

ENGLAND AND WALES / JUDGMENT

CF v CM (Finding of Fact Judgment 2)

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Judgment of District Judge Webb following the Second Finding of Fact hearing which took place on 4 and 5 December 2024

1. On 13 December 2023 I handed down judgment following a finding of fact which took place on 20-22 November 2023. At that hearing I made findings that the father had carried out an act of sexual abuse of his daughter X as alleged by the mother.
2. On 22 January 2024, the father applied for forensic analysis of the mother's devices contending that such analysis would demonstrate the evidence provided by the mother at the fact-finding hearing was untrue. On 29 February 2024, the father applied to reopen the finding of fact. On 4 March 2024 I approved the application ordering the analysis to take place with it conducted by a firm called Cyfor. It was subsequently indicated by the mother that she had lost her phone.

3. On 13 August 2024 I ordered that all adverse findings against the father and all positive finding about the mother be set aside and there would be a rehearing of the allegation of sexual abuse. In that order I directed that the mother provided responses in relation to the following issues:
 - a. When and how she lost her phone.
 - b. Whether it was insured and whether she has made a claim for a replacement.
 - c. When she notified the phone provider that she had lost her phone and whether and when the number was blocked to prevent its use, with documentary evidence of the same.
 - d. Whether she has a 'find my phone' option available and whether she attempted to use this. e. I asked her to provide evidence of the purchase of a new phone including the receipt. f. I asked her to produce copies of messages telling friends and family that she had lost her phone and evidence that she had provided her contacts with her new number.
 - g. Whether she notified the school of her new contact details and if so, provide evidence of this. h. I asked her to provide evidence of the new contract with a new phone provider. i. j. I asked her to provide evidence that her old contract was brought to an end. I asked her to evidence that her iCloud account was deactivated and to explain whether she downloaded all information from her account prior to deactivation and if not, why not.
 - k. Whether she attempted to reactivate her iCloud account and provide evidence of this.
 - l. Provide details of the new phone she is now using to include the IMEI numbers.
 - m. Whether she had any backups taken from her old phone and if so where are the backups held. n. I asked her to confirm what the recording of X showed, why she failed to disclose this in proceedings when asked and explain why she denied the existence of such a recording in evidence. 4. In determining how to proceed I have been guided by the judgment of Lord Justice Peter Jackson in CTD (A Child: rehearing) [2020] EWCA Civ 1316 in particular the following paragraphs;
12. In my view the concepts of 'a starting point', 'strong' evidence, 'making the running' and 'an evidential burden' which have ebbed and flowed in the distinguished judgments that developed the ground rules in this area, can now be laid aside as adding nothing and as being a possible source of misunderstanding. Of course, the product of the rehearing will be that the earlier finding should or should not to be changed, but it is only in that very limited sense that the original finding is the starting point. Likewise, the original evidence was clearly strong enough to justify the original findings, but to describe evidence as strong before it is reconsidered is to beg the question that has to be decided. Lastly, concepts of 'making the running' and of an 'evidential burden' apply at the first stage (when securing a rehearing) and may do at the second stage (when persuading the court that a particular issue needs to be revisited). By the time of the rehearing itself the applicant will already have made the running by successfully adducing evidence to persuade the court to carry out an

appropriate kind of rehearing and there is no need for further safeguards against unwarranted challenges to settled findings.

13. Accordingly, the simple position is that when it carries out a rehearing the court looks at all the evidence afresh and reaches its own conclusions, requiring the party seeking the relevant findings to prove them to the civil standard in the normal way. The practical arrangements for the hearing may well be influenced by what occurred in the earlier proceedings, but insofar as the concepts mentioned in the previous paragraph might suggest that a rehearing is in principle a different process to an ordinary factfinding hearing, that would be wrong. In saying this, I am reassured that there is no indication that any of the concepts have played any noticeable part in the decision making in the reported cases. To take an example, in *Re Q (Fact-Finding Rehearing)* 2019 EWFC 60, Baker LJ (sitting as a judge of the High Court) carried out a rehearing of findings that he had made in relation to a father's responsibility for injuries to a child in respect of which the mother was subsequently convicted at a criminal trial. He referred to the above authorities, assessed the evidence, and stated his conclusion: "104. Drawing all the various threads together and considering the evidence from the criminal trial alongside the earlier material, I conclude on the totality of the evidence that my findings of fact remain unchanged. Having conducted what I hope has been a thorough and comprehensive analysis of the individual areas where it is asserted that there was a change of evidence, and having evaluated that alongside the fact and circumstances of the conviction in the context of the totality of the evidence, I adhere to my original findings as to the perpetrator of the head injuries and my findings that I cannot identify the perpetrator of the rib fractures. ..." In carrying out that rehearing, Baker LJ did not ascribe any evidential burden to the father. Instead, he identified the new material in the context of the evidence on which the original findings were based, and he synthesized all of the evidence in order to reach his conclusion. 5. I do not propose to set out the legal framework further as it appears in my earlier judgment. The only witnesses called at this rehearing have been the mother and the father and the only allegation to be reconsidered is allegation d. Before considering the evidence provided it is necessary to set out why I considered a rehearing necessary.
6. Paragraph 4 of my judgment of 13 December included a detailed chronology setting out the process by which X made allegations. This indicated that on (a date in Spring 2022) "There were discussions between the mother and the father. Here there is a very significant factual dispute, the father states that he was shown a video which whilst not being entirely clear to him demonstrated X was retracting the allegation".

7. The parties' positions at that hearing were that the father maintained there was a recording, the mother was clear there was not. The mother was very clear saying under oath "I have not made any recording except for this one," in this context 'this one' referred to a recording made in Autumn 2022. She further stated, "I did not record X on Saturday night." "There is no such recording." She also stated "I have never been formally asked to produce a recording. The only recording I have is September."
8. The father's solicitors had asked for this recording in the run up to the November 2023 hearing sending an email on 13 June 2023 stating "Whilst we received one recording of X made by your client we are aware there is a second recording in which X withdrew her allegations. Please could we have a copy of that recording." The response dated the same day from the mother's then solicitors stated, "We can confirm that our client has instructed that the only recording taken was the one provided by the police". The father's solicitors pressed the matter in an email dated 14 June 2023 saying "We understand that your client did make a further recording in which X withdrew her allegations. Your client told our client she had made this recording and she played a clip to him." This prompted a response on 15 June where the mother's solicitors stated "We can confirm that we are instructed that our client has not made any other recordings of X regarding these allegations, neither of her confirming or withdrawing them. We instructed that no such recording of X withdrawing her allegations and your client has not been told there was."
9. At the hearing in November 2023, I made a factual finding in relation to whether the suggested recording existed, and I determined it did not. The analysis leading to this conclusion is set out below. "31. Here it is necessary to deal with the suggested first retraction captured by the undisclosed recording. The father asked his solicitors to request such a recording, and they did so in June 2023. He states that at the family home before they held discussions with X, the mother showed him a video of X taken by the mother which appeared to have a retraction of the allegation. The mother denies such a video exists. I note there are several applications which could have been made to forensically examine the phone and they have not been made. I was asked to clarify this point. I was informed that the father relied on the police to carry out an investigation of phones. He was mistaken on this for they did not do so, and I find this in no way undermines the finding that a failure on his part to actively seek out the alleged video was evidentially relevant. In determining whether such a recording exists I need to consider the joint call made on speaker phone to the NSPCC. At no point is it mentioned that a recording existed. In addition, the texts between the parties over the following days take place with the prospect that an arrest might occur at any stage. At no point in those texts does the father request a copy of this clip or refer to it. Significantly, he does visit the home and download the CCTV of the garden, presumably to examine the interaction between the children. As such at an early stage he is collecting electronic evidence. It is totally illogical not to attempt to secure the one piece of evidence which would protect him from these allegations. The absence of any request for this recording lead me to find it never existed."

10. Any finding of fact requires a survey of a broad canvass of evidence but it clear that this finding had a significant impact on further findings. I stated the following: “44. Again, much of the father’s evidence was in relation to the timeline and the sequencing of the allegation being made. Much of this has turned out not to be controversial. The most glaring discrepancy between the accounts was the existence or not of the suggested recording of the first retraction. I have made a decision on that predominantly based on contemporaneous documentary evidence. The father was clear the recording existed and logically I must find this to be a lie.” “57. I have one central witness (the mother) whose testimony I have largely accepted on the key issues. I have a second central witness (the father) whose testimony I have found not to be truthful on two occasions. Most significant in relation to the ‘lost’ recording, but also in relation to the description of the initial repetition of the allegation to him.” It is clear that the finding made that the father was lying about a very specific issue had, at least in part, led me to conclude he was not being truthful about the wider allegations made.
11. The key factual issues now to be decided have simplified to the following.
 - a. Was a recording made of X by her mother at some point in Spring 2022? b. If so, was that recording shown to the father?
 - c. What did that recording contain?
 - d. Where was that recording retained?
 - e. Why was it not disclosed?
 - f. What steps have been taken to either properly disclose the recording or alternatively to hide its existence?
 - g. What was the method and motive of such concealment if established?
 - h. Do any findings made shed any light on the parties’ wider motivations in this matter?
 - i. Finally, how do any conclusions reached affect the factual findings sought?
12. Some of these issues were resolved prior to this hearing and recorded in evidence and

orders.

- a. On 22 February 2024, the mother’s then solicitors emailed the father’s solicitors and stated. “However, my client now instructs that a video of X did exist previously, and I am in the process of taking instructions in respect of this point and will be in a position to clarify matters at next week’s hearing.”
- b. The mother’s solicitors withdrew from representing her at the hearing on 4 March 2024 and as such there is no recording of this change in the order but in her statement dated 23 September 2024 the mother stated: “I cannot recall what the recording of X consisted of in its entirety. For me to try and guess her words, over 2 years after would be unjust and

unreliable evidence. I remember trying to have a conversation with X, to understand what may have happened. I recall X becoming dysregulated/distracted and therefore I ended the recording. The recording and speech were unclear as she was only 3 years old at the time. The father confirmed the recording himself as being unclear... The video 'showed' nothing as the phone was placed down during the brief conversation. So I recall there was no visual to it. I failed to disclose this in proceedings because it was an overall extremely stressful experience over those 4 days in November. I was concerned overall that it was being labelled a 'retraction video' from the start of proceedings, which it wasn't. I have since apologised I was not clearer in explaining my view on this. Rather than denying the existence of the video in general." She continued "Therefore, I felt that unclear communication between me and children would not hold as reliable evidence in court. I understand this was not my decision to make but it forms part of my reasons why I did not disclose it."

13. The inevitable factual findings I make are thus.
 - a. The mother did record X discussing these allegations.
 - b. She showed that video to the father as part of their discussions.
 - c. She lied about the existence of that video when providing instructions to her solicitors on both 13 June and 15 June 2022.
 - d. At court at the finding of fact when specifically challenged on this point she lied to the court.
 - e. She made a conscious decision to lie as she felt the evidence would be misleading or unclear.
 - f. She considered my written judgment and made no attempt to correct the clear factual finding I made. She must have understood the clear link I drew between this issue and the eventual finding the father had abused X.
 - g. She made no effort to set the record straight in her statement of 16 January 2024 when asked to comment on the outcome of the finding of fact.
 - h. She opposed the application to consider her devices, her solicitors indicating "My client feels this is another example of the Respondent's coercive and controlling behaviour."
14. On 15 January 2024, the mother's solicitors indicated that the mother had lost her phone on 19 December 2023 whilst on a winter walk with the children and it has not been found. Her evidence at court was that she 'deactivated' her phone around 16 December 2023, she subsequently lost her phone on 19 December 2023 whilst out walking and she factory reset her iPad on 24 December 2023. She further accepted she had deactivated her iCloud account on or around 16 December 2024 and she did not know the password so could not reactivate it. This evidence is supported by the conclusions of the forensic investigator which can be summarised as follows:

- a. The mother provided an iPad; this had been factory reset on 24 December 2023 at 11.07 and had been re set up on 29 February 2024 the day before they received. As a result of the factory reset they were unable to extract any data from this device.
 - b. They confirmed that the phone owned by the mother had no active user events after 19 December 2023. The cells site analysis reported the phone being near Bristol on 17 December 2023 and the evidence suggests that the electronic evidence is consistent with the phone either being switched off on 16 December or having begun a power down then leading it to stop functioning on or around 19 December.
15. The issue is thus whether the actions of deactivating the phone and iCloud account and resetting the iPad were undertaken with knowledge of the intention to have those phones analysed.
16. At the hearing on 13 December the issue of the analysis of the phone was raised by counsel, it was made clear that if such analysis was sought that would need to be subject to formal application. The mother was present at the hearing and represented. On the same day the father's solicitors emailed the mother's solicitors and stated "Further to the hearing today and following the judge's comments we write to confirm that our client does request that your client's mobile phone is forensically examined in order to ascertain whether a video was taken by your client of X retracting her allegations. Please could you therefore ask your client to ensure that her mobile phone is retained and request that she does not delete any video recording pending such examination, failing which the matter will be brought to the court's attention." This email was chased on 18 December with a specific request for confirmation of receipt of the email. On 5 January 2024, the solicitors indicated they were still taking instructions and on 15 January they indicated that their client was not prepared to agree to the examination. a. In giving evidence, the mother said "I had already made a decision to deactivate based on being targeted in these allegations. My personal data is no one else's business. As far as I was concerned you would have free range of my phone and that was a breach of my privacy. I was not having it." This confirms she was aware of the request to preserve data at the point when she consciously deleted that data by deactivation.
- b. The inevitable conclusion I must draw is that the actions in factory resetting the iPad and deactivating the phone were undertaken as a result of this enquiry. The movement on to delete the iCloud account in a permanent manner is one of conscious destruction of evidence. I ask myself, 'who deactivates their phone a week before Christmas?' In making this decision I note that the mother did not make any efforts to find her phone once lost she stated, "I did not bother me, I took no steps to locate the phone." She was struggling financially at that time, to lose a phone and not even try to retrace your steps to find it is illogical. Again, I have to find that the removing of evidence from the court's consideration was a conscious decision. I have some sympathy for the mother's concern that her private data was about to be accessed but she was represented at that time and her lawyers if asked could have advised her of the court's ability to control what was accessed and how it was accessed.

17. It is difficult for me to determine in full detail what was on the recording. Given the huge issue between the parents on 16 and 17 April 2022 was whether abuse had occurred logically this was an attempt to obtain evidence from a child. At that point, the mother was seriously conflicted and may well have wanted something to exonerate the father as that would make life much easier and not require the chaos an allegation of this nature would cause to their lives. The father when asked to say what was on the video stated "The mother said she had a recording of X and she had taken a picture of a bruise to her groin area; X had fallen on the trampoline. I was shown the video. I remember seeing the white floorboards which X has in her bedroom and part of X's legs. It was quite short and brief, and I remember X saying that it was a joke, she was joking and she did not really want to talk about it. That is as far as I remember in terms of content. When me and the mother were talking, she said she had recorded X and it was because she wanted me to stay at home. In order to understand the video, you had to understand the context around the video. Then X came up to us and said she was joking." I find this to be an accurate account of the video, this is because it reflects other things X had said about X joking, The father's account was unembellished, and he did not exaggerate the probative value of this recording. The mother simply said it had no evidential value as X became very quickly deregulated. That is correct but followed on from being asked about the allegations and X's initial response as reported by the father.
18. What is significant is that this interaction between mother and child takes place before the father had any involvement with X post the allegation being made. As such the only influence on X at this point is the mother. The child coming to see her father in the context of an allegation being made is under great pressure to say something which does not cause confrontation. There is no such pressure on a child being videoed in her own bedroom by her mother.
19. Much was made of the motivation for the mother reporting this matter to the police in September. It was clear she was under immense stress at that time. She told the police on 22 September 2022 she felt suicidal and nobody was listening to her. The father then attended the house on 26 September and it is clear that caused her further distress, it is in the aftermath of this visit that she suggests X raises the allegation again and is eventually recorded. This sets in train the process of a further referral to the police and the ABE interview.

Analysis

20. I differentiated between the competing versions of events in December 2023 largely based on an assessment the father was lying to me on what I considered a significant issue. Subsequent admissions, expert evidence, and the testimony as above have shown that on that specific event the father was telling the truth and the mother was lying and concealing evidence. I also found on the last occasion that it was difficult to discern the motivation for either party's actions.

21. It is now clear that the mother made a conscious decision to withhold evidence from 13 June 2023, at the very latest. This is not a decision in the stress of giving evidence under cross examination. This is a calculated decision that a piece of evidence may not assist and so should not be disclosed. Under cross examination she was very clear saying on three occasions the recording did not exist. Whilst any court process is stressful this was not a momentary decision for the questioning was repeated later on in cross examination and the same answer given. She had two opportunities to correct what she knew to be an unsafe finding and chose not to take them (13 December and in her statement). She then made a second decision once she became aware that it was likely the video would become available to take very significant steps to destroy all links to that evidence.
22. At this hearing, the mother was noticeably more aggressive, refusing to answer questions, challenging the advocate's motivation and professionalism and acting in a manner which did not assist me in reaching a conclusion in her favour.
23. The conclusion that I must reach is that she has not been a neutral participant in this process but has been pursuing her own agenda. This becomes significant when she is the person who is the conduit to X discussing these allegations. As a neutral conduit as previously, I found her testimony was of great assistance in me finding that X was telling the truth at ABE. As a 'tainted' conduit I cannot trust the processes by which these allegations were discussed notably on 16 and 17 April and on 26 September. I do not need to make a finding on motivation or the reasons behind it I simply have to make the findings that her interactions with X in relation to this allegation have not been accurately reported to me. Perhaps I have been missing the point, the issue may not be that there was an undisclosed video, it was that there was an undisclosed conversation.
24. Here I do need to visit the section of my last judgment in relation to the care to be taken in cases of this type and I will highlight the passages which are of relevance.
25. MacDonald J in Re P [2019] EWFC 27 (§3) stated: 'Cases of alleged child sexual abuse create particularly acute forensic difficulties for the Family Courts charged with determining whether sexual abuse has occurred and, if so, who has perpetrated that abuse [...] McFarlane LJ (as he then was) observed in Re A (A Child) (Vulnerable Witness: Fact Finding) [2015] 1 FLR 1152 at [72], that no case of alleged sexual abuse where there is an absence of any probative medical or other direct physical evidence to support a finding can be regarded as straightforward.'
26. At §577, MacDonald J goes on to set out matters of which the court can properly take judicial notice in relation to allegations from children, including that children are suggestible, memories are prone to error, they are susceptible to influence and leading, repetition, pressure, threats, reward and praise, children's accounts are susceptible to contamination by others or by bias or preconceived ideas on the part of the questioner, and it is possible to induce false memories in children.

27. The case of AS v TH (False Allegations of Abuse) [2016] EWHC 532 (Fam) sets out the following principles:
 - a. Where the evidence of a child stands only as hearsay, the court weighing up that evidence has to take into account the fact that it was not subject to cross-examination (§24).
 - b. The court must not evaluate and assess the available evidence in separate compartments. Rather, regard must be had to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence (§26).
 - c. There is no room for a finding that something might have happened. Either it happened or it did not. However, a failure to find a fact proved does not, without more, amount to a finding that it is false (§27).
 - d. In principle the approach to fact finding in private proceedings ought to be the same as care proceedings. However, in private proceedings allegations are not being made by the more neutral and expert local authority but by a parent who is seeking to gain an advantage in a battle against the other parent. This increases the risk of misinterpretation, exaggeration, and downright fabrication (§28).
 - e. Care must be taken not to focus on statements made by the child at the expense of other evidence. This is particularly important if the child's primary care taker is unreliable (§29).
 - f. The court should adopt a two-stage process to allegations of sexual abuse. First, is there evidence of sexual abuse? If so, is there evidence of the identity of the perpetrator? (i.e. the alleged must prove, on the balance of probabilities, that the child has been sexually abused and that his father is the perpetrator of that abuse).
 - g. Any failings to follow interviewing guidelines does not compel the court to disregard evidence obtained during any such interview but may affect the weight to be attached (§52).
28. I identified the ABE as being essentially sound save for one or two leading questions in my last judgment. What that failed to recognise is the delay in the ABE from the date of the initial allegation being raised and the now known context of a further video and sadly of the mother being increasingly invested in the allegation being true particularly after the events of September 2022.
29. It must be true that the number of times X had given a contrary version of events is now certainly twice and she was present when in others spoke on her behalf to the social worker. The assessment of Children's Services at the time was that she may have a propensity for lying and whilst that would be a harsh finding for a 3-year-old I must conclude that she is capable of lying.
30. In those circumstances I note the concerns raised above particularly as to susceptibility and memory being prone to error.

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31. The combination of the finding that I cannot trust the process by which X was spoken to and the delay before the ABE leads me to find that it cannot be proven to me that it is more likely than not that X is telling the truth. A review of the authorities sets out the many ways in which the untested evidence of young children can be inaccurate supports this finding.
32. In those circumstances the allegation made of sexual abuse is not proven before me. District Judge Webb 5 December 2024
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