RE A (FACT-FINDING: DISPUTED FINDINGS) [2011] EWCA Civ 12

Court of Appeal

Richards, Aikens and Munby LJJ

19 January 2011

Wardship – Fact finding – Evidential basis for findings – References to suspicion and speculation in judgment – Extent to which acceptable

The parents were both Kurds, living in the UK. The father's family originated from Iraq and the mother's from Iran. The child, now aged 5, currently being cared for by the father and the paternal grandmother in this country, had been made a ward of court. The mother alleged that the father had abducted the child from her care, and that he had been guilty of serious sexual misconduct throughout the marriage, of domestic violence, of abandoning her abroad, and of threatening her with 'honour-based' violence. The father made counter-allegations against the mother. The judge conducted a complex and lengthy preliminary fact-finding hearing as a preliminary to a welfare hearing which would determine with whom the child should live and have contact. He heard evidence from a number of witnesses; the hearing involved not only numerous interpreters but also evidence given by video-link and evidence given by telephone link. At the conclusion, the judge made a number of findings; he disbelieved both the mother and the father on many aspects of evidence, but accepted the mother's core allegations. The father appealed. Nine of his grounds of appeal were considered at an oral hearing, at which both permission and the merits of the appeal were dealt with, on a 'rolled up' basis.

Held – refusing permission in respect of two grounds of appeal; granting permission in respect of but dismissing four grounds of appeal; granting permission in respect of and allowing three grounds of appeal (one to a limited extent) –

(1) While findings of fact must be based on evidence (including inferences that could be drawn from the evidence) and not on suspicion or speculation, suspicion and speculation as to matters upon which no findings had been made could appear in a judgment following a fact-finding hearing. A judge conducting a fact-finding hearing was entitled to explain thought processes and reasoning in an appropriate way, and in a case in which there was much suspicion and speculation, it might be potentially misleading for the judge to suppress all reference to this. Further, it might be relevant at the welfare stage of the proceedings to record whether a particular matter had not been found 'proved' because the judge was satisfied that it had not happened, or because the party making the assertion had failed to establish it to the relevant standard of proof albeit in circumstances of continuing suspicion. The fact that at the welfare stage the court could act only on facts, rather than on suspicions or doubts, was not of itself a reason for excluding material describing suspicion or speculation from the fact-finding judgment (see paras [26], [28]–[30]).

(2) The judge was required to provide a properly reasoned explanation for his findings although he or she was not required to give reasons for reasons, and might have little more to say than that on some particular issue X was believed and Y disbelieved. Three of the judge's findings could not stand, because: (i) there was no evidence that the father had been attempting to use the mother's mental health problems to improve the family's access to benefits; (ii) the judge should have accepted evidence given by the paternal aunt, not disputed in cross-examination, which required a finding that the mother had smacked the child, leading him to roll onto a heater and sustain a burn; (iii) there was insufficient evidence that the paternal grandfather was a risk to the mother, as the mother's evidence to this effect had been

specifically rejected by judge, while the maternal grandmother's evidence of this was flimsy in the extreme and had never been put to the grandfather in cross-examination (see paras [43], [52], [54], [76]).

Statutory provisions considered
Children Act 1989, ss 1, 31

Cases referred to in judgment
A (A Child) (Fact-Finding Hearing), Re [2010] EWCA Civ 1413, [2010] All ER (D) 156 (Dec), CA
A (Child Abuse), Re [2007] EWCA Civ 1058, [2008] 1 FLR 1423, CA
B (A Child) (Split Hearings: Jurisdiction), Re [2000] 1 WLR 790, [2000] 1 FLR 334, CA
B (Care Proceedings: Standard of Proof), Re [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, HL
Biogen Inc v Medeva plc [1997] RPC 1, HL
C (A Minor) (Adoption: Parental Agreement: Contact), Re [1993] 2 FLR 260, CA
D (An Infant) (Adoption: Parent's Consent), Re [1977] AC 602, [1977] 2 WLR 79, [1977] 1 All ER 145, HL
Floyd and Others v John Fairhurst & Co [2004] EWCA Civ 604, [2004] All ER (D) 312, CA
K, Re; A Local Authority v N and Others [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, FD
M and R (Minors) (Sexual Abuse: Expert Evidence), Re [1996] 2 FLR 195, [1996] 4 All ER 239, CA
O and N, Re; Re B [2003] UKHL 18, [2003] 1 FLR 1169, [2003] 2 All ER 305, HL
*Piglowska v Piglow*ski [1999] 1 WLR 1360, [1999] 2 FLR 763, [1999] 3 All ER 632, HL
R v Lucas (Ruth) [1981] QB 720, [1981] 3 WLR 120, [1981] 2 All ER 1008, 73 Cr App Rep 159, CA

Jane Crowley QC and *Kate Purkiss* for the appellant
Anthony Hayden QC and *Hassan Khan* for the respondent

Cur adv vult

MUNBY LJ:

[1] We are concerned with a little boy, A, who was born in November 2005. His parents are both Kurdish. They are first cousins (the paternal grandfather and maternal grandmother are siblings), the father's side of the family coming from Iraq and the mother's side of the family from Iran. Both have leave to remain in the UK. A is a ward of court. The wardship proceedings are before Roderic Wood J. In accordance with orders of the court, A is currently being looked after in this country by his father and paternal grandmother. The local authority was joined as an intervener at an early stage and prepared an assessment of A's welfare which raised no concerns about the care provided by the father and grandmother.

[2] Over 20 days between 5 and 30 July 2010 Roderic Wood J conducted a fact-finding hearing as a preliminary to a final hearing which is fixed for 14 January 2011. The primary focus of the hearing was on the allegations the mother made against the father and members of his immediate family as set out in a Scott Schedule which, in its final revised form, identified 20 numbered complaints. The allegations were of grave sexual misconduct

throughout the parents' marriage; domestic violence; child abduction; threats of 'honour based' violence. However, during the hearing various allegations against the mother emerged which the judge also considered.

[3] On 19 August 2010 Roderic Wood J handed down a reserved judgment: [2010] EWHC 2175 (Fam). It runs to 82 pages and 335 paragraphs. In accordance with *Re A (Child Abuse)* [2007] EWCA Civ 1058, [2008] 1 FLR 1423, the judge was asked to clarify certain parts of his judgment. On 28 August 2010 he handed down a further judgment: [2010] EWHC 2216 (Fam). It runs to 26 paragraphs. I shall refer to the two judgments as, respectively, the 'main judgment' and the 'supplemental judgment'.

[4] In the course of the two judgments the judge made many findings about, and in many cases adverse to, both the father and the mother. The core allegations made by the mother against the father were found to be true but Roderic Wood J disbelieved her on many aspects of her evidence, including – and this is an important factor understandably relied upon by the father – as to much of the detail she gave to describe facts which the judge found to be proved. The judge also disbelieved the father on many aspects of his evidence.

[5] On 7 September 2010 the father filed his appellant's notice. The attached grounds of appeal identified ten grounds which, in common with that document, I shall refer to as Ground 1, Ground 2 and so on.

[6] On 3 November 2010 Black LJ, dealing with the application for permission on the papers, refused permission to appeal on Ground 10. In relation to Grounds 1–9 she adjourned the application for an oral hearing on notice with appeal to follow if permission were granted. That hearing took place before us on 8 December 2010. The father did not seek to renew his application in relation to Ground 10. There was no respondent's notice. We were, accordingly, concerned only with Grounds 1–9.

[7] There is, of course, jurisdiction in this court to hear an appeal from a fact-finding hearing even if there is no order: *Re B (A Child) (Split Hearings: Jurisdiction)* [2000] 1 WLR 790, [2000] 1 FLR 334.

[8] The father was represented before us by Ms Jane Crowley QC and Ms Kate Purkiss, both of whom had appeared for him at the hearing before Roderic Wood J. The mother was represented before us by Mr Anthony Hayden QC and Mr Hassan Khan. Although his junior had appeared for the mother at the hearing before Roderic Wood J, Mr Hayden had come into the case at short notice, Miss Lucy Theis QC (as she then was) who had appeared for the mother before the judge being no longer available following her appointment to the Bench. Entirely appropriately in the circumstances, neither A's guardian nor the local authority, both of whom had been represented before the judge, has played any part in the appeal or been represented before us.

[9] We announced at the beginning that we would conduct the hearing on a 'rolled up' basis and announce our decision in relation to permission as part of our judgment. At the end of the hearing we reserved judgment.

[10] Given the imminence of the hearing due to start on 14 January 2011, and the need, in particular, for those preparing reports, assessments and evidence for that hearing to know as soon as possible the outcome of this appeal, and having come to a clear view as to what that outcome was, on 14 December 2010 we handed down a preliminary judgment in which we

announced our decision, albeit that we were not then ready to give our full reasons: *Re A (A Child) (Fact-Finding Hearing)* [2010] EWCA Civ 1413, [2010] All ER (D) 156 (Dec).

[11] We refused the father permission to appeal on Grounds 5 and 7; gave him permission but dismissed the appeals on Grounds 1, 2, 8 and 9; and gave him permission and allowed the appeals on Grounds 3, 4 (but only to a limited extent) and 6.

[12] The order giving effect to our decision was made the same day.

[13] We now hand down judgment giving our reasons.

[14] Roderic Wood J was faced with a task unusually difficult even by the standards of complex fact-finding hearings in the Family Division. In the first place (main judgment paras [14]–[19]) he was faced with a number of practical difficulties. Many of the witnesses required interpreters who on occasions did not agree with each other's translations. The witnesses in Iraq gave evidence by a video-link on which the visual images frequently broke up. The witnesses in Iran gave evidence by telephone-link. The mother, for security reasons, was not present in the courtroom and gave evidence from an unknown location by video-link. Many of the witnesses insisted, despite judicial intervention, on giving very long answers to questions which presented difficulties for the interpreters.

[15] Quite apart from all those difficulties, Roderic Wood J was also confronted with the fact that neither party, indeed very few of the witnesses, was consistently honest and straightforward. If anything, quite the contrary. Of one of the family witnesses the judge said (main judgment para [190]; see also para [331]) that he struck him as 'one of the few witnesses called by either side of the family as not speaking from a script'. Tellingly, he singled out another witness (main judgment paras [205], [269]) as being 'thoroughly honest and compelling' and someone whose evidence 'profoundly impressed' him; 'I did not doubt anything she said'.

[16] As to the mother and the father the fact is that the judge found them both to be not very frank (main judgment para [104]) and indeed to be liars (see below). He said (main judgment para [329]) that 'Both have been found wanting in large measure'.

[17] The judge variously described the father as a 'wholly unreliable historian' (main judgment para [47]) and as lying to the UK immigration authorities (main judgment para [35]), to various benefit authorities (main judgment para [115]), and to the court (main judgment paras [35], [38], [60], [65], [115], supplemental judgment para [7]). On occasions the judge observed (main judgment paras [35], [38], [219]), that he could not believe a word of the father's account. On other occasions he described the father's evidence as 'incredible' (main judgment paras [83], [206]), 'wholly' or 'completely' unconvincing (main judgment paras [219], [226]), 'wholly unsatisfactory' (main judgment para [253]) or 'wholly unimpressive' (main judgment para [274]). At one point he described the father (main judgment para [115]), as 'patently lying to the court'. On various matters he said in terms that he did not believe him (main judgment paras [201], [204], [253], [274]) or that he rejected his evidence (main judgment paras [226], [227]).

[18] The judge described the mother's evidence as containing 'inconsistencies' (main judgment paras [70], [227], [230]), and the mother as being an 'unreliable witness' (main judgment para [193]), a 'hopeless

historian' (main judgment para [87]), an 'inconsistent reporter of events' (main judgment para [155]) and 'woefully inaccurate' (main judgment para [285]); as giving 'a series of conflicting accounts' (main judgment para [213]), 'exaggerating' (main judgment paras [83], [108], [110]), and 're-writing history' (main judgment paras [72], [79], [193]). He found that she had knowingly deployed lies to the UK's Embassy in Tehran (main judgment para [39]) and that she had lied both to the Metropolitan Police (main judgment paras [298], [300]) and to him (main judgment paras [108], [198], [297], supplemental judgment para [11]). In another instance he rejected her 'wholly improbable account' (main judgment para [246]). Referring to the mother's ABE interviews he said (main judgment para [284]) that 'anyone reading [them] would be entitled to raise an eyebrow at aspects of their content'. In relation to another matter he found her evidence to be (main judgment para [316]) 'wholly unpersuasive and unsatisfactory'.

[19] One thing which must be noted, however, is what Roderic Wood J did *not* say. Any judge with experience of such fact-finding hearings is likely to have experienced a witness who is so unsatisfactory, so unreliable or so mendacious, that one comes to the conclusion that nothing the witness says, unless it is plainly against interest, can be accepted in the absence of corroboration. The judge here did not say that about either the mother or the father. On the contrary, on various occasions he accepted their uncorroborated evidence.

[20] Faced with circumstances such as this a judge must do his best. After all, the purpose of a fact-finding hearing in the Family Division is to give the judge the essential factual platform upon which to build his further 'welfare' findings as he decides – as he must – what form of final order is in the best interests of his ward. Should the ward live with the one parent or the other, or perhaps with someone else in the wider family? Should the ward have contact with the other adults? If the guiding principle of law is that the interests of the ward are paramount (s 1 of the Children Act 1989), the determination in any particular case of what is in the best interests of *this* child necessarily involves an intense and anxious scrutiny of *all* the relevant circumstances. The task can often appear daunting even to the most experienced judge. And, as any judge who has had to conduct such fact-finding hearings will know all too well, wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty. Yet as Baroness Hale of Richmond tartly observed in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, para [31], 'it is the task which we are paid to perform to the best of our ability'. The task, as she acknowledged, is a difficult one, to be performed without prejudice and preconceived ideas. Judges, as she explained:

> 'are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses.'

[21] Roderic Wood J, with all his vast experience, was, of course, well aware of all this and correctly understood that any findings he might make had to be based upon the evidence, just as he understood, and applied, the appropriate standard of proof, the simple balance of probabilities: *Re B (Care Proceedings: Standard of Proof)*. He also appropriately gave himself (main judgment paras [34], [115]) a 'Lucas' direction, taking care to remind himself of the problems of selective credibility: *R v Lucas (Ruth)* [1981] QB 720, [1981] 3 WLR 120. A finding adverse to a party's credibility on one issue does not of itself condemn her on another.

[22] There is, and can be, no suggestion that the judge did not direct himself correctly as to matters of law.

[23] Moreover, as Mr Hayden correctly points out, there were conspicuous endeavours, both at the case management stage and at the fact-finding hearing itself, to ensure procedural fairness to all parties. I need not go into the details save to note, as already mentioned, that the judge took evidence both by audio and video-links which was pursued to its conclusion despite, as Mr Hayden puts it, the longeurs of some of the witnesses and frequent interruptions of service. The fact is, in my judgment, that every measure was applied to obtain the best quality of evidence available.

[24] In the course of their submissions before us, counsel touched on two matters which it is appropriate to address at this stage: suspicion and stereotyping.

[25] Ms Crowley submits that Roderic Wood J entered into considerable speculation in the course of his judgment which, she says, exceeds the permissible drawing of reasonable inference based upon the evidence. She complains that some of this speculation he placed in the balance of his fact finding; some he brought into his judgment without making any finding. She asserts that where the judge did speculate it was almost without exception to the detriment of the father. She submits that where it is not possible to make a finding it is plainly wrong to introduce prejudicial suspicions into the judgment, which have the potential, even subconsciously, to influence any person using the judgment as a starting point for future assessment. Such speculations, such expressions of suspicion which cannot form the basis of a finding, should, she says, be excised from the judgment.

[26] There are, in my judgment, two different points wrapped up in this complaint which need to be disentangled and kept quite distinct. The first, on which, as a matter of principle, Ms Crowley is obviously correct, is the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation. Whether, as she would have it, Roderic Wood J fell into error in this respect, is something to be determined when I come to consider the particular findings of which complaint is made. When I come to embark upon that exercise I will, of course, have Ms Crowley's submissions on this point very much in mind. Here I merely observe that the judge, as one would expect, was very alert to the fact that suspicion cannot be the basis of findings. Thus, referring to the father's claim for asylum, the judge said (main judgment para [47]):

> 'I have … concluded that he is a wholly unreliable historian in relation to a very significant part of his claim for asylum. Whilst I am

accordingly suspicious as to his account of his activities in Iran/Iraq as a justification for asylum, I can do no more than record that suspicion. Since it is suspicion and does not achieve the necessary standard of proof to qualify as a probability I shall put that aspect of the matter firmly out of my mind.'

[27] I also record Mr Hayden's riposte to the effect that by subtle inference, though not directly, the father's case appears to amount to an implied assertion that the judge formed an adverse view of the father which cast a shadow over the neutrality of his forensic analysis. Moreover, as Mr Hayden points out, there are many examples throughout the course of the judgment of the judge preferring the evidence of the father or his family.

[28] The other point, namely that speculation and suspicion as to matters upon which no findings have been made should not appear in a judgment following a fact-finding hearing, is a very different proposition and one which, in my judgment, cannot with all respect to Ms Crowley be accepted.

[29] In the first place, a judge conducting a fact-finding hearing is entitled to explain his thought processes and his reasoning in whatever seems to him to be an appropriate and illuminating way. And in a case where there is much suspicion and speculation on some matters as well as satisfactory proof on others, it would be not merely artificial but potentially misleading for the judge, if he thinks this will be helpful, to suppress all reference to the one while giving appropriate prominence to the other.

[30] Second, and notwithstanding the 'binary system' explained by the House of Lords in *Re B (Care Proceedings: Standard of Proof)*, para [2] (Lord Hoffmann) and para [32] (Baroness Hale of Richmond), it may be relevant at the subsequent 'welfare' hearing to know, and thus for the judge as part of his fact finding to record, whether a particular matter was not found proved because the judge was satisfied as a matter of fact that it did not happen or whether it was not found proved (and, therefore, in law is deemed not to have happened) because the party making the assertion failed to establish it to the relevant standard of proof but in circumstances where there is nonetheless continuing suspicion. It is, of course, a cardinal principle that at the 'welfare' or 'disposal' stage, as at any preceding fact-finding hearing, the court must act on facts, not on suspicions or doubts; for unproven allegations are no more than that: see the analysis by Baroness Hale of Richmond in *Re B (Care Proceedings: Standard of Proof)*, following and declining to overrule what Butler-Sloss LJ had said in *Re M and R (Minors) (Sexual Abuse: Expert Evidence)* [1996] 2 FLR 195, at 246, and the obiter dicta of Lord Nicholls of Birkenhead in *Re O and N; Re B* [2003] UKHL 18, [2003] 1 FLR 1169, para [38]. But this is not, of itself, a reason for excluding from the fact-finding judgment material of the kind to which Ms Crowley takes objection.

[31] I turn to the issue of stereotyping. Mr Hayden submitted that Roderic Wood J had made what he (Mr Hayden) called strenuous efforts to place his findings in the context of this family's own Kurdish traditions as they revealed themselves to him over 20 days of evidence. And, he suggested, no complaint is made by the father of the central premise in the judgment that the family here (on both sides) adhered to a cultural code which encompasses concepts of shame, pride and honour – a proposition with which Ms Crowley took some issue, disputing that this premise, even if factually well-founded,

provided any safe basis for the findings the judge went on to make. The judge's evaluation of truth and lies, he says, was set against that wider backdrop, the judge properly refraining throughout from imposing an exclusively 'Western' rationalisation of any perceived motivation for dishonesty.

[32] The judge, as I read his judgments, was careful not to stereotype the parties or their witnesses, while at the same time being careful not to fall into the other trap of projecting on to them 'Western' views and behaviour. He founded his approach on his appraisal (even if often sceptical) of their evidence as to how *they* and *their* families behaved. Thus (main judgment para [332]) one finds the judge saying this:

> 'I take as one particularly egregious example of an attempt to mislead me from the paternal grandfather's evidence to the effect that he has never discussed with his son the reasons for the failure of his marriage and what has ensued. I am not, I emphasise, in making this finding projecting on to their familial culture an increasing tendency in 'the West' to intrude into private matters. These two families have a powerful sense of what is right and wrong (although their respective senses may be different from each other's). When relationships go wrong (as here they demonstrably did) it is groups of elders (and on the more formal occasions only male elders) which come together to attempt to resolve these problems. They do not come to such meetings and discussions blind of what has been going on, and the attempt to persuade me that these distressing matters had not been discussed is, I find, patently absurd.'

[33] The judge, in my judgment, was plainly correct in his approach and, given the totality of the material before him, well justified in the conclusions on the point to which he came. I venture to repeat in this context what I said in *Re K; A Local Authority v N and Others* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, paras [26], [93], itself, as it happens, a case involving members of the Kurdish community:

> 'The task of the court considering threshold for the purposes of s 31 of the 1989 Act may be to evaluate parental performance by reference to the objective standard of the hypothetical "reasonable" parent, but this does not mean that the court can simply ignore the underlying cultural, social or religious realities. On the contrary, the court must always be sensitive to the cultural, social and religious circumstances of the particular child and family …
>
> … We must guard against the risk of stereotyping. We must be careful to ensure that our understandable concern to protect vulnerable children (or, indeed, vulnerable young adults) does not lead us to interfere inappropriately – and if inappropriately then unjustly – with families merely because they cleave, as this family does, to mores, to cultural beliefs, more or less different from what is familiar to those who view life from a purely Euro-centric perspective.'

[34] So much for the judge's function below. What of ours on this appeal?

[35] Counsel drew our attention to the well-known words of Ward LJ in *Re S (Abduction*: *Custody Rights)* [2002] EWCA Civ 908, [2002] 2 FLR 815, para [25]:

> 'Although it is possible to appeal against a finding of fact, it is notoriously difficult to succeed in so doing. Where findings of fact are made based on the demeanour of a witness, the appeal court will seldom interfere because the trial judge has a special advantage over the appellate judge.'

I entirely agree but think there may be advantage in exploring the point a little further.

[36] The principles governing the proper approach an appellate court should adopt in relation to facts found and inferences drawn by the trial judge are to be found in the judgment of Arden LJ, with whom Potter and Neuberger LJJ agreed, in *Floyd and Others v John Fairhurst & Co* [2004] EWCA Civ 604, [2004] All ER (D) 312, paras [47]–[59]. I certainly do not propose to add to the jurisprudence. But I should like to emphasise, to borrow phrases used by Steyn and Hoffmann LJJ in their joint judgment in *Re C (A Minor) (Adoption: Parental Agreement: Contact)* [1993] 2 FLR 260, at 273, 275, that Roderic Wood J was steeped for 4 weeks in the evidence and the personalities of the witnesses and the parties. This gave him a very considerable, indeed an immense, advantage over us. As Lord Wilberforce said in *Re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602, [1977] 2 WLR 79, at 626 and 85 respectively, in a passage quoted by Steyn and Hoffmann LJJ:

> 'Character and personality certainly cannot be judged as well from a transcript of evidence … as by seeing and hearing those involved.'

[37] Moreover, as Lord Hoffmann later pointed out in *Piglowska v Piglow*ski [1999] 1 WLR 1360, [1999] 2 FLR 763, at 1372 and 784 respectively:

> '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 and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts'

He went on to quote his earlier observations in *Biogen v Medeva PLC* [1997] RPC 1, at 45:

> '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, 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.'

He continued:

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

[38] Any judge who has conducted the kind of fact-finding hearing with which Roderic Wood J had to deal, picking over, in almost relentless detail and for days on end, the most personal and intimate aspects of family and married life, will be acutely conscious of how even the most accurate transcript is at best only a pale representation of the inner dynamics, the tensions and the 'atmosphere' of the hearing, all of which are so powerfully palpable to those present, and will be conscious of how even the most skilled literary artist would be defeated in any attempt to bring the felt reality to life on the printed page. It is conventional in this context to refer to the demeanour of the witnesses, but the advantages afforded to the trial judge and denied to the appellate court extend much further. Particularly, perhaps, in family cases, the unguarded reactions – the facial expressions and the body language – of the protagonists as they listen to the evidence is often as illuminating, sometimes much more illuminating, for the judge than the demeanour of the witness.

[39] In this context Mr Hayden appositely reminds us of how Roderic Wood J had referred to the case (supplemental judgment para [20]) as having 'a dynamic of its own' and had described (main judgment para [255]) how 'the evidence … initially gave me the sensation of walking through a room full of smoke and mirrors'. Mr Hayden goes on to observe that over 20 days of hearing the judge steeped himself in the lives of these two families. As he rightly says, a great many factual disputes, some extremely serious, others less so, were addressed; some were resolved, others were not. But, as he points out, it was through the exploration of this broad canvas that the judge was, as I agree, uniquely placed to assess credibility, demeanour, themes in the evidence, perceived cultural imperatives, family interactions and relationships. And, as he submits, in a case such as this which, as the judge himself acknowledged, inevitably involved repetition in the evidential analysis, it is never possible to establish findings on each issue in a vacuum. So, says Mr Hayden the judgment requires the reader to consider it thematically as well as specifically. Put another way, he says, aspects of the evidence which may not seem strong considered in isolation gain greater weight in the context of other findings.

[40] Mr Hayden identified the following themes within the main judgment against which, as he put it, the father's attack on the judgment should be assessed:

(i) the mother experienced an unhappy childhood in Iran in which she was subjected to physical harm within her own family;
(ii) functionally illiterate and without any effective family support the mother was isolated and vulnerable within her marriage;
(iii) the father has a history of dishonesty in his dealings with the State (main judgment paras [115], [190]);
(iv) both families are patriarchal, to the extent that the women are expected to obey the men;
(v) though not unhappy with the prospect of marriage to the father, the mother faced considerable familial pressure to marry him (main judgment para [67]);
(vi) the mother exaggerated the extent and frequency of the father's physical and sexual assaults on her;
(vii) the mother has not always provided an acceptable level of care for A (main judgment para [191]);
(viii) the mother suffered from mental health problems prior to (main judgment para [190]) and during the course of the marriage;
(ix) both parents have a strong sense of family duty (main judgment para [202]);
(x) the decision to terminate the mother's second pregnancy was driven by the father; he was the interpreter and placed the mother under what the judge called 'enormous pressure' (main judgment para [219]);
(xi) the father had intended to take the mother to Germany and to abandon her there (main judgment para [223]);
(xii) significantly, it was *agreed evidence* (in a case where such was extremely thin on the ground!) that both sides of the family had historically operated in a culture where honour killings (so-called; there is no honour in such behaviour) were what the judge called a 'dominant feature' (main judgment para [277]);
(xiii) against the family's assertion, the judge found that those views continued to have currency within the family at the time of the hearing.

[41] As Mr Hayden commented, and I did not understand Ms Crowley to dispute this, none of these thematic findings was challenged by the father, either in his grounds of appeal or in Ms Crowley's skeleton argument.

[42] Mr Hayden relied upon these thematic findings as lending context to the findings the father complains against. He submits that, in headline format, and distilled from a lengthy judgment, they point to the reality of the mother's life within her marriage and within both families and form a factual basis from which the father's behaviour and personality emerge. Moreover, he says, the wider findings are frequently relevant to an understanding of the evidential basis behind the findings which are now complained about.

[43] Whilst accepting, as I do, the general thrust of these submissions, I emphasise that nothing in what Mr Hayden said can avoid – and I did not understand him to suggest for a moment that it could avoid – the twin needs, first, for any finding to be based on a proper evidential foundation and, second, for the judge to provide a properly reasoned explanation for his findings. A judge should give reasons for his findings, but he is not required,

as it were, to go on to give reasons for his reasons. Often, indeed, in this kind of case there is little more that a judge can say than that on some particular issue he believes X and disbelieves Y.

[44] I turn to consider the father's grounds of appeal.

[45] Sensibly and conveniently, the argument in relation to Grounds 3–9 preceded the argument in relation to Grounds 1–2, Ms Crowley making it clear that in large measure Grounds 3–9 went only to credibility. I propose to follow the same course here, starting with Ground 3.

[46] *Ground 3*: The father challenges the judge's finding (main judgment para [190(viii)]) that '[he] was attempting to use her mental health problems to improve their access to greater benefits'.

[47] In relation to this ground we gave the father permission to appeal and allowed the appeal. We said this finding cannot stand.

[48] Ms Crowley's submission was short and to the point. There was and is no evidence that the father and mother did improve their access to greater benefits during their time living together, indeed there was and is no evidence even of any request for financial assistance apart from the consideration – Ms Crowley says late in the day – of a carer's allowance. The father had been advised to apply for a carer's allowance, but whoever it was who gave him that advice was, says Ms Crowley, only advising him of his likely entitlements; indeed there was and is nothing to show that he was unlikely to be entitled to a carer's allowance. The mother was clearly mentally unwell, and the father was caring for both her and A in circumstances where, as the judge found (main judgment para [197]), the local authority's assessment that the mother should not be left unsupervised with A was understandable.

[49] Ms Crowley adds that although there are references in the medical records to them wanting separate accommodation, these requests are recorded as coming principally from the mother and as being said in the context of her complaints that she no longer wanted to live with the father. Moreover, the only evidence of dissatisfaction with the accommodation is that the mother was very disappointed with it when she arrived in this country and that they shared a mutual desire to move which, for the father's part at least, was a desire to move *together*. As Ms Crowley points out, the father continues to live in the same accommodation to this day. There was and is, she says, no evidence to support the speculation that the father had in mind the acquisition of a second apartment so that he could rent it out.

[50] In sum, Ms Crowley submits that the judge's finding against the father on this matter is not supported by the evidence, is fuelled by inappropriate speculation and is plainly wrong; it should, she says, be reversed.

[51] Mr Hayden seeks to support the finding by asserting that the judge correctly rooted his finding again in his assessment of the mother's credibility on the issue. Seeking to meet Ms Crowley's complaints he relies upon the mother's inability to communicate either orally or in writing with professionals (or, indeed, at all), and the judge's finding that the father managed the couple's affairs, as demonstrating that the many references in the medical notes which Ms Crowley relies upon can only have come from what the father was saying. He further seeks support from the fact that the judge had found, and was entitled to rely in this context on such findings, that the father had falsified the immigration documentation (main judgment para [37]; compare para [47]) and had misrepresented his circumstances to two public

agencies and to his bankers (main judgment paras [113]–[115]) – findings which the father has not sought to appeal. The totality of the evidence, he submits, cumulatively supports the findings of the judge, who, he says, was plainly able to reinforce his assessment of the mother's core credibility by what Mr Hayden characterises as the established pattern of the father's clear and opportunistic financial misconduct.

[52] On all this I prefer Ms Crowley's submissions. Mr Hayden's attempt to uphold the judge's finding founders, in my judgment, because it does not meet the point that the finding was expressed in terms of an attempt (or attempts) for which there was really no evidence at all. It would be one thing to say, based upon other things he is proved to have done, that the father is the kind of person who might be expected to try and put the mother's difficulties to his (or their) financial advantage – and that is really what Mr Hayden is suggesting – but that is not what the judge found. What he found was that the father 'was attempting' to do something for which there was really no evidence and which, insofar as there was any evidence, was evidence not justifying the pejorative terms in which, as I read it, the judge expressed his finding. Nor, with respect to Mr Hayden, is this a topic on which, given the inevitable documentary paper trail, any gaps in the evidence could safely be made good by the mother's unsupported assertions. I am persuaded, essentially for the reasons given by Ms Crowley, that this finding cannot stand.

[53] *Ground 4*: The father challenges the judge's finding (main judgment para [196], supplemental judgment para [11]) that a burn which A sustained on his bottom whilst, as the judge found, in his mother's care 'is more likely than not to have been the result of inattentive care rather than positive assault'.

[54] In relation to this ground we gave the father permission to appeal and allowed the appeal but only to a limited extent. We said the judge's finding must stand, so far as it goes, but that it required to be qualified in one respect. In a witness statement the father's sister said of this episode, referring to what she said the mother had told her:

> 'I was shocked to see a huge scar on his bottom. I asked her how he had got it and she told me that he rolled against the heater when she was smacking him.'

That account was not challenged in cross-examination and there was, in our judgment, no reason for the judge not to accept it. The finding should accordingly be amended to read:

> 'is more likely than not to have been the result of inattentive care rather than positive assault, having been caused, as the mother told the father's sister, when he rolled against the heater when she was smacking him.'

Ms Crowley asked us to find that the mother's actions although not deliberate were reckless. We declined to go that far.

[55] The forensic context underlying this issue is the fact that it was the *mother's* case that the burn which it is common ground A suffered had been inflicted by the *paternal grandmother* in her presence as a punishment for his urinating on her carpet in *Iraq*. The father's case, supported by a number of

his witnesses, was that the burn had been sustained whilst A was in his *mother's* care in *Iran*. Ms Crowley submits that it is implicit in the judge's finding that the burn was sustained in Iran, not only that the mother was deliberately lying about whether or not the paternal grandmother inflicted the burn but that she was also lying in denying that the burn occurred in her care. Her lies apply whether or not the burn was inflicted by her as a result of 'inattentive care' or deliberately. So far so good.

[56] Ms Crowley then points to various findings the judge made about the mother's care of A, including (main judgment para [191]) that 'at times her mental health problems were such that they did indeed impair her ability to look after A' and that 'that there were serious worries about her abilities'; that (main judgment para [192]) 'she did on one occasion bite A to the extent of leaving visible marks upon his leg'; adding that although he rejected her denial 'there is insufficient evidence for me to determine whether or not this act of hers was malicious, deliberate cruelty or carried out for some other reason'; and (main judgment para [193]) that 'she is re-writing history … in order to improve the impression of her as a competent and caring mother throughout'. Ms Crowley complains that the judge failed to consider the significance of these findings about the mother's parenting when he came to make his findings about how the burn had occurred in circumstances wholly different from those advanced by the mother. Furthermore, she says, the judge failed to consider in this context the evidence of the appellant's sister to which I have already referred.

[57] All in all, says Ms Crowley, the only finding consistent with the evidence was either that the burn was inflicted as the father and his witnesses had contended or that it was not possible for the judge to come to a conclusion about how it was caused. The judge's finding, she submits, was not supported by the evidence, was fuelled by inappropriate speculation, was plainly wrong and should be varied, either by substituting a finding that the mother's actions although not deliberate were reckless or by deleting the reference to the likely cause being 'inattentive care rather than positive assault'.

[58] Mr Hayden submits that the judge had little information to resolve this issue and certainly did not have sufficient information to establish a finding of non-accidental injury. The judge, he says, was entitled on the balance of probabilities to come to the conclusion that he did.

[59] It is a strong thing to invite this court on an issue such as this to make an adverse finding against a parent more stringent than the judge who heard all the evidence and saw all the witnesses was prepared to make. There is, with all respect to Ms Crowley's submissions, no basis upon which we could properly find that the mother's actions were reckless. We know too little about the case; indeed, we were not even taken through the relevant evidence, written and oral. Nor could we safely conclude, just because the mother has, on the judge's findings, been lying through her teeth in denying all responsibility for A's injury, that her actions, although not deliberate, were reckless rather than inattentive. A lying denial of responsibility when something has happened does not of itself establish precisely what that 'something' was. What it was that happened, who the perpetrator was, and what the perpetrator's motives, intentions and state of mind were, are different things, and a lie in relation to one does not without more establish the facts in relation to the others. Equally, there is no justification for our setting aside the

essential thrust of the judge's carefully expressed finding – a finding that, in my judgment, was manifestly open to him on the evidence – that the injury was the result of inattentive care rather than positive assault. That finding stands, but it requires to be qualified in the way and for the reasons I have already given.

[60] *Ground 5*: The father challenges the judge's findings (supplemental judgment para [15]) that:

> 'her [the mother's] brother H told her brother K, according to the evidence of K, that the former found that the mother had bruised wrists when he subsequently saw her.'

[61] In relation to this ground we refused the father permission to appeal. We added that, as we read the judgment, the judge's only finding was that K's account of what he had been told by H was truthful and accurate. The judge did not make any finding as to whether what H had said to K was either truthful or accurate. In particular, the judge did not find that the mother's wrists were bruised.

[62] Ms Crowley in her skeleton argument elaborated why, as she submitted, the judge erred in accepting K's evidence with regard to the bruising (for example because the mother herself had never alleged that she had sustained any injury at that time, that K's evidence that he had been told by H of the bruising only emerged in cross-examination, and that H made no mention in his evidence of observing any injury nor, indeed, of any conversation with K in regard to it) and why it was, therefore, contended that 'there is no reliable evidential basis to support a finding that the mother had bruised wrists'. Mr Hayden understandably in these circumstances sought to argue the contrary, though submitting – and I agree – that in the final analysis the question of whether or not the mother had bruised wrists has no forensic relevance and does not impact on the judge's assessment of the mother's credibility.

[63] With all respect to Ms Crowley she is here tilting at windmills. The judge, as I have said, did not make the findings she seeks to challenge. And when asked to explain what other issues or grounds of appeal K's credibility went to, Ms Crowley found herself in difficulty. I understood her in effect to concede that the answer to the question was: none. In the circumstances this is not a matter which requires or justifies any further consideration by us.

[64] *Ground 6*: The father challenges the judge's finding (main judgment paras [278], [280]) that:

> 'this mother's life is at real risk if she were to reveal her identity and location, or be found. I consider that she would be at risk from … the paternal grandfather … the paternal grandfather has made threats to the life of the mother, and would, more probably than not, have them carried out if he ascertained her whereabouts.'

[65] In relation to this ground we gave the father permission to appeal and allowed the appeal. We said this finding against the paternal grandfather cannot stand. We made clear, and I repeat, that this does *not* affect similar findings made by the judge in relation to other individuals.

[66] The judge rejected the mother's account of what he referred to (supplemental judgment para [16]) as the 'most graphic allegations of such a threat', namely that the paternal grandfather had threatened her with a gun, as being (main judgment para [246]) 'wholly improbable'. Ms Crowley submits that the mother's account has, therefore, been found to be untrue. Whilst accepting that, as the judge put it (supplemental judgment para [19]), this 'does not … necessarily fatally undermine her allegations of other threats made by the paternal grandfather', it is, she says, given that the judge had rejected the single most serious allegation made by the mother against the paternal grandfather, pertinent to ask what other allegations were made by the mother that he had threatened to kill her and, in particular, to examine what other evidence there was in support of her case.

[67] She answers by demonstrating that there was no other direct evidence from the mother of any additional threats to her, albeit that she provided hearsay accounts of such threats allegedly uttered by the paternal grandfather in the presence of others. The only evidence supporting that came from the maternal grandmother, who made two assertions. The first was that three relatives of the father had told her about another threat allegedly made by the paternal grandfather that he would 'murder all members of my household in the event that [the mother] reported [the father] to the British Authorities and that this led to an arrest'; this was disputed in the written evidence of four cousins who the mother indicated were not required for cross-examination even though it had always been made clear that the father relied upon their evidence. The other was that the maternal grandmother had overheard a telephone conversation between the paternal grandfather and her husband during which a threat was made against the mother; she went on to say that she took over the handset and that the paternal grandfather repeated the threat to her.

[68] So far as concerns the maternal grandmother's hearsay evidence about what she had been told by the father's relatives, there had been discussion during the hearing as to whether or not the cousins ought to be called. Understandably the judge made a comment to the effect that he was not going to spend time investigating hearsay and double hearsay allegations. That position, says Ms Crowley, is understood, but she submits that, having given that indication, the judge should not have proceeded to make a finding based upon the grandmother's hearsay evidence without hearing the evidence of those who refuted it; their evidence, as she points out, would not have been hearsay. I agree.

[69] Ms Crowley proceeds with the submission that, if the part of the grandmother's allegations which relates to the cousins is removed, all that is left is the overheard threat made over the telephone. She makes two powerful points in this connection: first, the fact that the maternal grandfather did not describe this event either in his statement or in his evidence (a matter the implications of which, she says, the judge did not consider); second, what she says was the judge's failure to attach sufficient weight to his findings, which there is no need for me to rehearse, that the maternal grandmother had already lied about a number of important issues, thus, says Ms Crowley, crucially undermining her credibility.

[70] Ms Crowley submits that the finding that the paternal grandfather had made and would carry out a threat to kill the mother has been made on an

unsatisfactory evidential basis, relying only on the evidence of the maternal grandmother whom the judge has found elsewhere to have told a variety of lies. She says that what she calls the judge's attempt to shore up his finding by adding in his response to the request for amplification (supplemental judgment para [26]) an additional finding that he 'did not believe the paternal grandfather's denials that he had not made such a threat' needs to be considered in the context of the caveats he placed in his main judgment arising from some of the practical difficulties experienced in receiving evidence from Iran and Iraq through interpreters. The judge, she says, was plainly wrong to make such a finding on such flimsy evidence and his finding should be reversed.

[71] Ms Crowley also points out that although the judge set out (main judgment paras [270]–[274]) quite a lengthy summary of the evidence about threats to kill, this summary is mainly concerned with threats allegedly emanating from the *mother's* family, not the father's, and that it does not refer at all to the maternal grandmother's evidence in relation to the threats allegedly made by the paternal grandfather. As a subsidiary point she observes that the judge has expressed his crucial finding against the paternal grandfather (main judgment para [280]) in terms of threats (plural) without indicating which he has in mind.

[72] Mr Hayden realistically accepts that at first blush this seems the most attractive of the various grounds of appeal. However, he submits, it encounters two sizeable obstacles. First, it is common ground, he says, that this is a family in which killing to satisfy perceived dishonour has historically been accepted as justifiable. Against that history a finding of threats to kill by the paternal grandfather, who is by virtue of his age chronologically closer to the accepted culture, is, he suggests, inherently less improbable than such a finding would be in a vacuum. Further, he suggests, the father can hardly complain when, having invited the judge to clarify his finding, the judge has, as here, amplified his reasoning to extend to a more substantial critique of the grandfather's own credibility on the point. The judge, he submits, was uniquely placed to make that assessment; we, in contrast, simply do not have this advantage.

[73] As to the first point, there may be some force in what Mr Hayden says, so far as it goes, but I am bound to observe: so what! That X is inherently less improbable than Y does not of itself suffice to establish X. And what other evidence did the judge have to justify his finding? Such evidence as there was – and it all came from the maternal grandmother – was, I agree, flimsy in the extreme.

[74] In relation to Mr Hayden's second point, one needs to be clear about what exactly it was that the paternal grandfather had denied. The judge said (supplemental judgment para [24]) that he was 'aware of the paternal grandfather's emphatic denial of such a threat … or indeed any threats. I disbelieve him.' That, as the page reference the judge gave made clear, was a reference to what the paternal grandfather had said in a witness statement. The crucial paragraph to which the judge referred did indeed say 'I have *never* made such a threat' (emphasis in the original), but in relation to specific matters was confined to answering the maternal grandmother's assertions in respect of the cousins.

[75] The judge's further observation (supplemental judgment para [26]) that he 'did not believe the paternal grandfather's denials that he had not made any such threat' seems to be a reference to his oral evidence, but, as the transcript shows, what he was asked about was a telephone call which he recalled as involving him asking the maternal grandfather to stop the mother returning to this country until he (the paternal grandfather) had brought A to her in Iran. As Mr Hayden had to accept, it was never put to the paternal grandfather that he had, whether in the course of that or any other telephone call, made the alleged threats referred to by the maternal grandmother. How in these circumstances can the finding stand? In my judgment, it cannot.

[76] On this occasion Homer has nodded. The judge rejected the mother's evidence. What was left was the evidence of the maternal grandmother and the paternal grandfather's denials. Even standing alone, the maternal grandmother's evidence was flimsy and in part hearsay. But the course the hearing took denied the judge the opportunity he would otherwise have had of being able to evaluate it in the round and, though I am sure this was the very last thing the judge would have wanted, also in the outcome denied the paternal grandfather the fair hearing on the issue to which he was entitled. On the one allegation, the cousins were not called to give evidence. The other allegation was never put to the father in cross-examination. On these grounds alone, as it seems to me, the finding cannot stand.

[77] However, the matter goes rather further. It is apparent that the judge placed weight on denials by the paternal grandfather which he disbelieved, but in doing so he seems to have misremembered exactly what had and had not been put to the paternal grandfather and precisely what it was that he was denying. The judge is not to be blamed for this single slip in such a factually complex case. Unlike us, he did not have the benefit when he was preparing his judgment of access to a transcript of the paternal grandfather's evidence – a significant handicap in a case where, as the transcript shows so vividly, that evidence was given in a way that would have made it more than usually difficult for any judge not taking it down in shorthand to make an accurate note of what was being said. Homer, as I say, has nodded. But the finding cannot stand.

[78] *Ground 7*: The father challenges the judge's finding (main judgment para [261]) that 'the maternal grandfather is a man of his word'.

[79] In relation to this ground we refused the father permission to appeal.

[80] Given the nature of the finding, and the fact that it relates not to the father but to the maternal grandfather, we asked Ms Crowley what she said the consequences of this finding were, what issue it could go to at the further 'welfare' hearing. She frankly accepted that it was marginal, suggesting only, and somewhat faintly, that it might bear upon the maternal grandfather's suitability to care for A. She sought to argue that the judge had himself come to various findings damaging to the maternal grandfather's credibility – a slightly different point – and to portray him as a man who, on his own evidence, emerged as a man who did not take responsibility for his legitimate son and refused to act honourably in terms of paying maintenance.

[81] Mr Hayden's riposte is that the judge was dealing here with a culture in which an otherwise honest individual may lie to defend honour or rebut shame or when motivated by family loyalty; that although it is apparent, as the judge found, that the maternal grandfather had lied about his relationship with

his son's mother, it is easy to see, even from a 'Western' perspective, how such circumstances attract dishonour; and that the judge was nonetheless entitled to assess that discrete issue on its facts and to conclude on what he identifies (main judgment para [261]) as 'a fine balance' that it does not impugn his findings that the maternal grandfather is a man of his word. The judge, as he points out, had found elsewhere that the maternal grandfather had honoured agreements, particularly financial agreements said to have been made on behalf of his daughter in the matter of her divorce.

[82] It is far from obvious that there is any great merit in Ms Crowley's attack on this finding. More to the point, however, is that it is in any event of only the most marginal and peripheral significance. Fundamentally, after all, this is a case about the father and the mother. It is not an appropriate use of the time of this court to explore findings which, without any relevance to other findings which are being challenged, go only to the credibility or character of other members of the wider families. In the circumstances this is not a matter which requires or justifies any further consideration by us.

[83] *Ground 8*: The father challenges the judge's findings (main judgment paras [225]–[231]) in relation to the mother's complaint that he had abandoned her in Iran. As formulated in the revised Scott Schedule the allegation (number 13) was that in August 2007 the father 'took the mother to a hotel in Iran on the pretext of a holiday, gave her medication that made her drowsy, tied her up, and left taking her passport, travel documents, jewellery and A with him'. The judge's conclusion (para [230]) was to accept the mother's evidence 'as to the essential matters on this subject'. A document produced by the hotel was described by the judge (para [230]) as being:

> 'a reasonably reliable account of these events in its essential particulars. This document, in significant respects, confirms the mother's evidence about her abandonment. It describes her being found helpless after she cried out, and that when she left the next day she was still worried and crying, and bore the visible mark of a "blow" on her face.'

[84] In relation to this ground we gave the father permission to appeal but dismissed the appeal. We emphasised, however, what, as we read his judgment, it is that the judge has or, as the case may be, has not found. There is no finding that the mother was tied up or that she suffered any violence. And the judge's finding in relation to what Ms Crowley would characterise as the father's 'drugging' of the mother (main judgment para [227]) is carefully nuanced and limited in its reach 'at some stage he provided her with a pill which rendered her sleepy'.

[85] The essential focus of Ms Crowley's submissions related to the 'blow' referred to in the hotel's document and to the alleged 'drugging'. As she points out, the mother never made any allegation, whether in her written or oral evidence or to the police, that she had been struck by the father at any point during the abandonment, so the document cannot in this respect be said to corroborate her case. Conversely, as she points out, the hotel's document does not corroborate the mother's case that she had been drugged and tied up. True; but it does corroborate the essential complaint that she was abandoned by the father, who had left taking both the child and the mother's documents

and passport. Ms Crowley also points to what she suggests are inconsistencies in the detail of the mother's account of what happened to her at the hotel.

[86] At the end of the day, Ms Crowley's complaint amounted to this: that there was insufficient reliable evidence to support the finding that the father drugged the mother or that he tied her to the bed, 'if indeed the judge made such a finding, which it is submitted is unclear'.

[87] Mr Hayden understandably places reliance on the hotel's document, pointing out that no suggestion was made by the father that the document was falsely manufactured and that K was not cross-examined on the basis that it was, and submitting that the judge was entitled to accept it as giving a reasonably reliable account. The document, he says, confirms the mother's evidence in significant respects. The absence of challenge to the document, he submits, is fatal to any displacement of the judge's findings in respect of its contents. Given that the father does not appeal the finding that he intended to abandon the mother in Germany it is, he says, difficult to see how he can credibly mount a challenge to a finding that shortly after that he actually abandoned her in Iran. Moreover it is clear, he says, that the mother and A were separated at this point and that she made concerted efforts thereafter to secure his return.

[88] There is, in my judgment, no proper basis upon which we could interfere with the judge's findings. The hotel's document corroborates the mother's essential case that she was left, abandoned and without her passport and documents, while A was taken from her. The judge did not find that the mother had been tied up. In relation to the other finding of which complaint is made – the so-called 'drugging' of the mother – there is, in my judgment, despite Ms Crowley's carefully presented submissions, no basis for rejecting what, as I have said, was the judge's carefully nuanced and limited finding. There was evidence before him which, if he accepted it, entitled the judge to find as he did, notwithstanding all the various deficiencies in the mother's performance as a witness. Whether or not he accepted that evidence was pre-eminently a matter for the judge, with all the advantages he had and which are denied to us. He was entitled to conclude as he did and for the reasons he gave. Were we to interfere we would trespassing impermissibly upon functions which were imposed upon him and denied to us.

[89] *Ground 9*: The father challenges the judge's finding (main judgment para [315]) in relation to the 'Afghan male' that 'she was, for the most part, telling me the truth about this relationship, "marriage" and separation'.

[90] In relation to this ground we gave the father permission to appeal but dismissed the appeal. We drew attention, however, to the fact that the judge specifically said that he made no finding in relation to the issue of whether or not the Afghan male had at one time had a gun. We added that, as we read the judgment, the judge made no finding that the Afghan male was guilty of domestic violence against the mother.

[91] Ms Crowley complains that the judge failed to take sufficient account of the many lies the mother had told about this relationship, notably denying its continuance over a period of some 6 months to the police. She submits that his finding that she was for the most part telling the truth about her relationship with the Afghan male is not supported by the evidence.

[92] She complains in particular about the judge's treatment of the mother's allegation that the Afghan male had threatened her with a gun, an

allegation in relation to which she failed to make a timely report to the police and thereafter gave differing accounts which the police did not believe. The judge said (main judgment para [310]) that he did not feel the need to investigate the allegation beyond the minimal aspects of it and declined (main judgment para [315]) to make any finding as to whether the Afghan had threatened her with a gun. By adopting that approach, Ms Crowley says, the judge failed to consider the submission made on behalf of the father that the mother's conduct in respect of her allegations against the Afghan should be considered as being strikingly similar to those made by her against the father and his family. In particular, she comments, the judge disbelieved the mother as to the gun allegation relating to the paternal grandfather but, despite the police concluding that there was no gun at the Afghan's premises, he made no finding about the Afghan having (or, rather, not having) a gun.

[93] Ms Crowley submits that the judge was plainly wrong not to find that the mother had lied about the gun threat, as she had lied previously about the paternal grandfather's similar threats. The pattern of behaviour of making an unfounded complaint that she had been threatened by a man with a gun was not considered by the judge and that failure, she says, undermines his refusal to make a positive finding. Had he undertaken that exercise she suggests that he would likely have concluded that the probability was that the mother was lying about the threat with a gun.

[94] On a separate point, Ms Crowley submits that, given the evidence that the Afghan was a devout Muslim, the judge's finding of the mother's essential truthfulness is inconsistent with the fact that the Afghan willingly went through a ceremony of marriage with a woman who was still married to another man (the father) when, on her evidence, she had explained her circumstances to him. Ms Crowley says it is difficult to discern from the judgment how the judge reconciles his finding that the mother had told the Afghan about her subsisting marriage, whilst lying to the court when giving an explanation as to how it was she was able to go through a marriage ceremony with him while still married to the father, with a finding that her account is 'essentially truthful'.

[95] On a point of detail Ms Crowley is able to demonstrate that the judge was plainly wrong in rejecting (main judgment para [313]) the submission made on behalf of the father that the mother made her complaint against the Afghan only after she became aware that he had reported her for alleged criminal offences, for the evidence demonstrates as a fact that that is the true chronology.

[96] For these reasons Ms Crowley submits that the judge's findings are inconsistent with the evidence as to the mother's veracity over her relationship with the Afghan and should not stand. Moreover, she says, we should make additional findings that the mother lied about the Afghan's possession of and threat with a gun and about her capacity to marry him.

[97] Mr Hayden submits that Ms Crowley's complaints fail to engage with the judge's clear acknowledgement (main judgment para [316]) that in her account of the relationship with the Afghan male the mother's credibility was impugned, indeed that her evidence was 'wholly unpersuasive and unsatisfactory', that (main judgment para [309]) her recollection of dates as to key points in this relationship was unreliable, and (main judgment paras [297], [298], [300]) that she had lied to the police and, I might add, also

to the judge. He points to the judge's conclusion in respect of her lies about the marriage (main judgment para [316]) that this one issue did not provide a key to her credibility on other issues. Mr Hayden submits that it was entirely open to the judge to take such a course. Moreover, as he also points out, the judge took particular care (main judgment para [316]) to remind himself, in the light of his adverse findings in this context, to be 'on guard when considering other crucial matters'. In respect of the alleged threat with a gun the judge did not feel the evidence supported such a finding but neither did he conclude that the search of the Afghan male's house, which failed to discover a gun, permitted him to conclude that the threat was manufactured by the mother. In the judge's analysis the evidence did not support a finding either way.

[98] Mr Hayden submits that against this evidential framework the judge was perfectly able and entitled to conclude (main judgment para [315]) that the mother 'was, for the most part, telling me the truth about this relationship, "marriage" and separation'. Mr Hayden points to what the judge said in the crucial passage of his judgment (main judgment para [315]):

> 'Overall, looking at these events, and leaving aside the issue of whether or not the Afghan male had at one time had a gun (even though not discovered on a search), in respect of which I make no finding, I consider it more likely than not that she was, for the most part, telling me the truth about this relationship, "marriage" and separation. In her oral evidence she spoke eloquently of her abandonment by all, her total isolation from any form of community (save for the hotchpotch community she was then staying in where the other young women had their children with them, making her feel even more lonely), and the investment of her hopes (woefully misplaced) in this marriage in which she felt, finally, she would be safe. She was only to find, all-too quickly, that she had married a man who was certainly very controlling of her.'

Ms Crowley says that this analysis is not supported by the evidence. Mr Hayden begs to differ. This assessment of the mother's demeanour in the witness box and the findings which flowed from it are, he suggests, buttressed by the judge's wider thematic finding that isolation has been a feature of this mother's life history.

[99] Mr Hayden submits that, as with so many aspects of this judgment, the judge has had to carve a careful path amongst witnesses who were never entirely reliable. He observes that the judge had the opportunity to assess this family at enormous length, hearing extensively from the mother, the father, the paternal grandparents and others. It was against that background that the judge was able to make his findings in relation to the paternal grandfather's use of a gun. In the case of the Afghan male, however, the judge had no evidence from him (other than his recorded interview with the police, to which the judge made only limited reference), had little information about him and no real opportunity at all to evaluate his credibility. Mr Hayden submits that it is difficult to see how in these circumstances the judge could have gone further than the neutral position he reached in relation to these findings. The judge was, he says, entirely justified in making no finding about the gun, just as he made no finding that the Afghan male was guilty of

domestic violence against the mother. This, he submits, is a perfect example of the balanced approach which runs throughout the entirety of the judgments.

[100] In essence I accept Mr Hayden's submissions.

[101] The key point, in my judgment, is that in contrast to Ground 3, where there was really no evidence at all to support the key finding, and Ground 6, where the evidence was flimsy and in part hearsay and where, moreover, there had been procedural shortcomings at the hearing, there was here, despite what Ms Crowley would have us accept, evidence which, if the judge was entitled to accept it, as he did, entitled him to go on to make the finding which is now challenged. The real thrust of Ms Crowley's complaint in relation to Ground 9 is not that there was no evidence to support the judge's finding but rather that his finding was against the weight of the evidence, particularly bearing in mind that all turned upon the uncorroborated evidence of the mother, whose credibility was severely compromised. That may be so, but her shortcomings as a witness, which as Mr Hayden emphasises the judge had very much in mind, were not such as on that ground alone to prevent the judge finding as he did. In particular, there was, in my judgment, nothing to prevent the judge concluding, as he did, that in this instance her lies on one aspect of the matter did not provide a key to her credibility on other issues.

[102] I agree with Mr Hayden's analysis of the forensic realities as explaining why the judge was justified – indeed I would be inclined to say well advised – to adopt a more cautious approach in determining what findings he could and could not make in relation to the Afghan male than was possible in relation to the paternal grandfather. And this, as it seems to me, goes far to draw the sting from that part of Ms Crowley's analysis which focuses upon the judge's finding – or, rather, non-finding – in relation to the gun.

[103] Despite her attempts to suggest otherwise, there are, in my judgment, no internal inconsistencies or contradictions in the judge's reasoning, whether in relation to different aspects of the mother's relationship with the Afghan male or in relation to the judge's findings about that relationship when compared with his findings in relation to the paternal grandfather. And the point of detail on which, as I have said, the judge was plainly wrong is not one which, in my judgment, affects the validity of the findings which are now under challenge.

[104] Any judge who has had to conduct a fact-finding hearing such as this is likely to have had experience of a witness – as here a woman deposing to serious domestic violence and grave sexual abuse – whose evidence, although shot through with unreliability as to details, with gross exaggeration and even with lies, is nonetheless compelling and convincing as to the central core. It is trite that there are all kinds of reasons why witnesses lie, but where the issues relate, as here, to failed marital relationships and the strong emotions and passions that the court process itself releases and brings into prominence in such a case, the reasons why someone in the mother's position may lie, even lie repeatedly, are more than usually difficult to decipher. Yet through all the lies, as experience teaches, one may nonetheless be left with a powerful conviction that on the essentials the witness is telling the truth, perhaps because of the way in which she gives her evidence, perhaps because of a number of small points which, although trivial in themselves, nonetheless suddenly illuminate the underlying realities.

[105] Here, as it seems to me, we find a reflection of that kind of forensic reality in what the judge said in the key passage in his judgment (main judgment para [315]). I have set it out already, and do not repeat it, but the language the judge uses is striking, reflecting, it would seem, the effect upon him as he was listening to the mother's evidence: 'In her oral evidence she spoke eloquently of her abandonment by all, her total isolation from any form of community … and the investment of her hopes (woefully misplaced) in this marriage in which she felt, finally, she would be safe'. The words are powerful and eloquent; surely they reflect the judge's belief that, with her defences down and speaking from the heart, what he was hearing from the mother was the truth.

[106] Roderic Wood J had the advantage of being there, watching and hearing the mother as she gave evidence. We do not have that advantage. And however eloquent the judge's words may be in creating for us an impression of her evidence they do not allow us to imagine ourselves in the judge's chair. In my judgment, the judge was entitled to find as he did and for the reasons he gave. We would be exceeding our proper function if we were to interfere.

[107] I would, therefore, reject Ms Crowley's submission that we should set aside the judge's finding, just as I would reject her submission that we should make additional findings against the mother. It is, as I have already remarked, a strong thing to invite this court on an issue such as this to make an adverse finding against a parent more stringent than the judge who heard all the evidence and saw all the witnesses was prepared to make. Particularly must that be so if, as here, this court is being invited to find that a witness has lied when the judge who actually watched and heard her giving evidence was not prepared to go that far.

[108] *Ground 1*: The father challenges the judge's finding (main judgment paras [108(ii)] and [108(vii)] that:

> 'He has perpetrated acts of non-consensual vaginal, anal, and oral rape upon her … regularly and frequently over the course of their time together.'

[109] In relation to this ground we gave the father permission to appeal but dismissed the appeal.

[110] These are far and away the most serious of the judge's findings against the father. Their gravity, particularly when taken in combination with the judge's findings in relation to the mother's general lack of credibility and reliability as a witness, demand that we subject his judgments to the most anxious scrutiny. The outcome of that exercise nonetheless leaves me satisfied, despite everything pressed on us by Ms Crowley, that there are no grounds upon which we can properly interfere.

[111] Ms Crowley marshals her attack on this part of the case under a number of headings. First, she points to the judge's characterisation of the mother's evidence. I need not repeat what I have already said on this topic save to observe that some of the judge's most stinging criticisms of the mother's evidence related, as Ms Crowley points out, to the evidence she gave in support of these very serious allegations. Thus it was in this context that the judge described the mother, for example, as being a 'hopeless historian' (main judgment para [87]), as 'exaggerating' (main judgment para [108]), and

telling him 'deliberate lies' (main judgment para [108]), just as it was when referring to the mother's ABE interviews that he said (main judgment para [284]) that 'anyone reading [them] would be entitled to raise an eyebrow at aspects of their content'.

[112] Second, Ms Crowley points to specific and, she would say significant, inconsistencies in the mother's evidence. Thus, whereas in her ABE interviews, the mother alleged that from the first night she arrived in the UK she was subjected to vaginal, anal and oral rape during the day and the night on a daily basis in assaults which lasted for many hours resulting in the father having many ejaculations in any one session, there being, she said, no period during the marriage when these assaults did not take place, save for 5 days at the time of A's birth, in a statement to the police she claimed that the rapes started 'three months after I arrived in the UK' and in her witness statements in these proceedings appeared to distance herself from the frequency of the assaults alleged during the ABE interviews. Yet in cross-examination she confirmed that it was her case that until she was admitted to hospital (to give birth to A) and from the time she was discharged home, she was brutally treated by the father on a daily basis and that he would ejaculate many times 'every night'.

[113] Third, Ms Crowley identifies the core of the judge's reasoning in the following passage (main judgment para [108]):

> 'I do not know whether or not this behaviour began on their first night together …, but I doubt it, and accordingly it is possible to ask why I have not regarded the rest of her evidence on this subject (she being firm in her account that it did begin on that first night) as less than credible. The simple answer is that I believed her account on the subject of the nature of the assaults, its narrative flow, and its compelling and congruent detail, but that her conflicting evidence as to the length of a number of the period when he was kind to her at the start of their marriage, one of which would take this young couple beyond the time of that first night, contradict her evidence on this point. I suspect, but cannot come to any concluded view, that her evidence on the date of commencement may be designed to emphasise and exaggerate his brutishness.'

In relation to this Ms Crowley submits that the deficiencies and inconsistencies in the mother's accounts of the assaults she sustained were so great and of such a nature that it would be impossible to regard the 'narrative flow' of the mother's account as anything other than fatally undermined; that the 'congruent detail' is not identified in the judgment, alternatively, that such congruent detail as there is, is undermined by the detail which the judge has found either to be deliberate lies or not established or to have been learned from her viewing of pornography; and that there is insufficient analysis in the judgment as to how the judge discerned what in the 'compelling detail' was truthful in an account which included lies that were 'deliberate', told 'in order to paint the father even more darkly' or 'may have been designed to emphasise and exaggerate his brutishness'.

[114] Fourth, having carefully analysed what the judge said, Ms Crowley submits that nowhere in the main judgment is there any analysis as to why the

mother's account should be preferred over the father's account beyond the following passage (main judgment para [87]), even though it is, she says, implicit there that such analysis will follow:

> 'The nature of their sexual behaviour together (as alleged by her) is set out below. But at this point I simply note that her evidence to me was that he was frequently cruel, and enjoyed watching her suffering during intercourse and/or sexual activity of other kinds. In describing her misery she was obviously distressed in the witness box, and I have no doubt she was giving me a true account as to how it felt for her as he took his pleasures, paying no regard to her comfort and feelings. Such a finding does not, however, amount to findings accepting the totality of her evidence of his sexual appetites and the manifestation of them.'

[115] In this context Ms Crowley also draws attention to the following passage (main judgment para [108]) where the judge speculated that the father's sexual behaviour:

> 'may well have followed on from her making her views clear about the nature of the accommodation, and how far they fell short of what she had been led to expect, as well as her increasing withdrawal from him as she became more depressed … There is reference in the papers to him being sexually frustrated over a long period prior to his marriage, and this, too, may well have led to what she, subjectively, regarded as excessive demands for intercourse and sexual play. There may well have been other reasons. I shall not speculate further.'

Of this Ms Crowley submits that there is no analysis as to how the judge bridges what she calls the enormous gulf between the mother's subjective regard for sexual activity with the father as excessive and what the judge had described (main judgment para [89]) as an 'account of almost unrelenting degradation of every conceivable kind'; that the only reference in the papers to the father's longstanding sexual frustration was given by the mother and corroborated nowhere else; moreover, he was not cross-examined on this; and that there is no analysis of how or why brutal regular rapes might follow on from the mother making her views clear about the nature of the accommodation. Such a proposition, she submits, is speculative and inherently unlikely.

[116] Fifth, Ms Crowley submits that the judge failed to engage adequately with the fact, as she asserts, that had the mother's allegations been true, neighbours and a relation staying with them would have heard sounds of the assaults and would have discerned something from the interaction between the couple to alert them to the fact that something was seriously amiss in the relationship. One neighbour, unrelated to the parties and who was not required for cross-examination, said in her witness statement, speaking of 2005–2006, that:

> 'I do not recall hearing screaming or sounds of violence. The sound insulation between the flats is pretty bad. I could for instance hear A crying or the television if it is on at a high volume which occasionally it

> is … if there had been serious and ongoing domestic violence in [their] flat, I would have heard this at the times I was there. I would have taken action if I had heard this.'

She also said that 'From outward appearances [they] seemed a very happy couple'. Another neighbour, whose evidence was accepted in its entirety by the judge (it was of her that he said 'I did not doubt anything she said') described in her witness statement how:

> 'When I first met [the mother] she did not strike me as unhappy. I did not perceive that she was the victim of domestic abuse as I could see that she did not seem frightened of [him] in any way and seemed quite confident in his presence … During the time I knew her she did not strike me as being in any way frightened of him. As a teacher I am trained to look for signs of abuse and I did not see any. I never heard raised voices when I approached the house.'

A relation of the mother who stayed with the couple for some months in 2005, and who was not cross-examined on this point, said in his witness statement:

> 'Whilst I stayed with them, I saw [them] as a normal couple; they were good with each other. I did not see any sign of trouble between them. Their flat was quite small and not very soundproof so I would have heard screaming, shoving, or fighting … I never heard anything that would have indicated that [the mother] was ill treated by her husband.'

[117] The judge's response to this evidence (main judgment para [110]) was as follows:

> 'I am further reinforced in my view that the mother has been exaggerating her allegations (in part) having heard the evidence of a number of the family's neighbours … and of the mother's cousin K (a young man who stayed with the mother and father during the summer of 2005). None of them heard the sort of levels of noise (crying out, screaming and crying) which the mother alleges took place, and which they would have been likely to hear if the assaults had taken place as frequently as she claims. Given the nature of the accommodation they were occupying, and given that at one stage her cousin K was sleeping in the next room, it is simply not credible that she was making these sorts of sounds at the level and frequency she asserts. A partial answer to this, accounting for some periods when others might well not have heard her, is to be found in her evidence that when she was crying out in the course of such activities he would stuff her mouth with a sock or his boxer shorts, or put a hand over it to diminish the sound levels. This sounds all-too credible, and I find it to be a compelling detail despite his denials. Overall I find she is exaggerating. However, I do not find the absence of complaint by her to others to be surprising. These are deeply private matters, and she would have had to trust someone to take her seriously and not report back to the father that she had complained. There was no such person to whom she could turn, for with the

> exception of K to whom it would have been wholly inappropriate to complain, she had no relatives or friends.'

In relation to this Ms Crowley complains that the judge wrongly referred to the witnesses as not hearing levels of noise consistent with abuse when the evidence was that they heard no sinister or concerning noise *at all*; that the judge failed even to refer in his judgment to the fact that the mother had agreed in cross-examination that the father shouted during these assaults; and that the judge, although he found that the assaults could not have taken place as frequently as the mother asserted, failed to analyse why the more obvious explanation – that they did not take place at all – was unlikely.

[118] Sixth, Ms Crowley submits that the judge failed to engage adequately with the fact that had the mother's allegations been true the repairs to the significant vaginal injuries she sustained during A's birth would have broken down, with the result that those treating her post-natally would have become aware of the injuries she sustained as a result of the sexual assaults. The mother's case was that she had been damaged as a result of the rapes which occurred after her vagina had been stitched following A's birth. Initially (main judgment para [94]) what the judge said was this:

> 'The physical damage to her noted in the records relates to the injuries suffered after the birth of A. She required repairs to tears in the vaginal region, and a torn clitoris. It is impossible to determine whether or not this damage is related to complications at the time of the birth of A or to brutal sexual activity.'

He added (main judgment para [95]):

> 'I do not find the absence of medical evidence on this subject of damage to her vaginal and anal areas as determinative of the issue. Over many years of practice, and as a judge in this Division, I have heard evidence from many doctors including gynaecologists and obstetricians, and whilst there is no formal expert medical evidence in relation to the issue in this case I feel able to take a view. Often, when listening to such experts, I have heard evidence of the ability of both the vagina and the anal sphincter muscles to accommodate the insertion, even with significant degrees of force, of large objects including a penis, without leaving signs of obvious damage.'

[119] Asked by Ms Crowley to clarify this, the judge said this (supplemental judgment paras [3]–[5]):

> 'Ms Crowley helpfully and rightly reminds me of the primary evidence relating to a clitoral tear, a tear to the labia minora, and a tear "ex sphincter", all of which were the subject of a repairing procedure at 22:00 hrs on 26 November 2005, a few hours after the birth of A.
>
> These tears, in all probability, occurred during the birth process. What the evidence does not establish, for there was no medical evidence called (understandably), is whether or not any of these individual tears

> arose because the area in question had been made more vulnerable than would normally be the case by prior brutal sexual activity. I can come to no conclusion on that possibility.
>
> As to "violent and/or vigorous sexual activity engaged in whilst the area was still healing", as a matter of common sense I imagine that such activity would be painful, but, again, in the absence of medical evidence do not know the precise effect that this would have on healing areas. To give but one illustration, the answer to that question might depend upon the extent to which the mother was physiologically self-lubricating.'

[120] Ms Crowley complains that the judge wrongly introduced a possible, speculative, contributory factor (whether 'the area in question had been made more vulnerable than would normally be the case by prior brutal sexual activity') as to their causation which had not been canvassed in the evidence and was, she says, inconsistent with his earlier observations (main judgment para [95]) that I have already quoted. Moreover, she says, the judge erroneously advanced a further hypothetical, speculative, explanation ('the answer to that question might depend upon the extent to which the mother was physiologically self-lubricating') in the absence of any evidence and indeed inconsistent with the evidence of both parties. She points to the mother's own evidence which, she says, was inconsistent with the judge's approach. 'I felt that my vagina was damaged and enlarged as a result of the [father] having sex with me following A's birth when my vagina had been stitched and was very sore'. She submits that whilst the judge did not come to any clear conclusion on these possibilities, 'it is unhelpful to have recorded speculation operating wholly in favour of the mother and to the prejudice of the father, which attempts to explain away clear and inexplicable inconsistencies and improbabilities in her accounts of abuse'. She says that such observations lend weight to the father's contention that the judge leaned too far in favour of the mother in seeking to reconcile the improbabilities in her evidence. She continues:

> 'The judge did not feel able to find as a fact that the injuries were caused by the father's sexual behaviour towards the mother. For the purpose of a fact finding judgment, an event either happened or it did not. There is no room for residual suspicion. There is even less room for the judge to introduce suspicion where none appeared upon the evidence.'

[121] Her key complaint, however, is simply that the judge failed to address the father's argument that injuries caused by such assaults would have alerted those treating the mother to her plight – and this despite the mother acknowledging in her evidence that no such observations were made during a number of intimate examinations.

[122] More generally, Ms Crowley says, those treating the mother pre-and post-natally, and the friends and family she came into contact with, would have noticed the bruising to her body from these daily assaults. The judge, as we have seen, said (main judgment para [95]) that the absence of medical evidence was 'not determinative of the issue'. But, she complains, he does not

explain how the slaps, punches and more physical assaults which the mother alleged occurred as part of the sexual assaults would not have been detected by the witnesses.

[123] Finally, Ms Crowley points to the fact that there were occasions when the mother told those treating her mental health problems that her husband was kind and supportive to her. And her clinical notes record an occasion when 'she seemed brighter when waiting for her husband'.

[124] Mr Hayden repeats in this context a submission he makes elsewhere: isolated excerpts from the transcript are, he submits, of little forensic assistance. He invites our attention to what he calls the logical integrity of the judgment, which, together with the wider findings, he submits support the findings under challenge. He drew particular attention to what the judge had said in passages (main judgment paras [87] and [110]) which I have already set out. In relation to the first, Mr Hayden says the judge's assessment of the mother's description in the witness box was of a woman obviously and congruently distressed while describing her husband's enjoyment at watching her suffering during intercourse and/or sexual activity. The second, he says, provides powerful support for the judge's findings. In summary, he submits, the judge was entitled to evaluate the mother's evidence in the witness box and was best placed to assess her credibility. As to the core of her allegations, he found her to be a substantially credible witness, appropriately discounting the exaggerations and other flaws in her evidence in what Mr Hayden invites us to accept was reasoned and satisfactory analysis.

[125] I have set out the opposing contentions in some detail not merely because the issues are very grave but also because it is important to see exactly how Ms Crowley puts her case. Reduced to essentials the various headings under which she puts her case can be reduced to three: first, that the judge's finding was against the weight of the evidence having regard to:

- (i) the judge's characterisation of the mother's evidence;
- (ii) the inconsistencies in her evidence;
- (iii) the evidence of the neighbours and the relation;
- (iv) the absence of any medical or other evidence of visible marks on the mother;
- (v) the absence of any medical evidence of post-birth re-opening of the birth injuries; and
- (vi) the mother's own presentation to mental health professionals; second, that the judge's analysis and reasoning was flawed; and, third, that the judge's finding was vitiated by his recourse to inappropriate and indeed inconsistent speculation.

[126] Again, in relation to Ground 1 as in relation to Ground 9, the essential thrust of Ms Crowley's case is – has to be – not that there was no evidence to support the judge's finding but that his finding was against the weight of the evidence. That is a difficult proposition to make good. In my judgment, and accepting, as I do, the general thrust of Mr Hayden's submissions, Ms Crowley fails to make good her complaints.

[127] The judge was very well aware of the difficulties presented by all the factors on which Ms Crowley relies in support of her submission that his finding was against the weight of the evidence, and he engaged with them in

his judgments. Mr Hayden has identified the crucial passages (main judgment paras [87], [108], [110]) in the judge's reasoning which he submits, and I agree, provide, in conjunction with all the other relevant passages, adequate justification and explanation for the judge's findings. These passages are important for two reasons. First, as providing (main judgment para [110]) factual explanations, which in my judgment, the judge was entitled to find, blunting the effect of the alleged inconsistencies between the mother's case and the evidence of third parties. Second, as demonstrating (main judgment paras [87], [108] and [110]) that fundamentally his findings were based upon his appraisal of the mother's evidence *as given in the witness box*.

[128] It is worth repeating the three key passages:

> 'In describing her misery she was obviously distressed in the witness box, and I have no doubt she was giving me a true account as to how it felt for her as he took his pleasures, paying no regard to her comfort and feelings (paragraph [87]).
>
> The simple answer is that I believed her account on the subject of the nature of the assaults, its narrative flow, and its compelling and congruent detail (paragraph [108]).
>
> … her evidence that when she was crying out in the course of such activities he would stuff her mouth with a sock or his boxer shorts, or put a hand over it to diminish the sound levels … sounds all-too credible, and I find it to be a compelling detail despite his denials (paragraph [110]).'

I do not repeat but merely reiterate in this context the points I have already made above when considering similar submissions in relation to Ground 9. The judge was persuaded, and he has given compelling examples of what it was that persuaded him, that despite all her lies the central core of the mother's case was true. The judge was entitled to come to that conclusion and for the reasons he gave.

[129] Ms Crowley's case is that, despite what he said, the judge's finding cannot stand because the weight of the evidence the other way was simply too great, because his reasoning was inadequate and flawed and because inappropriate speculation vitiates his findings. I do not agree. His findings were not, despite what Ms Crowley submits, against the weight of the evidence. The judge, in my judgment, was entitled to conclude, and for the reasons he gave, that the mother's case was made good despite all the other evidence. Nor can I accept Ms Crowley's attempt to demonstrate that the judge's reasoning was flawed, an attempt which amounted in reality to an invitation to us to embark upon the kind of textual analysis which, as Lord Hoffmann has so clearly explained, is no part of our function. On the contrary there is force in Mr Hayden's appeal to what he calls the logical integrity of the judgment. So far as concerns the judge's speculations, they went to an issue on which, as Ms Crowley accepted, the judge did not in the event make a finding. Whether or not well-founded or helpful, they do not, in my judgment, affect the coherence and integrity of the findings the judge did make.

[130] Notwithstanding the skill with which her arguments were presented, the reality at the end of the day is that what Ms Crowley was driven to doing

was simply trying to persuade us to take a view of the evidence different from that which had commended itself to the judge. That is not a course which is open to us. Be that as it may, and however the case is put, Ms Crowley has, in my judgment, failed to demonstrate any ground upon which it would be open to us to disturb the judge's finding.

[131] *Ground 2*: The father challenges the judge's finding (main judgment para [108(viii)] that:

> 'he has at times been guilty of physical (but non-sexual) assaults upon her. She has alleged that he kicked, slapped and punched her. I find at times that he has carried out such acts.'

[132] In relation to this ground we gave the father permission to appeal but dismissed the appeal.

[133] Inevitably in relation to this ground Ms Crowley's submissions mirror to a significant extent her submissions in relation to Ground 1. She points to the improbability of such assaults taking place, with whatever degree of frequency, without neighbours and other independent witnesses being alerted to her plight, in which connection she draws attention to the mother's assertion in her ABE interview that 'when angry he broke something or kicked door or kicked furniture'. She submits that had the assaults occurred in the way the mother alleged, there would have been physical evidence.

[134] Ms Crowley sought to undermine what the judge had said (main judgment para [108]):

> 'Although she was intermittently seeing others at this time, there were other times when she was not, sufficient for such an injury to repair itself without visible sign. I was unimpressed by the line of questioning best illustrated by the inquiry into why doctors/nurses/midwives had not seen any injuries at ante-natal clinics. It seemed to me that her straightforward answer that she only bared her stomach for such examinations was entirely credible, and more likely than not to have been the case. I do not forget that this young woman comes from a culture which has a greater respect for physical modesty than is currently fashionable in the West.'

The judge's finding that any injuries sustained by the mother had time to repair themselves by virtue of the fact she was only seeing people intermittently was, she says, inconsistent with the evidence of the neighbours and the mother's relative which I have already referred to, and failed adequately to grapple with the facts that during her pregnancy in 2005 the mother had regular examinations and that subsequent to her discharge from the psychiatric ward in late 2006 she was visited daily by the Community Mental Health Team for the administration of medication. Ms Crowley submits that although the judge accepted that the mother only bared her stomach for examinations by medical professionals during and subsequent to her pregnancy, this evidence provided no explanation as to why the injuries to parts of her body which were usually covered by clothing (which might include the abdomen) were not discovered or as to how injuries to her head, neck and face would not be visible to friends, relations and neighbours or to

those treating her either at hospital or subsequently in relation to her mental health. Nor, she says, did the judge deal with the internal inconsistency in the mother's account that any injuries sustained by her were only to parts of her body which were not on display when her original allegations of domestic violence, for example in her ABE interview, were of bruising to her head, neck and all over her body.

[135] Mr Hayden likewise made much the same submissions here as in relation to Ground 1. He comments, correctly, that the judge frequently cites the allegations without making specific findings on every instance, pointing to what the judge himself said (main judgment para [335]):

> 'I have at various points in this judgment recited aspects of the history in respect of which I have not made findings where the parties cannot agree what occurred. I have not done so on some occasions (declared on the face of the judgment) because the evidence was insufficiently illuminating to permit me to make findings on the cross-allegations. I have also declined to make findings on occasion because I do not feel it necessary to do so in order to come to a proper conclusion on the main aspects of the case.'

In other words, the fact that the judge has made the finding, expressed in somewhat general terms, of which complaint is made does *not* mean that the judge accepted, or is to be understood as having accepted, the totality of the mother's allegations. Plainly he did not.

[136] Mr Hayden submits that if she is to succeed Ms Crowley must demonstrate, which he says she cannot, that the judge's assessment of the mother's credibility on this issue was 'plainly wrong'. And here again the specific issues must be addressed in the context of the wider findings. Thus, he says, that the father's attitude to the mother is one of lack of respect for her and her personal autonomy is highlighted by the finding (main judgment para [219]) that he pressurised her into undergoing a termination. Such finding, he submits, both reinforces the mother's credibility on assault and suggests a lack of empathy for the mother consistent with domestic violence.

[137] I can take this part of the case quite shortly because although Grounds 1 and 2 have to be considered separately – they do not stand or fall together – the reasons why, in my judgment, Ms Crowley fails to make good her complaints under Ground 2 closely match the reasons I have already given as to why she fails to make good her complaints under Ground 1. I repeat in this context, and in relation to the passage in the judgment I have set out above (main judgment para [108]), the point I have already made in relation to Ground 1 in respect of para [110]. The judge's analysis in para [108] is not one we can disturb.

[138] Again, there is telling force in what the judge also said (main judgment para [108]) immediately after the finding to which challenge is mounted:

> 'I was, in particular, persuaded that he went so far as to punch her by her compelling oral evidence of one example when he left her with a swollen and bloody lip after such an assault.'

[139] That is another example of the judge explaining why, despite all the difficulties in her evidence generally, he was nonetheless able to accept her evidence on this particular point. To repeat: Roderic Wood J had the advantage of being there, watching and hearing the mother as she gave evidence. We do not have that advantage. In my judgment, the judge was entitled to find as he did and for the reasons he gave. We would be exceeding our proper function if we were to interfere.

AIKENS LJ:
[140] I agree.

RICHARDS LJ:
[141] I also agree.

Order accordingly.

Solicitors: *Goodman Ray* for the father
Dawson Cornwell for the mother

PHILIPPA JOHNSON
Law Reporter