should have analysed this evidence alongside the conclusions reached in CG’s report.
63. It is further submitted that there was similar evidence of inappropriate questioning and influence in relation to the 2016 allegations. Mr Feehan and Ms Korol rely in particular on the evidence of the social worker’s conversation with Y on 18 July 2016 in the course of which Y, in addition to making allegations of recent abuse, told the social worker “you do know he has abused me before when I was two” and, when asked how she knew, said that her grandmother had shown her pictures of her naked on her computer and said “this is what happened to you”. The judge did not mention this evidence in his judgment. Mr Feehan submits that it is wholly unsatisfactory that the judge accepted the grandmother’s explanation about the incident (having previously denied it altogether) without mentioning at all that it was the child herself who described that interaction in detail to the social worker.
64. In addition, Mr Feehan and Ms Korol attach particular weight to the mother’s continued questioning of Y between the first and subsequent ABE interviews in

August and September 2016, as described by the mother herself in her police statement. Again, this point was not addressed in the judgment, save for a passing observation (at paragraph 42) that the mother dealt with the ongoing disclosure made by Y during the summer of 2016 as advised by the experts. Mr Feehan and Ms Korol also draw attention to a note made by another member of the current social work team, RT, in which she stated, following a conversation with Y in December 2016, that Y's comments about her father sounded almost rehearsed and that she was concerned that what Y said was very similar to her mother's comments. This comment did not feature in the judge's analysis of RT's evidence. Instead, the judge recorded RT's oral evidence that she was satisfied that Y's presentation offered no evidence or indication that she had been coached.

65. Mr Feehan and Ms Korol submit that the judge made a number of further errors in his judgment which led him wrongly to add weight to the case against the father. First, they submit that he was wrong to find the father must have known that the teacher's evidence was false and misleading and to treat this as a factor pointing to the father's culpability. Second, they submit that the judge wrongly understood the father as having accepted the proposition that Y must have been abused because of her ability to describe the shape and characteristics of a penis. Thirdly, they argue that the judge's repeated criticism of the father for asserting that there had been a conspiracy amongst members of the maternal family and his reliance on this as a further ground for making the findings was wrong, because the assertion had some support in the social work evidence. Finally, it is submitted that the judge wrongly characterised as expert opinion the evidence given by two of the professional witnesses – the police officer who asserted that it is natural for allegations to become more elaborate over the course of a series of interviews as the child becomes more relaxed, and the social worker who said that there were no signs that Y had been coached.
66. In reply, it is submitted on behalf of the mother that, although the father's case before the judge was that Y had been coached or coerced into making allegations, there was no evidence (as opposed to bald assertion or suspicion voiced by the father) that the maternal family had engaged in lengthy discussions with Y before she made her allegations in May 2016. The evidence, accepted by the judge, was that the family had in fact not discussed those allegations with her between the day on which she made them and the middle of July when the police investigation was started. It is submitted that this is an example of a finding which lies classically within the province of the trial judge.
67. As for the earlier investigation in 2010, Miss Alicia Collinson for the local authority submitted that the judge had been correct to describe the conclusion in CG's 2010 report as representing that social worker's opinion. Miss Collinson explained that, with the perceived weight of subsequent evidence to the contrary, the authority elected not to rely on her opinion in a fact-finding hearing six years later. It is pointed out that the father did not call CG to give oral evidence but instead sought to rely on her untested written evidence. It is submitted on behalf of the respondents that, in those circumstances, the judge's treatment of that evidence was unobjectionable, given that no findings had been made by a court about the truth of Y's allegations in 2010 or the role of her mother in making them.
68. As for the incident when the grandmother showed Y the photograph on her computer, it is submitted that, having heard and considered all the evidence, the judge was

entitled to accept the grandmother's explanation. It is submitted that the fact that Y first raised the existence of the photograph with the social worker is irrelevant to the determination of the importance of the issue within the overall factual matrix. It is further submitted that the judge's assessment of the school teacher's evidence and the father's approach to that evidence, cannot be challenged in this court. It is contended that he was fully entitled to conclude that, in calling her to give a false statement, the father intended dishonestly to distort the evidential picture. As a result, it was clearly open to the judge to draw adverse inferences about his overall credibility. It is not accepted, however, this factor took on disproportionate importance in the judge's overall analysis. It was only one of a number of aspects of the father's evidence that troubled the judge. It is further submitted that the judge was entitled to rely on the evidence of an experienced child protection police officer that it was not unusual for allegations to develop over time as the child gained confidence in the process. It was also open to the judge to take account of the evidence of the current social worker that Y had not been coached or influenced by the maternal family.

69. The respondents attach particular weight to Y's detailed description of male genitalia and semen. The father's concession on that issue – that from her description, she must have seen it somewhere - was a matter which the judge was entitled to take into account. It was common ground before the judge that either Y was telling the truth about her father abusing her or she had fabricated and sustained lies about him at the instigation of the maternal family.
70. On behalf of the children, it was submitted that the driving thrust of the judgment is that the judge was compelled by Y's presentation in the ABE interviews, was satisfied by the mother and grandmother's evidence, and found the father to be an unimpressive witness who gave dishonest evidence. An appeal based on an argument that these findings turned on an evaluation of opinions of social workers or the police does not reflect the judgment read as a whole.

Further discussion and conclusion

71. As noted above, the judge cites the summary of the principles to be applied in fact-finding hearings in family proceedings from my judgment in the *Devon v EB* case. That summary is intended to be an *aide memoire* as to the general principles applicable in such hearings, but it does not deal with all the legal issues that arise in every care case. Where appropriate, judges must apply other specific legal principles, including, in cases of alleged sexual abuse of children, the principles set out in the ABE guidance and the cases in which that guidance has been considered. It is the father's case that the judge in this case failed to apply the specific principles of law relevant to sexual abuse cases.
72. I am not satisfied that this submission is made out. I do not accept the criticism levelled by Mr Feehan and Ms Korol at the advocates who appeared below for failing to assist the judge as to the appropriate law. On the contrary, the position statement submitted to the judge on behalf of their client cited passages from MacDonald J's judgment in *AS v TH* and the judgment of this court in *Re W and F*. In addition, the position statement filed on behalf of the mother also cited passages from *AS v TH*. Furthermore, the judge did refer to that case at a later point in his judgment, observing:

“I find that father’s criticisms [of the ABE interviews] bear no resemblance to the concerns identified in *AS v TH* and the resulting guidance.”

Although it might have been better if the judge had referred to the decision earlier in his judgment at the point when he was summarising the legal principles, I am satisfied, looking at the totality of the judgment, that he was referred to those authorities and had them in mind when considering his judgment.

73. There were, unquestionably, a number of significant breaches of the ABE guidelines during the three interviews of Y conducted in August and September 2016. There is no record of any planning of the interview process. There is no record of the previous conversations between Y and the police officer before the first interview. There was no proper “rapport” phase in any of the recorded interviews. The exchange about “truth and lies” and other ground rules in the first two interviews took place off-camera before the interviews started. In the third interview, the police officer encouraged Y to speak in ways that were inconsistent with the guidance (for example, when Y was plainly reluctant to speak, saying “I think you can”, and later telling her “I understand there is other stuff you haven’t told me and it’s really important for me to know”).
74. On the other hand, first and second interviews contain a significant amount of free narrative. Further, the officer’s follow-up questions are, in my judgment, by and large sensitive and appropriate, with no significant leading questions. The account given by Y during these passages of the first and second interviews contains considerable experiential detail, for example:
- that she had been lying on her bed and waited to get into her bath when her father had touched her on the first occasion
 - that he had scratched her inside “because he has really sharp nails”
 - that when she went to the toilet, it “just really hurted”
 - that “his knuckle was in my front bit where we pee”
 - that on the second occasion she had been lying on the bed and her father was reading her story
 - that her pyjama bottoms had been pulled down because it was hot
 - her description of her father’s penis in the second interview
 - a clear account of masturbating her father
 - a description of how her father had put his “thumb ... in the back, the finger it was in the front”
 - the reference to the knife
 - her description of blood.

75. The most striking experiential detail is in the third interview. On this occasion, there was not really any free narrative and, as stated above, Y was undoubtedly encouraged to speak by the police officer in ways that did not comply with the guidance. But the account of alleged abuse by the father comes from the child, not the officer. Furthermore, the description of ejaculation is so striking that it must have come from direct experience. In cross-examination, the father accepted that “from that description, she must have seen it somewhere”, but insisted that this had nothing to do with him and suggested that her description could have been derived from photographs or video recordings.
76. Mr Feehan criticises the conduct of interviews and the failure of the judge to address those criticisms. In considering this submission, however, it is important to take into account three important factors. First, I am satisfied that the judge was fully aware of the ABE guidance. It might have been wiser for him to set out in terms of the relevant parts of the guidance, but, looking at the judgment overall, I am satisfied that he had it fully in mind when assessing the interviews. Secondly, the advocate representing the father at trial did not put any specific criticisms of the interviews to the officer, nor did he identify any specific criticisms in the course of his submissions to the court, despite being asked to do so by counsel for the mother at the outset of the hearing. That, of course, does not obviate the need for the judge to carry out his own assessment of the interviews, but it is a factor which this court must take into account when assessing the judge’s overall treatment of the interviews in the judgment. Thirdly, and most importantly, the judge plainly gave interviews very careful attention. He watched them twice. He concluded that the father’s criticism bore “no resemblance to the concerns identified in *AS v TH* and the resulting guidance”. Admittedly, in his judgment the judge did not carry out the exercise I have just attempted in identifying the specific ways in which the conduct of the interviews failed to comply with the ABE guidance. It would probably have been better had he done so. Having carried out the exercise myself, however, I do not consider that the deficiencies in the interviews were so serious as to render them of no evidential value. I conclude that, despite the deficiencies, the interviews contain significant evidence on which the judge was entitled to rely. I accept Mr Garrido’s submission that the judge was entitled to find that Y’s repeated and detailed factual observations and recollection of her own feelings were more likely to be consistent with experiencing abuse.
77. Turning to consider the other criticisms made by Mr Feehan and Ms Korol, I was initially concerned, in particular, by the fact that the judgment does not refer to parts of the evidence about the grandmother showing Y the photograph on her computer. The judge referred to the grandmother’s evidence about this incident, and indicated that he accepted it. He did not, however, address the apparent inconsistency between that evidence and Y’s own account to the social worker when spoken to on 18 July 2016. Y’s account to the social worker was seemingly inconsistent with the grandmother’s explanation that she inadvertently showed Y the picture and that Y only had a fleeting glimpse at it. It is true that in her third police interview Y gave an account of the incident which was consistent with the grandmother’s explanation, but the judge does not refer to this part of the interview at all.
78. Some judges would no doubt have set out the evidence about this aspect of the case in greater detail. Y’s initial account to the social worker about the incident provides

support for the father's contention that the allegations had been made as a result of coaching or influence on the part of the maternal family. Looking at the judgment as a whole, however, and noting the judge's repeated assurances that he had the totality of the evidence in mind, I am not persuaded that he overlooked this piece of the evidence in reaching his conclusion that the grandmother's oral evidence about the incident was truthful.

79. I do not accept that the judge's treatment of CG's written report from 2011 was wrong. The local authority did not rely on that report, and no other party called CG to give oral evidence. I consider that the judge was entitled to treat the conclusion to her report as he did. In any event, even if it were in principle right to give greater credence to the 2011 report of the social worker, the ABE interviews were critical in this case and the child gave evidence of a significant number of incidents which she alleged had occurred after that report was prepared. So on any view the evidence in the report was of limited significance. I also do not accept Mr Feehan's criticism of the judge's reliance on the opinion of the current social worker that there was no evidence from Y's account that she had been coached and on the observation of the interviewing police officer that a child's account may expand during interviews as she becomes more relaxed. Each of these observations was based on professional experience and the judge was entitled to take them into account. None of these points, however, featured strongly in the judge's overall assessment of the evidence, which was substantially based on his impression of Y's account in the recorded interviews and the evidence of the mother, maternal grandmother and father.
80. The judge was plainly entitled to form the view that the teacher's evidence was false and misleading. Was he also entitled to criticise the father for calling her a witness? In my judgment, it was within his discretion to find that the father must have known her evidence was misleading. This finding was consistent with his overall assessment of the father's approach to the evidence.
81. Much of the rest of the appellant's case on appeal boils down to an assertion that the judge failed to take certain parts of the evidence into account and failed to consider each piece of evidence in the context of all the other evidence. The structure of the judgment, about which McFarlane LJ expressed concern when giving permission to appeal, provides some support for this submission. Going through the evidence by reference to the oral testimony witness by witness leaves the judgment open to the criticism that the judge failed to consider the written evidence of those who were not called to give oral evidence and, further, that the judge has failed to analyse each piece of evidence on a particular issue in the context of the other relevant evidence.
82. Any appellate court considering this criticism, however, must bear in mind the repeated warnings against interfering with findings of fact by trial judges, unless compelled to do so – see for example *Piglowska v Piglowski* [1999] 1 WLR 1360, *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911, and *Fage UK Ltd v Chobani UL Ltd* [2014] EWCA Civ 5. In the last-named case, Lewison LJ reiterated (at paragraph 114) that this extends “not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them”, and identified a number of reasons for this approach, including the expertise of a trial judge in determining what facts are relevant and in dispute, and the fact that, making his decisions, the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be “island

hopping”. Lewison LJ also acknowledged the important fact that the atmosphere of the courtroom during the trial cannot be recreated on appeal.

83. In the first paragraph of his judgment, the judge stated that, having reserved judgment, he had had the benefit of reviewing the evidence with the assistance of the parties’ submissions. At paragraph 22, before considering the evidence, he stated that he had

“to consider the totality of the evidence when assessing the witnesses and when making findings and reaching my decisions regardless of whether the evidence is referred to in this judgment”.

At paragraph 32, he again refers to

“having considered the evidence in its totality”.

At paragraph 55, he stated:

“as I have reflected on the central issue of whether Y’s allegations are true I have considered all of the evidence available to me both written and oral in the context of the guiding legal principles regardless of whether it is specifically referred to in this judgment”.

At paragraph 58, when considering his conclusions, he reiterated that he had reflected

“on the evidence as a whole”.

At paragraph 59, when setting out his final conclusion, he said that he had

“reflected on all of the available evidence”.

These repeated references to the totality of the evidence convince me not only that the judge was aware of his obligation to consider each piece of evidence in the context of all the other evidence but also that he did consider all the relevant evidence, including those parts of it that were not expressly referred to in the judgment.

84. Central to his decision was the impression he formed of Y’s veracity in the ABE interviews. Of equal importance was his impression of the father’s evidence, which he described as evasive, self-serving, and dishonest, and his positive assessments of evidence given by the mother and grandmother. Those assessments are entirely within the province of the trial judge. They were fundamental to his ultimate conclusion. It is not for this court to disagree with those assessments.
85. I have not found this an easy case to evaluate on appeal. The undoubted deficiencies in the ABE interviews, and the somewhat unusual structure of the judgment, have given me considerable pause for thought. I am acutely conscious of the importance of the findings, and the consequences for the family of the outcome of this appeal.
86. Having reviewed all the documents put before this court, and the submissions made by the parties, I have, however, concluded that the father has not demonstrated that the judge was wrong to make the findings. On the contrary, I conclude that the judge was entitled to make the findings on the evidence put before him, in particular the compelling account given by Y. Accordingly, I would dismiss this appeal.

SIR PATRICK ELIAS

87. I agree.

LORD JUSTICE UNDERHILL

88. I also agree.