PS v BP [2018] EWHC 1987 (Fam) (27 July 2018)

Appeal in relation to a fact finding hearing concerning a contact application in which the judge who had been in an “invidious position”, had not permitted the father to cross-examine the Mother directly. Hayden J sets out observations concerning the procedure for cases where the court is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser.

This appeal concerns L, a three year old girl. The Father sought contact with L on 6th February 2017. On 29th November 2017, District Judge Green listed the matter for a fact-finding hearing in January 2018 in front of His Honour Judge Scarratt to avoid further delay. By the time of the hearing, the Father was acting in person. The Father was informed at the start of the hearing that he would not be permitted to cross-examine the Mother directly, relying on *Re: A (a minor) (fact finding; unrepresented party)* [2017] EWHC 1195 (Fam).

On appeal, the 'invidious' position facing judges in cases of alleged domestic violence where one party is unrepresented was highlighted. *Re: J (children) (contact orders; procedure)* [2018] EWCA Civ 115 was referenced as highlighting the 'very substantial difficulties engendered by a litigant in person whose case needs to be 'put' to a key factual witness where the allegations are of the most intimate and serious nature and where the litigant and the witness are themselves the accused and accuser'. McFarlane LJ observed in that matter that two options were realistically left to the court: the alleged abuser conducting the cross-examination himself (possibly with the assistance of a McKenzie friend) or questions are put to the witness on that party's behalf by the judge. Hayden J viewed the possibility of granting rights of audience to a McKenzie friend as firmly inconsistent with the 2015 Litigant in Person Guidelines. He also reminded himself that the Courts do not have the power to direct funding from HM Courts and Tribunal Service (as per *Re K and H* [2015] EWCA Civ 543).

In the current case, although Hayden J felt that the Father's cross-examination mirrored an approach frequently taken in the criminal courts, his points were 'essentially proper questions' when dealing with allegations of this significance. Although the Judge had intended for the Father to identify the questions and for the Judge to refine them, the role was 'plainly unfamiliar' to the Judge and did not achieve the identified objective. As a consequence, the Father's questions, when put, were 'rendered superficial, overly simplified and repeatedly phrased in a way as to minimise their impact'. The approach 'hindered the effectiveness' of the cross-examination put on behalf of the Father.

Hayden J noted that the 'cross examination of a complainant alleging rape, requires particularly careful preparation, great sensitivity and rigorous forensic discipline. Ultimately, the complainant's evidence must be challenged effectively and the alleged perpetrator's case put fairly'. Although the Family Court strives to be non-adversarial, the party bringing the allegation has the burden of proving it to the civil standard of proof (*Re B* [2008] UKHL 35).

Although Hayden J was 'extremely sympathetic' to the Judge's predicament, the Judge was deemed to have formed an adverse impression of the Father and the hearing 'fell short of what fairness demands'. Hayden J noted that the conclusions reached in the short ex tempore judgment were not rooted in the substance of the factual allegations but on the Judge's observations of the Father's demeanour. Although important, the impression that a witness makes on the first instance Judge is not a substitute for a detailed analysis of the evidence, and a true assessment of a witness's demeanour can only properly be undertaken when the witness is 'put to the assay by challenge'. The weight placed on the Mother's presentation in the witness box was therefore diminished. The process of the hearing was 'so fundamentally flawed that it inevitably corroded the reasoning of the Judgment'.

Hayden J drew particular attention to the Youth Justice and Criminal Evidence Act 1999 (YJCEA) as a useful starting point for a family judge, as well as PD 12J, FPR 3A, PD 3AA and Matrimonial and Family Proceedings Act 1984, s 31G(6). As per *K v H*, the possibility of other case management options were considered, as well as their compliance with Convention rights, including:

(i) any direction that a party should give oral evidence being subject to the condition that they are questioned through a legal representative;
(ii) a party to be questioned 'sensitively and fairly' by the judge himself (including the potential for identification of the questions in advance);
(iii) a party to be questioned by a justices' clerk;
(iv) a guardian to be appointed to conduct proceedings on behalf of the children.

Observations were offered to provide a 'forensic life belt until a rescue craft' – by way of Parliamentary action – arrives:

(i) Once it becomes clear to the court that a case including serious and intimate allegations must be put where the witnesses are accused and accuser, a Ground Rules Hearing ('GRH') will always be necessary;
(ii) The GRH should usually be conducted prior to the hearing of the factual dispute;
(iii) Judicial continuity between the GRH and the substantive hearing is essential;
(iv) The accuser bears the burden of establishing the truth of the allegations. This burden may not be compromised in response to a witnesses' distress, and fairness to both sides must be ensured;
(v) There is no presumption that the accused may not cross-examine the accuser in every case. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused or improved if a prohibition on direct cross-examination was directed. In a Family Court fact-finding hearing, these two factors may be divisible;
(vi) If cross-examination of the alleged victim runs a 'real risk' of being abusive (if allegations are established, it should bear in mind that the impact of the court process is likely to adversely affect the welfare of the subject children;
(vii) Where the factual conclusions are likely to have an impact on the arrangements for, and welfare of, a child, the court should consider joining the child as a party and securing representation. In that instance, the child's advocate may be best placed to undertake the cross-examination;
(viii) If cross-examination is not permitted by the accused in person and there is no advocate

available, questions should be reduced to writing under specific headings. The Judge is not constrained to put every question sought but will have to evaluate relevance and proportionality. Cross-examination is dynamic and the process cannot become formulaic; (ix) Although fact-finding hearings have a 'highly adversarial complexion', the central philosophy of Children Act proceedings is investigative. A judge may therefore conduct questioning in an open and less adversarial style without compromising fairness to either side.

Hayden J noted that a complainant in family proceedings not being offered the same protection as a complainant in a criminal trial is 'manifestly irrational and unfair'. Hayden J reiterated the need for a regime which replicates that operating in the Criminal Courts and expressed his hope for urgent legislation to address this 'lamentable situation'. With the observation that the system has failed both parents, a rehearing was directed and the case remitted to the High Court.

Summary by **Lindsey Sambrooks-Wright**, barrister, **Garden Court Chambers**

Neutral Citation Number: [2018] EWHC 1987 (Fam)
Case No: ME17P00309
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM HIS HONOUR JUDGE SCARATT sitting in the Family Court at Canterbury

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2018

Before :

THE HONOURABLE MR JUSTICE HAYDEN
- -
Between :

PS Appellant
- and -
BP Respondent

- -
- -

Mr L Eaton (instructed by Aletta Shaw Solicitors) for the Appellant
Mr P Hepher (instructed by Brachers LLP) for the Respondent

Hearing date: 18th June 2018
- -

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

Mr Justice Hayden:

1. This is an appeal against Orders and findings made by His Honour Judge Scaratt, following a fact-finding hearing on the 19th January 2018. The father's (F) Appellant's Notice is dated 9th February 2018. On 12th February 2018 Cohen J issued directions for the filing of appeal documents. The mother (M) seeks to resist the appeal, inviting this court to restore the matter for further directions before the Family Court in Canterbury.

Background

2. The child subject to proceedings (L) is three years of age. F applied on 6th February 2017 for a Child Arrangements Order enabling him to spend time with L who lives with her mother. The matter was listed pursuant to the order of District Judge Green on 29th November 2017 for a fact-finding hearing. It had been determined necessary to conduct such a hearing before the court could reach conclusions on F's substantive application. I have been told that, conscious of the delay that there had been in the proceedings, District Judge Green arranged for the matter to be listed before His Honour Judge Scaratt when an available date emerged in the Court diary. Prior to the hearing Judge Scaratt had no previous involvement in the case nor, inevitably, any opportunity to shape the scope of the hearing.

3. M's lawyers had prepared a Scott Schedule setting out six core allegations which the court was invited to resolve. By the hearing F had dispensed with the service of his solicitors and was acting in person. He was at the time a serving police officer, facing related proceedings in the Criminal Court. He told Judge Scaratt that he had concluded that he should focus his available funds on his own defence costs.

4. Before hearing the case Judge Scaratt had obviously read the papers carefully and had come to two significant decisions. Firstly, he considered that only two of the six allegations identified in the schedule required to be tried; secondly, he had formed the firm view that F should not be permitted to cross examine M directly. It requires to be identified that the allegations Judge Scaratt elected to try were of the utmost gravity. The first alleged strangulation and rape of M; the second concerned attempted strangulation, which was said to have taken place in the presence of the child.

5. As Mr Hepher, who appeared on behalf of M both in this court and in the court below, opened his case before Judge Scaratt, the Judge immediately interjected with the following observation: "Well…I am not going to allow cross examination of your client by [F]". This, as I have indicated, had not been foreshadowed previously. It plainly took F by surprise. As a serving police officer F had planned his cross examination of M and was very clear about the material he wished to raise with her. The Judge then moved to a short preliminary ex tempore Judgment in which he set out the reasoning for his decision. The Judge did not invite any

representations on the point either from counsel or F. In his Judgment the Judge placed considerable emphasis on my own judgment in *Re: A (a minor) (fact finding; unrepresented party)* [2017] EWHC 1195 (Fam). He highlighted the following passages which require to be set out:

> "57. As I have made clear above it was necessary, in this case, to permit F to conduct cross examination of M directly. A number of points need to be highlighted. Firstly, F was not present in the Courtroom but cross examined by video link. Secondly, M requested and I granted permission for her to have her back to the video screen in order that she did not have to engage face to face with F. Thirdly, F barely engaged with M's allegations of violence, choosing to conduct a case which concentrated on undermining M's credibility (which as emerges above was largely unsuccessful).
>
> 58.Despite these features of the case, I have found it extremely disturbing to have been required to watch this woman cross examined about a period of her life that has been so obviously unhappy and by a man who was the direct cause of her unhappiness. M is articulate, educated and highly motivated to provide a decent life for herself and her son. She was represented at this hearing by leading and junior counsel and was prepared to submit to cross examination by her husband in order that the case could be concluded. She was faced with an invidious choice.
>
> 59.Nothing of what I have said above has masked the impact that this ordeal has had on her. She has at times looked both exhausted and extremely distressed. M was desperate to have the case concluded in order that she and A could effect some closure on this period of their lives and leave behind the anxiety of what has been protracted litigation.
>
> 60. It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator. This may not have been the worst or most extreme example but it serves only to underscore that the process is inherently and profoundly unfair. I would go further it is, in itself, abusive. For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties.
>
> 61.The iniquity of the situation was first highlighted 11 years ago by Roderick Wood J in **H v L & R [2006] EWHC 3099 (Fam)**, [2007] 2 FLR 162. It was reiterated in Re B (a child) (private law fact finding-unrepresented father), *DVK* [2014] EWHC (Fam). Cross examination by a perpetrator is prohibited by statute in the Crown Court, in recognition of its impact on victims and in order to facilitate fairness to both prosecution and defence. In Wood J's case he called for 'urgent attention' to be given to the issue. This call was volubly repeated by Sir James Munby, President of the Family Division in ***Q v Q; Re B (a child); Re C (a child)*** **[2014] EWFC 31** and again in his 'View from the President's Chambers (2016): Children and Vulnerable Witnesses: where are we?'

62.In that document the President highlighted the Women's Aid Publication: Nineteen Child Homicides. I too would wish to emphasise it:

> "Allowing a perpetrator of domestic abuse who is controlling, bullying and intimidating to question their victim when in the family court regarding child arrangement orders is a clear disregard for the impact of domestic abuse, and offers perpetrators of abuse another opportunity to wield power and control."

Commenting on this, the President asked 'who could possibly disagree?' The proposition, in my view, is redundant of any coherent contrary argument."

6. The challenges presented by litigants in person cross examining key witnesses have recently been considered by the Court of Appeal, see ***Re: J (children) (contact orders; procedure)* [2018] EWCA Civ 115**. There McFarlane LJ highlighted the very substantial difficulties engendered by a litigant in person whose case needs to be 'put' to a key factual witness where the allegations are of the most intimate and serious nature and where the litigant and the witness are themselves the accused and accuser. The court made the following observation:

> "67. Various strategies to meet this problem have been contemplated and attempted in recent times. One such, which no doubt had some impact on the progress of the present appeal, was the proposition that, where there was no other alternative source of funding for the representation of an alleged perpetrator of abuse for the purposes of cross examining his abuser, the Family Court could direct that funding be provided by HM Courts and Tribunal Service ['HMCTS']. The proposition was held to be sound by Sir James Munby P in ***Q v Q; Re B; Re C* [2014] EWFC 31** in a judgment delivered on 14 October 2014. The judgment in Q v Q no doubt influenced DJ Mornington's decision in April 2015 to transfer this case up for consideration at a more senior level of judiciary. By that time, in another case (*Re K and H*), HHJ Bellamy had, on 5 January 2015, made an order directing HMCTS to fund representation to enable cross examination on behalf of an alleged abusing father to be put to his former partner. Judge Bellamy's order was the subject of appeal and, on 22 May 2015, this court (Lord Dyson MR, Black and McFarlane LJJ) held that a judge in family proceedings lacked the power to make such an order [[2015] EWCA Civ 543]. Thus, by the time that the present case came before HHJ Allweis for the first time, the prospect of directing that HMCTS should fund representation for this father had ceased to be a tenable option."

7. Unfortunately, this case did not provide the Court of Appeal with an opportunity to set out definitive guidance to trial Judges as to how this most important and difficult issue is to be resolved when it arises. MacFarlane LJ observed:

> "The reality is that the options available to the Judge are likely to be stark. Either the alleged abuser conducts the cross examination himself (possibly with the assistance of a McKenzie Friend) or questions are put on his behalf to the witness by the Judge"

It is also necessary for me to record that the Court of Appeal considered my comments in *Re: A* (supra) required "wide publication".

"70. Hayden J's words demand respect, both because they come for a highly experienced family lawyer and judge, but also because of the force with which they were expressed following immediately upon first-hand experience of observing an alleged victim being directly cross examined by her alleged perpetrator and despite the significant degree of protection the court had sought to provide for her."

I include this extract because I recognise that it will have signalled to Judge Scaratt the Court of Appeal's apparent approval of my reluctance to permit cross-examination in these circumstances.

8. McFarlane LJ highlighted, as do I, the importance of the Practice Direction:

"71. The guidance in PD12J as to the conduct of a fact-finding hearing is extensive and requires consideration in full in every case to which it applies. For the purposes of concentrating upon the cross-examination process alone, I would draw attention to the following extracts. Paragraph 19 lists various matters which a court should consider when making case management directions prior to a fact-finding hearing:"

Paragraph 19(j): 'what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;'

Paragraph 19(l): what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence;'.

72.Paragraph 28 deals with the fact-finding hearing itself:

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

each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts; and

the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case.'

9. Finally, McFarlane LJ considered the possibility of granting rights of audience to a McKenzie Friend for these limited purposes. It is plainly an option that he views with little enthusiasm. If I may say so, I also recoil from that suggestion. It seems to me that it is inconsistent with the 2015 Litigant in Person Guidelines which emphasise an established distinction between the practical and supportive role of the McKenzie friend as opposed to his acting as advocate or carrying out the conduct of litigation. It should be remembered that it is a criminal offence to exercise rights of audience or to conduct litigation unless authorised to do so by an appropriate regulatory body or with the leave of the court. McFarlane LJ addresses it thus:

"73. In between the option of direct questioning from the alleged abuser and the alternative of questioning by the judge sits the possibility of affording rights of audience to an alleged abuser's McKenzie Friend so that he or she may conduct the necessary cross examination. The possibility of a McKenzie Friend acting as an advocate is not referred to in PD12J and, as has already been noted, the guidance on McKenzie Friends advises that, generally, courts should be slow to afford rights of audience. For my part, in terms of the spectrum of tasks that may be undertaken by an advocate, cross examination of a witness in the circumstances upon which this judgment is focussed must be at the top end in terms of sensitivity and importance; it is a forensic process which requires both skill and experience of a high order. Whilst it will be a matter for individual judges in particular cases to determine an application by a McKenzie Friend for rights of audience in order to cross examine in these circumstances, I anticipate that it will be extremely rare for such an application to be granted."

10. Judge Scaratt found himself in an invidious situation. Nobody has criticised his decision to pare down the schedule of findings, nor do I. It seems to me to have been an entirely sensible course, bearing in mind that there had already been considerable delay in the case, I can also understand why the Judge considered that he should press on with the hearing in order to reconnect with the child's own timescales. The Judge was taking pragmatic decisions in accordance with the avoidance of delay principle. In all this he is unimpeachable.

11. However, as Mr Eaton took me through the transcript, it became very clear that the Judge found his role as cross examiner on behalf of F both challenging and, I suspect, rather distasteful. The cross examination of a complainant alleging rape, requires particularly careful preparation, great sensitivity and rigorous forensic discipline. Ultimately, the complainant's evidence must be challenged effectively and the alleged perpetrator's case put fairly. This cannot be compromised, nothing less will do. The Family Court endeavours to be non-adversarial, investigative, sui generis. It strives to create a forensic atmosphere in which witnesses can give of their best and enable the truth to be identified as effectively as possible. None of this detracts from the fundamental premise that the party bringing the allegation has the burden of proving it and to the civil standard of proof. There is no burden on the accused party. All this is now trite law: see ***Re B*** **[2008] UKHL 35**

12. F, in this case, revealed his training as a police officer. His line of questioning was of a character that, sadly but properly, can be heard every day in the Crown Court in such cases. F sought to highlight inconsistences in the evidence, he raised questions of previous complaints, he asserted the importance of statements taken by the police but not included in the court bundle and he endeavoured to focus on conflicting 'sequences of events'.

13. Following the authorities, I have set out above, the Judge considered that the only option available to him was to take upon himself the heat and burden of cross-examination. The course that the Judge intended to follow was for F to identify the questions and for him, the Judge, to hone and refine them in a way that did justice to both the parties. I regret to say that the actual technique fell somewhat short of the identified objective. The role was plainly unfamiliar to the Judge, as it would be to many. I have a strong sense that the Judge felt the inevitable brutality of the questions, designed to reveal M's account of rape as dishonest,

compromised his independent role and lowered him into a fray for which he simply had no appetite. F's questions, in so far as they were put to M at all, by the Judge, were rendered superficial, overly simplified and repeatedly phrased in a way as to minimise their impact. Frequently, the Judge's questions required little by way of response from M. Mr Eaton has compiled a schedule of some seventy-two instances, highlighting what he contends became the essentially partisan nature of the Judge's questions. In addition, the Judge repeatedly summarised M's answers and read to her from her own witness statement. Mr Eaton submits that the Judge's interventions had "the effect of hindering the effectiveness of the cross examination, purportedly advanced on behalf of the father". I, with reluctance, agree.

14. Notwithstanding the seriousness of the allegations the Judge managed to conclude the entirety of the evidence by the lunch time adjournment. He heard from M, F and one further witness. He indicated in unambiguous terms that he was going to hear only, what he described as, "short evidence". The Judge warned F that "I shall control your cross examination very, very severely indeed". I find myself wondering whether if Counsel had been pursuing the same lines of enquiry the Judge would have been far more receptive. As I have indicated above I consider these were essentially proper questions. In closing them down as he did the Judge had, in my view, become overly protective of M. As F said in his submissions to the Judge, these were allegations of rape, likely to have a profound impact on his relationship with his child and almost certain to result in his suspension or dismissal as a police officer if adverse findings were made.

15. I should also add that the Judge offered "special measures" for M in giving her evidence. In doing so he did not invite any representations from F. Finally, in his determination to forge ahead the Judge did not offer F the opportunity to reduce his questions to writing.

16. Whilst I am extremely sympathetic to the situation Judge Scaratt found himself in it must be emphasised that, having decided to put F's case, he was required to do so fully, properly and fairly. A litigant in person is far more exposed than a represented party. The content, focus and style of the questions often reveal the personality of the litigant, long before he enters the witness box. It is clear to me that the Judge formed a very adverse impression of F, he considered him to be arrogant to the point that he regarded himself as "god like". The disagreeable and the arrogant are of course as entitled to a fair trial as the polite and amenable.

17. Despite Mr Hepher's robust efforts to defend the forensic integrity of the hearing and the Judgment, I am entirely satisfied that the hearing fell short of what fairness demands and to which F was entitled.

18. The Judgment was delivered, ex tempore, in the afternoon and is described by Mr Eaton as "surprisingly short given the nature of the issues in dispute and the amount of evidence before the court". It is also contended that there are significant factual errors within the Judgment. The Judge found there to have been "overwhelming evidence" supportive of the allegations and evaluated F as "deceitful, dishonest and dishonourable". When analysed, these conclusions proved not to have been rooted in the substance of the factual allegations but essentially predicated on the Judge's observation of F's demeanour. Whilst the impression a witness makes upon the Judge will always be important and signals the inestimable

advantage the first instance Judge has, in assessing the evidence, it is not a substitute for a detailed analysis of those features of the evidence which reinforce the reliability of the allegation. Though the Judge declared himself to be satisfied that there was "good corroborative evidence" he does not identify such material within his Judgment with the cogency of reasoning the exercise requires. The Judge invited submissions on any corrections or omissions after the conclusion of the hearing. F attempted to make representations but his suggestions were rejected.

19. M's written evidence was permitted to stand as her Evidence in Chief. F's cross examination, for reasons I have considered above, was curtailed. A true assessment of a witness's demeanour can only properly be undertaken when the witness is put to the assay by challenge (adversarial testing 'beats and bolts out the Truth much better, see *Crawford v Washington* (2004) 541 US 36 at 62 per Scalia J). In this case the witness's account was not satisfactorily challenged and the weight that can be placed on her presentation in the witness box is accordingly, in my view, diminished.

20. The process of the hearing was, in my Judgment, so fundamentally flawed that it inevitably corroded the reasoning of the Judgment. Accordingly, the appeal must be allowed. When I made my observations in *Re: A* (supra) I was indignant that the court had, in that case, been entirely powerless to prevent the replication of abuse in the court room i.e. permitting a perpetrator of domestic violence (as I found) to cross examine his witness directly. This process is an entirely different experience to hearing a witness robustly challenged by an advocate. The latter may trigger in the victim a vivid recollection of abuse but the former can have the effect of replicating the abuse. In simple terms the process itself becomes abusive. That a complainant in a criminal trial should be afforded protection denied to her in family proceedings is manifestly irrational and unfair. As I said in Re: A and I repeat, it is iniquitous and a stain on the Family Justice System. The problem is encountered by Judges at all levels. Recently, in a striking and self-deprecating judgment District Judge Read made the following observations (see: *JY v RY*) [2018] EWFC B16.

> "(10) There is always the fear in the mind of the Court that the questioning of an alleged victim about their abuse merely prolongs that abuse by other means. Given my findings in this case, limited though they are to only the first few allegations, I think that fear is borne out here. I am also worried that the father will see his stance of not making any admissions to have resulted in him "winning", in some sense, because only a few of the allegations were ever properly tested.
>
> (11) The questions I asked the father were rather stilted, and lacked any of the finesse, insight or skill of those that they would have had had they been asked by an advocate who had prepared the case properly. I cannot pretend that I was either thorough enough, probing enough, or pursued the right lines of enquiry in asking questions of either parent's evidence, but especially the father's.
>
> (12) I would also concede that my questioning of the mother was less than ideal, even though it had a script to follow, especially given that it was unduly lengthy. I did not want to cut short the number of questions the father had prepared for me to ask her, lest he think the Court was short-changing him or being less than even handed.

(13) I therefore think there is a very strong likelihood that the outcome of the fact finding would have been different, and most probably a truer reflection of what really happened, had the parents been represented. It would surely have concluded sooner, more fairly, and at far less expense to the public purse than ultimately was the case, with two wasted days at Court. It may also have been less painful for the participants.

(14) Overall, while this is not the first such hearing that I have conducted, it was manifestly the most unsatisfactory in terms of procedural history, preparation, process and outcome. I know that more senior members of the judiciary have repeatedly suggested the implementation of simple legislative measures which would avoid this."

21. District Judge Read plainly faced the same challenge confronted by HHJ Scarrat. He described his own questioning as lacking 'finesse', inferior to that of "an advocate who had prepared the case properly". He considered his enquires were not sufficiently "thorough" or "probing". He was also concerned that he might not have pursued "all the right lines of enquiry". Though the Judge had a "script to follow", I assume prepared by the father, he did not feel able to depart from it "lest he think the court was short changing him or being less than even handed".

22. I highlight the above because it casts light on the profound challenge that Judges face in this situation and which Judge Scaratt found himself addressing having had no opportunity to structure the evidence in advance. Judge Scaratt was, as I have said, hearing allegations of rape and attempted strangulation. District Judge Read was hearing allegations lower down the spectrum of gravity. I do not in any way wish to diminish the seriousness of a rape allegation but I would observe that the ordeal of being cross-examined by a perpetrator who is found to have inflicted physical and emotional abuse over many years will frequently be just as brutal an experience for the witness. Thus, the iniquity that I am confronting here exists at every level of our Family Justice system and is plainly causing real harm and distress.

23. Having allowed this appeal and in the light of my comments in Re: A (supra), I consider it to be important, at least, to try to provide some wider assistance. The Youth Justice and Criminal Evidence Act 1999 (YJCEA), operating in the criminal courts, strikes the careful balance between recognising an accused's right to cross-examine a witness in person and the protection of potentially vulnerable witnesses. (see also *Carmarthenshire County Council v Y and Others* [2017] WLR (D) 534; [2017] EWFC 36. Accordingly, the court may only prevent such cross-examination where it is satisfied that the quality of evidence given by the witness on cross-examination by the accused in person would (i) be diminished if conducted by the accused and (ii), would be likely to be improved if a direction were given prohibiting it. It is important to emphasise that the two, are indivisible in these provisions. Logically, there is not an automatic bar to cross-examination by a litigant in person in such circumstances. The application of these criteria may make it the predominant outcome but that is, of course, quite different. Having been required to confront these issues again in the context of this appeal I consider that they, by parity of reasoning, provide a useful starting point for the Judge in a family case. Thus, it requires to be emphasised that the prevention of cross-examination in person by an alleged perpetrator should not be regarded as automatic. The court must consider the broad canvas of evidence when reaching its decision on this point. Into this wider

picture must be factored in, the continuing reality that unlike in the criminal courts, there is no mechanism by which the court can provide for the instruction of an advocate.

24. The responsibility to ensure a trial that is fair to both sides cannot be compromised. The relevant provisions of the YJCEA require to be stated:

> "36 Direction prohibiting accused from cross-examining particular witness.
>
> (1) This section applies where, in a case where neither of sections 34 and 35 operates to prevent an accused in any criminal proceedings from cross-examining a witness in person—
>
> (a)the prosecutor makes an application for the court to give a direction under this section in relation to the witness, or
>
> (b)the court of its own motion raises the issue whether such a direction should be given.
>
> (2) If it appears to the court—
>
> (a)that the quality of evidence given by the witness on cross-examination—
>
> (i)is likely to be diminished if the cross-examination (or further cross-examination) is conducted by the accused in person, and
>
> (ii)would be likely to be improved if a direction were given under this section, and
>
> (b)that it would not be contrary to the interests of justice to give such a direction,
>
> the court may give a direction prohibiting the accused from cross-examining (or further cross-examining) the witness in person.
>
> (3) In determining whether subsection (2)(a) applies in the case of a witness the court must have regard, in particular, to—
>
> (a)any views expressed by the witness as to whether or not the witness is content to be cross-examined by the accused in person;
>
> (b)the nature of the questions likely to be asked, having regard to the issues in the proceedings and the defence case advanced so far (if any);
>
> (c)any behaviour on the part of the accused at any stage of the proceedings, both generally and in relation to the witness;
>
> (d)any relationship (of whatever nature) between the witness and the accused;
>
> (e)whether any person (other than the accused) is or has at any time been

charged in the proceedings with a sexual offence or an offence to which section 35 applies, and (if so) whether section 34 or 35 operates or would have operated to prevent that person from cross-examining the witness in person;

(f)any direction under section 19 which the court has given, or proposes to give, in relation to the witness.

(4) For the purposes of this section—

(a) "witness", in relation to an accused, does not include any other person who is charged with an offence in the proceedings; and

(b)any reference to the quality of a witness's evidence shall be construed in accordance with section 16(5).

25. Guidance within the framework of family law can be found in the revised Practice Direction 12J, FPR 2010 Part 3A and accompanying Practice Direction 3AA. The revised Practice Direction 12 J provides:

19. Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular, it should consider –

…(j) what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence; …

…(l) what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence"

26. The Family Proceedings Rules 2010 Part 3A and Practice Direction 3AA both came into force in November 2017. They incorporate details as to how a Court should approach vulnerable persons giving evidence. A person may be deemed to be vulnerable having been exposed to domestic abuse (PD 3AA para 2.1). This applies here in the context of those alleging domestic abuse. The Court (and the parties) are seized with many duties when considering whether and how a vulnerable party should give evidence:

3A.5 Court's duty to consider how a party or a witness can give evidence

(1) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

3A.9 When the duties of the court apply and recording reasons for decisions made under this Part

(1) The court's duties under rules 3A.3 to 3A.6 apply as soon as possible after the start of proceedings and continue until the resolution of the proceedings.

(2) The court must set out its reasons on the court order for –

(a) making, varying or revoking directions referred to in this Part; or

(b) deciding not to make, vary or revoke directions referred to in this Part, in proceedings that involve a vulnerable person or protected party.

3A.10 Application for directions under this Part

(1) An application for directions under this Part may be made on the application form initiating the proceedings or during the proceedings by any person filing an application notice.

(2) The application form or application notice must contain the matters set out in Practice Direction 3AA.

(3) Subject to paragraph (2), the Part 18 procedure applies to an application for directions made during the proceedings.

(4) This rule is subject to any direction of the court.

27. Of significance in this context is Practice Direction 3AA, which provides as follows:

1.3 It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings

28. I would wish to emphasise the provision for a Ground Rules Hearings:

5.2 When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a 'ground rules hearing' prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given –

(a) as to the conduct of the advocates and the parties in respect of the evidence of that person, including the need to address the matters referred to in paragraphs 5.3 to 5.7, and

(b) to put any necessary support in place for that person.

The ground rules hearing does not need to be a separate hearing to any other hearing in the proceedings.

5.3 If the court decides that a vulnerable party, vulnerable witness or protected party should give evidence to the court, consideration should be given to the form of such evidence, for example whether it should be oral or other physical evidence, such as through sign language or another form of direct physical communication.

5.4 The court must consider the best way in which the person should give evidence, including considering whether the person's oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made.

5.5 In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider whether to make participation directions, including prescribing the manner in which the person is to be cross-examined. The court must consider whether to direct that- –

(a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;

(b) questions or topics to be put in cross-examination should be agreed prior to the hearing;

(c) questions to be put in cross-examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and

(d) the taking of evidence should be managed in any other way.

29. To the above must be added the observations of the Master of the Rolls in ***K and H (children)*** **[2015] EWCA Civ 543**:

"[52] I do not accept that the only way in which Y can be questioned effectively is by being cross-examined by a legally qualified advocate appointed to represent the father. The court has at its disposal a number of other possible case management options. These include: (i) a direction that the order that Y should give oral evidence is made subject to the condition that the father questions her through a legal representative (this may not be a viable option if the judge's finding about the father's inability to pay stands); alternatively (ii) Y should be questioned by the judge himself; (iii) Y should be questioned by a justices' clerk; or (iv) a guardian should be appointed to conduct proceedings on behalf of K and H. The judge considered that it would not be appropriate for K and H to be joined to the proceedings and a children's guardian to be appointed for the same reasons as he thought it inappropriate for the questioning of Y to be conducted by himself: see para [27] of the judgment.

[53] In my view, all of these options should be considered by a judge who is faced with the problem which confronted the judge in this case. In some cases, the first option will be the most appropriate. But in others it will be inappropriate, for example, where the

court considers that it is essential to have oral evidence from the witness and to have it tested by questioning. Take the present case where the evidence of Y is of central importance to the Art 8 European Convention rights and welfare interests of K and H. If the court considers that it is necessary to receive oral evidence from Y and have it tested orally by questioning, then the first option may not satisfy the Convention rights of the children.

[54] We heard much argument as to whether questioning by the judge would be compatible with the European Convention. For those of us who have been schooled in an adversarial system, questioning by a judge of a key witness on controversial and centrally important issues may cause unease. I have already referred to the 'profound unease' expressed by Roderic Wood J in H v L and R at the thought of a judge having to question a witness in the family jurisdiction. He said that it should not be regarded as impossible, but should be done only in 'exceptional circumstances'. I have set out at para [22] above what Sir James Munby said on the subject in Q v Q. Sir James was, however, careful to say no more than that questioning by a judge where the issues are 'grave and forensically challenging' may not be sufficient to ensure compliance with the Convention.

30. The Master of the Rolls continued;

[58] The judge in the present case said at para [41] of his judgment that it would not be appropriate for him to be the 'cross-examiner'. He did not say why. It may be that he thought that it was inevitable that he would be perceived to be descending into the arena and siding with the father. The use of the term 'cross-examination' itself lends support to that idea. But questioning by a judge need not be conducted as if by a cross-examiner acting for one of the parties. That is implicit in what Baroness Hale said at para [28] in Re W (Children) (Abuse: Oral Evidence) [2010] UKSC 12, [2010] 1 WLR 701, [2010] 1 FLR 1485. It is also recognised in PD 12J – Child Arrangements and Contact Order: Domestic Violence and Harm. Paragraph [28] provides:

> 'While ensuring that the allegations are properly put and responded to, the fact-finding hearing can be an inquisitorial (or investigative) process, which at times must protect the interests of all involved. At the fact-finding hearing—
>
> - Each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts.
>
> - The judge or lay justices should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case.
>
> Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating, and thus it may be particularly appropriate for the judge or lay justices to conduct the questioning on behalf of the other

party in these circumstances, in order to ensure both parties are able to give their best evidence.'

[59] It is significant that the practice direction contemplates questioning on the 'key issues in the case' by a judge 'on behalf of the parties' in cases of alleged child abuse. In my respectful opinion, the approach expressed by Roderic Wood J is unnecessarily cautious. I accept, of course, that the questioning must always be conducted sensitively and fairly. If it is not so conducted, then this of itself may give rise to a breach of Arts 6 and 8 of the European Convention.

[62] I acknowledge that there may be cases where the position is different. I have in mind, for example, a case where the oral evidence which needs to be tested by questioning is complicated. It may be complex medical or other expert evidence. Or it may be complex and/or confused factual evidence, say, from a vulnerable witness. It may be that in such cases, none of the options to which I have referred can make up for the absence of a legal representative able to conduct the cross-examination. If this occurs, it may mean that the lack of legal representation results in the proceedings not being conducted in compliance with Arts 6 or 8 of the European Convention."

31. By way of completion it is important to note that the Matrimonial and Family Proceedings Act 1984, s 31G(6) provides as follows:

'(6) Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to –

(a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and

(b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper.

32. All this provides core source material from which to extrapolate general principles. Collectively they illuminate the general direction the court should follow but they do not establish a cogent framework. Inevitably, the exercise falls far short of what is required. The case for a regime which replicates the strengths of that operating in the Criminal Courts is compelling. Indeed, as I have said previously, there is no coherent alternative. In recognition of this the Government committed to legislate in the Prison and Courts Bill which I understand to have had cross party support. However, it was abandoned due to Parliamentary time constraints. I can do no more than express the hope that a legislative will may be found, perhaps by way of a mirco-bill, to address this lamentable situation urgently.

33. I am constrained to direct a re-hearing of this case. In addition, because of the complexities I have highlighted and as it involves an Appeal from an experienced Designated Family Judge, I consider it necessary to transfer the case to the High Court to be heard by a Judge of the Division. Accordingly, to the weight of human distress must be added avoidable delay to the subject child and significant additional public expense. Even more importantly

these parties will now have to re-live their respective ordeals. From each of their perspectives, whatever the ultimate findings, the system has failed them. There should be no ambiguity about this.

34. I propose to make a few observations intending to assist Judges and the profession where this kind of situation arises in future. I emphasise I do not intend what I say below to be elevated to the status of guidance. There can be no guidance where the situation is, as here, untenable. Until Parliament addresses these circumstances the best I can offer is a forensic life belt until a rescue craft arrives:

(i) Once it becomes clear to the court that it is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser, a "Ground Rules Hearing" (GRH) will always be necessary;

(ii) The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;

(iii) Judicial continuity between the GRH and the substantive hearing is to be regarded as essential;

(iv) It must be borne in mind throughout that the accuser bears the burden of establishing the truth of the allegations. The investigative process in the court room, however painful, must ensure fairness to both sides. The Judge must remind himself, at all stages, that this obligation may not be compromised in response to a witnesses' distress;

(v) There is no presumption that the individual facing the accusations will automatically be barred from cross examining the accuser in every case. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused and would likely to be improved if a prohibition on direct cross-examination was directed. In the context of a fact-finding hearing in the Family Court, where the ethos of the court is investigative, I consider these two factors may be divisible;

(vi) When the court forms the view, from the available evidence, that cross-examination of the alleged victim itself runs the real risk of being abusive, (if the allegations are established) it should bear in mind that the impact of the court process is likely to resonate adversely on the welfare of the subject children. It is axiomatic that acute distress to a carer will have an impact on the children's general well-being. This is an additional factor to those generally in contemplation during a criminal trial;

(vii) Where the factual conclusions are likely to have an impact on the arrangements for and welfare of a child or children, the court should consider joining the child as a party and securing representation. Where that is achieved, the child's advocate may be best placed to undertake the cross-examination. (see M and F & Ors. [2018] EWHC 1720 Fam; Re: S (wardship) (Guidance in cases of stranded spouses) [2011] 1 FLR 319);

(viii) If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if 'Grounds of Cross-Examination' are identified under specific headings;

(ix) A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;

(x) Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;

(xi) It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate.

35. This appeal has been heard in open Court. The Judgment will be reported on Bailii. In addition, I propose to send a copy of the Judgment to the Secretary of State, for reasons which I anticipate will be obvious from my reasoning above.

36. The Appellant's solicitors should contact the Clerk of the Rules immediately on receipt of this Judgment to arrange a listing before a Judge of the Division in order that the case may be re-heard expeditiously.