



Neutral Citation Number: [2021] EWCA Civ 451

Case No: B4/2021/0038
& B4/2021/0073

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EAST LONDON FAMILY COURT

Recorder Posner
ZE20C00089

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2021

Before:

LADY JUSTICE MACUR
LORD JUSTICE BAKER

and

LORD JUSTICE ARNOLD

A, B and C (CHILDREN)

Andrew Bagchi QC and Anna Lavelle (instructed by Russell-Cooke LLP) for the 1st
Appellant

James Presland (instructed by Atkins Hope Solicitors) for the 2nd Appellant
Jacqui Gilliat and Bronach Gordon (instructed by London Borough of Croydon) for the
Respondent

Hearing dates: 10 March 2021

Approved Judgment

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 10.30am on Thursday 1 April 2021.

Macur LJ:

Introduction

1. Two separate appeals arise from the decision of Recorder Posner, sitting in the Family Court, East London, on 17th December 2020. They raise distinct points and are not mutually dependent.
2. The first appeal, that of ‘D’, the juvenile intervenor in the fact-finding hearing, criticises the process by which serious findings of fact were made against him and which, he argues, are consequentially flawed. He is represented by Mr Bagchi QC and Miss Lavelle.
3. The second appeal is that of ‘H’, the stepfather of ‘A’, the subject child in terms of triggering the Local Authority’s intervention described below, and the biological father of ‘B’ and ‘C’. He accepts the findings of fact made against D but disputes the judge’s conclusions as to whether the threshold conditions in s.31 of the Children Act 1989 have been made out in his regard. He is represented by Mr Presland.
4. The Local Authority, represented by Miss Gilliat (who did not appear in the court below) and Miss Gordon, resist the appeal and seek to uphold the judgment, particularly as regards the findings against D but with “less vigour” in relation to the threshold conclusions against H.

Background

5. The case concerns three female children: A (born in December 2012), B (born in March 2016) and C (born in May 2017). The children’s mother is ‘G’ who at the relevant times was living with H. A’s biological father is ‘J’. D (born in January 2004) is H’s nephew.
6. The proceedings follow allegations by A that she was sexually assaulted by D at the beginning of 2019, starting at a time when she and her family were staying with D, his mother E and sister F, as they awaited to be rehoused, and during a subsequent visit that D made to A’s new family home when the three girls were present.
7. The Recorder found A raised these allegations with G between October 2019 and 12 December 2019. G spoke to J on 12 December 2019 and took A to see him on the following day where A repeated or made similar allegations. J covertly recorded part of the three-way conversation that took place. The recording has subsequently been professionally transcribed and is cited in full in the Recorder’s judgment.
8. J reported A’s allegations to the police on 17 December 2019. That evening H went to the home of E, D and F and informed them that A had made allegations that D had raped her. D denied that anything had happened. On the same evening, H also spoke to A, who repeated or made similar allegations to him. The Recorder found that H had not provided a consistent account of precisely what A said to him on this occasion and “*because it took place on the eve of [A’s] first interview with professionals ... what [H] said to [A] and the manner in which he questioned her could influence her subsequent accounts*”.

9. H accepted that after being informed of the allegations by M, his initial reaction was to wait until after Christmas and to have a family meeting before informing the police. He envisaged that A would make her allegations in the presence of D and the rest of the family and would be asked questions, D would then respond, and thereafter a joint decision would be made about referring the matter to the police.
10. A was interviewed at school on 18 December 2019 by police officers, a social worker, and teacher. Good practice in recording the critical details that emerged from this meeting certainly was not observed. There were extremely poor notes of the interview and no complete record was made. It appears that A made further allegations in this interview, suggesting that D had come to her home the previous Saturday, 14 December 2019. As a consequence of this latest allegation, all three children were taken into police protection that afternoon.
11. A was medically examined on 18 December 2019 in accordance with her allegations. Nothing abnormal was detected on external and internal anal-vaginal examination.
12. In her ABE (Achieving Best Evidence) interview on 19 December 2019, A made further allegations, including the claim that D had put his penis into her mouth and ejaculated on an occasion when he visited her home.
13. D was interviewed by police on the same day. He denied the allegations.
14. The Local Authority issued care proceedings on 11 February 2020. On 19 February, the children were made the subject of interim care orders.
15. G and H subsequently separated. H went to live with E, D and his older sister, 'K', in April 2020 whilst he searched for alternative accommodation.
16. D was rightly made an intervenor in the proceedings. An intermediary was instructed on his behalf. The Recorder's understanding, as recorded in her judgment, was that D required an intermediary *'because his ability to deal with large amounts of information and understanding of certain language and concepts including court terminology is limited by reason of his age.'* Questions that were intended to be put to him in cross examination were directed to be submitted in advance to the intermediary to ensure they were phrased in an appropriate way for him to understand and to then be approved by the Recorder.

Findings of fact and threshold conclusions

17. The Local Authority inter alia sought three findings of fact against D and a finding of fact against H that he failed to take any protective action once he became aware of the allegations in December 2019.
18. So far as is relevant to these appeals, on 9 December 2020, the Recorder found, that:
 1. D had anally raped A on multiple occasions during January and February 2019 at his home and once in April 2019 in the garden of A's home when he had also orally raped her and ejaculated into her mouth.

2. H did not know or suspect that D was sexually abusing A at the time, but once he became aware of A's allegations he did not take any protective action. His response to the allegations, as indicated above, had been inappropriate.
3. If A knew that H had been living with D since April 2020, this message would be *'potentially emotionally harmful'*.

19. As to threshold:

1. The relevant date was 18 December 2019, when the children were taken into police protection.
2. A had suffered significant physical, emotional, and sexual harm at the hands of D.
3. H was likely to fail to protect A, B and C from future sexual abuse by a person or persons unknown and was likely to cause them significant emotional harm.
4. The threshold was crossed in respect of B and C, *'by virtue of them being in their parents' care at the relevant time'*.

Decision under appeal

20. The Recorder, rightly in my view, was critical of the conduct and recording of A's interview at school on 18th December 2019. It was described as *'poor police and social work practice given the centrality of [A's] allegations and this being her first account to professionals.'* However, the Recorder was satisfied that a proper record of A's answers had been made by the teacher who was *'conscientious and competent'*. Nevertheless, the judge concluded that in the absence of a record of the questions asked it *'sound[ed] a clear need for caution in my assessment of [A's] allegations.'*
21. The Recorder concluded that H was likely to have first learnt of the allegations on 16th December directly from A. The Recorder regarded H as being unable to place A's needs before those of D and interpreted his visit to D's home on 17 December 2019 to have alerted D and thereby given him time to prepare what he would say to the police.
22. The Recorder decided that the questions of whether A had been sexually abused and, if so, by whom, were inextricably linked. The only person whom A had ever accused of sexually abusing her was D: it would be illogical to find A's description of what had happened to her to be credible, but not her identification of the perpetrator.
23. The Recorder gave little weight to the lack of supporting medical evidence. By the time A was physically examined, the forensic window had long passed. Although no-one had noticed any change in A's behaviour in January or February 2019 consistent with her being sexually abused, reactions would differ with each individual child. She could find no motive for A to make up the allegations nor was this a case in which any of the adults had an interest in prompting false allegations to serve their own ends.

24. The Recorder recognised that there were inconsistencies in A's account. The number of times the sexual abuse was alleged to have occurred at D's home ranged between 11 and 24, which the judge recognised as an *'improbably large number.'* A had also alleged on one occasion that the sexual abuse in the garden had happened on 14 December, although the covert recording taken by J indicates that A must have been referring to D's visit in April 2019. The Recorder concluded that either A was lying or had made *'a mistake of such magnitude that it shows she is not a reliable reporter'*. However, she had also considered that since A was questioned on her allegations *'at least 4 times in 6 days'*, a more serious concern was the risk that A was *'embellishing things and adding details in an effort to get people to believe her'*.
25. The Recorder found the level of detail which A included in describing what D did to be a *'striking'* feature of the case. She had not deviated from her first allegation that D had only ever penetrated her anally. She had demonstrated how D clamped his hand over her mouth and how this made her feel *'disappointed'*, how D took down her pants and trousers, how she crouched down when D penetrated her anally from behind, and how he then inserted his penis into her mouth and had described what an erect penis looked like, *'drawing an outline with her hands and finger.'* The Recorder reasonably found that *'[m]ost extraordinary of all'* for a girl of her age was A's *'accurate description of ejaculate'*, including *'the look, feel and taste of semen in her mouth.'* The Recorder agreed with what H said in his oral evidence that after he watched the ABE interview, he was left with no choice but *'to accept that [A] was talking about her own experiences and therefore that what she is saying must be true.'* The Recorder acknowledged that there were *'undoubtedly concerns about some aspects of the evidence in this case'*, but *'weighing everything in the balance'* she was satisfied on the balance of probabilities that the Local Authority had proved the first three findings. The *'key considerations for [her] which tip the balance'* were that she could find no propensity nor motivation for A to lie, nor explanation for A's graphic age inappropriately detailed accounts and descriptions of her experiences and that D had been *'so materially dishonest in his evidence on oath as to cast doubt on the truth of his denials.'*
26. As to this last issue, the Recorder said that in the recorded police interview, which she had listened to, and in his examination in chief D was *'very convincing'*. However, during cross-examination he had become *'increasingly less credible'*, The Recorder found five separate instances when D had invented things to *'cover himself and to explain away what [A] says'*:

"[164] The first is his claim in his interview that [G] says [A] tells lies. In her oral evidence the mother emphatically denies this. In his oral evidence [D] says that it was not her who said this to him, it was [H] who said [G] says [A] tells lies when he came round on the Tuesday evening. As I have said, [H] gave evidence last and he denies saying any such thing. The second is starting to say that [A] had grabbed his penis and then saying when she dropped her hand from her eyes during hide and seek it accidentally hit his groin area over his clothes.

[165] The third instance is what he says about using the toilet in front of [A] and [B] when his aunt was bathing them. When I first read the papers, I was surprised given what I had read about the mother worrying about sexual abuse that she had allowed [D] to do this. However, in her oral evidence she

agrees that she did, but that she pulled the shower curtain round so that the girls could not see him. In his oral evidence [D] said [A] did see his penis and he demonstrated her pulling back the curtain with 2 fingers and peeking. That is not the account he gave in his interview or witness statement where he makes no mention of a curtain.

[166] [D's mother E] said she did not know about [D] using the toilet when the mother was bathing the girls and said she was very surprised the mother had allowed that to happen. [F] said she knew about the incident. On probing she said she only found out about it from [D] in October 2020 after she had gone back to university which suggests that they had been discussing her evidence and he was telling her things she might be asked about.

[167] The fourth instance is what he says about being asked to wash the girls in the bath. I believe the mother when she says that she did not ask [D] to do this because it seems so out of character and moreover is reinforced by [his mother] who did not know about it and said that she thought it was highly improbable the mother would ask [D]. [F] said it had happened and she had gone to check on [D] that the water was the right temperature, and everything was OK.

[168] I am afraid that I did not believe either [D] or [F] about this. If the mother was busy with [C] and needed to ask somebody to bath the girls and [F] was available, she would have asked her. Everybody says that the mother saw to all the girls' needs and managed successfully on every other day to juggle these without asking anyone else to step in. [D] suddenly said that he remembered they had Sanex soap because [G's] evidence reminded him of this, which I consider to be a detail he added to bolster his story but had the opposite effect because the mother had quite clearly said that he did not bath them.

[169] The fifth and most striking instance is the story about going to the toilet in the garden at [A's address], which was so convoluted and nonsensical that it has to be a lie. Essentially, [D] said in his oral evidence that after they had been in the living room for a while it was boring, and he asked [G] for the key to the door to the garden (which is in the living room) and they went out in the garden to play. That part I do believe. Later on when questioned by Ms Brown about going to the toilet he says that had happened first, he had gone to the downstairs toilet, started to urinate, realised it would not flush, stopped urinating mid-stream, asked [G] for the key, told her he was going out to play with the girls, opened the door, left the girls in the living room, went into the garden, urinated by one bush, came back inside and then went out with the girls later on and they played hide and seek by another bush but the game only lasted for 5 seconds."

27. The Recorder dismissed F's evidence which supported D's account in relation to the third and fourth incidents referred to above and more generally, on the basis of collusion.

28. She then went on to say:

“[170] ‘Were it not for those instances of [D] being untruthful, his demeanour and / or the inferences I can draw from the circumstances as described by him and [A] would carry little weight. However, there are four considerations which lead me towards the conclusion that the only explanation that exists for his lies is guilt.”

[171] Firstly, [D] is a boy now 16 facing very serious allegations when he was 15, and I would at some point in his police interview or in the courtroom have expected to have seen at least a glimmer of anger, outrage or indignation. I heard that from his mother who said with great feeling that she wished she had left [G] and her children out in the cold, but not from [D].

[172] Secondly, as Ms Brown pointed out, [D] declined to watch the ABE interview and when asked by DC Clifton at the end of the interview “Did you ever cause her any injuries by putting your penis inside her vagina or her anus?” he does not give a straight denial, but says “No, I’ve never put anything inside her.”

[173] Thirdly, having said that he normally likes to sleep in if he can, why did he go to [A’s home address] at 8.00am instead of going later and ringing to check if the food was ready before setting off? The inference is he was looking for an opportunity to abuse [A].

[174] Fourthly, why did he insist she sat on his lap in the lounge when they came in from the garden? The inference is that when the mother emerged from the kitchen with the food, he wanted to make sure that [A] did not say anything to her. “

The Appeals

29. D, through Mr Bagchi QC, submits that the Recorder erred in her approach to his oral evidence and that the conclusions she drew from the lies she determined he had told were unsafe. Accordingly, the court should set aside the findings and remit the allegations for a rehearing.
30. Mr Bagchi QC draws specific attention to the intermediary’s report, critical aspects of which he submits demonstrably were not fully assimilated by the Recorder in her analysis of D’s evidence, namely:
 - i. D presented with difficulties in processing and retaining verbal information, particularly when it contained dense, precise detail.
 - ii. D found it difficult to challenge an incorrect statement phrased as a question. His ability to answer complex questions in court might be affected by their length and his emotional response.
 - iii. D sometimes answered questions in haste which led to him curtailing his utterance midway before re-framing his thoughts in a new sentence.
31. The Recorder had made insufficient allowance for D’s age, lack of familiarity with the court setting and the likelihood that he would have found the process of giving oral evidence intimidating and destabilising.

32. Further, after ground rules were agreed, counsel for the local authority had failed to provide written questions sufficiently in advance for them to be viewed by counsel and properly considered by D's intermediary. He had asked free-style questions, said to be follow up questions without check by the Recorder.
33. He argues that the Recorder, placed too much weight on D's oral evidence and the credibility of his denials in her overall assessment and thereby had reversed the burden of proof.
34. The five lies identified by the Recorder, taken at their highest were insufficient to establish guilt. Her assessment was flawed in so far as she relied upon the evidence of G and H, whom she had concluded were both unreliable witnesses. Otherwise, the Recorder had also failed to consider whether there had been confusion or misinterpretation. In short, the Recorder had enunciated the mantra of a Lucas self-direction in her judgment but had failed to apply it accordingly.
35. There was no logical connection between the five lies identified by the Recorder and the four considerations which led her to conclude that the only explanation for the lies was guilt. The case demonstrates the need for '*a more careful approach*' towards child intervenors. He relies upon the Advocate's Gateway toolkits and lists the considerations which he submits the court should be obliged to consider when assessing the credibility of answers given by child witnesses in oral evidence, and the implications of any lies which the child is found to have told.
36. H, through Mr Presland, cites *Re L-W Children* [2019] EWCA Civ 159 in support of the principle that it is for the local authority to prove that there is a necessary link between the facts upon which it relies and its case on the threshold for the purposes of s.31(2) of the Children Act 1989. The local authority must establish why, by reason of those facts, the child has suffered or is at risk of suffering significant harm bearing in mind that nearly all parents will be imperfect in some way or another. Further, in *Re G (Children)* [2001] EWCA Civ 968, Hale LJ, as she then was, made clear that at the welfare stage, the court may consider all the information available at the date of the hearing in applying s.1(3) Children Act 1989. However as far as the threshold is concerned, such evidence cannot be relied upon unless it is capable of showing what the position was at the time of the initial application for a care order.
37. The Recorder concluded that H was most likely informed of A's allegations on the afternoon of 16 December 2019. He submits there was no evidence that A suffered significant harm, or was likely to do so, between this date and 18 December 2019, when A was accommodated pursuant to section 20 of the Children Act 1989. Moreover, H's response, recorded in his interview with a social worker on 19 December, was that he accepted A's account. As of 18 December 2019, there was '*no real likelihood*' that he would fail to protect any of the girls from such abuse in future. H had been faced with unprecedented circumstances and although his immediate response was rightly criticised, it nonetheless was not carried through and did not amount to likelihood of harm of failure to protect his daughters from future sexual abuse. H's residence with his sister, E, was sanctioned by the police. He did not discuss the case with E or D. There was no evidence that A knew or was disturbed by the knowledge of where H was living.
38. The Local Authority defends the Recorder's assessment of D. Miss Gilliatt argues that appropriate allowance was made for D's age and maturity and the guidance to be derived from in *Re W* [2010] UKSC 12 at [27], the Advocacy Gateway and the FJC

2011 Guidance on Children Giving Evidence was applied. Whilst she does concede in written submissions that, with regards to the intermediary's report the Recorder, '*could perhaps have said a little more...it does not seem that there was anything much more she needed to say...She gave herself a perfectly appropriate Lucas direction*'.

39. Miss Gilliatt also concedes that it is '*not altogether clear*' what the Recorder meant by her statement at [170] and specifically by the inclusion of A in this paragraph. However, in the context of the judgment as a whole, any lack of clarity in this paragraph does not undermine the validity of the Recorder's conclusions.
40. The Recorder was entitled to consider whether the four factors she identified thereafter supported or undermined a conclusion that D's lies could only be explained by his guilt. The first consideration appeared to contradict the Recorder's indication that she did not take anything from D's demeanour, but this factor could be removed from the judgement '*without unseating the overall conclusion in relation to [D] or its validity*'. Further, the Recorder "*could perhaps have said more ...linking her strands of thinking in relation to lies and general credibility points* but the fact that she did not do so does not undermine the '*soundness of her overall analysis*' or suggest that she was in error in her conclusions.
41. In oral submissions, Miss Gilliatt conceded that she was on weaker ground regarding the appeal of H. However, H's response to the allegations were not protective of the children in his care. The finding that he is likely to cause emotional harm is on more '*solid ground.*' In the alternative, the Respondent's conclusions in respect of H can still stand as '*findings relevant to the welfare stage where the impact of them on parenting capacity can be explored.*'

Analysis and conclusions

The Appeal of D

42. As the single judge, I granted D permission to appeal on only one of his drafted grounds, namely:
"The learned judge was wrong to find that the intervenor had lied to the court in the witness box on five occasions and did not make sufficient allowance before [sic] the fact that he is a child facing extremely serious allegations in the unnatural setting of a courtroom and the extent to which the process (albeit with the assistance of an intermediary) might cause him to react to probing questions. The learned judge failed to bring into play the learning in Lucas in her assessment of the relevance of the inconsistencies in the intervenor's accounts."
I also considered that the case "illustrates the delicate balance of assessing the evidence of juvenile intervenors" and provided a compelling reason why the appeal should be heard.
43. As to this last point, I agree with the thrust of Miss Gilliatt's submissions. (See [38] above). It would be inappropriate to attempt to define suitable arrangements for vulnerable witnesses, whether by age or disability, as a one size fits all model. The court has a sufficient armoury to ensure that a competent witness is assisted in giving their best evidence.
44. There was absolutely no reason why D would be classed as incompetent to give evidence, nor otherwise anything to suggest that he had any characteristics that meant

it would be contrary to his welfare to do so; quite the reverse, for he apparently requested that he should give evidence and be cross examined by the advocates of all parties who wished to do so rather than, as suggested, by one of them on behalf of the others. Realistically, if D, or anyone of his age had declined to give evidence and be cross examined, then but for special considerations of educational special needs, mental or physical disability, or other good reason, it would be open to a judge to draw an adverse inference after the witness had been given due warning as to the consequences of a party or intervenor of failing to do so.

45. No criticism is made on D's behalf of the 'arrangements' devised to assist him in giving his evidence. D had the support of an intermediary. He was represented by Leading and Junior Counsel. The Recorder ensured that he had regular breaks. He was urged to seek clarification of questions he did not understand. These special measures were unfortunately thwarted on occasion by the vicissitudes of the IT which led to frequent interruptions by advocates who could not see or hear as internet connection faltered, but generally the system worked well on a practical level. and would have enabled D to maximise the quality of his evidence. Regrettably, it seems to me upon reading the transcript of his evidence that there was rather less adherence to the advice given in the intermediary's report in terms of the structure of some of the questions asked in cross examination.
46. The Recorder's summarises her understanding of the intermediary's report at [162] of her judgment, namely that D required an intermediary "not because he has communication difficulties but because his ability to deal with large amounts of information and understanding of certain language and concepts including court terminology is limited by reason of his age". There is no suggestion in her judgment that, having seen D give evidence, the Recorder had reached any contrary views to those of the intermediary regarding his expressive or descriptive abilities and which, I note, appear to be in line with the description of a teenager's manner of understanding and response given in the 'Advocates Toolkits' 8, at 1.1, and 6, at 5.12 and 6.1.
47. D was 16 years and 10 months old at the time of giving evidence before the Recorder. He was 15 years 11 months when interviewed by the police in relation to matters that were alleged to have occurred between 8 and 12 months previously. Save for the one specific allegation, which it transpired related to April 2019, the other allegations were not particularised beyond being anal rapes which occurred at D's home and were unspecified in number. As with any other witness, and regardless of age or maturity, it may be thought that he would have difficulty in making other than a general denial to the latter. Indeed, his case throughout was one of general denial rather than making a contrary case in answer to A's allegations whether by suggesting alibi or that A had misunderstood his behaviour towards her.
48. Transcripts of evidence were obtained and filed with this Court subsequent to permission being granted. Whilst we were not referred to them extensively in oral argument, the arguments upon which Mr Bagchi QC relied (see [30]- [35] above) made it incumbent in my view that we should have regard to the whole transcript of D's evidence. I found it to be instructive.

49. Mr Bagchi QC rightly acknowledged the difficulties he would have in persuading this Court to overturn findings of fact; the occasions when it does so will be far and few between and for good reason. Due deference should be afforded to the Recorder's findings of fact, and the advantage she would have in "actually hearing and considering [D's] evidence as it emerges" See *In re B (A child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 @ [53], and further at [108], and [200]. That said, I have difficulty in identifying the evidence which supports the finding made in some of the instances to which she refers, and, in some others, there appears to have been little regard paid to the factors identified by the intermediary regarding D's oral delivery and use of imprecise vocabulary or terminology. However, we did not hear full argument on this point and in my view, this appeal does not depend upon a disregard for the Recorder's findings, rather the reverse. She found it necessary to look for evidence in support of the Local Authority's case and sensibly, in light of the exercise of her judgment in that regard, gave herself what she referred to as a Lucas direction. In reality this appeal is therefore centred on her application of the Lucas principles.
50. It is pertinent to observe that there can be a significant difference between fact finding hearings in the civil and family courts. In the former, the tribunal determines the dispute upon an assessment of the witnesses' evidence which, if challenged, is subject to oral cross examination. It is possible in such circumstances for the judge to decide the issue on the basis of their assessment of the witnesses and the evidence they prefer, subject to the burden and standard of proof. In the family jurisdiction, there are many cases which involve challenge to a child complainant's allegations of sexual abuse, but in which the child is rarely, and too rarely in my view, called to give evidence despite their competence and in light of the decision in *Re W* [2010] UKSC 12. In these cases, there is often an absence of independent direct or forensic evidence that supports the case.
51. No doubt the continued roll out of section 28 of the Youth Justice and Child Evidence Act 1999, which commenced in 2019 and enables the pre-recording of the cross examination of, amongst others, a child witness will equally benefit the family courts, as it will and has done in the criminal courts. However, in the meantime the tribunal must balance the evidence of a child complainant, which is not directly challenged in cross examination, against the evidence of the alleged perpetrator whose evidence invariably is.
52. It is quite possible that the tribunal may conclude that, in the particular circumstances of the case, the integrity and substance of the uncorroborated evidence of a child complainant is sufficiently compelling to lead them to determine that the alleged perpetrator's denials must be a lie. In others the tribunal may reasonably determine that it is incumbent to look for other evidence in support.
53. In this case the Recorder had the unenviable task of determining whether she was satisfied on the balance of probabilities that A had been sexually abused by D, himself a juvenile. The waters had been muddied by late reporting by A, or lack of appreciation or ignorance of earlier complaints by G, and thereafter by inexpert and repeated questioning of A and deficient recording of her allegations which may have led to inconsistency or "story creep". There was no independent direct, or corroborative medical, evidence. The Recorder watched the ABE video recorded

interview of A and had read what she had said to J in the transcribed record of the covert recording he made. As indicated above, D denied any of the wrongdoing alleged and, so the Recorder said, was initially at least plausible in his denials. However, the Recorder made clear that she found his credibility to be undermined in the several respects referred to in [26] above and gave herself what she said was a ‘Lucas’ direction. I take this to signal implicitly that she would have found herself in difficulty in making the findings the Local Authority sought on the basis of A’s evidence alone and am confirmed in this view by the Recorder’s explicit reference in [177] of her judgment, to which I return below, as to the significance of D’s lies in her ultimate determination of fact.

54. That a witness’s dishonesty may be irrelevant in determining an issue of fact is commonly acknowledged in judgments, and with respect to the Recorder as we see in her judgment at [40], in formulaic terms:

“that people lie for all sorts of reasons, including shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure and the fact that somebody lies about one thing does not mean it actually did or did not happen and / or that they have lied about everything”.

But this formulation leaves open the question: how and when is a witness’s lack of credibility to be factored into the equation of determining an issue of fact? In my view, the answer is provided by the terms of the entire ‘Lucas’ direction as given, when necessary, in criminal trials.

55. Chapter 16-3, paragraphs 1 and 2 of the December 2020 Crown Court Compendium, provides a useful legal summary:

“1. A defendant’s lie, whether made before the trial or in the course of evidence or both, may be probative of guilt. A lie is only capable of supporting other evidence against D if the jury are sure that: (1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake; (2) it relates to a significant issue; (3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D’s guilt. 2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D’s lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt. ...”

56. *In Re H-C (Children) [2016] EWCA Civ 136 @ [99]*, McFarlane LJ, as he then was said:

“99 In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the “lie” has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.

100 ... In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt.”

57. To be clear, and as I indicate above, a ‘Lucas direction’ will not be called for in every family case in which a party or intervenor is challenging the factual case alleged against them and, in my opinion, should not be included in the judgment as a tick box exercise. If the issue for the tribunal to decide is whether to believe A or B on the central issue/s, and the evidence is clearly one way then there will be no need to address credibility in general. However, if the tribunal looks to find support for their view, it must caution itself against treating what it finds to be an established propensity to dishonesty as determinative of guilt for the reasons the Recorder gave in [40]. Conversely, an established propensity to honesty will not always equate with the witness’s reliability of recall on a particular issue.
58. That a tribunal’s Lucas self-direction is formulaic, and incomplete is unlikely to determine an appeal, but the danger lies in its potential to distract from the proper application of its principles. In these circumstances, I venture to suggest that it would be good practice when the tribunal is invited to proceed on the basis , or itself determines, that such a direction is called for, to seek Counsel’s submissions to identify: (i) the deliberate lie(s) upon which they seek to rely; (ii) the significant issue to which it/they relate(s), and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. The principles of the direction will remain the same, but they must be tailored to the facts and circumstances of the witness before the court.
59. For the purpose of this appeal, despite the misgivings I express in [49] above, I proceed on the basis that the Recorder was entitled to find the lies or inventions that she did, as set out in [26] above. Further, although the judgment is silent on this point, I assume for the purpose of this appeal that the lies do go to a significant issue, not least because the Recorder describes D as “materially dishonest” (my underlining) in [177] of her judgment.
60. The third element of the Lucas direction is no less important than the first two, and even in the terms of the restricted direction articulated by the Recorder, is patently a crucial component. The Recorder unequivocally indicates in the second sentence of [170] that the reasons she finds the lies to be indicative of guilt are set out in [171] – [174] of her judgment.
61. In my view none of the reasons the Recorder gives can withstand critical scrutiny. There is no logical connection between the conclusions she draws about his demeanour or the inferences she drew from the evidence which fixes the five ‘lies’ as made through “realisation of guilt and a fear of the truth”. See *R v Lucas (Ruth)* [1981] QB 720 @p 123 H.
62. Indeed, the four specified ‘considerations’ cause me considerable further disquiet. The Recorder’s interpretation of D’s demeanour in the witness box, or during

interview, would be highly concerning if he were the most seasoned adult witness, rather than a juvenile being interviewed and giving evidence for the first time. A jury would be firmly told, and for good reason, that the presence or absence of emotion or distress when giving evidence is not a good indication of whether a person is telling the truth or not. Equally so in police interview.

63. It is not clear to me where D's stated 'refusal' to view the video recording of SH's allegations arises from the evidence. There is no suggestion that he was invited to view the video by the police in the course of his interview. When asked by Counsel for the Guardian if he had done so, he said he had not but had read the transcript. This question and answer appear to have been miscategorised. In any event, I do not understand why a refusal to view the video is indicative of guilt. I regret that I also consider that the Recorder has over enthusiastically embraced what appears to have been a submission made by the same counsel as to his "lack of straight denial". This is not realistic, nor entirely accurate. It seems to me to be 'scraping the barrel'.
64. The inference drawn by the Recorder that the reason D went in the early morning to A's house without telephoning in advance to ensure that the food he was to collect would be ready, was to provide him with a better opportunity to sexually abuse A is nothing more than speculation, against which a jury would be warned.
65. The interpretation of A sitting on D's knee is dependent upon the Recorder finding D to have lied on this point, for he denied in evidence that she had done so. The Recorder obviously preferred the evidence of A on this point, but this lie does not logically fix the other 'inventions' as indicative of guilt.
66. I do not consider that this Court can or should ignore these four paragraphs or to regard them as irrelevant to the judgment as a whole. There is undoubtedly evidence upon which findings of sexual abuse could be made, but that is not for this Court to determine without regard to all of the evidence. These are very serious allegations which will, if proved, 'follow' D throughout his adult domestic and professional life. Findings of fact in the Family Court are to be made on the balance of probabilities but should be subject to a similar forensic rigour as deployed in the criminal courts.
67. Specifically, I do not accept Miss Gilliat's submission, made in response to a question posed by my Lord, Arnold LJ, that you could remove paragraphs [170] to [174] and the judgment would stand up perfectly well. This would be to diminish the foundation of the Lucas direction and to effectively require this Court's to substitute its own conclusions as to why the lies could only be indicative of guilt. I do not consider that it is possible to do so in a vacuum, and certainly not without reference to the transcript to examine the context of the 'lies' upon which, as I indicate above, we did not hear full argument.
68. I am not satisfied that but for D's 'lies' that the Recorder would have made the findings against him. The first sentence of paragraph [170] of the Recorder's judgment, (see [28] above), is difficult to comprehend, but the Recorder makes clear what weight she placed upon the lies in [177] of her judgment, namely:

“.... The key considerations for me which tip the balance so that I am satisfied that it is more likely than not that [A] was sexually abused by [D] are: firstly, I can find no propensity for [A] to lie and no motivation, secondly, I can find no explanation for [SH’s] materially consistent, cogent and graphic accounts apart from that the person whom she accuses of sexually assaulting her did so in the way she describes and thirdly, the person she accuses has been so materially dishonest in his evidence on oath as to cast doubt on the truth of his denials.”

69. I read this paragraph to indicate that D’s ‘lies’ were equally significant to the Recorder’s findings, as were her assessment of A and the nature of the allegations she made. Consequently, if the ‘lies’ are removed from the equation, as I consider they must be in the absence of any reason to find that they can only be indicative of guilt, the findings of sexual abuse are inevitably vitiated.
70. Subject to my Lords, I would allow his appeal and remit the matter for a case management hearing in respect of a rehearing of this discrete issue.
A is placed with J. The case against G and H does not depend upon the validity of the allegations against D, but rather their reaction to A’s disclosure. I would direct that this hearing take place before another Judge nominated by the Family Division Liaison Judge. In coming to that view, I do not seek to suggest that the Recorder would do other than apply herself scrupulously to the task in hand and would wish to indicate here that the construction of her judgment indicates the care and attention she otherwise applied to this difficult case.

The Appeal of H.

71. I would allow this appeal. I find the conclusions the Recorder made regarding the threshold criteria as recorded in [19] numbered 3 and 4 above, have unquestionably overreached the findings she made against H. I would set them aside.
72. In her supplementary judgment handed down on 17 December 2020, the Recorder reiterated her view that there was a connection between the facts found and the risk alleged which led to her conclusions. She rejected the submissions of Mr Presland that this was a ‘bolt on’ to the central issue of perpetration (See *Re L-W Children [2019] EWCA Civ 159 @ [64]*) for the following reasons:

‘ Put simply, my concern is that if the same thing happened all over again to [any of the girls] and it was another family member or a complete stranger the whole way ...[H] dealt with things and treated [SH’s] allegations is indicative that [he] would not safeguard any of the girls from being sexually abused and / or suffering the consequences of being sexually abused and / or from suffering significant emotional harm.’

73. I am unable to comprehend the Recorder’s reasoning in this regard. The leap from finding H’s reaction to the sexual abuse allegations to be inappropriate, whether by raising his voice to A in demanding to hear her confirm the allegations or his expressed intentions to arrange a family confrontation before involving the police, to concluding that he would fail to safeguard ‘the girls’ from sexual abuse from other family members or a person unknown in the future is illogical and unfounded.

74. The Recorder made findings that H was not aware of the sexual abuse she found to have occurred until the evening of 16 December 2019. The children were removed on the 18 December 2019 into police protection. H's case was, and continues to be, that he accepted the veracity of the allegations made by A. He acknowledged that his intention to have A confront D was ill advised and wrong and in conversation with the social worker he advised the mother to focus upon what A was saying rather than D on the 19 December. His obvious knee jerk reaction to the allegations were not child-centred but there is no evidence that they did cause significant harm, and the likelihood that they would do so was forestalled by the removal of the children. The assessment of his better understanding and judgement if any like situation were to arise in the future is still to take place.
75. H was an imperfect parent in his instinctive response, but the principle recited by Aikens LJ in *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2016] 1FLR 1 @ [56], 'to bear in mind that nearly all parents will be imperfect in some way or other' should serve as an important reminder to judges that they should not adopt a model of perfection against which to assess the parent's asserted shortcomings. It appears to me that the Recorder is likely to have fallen into error in this respect so far as H was concerned, as may be demonstrated by the adverse inference she drew concerning H's living arrangements from April 2020, divorced from the reality of his personal circumstances in which he found himself, the advice he received from the police and the exigencies of the pandemic.
76. Mr Presland readily concedes H's reactions at the time, and subsequently, will be open to legitimate review at the welfare hearing but this is not to render the outcome of his appeal academic. I accept Mr Presland's submissions, that the nature of the finding as to threshold was premature and is likely to adversely inform the Local Authority's relationship with H and prejudice his future application to have care of B and C.
77. Subject to my Lords, I would allow this appeal with directions that, regardless of any directions made in the further case management hearing regarding D as referred to in [70] above, the welfare hearing in which H seeks to resume care of B and C should proceed with all due haste, and subject to allocation by the Family Division Liaison Judge.

Baker LJ:

78. For the reasons given by Macur LJ, I agree that the appeals in this case should be allowed with the directions proposed in paragraphs 70 and 77 of my Lady's judgment.

Arnold LJ:

79. I am grateful to Macur LJ for setting out the facts and issues in this troubling case. I agree that H's appeal should be allowed for the reasons Macur LJ gives and have nothing to add. I am also reluctantly and narrowly persuaded that D's appeal should be allowed for the reasons Macur LJ gives.
80. There are four reasons for my hesitation. First, the Recorder had the advantage of seeing and hearing the witnesses give evidence (albeit that A was not cross-examined) over an eight day hearing, and she delivered a careful judgment running

to 188 paragraphs in which she methodically analysed all the evidence in detail. Secondly, D does not allege that the Recorder made any error with respect to the first two reasons she gave for her conclusion at [177] (quoted in paragraph 68 above), but only with respect to the third reason. Thirdly, no doubt as a consequence of the previous point, D does not suggest that this Court should reverse the finding made by the Recorder, but only that it should order that the issue be re-heard. Fourthly, it is not suggested that any fresh evidence will be available at such a re-hearing. It follows that the court tasked with carrying out such a re-hearing will be faced with the precisely the same question of whether to believe A or D.

81. As my Lady has explained, the problem with the Recorder's judgment is what she said at [170]-[174].
82. The first sentence of [170] is incomprehensible. It may be that some words were accidentally omitted, but it would be wrong for this Court to speculate as to what the Recorder meant to say. She ought to have been asked to clarify this sentence, but that did not happen. In those circumstances, I do not consider that the incomprehensibility of this sentence justifies interfering with the Recorder's findings.
83. The second sentence of [170], however, is a clear statement that "there are four considerations which lead me towards the conclusion that the only explanation that exists for his lies is guilt". As my Lady has explained, the four considerations identified by the Recorder at [171]-[174] (quoted in paragraph 28 above) do not justify this conclusion. The first is a pure question of demeanour. The second treats the wording D used in his denial as having a significance which it cannot bear. The third is speculative. The fourth ignores his denial in the absence of a finding that that denial was a lie. Moreover, there is no logical connection between these considerations and the conclusion that the five lies that the Recorder found D had told in his evidence were indicative of guilt.
84. If [170]-[174] were excised from the Recorder's judgment, it would be unassailable. Does the inclusion of these paragraphs taint the rest of the Recorder's reasoning? The argument for the local authority is that it does not: the Recorder gave two solid reasons at [177] for accepting A's evidence which are not challenged; and, having regard to the five lies she found D had told, her third reason stands up even if she was wrong to regard it as supported by the four considerations set out in [171]-[174].
85. Although I have waived, I have ultimately concluded that I do not accept this argument because one cannot get away from the fact that the Recorder expressly stated in [170] that it was the four considerations listed at [171]-[174] which satisfied her that D's lies were only consistent with guilt. Regrettably, therefore, the issue must be re-heard.