



Neutral Citation Number: [2021] EWCA Civ 448

Case No: B4/2020/1872, B4/2020/1874,  
B4/2020/1918 & B4/2020/1945

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM CENTRAL FAMILY COURT**  
**GUILDFORD COMBINED COURT AND FAMILY COURT**  
**CANTERBURY COMBINED COURT CENTRE**  
**HHJ Tolson QC (Re H-N and Re H)**  
**HHJ Evans-Gordon (Re T)**  
**HHJ Scarratt (Re B-B)**

**ZC19P01540 (Re H-N)**  
**ZE18P00971 (Re T)**  
**ZC18P01277 (Re H)**  
**CT18P00257/00238 and ME20P50123 (Re B-B)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/03/2021

**Before:**

**THE PRESIDENT OF THE FAMILY DIVISION**  
**LADY JUSTICE KING**  
and  
**LORD JUSTICE HOLROYDE**

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**Re H-N and Others (children) (domestic abuse: finding of fact hearings)**

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In the H-N Appeal

**Mr Christopher Hames QC, Ms Camini Kumar and Ms Charlotte Baker** (instructed by  
**Goodman Ray Solicitors**) for the **Appellant Mother**  
**Ms Janet Bazley QC, Ms Jessica Lee and Ms Costanza Bertoni** (instructed by **Bindmans**  
**LLP**) for the **Respondent Father**

In the H Appeal

**Ms Amanda Weston QC and Dr Charlotte Proudman** (instructed by **Duncan Lewis**  
**Solicitors**) for the **Appellant Mother**  
**Ms Denise Gilling QC, Ms Arlene Small and Ms Melissa Elsworth** (instructed by **Mills &**  
**Reeve LLP**) for the **Respondent Father**

In the B-B Appeal  
**Ms Amanda Weston QC and Dr Charlotte Proudman** (instructed by **Beck Fitzgerald**) for  
the **Appellant Mother**  
**Mr Teertha Gupta QC, Mr Matthew Persson and Ms Clarissa Wigoder** (instructed by  
**Messrs Pennington's Manches**) for the **Respondent Father**

In the T Appeal  
**Professor Jo Delahunty QC, Mr Chris Barnes and Ms Adele Cameron-Douglas** (instructed  
by **Beck Fitzgerald**) for the **Appellant Mother**  
**Mr Charles Hale QC, Ms Rebecca Foulkes and Ms Miriam Best** (instructed by **Meadows  
Ryan Solicitors**) for the **Respondent Father**

**Mr Mark Jarman and Mr Michael Gration** (instructed by **Cafcass Legal**) for **Cafcass** the  
**First Intervener**

**Ms Barbara Mills QC, Ms Joy Brereton and Ms Emma Spruce** (instructed by **Scott  
Moncrieff & Associates Ltd**) for **Women's Aid, Women's Aid Wales, Rape Crisis and  
Rights of Women** the **Second Intervener**

**Ms Sarah Morgan QC, Mr Tom Wilson and Ms Lucy Maxwell** (instructed by **Irwin  
Mitchell**) for **Families Need Fathers** the **Third Intervener**

**Ms Deirdre Fottrell QC and Ms Lorraine Cavanagh QC** (instructed by **ITN Solicitors**) for  
the **Association of Lawyers for Children** the **Third Intervener**

Hearing dates: 19 to 21 January 2021

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**Approved Judgment**

This judgment is subject to a Reporting Restriction Order.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 30 March 2021.

## **The President of the Family Division, Lady Justice King and Lord Justice Holroyde:**

1. The court is concerned with four appeals each of which involves an allegation of domestic abuse by one parent against the other. Later in this judgment at paragraph 78 onwards, we address the individual appeals, but we also take the opportunity to give more general guidance about matters which commonly arise in the Family Court and are of great importance. In particular we address the issue of whether, where domestic abuse is alleged in proceedings affecting the welfare of children, the focus should in some cases be on a pattern of behaviour as opposed to specific incidents. We also address the issue of the extent to which it is appropriate for a Family Court to have regard to concepts which are applicable in criminal proceedings. We consider the consequence of these issues for the way such cases are conducted in applications made for private law children orders ('private law orders') made under the Children Act 1989 ('CA 1989').
2. We must make clear at the outset that there is a limit to the extent to which we can give general guidance. In part, this is because there are various initiatives already in train, to which we refer in paragraphs (19-20) below. But it is also because there is plainly and properly a limit to what a constitution of the Court of Appeal, determining four individual appeals, can, and as a matter of law should, say about issues which do not strictly arise in any of those appeals.

### *Domestic Abuse and The Family Court*

3. The four appeals to which this judgment relates each involve proceedings before the Family Court under CA 1989 concerning the welfare of children in which at least one parent has made allegations of domestic abuse against the other parent. Such cases are far from rare. In the year 2019/2020 the Family Court received 55,253 'private law' applications by parents for a CA 1989 order seeking to resolve a dispute with the other parent relating to the future care arrangements for their child. Although the figure is by no means firm, it is thought that at least 40% of private law children cases now involve allegations of domestic abuse. If that proportion is right, then the Family Court is required to engage with the question of domestic abuse in around 22,000 cases each year. In addition, the court received 29,285 applications in the year 2019/2020 for injunction orders under the Family Law Act 1996 ('FLA 1996') in which an individual seeks protection from domestic abuse. Whilst many FLA 1996 cases are linked with a CA 1989 application, a good proportion are not and the FLA injunction application will be a free-standing case before the court. In this judgment we are concerned only with applications under CA1989.
4. Despite the high volume of cases, the need to identify and, where necessary, decide upon issues of domestic abuse is a matter that is rightly afforded a high level of importance in Family Court proceedings. Where past domestic abuse is found to have taken place, the court must consider the impact that abuse has had on both the child and parent and thereafter determine what orders are to be made for the future protection and welfare of parent and child in the light of those findings. Depending upon the circumstances, such orders may substantially restrict, or even close down, the continuing relationship between the abusive parent and their child.
5. The Family Court is a civil court of law. Where an allegation of domestic abuse is made, but not admitted and the court goes on to conduct a 'fact-finding' hearing to determine

whether the allegation is proved, it does so under the ordinary civil law. The burden of establishing truth is on the parent who makes the allegation. It is for that parent to satisfy the court, on the balance of probabilities, that ‘the occurrence of the event was more likely than not’ [*Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563]. This is a binary analysis in which each allegation is either found to be ‘proved’ or ‘not proved’:

“In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other.” (*Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, Baroness Hale at paragraph 32).

6. Very substantial numbers of cases involving contested allegations of domestic abuse are heard each day in the Family Courts throughout England and Wales by a total of 2744 lay magistrates, and 1582 full time salaried judges at all levels and together with part time fee paid judges. In the light of the binary nature of the burden and standard of proof, the responsibility placed upon each one of those magistrates and judges in each one of those cases is a weighty one. Given the nature of such allegations, the evidence may often turn on the word of one parent against that of the other. The evidence may not be crystal clear, yet the stakes may be high. If the court decides that an abusive allegation has not been sufficiently proved, the court must assess future risk on the basis that the event ‘did not take place’. If, in reality, the abuse did occur but there is a lack of evidence to prove it, the court’s subsequent orders may risk exposing the child and parent to further abuse. Conversely, if alleged abuse did not in fact occur, but the court finds the allegation proved, orders significantly limiting the ‘perpetrating’ parent’s future relationship with their child may be imposed.
7. In addition to deciding what facts are, or are not, proved, Family judges and magistrates also have the responsibility at an earlier stage of proceedings in deciding whether or not it is necessary to conduct a fact-finding hearing and, if so, which of a range of allegations that may be before the court should be the focus of that exercise. Such ‘case management’ decisions may not be straight forward, yet they too may have a long-lasting impact on the outcome of the court case and the final orders that are, or are not, made.
8. Not every case requires a fact-finding hearing even where domestic abuse is alleged. As we emphasise later, it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take.
9. Those responsible for the delivery of Family Justice and for the training of the Family judiciary have for decades focussed on the importance of enhancing the court’s ability to deal appropriately and insightfully with cases where domestic abuse is raised as an issue. The most visible example of this endeavour is *Family Proceedings Rule 2010: Practice Direction 12J- Child Arrangements and Contact Orders: Domestic Abuse and Harm* (‘PD12J’) which was originally implemented in 2008.
10. PD12J sets out:

‘what the Family Court or the High Court is *required to do* in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse.’ [PD12J, para 2] (emphasis added)

Over the course of 40 detailed paragraphs, PD12J imposes a step-by-step template that courts are required to follow in such cases.

11. As the round figures given in paragraph 2 suggest, the task of engaging with and determining allegations of domestic abuse is at the very core of the everyday work of the Family court; it is what Family judges do. The short summary set out at paragraphs 3 – 9 demonstrates that deciding issues of domestic abuse is neither an easy task nor a precise science. The combination of the detailed guidance in PD12J together with the training in place for those judges who try these cases means that despite the high volume of cases, the number of appeals in private law children cases is small, but even a small number of cases where the judicial approach to domestic abuse has been shown to fall short gives rise to deep unease.
12. By virtue of Regulation 33 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), Legal Aid is (subject to a means test) available in private family law cases for those who have experienced or are at risk of experiencing, domestic abuse. Such parties therefore have the benefit of legal representation during the course of the proceedings. Importantly for these purposes, this means that as the alleged victim of domestic abuse will have had the benefit of public funding, they will also have the benefit of lawyers who can advise them on the merits of an appeal.
13. The low number of appeals does not however mean that there is any room for complacency. Victim and parent support groups and other bodies rightly seek to hold the Family Justice system to account for its failures, either where victims or children are said to have been left unprotected, or where parents, who are said not to be a source of future risk, are barred from seeing their children. As we indicate below (para 20 - 22), the Family Court is engaged in a continuing process aimed at developing and improving its procedures.

### *The Appeals*

14. As we have indicated, each of the four appeals currently before the court relate to a fact-finding hearing in the course of ongoing CA 1989 proceedings concerning a child or children. Three of the decisions under appeal relate to hearings in 2019 and the fourth to a hearing in August 2020. All four applications for permission to appeal were issued in the High Court in the Autumn of 2020. Whilst each is different, some common issues are raised. Permission to appeal having been granted in each case by the High Court, all four appeals were transferred to the Court of Appeal to be heard together. The court is grateful to all of the parties who agreed to this manner of proceeding.
15. At a case management hearing on 22 December 2020, Lady Justice King set out the parameters of the appeal. In addition, the court indicated that it would welcome submissions from interested bodies on the wider issues. We are grateful to Cafcass (First Intervener); Rights of Women, Women’s Aid Federation of England, Welsh Women’s Aid and Rape Crisis England & Wales, (Second Intervener); Families Need Fathers, (Third Intervener); and Association of Lawyers for Children (Fourth

Intervener) for their contributions to the issues which were identified for consideration at the conjoined appeal hearing.

16. In the appeals before us, each of the mothers/appellants who have been the victims of domestic abuse have had the benefit of public funding. Each of the fathers/respondents by contrast have been represented by solicitors and counsel acting *pro bono* in every case. The court wishes to express its gratitude to all those who have acted *pro bono* which has also included many of the interveners. As a consequence of their willingness to act without payment, this court has had the inestimable advantage of hearing submissions made from all perspectives.
17. The first part of this judgment will consider common issues and look more generally at the approach of the Family Court to issues of domestic abuse. After that, each of the four appeals will be considered and determined in turn.
18. As will be seen, our decisions on the various appeals very much turn on long-established principles of fairness or the ordinary approach to judicial fact-finding. None of the four appeal decisions purports to establish ‘new law’. They therefore do not establish any legally binding precedent.

#### *Private Law Initiatives*

19. The task of reviewing the approach to domestic abuse is a complicated one in respect of which the understanding of society, those who work with victims, and politicians and professionals, is developing all the time. At present the Ministry of Justice is moving to implement their report: *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: (‘The Harm Panel Report’)*. At the same time, the Domestic Abuse Bill is before Parliament. In addition, those within the judiciary, Cafcass and the legal and social work professions have contributed to the recommendations of the *President of the Family Division’s ‘Private Law Working Group’ (‘PLWG’)* (2<sup>nd</sup> report published April 2020)<sup>1</sup> which are beginning to be piloted in the courts.
20. The Harm Panel in its recommendations said that they regard the adversarial system by which contact disputes are presently determined as a barrier to the Family Court’s ability to respond ‘consistently and effectively to domestic abuse’. The Harm Panel is now looking to implement an approach to domestic abuse in the courts which is ‘investigative and problem solving based on open enquiry into what is happening for the child and their family’ (Chapter 11.2). Following the publication of The Harm Panel, the Ministry of Justice has started work on how the proposed new approach can be effected and, as part of its recommendations, pilots of Integrated Domestic Abuse Courts (IDAC) are being designed.
21. These various endeavours could not be more important in the context of improving our collective approach to issues of domestic abuse. The scope of each is wide and the substantive content is complex. It would be both impossible and inappropriate for us, as judges in the Court of Appeal, following a short hearing of four appeals, to lay down comprehensive guidance in this judgment aimed at resolving (or even identifying) the

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<sup>1</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/PRIVATE-LAW-WORKING-GROUP-REPORT-1.pdf>

many difficulties that are said to exist and which are the very subject of these other more extensive endeavours.

22. Our focus must therefore necessarily be limited to offering guidance on those matters which are most directly relevant to the court process.

*'Domestic Violence'*

23. Over the past 40 years there have been significant developments in the understanding of domestic abuse. The Domestic Violence and Matrimonial Homes Act 1976 ('DVMA 1976') introduced the concept of 'domestic violence'; although ground breaking in its time, it is now wholly outdated and hard to comprehend an approach which required evidence of actual bodily harm to a victim before a power of arrest could be attached to an injunction (s 2 DVMA 1976).
24. Obsolete too is the approach often seen in the 1980s where, although 'domestic violence' had been established and an injunction granted, judges regarded that violence as purely a matter as between the adults and not as a factor that would ordinarily be relevant to determining questions about the welfare of their children. Fortunately, there has been an ever-increasing understanding of the impact on children of living in an abusive environment. A seminal moment in the court's approach to domestic violence (as it was still called) was the Court of Appeal judgment in four appeal cases that were, like the present appeals, heard together: *Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H (Contact: Domestic Violence)* [2000] 2 FCR 404; [2000] 2 FLR 334. The central conclusion from *Re L*, which was based on the Court of Appeal's acceptance of authoritative expert child psychiatric evidence, was that there needed to be a heightened awareness of the existence of, and the consequences for children of, exposure to 'domestic violence' between parents and other partners. In CA 1989 applications, where an allegation of 'domestic violence' was made which might have an effect on the outcome, the Court of Appeal held that it was plain that it should be adjudicated upon and found to be proved or not. In its time, 20 years ago, the messages from *Re L* led to a significant change in the approach to domestic abuse allegations in the context of child welfare proceedings.
25. As the present appeals illustrate, there are many cases in which the allegations are not of violence, but of a pattern of behaviour which it is now understood is abusive. This has led to an increasing recognition of the need in many cases for the court to focus on a pattern of behaviour and this is reflected by (PD12J).
26. PD12J paragraph 3 includes the following definitions each of which it should be noted, refer to a pattern of acts or incidents:

“‘domestic abuse’ includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;

‘coercive behaviour’ means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

‘controlling behaviour’ means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.”

27. The definition, which was expanded in 2017 and is the one currently to be used by judges in the Family Court, is plainly a far cry from the 1970s’ concept of ‘domestic violence’ with its focus on actual bodily harm. It is now accepted without reservation that it is possible to be a victim of controlling or coercive behaviour or threatening behaviour without ever sustaining a physical injury. Importantly it is now also understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour. It is of note that none of the submissions to this court suggested that the current definition of ‘domestic abuse’ in PD12J required substantial amendment. Although the structure of the definition of ‘domestic abuse’ in clause 1 of the Domestic Abuse Bill [‘DAB’] currently before Parliament differs from that in PD12J, the content is substantially the same. Thus, whilst PD12J will undoubtedly fall for review to ensure that it complies with the DAB once the Bill becomes an Act, it is unlikely that the substance of the core definitions will substantially change.
28. We are therefore of the view that PD12J is and remains, fit for the purpose for which it was designed namely to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings. As was also recognised by The Harm Panel, we are satisfied that the structure properly reflects modern concepts and understanding of domestic abuse. The challenge relates to the proper implementation of PD12J.

#### *Coercive and/or controlling behaviour*

29. As can be seen at paragraph 27 above, central to the modern definitions of domestic abuse is the concept of coercive and/or controlling behaviour. Shortly before the hearing of these appeals, Mr Justice Hayden handed down judgment in *F v M* [2021] EWFC 4. The judgment followed a two-week fact-finding hearing of domestic abuse allegations centred on coercive and/or controlling behaviour. The arrival of Hayden J’s judgment was timely. All parties commended it to the court for its comprehensive and lucid analysis, and for the plea contained within it urging greater prominence to be given to coercive and controlling behaviour in Family Court proceedings. The parties’ endorsement of the judgment in *F v M* is, in our view, fully justified. It is helpful to set out one of the central paragraphs from Hayden J’s judgment here:

“4. In November 2017, M [the mother] applied for and was granted a non-molestation order against F [the father]. That order has been renewed and remains effective. The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of ‘coercive and controlling behaviour’ on F’s part. In the Family Court, that expression is given no



legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that ‘coercion’ will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. ‘Controlling behaviour’ really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a ‘pattern’ or ‘a series of acts’, the impact of which must be assessed cumulatively and rarely in isolation. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals.”

30. Whilst the facts found in *F v M* may be towards the higher end of the spectrum of coercive or controlling behaviour, their essential character is not, and will be all too familiar to those who have been the victim of this form of domestic abuse, albeit to a lesser degree or for a shorter time. The judgment of Hayden J in *F v M* (which should be essential reading for the Family judiciary) is of value both because of the illustration that its facts provide of what is meant by coercive and controlling behaviour, but also because of the valuable exercise that the judge has undertaken in highlighting at paragraph 60 the statutory guidance published by the Home Office pursuant to Section 77 (1) of the Serious Crime Act 2015 which identified paradigm behaviours of controlling and coercive behaviour. That guidance is relevant to the evaluation of evidence in the Family Court.
31. The circumstances encompassed by the definition of ‘domestic abuse’ in PD12J fully recognise that coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse. In short, a pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings (see ‘Scott Schedules’ at paragraph 42 -50). It follows that the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:
  - i) Is directed against, or witnessed by, the child;
  - ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;
  - iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;
  - iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.

32. It is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be ‘abuse’ in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. We would endorse the approach taken by Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 (paragraph 61):

“Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to ‘domestic abuse’, where ‘coercive behaviour’ is defined as behaviour that is ‘*used to harm, punish, or frighten the victim...*’ and ‘controlling behaviour’ as behaviour ‘*designed to make a person subordinate...*’ In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.”

*Patterns of behaviour*

33. Having considered what is controlling and coercive behaviour and emphasised the damage which it can cause to children living in a household in which it is a feature of the adult dynamics, it is necessary to move on to consider the approach of the court where the question of whether there has been a ‘pattern’ of ‘coercive’ and/or ‘controlling’ behaviour by one or more of the adults in a family is raised. Although the principal focus in this judgment has been on controlling and coercive behaviour, it should be noted that the definition of domestic abuse makes reference to patterns of behaviour not only in respect of domestic abuse refers to a ‘pattern of incidents’ not only in relation to coercive and/or controlling behaviour but to all forms of abuse including physical and sexual violence. Our observations therefore apply equally to all forms of abuse.
34. In our judgment there are a number of important issues which arise out of the submissions made by the parties to these appeals in relation to the proper approach of the court to such cases namely:
- i) Whether there should be a finding of fact hearing;
  - ii) The challenges presented by Scott Schedules as a means of pleading a case;
  - iii) If a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?
  - iv) The relevance of criminal law concepts.

***The approach of the court:***

*(i) The need for and the scope of any fact-finding hearing*

35. Practice Direction 12J contains detailed guidance on determining whether or not it is necessary to conduct a fact-finding hearing with respect to allegations of domestic abuse, in particular in paragraphs 5, 16 and 17:

‘5. The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment (‘FHDRA’), consider whether domestic abuse is raised as an issue, either by the parties or by Cafcass or Cafcass Cymru or otherwise, and if so must –

- identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
- consider the nature of any allegation, admission or evidence of domestic abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;
- give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
- ensure that where domestic abuse is admitted or proven, any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm; and
- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25–27 below. In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child.’

...

‘16. The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse –

- (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 below;
- (b) in order to provide a basis for an accurate assessment of risk;
- (c) before it can consider any final welfare-based order(s) in relation to child arrangements; or
- (d) before it considers the need for a domestic abuse-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

17. In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –

- (a) the views of the parties and of Cafcass or Cafcass Cymru;

(b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;

(c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;

(d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;

(e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;

(f) the nature of the evidence required to resolve disputed allegations;

(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and

(h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.’

36. It is important for the court to have regard to the need for procedural proportionality at all times, both before and during any fact-finding process. A key word in PD12J paragraphs 16 and 17 is ‘necessary’. It is a word which also sits at the core of the President’s Guidance ‘*The Road Ahead*’ (June 2020), (‘RA II’) in particular:

‘43.If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.’

...

‘46.Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; an oral hearing will encompass only that which is necessary to determine the application before the court.

47.It is important at this time to keep the ‘overriding objective’ as set out in Family Procedure Rules 2010, r 1.1 in mind:

“The overriding objective

1.1

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

In these times, each of these elements is important, but particular emphasis should be afforded to identifying the 'welfare issues involved', dealing with a case proportionately in terms of 'allotting to it an appropriate share of the court's resources' and ensuring an 'equal footing' between parties.' (emphasis added)

37. The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

- i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).
- ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.
- iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.
- iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in '*The Road Ahead*'.

38. In its submissions, Cafcass offered additional support to the court when deciding whether to hold a fact-finding hearing:

'It would benefit the court and the parties for there to be Cafcass involvement prior to determination of whether or not a fact-finding hearing is necessary. At present, the 'safeguarding' system and the preparation of a Cafcass 'Letter to the Court' allows a Cafcass Officer to report on allegations that have been made, but nothing more. In some cases, the allegations may be such as to make it obvious that a fact-finding hearing is required before any further assessment can take place. In others, early social work assessment could lead to a conclusion that a fact-finding hearing is not necessary, but that some other intervention would be more helpful. At

present, it is rare for there to be any substantive Cafcass involvement prior to fact-finding.’

39. In putting forward this submission, Cafcass contended that the present system was ‘sub-optimal’ and that, rather than a gatekeeping judge simply allocating a case for a fact-finding hearing without any social work input other than the Cafcass ‘safeguarding’ letter, the judge should direct that Cafcass undertake an enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment, with any resulting listing decision being made on a more informed and child-centred basis.
40. As is the case with some other submissions and suggestions that were made to the court, this offer by Cafcass (which was expressly supported by the Association of Lawyers for Children) seems to us to justify close consideration by those who are charged with reviewing PD12J.

(ii) *‘Scott Schedules’*

41. For any part of the legal process to function fairly and efficiently, there is a need for material that is to be placed before a court to be organised and structured so that all involved in the court process may understand its significance. The need for, in lay terms, an agenda, or in terms of criminal law, a charge-sheet or indictment and, in terms of a civil action, ‘pleadings’, is seen as essential both in terms of allowing a party against whom a case is being brought to understand what is being said against them, and, secondly, on grounds of basic efficiency.
42. For a long time now, the Family courts have not only required a party making allegations of domestic abuse to file witness statements setting out the evidence on which they rely, but also to reduce the allegations made into a ‘Scott Schedule’ to provide an agenda for the fact-finding hearing. PD12J paragraph 19(c) requires the court to consider at an early stage:

‘whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegations or complaint; the allegations in the schedule should be focussed on the factual issues to be tried; ...’

43. One striking feature of the dozen oral submissions heard during the hearing of these appeals was that there was effective unanimity that the value of Scott Schedules in domestic abuse cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid.
44. Concern about the utility of Scott Schedules was raised on two different bases: one of principle and the other more pragmatic. The principled concern arose from an asserted need for the court to focus on the wider context of whether there has been a *pattern* of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time. Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents.

45. The second, more pragmatic, criticism is not unrelated to the first. As an example in one of these four appeals, the parties were required to ‘limit’ the allegations to be tried to ten and the judge at trial further reduced the focus of the hearing by directing that only three would be tried. It was submitted that that very process of directed selection, produces a false portrayal of the couple’s relationship. If such an applicant succeeds in proving the three remaining allegations, there is a risk that the court will move forward on the basis that those three episodes are the only matters ‘proved’ and therefore the only facts upon which any adverse assessment of the perpetrator’s future risk falls to be made. By reducing and then further reducing its field of focus, the court is said to have robbed itself of a vantage point from which to view the quality of the alleged perpetrator’s behaviour as a whole and, importantly, removed consideration of whether there was a *pattern* of coercive and controlling behaviour from its assessment.
46. For our part, we see the force of these criticisms and consider that serious thought is now needed to develop a different way of summarising and organising the matters that are to be tried at a fact-finding hearing so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be. This is an important point. Everyone agrees.
47. The Harm Panel has expressed a similar view and noted that ‘reducing a long and complicated history of abuse into neat and discrete descriptions is challenging and can itself result in minimisation of the abuse’ (Chapter 5.4), and that by limiting the number of allegations the court is not exposed to ‘more subtle and persistent patterns of behaviour’ (Chapter 7.5.1). So too did Hayden J in *F v M* in his Post Script
48. Quite how a move away from the use of Scott Schedules is to be achieved, and what form any replacement ‘pleading’ might take, does, however, raise difficult questions and was the subject of submissions to this court. A number of suggestions were made by the parties in submissions including; a ‘threshold’ type document, similar to that used in public law proceedings, formal pleadings by way of particulars of claim as seen in civil proceedings and a narrative statement in prescribed form. The particular advantage of a narrative statement was, it was submitted, that it would allow there to be a focus on the overall nature of the relationship and expressly whether a party says that she had been harmed as a result of the behaviour and, if so, in what manner. Such an approach would allow the court to identify at an early stage whether an allegation of controlling and coercive behaviour is in issue. Identifying the form of harm (which may be psychological) and only then looking back at the more granular detail, would, it was submitted, allow the court to determine what specific facts need to be determined at a fact-finding hearing.
49. The process before this court has undoubtedly confirmed the need to move away from using Scott Schedules. This court is plainly not an appropriate vehicle to do more than describe the options suggested by the parties in their submissions during the course of the hearing. It will be for others, outside the crucible of an individual case or appeal, to develop these suggestions into new guidance or rule changes. In practice that work is likely, in the first instance, to be done through the Private Law Working Group together with The Harm Panel’s implementation group whose final recommendations may in turn lead to changes to the FPR or in the issuing of fresh guidance through the medium of a Practice Direction.

*(iii) Approach to Controlling and Coercive Behaviour*

50. In the meantime, cases must still be heard and with an increased focus on controlling and coercive behaviour as identified earlier in this judgment. We accept that judges will inevitably be faced with difficult case management decisions as they balance the need for a proper application of PD12J with the damage caused to children by delay.
51. Ms Mills QC on behalf of the second interveners, ('Women's Aid', 'Rights for Women', 'Rape Crisis England and Wales' and 'Welsh Women's Aid'), submitted that 'the overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court.' We agree and it follows that consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse, irrespective of whether there are other more specific factual allegations to be determined. The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact.
52. Professionals would now, rightly, regard as 'old fashioned' the approach of the DVMPA 1976 where protective measures were only triggered in the event of 'violence' or 'actual bodily harm'. In like manner, the approach of regarding coercive or controlling incidents that occurred between the adults when they were together in a close relationship as being 'in the past', and therefore of little or no relevance in terms of establishing a risk of future harm, should, we believe, also be considered to be 'old fashioned' and no longer acceptable. The fact that there may in the future be no longer any risk of assault, because an injunction has been granted, or that the opportunity for inter-marital or inter-partnership rape may no longer arise, does not mean that a pattern of coercive or controlling behaviour of that nature, adopted by one partner towards another, where this is proved, will not manifest itself in some other, albeit more subtle, manner so as to cause further harm or otherwise suborn the independence of the victim in the future and impact upon the welfare of the children of the family.
53. We are confident that the modern approach that we have described is already well understood and has become embedded through training and experience in the practice of the vast majority of judges and magistrates sitting in the Family Court. Where however an issue properly arises as to whether there has been a pattern of coercive and/or controlling abusive behaviour within a family, and the determination of that issue is likely to be relevant to the assessment of the risk of future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error.
54. In promoting the need for courts to prioritise consideration of whether a pattern of coercive and/or controlling behaviour is established over and above the determination of any specific factual allegations, there is the potential that this additional layer of evaluation may add to an already lengthy forensic evaluative process. By example, the fact-finding hearing that had been listed in *Re B-B* (one of the four appeal cases before the court) was planned to last five days (that is 25 court hours) in order to consider five factual allegations.



55. As is well known, the Family Justice system is currently overborne with work (a situation which has been exacerbated as a result of the Covid 19 pandemic). The Family Court's ability to hear disputed private law cases in a timely manner, mindful throughout that court delay is likely to prejudice the welfare of the subject child (CA 1989, s 1(2)), is already significantly compromised by the sheer volume of work in the system. Any requirements imposed through guidance from this court resulting in additional fact-finding hearings or extending the length of fact-finding trials could only increase the volume of work in the system, extend yet further the current potential for delay and thereby be entirely contrary to the very rights and needs of the children and parents that the jurisdiction exists to meet; it is also likely to be experienced as a substantial additional burden by the hard-pressed Family judiciary and the specialist solicitors and Family Bar upon whom the courts are heavily reliant.
56. It is the responsibility of the individual judge or bench of magistrates in each case to set a proportionate timetable and to maintain control of the court process where it has been determined that a fact-finding hearing is necessary. It is, however, our expectation that, in cases where an alleged pattern of coercive and/or controlling behaviour falls for determination, and the court has made that issue its primary focus, the need to determine a range of subsidiary date-specific factual allegations will cease to be 'necessary' (unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour).
57. How to meet the need to evaluate the existence, or otherwise, of a pattern of coercive and/or controlling behaviour without significantly increasing the scale and length of private law proceedings is therefore a most important, and not altogether straightforward, question. It is a matter that will require consideration by others involved in working through the implications of the MOJ Harm Panel report, in implementing the Domestic Abuse Act and in any subsequent revision of revising PD12J as part of those two processes. The President will refer the anonymised skeleton arguments in these appeals to Mrs Justice Knowles (the lead judge on issues of domestic abuse) and to Mr Justice Cobb (the lead judge on private law matters) for consideration as part of that review.
58. As part of that process, we offer the following pointers:
- a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;
  - b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:
    - i) Provide a factual basis for any welfare report or other assessment;
    - ii) Provide a basis for an accurate assessment of risk;
    - iii) Consider any final welfare-based order(s) in relation to child arrangements; or

- iv) Consider the need for a domestic abuse-related activity.
  - c) Where a fact-finding hearing is ‘necessary’, only those allegations which are ‘necessary’ to support the above processes should be listed for determination;
  - d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.
59. Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact-finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).

*(iv) The relevance of criminal law concepts*

60. The primary purpose of criminal law is the prosecution of criminal behaviour and the punishment of offenders by the state. The purpose of family law, in the present context, is to resolve private disputes between parents and other family members, which may include the need to protect the vulnerable and victims of abuse and, where the upbringing of a child is in question, the need to afford paramount consideration to that child’s welfare.
61. When considering domestic abuse, it will not infrequently be the case that the alleged behaviour will be such that it is capable both of being the subject of prosecution as an offence before the criminal courts and being the focus of consideration in the family courts as justification for the implementation of protective measures. The criminal law has developed a sophisticated and structured approach to the analysis of evidence of behaviour, to enable the criminal court to determine whether the guilt of the alleged offender has been proved to the requisite high standard. This raises the question of the degree to which the Family Court, if at all, should have regard to and deploy criminal law concepts in its own evaluation of the same or similar behaviour in the different context of Family proceedings.
62. In *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198; [2018] 1 WLR 1821, this court [Gloster, McFarlane and Hickinbottom LJJ, Gloster LJ dissenting], having considered this issue, held that, as a matter of principle, it was fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts. At paragraph 62, McFarlane LJ said:
- “The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court. The latter is concerned with the culpability and, if guilty, punishment for a

specific criminal offence, whereas the former involves the determination facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare. Similarly, where facts fall to be determined in the course of ordinary civil litigation, the purpose of the exercise, which is to establish liability, operates in a wholly different context to a fact-finding process in family proceedings. Reduced to simple basics, in both criminal and civil proceedings the ultimate outcome of the litigation will be binary, either 'guilty' or 'not guilty', or 'liable' or 'not liable'. In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established.”

63. Following reference to *Re U (A Child) (Department for Education and Skills intervening)* [2005] Fam 134 and to *A Local Authority v S, W and T* [2004] 2 FLR 129, McFarlane LJ continued at paragraph 65:

“The extracts from the judgments of Butler-Sloss P and Hedley J helpfully, and accurately, point to the crucial differences between the distinct roles and focus of the criminal court, on the one hand, and the Family Court, on the other, albeit that each may be considering the same event or events within their separate proceedings. Against that background, it must be clear that criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court. Given the wider range of evidence that is admissible in family proceedings and, importantly, the lower standard of proof, it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'. How is such a finding to be understood, both by the professionals and the individual family members in the case itself, and by those outside who may be told of it, for example the Police? The potential for such a finding to be misunderstood and to cause profound upset and harm is, to me, all too clear.

66. Looked at from another angle, if the Family Court were required to deploy the criminal law directly into its analysis of the evidence at a fact-finding hearing such as this, the potential for the process to become unnecessarily bogged down in legal technicality is also plain to see. In the present case, the judge's detailed self-direction on the law of self-defence, and the resulting appeal asserting that it was misapplied, together with Miss Venters' late but sound observations about the statutory defence of 'loss of self-control', are but two examples of the manner in which proceedings could easily become over-complicated and side-tracked from the central task of simply deciding what has happened and what is the best future course for a child. It is also likely that the judges chosen to sit on such cases in the Family Court would inevitably need to be competent to sit in the criminal jurisdiction.

67. There is no need to labour this point further. For the reasons that I have shortly rehearsed, as a matter of principle, it is fundamentally wrong for the Family Court

to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts. As my Lord, Hickinbottom LJ, observed during submissions, 'what matters in a fact-finding hearing are the findings of fact'. Whilst it may not infrequently be the case that the Family Court may be called upon to re-hear evidence that has already been considered in the different context of a criminal prosecution, that evidence comes to the court simply as evidence and it falls to be evaluated, in accordance with the civil standard of proof, and set against whatever other evidence there may be (whether heard by the criminal court or not) for the sole purpose of determining the relevant facts.”

64. Hickinbottom LJ in his concurring judgment in which he ‘very firmly’ agreed with McFarlane LJ, succinctly put it in the following way: ‘importation of concepts from the criminal courts to the Family Court’ is ‘inappropriate, unnecessary and unwise, and should be avoided’.
65. Thus it can be seen that there is a clear distinction on the one hand between judges needing to have a sound understanding of the potential psychological impact serious sexual assault may have on a victim’s behaviour, both during and after the event, and in the way that they may give their evidence and present in court, and on the other of the importance of Family judges avoiding being drawn into an analysis of factual evidence based on criminal law principles and concepts. In *Re JH v MF* [2020] EWHC 86 (Fam), Russell J, hearing an appeal from a fact-finding decision, considered the degree to which the Family Court in such cases should have regard to concepts and principles of the criminal law. This court has been invited to clarify the approach to be taken by the Family Court when determining allegations of domestic abuse in the light of any apparent difference, as some submitted was the case, between the judgments in *Re R* and in *JH v MF*.
66. Although we consider that the position to be clear, for the avoidance of doubt, we confirm that the authoritative statement of the law in this regard is that which is found in the judgments of McFarlane and Hickinbottom LJ in *Re R*. Insofar as it is suggested that paragraphs 47 and 48 of the judgment of Russell J in *JH v MF* are contrary to that of this court in *Re R*, plainly the Court of Appeal ruling in *Re R* is the binding authority and must prevail over that of the High Court.
67. Following the judgment of Russell J and at the request of the President, the Judicial College devised a free standing sexual assault awareness training programme for Family judges. The programme draws heavily on the successful ‘serious sexual assault’ programme for criminal judges. Since July 2020, it has been a mandatory requirement for all judges who hear any category of Family cases to undertake this programme. The programme, which is under constant review, includes elements in respect of psychological reactions to sexual assault and trauma, and has the benefit of contributions having been made by a number of victims of sexual assault discussing the impact that an attack has had upon them. In addition to the more general training in relation to domestic abuse which is already in place for Magistrates, bespoke training suitable for the work they undertake in respect of sexual assault and trauma is in the process of being developed.
68. This bespoke Family training feeds in turn into, and is further developed within, the extensive training programmes that are run in relation to domestic abuse by the Judicial

College for the fee paid and salaried judges. These courses have been in place for some years and play a key role in both induction courses for newly appointed Family judges and continuation courses run for Family judges who are already in post.

69. In *F v M* [2019] EWHC 3177, Cobb J heard an appeal where a judge had concluded that the father had ‘raped’ the mother. Cobb J, in an unimpeachable analysis said at para.[29]:

“There is a risk in a case such as this, where the alleged conduct at the heart of the fact-finding enquiry is, or could be, of a criminal nature, for the family court to become *too* distracted by criminal law concepts. Although the family court may be tempted to consider the ingredients of an offence, and any defence available, when considering conduct which may also represent an offence, it is not of course directly concerned with the prosecution of crime.”

70. Having quoted from *Re R*, Cobb J went on:

“Quite irrespective, therefore, of whether F has committed the offence of ‘rape’ or is otherwise criminally culpable, there is a range of reasons why the circumstances of N’s conception may ultimately be relevant to future child arrangements. Specifically, it was regarded at an earlier case management hearing (and I agree with this direction) that it would be important for there to be a determination of whether F’s conduct towards M in the sexual act by which N was conceived was ‘violent or abusive’, and in turn whether that conduct would be likely to be relevant in deciding whether to make a child arrangements order (see *PD12J FPR 2010, para.4, para.5, and see further para.7* [i.e. does the statutory presumption apply having regard to any incident of domestic abuse?]).”

71. Hickinbottom LJ observed during the hearing in *Re R*, ‘what matters in a fact-finding hearing are the findings of fact’ [paragraph 67]. The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of ‘rape’, ‘murder’, ‘manslaughter’ or other serious crimes. Behaviour which falls short of establishing ‘rape’, for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to ‘not guilty’ in the family context. For example in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between ‘consent’ and ‘submission’ may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault.

72. That is not to say that the Family courts and the parties who appear in them should shy away from using the word ‘rape’ in the manner that it is used generally in ordinary speech to describe penetrative sex without consent. Judges are not required to avoid using the word ‘rape’ in their judgments as a general label for non-consensual penetrative sexual assault; to do otherwise would produce a wholly artificial approach. The point made in *Re R* and now in this judgment is different; it is that Family courts

should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved. A further example can be drawn where the domestic abuse involves violence. The Family Court may well make a finding as to what injury was caused, but need not spend time analysing whether in a criminal case the charge would allege actual bodily harm or grievous bodily harm.

73. It follows therefore that a Family judge making a finding on the balance of probabilities is not required to decide, and does not decide, whether a criminal offence has been proved to the criminal standard. Any use of familiar terms should not give the impression that the abusive parent has been convicted by a criminal court. Equally where an abusive parent has in fact been convicted of a relevant offence (e.g. a sexual or violent offence against the other parent), the conviction is proof of the fact that he or she committed the offence ‘unless the contrary is proved’ (Civil Evidence Act 1968 s.11(1) and s11(2)). Where a party seeks to go behind a conviction, the burden of proof is on him to prove on the balance of probability that the conviction was erroneous (*McCauley v Vine v Carryl* [1999] 1 WLR 1977).
74. The distinction between a court having an understanding of likely behaviour in certain highly abusive settings and the tightly structured requirements of the criminal law will not, of course, be clear cut. That is particularly so when the judge in the Family court must conduct their own analysis of issues such as consent, and must do so in the context of a fair hearing. In this regard the *procedural* manner in which the hearing is conducted and, in particular, the scope of cross-examination of an alleged victim as to their sexual history, past relationships or medical history, justify consideration separately from the general prohibition on family judges adopting criminal concepts in determining the *substantive* allegation. Nothing that is said in *Re R*, or endorsed in this judgment, should inhibit further consideration of such procedural matters. They are beyond the scope of this judgment and are more properly to be considered elsewhere.

### ***The approach to appeals against fact-finding***

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

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

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

This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva Ltd* [1997] RPC 1:

‘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.’

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.”

76. In hearing and determining the present appeals we have endeavoured to apply the well-established understanding and approach described in *Piglowska*, and elsewhere. Full allowance is to be afforded to the trial judge who has heard the evidence and been exposed to the parties and the detail of each case over an extended period.
77. Three of the four appeals now before the court involve a challenge to conclusions made by experienced Family judges on the issue of whether particular facts have or have not been proved (*Re H*, *Re T* and *Re H-N*). Three of the four appeals relate to trials which took place in 2019 prior to Russell J handing down her judgment in *JH v MF* in January 2020. In each of those cases (*B v B*, *Re H* and *Re T*), an application for permission to appeal was made out of time in the light of the observations of Russell J in *JH v MF*.

***The four appeals:***

78. We consider each of the appeals in chronological order as follows:
  - i) Re B-B: paragraphs 78 – 114
  - ii) Re H: paragraphs 116 – 153
  - iii) Re T: paragraphs 155 – 184
  - iv) Re H-N: paragraphs 185 – 223.

**[1] *Re B-B***

79. *Re B-B* is an appeal by the appellant ('mother') against the order of HHJ Scarratt ('the judge') dated 5 August 2019 which resulted in the making of a consent order ('the order') setting out time to be spent ('contact') between the respondent ('father') and B-B, the child.
80. Contact proceeded in accordance with the order which saw contact between the child and the father progress from supervised contact to unsupervised contact, so that by March 2020 the father was having unsupervised contact at his home for a period of 8 hours at a time.
81. Contact was suspended by the mother in the light of the Covid crisis in March 2020. The father made an application for enforcement of the order on 27 July 2020. The current position is that, by an order dated 10 November 2020, contact is taking place fortnightly at a contact centre. There is a continuing issue in relation to contact as between the parties.
82. By an application for permission to appeal dated 9 November 2020, the mother seeks to appeal the consent order made in August 2020. Permission was granted by Cohen J on the 20 November 2020.
83. The basis of the present appeal is that the judge was wrong to make an order by consent when there were unresolved allegations of serious domestic abuse, including rape. It is the appellant's case that the cumulative effect of the judge's approach over the course of hearings held in March and August 2019 meant that that there was no true consent to the making of the order on the mother's part and resulted in an order being made which was the product of serious procedural or other irregularity.
84. It is common ground that the judge, no doubt when under pressure and at a moment of intense irritation, said a number of ill-judged things at the hearing in March. The questions for this court are: (i) whether those remarks served to infect the hearing in August to such a degree that the consent order cannot, in any event, stand; and (ii) if that is not the case, did the judge fail adequately to take into consideration those matters set out in PD12J(6) prior to making the order which he had been invited by the parties to make by consent.

*Re B-B: Background in brief*

85. The parties began their relationship in 2015 and started to cohabit in 2016. They have a daughter, B-B. The relationship was volatile, each making separate allegations against the other.
86. The father alleged that the mother was verbally and physically abusive, including pouring a bucket of water over the father, throwing his laptop at the wall and pushing over a television; that she threatened to harm herself with medication and knives; that she would accuse the father of cheating and regularly check his phone; that she was violent with B-B; that she drank excessively and had taken cocaine on two occasions, once when pregnant with B-B.



87. The mother's claims included allegations that the father abused alcohol, cannabis, and cocaine and that, on one occasion, he forced her to take cocaine; that he controlled her financially, relying on her income to support him; that he was verbally and physically abusive; that he was controlling by listening to her phone conversations, wanting to know where she was at all times and that he was unsupportive and irresponsible.
88. The parties separated in May or June 2017, and the mother moved out with their child. B-B did not see the father from September 2017 to February 2018. Contact then resumed.
89. Both parents issued proceedings in July 2018; the father sought an order that B-B live with him, and the mother, having obtained an ex-parte non-molestation injunction, opposed his application. On 21 August 2018, directions were made for a fact-finding hearing in respect of the parties' cross allegations. Between then and August 2019, on no fewer than 5 occasions, the matter was listed for trial but was adjourned without a hearing. The reasons for the trial not proceeding included judicial unavailability, legal aid difficulties, and on an occasion in December 2018 because the mother had made allegations of rape to the police. It is not hard to imagine how frustrating and upsetting these constant adjournments must have been for both the mother and the father.
90. Following reporting the allegation to the police, in a statement dated 10 December 2018, the mother alleged that the father raped her multiple times during their relationship, often following an argument, during which, she said, he used force and refused to use protection.

*The hearing on 18 March 2019*

91. The fact-finding hearing was listed to be heard over 5 days in front of the judge. The case had a singularly unpromising start; not only did counsel for the father fail to attend court for personal reasons, but the judge had also only just received the papers and it was abundantly clear that the parties had failed to comply with many of the case management directions which had been made at an earlier hearing.
92. This court has had an opportunity to listen to a recording of this hearing and it is undoubtedly the case that the judge was both frustrated and cross at the total 'shambles' in terms of case preparation. The judge said that he would deal with only three allegations 'if I deal with anything' and that he would 'probably not deal with anything'. By reference to the schedule in which the father alleged that the mother drinks and took cocaine, the judge said that he would try that allegation, saying that 'if both parties are taking drugs and that there was evidence that both parties took drugs' he would make those findings. The judge accepted that the mother's allegation of rape was one of the three allegations which may be tried.
93. The judge went on to ask with whom 'the child' lives and was told that it was the mother. It was at this point that the judge said that 'if this goes on the child will be taken into care and adopted'. Unsurprisingly, the mother became deeply distressed and can be heard crying on the tape.
94. The judge asked if the mother accepted that she took drugs and asked whether she describes herself as an addict.

95. In the subsequent exchanges counsel told the judge that the mother accepted taking drugs on only one occasion and then by coercion by the father. The mother can be heard in the background weeping and denying that she is an addict. The judge then said that it may be that he would have to report the matter to social services. The exchanges continued in similar vein with the judge saying that the parties were where they are 'because of your own making'. He accepted that the matter would have to be adjourned as the father's counsel had failed to attend.
96. Counsel for the mother submitted to the judge that the case was not about drugs, but about the allegations made by the mother of abuse, to which the judge responded: 'Well how's that going to affect contact'. Further attempts by counsel to highlight aspects of the mother's case were to no avail. The judge said that the parties should 'sort it out' and that 'you should have had the riot act read to you months ago'. The parties were then sent out to see if they could reach an agreement as to contact.
97. The parties were unable to reach an agreement. The following morning the parties again appeared before the judge in an infinitely calmer atmosphere. The judge properly acknowledged that the allegations were serious and that if the parties could not agree a way forward then the court would have to decide. He, therefore, made fresh directions limiting the parties' allegations to five in total and setting the matter down for a three-day hearing in front of HHJ Cove on 8 May 2019.
98. At the conclusion of the hearing, the judge said that contact would have to 'come out of the contact centre' at some point and that 'this is why fact findings are often a complete waste of time, because the end result will be that there'll be, at some stage, contact outside with father.'
99. Unhappily, the hearing on 8 May in front of HHJ Cove was adjourned due to the father's application for legal aid not having been processed (he was entitled to legal aid having made allegations of domestic abuse in his original application for residence). The matter was therefore relisted, yet again, to be heard in August once more in front of HHJ Scarratt. We were told during the hearing of this appeal that the mother and those representing her were aware at that hearing that the matter was to go back before HHJ Scarratt.

*The Hearing on 5 August 2019*

100. At the hearing on 5 August, the mother had the benefit of representation by her regular counsel, Mr Davis. The father was also represented by counsel. Upon Mr Davis rising to address the court, the judge indicated that he wished to 'do some housekeeping' saying that he was certainly 'not going to be dealing with all this nonsense in the bundle'. He referred to the fact that papers, both relevant and irrelevant were contained in a bundle which was, in any event, broken. The judge went on to comment that this was a 'very straightforward case solely about contact' and asked 'in those circumstances, do we have to have a fact finding?'
101. It was apparent that the parties had been in discussion outside court, as Mr Davis responded by asking for an hour to continue those discussions with a view to achieving a settlement. The judge was happy to give the parties the time they needed, but before they left the court he indicated that if negotiations failed, he would not be prepared to deal with the first allegation on the schedule which he said was insufficiently

particularised. Mr Davis explained that it was a reference to a course of conduct (controlling and coercive behaviour) which was set out in detail in the mother's statement.

102. Subject to these early remarks by the judge, Ms Weston QC on behalf of the mother makes no further complaint about the judge's management of the balance of the hearing on 5 August. The judge indicated his willingness to have a fact-finding hearing, highlighted the dangers of allegations surfacing later in the event that they are not dealt with, and offered the parents every encouragement and warm congratulations when they reached a compromise which led to the making of a comprehensive order intended to cover the period until 2022.

*Re B-B: Discussion*

103. Mr Gupta QC, on behalf of the father, makes no attempt to justify or to minimise the distress which was caused to the mother by the judge's remarks at the hearing on 18 March 2020. He submits, however, that there is no evidence to indicate that that distress had a lasting impact upon the mother to the extent that she was unable to face a trial before the same judge and so felt driven at the August hearing to negotiate the best order she could rather than face a fact-finding hearing before the judge.
104. Mr Gupta goes on to highlight that the mother had the benefit of the same counsel throughout and that, as long ago as May 8, the mother and her counsel were aware that the fact-finding hearing was listed before HHJ Scarratt. Those representing the mother did not, Mr Gupta says, make an application, whether formal or informal, with the aim of either the judge being recused or, alternatively, for the matter informally to be relisted before a different judge. Further, Mr Gupta says, the mother has had since November 2020, when she made her application to appeal, every opportunity to file a statement setting out the continuing impact the judge's comments had had upon her and how she alleges it had affected her decision not to proceed with the finding of fact hearing in August. In the circumstances of this case Mr Gupta says, such a statement would inevitably have satisfied the *Ladd v Marshall* [1954] EWCA Civ 1, [1954] 1 WLR 1489, fresh evidence test.
105. Mr Gupta, in summary, says that whilst a consent order made at, or shortly after, the March hearing would undoubtedly have been impugned, the same cannot be said in relation to a hearing conducted perfectly properly by the judge five months later.
106. Ms Weston, for her part, submits that no such evidence was necessary, the judge's comments speak for themselves and that no court can, or should, be satisfied that a consent order agreed to in such circumstances, by a young woman in her early twenties with fragile mental health, was made with her genuinely and freely given consent.
107. We have given considerable thought to the persuasive submissions of Mr Gupta and it is undoubtedly the case that this court would have been assisted by a witness statement filed by the mother covering the issues identified by Mr Gupta. We have, further, had well in mind that the detailed order put before the judge, which is now the subject of challenge, had by March of last year progressed to the extent that the father and child were having extensive unsupervised time together. We are however conscious that the mother's case is that the order was obtained without true consent and that whilst she

complied with the court's order, she was opposed to the reintroduction of unsupervised contact.

108. In our judgment, the judge's unguarded comments, made to the mother, not only to have her child taken from her but to have her adopted and, on two further occasions, to refer the case to social services, have to be regarded as having had long lasting repercussions for her. It is clear that the parties were discussing settlement before they came into court in August 2019; that was hardly surprising given the appalling litigation history and the judge's attitude towards the mother as demonstrated in March. It is hard to see how the mother, faced with the prospect of a hearing in front of the same judge, would have felt herself to have retained any real negotiating boundaries about contact. One can understand that the mother may have felt that she had little option but to settle, particularly given the judge's opening remarks questioning the point of a fact-finding hearing and his refusal to hear the allegations of controlling and coercive behaviour.
109. In our judgment, such remarks could only have been felt by the mother to have reinforced the judge's previous attitude. It may indeed temporally have been five months ago but, from this mother's perspective, it was her last experience in front of this judge.
110. It is with reluctance that we reach this conclusion. It is well known that judges sitting in the Family Court are, and have been for some considerable time, over-worked. There was good reason for the judge to express frustration that none of the essential case management preparations for the hearing had been undertaken. There was however no justification for the judge to say that 'if this goes on the child will be taken into care and adopted'. Nor was there any justification for the judge twice referring to the possibility of reporting the case to social services. Whilst we have in mind that, between the making of the order and the intervention of the pandemic, the order was implemented by both parties, nevertheless in our judgment, the impact of the things said by the judge to the mother cannot be underestimated. It is hard to imagine a more serious and frightening prospect for any mother, let alone a young, single mother, than that of having her child taken off her and placed for adoption.
111. Whilst the time which elapsed between March and August is an important feature, the consent order is, in our judgment, the product of procedural irregularity emanating from an earlier hearing in the same proceedings.
112. It would normally be necessary for a party in circumstances such as this to adduce evidence showing a causal link between the procedural irregularity at an earlier hearing and the agreement of a consent order at a later hearing; but the facts of this case are exceptional and an inference can properly be drawn that the mother's wish to reach agreement on a consent order reflected the extreme anxiety she must have felt as a result of what happened at the March hearing.
113. It follows that we have concluded that the consent order was made in circumstances where there had been procedural irregularity of such seriousness that the appeal must be allowed.
114. Ms Weston's second area of attack is that the judge failed adequately to take into consideration those matters set out in PD12J (6) prior to making the order which he had been invited by the parties to make by consent. Given our conclusions in respect of the

judge's inappropriate remarks, it is not necessary for the court to deal specifically with this ground, although we should emphasise that no consent order should ever be made before it has been scrutinised by a family judge (see PD12B para.14.13: Consent Orders).

115. The appeal in *Re B-B* will, therefore, be allowed. The matter will be remitted to a different judge who will consider any application for a fact-finding hearing at a directions hearing in the continuing enforcement proceedings brought by the father.

## **[2] *Re H***

116. *Re H* is an appeal against an order made by HHJ Tolson QC ('the judge') on 17 September 2019. Following a fact-finding hearing, the judge held that: (i) three allegations relating to two incidents of rape were 'not proven and did not happen'; and (ii) two allegations of financial and emotional abuse and harassment 'have not been investigated' and have 'no implications for the future child arrangements in the context of this case'.
117. Following the hearing, orders were made for unsupervised contact to take place as between the father and his daughter, H. The terms of that order have recently been confirmed in continuing proceedings before HHJ Cox and the mother does not seek to curtail the successful contact which is now taking place. She seeks, however, a rehearing of the allegations of both the rape and controlling and coercive behaviour allegations on the basis that the judge's judgment was flawed.

### *Re H: Background*

118. The relationship between the mother and father began on social media in 2013 at a time when the father was living in Jamaica and the mother in England. The parties first met face to face in May 2014 when the mother went to visit the father in Jamaica. They stayed in a hotel together for about a month. The mother alleges that, although they had a consensual sexual relationship during her visit, there was an incident early on in her stay when there was an occasion of unprotected rape by the father which led to the conception of H. We should emphasise that we provide here only factual background and draw no inferences. It goes without saying that a woman in an otherwise consensual sexual relationship, can, and is fully entitled, to decline to consent to sexual relations on any particular occasion.
119. The mother returned to England in June 2014 and H was born in early 2015. In November 2015, H and the mother (together with the mother's child from an earlier relationship) travelled to Jamaica to visit the father for about three weeks. The mother alleges that during this visit there was a second incident of rape. On this occasion she alleges she was forced to the floor and, when she called a friend in England to tell her about it, the father banged her head against a cupboard.
120. At the end of this visit the father proposed marriage and the mother accepted. The parties, however, never married or lived together and by April 2016 the relationship had come to an end.
121. The father subsequently married his present wife and moved to England in March 2017. Mediation having failed, the father applied for contact with H. Introductory contact took

place at the mother's home in November 2017, no safeguarding concerns having been raised at that stage. On 12 December 2017, a district judge made an order for supervised contact each alternate Saturday afternoon. There was no finding of fact hearing, nor has any complaint been made about the absence of one.

122. This order was followed by enforcement proceedings issued by the father. On 2 October 2018, HHJ Cox confirmed the order of 12 December 2017. In addition to the enforcement proceedings, the father sought a Child Arrangements Order in which application he filed a C1A 'schedule of harm' making allegations about the mother's behaviour towards him. At a direction hearing on 27 November 2018, the parties agreed to contact continuing on the same basis and the order records that contact had been 'working reasonably well'.
123. At a directions hearing on 27 March 2019, the mother was directed by HHJ Tolson to file a statement by 17 April 2019 detailing her allegations against the father. The judge's view, as recorded on the face of the order, was that no separate finding of fact would be necessary. When no statement had been filed on behalf of the mother by 31 July 2019, the judge directed that a statement be prepared on behalf of the mother that day at court. The statement was duly prepared with the assistance of her lawyer, and it was in this statement that the allegations of rape were made. The mother stated in her statement that she had reported the incidents of alleged rape to the police on 22 October 2018. In the light of the allegations, the judge ordered the matter to be listed for a fact-finding hearing on 17 September 2019.
124. H continued to have contact with her father in the months leading up to the hearing on alternate Sundays, usually supervised by the mother.
125. On 17 September 2019, the fact-finding hearing (the subject of this appeal) was held at which the judge found the allegations of rape made by the mother to have been 'not proven'. As noted above, allegations of financial and emotional abuse were not investigated as they had, the judge held, 'no implications for the future child arrangements in the context of the case'. It is in relation to the judge's failure to consider all the allegations and his failure to find that the mother had been raped by the father on two occasions that the mother appeals out of time.

*Events following the fact-finding hearing*

126. Following the hearing, the parents agreed that the father's contact should progress to become unsupervised every other Saturday from 10.00am – 5.00pm and, as of March 2020, an additional Sunday each month.
127. Unhappily, as recently as September 2020 it has been necessary for there to be a further finding of fact hearing in front of HHJ Cox. HHJ Cox started the hearing on 22 July 2020 but adjourned the trial to 1 September due to technical difficulties. On 22 July 2020, the mother filed a notice of appeal seeking an extension of time to appeal HHJ Tolson's order of 17 July 2019.
128. HHJ Cox held categorically that the allegation with which she was concerned, namely that the father had acted sexually inappropriately to H, was not true. The judge said that there was no reason for contact to be supervised.

129. At the conclusion of this second fact-finding hearing, HHJ Cox made a lengthy and detailed order dated 11 September 2020. That order records the parties' agreement that unsupervised contact will continue. The order continues at considerable length to record the mistrust as between the parties. In bald summary, the order records that 'whilst the father did not do anything to H, the mother was telling the truth' and was 'trying to do her best for her child, but not knowing how to go about it'.
130. The judge ordered contact to continue as set out in the order of HHJ Tolson as modified by DJ Jenkins on 1 June 2020.
131. The mother has been consistent in saying that she does not want to stop contact. When asked about contact at the first fact-finding trial, by the Cafcass officer in preparation for the second fact-finding trial, and again by this court through Ms Weston, she has said that she wants H to be 'safe' and to protect her from the father if he is angry.
132. Unsupervised contact continues. All the evidence is that, whilst the parents' relationship can only be described as appalling, contact itself is of a high quality with H benefitting from spending time with her father, stepmother and her half and step siblings.
133. In a letter written directly to the court by the London Borough of Hammersmith and Fulham on 9 December 2020, having become aware of these proceedings, the local authority expressed its concern that contact should not be disrupted. The letter said that an important part of the current Child Protection Plan, which is in place for H, is for contact to continue 'as [H] has reported having positive contact to her father even to the extent of requesting overnight contact. The Social Work Team do not have any concerns about [H]'s safety and wellbeing when in the care of her Father and Paternal Family.'

#### *The Present Position*

134. This court is, therefore, in this position; Ms Weston QC, on behalf of the mother, accepts that contact is established and should continue unsupervised as ordered by HHJ Tolson in September 2019. With respect to Ms Weston, she was wholly unable to tell the court what, from H's perspective, she was seeking to achieve in terms of an order in the event of a successful appeal. The focus of private law proceedings is the best interests of the child and the purpose of a finding of fact hearing is to ascertain facts relevant to the issue of contact, in this case very serious allegations of rape.
135. An appeal is, however, against an order (see *Vaughan v Vaughan* [2008] 1 FLR 1108). The order the subject of this appeal is dated 12 September 2019. The recitals record that:
  - i) The allegations have not been proved;
  - ii) That there are no risks to the child having unsupervised contact;
  - iii) The parties agree to the commencement of unsupervised contact.
136. It follows, therefore, that this mother does not seek to appeal the terms of the order in relation to contact but seeks to challenge one of the recitals which, no doubt it would be argued, provide the basis for the subsequent order. The welfare aspect of the case

has however been entirely overtaken by events. The appeal is not, therefore, against the outcome and resulting order, but against the judge's failure to make the findings.

137. Ms Weston, whilst accepting this to be the case, submits that the order should be set aside and the allegations relisted for a full trial before a High Court Judge. She makes this submission on the basis that the judgment is flawed for the detailed reasons set out in her Grounds of Appeal and skeleton argument, which grounds include a challenge to the adequacy of the judge's reasons, his finding that there were no implications for contact, and his general approach to PD3AA and PD12J.
138. We could well understand Ms Weston's submission if the mother's case was that the only reason contact is taking place at all is because the judge failed to make the findings and that contact is not in the best interests of H. But the appellant's case is not that the purpose of a retrial would be to obtain findings of rape against the father in order to re-evaluate whether contact is in H's best interests whether at all, or in its current form. That is not the mother's case and nor could it be, given that: (i) the mother personally chose to supervise contact (notwithstanding that her mother was willing and available to do so); (ii) there have been a number of investigations and reports conducted since that time, in particular in preparation for the most recent finding of fact hearing, which demonstrate that contact is overwhelmingly in H's best interests; (iii) the mother herself does not now seek to prevent contact taking place as ordered by HHJ Tolson but only, in some unspecified way, to ensure that contact is 'safe', an issue which has clearly been at the forefront of both the corporate mind of the local authority and of HHJ Cox, both of whom are entirely satisfied that contact is not only safe but overwhelmingly in H's best interests.

*Re H: Discussion*

139. Domestic abuse is often rightly described as pernicious. In recent years, the greatly improved understanding both of the various forms of abuse, and also of the devastating impact it has upon the victims and any children of the family, described in the main section of this judgment, have been most significant and positive developments. The modern approach and understanding is reflected in the 'General principles' section of PD12J (4). As discussed at paragraphs 36 – 41 above that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing, so much is clear from the detailed guidance set out in paragraphs 16 – 20 of PD12J and, in particular, at paragraph 17:

“(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court;

(h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.”

140. Further, it should be born in mind that it has always been intended that PD12J should be read together with the overriding objective as set out in Family Procedure Rules 2010 r.1.1 of which PD12J is a part. The two provisions work together rather than in conflict with each other.



141. The President of the Family Division has, in the last year, published two documents entitled *'The Road Ahead'*. The first was disseminated in June 2020, RA I, and its recent update on 8 January 2021 ('RA II'). In RA I, the President said in relation to the overriding objective (*repeated here for convenience*):

“47. In these times, each of these elements is important, but particular emphasis should be afforded to identifying the **'welfare issues involved'**, dealing with a case **proportionately** in terms of **'allotting to it an appropriate share of the court's resources'** and ensuring an **'equal footing'** between parties.”  
[emphasis as in original]

142. The context of the President's emphasis is found at para.42 (iii) of RA I, where he said that:

“The Family Court was not coping with the pre-COVID workload and radical steps aimed at changing professional culture and working practices were about to be launched when the pandemic struck.”

143. That this is the case was highlighted during the course of the hearing of these appeals by reference to the substantial number of applications which contain allegations of domestic abuse in some form or another (see paragraph 3 above). It is hardly surprising, therefore, that the President went on:

“43. If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.” [emphasis as in original]

144. The President incorporated these observations from RA I into his recently published RA II update saying:

“6. 'The Road Ahead' stressed the need for the parties and courts to identify the welfare issues involved in a children's case and then to deal with the case proportionately in terms of allotting an appropriate share of the court's resources and to ensure that all parties are on an equal footing in the proceedings.”

145. How then should this relate to this appeal where the allegations are of the utmost seriousness, but the court has before it, what is strictly speaking, an academic appeal?

146. In *Hutcheson v Popdog Ltd.* [2011] EWCA Civ 1580, the Master of the Rolls, Lord Dyson, considered the proper approach to academic appeals. (*Practice Note*) [2012] 1 WLR 782:

“12. *The mere fact that a projected appeal may raise a point, or more than one point, of significance does not mean that it should be allowed to proceed, where there are no longer any real issues in the proceedings as between the parties.* In *Gawler v. Raettig* [2007] EWCA Civ 1560, 2007 WL 5116827, the Court of Appeal refused permission to appeal on the ground that the issue it would raise was academic as between the parties. In his judgment, Sir Anthony Clarke MR gave helpful guidance as to the correct approach in such cases. He said at [2007] EWCA Civ 1560, para 36 that, *before an appeal could proceed in those circumstances, the court must be satisfied that it would be in the public interest for the projected appeal to proceed, but he added that it would be ‘a very rare event, especially where the rights and duties to be considered are private and not public’.* Nonetheless, in the following paragraph, he emphasised that all must ‘depend upon the facts of the particular case’ and that he did not ‘intend to be too prescriptive’. [*emphasis added*]

15. Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.”

147. As recently as 2019, Peter Jackson LJ considered the issue of the proper approach to academic appeals in children’s cases in *J-S (Children)* [2019] EWCA Civ 894. In that case, as in the present case, permission to appeal had been granted on the basis that there was a compelling reason for the appeal to be heard in order for guidance to be given (in that case in relation to the use of electronic tagging). Peter Jackson LJ concluded that the case did not satisfy the *Hutcheson v Popdog Ltd* test and declined to give guidance and dismissed the academic appeal saying that ‘the priority must now be to further the children’s welfare by conventional means’.
148. In this case, permission to appeal was given by Judd J on 28 July 2020. At that stage it seemed clear that the mother was challenging the concept of contact. By the time the matter was heard before this court, the second fact-finding trial had taken place and the situation had changed. As noted above, the mother does not in reality seek to appeal the judge’s order for contact of 18 September 2019, nor has she issued a notice of appeal in respect of HHJ Cox’s order of 11 September 2020 whereby the 2019 order was confirmed.
149. In our judgment, this is not one of those rare private law cases where it is appropriate to determine an appeal where there is no challenge to the substantive order under appeal. We would reach the same conclusion by reference to the test in *Hutcheson v Popdog Ltd*. The issues of significance which led to this case being listed with three other appeals are capable of, and have been dealt with, in this judgment by reference to

the other appeals before the court. So far as the second limb of the test is concerned, it is obvious that the father would not wish the appeal to proceed, he having recently been through a second fact-finding hearing, where contact is progressing and not disputed and where all the up to date welfare enquiries demonstrate that contact is undoubtedly in the best interests of H. We should say for completeness sake that the third limb of the test would be satisfied as both parties have had the benefit of leading and junior counsel representing them in the appeal.

150. We have considered with considerable care whether, given (i) the serious nature of the allegations made, and (ii) the unusual circumstances in which these conjoined appeals are being heard with a view to guidance being given, this court should nevertheless analyse through the medium of the lengthy Grounds of Appeal, the judge's approach to the evidence and rape allegations even though there is no effective challenge to the order for contact which was made at its conclusion and which has, in any event, been superseded.
151. We have concluded that it would be wrong to do so. We are satisfied that there would be no purpose in considering the merits of the judge's judgment in relation to his approach to the allegations made by the mother, given that they no longer have any direct relevance to any welfare decisions which need to be made in relation to H. We emphasise however that we would not have hesitated to determine the appeal had a true purpose in doing so been identified.
152. We bear in mind also that each appeal must be dealt with individually as it presents itself to the court, notwithstanding that it is part of a group of appeals being heard together as potentially raising the same, or similar, issues.
153. In our judgment, our conclusion dovetails not only with PD12J and the overriding objective, but the guidance contained in RA I and RA II (as referred to in paragraph 143 & 144).
154. In those circumstances the appeal in *Re H* will be dismissed.

### [3] *Re T*

155. *Re T* is an appeal from an order made by HHJ Evans-Gordon ('the judge') on 13 December 2019. The order made extensive case management directions for a welfare hearing which was to take place following a fact-finding hearing which had been conducted by the judge over a period of three days. The appellant ('mother'), by her grounds of appeal, submits that the judge's decision was wrong and unjust in that she not only failed to appreciate the significance of those findings that she did make, but also failed properly to find that the mother had been anally raped by the respondent ('father').

### *Re T: Background*

156. The mother and father met online in January 2014 and, subsequently, in person in Egypt in 2016 where the mother lived. They married four days after they met. The mother joined the father in England on a spousal visa in February 2017. The mother speaks little English.

157. The parties have one child, T, who was born in the Spring of 2017. The couple separated in December 2017. The mother alleges verbal and physical abuse, anal rape, and coercive control. T has not seen the father since the parties separated, now a little over three years ago.
158. Proceedings began on 8 June 2018. By September 2018, the court had decided that a finding of fact hearing was necessary, unfortunately the trial did not take place until 8 November 2019, 14 months later. The judgment, the subject of this appeal, was handed down on 13 December 2019.
159. Permission to appeal out of time was granted by Lieven J on 3 November 2020. The father seeks permission to cross appeal in relation to a single finding of the judge, referred to in this appeal as ‘the plastic bag’ finding.

*Re T: The Judgment*

160. The bulk of the judgment, as would be expected in a conventional finding of fact hearing, concerned the judge’s consideration of each of the individual allegations made respectively by the mother and the father.
161. In her analysis of the mother’s allegations, the judge found the evidence of the mother to be variously ‘embellished’ or ‘inconsistent’. The judge described her oral evidence saying:

“11....often difficult to follow she could not focus on the questions she was being asked. Her oral evidence was often inconsistent with the contemporaneous documentary evidence and inconsistent with accounts she had given to third parties such a [Ms X]. I found much of her evidence difficult to accept. She was also in my judgment, revising what had occurred in the light of her current narrative about the relationship.”
162. The mother initially alleged that there had been one incident of anal rape, but subsequently alleged a total of three occasions. The judge found this to be ‘a difficult issue’ as, unfortunately, possible corroborative evidence from mobile phones was not available. It did not appear to the judge that either party was telling the court the truth about anal sex. The judge set out in some detail the difference in the various accounts given by the mother which the judge was entitled to regard as ‘very significant’. The judge, accordingly, found herself unable to be satisfied on the evidence that the father had anally raped the mother.
163. Had the grounds of appeal focused solely on the judge’s failure to make the finding in relation to the allegation of rape, we would not have allowed the appeal. As Lord Hoffman said in *Piglowska*, the first instance judge had the advantage of seeing both parties give evidence and the judge was entitled to reach the conclusion she did in relation to the credibility of the wife (and indeed of the husband) with respect to the allegations of anal rape which assessment led her to conclude that she could not be satisfied to the requisite stand of proof that the wife had discharged the burden of proof in respect of that allegation.

164. The judge did, however, find three of the other allegations made by the mother to have been proved. The three incidents can be briefly described:
165. In August 2017, the father slapped the mother on her face. The background of this incident is that the mother found photographs of a Moroccan woman who the father had been speaking to online prior to meeting mother. The judge held that they ‘got into an argument’ and ‘the father slapped the mother on this occasion and that was inappropriate, notwithstanding the fact that the mother precipitated the incident and was aggressive towards the father’.
166. In November 2017 the allegation made by the mother was that the father ‘grabbed the mother by the throat and began strangling her’. The father, it was alleged, threatened the mother with death. The background to this incident was an argument during which the father began, allegedly, to choke the mother. The judge found that the: ‘mother asserted she was choking. However, in oral evidence she said that the strangulation lasted a few seconds, she coughed, and he let her go; there was no mention of any choking. Afterwards, there was no visible marks. The father denied the whole event.’
167. The judge, whilst not satisfied that the father ever attempted to ‘strangle’ the mother, held that ‘the father probably held the mother in the vicinity of her neck’. She went on that he ‘may well have used words to the effect that he would kill the mother but, it seems to me, that these words are commonly used in anger which do not import any genuine threat to life’.
168. A month or so later in December 2017, the ‘plastic bag’ incident occurred. The father came up behind the mother when she was sitting on the floor with T on her knee and, without warning, put a plastic bag over the mother’s head. The father said, ‘This is how you should die’. The father denied that any such incident took place.
169. In contrast to her findings as to the mother’s evidence in relation to various of the other allegations, the judge said that, in relation to this incident, the mother spoke with ‘total clarity’ with ‘no inconsistencies’. The judge went on to find:
- “52. I accept mother’s account of this incident...However, as there was no trigger to this event at all, I am not satisfied that it represented an attempt to kill, a threat to kill or that the mother felt threatened, given her oral evidence. It may be that it was some sort of prank by the father that he now denies because of the allegations made against him. Indeed, the mother told social workers that the father had called this incident a joke. That said, it was an unpleasant aggressive thing for the father to do and is not acceptable behaviour.”
170. So far as to the cross allegations made by the father about the mother, the judge found that the mother had slapped the father in December 2017 and that the next day there was a further ‘unpleasant incident where there was pushing and slapping on both sides’. The judge did not accept that the mother had threatened the father’s elder daughter, but did find that the mother had been aggressive to the father and shouted at him and his daughter in a restaurant.
171. The judge, having considered each allegation individually, concluded as follows:

“[59] While I have found that some of the mother’s allegations are true and some of the father’s allegations are true and I am satisfied that this was a mutually abusive relationship I am not satisfied that these represent anything more than the sad and bitter end of a relationship which met neither party’s expectations..... I am satisfied that this relationship was one of mutual verbal and minor physical abuse attributable to relationship conflict. ... I am not satisfied that T would be at risk from her father..... I am not satisfied that the father is a violent man as portrayed by the mother. It seems to me more likely that he was, occasionally, driven to anger and loss of control in conflicts with the mother in situations where she was verbally and, occasionally, physically abusing him. This is not an excuse and I should not be taken as endorsing any abusive behaviour by either of the parties but, having separated, I cannot see that either poses a threat to the other or to T.”

*Re T: The Appeal*

172. The Grounds of Appeal are wide ranging and can be summarised as follows:

- (i) The trial itself was not fair in that the judge prejudged the case, failed to take into account the mother’s vulnerability, that English was not her first language, and that she had not had access to the father’s statements in a translated form;
- (ii) That the judge failed to appreciate the significance of the findings made;
- (iii) The judge’s direction on the law was inadequate and as a result she failed to make findings of anal rape.

*Re T: Discussion*

173. Without either minimising the seriousness of the mother’s allegation of anal rape, or meaning any disrespect to the arguments skilfully developed both on paper and orally by Prof Delahunty QC on behalf of the mother and by Mr Hale QC on behalf of the father, in our judgment the appeal against the judge’s failure to make a finding that the father anally raped the mother is dismissed for the reasons given above. The appeal must be allowed however on the second of the two areas of challenge, namely that the judge failed to appreciate the significance of the findings she made.
174. The judge made three findings of physical violence against the father. In our view, the judge failed to acknowledge in particular the seriousness of the two incidents where the father made reference to dying or to killing. The judge did not acknowledge that whilst she, the judge, may have concluded that the father did not intend either to ‘strangle’ or to ‘suffocate’ the mother, that does not prevent the mother from having been the victim of two extremely frightening episodes. The judge failed to recognise the impact upon the mother and the child. For our part we do not accept that words which can be interpreted as threats to kill are words which are ‘commonly used in anger which do not import any genuine threat to life’. The impact on the mother was abundantly clear given that the judge accepted her evidence that when she was on the floor with the plastic bag over her head she was ‘feeling as though she wanted to die’. In short, the

failure to stand back and to consider the impact of her findings prevented the judge from asking the key primary question, which was whether the evidence established a pattern of coercive and/or controlling behaviour.

*Re T: The Cross Appeal*

175. Mr Hale submits that the finding in relation to the plastic bag was an ‘outlier’ and wholly inconsistent with the finding of the judge overall that the mother was an unreliable witness. The evidence in support of the incident was, he said, scant, and the judge, he suggested, had wrongly relied on the mother’s demeanour as she gave her evidence about this event. Mr Hale was, however, in considerable difficulties with this submission given that: (i) the judge had been uncompromisingly critical about the mother’s demeanour in respect of other aspects of her evidence; and further (ii) Mr Hale had to accept that the mother had made an independent complaint about what had happened to a social worker and there was, therefore, some supporting evidence of her allegation.
176. Prof. Delahunty rightly pointed out that the finding should not be regarded as an outlier given the finding that the judge made about the earlier November ‘strangling’ incident. In respect of that incident, in the face of his blanket denial, the judge had found that the father had ‘held the mother in the vicinity of her neck’ and used words to the effect that he would kill her. We note that there is no application for permission to cross appeal in respect of this finding.
177. In our judgment, permission to appeal should be granted to the father to cross appeal in relation to the plastic bag incident but, having heard detailed submissions from each of the father and mother, the appeal against the finding shall be dismissed. The judge heard each of the parties give evidence and was entitled to make the finding she did on the evidence before her.

*Re T: Conclusion*

178. In our judgment, the judge fell into error in that she omitted to look at the findings she had made as a whole. We fear that having determined that the allegations of anal rape were not made out, she did not then step back and appreciate the significance of the matters which she did find to have been proved. As a consequence, the judge failed to appreciate the true significance and seriousness of the father’s behaviour or to consider whether these findings established a pattern of coercive and/or controlling behaviour.
179. We have difficulty, for example, with the judge’s observation in relation to the November 2017 ‘strangling’ incident. The judge found that the father had said something to the effect that he would kill the mother, but she held that these words are commonly used in anger which do not import any genuine threat to life’. We are not convinced that that is the case, but in any event those words need to be considered in context, namely that the judge had found that the father had ‘probably held the mother in the vicinity of her neck’ at the time he spoke those words. There does not need to have been a ‘genuine threat to life’ for this to be regarded as a signal piece of highly intimidating behaviour on the father’s part.
180. We are particularly troubled by the ‘plastic bag’ incident. Looking at the background history and the state of the parties’ relationship by December 2017, with the ‘strangling’

incident having taken place only the month before, we cannot see on what basis the judge could conclude that coming up behind the mother (who was on the floor holding their baby), and putting a plastic bag over her head before saying that ‘this was the way she would die’ could be regarded as a ‘prank’. This was, in our judgment, the second of two intimidating and highly abusive incidents of a similar type carried out within a few weeks of each other. We say that conscious of the findings the judge made about the mother’s own aggressive behaviour towards the father on occasion.

181. During the course of the hearing of these appeals we have sought to emphasise that the child’s welfare remains at the heart of these cases and that neither the parties, nor the courts, should lose sight of the importance of considering what the impact any findings of domestic abuse have on the welfare of the child and, therefore, the issue of contact.
182. In our judgment, these findings are highly relevant to any risk assessment. We repeat that the judge took care to say that her analysis of the situation should not be taken ‘as an excuse’ nor should she be taken as endorsing any abusive behaviour by either of the parties. The two findings which we have highlighted however sit uneasily with the judge’s assessment that: (i) this relationship was characterised by ‘mutual verbal and minor physical abuse attributable to relationship conflict’; or (ii) that there was no risk, the parties having separated, in circumstances where (on the judge’s own finding) there had been no ‘trigger’ for the plastic bag incident; and (iii) that the father had only been: ‘driven to anger and loss of control in conflicts with the mother in situations where she was verbally and, occasionally, physically abusing him’. In our judgment had the judge regarded the November and December incidents with the significance they deserve it is unlikely that she would have drawn such conclusions.
183. In our judgment, the appeal must be allowed as we are satisfied that the judge did not appreciate the significance of the findings she had made against the father. The question is what happens next? The court is aware that the proceedings continue in the Family Court and that, as a consequence of the unconscionable delay which has been a feature of this case, the father has not seen T for three years.
184. In those circumstances, the matter will be remitted to a different judge who will, against the backdrop of the proceedings as they have developed, decide by reference to PD12J whether a further fact-finding hearing is necessary and, if so, its parameters. We would say for the avoidance of doubt that (i) the finding by the judge that the allegation of anal rape had not been made out stands as do (ii) the positive findings that were made by the judge in relation to violence. Those findings will, therefore, not form part of a further finding of fact hearing but will form part of the information to be made available to those conducting any risk assessments in this case.

#### **[4] *Re H-N***

185. *Re H-N* is an appeal by the appellant (‘mother’) against an order made by HHJ Tolson QC on 28 August 2020 following a fact-finding hearing. The judge declined to make the findings of domestic abuse sought by the mother against the respondent (‘father’) and recorded in a recital that, whilst the father had made limited admissions of domestic abuse, the approach of the professionals was to be on the basis that the matters alleged by the mother ‘did not happen’.



186. The judge made case management orders, including: the appointment of a Children's Guardian; a psychiatric assessment of the mother; a s 37 Children Act 1989 investigation; and for the father to file a statement in support of his application for a 'lives with' order and permission to remove H-N, the child who is the subject of the dispute, permanently from the jurisdiction to live in France.
187. Permission to appeal was granted by Williams J on 30 September 2020. The issues before this court, as were identified by Williams J, go to the judge's evaluation of domestic abuse, his observations on matters that were not germane to the evaluation of evidence and his evaluation of the seriousness of the matters which were established or admitted.

*Background*

188. The father is French and the mother British. The parties met in London and commenced a relationship in July 2013. They cohabited briefly between April 2015 and January 2016 when they lived together at the mother's home together with the mother's son, B, from a previous relationship. Shortly before H-N was born in February 2016, the father moved out and returned to France where he continues to live. During the course of that year, the parents spent much of their time together in either England or France. It was whilst the mother was visiting the father in France in October 2016 that she alleges there was an incident of rape.
189. The family spent significantly less time together during the course of 2017 and there was some local authority involvement following a hospital referral. The father attended the Child Protection Conference which was held at which he was supportive of the mother.
190. In April 2018, the mother's house had a mouse infestation and it was agreed that H-N would go on his own to France with the father. In July 2018, the mother and B joined the father and H-N before she returned to England with both children in September. In early December 2018, at the mother's request, the father took both children to France to stay at his parents' home whilst the mother travelled to the United States on holiday to stay with a person she described as a 'close online friend'. The mother returned to the UK on about 18 December 2018, having ended the relationship with the father the day before.
191. There was a dispute as to how energetically the mother sought the return of the children over Christmas, but what was common ground was that by January she was vociferous in her demands and she went over to France on 9 January 2019 to collect both children. She succeeded only in collecting B. H-N remained in the care of the father until 25 September 2019, when the French court ordered the return of H-N to the mother at the conclusion of Hague Convention proceedings. The French court were satisfied that the children were habitually resident in England and that the father's Article 13(b) defence (grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation) to the mother's application for the return of the children to England had not been made out. H-N returned to the care of the mother and has not seen the father since September 2019.
192. On 19 November 2019, the father commenced proceedings in England for permission to remove H-N from England to live with him in France.

*The Finding of Fact Hearing*

193. In response to the father’s application, the mother filed a Scott Schedule containing a total of nine allegations against the father, made up of three allegations of physical abuse, four of psychological and emotional abuse towards her and two towards H-N. At the outset of the hearing the judge granted permission, unopposed by the father, to add a further allegation of rape to the schedule. The allegation was detailed within the mother’s witness statement and responded to in the father’s statement.
194. The judge rightly recognised that an allegation of rape is serious but went on to say that its relevance was ‘more limited’ so far as the best interests of the child are concerned in circumstances where there were many later occasions of consensual sex and limited also by the fact that H-N had stayed with the father by consent for a lengthy period in 2018. The judge commented that such allegations are ‘increasingly common’ and, whilst emphasising that he was not making a political point, expressed his belief that ‘it is necessary to factor in the effects of a system which encourages allegations of domestic abuse’. The judge referred to what he regarded as the significant advantages to a litigant in ‘portraying herself as a victim of serious domestic abuse’ by reference to the availability of public funding in such circumstances and to what he described as ‘professional sympathy’. The judge expressed the view that this mother is a victim of domestic abuse by virtue of the father’s ‘minor’ admissions and expressed the hope that she would retain public funding for the next stage of the case. We are bound to say that such comments were inappropriate and should not have been made.
195. Ms Bazley QC on behalf of the father submitted that even if the remarks made by the judge are undesirable and inappropriate, the court can ‘blue pencil’ them as the judgment overall shows an appropriate consideration of all the allegations.
196. The judge rejected each of the allegations made by the mother. The recital to the judge’s order as drafted by the judge is as follows:
- “Having heard the evidence, the court does not make the findings sought by the mother in her schedule of allegations. The father made limited admissions of domestic abuse. The professionals are therefore required to approach this case on the basis that the matters alleged by the mother did not happen.”
197. The admissions made by the father were in broad terms as follows:
- i) He had punched the mother early in the relationship;
  - ii) He had slapped the mother across the face when she was 8 months pregnant with H-N;
  - iii) He had punched a wall;
  - iv) He had wrongfully retained H-N in France;
  - v) That when the mother travelled to France to collect H-N he had been involved in an altercation with mother when he blocked her way and held her by the arms.

198. The judge, having made his findings, reached the following conclusion about the domestic abuse in this case:

“69. Almost a year has gone by without the father seeing H-N. this must change as soon as possible. By his own admission the father is a perpetrator of domestic abuse. I judge, however, that the only 2 occasions of any violence, neither of which resulted in any injury to the mother were ‘situational’, that is to say the product of the dysfunctional relationship between the parents rather than a character trait of the father which is likely to be repeated in the future. The incidents were a long time ago and the relationship has now ended. In any event there is no threat to H-N himself.”

*Discussion*

199. Mr Hames QC, for the mother in this appeal, submits that the judge not only made a number of errors in relation to the evidence itself, but that he failed to look at the pattern of control and abuse which were demonstrated even on the basis of the father’s admissions alone. The judge, he submitted, wholly failed to consider the impact on the mother of such behaviour.
200. In our judgment the submissions of Mr Hames hold good when considered against the facts of the case. Whilst accepting fully that no judge can be expected to analyse the detail of each and every allegation and to comment on or record every submission, in our judgment the judge nevertheless failed sufficiently to take into account significant features in respect of the various allegations. That failure feeds into the submission that the judge revealed through some of his remarks as set out above, that he had preconceived views about the case and in particular about the mother.
201. By way of example; in relation to a slap which formed the basis of Allegation 2 on the Schedule, the judge made no mention of the police disclosure in relation to this event which referred to the reddening of the mother’s face when the police were called out 20 minutes after the incident. This report would seem to undermine the judge’s conclusion that the mother had never been injured. Further, the judge failed to place the incident in context, namely that the mother was heavily pregnant at the time. The father accepted in evidence that the argument which had led to him slapping the mother on this occasion, had been about him opening the mother’s post without her permission, (in itself a highly controlling piece of behaviour, Mr Hames submits).
202. The judge erroneously conflated this allegation with a different allegation, Allegation 1, on the schedule and in so doing the judge wrongly found that the ‘post’ incident involved ‘no violence’, notwithstanding the father’s admission to the contrary. The judge concluded in relation to this incident that ‘it would be typical of the mother, as is the father’s submission, to take a trivial incident and blow it out of all proportion’. In our judgment, for a man to slap a woman who is heavily pregnant in response to her having remonstrated with him for opening her private mail cannot be characterised as trivial.
203. A further example is in relation to an allegation that the father had held a knife against his wrist (Allegation 3). The judge simply accepted the father’s evidence as to what

occurred without describing it. The judge said, however, that ‘this shows there is a side to the father’s character which was not on display in court, but it does not assist the mother’s case.’ The judge did not, however, feed this insight into the father’s behaviour into his analysis of the significance of the father’s admissions of domestic abuse.

204. The mother alleged emotionally abusive, controlling behaviour on the part of the father. The judge simply said that ‘this behaviour did not occur’. The father, the judge said, ‘was dealing with a mother whose own behaviour was very intense, unpredictable and chaotic. Her home was a mess... and her childcare routines lacking as the father describes’. The admissions of violence which had been made by the father were not put onto the other side of the equation nor was the relevance of her having an untidy house or erratic childcare routines explained.
205. That there was another side to the father’s character was undoubtedly the case and was reflected in the fact that he wrongfully retained H-N (then just rising three), keeping her from the mother (the primary carer) for a period of 9 months. Mr Hames submits that the judge failed adequately to take into account, what he submits is, the ultimate controlling act by any parent; namely the wrongful retention of their child in another country.
206. Ms Bazley urges caution before concluding that the judge failed adequately to take into account the wrongful retention of H-N in France. She reminded the court that the mother had been content to send H-N to France with the father when H-N was only just over 2 years old and to leave her in his sole care for about three months before joining them. Similarly the mother had asked the father to have both children (one of whom, was not his child and has special needs) to stay in France so that she could go to the United States to be with a man she had never met.
207. No matter how ill-judged the father’s decision had been to retain H-N, it is impossible, Ms Bazley says, to reconcile such purely voluntary decisions made by the mother to trust the father with her infant child for protracted periods of time with a suggestion that the modest findings of domestic violence made against him should impact upon H-N’s ability to have contact with his father.
208. The judge posed for himself the question as to whether the father’s behaviour demonstrated that he was ‘emotionally, mentally and psychologically abusive’ of the mother by retaining H-N and B in France. The judge accepted that the father’s ‘actions had an effect on the mother’. The judge held, however, that they did not affect her mentally in the long term, save that they ‘determined her upon denying the father any relationship with H-N in the future’. The judge went on: ‘the mother presents too great a picture of mental damage even before the events in January – September 2019 for me to ascribe those events as an active cause of her problems. Moreover, the father’s motives [*in retaining H-N in France*] were genuine.’
209. The judge went on to consider whether those same actions on the father’s part had been abusive to H-N. The judge rejected that allegation also saying that he did not believe they were abusive. The judge recorded the mother’s evidence to the effect that H-N was displaying some extreme behaviours upon return to England and that H-N had been referred to CAMHS and onto the Tavistock clinic. The judge, whilst recognising that it is hard to imagine a more controlling act than abduction or retention of a child, found there to be ‘a very different context than is usual to the father’s actions’. At no stage

did the judge put together the father's action in retaining H-N with the other admitted acts of domestic abuse on the father's part in order to see if there was a controlling pattern overall, or to consider the impact that it had, or may have had, on the mother and upon her own presentation and behaviour during the time they were together.

210. The judge made no reference to the findings of the French court that 'it is evidence from the immediate protestations made by [the mother] in numerous emails that she did not agree to the child staying in France in December 2018', nor does the judge note that the father's Article 13b defence was dismissed, no proof having been produced of the 'child being exposed to a physical or psychological danger in the event of his return'.
211. Further, in his analysis of the father's retention of H-N, the judge made no reference to the detail of what was described as an 'altercation' when the mother went to France to try and collect the children. There is a somewhat pejorative reference to her having arrived 'without warning', but none to the fact that the father accepted in evidence that there had been a 'physical encounter' by the father with the mother which was sufficiently violent for her coat to have been torn and during which the father accepted he had 'held her by her arms'. The incident ended with the mother having to leave and return to England with only one of her two children.
212. The judge said that there was 'no reliable evidence' that H-N had suffered harm. There are only the contentions of the mother.'
213. No mention was made to the fact that the father made a referral to social services upon H-N's return and that their enquiries into the care of H-N revealed no safeguarding concerns, or to the detailed report from the nursery who described H-N's significant separation anxiety upon his return to this country and the competent and caring way in which the mother had helped him to cope.
214. The judge observed that the father could have handed back the children to the mother and sought the care of H-N through the English courts, but that he had instead chosen to contest the French proceedings for 8 months. The judge said that 'I do not think that this can be described as blameless behaviour'. The furthest the judge went in criticising the father's actions was to say that he had been 'unwise' to rely on the fact that he (the father) thought he would be the better parent, or that the mother would decide to leave H-N with him.
215. Even if the judge was justified in his clear disapproval of the mother having gone to the United States for a holiday in the circumstances in which she did, and even if he was right to accept the father's evidence that the mother was erratic and mentally unstable, in our judgment the judge nevertheless failed to give sufficient weight to the fact of the wrongful retention. Further, even though the father had undoubtedly played an important role in H-N's life and had had him in his sole care for a number of months earlier in the year, it must inevitably have been harmful for H-N to experience the disappearance for the best part of a third of his life of his primary carer with no explanation.
216. This hearing was a fact-finding hearing into the allegations made by the mother which included allegations of controlling and coercive behaviour, allegations which require consideration of both an overall pattern of behaviour and of the impact of that behaviour on the person making the allegations and the child at the centre of the dispute. Where a

fact-finding hearing is held to be necessary, the findings made will always be important and will inform the subsequent welfare analysis. It should be recollected that the father's ambition was to remove H-N from the care of the mother and to relocate with him to France, it may therefore be thought that the importance of a proper approach is highlighted in a case such as this where the outcome sought by one party is a radical change in the child's living arrangements.

217. We also accept the submission made by Mr Hames, that the judge fell into error in effectively recasting the terms of reference for the court. The judge in the second paragraph of the judgment expresses the view that the events described by the mother were 'insufficient in themselves' and 'hardly likely to affect child arrangements in the future'. The hearing, rather than a fact-finding on the limited issues in dispute and a determination as to whether this was an abusive relationship, became a binary choice between:

“[a] relationship characterised by the deeply-controlling father described by the mother, a relationship in which she was blameless and under his spell? Or is the problem in this case the deeply-troubled mother with mental health difficulties unrelated to the father's behaviour and responsible herself for the wild, unboundaried behaviour described by the father?”

218. It goes without saying that an individual does not have to be 'blameless' to be the victim of domestic abuse and neither was that the mother's case. Although the judge said that he was 'not to be thought to be seen to be trespassing on the ground of the psychiatric assessment which is to come', in our judgment he did just that with the focus turning both to the mother's mental stability and to her skills as a mother and a homemaker rather than whether she was the victim of domestic abuse.
219. A consideration of credibility will necessitate a wide consideration of all the circumstances, however in our judgment as a result of this error in approach which is reflected in the recital set out at paragraph 196 above, the judge discounted the father's admissions of domestic abuse over a significant period of time and underestimated the significance of the wrongful retention of H-N for a period of 8 months on both the mother and upon H-N.
220. In reaching this conclusion, we fully take into account that this experienced judge, having heard and seen the parties in the witness box, had formed a poor impression of the mother. He found her to have trimmed her evidence to fit the occasion, dissembled frequently and he believed that the considerable distress she had shown when speaking of the alleged rape was 'staged' for his benefit.
221. But as the judge himself said, 'there are better guides to the truth' than the mother's presentation. In our judgment, the judge failed properly to analyse the evidence and to draw together the threads of the admissions made by the father including his retention of H-N in France. When this is put against the intensity of the judicial focus having rested on the mother's ability as a parent and her vulnerable mental health rather than on the allegations of domestic abuse, it leaves one unclear as to whether what the judge was in fact seeing in the presentation of this mother was not an intelligent manipulative mother making up allegations for her own ends, but a woman who, whilst she has undoubtedly suffered mental health issues, was demonstrating both in her behaviour

during the course of the relationship and her presentation in court, the classic signs of a person who has been the victim of domestic abuse and in particular a controlling and coercive relationship.

222. That same concern inevitably impacts upon the judge's rejection of the mother's allegation of rape which he regarded as being presented in an overdramatic and inconsistent way. For our part we also think that it was unfortunate at best that the judge expressed his 'concern' that, whilst the allegation of rape was made in the mother's witness statement and had been reported to the police, 'for reasons which are unclear', the allegation was not on the schedule of allegations filed subsequently. The judge raised this as an issue and commented that a 'convincing allegation of rape would surely have been pleaded in the Schedule'. Notwithstanding that the judge observed that this was 'not ultimately probative', one is left with the strong impression that it had influenced the judge adversely against the mother.
223. Whether that is in fact the case is a matter for another court on another day. So far as this court is concerned the appeal in *Re H-N* is allowed on the basis that the judge's approach to the evidence in the case was seriously flawed and the matter is therefore remitted to the Designated Family Judge at the Central Family Court for further case management. The admissions made by the father should be recorded on the face of the order of this court for the assistance of the Designated Family Judge and the judge's findings in relation to the allegations will be set aside. It will be a matter for the Designated Family Judge to decide having heard submissions whether there should be a further finding of fact hearing and, if so, to define its scope.

### ***Conclusion***

224. Each of these appeals are examples in differing ways of the importance of the modern judiciary having a proper understanding of the nature of domestic abuse and in particular of controlling and coercive behaviour and of its impact on both the victims and the children caught up in the atmosphere engendered in such a household. Training together with a proper application of PD12J largely ensures that such errors are the exception rather than the rule, but that that is the case does not lessen the impact on those individuals affected when things do go wrong.
225. We would accordingly allow the appeals for the reasons given in: *Re B-B*, *Re T* and *Re H-N* and dismiss the appeal in *Re H*.