Neutral Citation Number: [2019] EWHC 572 (Fam)

Case No: 2018/0127

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2019

Before:

MR JUSTICE WILLIAMS

- -

Between:

M	**Applicant**
- and -	
F	**Respondent**

(Appeal: Fact Finding)

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Simon Rowbotham (instructed by **Hopkin Murray Beskine**) for the **Applicant**
Neil Mercer (instructed by **Woodford Wise Solicitors**) for the **Responsent**

Hearing dates: 25th February 2019

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Approved Judgment

I direct that pursuant to FPR 27.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WILLIAMS

This judgment was delivered in public. 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.

Mr Justice Williams :

Introduction

1. This is my judgment on the appellant mother's application for permission to appeal in respect of a decision made by His Honour Judge Tolson QC on 17 July 2018. The appeal was lodged on 7 August 2018. Mr Justice Cohen gave directions on 16 August 2018 and on 4 December 2018. He directed that the matter be listed for permission to appeal on notice with appeal to follow if permission to appeal is granted. The case was given a one-day time estimate. Mr Justice Cohen recorded in the order that the case had been the subject of far too much delay and that he might have listed it for PTA only but such a course might have led to further delay which he wished to avoid.

2. The application for permission to appeal is supported by 14 'revised' grounds of appeal settled by Mr Rowbotham who appears on behalf of the Appellant, as he did at first instance. The grounds are expanded upon in the Skeleton Argument and have been further argued in oral submissions.

3. The respondent father's position is set out in a position statement (as directed by Mr Justice Cohen) settled by Mr Mercer, who also appeared in the court below.

4. The grounds of appeal are helpfully subdivided into three headings

    a. Issues of fairness and public policy

        i. Ground one: the comments of the learned judge about the mother and or cases involving alleged domestic abuse more widely were such that an objective observer would be led to believe that the mother did not receive a fair hearing and/or that the court had predetermined the matter.

        ii. Ground two: the observations of the learned judge concerning wider issues in cases of domestic abuse, and the comparisons drawn between the mother's case and other cases previously heard by the learned judge, were inappropriate and fell below the standard expected of an experienced judge of the family court. In particular, the court's observations about the waste of resources (including legal aid and the use of special measures) were wholly unfair and contrary to public policy.

        iii. Ground three: the learned judge displayed what might be perceived as a lack of understanding and/or insight into the presentation of an alleged victim of abuse. The apparent need for the mother to present/look like a victim of abuse was inappropriate. The learned judge failed to acknowledge the possibility that in the 17 months or so since the mother fled to a refuge she has made progress with the extensive support of professionals. Further, the expectations placed on the mother to recall events precisely was unrealistic while the apparent criticism of her for "planning" her exit from the family home failed to acknowledge the realities of cases involving domestic abuse.

    b. The Findings

i. Ground four: the learned judge was plainly wrong to dismiss the mother's allegations that the father had repeatedly bitten her to the face and to the body. In considering whether or not to make this finding, the learned judge imposed a false dichotomy that such an action must either have taken place in "anger" or with "sexual" motivation. The expectation placed on an alleged victim to explain the motivations behind her alleged abuser (including direct questioning on this issue by the court) was inappropriate.

ii. Ground five: the learned judge was plainly wrong to dismiss the mother's allegations of controlling and coercive behaviour. Insufficient weight was placed on key aspects of the case, for example the fact that the parties were married in a ceremony held in a language that she did not understand and with no maternal family present. The learned judge's observations that the mother did not 'present' as a victim of controlling and coercive behaviour were inappropriate.

iii. Ground six: the court's finding that the father had caused bruising to the mother but that the mother had 'provoked' the father into hitting her was wholly inappropriate.

iv. Ground seven: during the course of the hearing, the learned judge voiced unfounded conclusions regarding the sexual behaviour of the mother while at the same time failing to consider at all the highly gratuitous nature of the father's written and oral evidence, which included inter-alia irrelevant allegations regarding the mother's sexual activity.

v. Ground eight: the court's finding that the mother was not a reliable witness was unsubstantiated. The learned judge appeared to conflate questions of exaggeration with honesty. Insufficient weight was placed on the father's lack of candour and evasive approach to questioning.

vi. Ground nine: the learned judge failed to consider sufficiently if at all the medical evidence. It was common ground that the mother suffers from mental and emotional ill-health; further, the evidence indicated her self harming behaviour and suicidal ideation at the point she fled the family home to live in a refuge. There was clear evidence of the extensive support that the mother had received from health and welfare professionals and of her progress since leaving the father. The court also failed to acknowledge the fact that she had remained in a refuge for many months.

vii. Ground 10: the learned judge erred in making a finding concerning the mother's psychological well-being. Such a finding was out with the expertise of the court and should not have been made in the absence of expert psychological evidence obtained pursuant to part 25 of the family procedure rules 2010.

viii. Ground 11 the learned judge failed to rule on the balance of the allegations placed before the court, notwithstanding the previous approval of the Scott schedule by multiple judges.

ix. Ground 12: in focusing on such detail on just two of the allegations before the court, the learned judge failed to grapple with the wider factual matrix of the case. As a result, the final conclusions reached by the learned judge as to the nature of the parents' relationship were wrong.

c. Application of the law

i. Ground 13: the learned judge erred in his approach to the fact-finding process and the application of the balance of probability test. It was clear that the learned judge did not consider the allegations raised by the mother a bar to contact to such an extent that this impacted the court's reasoning on findings of fact.

ii. Ground 14: the court erred in its application of practice direction 12 J of the FPR 2010 as being in any way relevant to the question of making findings of fact on a balance of probability.

5. Mr Rowbotham expanded upon and argued these grounds in his comprehensive 24-page skeleton argument. At the outset of the hearing he anticipated that he might not need to supplement the skeleton argument for long in oral submissions as it was more a fully fleshed body than a skeleton but nonetheless he developed the skeleton over a period of 2 ½ hours or so. I shall address some (but not all) of his arguments when I turn to the grounds themselves.

6. Mr Mercer filed a position statement in response running to some eight pages. His essential position was that this was an entirely proper decision reached by a hugely experienced family judge and that there was no merit in any of the criticism contained within the 14 grounds of appeal or the skeleton or submissions in support. He submitted that the appellant's approach was based on a textual analysis which took comments or conclusions or observations out of context in order to crochet together an argument which had a superficial attractiveness but which (my words) fell apart when looked at in its true context.

7. Given the extensive documents which had been filed with the court and the nature of the challenge to the decision it did not seem possible to deal with permission to appeal as a preliminary issue but rather the decision on permission required a fuller exploration of the arguments and thus I allowed both counsel to make what in essence amounted to full submissions on the appeal. At the conclusion of the hearing at about 4:00pm, I indicated to the parties that my decision was that I was refusing permission to appeal and that I would set out at my reasons more fully in a written judgment. This is my judgment.

Background

8. The parties are the parents of C (born in 2014) and were married on 2012. They separated in 2017 when the mother left the parties home together with the child and moved to a refuge.

9. On 17 July 2018 His Honour Judge Tolson QC delivered an extempore judgment at the end of a two-day fact-finding hearing which had been listed by District Judge Gibson on 8 February 2018. That fact-finding hearing took place within cross applications by

the father for a child arrangements order (issued on 7 April 2017) and an application for a non-molestation order issued by the mother on the 18 of May 2017.

10. As a result of the judgment His Honour Judge Tolson QC made an order dated 17 July 2018. Paragraphs 11 and 12 record that the hearing was a fact-finding hearing, that both parties were in attendance and that the mother was provided with screens for the duration of the hearing. It records the witnesses who were heard and at paragraph 12 it records that the court made findings as set out in the schedule to the order. Those findings were as follows:

    1. On 23 July 2011 the injuries to the mother's face were caused in the course of being pushed to the ground by the father including pushing to the head. The father's actions were significantly provoked by the actions of the mother who was very drunk at the time.
    2. On 4 February 2017, the father did not push the child deliberately into the mother. The father uttered a threat to kill the mother but there was nothing to indicate that he would act violently or act on it.
    3. On the mother's allegation of biting, the only firm conclusion the court can reach is that there was no clear, controlling behaviour designed to impose psychological pressure on the mother.
    4. The father's behaviour in respect of finances falls a long way short of controlling or coercive behaviour. The father was pushy and placed himself in a position where he had the better position in family decisions, for example the house being in his sole name
    5. The father does not pose any direct risk of physical harm to the child.
    6. The father does not pose any psychological risk to the mother.

11. The original schedule of allegations filed on behalf of the mother dated 26 May 2017 and responded to by the father on 11 October 2017 ran to some 14 allegations. These consisted of:

    a. Allegations of the use of serious violence by the father towards the mother (item 1, 23 July 2011 [punching and slapping the mother to the face and head], item 4 [pinching, grabbing breasts, biting on an almost daily basis]

    b. Allegations of controlling and coercive and abusive behaviour (item 2, item 3

    c. Allegations of the use of force against the child (item 6 [throwing the child on the bed], 7 [pushing the child down on the bed], 8 [tapping the child on the arm with a knife and saying our batter you to him], 11 [pushing the child into the applicant causing their heads to hit and then threatening to kill the mother], 12 [hitting the child on the legs with a spoon and threatening to batter him], 14 [leading to copycat behaviour by the child against the mother (item 9)]

    d. Allegations of emotional abuse of the child (item 5, 10 [exposure to pornography], 13 [egging the child onto hit the mother which he did].

12. The father's response which is also set out in the schedule was in broad terms to deny the allegations. In respect of the allegations of assault (item 1) he accepted that an incident had taken place in which he had pushed the mother and she had fallen over but he gave a context to this of the mother having been drunk. In respect of some of the allegations of assault on the child he accepted some horseplay but no assaults. He accepted that he had looked at pornographic material but alleged the mother had also.

In respect of item 11 he gave a different explanation. The parties' cases were set out in their witness statements in the trial bundle and were cross-referenced within the Scott schedule. The court heard evidence from the mother and the father and also from the maternal grandmother. There were further witness statements in support of the mother's case and there were some documents from health visitors support workers police and a Cafcass report.

Appeals: Fact Finding

13. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

14. The test for granting permission [FPR 30.3(7)] is:

    i) there is a real (realistic as opposed to fanciful) prospect of success, and
    ii) there is some other compelling reason to hear the appeal.

15. In Re F (Children) [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

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

    23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

    > *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. 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 Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"

16. Lord Hoffmann also said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

"*If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC 1, 45:*

'... [S]pecific findings of fact, even by the most meticulous judge, 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 and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

... The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed."

17. So far as concerns the appellate approach to matters of evaluation and fact: see Lord Hodge in *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93, paras 21-22:

"21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House ... Lord Reed summarised the relevant law in para 67 of his judgment in Henderson [Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600] in these terms:

"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, ***or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence****, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

18. See also the Privy Council decision in Chen-v-Ng [2017] UKPC 27

Recent guidance has been given by the UK Supreme Court in McGraddie v McGraddie [2013] 1 WLR 2477 and Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 and by the Board itself in Central Bank of Ecuador v Conticorp SA [2015] UKPC 11 as to the proper approach of an appellate court when deciding whether to interfere with a judge's conclusion on a disputed issue of fact on which the judge has heard oral evidence. In McGraddie the Supreme Court and in Central Bank of Ecuador the Board set out a well-known passage from Lord Thankerton's speech in Thomas v Thomas [1947] AC 484, 487-488, which encapsulates the principles relevant on this appeal. It is to this effect:

> *"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."*

The Judgment

19. Included within the appeal bundle are the transcripts of the first and second day during which the evidence was heard and submissions were made. I have not been able to read the entirety of the transcripts of evidence but the sampling that I have undertaken accords with Mr Mercer's description of the hearing as being courteous, even-tempered, appropriately inquisitorial and adversarial when necessary. In a sense the impression which emerges is of an unremarkable form of evidence gathering. Mr Rowbotham noted that the hearing had been fragmented by the need for His Honour Judge Tolson QC to deal with another matter, and that this added to the appellant's impression of a hearing which did not give her a fair chance to have her case heard. Whilst I can accept in principle the possibility that a hearing which was so fragmented or rushed would amount to a procedural irregularity which rendered the decision unjust, the transcript of the hearing does not support the submission that in this case there was unfairness arising from the way in which the hearing was conducted. As judges we would all hope to provide an exceptional quality service to the parties who come before us; occasionally that is possible but more often in busy family courts up and down the country the pressures on judges and courts mean that the service is good enough but not perhaps what we all wish we could provide if we had unlimited resources. There is nothing that emerges from the transcript or judgment which depicts anything other than a fair hearing.

20. I have immersed myself in more detail in respect of the transcript of the submissions made which I understand commenced at about 4:00pm. The judgment was delivered from around 6:00pm and the hearing concluded after short post judgment submissions at 6:47 PM. The submissions of Mr Mercer, and those of Mr Rowbotham, demonstrate an interactive process with counsel taking points and His Honour Judge Tolson QC testing them and expressing views on the evidence and its implications. Mr Rowbotham submitted that he had not been able to develop his submissions in the way he had intended and had not been able to get all of his point across. The transcript does not to my mind demonstrate any form of inappropriate interventionism by His Honour Judge Tolson QC. In particular in relation to a relatively straightforward fact-finding hearing which had taken place over two days and in which the evidence was not extensive and where the judge inevitably would have been forming views as to

credibility in particular over the course of the hearing submissions may often be very limited indeed and there is no suggestion that Mr Rowbotham was prevented from making his client's case in an appropriate fashion in that context. Having heard from Mr Rowbotham myself for some half a day, I detected no reticence or lack of ability to make his point in the face of judicial interventionism.

21. In the course of submissions Mr Rowbotham submitted that the approach of His Honour Judge Tolson QC in submissions and indeed earlier indicated that he had prejudged the case. Mr Rowbotham is undoubtedly right that in the course of submissions His Honour Judge Tolson QC expressed views as to matters of credibility and as to the facts he was being asked to determine and to the direction of travel of the case in terms of possible child arrangements orders. However this approach is one which many judges would adopt in particular in relation to fact finding matters where the outcome essentially depended upon an analysis of the witnesses who had just been heard, together with documentary evidence recently read by the judge. As Lord Neuberger pointed out in his F A Mann lecture in 2015 'Judge not, that ye be not judged: judging judicial decision-making' the route by which a judge reaches his ultimate decision takes a number of forms. The process by which a judge reaches a decision will vary from case to case depending on the nature of the evidence and perhaps also linked to the sort of case it is. Is it a purely factual evaluation? Is it a discretionary matter? Is a decision needed on the law? Albeit Lord Neuberger was focusing more on decisions on the law it is very often the case that in a time limited and oral evidence heavy, fact-finding hearing that the judge will be reaching at least tentative if not firm conclusions in the course of the hearing. That is hardly surprising given the nature of the task and the process by which the judge reaches a decision on matters of fact. In the absence of very clear evidence emerging from a transcript of a hearing or from a judgment of the judge having plainly pre-determined matters of fact prior to hearing any evidence or to having closed his mind it will be a very difficult task on an appeal for an appellant to persuade the appeal court that the judge did not carry out the fact-finding task in an appropriate and just manner.

22. Having immersed myself in the transcript of the submissions it is very evident to me that one has to read those transcripts and the judgment itself together in order to better understand the 'penumbra' which surrounds the judgment. I gained the impression that immersion in the transcript of evidence would further illustrate the penumbra.

23. In his judgment His Honour Judge Tolson QC refers in succinct terms to the burden and standard of proof. The judge refers in general terms to PD12J and the importance of fact finding in respect of matters which have the potential to affect the child arrangements that might be made. The judge refers to the importance of making findings as to credibility. He concluded having read the written material and having heard oral evidence that neither the mother or the father were a wholly reliable witness. The judgment demonstrates a sure-footedness in its approach to fact-finding which no doubt arises from His Honour Judge Tolson QC's very considerable experience both in practice and as the designated family judge for the Central Family Court of dealing with contested factual matters ranging from the most simple to some of the most complex which come before the family courts.

24. In respect of the allegations of physical violence the judge focuses on the two particular incidents covered by items 1 and 11 in the schedule. This is understandable because it is in respect of those incidents that there was a measure of agreement between the parties that something had occurred. The judge carefully considers the

evidence of each of the parties and in respect of each of the incidents finds that the truth lay somewhere between the parties to accounts.

25. In respect of the allegation of physical abuse being used as a tool to control the mother the judge focused on a biting incident which became the focus of attention during the hearing. Again he analyses the evidence in particular the inconsistencies and he rejected the mother's allegation that physical abuse had been used as a form of control.

26. He considered the financial control allegation. He noted and accepted that the mother had trained and qualified as a nurse and had a bank account of which she had the sole control. He noted that the parties did not have a joint account and that the mother was able to spend her money on what she chose. He concluded that the evidence fell a long way short of a pattern of controlling and coercive behaviour in financial terms. He did accept that there were elements which indicated the father placed himself in a better position in terms of taking major family decisions and identified the purchase of the family home in his sole name as one of this. He characterised the father as being pushy but concluded this fell short of controlling or coercive behaviour certainly in terms of having implications for his relationship with the child.

27. He did not descend into the detail of each of the allegations it is clear from his judgment that he considered he had made findings that he thought necessary comply with the requirements of PD12J. In respect of the allegations in respect of the use of physical violence towards the child himself seems clear from the totality of the judgment and in particular the judge's analysis of the incident of 4 February 2017 that His Honour Judge Tolson did not consider that the father ever assaulted the child but that any use of physical force was in the context of playfighting.

28. The judgment taken together with what emerges from the submissions has the appearance and hallmarks of a concise, robust piece of judicial decision-making based on a thorough understanding of the essential principles which bore upon the decision he had to make. Far from anything jumping out from the judgment or transcript which rings alarm bells for an appellate judge it is an essentially reassuring read.

Conclusions on Grounds of Appeal

29. Notwithstanding Mr Rowbotham's eloquent and forceful advocacy on the mother's behalf I was left unpersuaded at the conclusion of the hearing that any of the grounds of appeal had a realistic prospect of success or that there was some other compelling reason for hearing the appeal. I do not consider that any of the grounds of appeal have a realistic prospect of success in demonstrating either that the decision was wrong or that it was unjust by reason of a procedural irregularity.

30. In respect of the grounds of appeal my conclusions are set out below.

Issues of fairness and public policy

Ground one: the comments of the learned judge about the mother and or cases involving alleged domestic abuse more widely were such that an objective observer would be led to believe that the mother did not receive a fair hearing and/or that the court had predetermined the matter.

31. I do not accept that the observations made by His Honour Judge Tolson QC bear the inference that the appellant relies upon. At one point I wondered whether Mr

Rowbotham's submissions amounted to an assertion that His Honour Judge Tolson QC was in fact not accepting either the rationale underlying the statutory scheme to address allegations of domestic abuse and thus was not applying them correctly. On further exploration with Mr Rowbotham he clarified that the real thrust of his argument was that the appellant was left with the impression that the judge did not take her case seriously and had not given her a fair hearing. He submitted that this would have been the impression an objective observer would have gained. Some of the extracts that Mr Rowbotham relied upon [D184] for instance to my reading indicated the judge specifically acknowledging the importance of domestic abuse and applying the statutory framework which deals with it. His use of the expression 'the domestic violence agenda' does not to my mind indicate some disapproval of the statutory scheme or the principles underlying it either at that point in his judgment or when he makes further reference to it at [D194]. At that point the judge specifically refers to the fact that he was not suggesting that the mother has deliberately manufactured allegations in order to bring herself within PD12J or special measures. He makes reference to the issue because he is exploring an aspect of the mother's evidence where her oral evidence did not chime with the impression created by her written statement; the inference from the exchanges that the mother's written allegation was somewhat exaggerated rather than falling into the category of a fabricated allegation made in order to support a domestic abuse case. It may of course be a matter of perception. Mr Mercer submitted that he had interpreted the judge's comments in respect of domestic abuse to be an endorsement of the importance of the statutory principles rather than some form of criticism. Mr Mercer submitted that the occasion referred to at [D99] of the judge questioning whether it was necessary for him to rise in order to enable the appellant at the conclusion of her evidence to move from the screened witness box to the screened bench behind counsel (which would momentarily have enabled her to see the respondent and he to see her) was not in any way indicative of the judge failing to take seriously the domestic abuse issue or the need for protective measures' but was at worst a clumsy moment indicative only of the judge seeking to avoid further loss of time.

32. Mr Rowbotham also relies on the judge's references to the mother not coming across as a victim and to his reference to her as being feisty. Mr Rowbotham submitted that it was inappropriate to rely on her presentation in reaching his conclusions as to whether she had been subjected to domestic abuse including coercion and control. He submitted that her presentation some 17 months after having left the father and having received considerable counselling support was bound to be different and that seeking to identify features which marked an individual as a victim was inherently inappropriate. It is clear that the judge considered the issue of the likely change in her presentation but what he focused on was the fact that he had identified areas where the mother had clearly exaggerated her allegations rather than her presentation per se. He also identified pieces of evidence which illustrated the appellant's character during the course of the relationship. His conclusion that she appeared to be in control of her destiny, able to undertake and pass a nursing course and to demonstrate 'feisty' behaviour towards the father were all matters which the judge was entitled to draw upon in his assessment of the appellant's character and his evaluation of whether there was evidence that she had been subjected to coercion and control and whether her character was such that such coercion and control was likely. Inevitably a judge with the experience of His Honour Judge Tolson QC will have come across a very considerable number of individuals who have been the victim of domestic abuse.

Equally as he said he had come across others who had either exaggerated or who had fabricated allegations. Whilst Mr Rowbotham must be right that to determine allegations of domestic abuse solely by reference to the presentation of the complainant would very probably render the conclusion wrong, this is not the approach His Honour Judge Tolson QC took. His evaluation of the written and oral evidence was broad and his assessment of the appellants character and her presentation in court was only one part of that evaluation. I have no doubt that he was entitled to take into account her presentation both in court and what he was able to learn of her character previously.

Ground two: the observations of the learned judge concerning wider issues in cases of domestic abuse, and the comparisons drawn between the mother's case and other cases previously heard by the learned judge, were inappropriate and fell below the standard expected of an experienced judge of the family court. In particular, the court's observations about the waste of resources (including legal aid and the use of special measures) were wholly unfair and contrary to public policy.

33. Aspects of ground one above also feature in this ground but Mr Rowbotham's supplements them by referring to the judges references during submissions in particular to his experience of other cases and how this compared to those. Whilst Mr Rowbotham is right in submitting that there is no particular marker or feature by which a court can determine whether a case is one of domestic abuse or not and thus whether an individual is a victim of domestic abuse or not there is no suggestion in the judgment that His Honour Judge Tolson QC determined the case only by reference to how the appellant appeared compared to other cases he had heard or how the evidence or allegations appeared compared to other cases. Part of the judicial function is to bring to bear the experience acquired over long years of dealing with such cases and to weave the lessons learned from that experience into the evaluation of the case. I see no evidence that His Honour Judge Tolson QC determined the case solely by reference to some comparison with his previous experience. In so far as he made comments about how this case appeared compared to other cases he was entitled to bring that experience to bear and to rely on it as part of a broader evaluation. The judge specifically refers to looking for supporting evidence in terms of consistency, accuracy and good contextual detail rather than assessing the appellant against some notional standard of witness the court expected to hear.

34. Mr Rowbotham also relies on the reference in the judgment to the mother having remained in the relationship after the alleged assault in July 2011 at the conclusion in the judgment that '*the mother's lack of reaction was because what happened was not as serious as the mother describes'* as indicating a lack of appreciation of the responses of victims of domestic violence. This simply does not bear scrutiny given the judge specifically refers elsewhere to the learning available to judges in respect of how frequently victims of abuse will remain with the perpetrator of abuse. The observation by the judge has to be viewed in context of his overall evaluation of the evidence in relation to the incident which he had explored in paragraphs 8,9 and 10 and in relation to the points he made subsequently which undermined the reliability of the mother's allegation.

35. Again Mr Rowbotham is right in identifying cases of coercion and control as being amongst the hardest to determine; they often requiring a deep dive into the day-to-day nature of two parties relationship and an assessment of what may appear to be relatively minor forms of behaviour viewed in isolation, but which take on a different

complexion when viewed over a long term perspective. However this was not a case only of coercion and control but was a case where the mother made frank allegations of physical violence towards her and to the child. Having concluded that the mother was an unreliable witness in respect of those frank allegations inevitably that would sound in the judge's assessment of the more nebulous coercion and control allegations. In so far as the judge was able to identify specific components of the coercion and control he did so in looking at the financial aspects of the relationship and he rejected the assertion that there was any degree of financial control based on an analysis of the evidence which went to that issue.

36. The observations the judge made as to special measures and the availability of legal aid (for instance see [D184]) do not support the ground of appeal in the way it is framed. On one reading it is simply a recognition of the fact of special measures and legal aid having been available to the mother. I see nothing in the transcript or judgment which support the argument that His Honour Judge Tolson QC was somehow undermining the importance of the availability of legal aid in domestic violence cases or the need for special measures to ensure vulnerable witnesses were able to give their best evidence. Given that I do not see that the observations made by the judge as to special measures bear the reading Mr Rowbotham invites me to give them I do not accept that they betray the extent to which his views of the allegations had been pre-formed.

Ground three: the learned judge displayed what might be perceived as a lack of understanding and/or insight into the presentation of an alleged victim of abuse. The apparent need for the mother to present/look like a victim of abuse was inappropriate; the learned judge failed to acknowledge the possibility that in the 17 months or so since the mother fled to a refuge she has made progress with the extensive support of professionals. Further, the expectations placed on the mother to recall events precisely was unrealistic while the apparent criticism of her for "planning" her exit from the family home failed to acknowledge the realities of cases involving domestic abuse.

37. As Mr Rowbotham acknowledges a paragraph 37 of the skeleton this ground is interlinked with grounds one and two. The judge's conclusions as to the mother's presentation as I have already addressed above was a matter peculiarly for the trial judge who has seen the witness give evidence and who has considered the written material alongside that presentation. The observation that the mother presented as 'feisty' during the course of the relationship and in evidence was one which the judge was entitled to take into account in determining how she was likely to have behaved at the relevant times. The criticism of the judges use of the words "*present as a cowed victim of domestic violence*" in support of the submission that the judge required the mother to present/look like a victim of domestic abuse is an example of the narrow textual analysis deprecated by the appellate courts. The full reading of paragraph 20 of the judgment illustrates that the judge was surveying a far broader canvas than her demeanour in the witness box in order to evaluate her allegations and her likely behaviour. The judge was clearly alert to the likelihood that the mother's presentation had changed since her departure from the family home; it is referred to during exchanges. The judge's criticism of the mother's current demeanour was the inconsistencies or exaggerations in her evidence. The judge also considered that there was an element of calculation in the mother's behaviour in particular in relation to the texts which were sent in relation to the incident on 4 February 2017. The criticism that Mr Rowbotham makes of the judge's conclusion that there was an element of

calculation has to be viewed in this context. The judge was not simply saying that making a plan to leave did not indicate abuse - that indeed would tend to be contradicted by long experience and the 'Survivors Handbook' which Mr Rowbotham relied upon. I cannot see anything in the judgment viewed as a whole, particularly taken together with the transcript, which supports the submission that His Honour Judge Tolson QC imposed an unrealistic standard of behaviour or recall on the mother or that he demonstrated any lack of understanding of the presentation of an alleged victim of abuse.

38. Thus my overall conclusion in respect of those grounds which fall into the bracket 'fairness and public policy' is that there is no foundation to the criticism of either the judges approach or the decision he reached. The decision was not therefore wrong nor was it unjust by reason of any procedural irregularity.

The Findings

39. As I have set out above the task facing an appellant's challenging findings of fact is a rigorous one. The function of the trial judge hearing oral evidence is to assess credibility and to evaluate the oral and documentary evidence before him in the context of his views in respect of credibility. Only where it can be clearly demonstrated that the judge has reached conclusions which were unsupported by the evidence he heard or where he has clearly failed to take into consideration material evidence is an appeal court likely to interfere. So were these findings open to the judge to make on the evidence before him?

40. Having heard from both the mother and the father he concluded that neither were telling him the whole truth. On the other hand there were elements which he could accept. He noted that he had no reliable ground in terms of the evidence and suspected that the truth lay somewhere in the middle. He identified inconsistencies or exaggerations or improbable accounts by each of the parties. It seems to me that he was perfectly entitled to reach those conclusions having heard from the parties over an extended period of time.

Ground four: the learned judge was plainly wrong to dismiss the mother's allegations that the father had repeatedly bitten her to the face and to the body. In considering whether or not to make this finding, the learned judge imposed a false dichotomy that such an action must either have taken place in "anger" or with "sexual" motivation. The expectation placed on an alleged victim to explain the motivations behind her alleged abuser (including direct questioning on this issue by the court) was inappropriate.

41. The question of biting clearly occupied significant parts of the witness evidence, submissions and is addressed at paragraph 24 of the judgment. Mr Rowbotham submits that the judge imposed a false dichotomy where the judge effectively required the biting to be explained by either a sexual motive or anger. Mr Rowbotham submits that he thus excluded the possibility that it was linked to intimidation or control. The evidence on the issue was far from clear as the judge noted in paragraph 24. In her evidence the mother said that when she queried the biting with the father he said it was linked to sexual frustration. The father denied biting or it being sexually motivated. The mother stated that it always took place in bed - which might have suggested it was linked to a sexual motive albeit not necessarily. She did not suggest it took place outside the bed. She did say that she interpreted it as being to do with intimidating or controlling her. The evidence in relation to the mother bearing a

physical mark from a bite was also confused; the maternal grandmother identified an occasion which she seems to have ascribed to a bite but the mother could not recall that. In the circumstances the judge's conclusion that he could find no easy explanation for the marks and that he could not accept that they fell into some pattern of controlling behaviour was clearly one which was open to him on that evidence. I do not think that imposed a false dichotomy. The other criticisms made by Mr Rowbotham do not take the argument any further; the conclusions the judge reached on the witnesses and the evidence were open to him and there is nothing in the arguments Mr Rowbotham advances which persuade me that the conclusion was against the weight of the evidence or otherwise insupportable.

Ground five: the learned judge was plainly wrong to dismiss the mother's allegations of controlling and coercive behaviour. Insufficient weight was placed on key aspects of the case for example the fact that the parties were married in a ceremony held in a language that she did not understand and with no maternal family present. The learned judge's observations that the mother did not "present" as a victim of controlling and coercive behaviour were inappropriate.

42. The judge specifically addressed an obvious example of potentially controlling behaviour when he addressed the financial issues at paragraph 25 of the judgment. This was an area of the evidence where the judge found himself on firmer ground. His conclusions as to the mother's ability to train as a nurse and her sole control over her earnings were a clear marker that the mother was not subject to control at the father's hands. That taken together with his conclusions on biting (both of which were plainly open to him on the evidence) clearly led the judge to the conclusion that the allegations of controlling and coercive behaviour were not established. However he did not stop there he identified that the father was "pushy" which I think indicates that he was able to get his way more often and the judge gave examples of this. However in many relationships one individual will be more assertive, pushy, dominant, but this does not mean that the relationship is characterised by coercion or control. The finding the judge reached was plainly open to him on the evidence and supported by his reasoning.

Ground six: the court's finding that the father had caused bruising to the mother but that the mother had "provoked" the father into hitting her was wholly inappropriate.

43. As a stand-alone ground this does not amount to an assertion that the decision was wrong or that it was unjust by procedural irregularity. It can perhaps best be seen as part of Mr Rowbotham's submission that the judge's approach to the case was characterised by a failure to take seriously the question of domestic abuse or to properly apply the principles emerging from the jurisprudence and the statutory framework in respect of allegations of domestic abuse. We spent some time exploring in submissions the use of the word 'provoked' in the context of the findings that the judge had made. Perhaps some judges might have expressed themselves in a different way. The reality was that the judge found that the behaviour of both the mother and the father on that evening led to (and contributed to) the incident that developed in which the mother sustained a number of injuries as a result of the father pushing her away and her falling to the ground. The judge did not feel that the evidence was sufficiently clear to enable him to precisely identify why the father pushed the mother but it is clear from the finding that he reached and his analysis of the evidence that he considered that both had behaved in a way which led to an unpleasant incident in which the mother sustained some injury. I do not consider that the use of the word

provoked is indicative of a failure by His Honour Judge Tolson QC to take the issue of domestic abuse seriously nor do I view it as an indication that he was blaming a victim in a way which sometimes hits the headlines in the criminal context.

Ground seven: during the course of the hearing, the learned judge voiced unfounded conclusions regarding the sexual behaviour of the mother while at the same time failing to consider at all the highly gratuitous nature of the father's written and oral evidence, which included inter-alia irrelevant allegations regarding the mother's sexual activity.

44. The passages in the father's statements which form the foundations of Mr Rowbotham's submission that the father's gratuitous exposure of intimate sexual matters was an example of him seeking to humiliate the mother is found in his witness statement in the original trial bundle. It is quite clear from that statement that the issue of the mother's sexual activity arose in response to her allegation that he had refused to let her use contraception. In his statement in response the father went into some detail as to the background to the mother ceasing to take contraception and this was linked to his assertion that her previous activities including sexual ones had lead her to think they had affected her fertility. In that context I see no foundation for the assertion that the father's reference to these matters was gratuitous and a form of humiliation of the mother. It was evidence-based. The judge's references to it must be seen in that context.

Ground eight: the court's finding that the mother was not a reliable witness was unsubstantiated. The learned judge appeared to conflate questions of exaggeration with honesty. Insufficient weight was placed on the father's lack of candour and evasive approach to questioning.

45. The judge identified at various stages of the judgment and in the course of submissions examples of the mother having exaggerated a matter or inconsistent versions of events and he did the same for the father. The judge refers to his conclusions as to the reliability of the parties at paragraph 7 and 18 but it infuses the whole of the judgment. His conclusions as to their credibility were ones he was plainly entitled to reach having heard and seen the parties. Inevitably there is a link between exaggeration and honesty or reliability. This is meat and drink to first instance judges. They can be trusted to form assessments of the extent to which exaggerations undermine a witness's reliability honesty.

Ground nine: the learned judge failed to consider sufficiently if at all the medical evidence. It was common ground that the mother suffers from mental and emotional ill-health; further, the evidence indicated her self harming behaviour and suicidal ideation at the point she fled the family home to live in a refuge. There was clear evidence of the extensive support that the mother had received from health and welfare professionals and of her progress since leaving the father. The court also failed to acknowledge the fact that she had remained in a refuge for many months.

46. The medical evidence takes the form of a letter from a family systemic psychotherapist, from a health visitor and from an individual from Solace Women's Aid. They are limited in extent and are essentially the mother self reporting and the individuals passing some observations on her self reporting. Mr Rowbotham appeared to suggest in submissions that these had a status akin to expert evidence. I do not accept that for one moment. They were part of the broader canvas which the judge needed to survey and undoubtedly they were in his mind. The evidence suggested that the mother had a history of psychological vulnerability which predated the relationship with the father. I see no merit at all in the contention that these documents

amounted to evidence which was so material that it ought to have resulted in the judge relying upon it to, in essence, corroborate the conclusion that the mother was indeed a victim of domestic abuse.

Ground 10: the learned judge erred in making a finding concerning the mother's psychological well-being. Such a finding was out with the expertise of the court and should not have been made in the absence of expert psychological evidence obtained pursuant to part 25 of the family procedure rules 2010.

47. At paragraph 59 of the skeleton Mr Rowbotham submits that the judge's conclusion that the father's time with the child would not convey any psychological risk upon the mother which converted into finding six on the schedule was not one which was open to him in the absence of expert psychological evidence. This submission is simply unsustainable. Judges up and down the country in the family court every day have to assess the risk of psychological harm whether in the context of care proceedings, child arrangements proceedings child abduction proceedings and it is in no sense a prerequisite for a judge to have expert evidence in every case in order to inform the decision as to whether a risk of psychological harm to an individual can be determined.

Ground 11: the learned judge failed to rule on the balance of the allegations placed before the court, notwithstanding the previous approval of the Scott schedule by multiple judges.

48. His Honour Judge Tolson QC identified in his judgment that the 14 allegations set out in the Scott schedule were more than he would have allowed had he case managed the application previously. I have some sympathy with him in that regard; the nebulous nature of some of the items such as number 14 and the identification of number nine as a separate allegation are examples of the Scott schedule being overloaded or insufficiently focused. At a fact-finding the judicial task is to determine those facts which the judge considers are necessary in order to determine the child arrangements application. It is a matter for the case management discretion of a fact-finding judge as to which they consider require findings to be made. Given His Honour Judge Tolson QC was going to continue to determine the child arrangements aspects following the fact-finding it was a matter on which he was uniquely placed to reach decisions. He grappled with the principal allegations which arose in relation to physical abuse of the mother, physical abuse of the child and emotional abuse of the mother and child. Having determined those on the evidence which the parties had focused on and which appeared to be clearest he was entitled to decline to rule on the remainder of the allegations. He clearly considered that they added nothing further to the factual matrix which would inform child arrangements going forwards. It may be a counsel of perfection but it might perhaps have assisted had His Honour Judge Tolson QC specifically set out that he did not accept any of the allegations that the father had deliberately harmed the child although it is perhaps implicit from his conclusion at paragraphs 2 and five of the schedule and his judgment in respect of 4 February 2017 incident. However as I say it is perhaps implicit what his conclusion was. I also note that the judgment was given at about 6pm (at the request of the parties) and that following the judgment there was no request for him to specifically determine the other allegations relating to the father and the child.

Ground 12: in focusing on such detail on just two of the allegations before the court, the learned judge failed to grapple with the wider factual matrix of the case. As a result, the

final conclusions reached by the learned judge as to the nature of the parents' relationship were wrong.

49. Whilst it is right that the judge focused on two particular physical incidents it is not right to say that he failed to grapple with the wider factual matrix. The judge grappled with aspects of the wider factual matrix in dealing with the biting issue and the financial control issue which appeared to be the best evidenced. As I have referred to above, in cases where there are no frank allegations of physical violence or threats and where the allegation is of a more subtle or insidious form of coercion and control the court may find it necessary to undertake a more detailed examination of the daily lives of the parties and the broader sweep of the history of their relationship. I accept that in such cases what may be apparently trivial behaviour viewed in isolation may take on a very different connotation when viewed over a period of weeks months or years and this may require a more delicate enquiry and indeed a more detailed enquiry. However in this case the majority of the allegations contained in the schedule were of frank assaults or similar behaviour. Having reached conclusions on the credibility of the parties in relation to those and conclusions on the frank incidents I do not consider it was necessary for the judge to conduct a parallel assessment of coercion and control issues isolated from the conclusions he had reached on the frank allegations. I note also that no application was made to His Honour Judge Tolson QC of the need for a longer time estimate or a more detailed enquiry. I therefore do not consider there is any merit in the submission that the overall conclusions were wrong.

Application of the law

Ground 13: the learned judge erred in his approach to the fact-finding process and the application of the balance of probability test. It was clear that the learned judge did not consider the allegations raised by the mother a bar to contact to such an extent that this impacted the court's reasoning on findings of fact.

50. The essential thrust of this ground seems to be that His Honour Judge Tolson QC had determined in his own mind that the allegations would not have constituted an impediment to contact between the father and child taking place and that this view became his starting point for determining whether the allegations were established on the balance of probabilities. I think the import of this is the suggestion that having determined that none of the allegations would constitute an impediment to contact the judge failed properly to apply the balance of probabilities approach to determining the factual allegations. The submission arises out of the observations by His Honour Judge Tolson QC at the commencement of submissions "*gentlemen, where is this case going? Do we-where do we all-where do we all want to end up*?" and a later observation "*I just want to get this family on an even keel in the future".* The judgment itself makes absolutely clear that the judge applied a balance of probabilities approach to the determination of the principal allegations and the reasoning process that is evident from the judgment in respect of the conclusions shows that the judge carried out the balance of probabilities evaluation of the contested evidence. There is nothing in the judgment which suggests that the judge had predetermined matters or otherwise failed to properly determine contested matters of fact. I do not accept that the observations made by His Honour Judge Tolson QC at the commencement of submissions or otherwise were inappropriate. As I have said before by the end of the evidence a judge may well have formed preliminary or even firmer views as to the facts. In a simple case such as the subject case this is neither surprising or inappropriate. Making observations on welfare at the same time as expressing preliminary you other views on the facts is also neither surprising or inappropriate. In

many cases it will enable the parties and the lawyers to better understand the way the judicial mind is thinking and enable them to address matters at that stage.

Ground 14: the court erred in its application of practice direction 12 J of the FPR 2010 as being in any way relevant to the question of making findings of fact on a balance of probability.

51. Mr Rowbotham submission in this regard arises out of His Honour Judge Tolson QC's observations on PD12J in submissions and in his judgment [#21] where he said

> "*I the important point in my judgment about both of these incidents if I direct my mind specifically to practice direction 12 J, which, of course, I must do, is that neither of them in my judgment in the light of my findings has any implications at all for the future relationship between the father and [the child]*'

Mr Rowbotham submits that this reference to PD12J was erroneous and misplaced as PD12J has no relevance to the question of determining whether or not a finding is made out evidentially. It seems to me that this is to misunderstand what the judge was saying. Having determined two allegations, the judge cross referred back to PD12J noting that the findings he had made in respect of the two allegations were not such as to have implications for the future of the relationship between the father and the child. He went on to explain that in relation to the 'pushing' incident he accepted the father's evidence about it which was that they had talked about it a lot subsequently, had resolved it and may even have laughed about it. Mr Rowbotham's submission that PD12J is largely procedural is a correct but materially incomplete statement about PD12J. Whilst much of the Practice Direction sets out a procedural route map for determining cases where domestic abuse and harm may be an issue it also contains general principles. It is those general principles (in particular see paragraphs 4 and five) to which His Honour Judge Tolson QC was undoubtedly referring and in particular bullet point 2 of paragraph 5 which requires the court to '*consider the nature of any allegation… and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and if so in what terms'.* I simply cannot accept that an objective observer reading the judgment would have been under the impression that the court had made up its mind on contact and then worked backwards. I think the submission is that having decided that contact should take place the judge somehow neglected to undertake the evaluation of the allegations properly. Of course if the judge had decided that none of the allegations, or the totality of the allegations, taken at their highest were irrelevant to the question of determining the relationship between the father and child he probably would have declined to determine any of them and would have indicated so at the beginning of the hearing. It is certainly contemplated by PD12J that some allegations of domestic abuse or harm will not be such as to be relevant in the determination of a child arrangements order application and thus will not need determining: see for instance In the Matter of P-G) [2015] EWCA Civ 1025. Thus PD12J is relevant even during the course of a fact-finding hearing in the event that the judge hearing the fact-finding takes the view that an allegation is not relevant to the determination of the child arrangements application. The fact that an earlier case management judge has approved the schedule and has considered an allegation to be relevant is in no way a fetter on the decision-making powers of the trial judge who will of course have had the benefit of reading the evidence and seeing the witnesses and being able to

determine whether on the facts as they are emerging to be, the allegation requires determination.

Conclusion

52. Having had the opportunity of reading a significant amount of the documents and having heard detailed submissions in respect of each of the 14 grounds I conclude that none of them stand any realistic prospect of success. None of them demonstrate a realistic prospect of establishing that the decision was wrong in the way suggested or that the decision was unjust because of a serious procedural or other irregularity. Permission to appeal is therefore refused.