



Neutral Citation Number: [2022] EWHC 3089 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2022

Before:

MRS JUSTICE KNOWLES

Between:

A and D
- and -
B, C and E

Applicants

Respondents

Mr Anthony Metzger KC and Dr Charlotte Proudman for the mothers, A and D
Miss Deirdre Fottrell KC and Mr Tom Wilson for father B
Mr Tahir Khan KC and Miss Sima Najma for father E
Miss Rachel Langdale KC and Mr James Hargan for the child C
Miss Gillian Jones KC, Miss Bethan Rogers and Miss Genevieve Page for the intervener,
Centre for Women’s Justice.

Hearing dates: 16-18 November 2022

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This judgment was handed down remotely at 10.30am on 2 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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

Mrs Justice Knowles:**Introduction**

1. This court is concerned with two appeals, each of which involves allegations of domestic abuse, specifically rape and sexual assault, by one parent against the other. This judgment is in three main parts: the first concerns the general propositions of law engaged by both appeals; the second concerns my determination of the appeal in the case of ABC; and the third, my determination of the appeal in DE. I have given these initials to the parties in these appeals in order to prevent identification of the children with whom these appeals are concerned.
2. Permission to appeal in the case of ABC was given by Morgan J and in the case of DE by Arbuthnot J. As the grounds on which permission was given raised similar issues, both cases were allocated to me and listed for a case management hearing on 7 October 2022. Prior to that hearing and in an effort to give some focus both to the wide-ranging submissions made by the Appellant mothers and the rather broad grounds on which permission had been given, I prepared a document which set out the general propositions raised in both appeals upon which I would require submissions. Those propositions were as follows:
 - A) Whether the family court should apply a consistent definition of (i) rape, (ii) sexual assault or (iii) consent, making clear the difference between consent and submission;
 - B) Whether the failure to have a consistent approach to these issues was in breach of the Article 6, 8 and 14 rights of the Appellant mothers;
 - C) Whether the definitions of rape, sexual assault and consent used in the criminal justice system should be either a starting or finishing point for judges in the family court;
 - D) What the approach of the family court should be to a complainant's sexual history when determining allegations of rape or sexual assault; and
 - E) Whether, when determining allegations of rape and/or sexual assault, judges in the family court should give themselves a warning about rape myths. Generally, such myths concern themselves with the behaviour or experiences of a complainant.
3. All the parties produced written argument addressing these propositions and I heard oral argument on 17 November 2022. I had invited the Centre for Women's Justice to intervene to assist me with the manner in which these matters were addressed in the criminal court and it accepted my invitation to do so. The Centre for Women's Justice produced helpful written argument and a bundle of relevant authorities but, though present in court through leading counsel, did not participate in the oral argument. On 18 November 2022, I heard oral argument specific to each appeal. This judgment is lengthy and would have been even longer had I listed all the evidence and submissions I considered. I have, of course, taken all I have read and heard into account in reaching my decisions.

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4. I am very grateful to all the advocates who provided written submissions and to those who supplemented those submissions with oral argument. I note that Dr Proudman and Miss Najma took the lead in making oral submissions in the DE appeal.
5. Busy judges and practitioners may find the following paragraphs of particular interest:
 - a) The legal context: criminal law concepts in the family court ([13] - [17]);
 - b) The analysis of the role of criminal concepts in fact finding hearings in the family court where allegations of sexual abuse between two adults are in issue ([23] - [31]);
 - c) The analysis of the approach of the family court to a complainant's sexual history including procedural guidance ([46] - [58] with guidance at [58]);
 - d) Sources of information about rape stereotypes/myths ([63]); and
 - e) Good practice on schedules of findings ([127]).

General Propositions

6. Before I address the general propositions, it is important to set these in context by, first, having regard to the role of an appellate court and, second, having regard to the general milieu in which both these appeals fall to be decided.

The Role of The Appellate Court

7. In a wide-ranging document, the Appellant mothers asked the court to give guidance on matters such as how allegations of sexual assault, rape and consent to sex should be determined in family proceedings. Such a course is problematic given the role of the appellate court which is to determine whether the decision at first instance was “*wrong*” or “*unjust because of a serious procedural or other irregularity in the proceedings in the lower court*” (see Family Procedure Rules 2010 [“the FPR”], rule 30.12(3)). On behalf of father B, Miss Fottrell KC submitted that, were the court to embark on the exercise suggested by the Appellants, it would go well beyond its appellate role by seeking to legislate on matters where Parliament had declined to do so. If Parliament had intended the framework applicable to these issues in the criminal justice system to apply to the family court, it would have made that clear. It would thus be wrong for the court itself to construct a wholly new legal framework. She drew my attention to the clear guidance of the Court of Appeal on the use and application of criminal legal concepts in the family court reiterated as recently as 2021 in Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448 [“Re H-N”].
8. I am quite clear that my appellate role is circumscribed and I have been guided by the observations of the Court of Appeal in Re H-N at [2], namely:

“But it is also because there is plainly and properly a limit to what a constitution of the Court of Appeal, determining four individual appeals, can, and as a matter of law should, say about issues which do not strictly arise in any of those appeals.”

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I also accept that it is not the role of an appellate court to be “*used to determine issues just because it would be useful to have an authoritative answer*” (Re X (Court of Protection Practice) [2016] 1 WLR 227 at [47]).

9. I am also mindful that, where new legal principles are derived from common law, there is a need for judicial restraint as to their parameters and, as Lord Lowry identified in C v Director of Public Prosecutions [1996] AC 1 at p.28, the correct approach for any court is as follows:

“I believe, however, that one can find in the authorities some aids to navigation across an uncertainly charted sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrine should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.”

Though C v DPP was decided prior to the enactment of the Human Rights Act 1998, as acknowledged by Eady J in Secretary of State for the Home Department v British Union for the Abolition of Vivisection [2009] 1 WLR 636, that latter decision suggested that the Human Rights Act 1998 may require a court to be more interventionist albeit with “*a note of judicial caution*” and an emphasis on a judge or tribunal needing to “*think long and hard before deciding to step in*” (at [51]).

10. I agree with Miss Fottrell KC that any suggestion that this court should step in to fill a lacuna left by Parliament is misplaced. In Re K and H (Children: Unrepresented Father: Cross examination of Child) [2016] 1 FLR 754, Lord Dyson MR emphasised the importance of judicial restraint in such circumstances notwithstanding that the consequence may be to tolerate an apparent iniquity. At [31] he observed that:

“As the judge acknowledged, LASPO provides a comprehensive code for the funding of litigants whose case is within the scope of the scheme. It is a detailed scheme. I do not consider that it is possible to interpret either s. 1 of the 2003 Act or s. 31(G)(6) of the 1984 Act as giving the court the power to require the Lord Chancellor to provide funding for legal representation in circumstances where such funding is not available under a scheme as detailed and comprehensive as that which has been set up under LASPO. The court must respect the boundaries drawn by Parliament for public funding of legal representation. In my view, the interpretation adopted by the judge is impermissible: it amounts to judicial legislation.”

11. In Re B (A Child) (Family Proceedings: Judicial Guidance) [2017] 4 WLR 202, Munby LJ considered whether it had been appropriate for guidance to have been given on a general issue of some importance by a Deputy High Court Judge at first instance when that issue was not central to the case which he was deciding. Munby LJ emphasised that judges should not go beyond what was necessary to decide the particular case which was before them [24]-[26], saying:

“These are not matters that the judge needed to address in order to decide the case before him fairly and justly. Moreover, he embarked on the whole exercise in a case where, because the father and the mother appeared in person, he did not have - and

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this, I emphasise, is no reflection at all upon Ms Clifford or, for that matter, Mr Graham, who seems to have been well informed on the point - the benefit of sustained, professional and adversarial argument. However, this was not, with great respect to the judge, an exercise appropriately undertaken by a Circuit Judge.”

There are a variety of ways in which guidance for the family courts is, as a matter of current practice, formulated and disseminated. The President of the Family Division can exercise the statutory function delegated to him by the Lord Chief Justice, of issuing a Practice Direction. The President can issue also non-statutory Practice Guidance. The Family Justice Council can issue guidance, which typically bears the President’s endorsement (a recent example is Guidance on Financial Needs on Divorce, June 2016). The President can commission a piece of work from some appropriate expert which is then issued with his imprimatur (for example, The Family Courts: Media Access and reporting - Guidance issued by the President of the Family Division, Sir Nicholas Wall, the Judicial College and the Society of Editors, issued in July 2011). Very typically, all these various forms of guidance are the result of processes which, even if they do not involve wider consultation, will have involve the input of the Family Justice Council and/or the Family Procedure Rule Committee.

Finally, there are so-called “guidance judgements” delivered either by the President or by another judge of the Family Division, reflecting the need for more general guidance on a topic which has arisen in a particular case and in relation to which the judge has had the benefit of detailed submissions from counsel. Very frequently, a “guidance judgement” given by a judge of the Family Division will, with the President’s agreement, record the fact that it has, in relation to such guidance, been read and approved by the President: see In Re V (A Child) (Care Proceedings: Human Rights Claims) (Practice Note) [2004] EWCA Civ 54, [2004] 1 WLR 1433, paras 4.6, 98.”

12. I observe that my role as an appellate judge does not preclude me, where I consider it is necessary to do so, from providing some guidance or observations which aim to clarify the law as it currently stands. Any such guidance seems to me best suited to clarifying the practical approach in the family court to managing evidential issues which can arise in cases of disputed allegations of rape and sexual assault in children proceedings. I am quite clear, however, that it is not my role to construct a substantive framework for determining allegations of rape and sexual assault in the family court.

Legal Context

13. The general propositions fell to be considered against the backdrop of the well-established rule that it is “*fundamentally wrong*” for the family court to be drawn into an analysis of factual evidence based upon criminal law principles and concepts. The authoritative statement of this principle was articulated by McFarlane LJ (as he then was) in Re R (Children) (Care Proceedings: Fact-finding Hearing) [2018] EWCA Civ 198 [“Re R”] at [82]:

“By way of summary, the following points are, in my judgement, clear:

- (1) The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to*

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those applicable to the prosecution by the State of an individual before a Criminal Court (para [62] above).

- (2) *The primary purpose of the family process is to determine what has gone on in the past, so that those findings may inform the ultimate welfare evaluation as to the child's future with the court's eyes opened to such risks as the factual determination may have established (para [62] above).*
- (3) *Criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court (para [65] above).*
- (4) *As a matter of principle, it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings based upon criminal law principles and concepts (para [67] above)."*

14. In Re H-N, the Court of Appeal was addressed at length by a wider range of parties and interveners than were present in these appeals on whether the family court should analyse factual issues within the criminal law framework. At [71], the Court of Appeal reaffirmed the general principle that:

"The Family Court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of "rape", "murder", "manslaughter" or other serious crimes."

15. At [65] of Re H-N, the President emphasised that there was a clear distinction between (a) family judges needing to have a sound understanding of the potential psychological impact that serious sexual assault may have on a victim's behaviour, both during and after the event, and in the way that they may give their evidence and present in court and (b) family judges avoiding being drawn into an analysis of factual evidence based on criminal law principles and concepts. However, issues concerned with process in the family court such as the conduct of the hearing and the scope of cross examination could potentially draw upon good practice in the criminal court [74]:

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

16. In Re H-N, the Court of Appeal identified a tension between the decisions in Re R and JH v MF (Child Arrangements) [2020] 2 FLR 344, a decision of Russell J sitting as an appellate judge in the Family Division, as to the application of substantive criminal

concepts in family proceedings. In JH v MF at [46], Russell J recognised the statement of principles set out at [82] of Re R but expressed the view that:

“While a trial in the Family Court cannot, and must not, set out to replicate a trial or to apply, or seek to apply, criminal law or statute it cannot be lawful or jurisprudentially apposite for the Family Court to apply wholly different concepts or to take an approach wholly at odds from that which applies in the criminal jurisdiction when it comes to deciding whether incidents involving sexual intercourse, whether vaginally penetrative or not, and other sexual acts including oral penetration, penetration by an object or another form were non-consensual.”

At [48] Russell J observed that reference should be made to the statutory provisions in respect of consent and undertook a wide survey of the statutory framework under the Sexual Offences Act 2003, and the authoritative guidance, and legal commentary in relation to issues of rape and consent in the criminal jurisdiction. At [59], she expressed the view that the approach taken in family proceedings should, in general, be congruent with the principles applied in the criminal jurisdiction.

17. Notwithstanding the analysis of Russell J in JH v MF, the Court of Appeal in Re H-N reaffirmed the principles stated in Re R as the authoritative statement and the binding authority of the law relating to the application of substantive criminal concepts in family proceedings.

Proposition 1: Whether the family court should apply a consistent definition of: (a) rape; (b) sexual assault; (c) consent, making clear the difference between consent and submission.

Proposition 3: Whether the definitions of rape, sexual assault, and consent used in the criminal justice system should be either a starting or finishing point for judges in the family court.

18. I address both these propositions together as the parties invited me to do so.
19. Mr Metzger KC submitted that there was a need for a consistent approach to rape, sexual assault and consent relying on (a) a variety of published fact finding judgments which appeared to show contradictory approaches to the analysis of rape allegations in the family court and (b) the absence of a framework for determining such allegations within the FPR, Practice Direction 12J (Child Arrangements and Contact Orders: Domestic Abuse and Harm) [“PD12J”]. He accepted that the definitions used by the family court should not mirror or reflect those in use within the criminal court and, in written argument, Mr Metzger KC set out a framework for the family court to apply when considering allegations of rape and sexual assault. His framework read as follows:
- (a) Rape should be defined as an absence of willingness to engage in sex.
 - (b) Willingness is given freely and voluntarily. It may be demonstrated by verbal communication or other cues which must be active rather than passive. A willingness to have sex may not be inferred from silence or passivity.

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- (c) A person may be willing to have sex (or any lesser form of sexual contact) and they might change their mind at any stage prior to or even in the course of intercourse.
 - (d) Mutuality, enjoyment, and welcomeness are indicators of consent.
 - (e) The converse: unwanted sex that was not welcome or enjoyed are indicators of absence of consent and therefore rape.
 - (f) If there is an absence of willingness, lack of consent or submission is irrelevant, as the sex is not wanted.
 - (g) An absence of willingness would be found in cases where there is no freedom and capacity to make that choice, which could include those involving a child, an incapacitated person, a person whether intoxicated by drink and/or drugs, or a person threatened by violence, deceived, or in fear.
 - (h) A person who simply freezes with no protest or resistance is unlikely to be consenting - violence or the threat thereof is not a necessary ingredient.
 - (i) For sex to happen when a party is not willing to have sex is profoundly abusive, which is the primary concern of the family court rather than the act fulfilling the strict constituent elements of a criminal offence.
20. In oral argument, Mr Metzger KC submitted that there should be a clear definition of consent and that submission to sexual intercourse was not true consent as it was not a willingness to have a sexual encounter with another person. If the court dwelt on consensual sex between two adults, there was a danger it might miss a broader picture of controlling and coercive behaviour. Towards the end of oral argument, Mr Metzger KC appeared to have moved away from asking me to introduce a new framework based on that set out in his written argument.
21. In response, Miss Fottrell KC submitted that there was no evidence of inconsistency within the reported decisions cited by the Appellants since the cases to which the court was signposted merely showed that different judges reached different conclusions. The framework advanced by the Appellants side-lined the importance of consent and replaced it with the concept of willingness. It presented a de novo framework which was impermissible and unnecessary. She submitted that importing definitions applied in the criminal courts or having regard to the ingredients of particular offences ran contrary to the purpose of the fact-finding task in family proceedings. A focus on seeking to characterise or establish behaviour as meeting a particular definition obscured the court's task of identifying and determining only those factual disputes which were relevant to the child's welfare.
22. Mr Khan KC adopted the submissions made by Miss Fottrell KC. On behalf of the child C, Miss Langdale KC also agreed with Miss Fottrell KC that it was difficult to identify the type of worrying inconsistency suggested by the Appellants in first instance decisions in the family court. She emphasised that the family court assessed the whole relationship between two adults as well as particular instances of what was alleged to be bad behaviour within the relationship. It had the freedom to determine what was abusive within the definitions set out in PD12J, always focused on what was relevant

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for the welfare determination. A focus on the issue of consent risked a narrow focus on specific events rather than the holistic assessment of the adult relationship as a whole.

23. In my view, the correct starting point is that the family court must not import criminal definitions as an aid to fact-finding. Its focus, as Re R and Re H-N made clear, is to determine how the parents of a child behaved towards each other so as to be able properly to assess risk and determine the welfare issues in each case. I note that Parliament recently passed the Domestic Abuse Act 2021 and, in so doing, expressly replicated in the family court some provisions applicable in the criminal courts, for example, in relation to cross-examination by litigants in person. However, Parliament declined to legislate for a framework in the family court within which to determine allegations of rape and sexual assault: it was not invited to do so during the passage of the Act. In those circumstances, it is difficult to conceive that this court might now attempt to do so.
24. At first instance, the family court determines allegations of rape and sexual assault without a legislative definition or framework. That is consistent with the purpose of a fact-finding exercise in family proceedings, which is to determine only such factual issues as are necessary to assess risk and to illuminate the welfare issues. That approach in private law proceedings is consistent with the approach in public law proceedings in which the family court conducts fact-finding in circumstances where, for example, a parent is alleged to have caused the death of a child, or where a parent is alleged to have inflicted injury on a child.
25. The Appellants placed reliance on examples of variable approaches taken by first instance judges sitting in the family court to the factual determination of allegations of rape or sexual assault. It is unnecessary for me to identify the judgments in issue since the relevance of those decisions was not the characterisation of behaviour by reference to concepts of consent or submission to sexual intercourse but rather that the court had accurately determined narrative findings which could inform the subsequent risk and welfare analysis. In that regard, I am very clear that the comments of the Court of Appeal at [71] in Re H-N are crucial in underscoring the clear distinction between the family and the criminal court, namely that:

“Behaviour which falls short of establishing “rape”, for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to “not guilty” in the family context. For example, in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the borderline as between “consent” and “submission” may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault”.

26. It is my firm view that a focus on seeking to characterise or establish behaviour as meeting a particular definition runs the risk of the court becoming *“unnecessarily bogged down in legal technicality”* (see [29] of the decision of Cobb J in F v M (Appeal: Finding of Fact) [2019] EWHC 3177 (Fam) and [66] of Re R in the Court of Appeal). Applying criminal definitions narrows the court’s focus inappropriately away from the wider consideration of family relationships at play in a fact-finding hearing. In Re R, albeit in the context of findings of *“murder”* or *“manslaughter”*, McFarlane LJ identified at [62] the scope and purpose of a fact-finding hearing in the family court as follows:

“The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a Criminal Court. The latter is concerned with the culpability and, if guilty, punishment for a specific criminal offence, whereas the former involves the determination of facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare...

... In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge the ultimate welfare evaluation where the court will choose which option is best for a child with the court’s eyes open to such risks as the factual determination may have established”.

Thus, a family judge must consider a “wide canvas” and scrutinise the family relationships - whether of adult to adult or adult to child - over a period of time in order to arrive at a factual determination relevant to both risk and welfare. Whilst I recognise the effort which Mr Metzer KC and Dr Proudman have invested in their framework for determining allegations of rape and sexual assault/abuse, that framework is too narrowly focused on the specifics of whether a sexual relationship is “willing” or not. In essence, it substitutes the word “willing” for “consent” and would be as prescriptive as applying the concepts used in the criminal courts. It is, in my view, too narrow a prism through which to view and investigate the true nature of an adult relationship.

27. The danger of adopting too narrow a focus on the sexual relationship between two adults was evident in the decision of the Court of Appeal in K v K [2022] EWCA Civ 468 where, amongst other matters, the Court of Appeal was critical of a family judge for failing to stand back and take account of the whole of the evidence before him. In [61], the Court of Appeal stated this:

“In this case, however, by failing to step back and take into account the whole of the evidence before him, the judge placed unjustifiable weight on the issue of whether the mother had had a conversation with the father about her unhappiness at his initiating sex when she was asleep. He elevated that issue into the determinative one, saying that if it were proved, the allegations would themselves be made out. The judge failed to bring the various points of challenge made by the father into his evaluation. Those failures meant that there cannot be said to have been a fair consideration of these important allegations from the father’s perspective. At no stage did the judge step back and consider the mother’s credibility in the round, bringing into account his findings that the mother had put forward false allegations of reporting to Dr C, of financial control, and (also) of isolation from her family when in fact the family had lived with her parents between 2004 and 2012.”

28. K v K is also of importance because it emphasised yet again what ought to be the focus of a fact-finding exercise in children cases where there are allegations of domestic abuse, namely whether the adult relationship was characterised by coercion and/or

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control. In [51] of Re H-N, the Court of Appeal was at pains to emphasise that “*consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse, irrespective of whether there are other more specific factual allegations to be determined*”. Barely a year after Re H-N was determined, K v K sought to clarify a perception that it was a requirement for a family judge to determine each and every allegation of domestic abuse during a fact-finding exercise. In robust terms, the Court of Appeal stated this was not the case and that a family court should determine “*only those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, on what terms*” [67]. That steer from the Court of Appeal underscores my view that as wide a canvas should be brought to the determination of specific allegations of sexual abuse as is brought to any overarching allegations of coercive and controlling behaviour.

29. As to any criticism of PD12J for a failure to contain a framework to assist in determining specific allegations of sexual abuse, that is, in my view, misplaced. PD12J sets out a specific **procedural** framework for managing and determining allegations of domestic abuse within private law children proceedings. It includes definitions of the sorts of behaviour which constitute domestic abuse and general principles by which the court should be guided but, rightly, does not contain a detailed framework to assist the family court either in evaluating evidence or in determining what might constitute domestic abuse in an individual case. As I have already indicated, the inclusion of the type of framework advocated for by Mr Metzer KC would inappropriately narrow the court’s focus and run the risk of becoming a tick box exercise rather than a holistic evaluation of the evidence in a particular case.
30. I also acknowledge that there are examples of the family court analysing evidence by reference to principles established in the criminal court. Thus, the Lucas direction with respect to lies (R v Lucas (1981) QB 720) is firmly established as a principle in the family court and, when determining allegations as to whether an injury is inflicted, the family court not infrequently relies upon the guidance in R v Henderson and Others [2010] EWCA Crim 1219 and R v Cannings [2004] 2 Crim Ap Reports 63, namely that the court should resist the temptation to believe that it is always possible to identify the cause of injury to a child. Finally, in F v M [2021] EWFC 4, Hayden J had regard to s 76 of the Serious Crime Act 2015 when considering allegations of coercive and controlling behaviour. The first two examples do not concern definitions of criminal concepts or frameworks for establishing an offence. As Miss Fottrell KC submitted and I accept, these relate to the broader task of evaluating evidence more generally. Although in F v M, Hayden J considered the substantive framework for the offence of coercive and controlling behaviour, he analysed such behaviour by reference to the definitions contained in the FPR, specifically disapproving of an overly formulaic analysis which might tend “*to obfuscate rather than illuminate*” the nature of such behaviour within family proceedings (see [108]).
31. A recent example of the family court’s approach to allegations of sexual abuse within private law children proceedings is the case of Re B-B (Domestic Abuse: Fact Finding) [2022] EWHC 108 (Fam). This judgment followed a re-hearing of allegations of domestic abuse following the Court of Appeal’s decision to allow an appeal against the original first instance decision (see Re H-N at [78]-[115]).

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32. Thus, for the reasons set out above, I reject the need for the family court to apply consistent definitions of rape, sexual assault, and consent. I also hold that the definitions of rape, sexual assault, and consent used in the criminal justice system should have no place in the family court.

Proposition 2: Whether the failure to have a consistent approach to these issues is in breach of the Article 6, 8 and 14 rights of the Appellant mothers

33. Mr Metzger KC submitted that the lack of consistency in these issues led to unfairness in the proceedings and to potential breaches of Articles 6 and 8. The absence of consistency meant that the parties did not know the parameters and guidance applicable, such that they could be confident that the judge hearing the case was applying the principles consistently in her/his approach to fact-finding. Article 14 was relevant because discrimination following breaches of Article 6 and/or 8 was almost exclusively on gendered grounds, as women were much more likely to be victims of rape.
34. In contrast, Miss Fottrell KC did not accept that an absence of definitions of rape, sexual assault, or consent in family proceedings violated the rights of either parent. She criticised the Appellants for being unable to identify any domestic or international authority for the proposition that Articles 6, 8 or 14 required the State to formulate definitions of rape, sexual assault, or consent in **civil proceedings** [my emphasis] concerning the welfare of children. Whilst there was clear jurisprudence from the European Court of Human Rights as to the positive obligations of the State to protect individuals from domestic abuse, the Appellants had failed to make out a case that the obligation of due diligence translated into an obligation to construct a legal framework in the terms which they set out. Mr Khan KC and Miss Langdale KC allied themselves with Miss Fottrell KC's submissions. I am indebted to Miss Fottrell KC for the legal analysis which follows.
35. It is accepted that domestic abuse engages a complainant's rights under Articles 6, 8 and 14 of the European Convention on Human Rights. In Volodina v Russia (2019) (App No. 41261/17), the European Court of Human Rights ("the European Court") stated at [71]-[72] that:
- "... The issue of domestic violence, which can take various forms - ranging from physical assault to sexual, economic, emotional or verbal abuse - transcends the circumstances of an individual case. It is a general problem which affects, to a varying degree, all member States and which does not always surface since it often takes place within personal relationships or closed circuits and affects different family members, although women make up an overwhelming majority of victims..."*
- ... The particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection have been emphasised in a number of international instruments and the Court's case law..."*
36. Article 6 provides, as is relevant, that "*in determination of his civil rights and obligations... everyone is entitled to a fair.... hearing*". The European Court has determined that inconsistency in decision-making **may** infringe upon the rights to a fair hearing but only in limited circumstances and where that inconsistency arises at the court of last instance. In Svilengacanic v Serbia (2021) App No. 50104/10 in which a

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series of applicants complained that the municipal courts in Serbia had reached conflicting decisions as to their jurisdiction to hear claims relating to military pay, at [79], and in summary, the Court held that:

- a) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. That, in itself, cannot be considered contrary to the Convention.
- b) The criteria guiding an assessment of whether conflicting decisions, ruling at last instance, are in breach of the fair trial requirement are whether “*profound and long-standing differences*” exist in the case law, whether the domestic law provides for a machinery capable of overcoming those inconsistencies, and whether that machinery has been applied and to what effect.

37. Those principles are far removed from the present case. There is no clear conflict of approach in the court of last instance in this jurisdiction. Instead, at the most, there are different decisions reached by different judges on different facts and different evidence. That is a feature of the fact-finding process, and not a breach of Article 6.
38. Article 8 protects an individual’s rights to respect for their private and family life. This imposes upon public authorities certain positive duties to take steps to safeguard this right as between private individuals. States enjoy a wide margin of appreciation in conjunction with the limitations imposed by Article 8(2). In *MC v Bulgaria* (2003) (App No. 39272/98), the European Court examined Bulgarian criminal law by reference to Articles 3, 8 and 14. It held that states have a positive obligation inherent in Articles 3 and 8 of the Convention to enact **criminal law** provisions effectively punishing rape through effective investigation and prosecution.
39. Article 14 guarantees that all the rights and freedoms set out in the Act must be protected and applied without discrimination. The European Court has long accepted that gender-based domestic abuse perpetrated against women is a form of discrimination against women (*Volodina* at [110]). However, the majority of domestic abuse cases concerning Article 14 have related to circumstances in which domestic authorities have acted with “*passivity*” in response to alleged domestic abuse and/or have adopted an approach which amounts to “*condoning*” such abuse. Those circumstances are wholly different to the circumstances in this appeal.
40. The Appellants made reference to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (“the Istanbul Convention”) which the UK has ratified, and which entered into force on 1 November 2022. Article 31 requires that “*Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account*”.
41. Article 36 requires, in summary, that parties to the Convention shall take the necessary legislative or other measures to ensure that a variety of non-consensual vaginal, oral, or anal penetration/acts of a sexual nature are criminalised. The explanatory notes to Article 36 provide at paragraph 194 that:

“Paragraph 3 spells out the obligation of Parties to ensure that the criminal offences of sexual violence and rape established in accordance with this Convention are applicable to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim. Sexual violence and rape are a common form of exerting power and control in abusive relationships and are likely to occur during and after breakup. It is crucial to ensure that there are no exceptions to the criminalisation and prosecution of such acts when committed against a current or former spouse or partner is recognised by internal law”.

42. Thus, the Istanbul Convention imposes no obligation on the family court beyond that articulated in Article 31, namely that violence covered by the Convention is taken into account when determining issues concerning children. Even if I were to take the Appellants’ case at its highest, I cannot see how it could sensibly be argued that the family court in this jurisdiction fails to do so.
43. Thus, I am wholly unpersuaded that the Appellants have established Proposition 2.

Proposition 4: What the approach of the family court should be to a complainant’s sexual history when determining allegations of rape or sexual assault

44. In the absence of procedural guidance on this issue in PD12J, there was a consensus amongst the parties that it would be helpful for this court to give some guidance. All the parties appeared to be in agreement that a complainant’s sexual history with a person not involved in the proceedings would rarely be relevant. However, Mr Metzger KC alone sought to persuade me that evidence of consensual sexual encounters between the complainant and the alleged perpetrator was irrelevant when the court was determining allegations of abusive sexual behaviour.
45. Having reflected on the invitation to give some guidance on this issue, I do so mindful of the comments in [74] of Re H-N which did not inhibit further judicial consideration of procedural matters such as the scope of cross-examination of an alleged victim as to their sexual history and past relationships. The framework I offer for determining these issues is firmly grounded in the established approach to evidence in the family court.
46. My starting point is that the established approach to evidence in the family court can accommodate circumstances in which a parent, either making or facing allegations of sexual abuse, seeks to adduce evidence of the other person’s sexual history, or their own sexual history or their shared sexual history. To summarise, this involves the following process:
 - (a) An assessment of the relevance of the evidence for which permission is sought to be adduced, having regard to the need for the court to consider the “*wide canvas*” of evidence;
 - (b) Thereafter, where objection is made to such evidence being adduced, a balancing exercise as to the competing interests and Convention rights involved;
 - (c) At all times, consideration of the breadth of the court’s powers to control the manner in which evidence is to be placed before it.

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47. The family court has a discretion to control the evidence before it. FPR r.22.1(1) provides that:

“(1) The court may control the evidence by giving directions as to –

- a) the issues on which it requires evidence;*
- b) the nature of the evidence which it requires to decide these issues; and*
- c) the way in which the evidence is to be placed before the court.*

When applying this rule, the family court will also be mindful of the overriding objective to deal with cases justly, having regard to any welfare issues involved, set out in r.1.1.

48. When considering these matters, **the first step** must be to consider the admissibility of the evidence in question. Admissibility is determined by relevance and the question of relevance is one of fact, degree, and proportionality (see [23] of Dunn v Durham County Council [2013] EWCA Civ 1654).
49. When considering the question of relevance and evaluating the weight to be afforded to evidence which crosses that threshold, the family court applies well established principles, many of which were developed in the context of public law proceedings, but which are equally applicable to private law proceedings:
- (a) The court must consider the “*wide canvas*” of evidence.
 - (b) Evidence cannot be evaluated and assessed in separate compartments but must be considered in its totality. The court must consider each piece of evidence in the context of all the other evidence (see [33] of Re T [2004] EWCA Civ 558 per Butler-Sloss P).
 - (c) The decision on whether the facts in issue have been proved to the requisite standard must be based on all the available evidence and falls to be assessed against the wider context of social, emotional, ethical, and moral factors (see [44] of A County Council v A Mother, A Father, and X, Y and Z [2005] 2 FLR 129).
 - (d) The assessment of credibility generally involves more than mere demeanour, the latter being mostly concerned with whether the witness appears to be telling the truth as s/he believes it to be. Memory becomes fainter with every day that passes and the imagination becomes correspondingly more active. Thus, contemporary documents are always of the utmost importance (see [29]-[30] of A County Council v M and F [2012] 2 FLR 939).
50. **The second step**, where a party objects to the admission of otherwise relevant evidence, is to undertake a balancing exercise. Though determined in the context of an application for disclosure against the local authority, the approach articulated by Maurice Kay LJ at [23] in Dunn v Durham County Council is the correct one. It was followed by MacDonal J in R v Secretary of State for the Home Department (Disclosure of Asylum

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Documents) [2019] EWHC 3147 (Fam). I observe that the Court of Appeal in Secretary of State for the Home Department and G v RH [2020] EWCA Civ 1001 at [52]-[54] endorsed the approach to disclosure taken by MacDonald J and confirmed that it had application to a wide range of documents where disclosure was sought in family proceedings.

51. The approach in Dunn v Durham County Council is as follows [23]:

“What does that approach require? First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include “train of inquiry” points which are not merely fishing expeditions. This is a matter of fact, degree and proportionality. Secondly, if the relevance test is satisfied it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection. Thirdly, any ensuing dispute falls to be determined. We determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose rights may require protection. It will generally involve a consideration of competing ECHR rights. Fourthly, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary. Fifthly, in some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or such other order. Again, the limitation or restriction must satisfy the test of strict necessity.”

Evidence Relating to Sexual History

52. The current legal framework set out above is capable of accommodating issues relating to evidence about a parent’s sexual history. Evidence about that issue is likely to be found in a witness statement or in contemporaneous material such as text messages or images.
53. Insofar as an application might be made by an alleged perpetrator of sexual abuse to adduce evidence of a complainant’s sexual history with **another** individual, I find it difficult to envisage circumstances in which this would satisfy the test of relevance. How might such evidence about behaviour with person A make a complainant’s allegation of rape or sexual assault against an alleged perpetrator, person B, more or less probable? In making that observation, I do not intend that this should operate as an absolute bar on adducing such evidence since it is ultimately a matter for assessment by a particular court dealing with a particular case
54. More complicated is the question of relevance in relation to evidence of a complainant’s sexual history **with the alleged perpetrator**. The fact that adult parents had previously or subsequently engaged in consensual sexual activity of any sort does not mean that they were not raped or sexually assaulted on another occasion. However, evidence as to the parents’ sexual relationship may be logically probative of an allegation of partnership rape or sexual assault. Thus, communications between the parties of a sexual nature may well be relevant as may communications between them either before or after the relevant incident or time period. That approach is in keeping with the court’s obligation to consider the wide canvas of evidence and its duty to have regard to

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patterns of behaviour - both of the complainant and the alleged perpetrator - as described in Re H-N. It does not give an alleged perpetrator permission to produce any material that they wish if it is irrelevant and, if relevant, where it fails to meet the approach articulated in [23] of Dunn v Durham County Council.

55. Mr Metzger KC invited me to state that there would be a strong presumption against the admission of evidence relating to a complainant's sexual history with an alleged perpetrator and to declare that the circumstances should be exceptional. I decline to do so. First, that approach runs contrary to current practice in the family court which has been centred on relevance and is free from presumption or starting point. It also runs contrary to the basic principle that, by adopting an inquisitorial approach, the court requires the best **relevant** evidence before it to assess both the risk posed by a parent or the welfare best interests of the child. Second, and practically speaking, the Appellant's approach runs the risk of depriving the court of evidence relevant to its factual determination. I observe that there may well be circumstances in which evidence of sexual history **as between partners** is relevant to the court's assessment of the dynamic, their respective patterns of behaviour and the nature of their relationship.
56. Based on the analysis above, I do not regard it as necessary for a party wishing to rely on evidence of sexual history between partners to make a specific application to the court for permission to do so. Practically speaking, this would add complexity and cost to already contentious children proceedings where a high proportion of litigants are self-representing.
57. Though not addressed in either the written or oral argument because it is not a matter at large in these appeals, I note that a complainant may wish to adduce evidence of an alleged perpetrator's sexual history with other individuals to demonstrate a pattern of allegedly abusive behaviour (such evidence being described as similar fact evidence). The Court of Appeal in R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088 set out the approach to be taken to the admissibility of such evidence at the case management stage in [19], and [23]-[24], emphasising the test of relevance and the need for the court to have available the best evidence to illuminate the subtle and persistent patterns of behaviour involved in coercive control, harassment and stalking.
58. In conclusion and to assist family judges in their case management task, I offer the following procedural framework, loosely based on that I articulated in Re M (A Child) (Private Law Children Proceedings: Case Management: Intimate Images) [2022] EWHC 986 (Fam), namely:
 - (a) If a party wishes to adduce evidence about a complainant's sexual history with a third party, a written application should be made in advance for permission to do so, supported by a witness statement;
 - (b) It is for the party making such an application to persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine.
 - (c) Any such application will require the court's adjudication preferably at a case management hearing.
 - (d) The court should apply the approach set out above at [45]-[49].

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- (e) If a party wishes to rely on evidence about sexual history between partners, they do not need to make a specific application to do so unless reliance is also placed on intimate images. In those circumstances, the party must issue an application in accordance with the guidance at [77]-[78] in Re M (Intimate Images).
- (f) If a party objects to evidence of sexual history between parents/parties being filed, it should make an application to the court in advance, supported by a witness statement explaining why this material is either irrelevant or should not be admitted.
- (g) Any such application will require the court's adjudication preferably at a case management hearing.
- (h) The court should apply the approach set out above at [45]-[49].

Proposition 5: Whether, when determining allegations of rape and/or sexual assault, judges in the family court should give themselves a warning about rape myths. Generally, such myths concern themselves with the behaviour or experiences of a complainant.

- 59. Mr Metzger KC submitted that family court judges needed to have a full understanding about the types of rape myths/stereotypes which had been pervasive in the judicial system for a long time. He noted that Crown Court judges were advised to give specific directions to juries about the types of stereotypes which were common in cases of sexual assault. He drew my attention to the relevant passages of the Equal Treatment Bench Book (July 2022), to the Crown Court Compendium and to the Crown Prosecution Service Guidance found at "*Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes*". The latter guidance contained a comprehensive list, outlining various rape myths by category and which contained subsections dealing with intoxication, victim behaviour, sexual history, inconsistent accounts and a victim's response to sexual assault. The CPS Guidance is a dynamic document which is regularly updated in accordance with new case-law. Mr Metzger KC submitted that this Guidance would be a useful starting point for judges to remind themselves of rape myths and stereotypes before and during any fact-finding exercise.
- 60. In response, Miss Fottrell KC noted that family judges are now required to have Judicial College training in relation to sexual assault awareness as well as to attend extensive training programmes on domestic abuse. If this court considered that there were further training issues which may benefit family judges, the appropriate course was to bring this to the attention of the head of the Judicial College, Lady Justice King. However, if the court considered that the CPS guidance and the Equal Treatment Bench Book were useful, it was invited to say so for the benefit of judges in the family court.
- 61. None of the other advocates suggested anything markedly different from the submissions made by Mr Metzger KC and by Miss Fottrell KC. All the advocates accepted that, anecdotally, family judges not infrequently directed themselves as to rape myths and stereotypes.
- 62. I have reflected very carefully on what it is appropriate for me to say on this matter. Judicial training is a matter reserved to the Judicial College. In my view, the College is best able to assess what training is needed for family judges determining factual disputes between parents about the nature of their relationship, especially where those

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disputes concern allegations of sexual assault. In that regard, I note that the Court of Appeal highlighted the training available to family judges in [67]-[68] of Re H-N as follows:

- “(67) Following the judgment of Russell J and at the request of the President, the Judicial College devised a freestanding sexual assault awareness training programme for Family judges. The programme draws heavily on the successful “serious sexual assault” programme for criminal judges. Since July 2020, it has been a mandatory requirement for all judges who hear any category of Family cases to undertake this programme. The programme, which is under constant review, includes elements in respect of psychological reactions to sexual assault and trauma, and has the benefit of contributions having been made by a number of victims of sexual assault discussing the impact that an attack has had upon them. In addition to the more general training in relation to domestic abuse, which is already in place for Magistrates, bespoke training suitable for the work they undertake in respect of sexual assault and trauma is in the process of being developed.*
- (68) This bespoke Family training these in turn into, and is further developed within, the extensive training programmes that are run in relation to domestic abuse by the Judicial College for the fee paid and salaried judges. These courses have been in place for some years and play a key role in both induction courses for newly appointed Family judges and continuation courses run for Family judges who are already in post.”*

63. On the basis that I have found what follows of assistance in my own practice as the lead judge for domestic abuse, I draw the attention of family judges to Chapter 6 of the Equal Treatment Bench Book (July 2022) entitled “*Gender*”. Under a subheading entitled “*Sexual Offences: Who is Affected?*”, there is information about sexual offences which includes several paragraphs addressing rape myths which may feature in criminal proceedings (see [74]-[91]). Though written to assist those sitting in the criminal courts, there is much in that section which family judges may find useful. The Equal Treatment Bench Book is publicly available on the judiciary.uk website at [Equal Treatment Bench Book July 2022 revision \(2\) \(judiciary.uk\)](#). Likewise, the CPS Guidance on Rape and Sexual Offences at Annex A provides a comprehensive guide to the unhelpful stereotypes which may cloud judicial thinking in cases involving sexual assault. It too is publicly available on the cps.gov.uk website and was last revised in May 2021: [Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes | The Crown Prosecution Service \(cps.gov.uk\)](#).
64. I have also come to the view that I should not produce a list of common rape myths or stereotypes or attempt to craft a standard self-direction about sexual assault stereotypes which a family judge might give her/himself. No list would be comprehensive. Further, it would run the risk of creating a rigid framework to which adherence would be given. That would deprive a family judge of the flexibility to think about what is apposite in the particular case, having been appropriately trained to recognise unhelpful stereotypes, and should they consider it necessary to do so, for a family judge to draw attention in her/his judgment to the manner in which they have guarded against applying any relevant stereotypes. Secondly, any self-direction I might devise would be equally inflexible because it cannot encompass the great variety of stereotypical thinking outlined, for example, in the two sources to which I have referred.

The Approach to Appeals Against Fact-Finding

65. A summary of the correct approach by an appellate court to an appeal against a fact-finding determination by a judge at first instance is contained in [75]-[76] of Re H-N namely:

“(75) Although the House of Lords decision in Piglowska v Piglowski [1999] 2 FLR 763 concerned an appeal against the court’s exercise of discretion in matrimonial finance proceedings, much of Lord Hoffman’s description of the general approach to appeals is expressly applicable to fact-finding cases:

“In G v G (Minors: Custody Appeal) [1985] 1 WLR 647, 651-652, this in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343, 345, which concerned an order for maintenance for a divorced wife:

‘It is, of course, not enough for the wife to establish that this court might, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.’

This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility. But it goes further than that. It applies also to the judge’s evaluation of those facts. If I may quote what I said in Biogen Inc V Medeva Ltd [1997] RPC1:

‘The need for appellate caution in reversing the trial judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification... of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation’

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgement will always be capable of having been better expressed. This is particularly true of an unreserved judgement such as the judge gave in this case but also of a reserved judgement based upon notes, such as was given by the District Judge. 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.’

- (76) In hearing and determining the present appeals we have endeavoured to apply the well-established understanding and approach described in Piglowska and*

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elsewhere. Full allowance is to be afforded to the trial judge who has heard the evidence and been exposed to the parties and the detail of each case over an extended period.”

66. An appellate court should also be cautious not to strain to find error where there is none, particularly where an appeal is based on a failure to reference a relevant authority or to refer to a particular matter. Applying Piglowska in Re F (Children) [2016] EWCA Civ 546, Sir James Munby P explained at [22]-[23]:

“Like any judgement, the judgement of the Deputy Judge has to be read as a whole, and having regard to its content 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 provide sufficient detail and analysis to enable to decide whether or not the judgement is sustainable. The judge need not slavishly restate either the facts, the arguments Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 229, 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”.

The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360...

“[...] An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the 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 Hoffman’s phrase, the court must be wary of becoming embroiled in “narrow textual analysis”.

The Appeal in ABC

67. This is an appeal by the respondent mother against the decision of Recorder Temple [hereinafter referred to in this part of the judgment as “the judge”] dated 19 May 2022 by which, at the conclusion of a fact-finding hearing within private law children proceedings, the judge dismissed all the findings sought by the mother, A, against the father, B. The appeal is opposed by the father, C, by his children’s Guardian, took a broadly neutral stance in written argument but was more critical in her oral submissions though did not go as far as suggesting that I should allow the mother’s appeal.
68. The judgment followed a four-day hearing in March 2022. Both the parents were represented by junior counsel as was the child. The judge heard the oral evidence of each parent and of another witness and heard oral submissions on behalf of each party. The judge found that each of the mother’s allegations of rape, sexual assault, sexual coercion, physical and emotional abuse, and coercive and controlling behaviour were

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not proven. Importantly, at the conclusion of the evidence, the children's Guardian invited the judge to find that the evidence did not establish the findings sought by the mother.

69. This fact-finding hearing took place more than two years after the proceedings began and represented the court's seventh attempt at determining the disputed factual issues. Previously listed fact-finding hearings in September 2020, January 2021, May 2021, August 2021, and twice in November 2021 had been vacated or were ineffective.
70. On 26 July 2022, Morgan J granted the mother permission to appeal on grounds 1, 2 and 4 and refused permission to appeal on grounds 3 and 5. The grounds upon which permission was given were as follows: (a) that the judge had erred in law in importing a criminal definition of rape which infected and coloured her analysis and findings; (b) that the judge had failed to apply leading case law concerning rape, domestic abuse, and coercive controlling behaviour and had failed to apply Practice Direction 12J; and (c) that the judge was wrong to place significant weight on the past sexual conduct of the mother when assessing her allegations of rape, domestic abuse and coercive and controlling behaviour.

Background Summary

71. The mother and father met in 2012 and commenced their relationship in August 2013. Both had older children from previous relationships. In November 2013, the mother and father had an Islamic wedding. They separated in early February 2014 and their child was born in October that year.
72. The mother asserted that the father had been coercive and controlling in their relationship and had engaged in sexual intercourse without her consent on two occasions. The first occasion was alleged to have taken place in August 2013 when the mother said that she had consented specifically and only to protected intercourse and the father removed his condom during intercourse, thereby vitiating her consent. The mother became pregnant from this encounter and a termination was undertaken. Following her termination, the mother alleged that the father coerced her into sexual intercourse after two weeks instead of the recommended six weeks' post termination healing time. She said he manipulated her emotionally as well as causing her vaginal trauma. At Christmas 2013 the mother alleged that the father suggested they should have a child together and she said he emotionally manipulated her into agreeing to conceive. A second incident of rape was alleged to have taken place in the mother's home in January 2014 the presence of her daughter (then aged two years). The father did not deny the presence of the child on this occasion but said this was consensual intercourse.
73. Following their separation, the mother obtained a non-molestation order against the father and reported him to the police for breach of that order on multiple occasions. In October 2014, the father was arrested and interviewed under caution, when he accepted that he had had contact with the mother but claimed that she had initiated this. In September 2014, the mother first complained the father had raped her and an initial account was taken from her in October 2014. Later that month, the mother said she did not wish to make a complaint of rape as she felt it would worsen her situation. However, in April 2015, the mother contacted the police saying she wished to pursue her complaint of rape and gave a video recorded interview. The father was arrested in July

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2015 and interviewed but asserted that the sexual encounter in January 2014, which was the subject of the rape complaint, was consensual. In October 2016, the Crown Prosecution Service refused to authorise any charges against the father with respect to this allegation.

74. The mother and father had no contact with each other between November 2014 and December 2016. In January 2017, the mother asked the father for help to care for their child and thereafter they resumed a sexual relationship until April 2017. The mother asserted that she was manipulated into resuming her relationship with the father whereas the father asserted that she had instigated their contact. During the brief resumption of their relationship, the child had unsupervised contact with his father. The application which commenced these proceedings was issued in January 2020.
75. Against this background, the judge was faced with a complex factual history and competing accounts from each parent, both as to the nature of the specific incidents and the dynamic between them more generally. Available to the court was a wealth of documentary, contemporaneous material, including police disclosure between 2014 and 2020, medical disclosure, disclosure from the local authority involved with the mother, text messages between the parties, and records of the mother's conversations with various other support services.
76. By the time that the judge came to determine the disputed factual issues in March 2022, she had case managed the proceedings since early 2021 when the second attempt at a fact-finding hearing was adjourned and issues of disclosure arose which she was required to determine. In April 2021, the judge had case managed and determined the need for third-party evidence and for expert evidence to assess the mother's vulnerability. Finally, in the six months prior to the eventual fact-finding hearing, the judge had case managed the proceedings at five hearings (including a ground rules hearing and an aborted fact-finding hearing in November 2021). She had determined that the mother was a vulnerable person who had difficulty giving instructions or understanding advice and had imposed a number of ground rules for the mother's participation in the fact-finding hearing. She had also permitted the mother to be assisted by an intermediary during both the hearing and her evidence.

The Judgment Under Appeal

77. At the start of her judgment, the judge observed that the case had been listed for fact finding in accordance with Practice Direction 12J and went on to draw specific attention to the mother's vulnerability. Having itemised the allegations she was required to determine with a brief summary of the factual background, the judge set out the general legal principles relevant to the fact finding exercise. Having done so and under the heading "*The Legal Definition of Rape*", the judge set out the definition of rape in s. 1(1) of the Sexual Offences Act 2003. She made no mention of other case law concerned with fact-finding in private law proceedings where domestic abuse was alleged. The judge then listed particular features of the mother's oral evidence at some length as well as, rather more briefly, features of the father's oral evidence in response. Having done so, the judge went on to consider her findings with respect to each allegation, reminding herself that the mother had the burden of proof on each of the allegations she made.

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78. The judge identified some difficulties with the more serious allegations of rape in that the mother had resumed a “*sexually charged and explicit relationship*” with the father for a brief period in 2017, during which she had permitted him to have unsupervised contact with their child as well as the daughter who had allegedly witnessed one of the rapes on which findings were sought. Additionally, the judge noted that the mother had given an inconsistent account of the alleged rapes to a consultant psychologist who reported in 2019. The mother had also neglected to inform the psychologist that she and the father had resumed their sexual relationship in early 2017. Finally, the mother’s case that she was coerced and manipulated by the father was, in the view of the judge, inconsistent with the text messages and photographs sent by her to the father in 2017. In [60] of her judgment, the judge made plain that she preferred the evidence of the father to that of the mother who, the judge commented, had a tendency to recharacterise past events to make them consistent with her view that the father had abused her.
79. The judge went on to list each allegation and to analyse the evidence pertaining to each. With respect to some but not all of the allegations, the judge reminded herself that the mother had the burden of proof. Her analysis of certain allegations contained either the phrase “*taking a holistic view of the evidence*” or another phrase which made it apparent that she had surveyed the wide canvas of evidence to come to her conclusions. The judge found that none of the allegations made by the mother were made out.
80. Specifically, the judge found that the resumption of a consensual sexual relationship between the mother and the father was inconsistent with the mother alleging two occasions of rape, one in August 2013 and the other in January 2014. The judge’s reasoning can be found in [66]-[67] as follows:

“66) *Furthermore the resumption of a sexual relationship with [B] in 2017 is not consistent with [A] having been raped twice previously by [B], neither the communications sent by text message by [A] to [B] at that time, including repeatedly and heavily sexualised photographs, language and images. It is not probable in my judgment that she would have resumed such a highly charged sexual relationship with [B] if he had raped her as [A] suggests. Furthermore, this allegation is also in my judgment inconsistent with the allegation that [A] permitted [B] to have unsupervised contact with [C] in 2017 and her daughter who was said to have witnessed the rape as a very young child and to have been upset by it at the time.*

67) *[A] argued that the resumption of her relationship in 2017 with [B] was non-consensual and that it was driven by the need for help and support with family matters, however this is hard to reconcile with the evidence I have seen in the text messages to which I have referred. Significantly, in my judgment, those messages and exchanges are consistent with a consensual relationship, there is no sense of unwillingness that can be derived from them on the part of [A], or any sense that she is in a position where she had to placate an abusive partner. Looking at the broad canvas of matters, therefore, and the fact that [A] did not volunteer anything about the resumption of her relationship with [B] in 2017 until the text messages referred to were put in evidence by [B], I am unable to accept [A’s] account is accurate. If [A] had truly felt she had no choice but to engage in a relationship with [B] in 2017 she could and should have been upfront about that in the context of her allegations that this was a coercive and abusive relationship. In fact, the suggestion that [A] felt that she had no choice*

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but to engage in a relationship with [B] because she needed support only came after [B] had put the resumption of their relationship in 2017 into evidence. For all the reasons set out above therefore, and on the basis of the evidence I have seen and heard, I prefer the evidence of [B] on this allegation and I do not find [A] has proved this allegation.”

81. In concluding her judgment, the judge observed that her findings should be recorded in the order and invited the parties to agree a schedule of findings/non-findings of fact. That schedule was attached to the order dated 20 May 2022.

Discussion

82. **Ground 1** asserted that the judge had been wrong in law in importing a criminal definition of rape and that, in so doing, it had infected and coloured her analysis and findings. All the parties were in agreement that the judge’s reference to the Sexual Offences Act 2003 was contrary to Re H-N and Re R. Mr Metzger KC submitted that the judge approached her task as if she were trying to determine the mother’s allegations of rape by reference to the criminal standard of proof – she constantly referred to the mother needing to satisfy the burden of proof. Miss Fottrell KC submitted that, though the judge’s reference to the Sexual Offences Act 2003 was erroneous and unhelpful, the judge neither became bogged down in legal technicality nor distracted from the task of reaching narrative conclusions as to how the parents behaved towards each other.
83. I regard the judge’s reference to the Sexual Offences Act 2003 as very troubling. It was neither qualified nor explained in the context of a fact-finding exercise in the family court and, as such, should not have formed any part of her judgment. However, to leap from that error to the assertion that the judge determined the rape allegations in this case to the criminal standard requires a more careful analysis of the judgment. It is the substance and not the form of the judgment which must be the focus of any appeal.
84. The finding sought by the mother with respect to the alleged rape in August 2013 read as follows: *“The Applicant sexually assaulted the Respondent by removing a condom in the course of sexual intercourse without the Respondent’s knowledge or consent”*. In her judgment, the judge recorded each party’s narrative account of the events of the relevant evening and correctly identified the key issues as being (a) the circumstances in which the father removed the condom during otherwise consensual sexual intercourse and (b) whether the mother had consented to him doing so. By reference to the finding sought by the mother, the judge reached a wider narrative finding than simply determining whether rape had or had not occurred: *“I do not find that [B] raped her on this occasion or that he removed the condom without her consent”* [61]. She did so having come to a view about each party’s evidence in relation to the incident and more generally.
85. Though Mr Metzger KC sought to persuade me that the judge’s focus on the issue of consent with respect to the August 2013 allegation of rape indicated an inappropriate focus on concepts applicable to the criminal law, I found that submission unpersuasive given that the wording of the finding sought by the mother made express reference to the issue of consent. Furthermore, the conflict of evidence which the judge had to and did resolve was between the mother’s assertion that the condom was removed without her consent or knowledge and the father’s contention that removal had been a consensual decision during the act of intercourse.

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86. With respect to the alleged rape in January 2014, the mother sought a finding that “*the Applicant raped the Respondent in the presence of her two year old daughter*”. The judge neither referred to the framework for the criminal offence nor did she abdicate her responsibility to consider the broad canvas of evidence when reaching her decision on this allegation in [65]-[67] of her judgment.
87. Thus, though I am troubled by the judge’s reference to the Sexual Offences Act 2003 without qualification or explanation, I find that this error did not infect her substantive decision-making which was in accordance with the legal principles applicable to fact-finding in the family court, were set out at the beginning of her judgment.
88. **Ground 2** asserted that the judge had failed to apply leading (a) case law concerning rape, domestic abuse, and coercive and controlling behaviour and (b) Practice Direction 12J. Mr Metzger KC submitted that this was a fatal error for nowhere in the judgment was there an overall analysis of the parental relationship to determine whether it demonstrated features of coercion or control attributable to the father’s behaviour. Though he accepted that the judge had not been taken to the relevant Practice Direction or case law, he asserted that the judge had a responsibility to take the same into account in her judgment. It was a fundamental error to have made no reference to PD12J in her analysis. In response, Miss Fottrell KC acknowledged that the judge had made no reference to the relevant case law or Practice Direction but submitted that the judge’s reasoning was nevertheless consistent with case law and Guidance.
89. I am concerned with substance rather than form. It is unnecessary for a judge to “*slavishly restate the law*” or “*incant mechanically passages from the authorities*” (applying Re F). Further, I should assume that, unless the judge has demonstrated the contrary, she knew how to perform her functions and which matters she should take into account. I have taken into account in my evaluation of this ground that the evidence in this case amply demonstrated the judge’s awareness and application of Practice Direction 12J in her case management of these proceedings. No party submitted otherwise. In fact, at paragraph 2 of the judgment, the judge made explicit reference to PD12J when she recorded that the matter had been listed for a fact-finding hearing “*in accordance with PD12J*”.
90. PD12J is a crucial document for family judges dealing with domestic abuse and harm within children proceedings. Its purpose is set out in [2] of the Summary, namely:

“The purpose of this Practice Direction is to set out what the Family Court or the High Court is required to do in any case in which it is alleged or admitted, or there is other reason to believe, but the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse.”

The Practice Direction contains general principles applicable to such cases, beginning with a powerful statement of how domestic abuse is harmful to children and/or puts them at risk [4]. It emphasises that the family court must consider, at all stages of the proceedings, whether domestic abuse is raised as an issue, case manage the proceedings accordingly, and ensure that, where domestic abuse is admitted or proven, any child arrangements order in place protects the safety and well-being of the child and the parent with whom the child is living and does not expose either of them to the risk of further harm. PD12J contains a number of sections, one of which is entitled “*the fact-finding hearing or other hearing of the facts where domestic abuse is alleged*”. Two of

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the paragraphs in that section – [30] and [31] - concern themselves with future management once the court has concluded the fact-finding exercise. The other two – [28] and [29] - give guidance to the court when it conducts a fact-finding hearing. Those paragraphs are reproduced as follows:

28. While ensuring that the allegations are properly put and responded to, the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing or other hearing –

- *Each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts; and*
- *the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case.*

29. The court should, wherever practicable, make findings of fact as to the nature and degree of any domestic abuse which is established and its effect on the child, the child's parents and any other relevant person. The court must record its findings in writing in a Schedule to the relevant order, and the court office must serve a copy of this order on the parties. A copy of any record of findings of fact or of admissions must be sent by the court office to any officer preparing a report under Section 7 of the 1989 Act.

91. The contents of [28] and [29] concern themselves with the judge's management of the hearing and his/her obligation to find fact where domestic abuse is established on the evidence. Nothing in either of those paragraphs provides assistance to the judge in evaluating the evidence before the court at any fact-finding hearing. I thus cannot accept Mr Metzger KC's submission that the judge's failure to cite PD12J in the context of a fact-finding exercise was fatal to her conclusions on the evidence.

92. The key guidance, relevant to this ground of appeal and derived from Re H-N, was as follows:

- (a) A pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings (see [31]);
- (b) The definition of domestic abuse makes reference to patterns of behaviour, not only in relation to coercive and/or controlling behaviour but to all forms of abuse including physical and sexual violence (see [33]);
- (c) Where a pattern of coercive and controlling behaviour is alleged, that assertion should be the primary issue for determination. Any other, more specific, factual allegations should be selected for trial because of the potential probative relevance to the alleged pattern of behaviour, unless any particular factual allegation is so serious it justifies determination irrespective of any alleged pattern of behaviour - such as rape (see [51] and [59]).

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93. The mother's case was put on the basis that the father exhibited a pattern of controlling and abusive behaviour which had the effect of coercing her to remain in a relationship, to conceive a child, to have sex, to rekindle the relationship. The judge did not ignore the asserted pattern of behaviour to focus only on specific incidents but, under the framework of the individual allegations pleaded, stood back and considered the relationship and the dynamic between the parents as a whole: she took a holistic view, as stated often in her analysis. In [64], the judge assessed the parental relationship overall as follows:

“It is plain that the relationship between [A] and [B] has been a tumultuous one, and [B] plainly was having a relationship with at least one other woman in the background. [B's] case is that the only sexually intimate relationship he had at the time was with [A]. I cannot find on the evidence that [A] was being coerced or manipulated into continuing a relationship with [B]. Taking a holistic view of the evidence, it seems to me much more likely that [A] was a willing participant in her relationship with [B] in 2014, as [B's] evidence confirmed.”

94. The judge's conclusions were based on her analysis of the evidence. For example, she observed that the mother's case as to the father's coercive behaviour was expressly based upon alleged threats made to her of blackmail by the father, of which the judge found no evidence. Further, the judge evaluated the mother's allegation that she was pressured or coerced into having sex and rough sex at that. The mother had expressly relied upon an assertion that there was medical evidence in support of her sustaining vaginal trauma as a result. Having surveyed the wide canvas of evidence, the judge could not identify any such medical evidence. She also for the reasons articulated in her judgment found the mother's evidence about being pressured into conceiving a child and coerced into having an abortion to be internally inconsistent, preferring the evidence of the father on this issue. Thus, the judge evaluated the mother's allegations about pressure and coercion in the parental relationship by reference both to the evidence as a whole and to the evidence of each party.
95. Thus, I have concluded that ground 2 is not established.
96. **Ground 4** asserted that the judge was wrong to place significant weight on the past sexual conduct of the mother when assessing her allegations of rape, domestic abuse and coercive and controlling behaviour. Mr Metzger KC submitted that the judge had gone too far in focusing upon the sexually consensual behaviour and submitted that the judge had found that, because the mother was sexually adventurous, she could not therefore have been raped. He criticised the judge providing insufficient analysis as to the factual basis for her finding that the mother had not been raped on two occasions as she alleged. The essence of Mr Metzger KC's case was that the judge had applied victim-blaming stereotypes or stereotypes about how a victim of rape should behave.
97. In response, Miss Fottrell KC submitted that the judge had evaluated the parents' sexual behaviour against a wider background including contemporaneous communications between them about sexual activity. It was within her expertise, having heard all the evidence, to decide the weight to give to the evidence about the parties' sexual relationship and an appellate court should be slow to interfere with that evaluative exercise. Miss Langdale KC suggested that the judge may have erred by placing too much weight on the resumption of the sexual relationship between the parties in 2017,

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but left to this court to decide whether there was sufficient evidence overall to buttress the judge's conclusions.

98. As my analysis of proposition 4 makes clear, in circumstances where a pattern of sexual coercion between parents is alleged, this may include - to whatever extent is appropriate - judicial evaluation of the pattern of their sexual relationship before, during, and after any alleged incidents or periods of coercion. The fact that the parents had previously engaged in consensual sexual activity of any nature did not mean that the mother was not raped or sexually assaulted on another occasion.
99. The judge identified a number of matters relevant to this factual determination. Firstly, and following the parties' separation in 2014, the mother had taken a number of protective measures and sought support from a variety of sources: obtaining non-molestation relief from the family court; reporting to the police on several occasions the father's breaches of that order; reporting to the police and then eventually pursuing allegations of rape and sexual assault; obtaining support from the local authority and from domestic abuse support services; and obtaining support from her GP. Secondly, between November 2014 and December 2016, there was no contact between the parties. Thirdly, in January 2017, the mother initiated contact with the father seeking his support to care for their child. Thereafter, she facilitated contact between the father and his child. Fourthly, the parties resumed a "*sexually charged and explicit relationship*" in which, on the judge's assessment, the mother appeared to be very much in control of her role and where she was clear in articulating her own wants and desires. Fifthly, in 2019, the mother obtained support from a psychologist, Dr X, to whom, in the judge's assessment, she inaccurately reported the most serious of the allegations she made to the court and she also failed to inform Dr X that she had resumed a sexual relationship with the father in early 2017.
100. None of those matters led to the conclusion that the mother's findings were not made out and the judge did not suggest this was so. The judge did attach weight to the contemporaneous evidence from early 2017 when evaluating the mother's assertion that the sexual relationship between the parents at that time was non-consensual. It is difficult to see how the judge's approach can be challenged when she was entitled to do so as part of her evaluation of the evidence. The judge was also entitled to have regard to the fact that the mother's account of the parental relationship in 2017 was only raised late in the proceedings (see [80] above).
101. The key issue was whether the judge placed improper weight on the evidence relating to the parents' 2017 relationship when assessing the allegations of earlier sexual abuse. The judge clearly took that material into account when assessing the relationship as a whole. However, it was evident that her analysis of the earlier allegations of rape and sexual coercion was based on her assessment of the parties' evidence as a whole, with appropriate self-direction as to the caution to be applied to the way in which the parties gave their oral evidence as set out in [21] - [22] of her judgment. Thus, the judge found that the mother's evidence with respect to the first allegation of rape in August 2013 was internally inconsistent whereas that of the father was consistent. Where there was a conflict of evidence, the judge preferred that of the father. Additionally, there was an absence of evidence to support the mother's account that she had been subjected to rough sex as she described. The mother had expressly claimed that there was medical evidence in support of that allegation yet the judge had been unable to find any such evidence in the records upon which reliance was placed. Further, although the mother

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had alleged that the father had threatened her and engaged in blackmail, the judge was unable to find evidence of this and preferred the evidence of the father. With respect to the remainder of the allegations, and in particular to allegations that the father had coerced the mother into conceiving a child and into having an abortion, the judge's evaluation of each parent's evidence led her to find the father's evidence on these issues more credible than the mother's because of the inconsistencies in the mother's evidence.

102. Having considered carefully the evaluative exercise conducted by the judge, I am unpersuaded that any of the grounds of appeal have been established. It thus follows that I dismiss this appeal. The proceedings should be referred to the Designated Family Judge and listed for a case management hearing to address the welfare stage of the proceedings.

The Appeal in DE

103. This was an appeal against the decision of His Honour Judge Marin [hereinafter referred to in this section as "the judge"] dated 11 July 2022 by which, at the conclusion of a fact-finding hearing, the judge dismissed some of the findings sought by the mother against the father, specifically those relating to sexual assault and non-fatal strangulation. The judge did however make some of the other findings sought by the mother. The appeal was opposed by the father. The child was not a party to the proceedings either at first instance or on appeal.
104. The judgment followed a three-day hearing in June 2022 at which both parties were represented by counsel. The judge heard the oral evidence of the mother, the father and five other witnesses and received oral argument from counsel on behalf of the mother and the father. By his judgment - though regrettably not reduced to a schedule contained in the court's order dated 20 July 2022 – the judge found (a) that the mother had been economically controlled by the father; (b) that the father's behaviour had, on occasion, been unacceptably nasty and arrogant towards the mother and the child; and (c) that the father had asserted himself over the mother in a way which was insensitive. The judge made no findings on the mother's allegation that she had been raped by the father on a date between October 2011 and June 2012 and that, on occasion, the father had strangled her during sex. He also made no findings that the father had physically and psychologically abused the couple's child.
105. By a notice of appeal dated 29 July 2022, the mother sought permission to appeal the judge's findings. On 30 August 2022, Arbuthnot J stayed the judge's order and gave permission to appeal on the following grounds: (a) that the mother had raised a number of grounds based on the judge's finding that she had not been raped; (b) that it was arguable that the family court should apply a consistent definition of rape; (c) that it was arguable that the family court should apply consistent definition of consent which made clear the difference between submission and consent; (d) that it was arguable that judges should give themselves a warning about rape myths and have a consistent approach to the complainant's sexual history; and (e) that it was arguable that the definition of rape and consent used in the criminal justice system could be a starting or finishing point for use in the family courts.

Background Summary

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106. The mother and father began their relationship in 2004 and married in 2009. They separated in spring 2018. The mother's case was that she had suffered serious emotional and physical abuse from the father during their relationship whereas the father attributed the breakdown of the marriage to the parties growing apart and to financial pressures as the mother was not working. The couple had one daughter, F, now aged six years, who lived with her mother. Arrangements for the father to spend time with F were agreed through mediation. In 2019, the father entered into a relationship with another woman whom he eventually married. The father claimed that, at this point, contact with F deteriorated as the mother gradually restricted his time with her. The mother maintained that F was not always willing to go with the father and she criticised some of his behaviour towards the child. Contact between the father and F ceased in January 2021.
107. In December 2020, the father issued an application for a shared care arrangement which was opposed by the mother who made allegations of rape, non-fatal strangulation, domestic abuse, controlling behaviour, and child abuse. In September 2021, the matter was set down for a fact-finding hearing and allocated to a circuit judge. Indirect contact by way of monthly cards and letters was agreed.

The Judgment Under Appeal

108. My summary of the judgment is focused on the judge's findings about sexual matters as these were the focus of this appeal.
109. The judge summarised the relevant background and then itemised the findings sought by the mother. These were as follows: a) between October 2011 and June 2012, the father raped the mother on one occasion and, on many occasions between June 2012 and December 2017, the father strangled the mother when they were having sex; b) the father was emotionally abusive to the mother and F between 2004 and 2021, by calling the mother names, criticising her, referring to previous abuse she had suffered, and expressing frustration that she did not earn money. Further, the father was said to have manipulated the mother into meeting his new partner unannounced on three occasions and to have made fun of and been unkind to F, sometimes refusing to communicate with her; c) the father intimidated the mother by lunging at her in the dark to scare her, by punching his chest to show how strong he was, by threatening the mother when she was pregnant and at a time when she was concerned that the baby had stopped moving in the womb, by grabbing her finger and pushing it backwards when F was crying and the mother refused to hand her to the father; d) the father economically abused the mother by not including her as joint owner of the home, by requiring her to use her savings when she was unemployed in order to pay household bills, by stopping maintenance in retaliation when there were problems with contact; e) the father psychologically abused F by telling her the mother would die and that she would then live with him and by telling her that Covid would kill "*useless old people*" thereby causing F to become concerned for her grandparents; and f) the father was physically abusive to F by hitting her with an umbrella, by smacking her hard, by biting her finger in January 2021, and by putting his foot on her stomach in December 2018.
110. The judge then summarised the law, relevantly a) reminding himself by reference to Re R and Re B-B (Domestic Abuse: Fact Finding) [2022] EWHC 108 (Fam) that the family court's function in a fact-finding process was fundamentally different from that of the criminal court in that it determined what had happened in the past so this knowledge

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might inform the ultimate welfare evaluation; b) reminding himself of the principles set out in R v Lucas; c) citing PD12J and specifically the definitions of domestic abuse contained therein; d) reminding himself of the guidance in Re H-N about patterns of behaviour and the harm which those caused; and e) noting that non-fatal strangulation was now a criminal offence as of June 2022.

111. The judge then stated that he did not propose to deal with every issue in dispute or analyse the fine detail of all of the evidence as this would be disproportionate and unnecessary. Instead, he stated that he would highlight the evidence of particular relevance to his decision-making and affirmed that he had taken into account the totality of the evidence when reaching his decisions including by considering how the allegations overlapped and how evidence might be relevant to more than one category of allegation.
112. The judge then summarised his impression of the mother as a witness, noting that she described her own childhood as abusive, violent, and completely dysfunctional. It was plain to the judge that the mother viewed the father as a perpetrator of serious physical and emotional abuse. The judge considered the mother was doing her best to assist the court but stated that he approached her evidence with some caution. He concluded that the mother had a fixed view about the father and the judge was concerned about how much her own childhood abuse had clouded her view of the father.
113. For his part, the judge noted that the father conceded he had acted badly at times. His impression was that the father lacked insight into many matters and did not understand how he may have hurt or upset the mother and F, or how his behaviour might have been insensitive or unacceptable at times. The judge thought the father presented as somewhat arrogant.
114. Turning to the allegation of rape, the judge listed ten deficits in the mother's evidence. First, he noted that the mother was unable to give a date as to when the rape occurred, giving three different timeframes between 2011 and 2012. He contrasted this with her ability to give a detailed account of what had occurred when she was raped and said, "*I found it difficult to accept that an intelligent lady could not place the alleged rape within a very short time window given that the incident was certainly etched in her memory*". Second, the judge noted discrepancies between the mother's account to the police of what had happened when she was raped and her evidence to the court. This included the father putting on a condom, a feature she had not mentioned to the police. Third, the judge noted that there was no contemporaneous evidence to support the mother's allegation of rape in that she had not complained to the police, to her GP or to the hospital when she was pregnant. The judge made particular reference to the mother contacting a charity in 2012 for those who had experienced abuse in childhood and said, "*if they had been told about rape in the mother's marriage, I am sure they would have told her to go straight to the police and to leave the father*". The judge noted that the absence of contemporaneous evidence meant that the court only had the evidence of the mother and father about an alleged rape which had happened a decade earlier. Fourth, the mother said that, at the time of the rape, she was unable to move and was in a debilitated state as she was suffering from Lyme Disease. The judge examined the GP notes and concluded that they did not support the picture painted by the mother. However, he noted that the father accepted the mother was unwell at times and that, on one occasion, he had had to shower her.

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115. Fifth, the mother claimed that the father tried to have anal sex with her which she did not allow. The judge noted the father's denial and also observed that, if this was a "*kink*" of the father's sexual conduct as had been put on behalf of the mother, there was no explanation why such behaviour had not occurred earlier in their sexual relationship. Sixth, the judge referred to a long email sent by the mother to the father in March 2018, the purpose of which was to explain why the mother felt unable to continue with their relationship. Though the email made reference to the parties' sexual relationship, there was no reference to any rape or strangulation during sex. Seventh, the judge noted that the mother had left the family home in 2018 to live with her own mother but returned a month later because of difficulties in that relationship. The judge opined that it made no sense for the mother to return to the matrimonial home when there were other options to her such as staying with friends or living in a refuge. Eighth, the judge referred to seemingly affectionate messages between the parties in 2012 and at other times. The judge dismissed the suggestion that such messages reflected the mother's fear of the father together with a desire to avoid conflict on the basis that the mother had sent the father a message in May 2018 before she returned to the family home. This described her confronting her own mother about the childhood abuse the mother had experienced and the judge observed that it was odd the mother had chosen to confide in the father about this when she believed him to have abused her. Ninth, the judge noted that nothing had been said about the rape and strangulation during sex in the mother's divorce petition. The judge recognised that some petitions were watered down in order to avoid further conflict but considered it strange that these matters had not been mentioned. Tenth and finally, the judge noted that contact had broken down after the father had formed a relationship with a new partner.
116. The judge went on to describe difficulties with the father's evidence such as his inability to give a full account to the police of what he described as a consensual sexual relationship. He noted that the father had lied to the mother about his sexual experience prior to their relationship. In particular, the judge made reference to the father's account to the police of having sex on a daily basis with the mother save for three occasions when she was unwell. The father had accepted that the mother had Lyme Disease which the judge noted must have restricted the mother on occasion. The judge noted that, in his oral evidence, the father tried to distance himself from his account of having sex on a daily basis with the mother. The judge found that the father had been telling the truth in his account to the police. Finally, the judge noted the father's lack of sympathy when the mother had spoken to him about the abuse she had suffered as a child.
117. The judge reached the following conclusions. First, that the father saw sex as important in a relationship and felt entitled to demand it from the mother. He wanted sex regularly and bragged about being sexually experienced so the mother could live up to his sexual expectations. At times and as the mother had suggested, the father wanted sex regularly to make the mother pregnant. However, the father did not know about the mother's abusive childhood experiences. Second, the mother had a complex personality and struggled at times with emotions arising from her past and with her desire to become pregnant. Against this background, the judge found that "*she allowed the father's demands for sex*". The judge was not satisfied that the father realised on any occasion that the mother did not want sex or that he knew she did not consent to sex. He found that the evidence did not permit him to make a finding of rape.

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118. In addition, he made no finding that the father had strangled the mother during sex given the deficiencies in the mother's evidence to which he had already referred. His main reason for doing so was because he did not accept that the mother would have permitted this behaviour to have happened for many years, stating: "...*She is intelligent. She felt able to approach [name of charity] in 2012. She was capable of seeking advice from her GP over the years about the father strangling her during sex. She came across as someone who would not have just accepted such conduct....*" [96].
119. The judge went on to make findings about the other allegations made by the mother summarised in [104] above. At the conclusion of his judgment, the judge recorded his impression of the parental relationship in this way:
- "Outside of the specific allegations and looking at the parties' relationship as a whole, what emerges in my judgment is that the mother with a complex background borne of the trauma of her own childhood coming from a somewhat sheltered background who was maturing in the more secular world found herself with a man who believed that he had to run things his way and who lacked insight and behaved in ways that were at times unacceptable as I have said in my findings. I do not find the father to be malevolent though."*
120. The judge did not attach a schedule of findings he made either to his judgment or to the court order dated 20 July 2022. Counsel for the mother and the father attempted to reduce the judge's findings to a schedule but that draft document has never been approved by the judge.

Discussion

121. The grounds upon which permission to appeal was granted focused on the manner in which the judge had approached his fact-finding task with respect to the allegation of rape and non-fatal strangulation. That was the main focus of Dr Proudman's skeleton argument in support of the application for permission to appeal though Arbuthnot J's decision did not exclude the other grounds upon which permission was sought. These included a failure by the judge to assess whether the father's behaviour overall amounted to a pattern of abusive behaviour and a failure to give any reasons for rejecting the evidence of the witnesses called on behalf of the mother. I record that, very helpfully, Ms Najma's skeleton argument engaged fully with the contents of Dr Proudman's skeleton argument. My primary focus has necessarily been the judge's decision making in relation to the allegation of rape and non-fatal strangulation.
122. During the course of oral argument, both counsel conceded that the judge had failed to identify with precision whether some of the findings he made constituted abusive behaviour within the meaning of PD12J. Given some uncertainty about that matter, both advocates had struggled to produce a schedule of the court's findings. I was told this document had been sent to the judge for his approval, but counsel understood that their schedule had not been formally approved. Both acknowledged that the basis for the welfare assessment by the Child and Family Court Advisory Service ["Cafcass"] remained the judgment itself.
123. Without rehearsing at length, the detailed submissions made by both Dr Proudman and Miss Najma about the manner in which the judge had approached his determination of the allegations of rape and non-fatal strangulation, I was not persuaded that this court

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should interfere with the judge's finding that the mother was not raped by the father. The judge had the inestimable benefit of hearing from both the parties at length and was best placed to assess the credibility of their evidence. It was plain that he had reservations about the account given by both the mother and the father which he set out in some detail. He was thus uniquely well placed to determine the factual issues. Likewise, the judge's finding that the father had not strangled the mother during sex was grounded in his assessment of the evidence, particularly the deficits he identified in the mother's evidence overall.

124. However, Dr Proudman's submission, that the judge had failed to stand back and consider the significance of the findings he had made about the parties' sexual relationship and set these against the other findings he made about the father's behaviour, had real traction. First of all, it seems to me that the judge failed to consider whether his findings amounted to behaviour which, though falling short of establishing rape or non-fatal strangulation, was nevertheless profoundly abusive and which should not be ignored (see Re H-N at [71]). It might well be thought that, in the circumstances of this case where the judge assessed the father to be a man who wanted things his own way, the father's sexual behaviour - evincing an entitlement to daily sex coupled with his admission to having had sex with the mother each day apart from three occasions - might constitute sexually abusive behaviour in circumstances where the mother "*allowed*" this behaviour to happen. Secondly, that conclusion might also have added force in circumstances where, on my reading of the judgment, the judge had found other examples of abusive conduct by the father within the meaning of PD12J, for example, verbal abuse of the mother, belittling her in front of others, and frightening her as a way of asserting himself over her. In my assessment, though he had a stated awareness of the need to consider if there was a pattern of abusive behaviour, the judge fell into error by failing to stand back and look at the big picture. I venture to suggest that, had the judge adopted the discipline of evaluating his factual conclusions against the definitions in PD12J, so as to produce a schedule of his findings, he may not have fallen into error. A failure to evaluate whether there was a pattern of abusive behaviour has profound implications both for any welfare analysis by Cafcass and for the court's ultimate determination about the children's welfare.
125. I am thus satisfied that I should allow this appeal for the reasons outlined above. I have decided that the matter should be remitted to the relevant Designated Family Judge who should determine, by reference to PD12J, whether a further fact-finding hearing is necessary and, if so, its parameters. For the avoidance of doubt, the finding by the judge that the allegations of rape and non-fatal strangulation were not made out stand, as do the positive findings that were made by the judge with respect to allegations two, three and four.
126. Dr Proudman was highly critical of the judge for adopting what she described as stereotypical thinking about the way a victim of rape should have behaved. Given the conclusion I have come to above, I need not dwell on this issue save to make one observation. I regard the judge's comment in [96] of his judgment (see above at [116]) that the mother was intelligent in the context of her failure to seek help about the father's sexual behaviour at the time it occurred as unhelpful. The intelligence or otherwise of a victim of sexual assault or of any assault in the context of an intimate relationship is nearly always irrelevant to the reporting of an assault to the authorities. Victims of whatever age, race, sexuality, appearance, intelligence, and background often have the

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greatest difficulty in reporting when an assault has occurred because of shame, fear of being disbelieved or fear that the process of reporting an assault will itself be traumatic. However, that observation does not mean that the judge's finding about rape and non-fatal strangulation should not stand since he gave other detailed reasons grounded in the evidence for coming to his conclusions about those two issues.

127. Finally, I have already commented on the failure by the judge to either produce his own schedule of findings or, if what I was told was correct, to endorse the schedule drafted by counsel. He was not alone in so doing, as the judge in the ABC appeal also failed to produce her own schedule of findings (though one was later produced by counsel at her invitation and attached to her order). Paragraph 29 of PD12J requires a schedule of findings to be attached to the court order following a fact-finding determination. In my view, it is desirable that, with the definitions of domestic abuse contained in PD12J firmly in mind when doing so, a judge produces her/his own schedule of findings, either incorporated into the body of a judgment or appended to its conclusion. That course avoids any lack of clarity about the detail of what the judge found, and any schedule can then be incorporated in or appended to the court's order. I make this suggestion fully conscious of the pressures on the family judiciary engaged in what can often be a relentless train of successive fact-finding determinations, but it is not intended to make the task of judgment writing more difficult. On the contrary, I hope it represents good practice which may help to illuminate a judge's evaluation of the evidence and to inform their ultimate findings.

Conclusion

128. Accordingly, for the reasons given, I dismiss the appeal in ABC and allow the appeal in DE.
129. That is my decision.