

IN THE FAMILY COURT SITTING AT BOURNEMOUTH

Courts of Justice
Deansleigh Road
Bournemouth
BH7 7DS
Date: 12/1/22

Before:
HIS HONOUR JUDGE DANCEY

Between:

A mother	<u>Applicant</u>
- and -	
A father	<u>1st Respondent</u>
-and-	
A, B and C (the children)	<u>2nd Respondents</u>
-(by their Children's Guardian Hazel Borthwick)	

Adam Langrish (instructed by **Ellis Jones**) for the **Applicant**
Les Smith (instructed by **Alderson Law LLP**) for the **1st Respondent**
John Ward-Prowse (instructed by **Abels**) for the **2nd Respondents**

Hearing dates: 20-22 December 2021

JUDGMENT

His Honour Judge Dancey:

Introduction

- 1) On 6 October 2021 I gave a judgment in this case, reported as *A Child (Application of PD 12J)* [\[2021\] EWFC B59](#), followed an appeal from a district judge's order requiring the mother to return the children (boys A aged 10 and B 8 and a girl C, aged 5) from the north of England, to where she had removed them, to the local area, failing which primary care of the children was to be transferred to their father. That order had been made in the face of allegations of domestic abuse. I allowed the appeal and gave directions for a fact-finding hearing.
- 2) This judgment, which should be read with the October judgment, follows the fact-finding hearing conducted over 3 days between 20 and 22 December 2021.
- 3) The essential background, down to the appeal hearing, is set out in my October judgment. Since then the children have been joined to the proceedings and a guardian appointed for them pursuant to FPR 16.4. Further statements have been made by the parents.

The allegations in summary

- 4) The allegations fall under four main headings:
 - a) failure by the father to disclose to the mother until 1 November 2017 that he had HIV+ status when he met the mother and they started a sexual relationship in 2009, resulting in the birth of the three children;
 - b) incidents of rape in 2013 and thereafter and again in 2018;
 - c) controlling and coercive behaviour, including economic abuse;
 - d) unreasonable physical chastisement of the boys.

The hearing

- 5) The hearing was conducted as an entirely attended hearing. Previous hearings had been conducted remotely.
- 6) The mother (who is the respondent in the proceedings) was represented by Les Smith, the father by Adam Langrish and the children by John Ward-Prowse, instructed by the children's guardian, who did not attend the hearing.
- 7) Section 63 of the Domestic Abuse Act 2021, which came into force on 1 October 2021, requires amendment of the Family Procedure Rules to ensure that, where a person is, or is at risk of being, a victim of domestic abuse carried out by another party, or relative of another party or witness, it is to be assumed that the quality of their evidence and, where they are a party, their participation in the proceedings, are likely to be diminished by reason of vulnerability.
- 8) Para 3A has as a result been added to FPR PD12J, referring to provision in PD3A to victims of domestic abuse giving evidence and making clear that, in that context, it is not necessary for the court to make findings of fact in relation to domestic abuse before assuming that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by another party, a relative of another party or witness.

- 9) The upshot is that where the court has yet to decide allegations of domestic abuse it must treat the person making them as a vulnerable person for the purposes of FPR 3A and PD3AA and must consider the question of participation directions (whether or not requested). The purpose is to ensure effective participation and ability to give best evidence.
- 10) The following measures were put in place for the hearing:
 - a) separate waiting areas were arranged for the mother;
 - b) in court the father was screened from sight by the mother and arrangements were made when going in and out of court and during adjournments to ensure she would not see the father;
 - c) the mother was screened from the father while giving her evidence from the witness box;
 - d) breaks were taken during the mother's evidence which spanned the afternoon of the first day of the hearing and the morning of the second and took some 5 hours;
 - e) additional opportunities for breaks were offered to the mother at points when she appeared to find questions about intimate matters particularly difficult, although in fact the mother opted to carry on;
 - f) given that there were some long pauses before the mother was able to answer some questions, I ensured that adequate time was given to the mother to answer questions fully before moving on to the next.
- 11) The only witnesses were the mother and the father. They had each made a number of statements. I have also considered the police disclosure and the mother's medical records contained in the bundle.

Background and evidence

- 12) The central question I have to resolve is whether the mother is a victim of domestic abuse, including sexual abuse and controlling and coercive behaviour, with the children being exposed to both abuse of their mother and physical abuse, or whether the mother has laid a trail of false and/or exaggerated allegations to justify removal of the children from their family home both in May 2019 and in July 2021 and to put distance between the father and her and the children.
- 13) That question requires forensic analysis of the context and chronology of the mother's allegations in some detail.
- 14) The parents are both practising Christians. The father is black African, the mother white British. They met through a Christian website in November 2009. The father was living in Ireland, the mother in the north of England, although she had most of her family and friends in Scotland. They met face to face for the first time in February 2010 and travelled to see each other in Ireland or England after that.
- 15) In 2005 the father was diagnosed as HIV+. In about 2008 or 2009, before he met the mother, he says he was advised by his treating hospital that, provided he kept taking his daily medication, there was no appreciable risk of him transmitting HIV. The mother says he could not have been given that advice until completion of a 10-year study in 2016.

- 16) It is common ground that the father did not tell the mother of his HIV status. Despite their belief that sex should not take place out of wedlock they had consensual unprotected sex in May 2010 and A was conceived. There was discussion whether to continue the pregnancy. They decided to marry quickly, with a ceremony in Africa in August 2010 and blessing in Ireland in October that year.
- 17) The father expresses his regret and apologies for not telling the mother about his HIV status, describing it as "*the worst decision of my life*". He told me he lacked the courage to tell her. He was clearly concerned if he told her the relationship would not start or might end.
- 18) There were either two or three occasions when the mother says she found the father's medication and confronted him. They were living in his boss's house in Ireland. On the first occasion the father told the mother the medication was his boss's and had been left in the house. He says he took the medication to a pharmacy. On the second occasion the same medication was found in the car and the father explained it must have fallen from bag when taking it to the pharmacy. On the third occasion the father said he was looking after medication for a friend who didn't want his wife to know what he was taking.
- 19) The family moved to England in July 2017. The mother had been brought up on the south coast. The choice was between there and Scotland. Job prospects were better on the south coast and that seems to have been the deciding factor. The mother said the decision was the father's but he said he had never been to England and had no particular interest in where they lived.
- 20) In November 2017 the mother again found medication, this time with the father's name on it. She confronted him once again and he admitted his HIV+ status. He told me he tried to give reassurance that it could not have been transmitted but it came over as him trying to minimise his actions. The mother was understandably upset and not really able to hear what he was trying to tell her. The mother told me that the father would start telling a lie, only telling the truth when she pulled him up on it.
- 21) The following day the mother visited a sexual health clinic. She tested negative for HIV and was told the children would also therefore be negative. She says she was advised that, although the transmission risk might be low, she should not have unprotected sex with the father and she would need annual check-ups.
- 22) Finding out about her husband's HIV status and realising his deception about it clearly had a devastating effect on the mother and signalled the start of the end of the marriage.
- 23) The mother says that sex last took place in summer 2018. It could not happen thereafter because she had thrush.
- 24) At the end of 2018 the mother consulted her GP surgery with a 5-month history of thrush. During a telephone consultation on 6 February 2019 the mother reported breaking down at a hospital appointment as a result of questioning about recent events. She described being emotional about finding out about her husband's HIV+ status. Although she had tested negative she had struggled with finding out. The surgery note reads:

“Several times she has trashed it out with husband ... Married her to feel normal. Gave up career when she got married... Doesn't want to be in the marriage unsure what to do. Children aged 7, 5, 3. Sexual life with partner non-existent. Has to get tested every year. Suffering anxiety and poor sleep. Has shared this with her sister. Husband has thought that eldest child and herself had the virus but was just going to wait and watch without telling her trying to work out what to do for best of children and her own life [sic]”.

25) There is also a note that the mother planned to go to a [Christian] retreat the following Saturday when her husband was home to plan how to deal with this. She wanted to deal with her physical situation first.

26) On 24 April 2019 the mother saw a GP. The note reads:

“Relationship problems... Wants to end the relationship. Feels on edge and upset. C/O [complaining of] tearfulness... [Husband] African and she feels he believes women subservient. Verbally abusive behaviour...feels threatened. No physical violence to her. Sexual violence in that he has pressed with sex when she says no – says he says men have needs and has sex when he wants even when she doesn't want to, Feels intimidated by this and has to go along...father does hit eldest son at times, grabbed son and hurt arm disciplining him – mum does not want this but worried as can't stop it. Kids generally happy and doing well at school...He goes to church, she doesn't. He is HIV positive – he didnt tell her – she found out by accident – found his meds – upsetting, lost trust – she has been tested is not positive and kids not positive. Sister supportive, lives [locally].”

27) Under the heading 'plan' the note reads:

“Discussion re abusive relationship, not feeling safe, concern re safety of self and children. Discussed if any concern always contact the police options. Discussed CAB for options and an.iwrs [sic] re benefits what available [sic]. Support numbers given of Dorset Rape Crisis, DV support, Victim Support...Discussed Social services – is happy I refer to SS team with her number and will liaise with them – called SS – they will fax an interagency referral form to complete and send back RV with me 2/52 or sos. Know we are here to support her book for life coach to support and help signpost/guide to services.”

28) On 2 May 2019 the mother made a report to the police of an assault by the father on B. The police officer records being shown a photograph on the mother's phone of a child's leg with a red handprint on it and the mother saying that her husband slapped B that morning because he wouldn't put his toys away.

29) On the same date the police received an email from the local authority (via the MASH) in relation to a 'disclosure of sexual domestic abuse – a rape in September 2018 – and additional concern is the disclosure of ongoing sexual intercourse with the aggressor who is HIV positive and is not using protection.'

30) It was noted that the case would be referred to MARAC. A MASH social worker had spoken to the mother and 'unpacked the children's side'. The mother had described smacking and not over chastisement.

- 31) There was a further police report on 16 May 2019 when the mother was upset and showed the officer a screen shot of B's leg with a scratch mark, saying her husband did this to him for not putting away his toys, that her son had fallen over on the way to school that morning and the teacher was going to clean up his graze and may see the handprint. The mother was advised to tell the school.
- 32) Three days later, on 19 May 2019, the mother took the three children to Scotland. Initially she stayed with a friend locally before going to a refuge. She did not tell the father where she was. She remained there for three months. He had contact with the children once during that time.
- 33) On 24 May 2019 the mother contacted the police in case the father reported her and the children missing, saying that she was in a safe house having fled domestic abuse. She told the police that on the morning of 16 May 2019 the father had struck one of the children, so social services told her to remove herself and the children from the address and found her a safe house. She had taken the family car and was concerned the father might report it as stolen. The police contacted social services. The Cafcass safeguarding letter refers to a GP referral in April 2019 and a police referral on 16 May 2019 but does not give any information about advice or assistance given to the mother to flee domestic abuse.
- 34) A police report in June 2019 shows that the mother did not wish to support a prosecution for rape. Nor did she want the father spoken to because she felt that would simply aggravate the situation.
- 35) The mother returned to the family home on 9 August 2019. She told me the manager of the refuge she was staying at in Scotland advised she would have to return or she might be arrested. She said support workers tried to find a refuge on the south coast but there were none available that could take 3 children. She searched the private rented market and council housing. There was little available for a single mother with 3 children. She felt she had little alternative but to return to the family home. She was told by the father that unless he signed a new tenancy the house would be lost to them. She insisted on separate bedrooms and privacy.
- 36) On 9 July 2021 the mother again left the family home with the children, taking them to a refuge in the north of England. The father had no fore-warning. He came home to find them and some of their possessions missing. He texted the mother asking to talk to her. The mother responded two days later to say that the police had undertaken a welfare check and had no concerns. She said she would make arrangements for the father to see the children. The father responded simply "*Ok understood, thank you.*"
- 37) When the police spoke to the mother on 11 July as part of the welfare check she said she had been raped but, according to the summary in the police disclosure, that appeared to be in the context of the failure to disclose HIV status and her statement that she would not have consented to unprotected sexual intercourse had she known.
- 38) There followed some exchanges about contact arrangements, with the mother saying that while she had no intention of denying contact, the children were isolating. The father texted on 15, 16 and 21 July asking to speak to the children. The mother did not respond.

- 39) On 6 August, 4 weeks after the mother had left and without any contact having taken place, the father texted again saying he hoped all was well and that he hadn't texted for more than a week "*as I don't want to come across as pesky.*" There was no response to this text either. He texted again on about 22 August expressing concern about the children's mental health, given that it was a month and a half since they had seen him. He asked where the children were living. He seemed to know they were in Scotland but was not sure. He again asked for contact. He said the house was for sale and he asked what her plans were for collecting her belongings.
- 40) On 24 August 2021 the father issued his application seeking orders for disclosure of the children's whereabouts, prohibited steps and child arrangements orders. The father filed a C1A citing the emotional and psychological harm of removal from home and school.
- 41) On 31 August 2021 the father made a report to the police that the mother and her sister and brother had come to the home to collect her personal belongings. The police took the view that no offence had been committed. The father said in his statement he felt intimidated by the mother's behaviour, which included the use of bolt-cutters to remove the children's bikes. The mother's sister has made a statement (not tested by cross-examination) in which she said the father stared at her and made her feel intimidated. The father denies this saying that if anything they were confrontational.
- 42) On 1 September 2021 the mother filed a cross-application seeking transfer of the proceedings to the court where she was living in the north of England, a prohibited steps order preventing the father removing the children from the UK and child arrangements orders. The mother did not file a C1A alleging harm, but did respond to the father's C1A, saying that she had removed the children because of the father's behaviour.
- 43) At paragraph 15 of my judgment in October I set out what the mother said in her first statement, filed on the day of the first hearing before the recorder on 6 September:
- a) she was frightened of the father;
 - b) she did not believe the father could be trusted;
 - c) he had lied to her and consistently sought to undermine her and control her emotionally, intellectually and physically and manipulated her financially;
 - d) she was receiving help from domestic violence support services;
 - e) he had made reference in his statement to the fact that he and the children attended church but that she had stopped to put her in a bad light and as part of his ongoing control and abuse;
 - f) his description of her as an 'unemployed housewife' was an indication of his controlling behaviour and attitude;
 - g) he did not understand the impact of his actions regarding HIV – he had lied to her about medication she found and, although she has been tested negative for HIV and told the children will therefore also be clear, he was concerned that both she had contracted it and the eldest child was born with it (but did nothing to enable medical diagnosis or treatment);

- h) transmission of a STD is listed on government websites as domestic abuse;
 - i) she had in 2019 gone to Scotland with the children, returning in August 2019 because she had been told she may be arrested for abduction;
 - j) at that point she returned to the family home because the father told her he would lose the tenancy – this she says is also an example of his controlling behaviour;
 - k) she said she needed her own bedroom and asked him not to enter it, but on her birthday in 2019 he just walked in and did not respect her boundaries – he also walked in on her in the bathroom;
 - l) when they lived in Ireland (until 2017) he had driven dangerously with the children in the car;
 - m) he had also left the children alone in the park to go cycling;
 - n) he had been sexually abusive, laying on top of her and holding her down while having sex so that she could not breathe;
 - o) she left the father, taking the children, on 9 July 2021 because, as a final straw, she believed he was stealing from work and she thought she would get into trouble.
- 44) The recorder felt unable to make a decision without a safeguarding letter from Cafcass and adjourned without making any substantive orders. I set out at paragraphs 19 to 23 of the October judgment the contents of the safeguarding letter. In short, Cafcass, who had spoken to the mother only, recommended no direct or indirect contact in light of the allegations of domestic abuse.
- 45) On 7 September the mother contacted the police wishing to press charges for controlling and coercive behaviour.
- 46) On 16 September the mother contacted the police again seeking a Clare’s law disclosure in respect of her husband and repeating the report of rape.
- 47) On 27 September there was a hearing before the district judge who ordered the return of the children to the south coast, with a transfer of residence to the father in default. I allowed an appeal from that decision.
- 48) The mother confirmed to me that immediately after the hearing before the district judge she contacted Cafcass to let them know the outcome. That led to the s.16A risk assessment detailed at paragraphs 37 to 47 of the October judgment.
- 49) On 28 September the mother attended a local police station for initial assessment following her allegations against the father. She was distressed by the decision made the day before. The police disclosure records that her solicitor told the police the mother did not want the family court told about an ongoing investigation as that might lead to the father finding out where she was, although the mother’s solicitor does not in fact accept that was said.
- 50) Although the assessment was deferred there was what was described as a long chat with the mother about the situation, She told the police that A had said that he was smacked excessively by the father when he was 3-4 years old after he had accidentally defecated in the bath. She also said she believed he had slapped his face on another occasion when asked to get a teaspoon. She said C had told her numerous times that she was frightened of her father.

- 51) On 5 October 2021 the mother was interviewed by the police. The interview was recorded but we do not have the recording, just handwritten and typed summaries (which differ slightly). The first part of the interview focussed on how the parents met and the circumstances of non-disclosure of HIV status.
- 52) The mother went on however to talk about a number of rapes which started two weeks after B's birth. She was still bleeding following the birth yet, she said, father got on top of her and had sexual intercourse with her. She lay crying as she was still in pain after giving birth. There is also a note in the manuscript summary that the lights were off and the mother didn't think he cared about how she felt or thought. She said she did not know if he knew she was crying.
- 53) The mother said these incidents occurred once every couple of weeks although they also continued to have consensual sex during this time. She said she did not say anything to the father but put her arm across her face. She was, the police reported, unable to explain what was different between the occasions when she consented and when she did not other than by her different body language i.e. covering her head with her arm when not wanting sex or having a more open body language when she did. She described the father pulling her legs apart and moving her arm.
- 54) The mother said that she asked the father for a conversation about their sexual relationship in 2016 but he said he thought it was 'great'.
- 55) During the last year of these offences (2018) the mother said she also placed her other arm across her body as the father would also lean on her with his shoulder pressing into her breastbone causing her pain and leaving her unable to breathe. In the manuscript summary the mother is noted as saying that he did this because she placed her arm across her face, although she went on to say she did not know why he put his shoulder in her chest.
- 56) The mother said she did not know it was rape if she was married. In the manuscript summary the mother is noted as saying that on two occasions the father got on top of her and took her underwear off. She said she told the father on one occasion when he was removing her knickers "you're ripping my underwear" and the father giggled and said he would buy her new ones.
- 57) The mother said that in 2018 she had a bad dose of thrush and used the fact that she was having treatment as an excuse for them not to have sex. She said that she had made it clear to the father when he admitted his HIV status in November 2017 that she no longer wanted to have sex with him yet non-consensual sex continued until August 2018.
- 58) The mother also described breach of her privacy after she had returned to the home in August 2019, coming into her bedroom uninvited and leaving the door open and walking into the bathroom when she was using the toilet.

The mother's second statement

- 59) In her second statement, made on 13 October, the mother said:
 - a) when they met the father had lied about his job and earnings and said he owned the house he was living in and on the strength of this she gave up a good career;

- b) he searched for a wife on a Christian website because he knew it would be frowned on to get divorced and that she would be torn between the abuse of HIV deception she would be subjected to and the stigma of getting divorced;
- c) the father was stealing from work;
- d) when the mother complained about lack of affection from the father he said “*that is not what I signed up for*”, that their newborn son was his priority and she could take care of herself, leaving her feeling confused, worthless, sad and isolated (having come to live with him in Ireland);
- e) when A was born the father did dangerous things like putting a pillow in his Moses basket and mattress on top, putting a blanket around the cot using hair grips with sharp edges and putting the baby seat in the car without strapping it in and then telling the mother she was over-reacting when she said anything;
- f) the father questioned all her actions and making her feel she was unable to make decisions and leaving her feeling worthless;
- g) he told the mother her breast milk was not good enough – she thought with hindsight because he was concerned about the risk of HIV transmission;
- h) she had no money and he kept his money to himself, giving her insufficient cash for food and necessities – he ate well at work while she would have to hunt for bargains;
- i) when the father raped her two weeks after B was born she was crying uncontrollably throughout;
- j) thereafter rape became part of his routine, describing hiding her face and trying to switch off and wearing underwear to prevent him from forcing himself on her which he would rip off;
- k) on one occasion she tried to protest but the father said “*wives cannot refuse sex to their husbands. If they do so, the husband can have sex elsewhere*”;
- l) on another occasion she told him to “*just get on with it*” and when she protested on a later occasion he told her she had given him a green light to have sex whenever he wanted;
- m) after C was born the father took to sleeping in the spare room, saying he needed to have a good night’s sleep, coming into the bedroom for sex and then returning to the spare room and leaving her to care for the children;
- n) in 2017, after their landlord refused to return a deposit, the father wanted to make a court claim but the mother did not; he pressed on with the claim leaving her to deal with much of the paperwork and saw how much this affected her (including losing her hair and having sleepless nights due to anxiety); she believes he has pursued his current course of action (ie these proceedings) aware that it will be physically draining and re-traumatising for her;
- o) varying amounts of cash he gave her when in Ireland (leaving it on the bedside cabinet) was based on her performance in the bedroom;

- p) the rapes continued after the move to England, which is when the father started putting his shoulder to her chest and when she started to place her arm across her body as well as her other arm across her face; on occasion he tried to forcibly remove her arm;
 - q) she insisted on having her own bank account into which she could pay benefits;
 - r) he was angry and confrontational, blocking the doorway and describing her as an irresponsible parent, when she returned late with the children having spent the day at an air-show in late August 2017;
 - s) he minimised his failure to disclose his HIV status, effectively telling her to “*get over it*” and suggesting if she had tested positive she would have caught it as a result of an affair with somebody else;
 - t) she repeated the privacy issues raised in her first statement (walking into her bedroom and the bathroom, including when she was trying to self-administer thrush medication);
 - u) the father would remove his wedding ring to make her feel jealous and paranoid about what he was up to and, when he did wear it, displaying it in front of her face to remind her they were married which she found intimidating and scary.
- 60) According to the mother, the sexual health clinic had told her that she would put herself at risk if she had sex with the father. She told him she was no longer prepared to put herself at risk. Initially he seemed alright about this but soon started to rape her again, putting his shoulder in her chest and becoming increasingly violent so that she had to seek medical attention. The mother referred to going to the GP in April 2019 and the GP expressing concern about her mental health, as a result of which she spoke about the HIV deception and being raped. The GP reported this to the police and social services and the mother says she was allocated a domestic abuse worker.
- 61) The mother set out her reasons for leaving the father in May 2019:
- a) continuing to pressure regularly for sex even though she was unwell and unable physically to have sex (un uncomfortable lump had developed on her vagina);
 - b) he made daily comments about her being incompetent or unable to care for the children;
 - c) physical intimidation by standing over her and refusing to allow her any privacy;
 - d) punching his hand in front of her when angry;
 - e) shutting her in the kitchen and blocking the door having demanded that she fill his water bottle and being enraged in front of the children when she refused;
 - f) driving off angrily with the children in the car when she could not find him in a supermarket car park;

- g) when asking A to shine a torch behind the fridge so he could see, grabbing A's arm and aggressively dragging him to the other side of the fridge, causing A distress;
 - h) specifically, the father hitting B on the leg on 16 May, causing a mark which she reported to her domestic abuse worker who in turn reported it to children's services who advised her to leave, given that his violence was now extending to the children.
- 62) Having failed to find accommodation locally, the mother says she travelled with the children to Scotland where she has friends and family – not to settle, but to find a breathing space while she tried to work out how to resolve her housing situation. She went to a refuge and engaged with them, the police, social services and housing services in the south. She enrolled the children in schools in Scotland to ensure continuity of education.
- 63) When she left the father unregistered and taxed the car she was using so that it was uninsured. She felt this was done deliberately to force her back to him or get her into trouble.
- 64) The mother says the father harassed her with continual messages and calls demanding to know where she was.
- 65) Attempts to resolve the housing situation were hampered at every turn, the mother believes because of the father's job and his contacts within the housing department. She felt she had no option but to return to the family home, having received legal advice that she could be arrested. In evidence the mother said the advice was given by the refuge manager.
- 66) When she returned the mother believed that the father had spread lies about her to the church community which had sided with him. He failed to correct discussion about her running off with another man or stories about her mental health. This made her even more isolated in the local community.
- 67) The mother refers to incidents when she was berated for wanting to buy the children new schools when their shoes were ill-fitting but not worn out and an occasion when the father buried in the garden a paper cup pot plant which had been given to the mother by B as a Mothers' Day gift, saying she had not bothered to water it. This last incident was interpreted by the mother as the father treating her things as family items for him to do with as he wished. The father says B just thought the plant might grow better in the garden and there was no question of control over possessions. He recalled the mother being offended that he had tried to rescue the plant and he said he apologised to her over this.
- 68) The mother described in her statement that the father increased his intimidating behaviour during lockdown. When she tried to talk to him (bearing in mind he was going out to work while she was stuck at home) he rolled his eyes and refused to speak to her. He made, she said, inappropriate racist and homophobic comments. He flirted with people in front of her. He undermined her in front of the children, using language to manipulate situations. He said she was not accepting his leadership in life. He asked about the children's passports and talked about the children experiencing other cultures, listing countries where he had contacts, before saying the next day he had booked annual leave and making her fearful he was going to take the children. He was controlling of who the children saw and what they watched. He said he had a problem with her buying

things. In October 2018 he tried to get the children to drink from a water butt and puddle, saying that is what they do in Africa (denied by the father). He would sit on the floor and use his legs to block her into rooms.

- 69) The mother says that in February 2021 she told the father she felt absolutely broken due to his ongoing abusive behaviour and did not want to be with him. She said she needed counselling to deal with the trauma of finding out about his HIV status. The father, she says, told her she would not be permitted to leave him and that he had trapped her by lying about the tenancy of the home when she returned from Scotland. From then she started looking for private rented housing. The father talked about contacts in social welfare and housing and she was fearful that any enquiries she made would get back to him.
- 70) According to the mother, in April 2021 the children told her the father left them alone in the park while he went off on a bike ride.
- 71) When she tried to talk about these issues the father would become enraged or change the subject, pretending not to know what she was talking about.
- 72) In June 2021, the mother says, the father told her she owed him money. When she asked how much he refused to give specifics but just entered into circular arguments with her. The father was also saying to the children they had to stop wanting stuff because in Africa that will not have stuff. This made her fearful he was planning to take the children to Africa.
- 73) The mother set out in her statement the factors which led to her leaving on 9 July 2021:
 - a) increased use of racist language in front of the children and not listening to her thoughts on this;
 - b) saying the boys needed to be ‘cracked down’ on, meaning physical chastisement;
 - c) making her feel like a servant, childminder and cook without her own identity;
 - d) not wanting C to see how she was treated and being brought up to think that was acceptable or the boys to think they were superior to women;
 - e) changing any subject she raised into an argument and minimising her thoughts;
 - f) demanding money without explanation;
 - g) his, ‘if I want it, I take it’ attitude;
 - h) derogatory language towards her;
 - i) introducing her to friends as ‘the wife’ rather than by name, making her feel like his possession without identity;
 - j) no privacy;
 - k) realising whenever he returned from work that she was physically shaking and petrified of him entering the house.
- 74) The mother says that in June 2021 the father told her all the finances needed to go back to being paid into his personal account. This made her afraid that he would go back to giving her cash for sex and made her fearful she would have to

sleep with him to provide for the children. She knew she could not allow this to happen. She tried to have a conversation with him about leaving but he said the boys would get their identity from him and if he left she would not be taking the children with her as this would happen 'over his dead body'. He told her he would not allow her to leave. She was fearful if she tried to leave the children would be taken from her.

- 75) The mother says that the father has no real ties with the south coast, probably cannot afford to live here and has talked about moving north. She thinks he is insisting that the mother return to the south coast to control her.
- 76) The mother also says the father has made damaging comments to the children about the Black Lives Matter campaign, saying that mixed race children identify as black because white people do not accept them, leading B to say he hates white people.
- 77) The mother also repeated her concern about being involved with the father's theft from work. The combination of fear of arrest and the potential removal of the children to Africa prompted the mother, she says, to make the difficult decision to remove herself and the children from the family home on 9 July. She did not choose the area where she is living in the north – that is where there was refuge accommodation. The children have settled well and made new friends. The mother reports reduced stress levels to the point where a stress-related thyroid problem has resolved.
- 78) The mother concluded her statement by referring to statements the father had made about his experience and culture in Africa, including his status in that community and attending a 'virility ceremony' as a test. This worries the mother who links it with possible FGM practice. She could not trust the father, she says, not to take the children to Africa.

The father's statement in reply

- 79) In his statement in reply, made on 25 October, the father denied any abusive behaviour. He maintained he has always been caring and supportive. He said the mother was always aware of his true circumstances and he did not lie to her. He denied any plan to trap her into marriage and any suggestion she would be torn between his HIV status and the stigma of divorce was, he said, ridiculous. He wanted to find somebody with similar religious beliefs to his own and he felt that sharing those beliefs was why they got on so well together.
- 80) The father denies any theft from his employers, producing a letter from his current employer confirming the arrangements he describes of being able to bring home items that would otherwise go to waste. He believes the mother makes this allegation to make him look untrustworthy.
- 81) The father recalled a conversation about the changed dynamic in the relationship after birth of a child. He said they both felt lonely and underappreciated which he put down to them being exhausted from looking after a new-born baby. He denied any lack of affection.
- 82) He also denied that the mother was isolated in Ireland. They often socialised, although he said the mother more often than not fell out with friends in Ireland and the UK as she could be quite rude and confrontational.

- 83) He also denied doing anything dangerous so far as the baby was concerned (regarding the Moses basket and cot). Anything they did was a joint decision and was safe and he never told the mother she was overreacting or undermined her. He had been supportive of her breastfeeding all three children, although A was very demanding and the mother had worried she did not have enough breast milk. He felt the mother had twisted the situation to portray him negatively. Based on medical advice already received he knew he could not transmit HIV.
- 84) The father described the mother as being anxious and needing reassurance, which he gave, but also being quite strong minded, with him often being guided by her thoughts about bringing up the children.
- 85) The father denied exercising any economic control. He would eat at work when he could to save on food bills at home. He provided regular cash to the mother for food and household shopping and provided more if asked. He would leave cash tips from work for her which were, in the nature of tips, in varying amounts. It was untrue to suggest that these amounts were based on performance in the bedroom. The mother had failed to disclose that she had a bank account with a considerable balance (accepted by the mother in evidence as not less than £1500).
- 86) The father denied forcing sex on the mother, saying that sex did not take place until at least 3 months after the birth of any of the children and then only on the mother's terms. At no point, he said, had the mother not consented to sex. She had never shown any sign of being distressed, in pain, crying uncontrollably or not speaking or not being able to breathe during sex. She had never hidden her face and he had never ripped off her underwear. When not trying for a child they would always use protection. He denied saying that wives cannot refuse sex to their husbands and never had she said, "*just get on with it*". He said he would not want to have sex unless his feelings were reciprocated. Following the birth of A they rarely had sex and it was always on the mother's terms. In evidence he said that the mother would often initiate sex by putting her leg over his or removing her underwear. Rape, which he described as tantamount to murder in God's eyes, would be entirely against his moral and religious beliefs.
- 87) On some occasions, the father accepted, he would sleep in the spare room but only if he had an early morning shift the next day. He was, he said, very much a 'hands on' father who shared in child-care duties particularly when the mother was exhausted and in pain having just given birth.
- 88) The father says that the mother was the driving force in the court proceedings against their landlord and took control to the extent of wanting to defend an appeal by the landlord. Although the mother was anxious she did not start losing her hair as she claimed. He thought that for the mother to suggest he had issued these children proceedings to damage her health was utterly ridiculous. He had no choice after she removed the children and failing to tell him where she had taken them.
- 89) In his statement the father referred to how he had been saving ever since they married so he could buy them a house. He was questioned by Mr Smith about the use of 'I, me' rather than 'we, us', suggesting that was indeed in economic control of the family finances and saw money coming in as his rather than family money. The father was not prepared to accept this interpretation.

- 90) The father accepts he did ask the mother where they had been when they returned late from the air-show. He was worried because he knew the air-show had finished and he was worried for their safety. He accepted he may have come across as frustrated. He did not accept he was intimidating or enraged and he did not block the door.
- 91) The father gave considerable detail about his HIV status in his statement. He produced a statement from a consultant in sexual health and HIV confirming the 2005 diagnosis, the father's daily medication and the fact that he has a consistently undetectable HIV viral load so will not transmit the virus while taking his medication. The father said in his statement that he was advised from the outset that he would not transmit the virus while taking his medication, although in evidence he said he was told that in 2008. At no point, he said, did he believe that the mother or any of the children had contracted HIV. He was, he said, truly sorry about his deceit and the consequences for the mother and the impact on her trust in him and on their relationship.
- 92) That said the father denied having affairs outside the marriage (as the mother had suggested) or that the mother had ever questioned him about whether he had HIV having found medication. He had tried to reassure her and she had known the day after finding out about his HIV status that she and the children were negative. The suggestion (made by the mother in her statement) that he could have killed them all he described as a 'stark allegation'.
- 93) The father recognised that the disclosure of his HIV status had a damaging effect on their relationship and, he said, he worked hard to try and repair that damage. They had limited intimacy from that time and not at all since summer 2018. He assumed she would not want to be in a sexual relationship with him after finding out about his HIV status and sex only took place between November 2017 and summer 2018 on a few occasions, always with the mother's consent. The last occasion of sex was at a Christian Festival in July 2018 following which the mother caught a UTI which she blamed on the camping conditions at the Festival.
- 94) The father denied breaching the mother's privacy. There were locks on the inside of the bedroom and bathroom doors that she could use. The only time he would enter her bedroom was if she was talking to him or one of the children called him in. He was aware she wanted privacy and respected this. He denied ever walking in on the mother while she was administering thrush medication.
- 95) The father accepted he did not wear his wedding ring often because, as the mother is fully aware, he is allergic to the compound in the ring and it gives him blisters if worn for too long. He denied displaying to her when he was wearing it.
- 96) The father also denied any physical or emotional abuse of the children. He denied punching his fist in front of them, blocking doors or driving away from the supermarket in an aggressive or dangerous manner. He denied grabbing A's arm or (in evidence) that there was any incident involving a torch and the fridge at all. He accepted he had once slapped B on the back of the legs but not hard and it did not cause a red mark as described by the mother. B had ignored the father asking him to leave his sister alone. B was not upset by this and was sorry for misbehaving. The mother asked him not to use this as a method of discipline and he has complied out of respect for her views, he said. He accepted he said they needed to "*crack down on the boys' behaviour*" as they were becoming

increasingly naughty and talking back. He denied this was a reason for her to leave for Scotland. He accepted that he was stricter with the children than the mother was because he believed in boundary-setting, but not in an abusive or physical way.

- 97) The father is of the view that the move to Scotland in 2019 was not because of abuse or to keep the children safe, as the mother says, but because she was unhappy in the marriage. She could, he said, have re-housed locally (and he denied any inside involvement with the housing department). She went to Scotland to see her family and for her own purposes and without consideration for the impact on the children.
- 98) The father said he contacted DVLA when the mother took the car and was advised to remove his name from the registration to avoid the risk of fines or penalties. He did not cancel tax or insurance but advised her to apply for change of ownership, which she did. He offered to stand guarantor to assist in finding local accommodation and to assist with maintenance and expenses. He denied using possible expiration of the tenancy to force her back to the family home. The children were very happy to be home.
- 99) The father denied spreading rumour in the church community. He said he only found out she was in Scotland from something somebody in the church said to him.
- 100) The father strongly denied the suggestion that he was racist or homophobic. In fact it was the mother, he said, who made derogatory comments saying that one of the reasons she did not want to return to a particular area was because "*Asians and Blacks do not get along in that part of the UK*". She said she had once had an unpleasant experience with an Asian man working as a cashier in a supermarket in that area and had not liked "*them*" ever since.
- 101) The father denied flirting (with a female tutor on a counselling course as suggested by the mother). He said he was a naturally friendly person who remained loyal to the mother throughout the marriage. The mother was just jealous whenever he had any dealings with females (despite trying to give the impression she didn't care about him any longer).
- 102) The father denied any threat to take the children to another country. He had talked to the mother as a matter of general conversation about the children experiencing other cultures, which he considered healthy for them. But he had never said anything to suggest he might remove them, as she has done in fact on two occasions.
- 103) The father accepted a natural interest in who the children were socialising with and mutually agreed the need to monitor what they saw on television, particularly when C was with the boys and they might want to watch something scary or 'action-packed'.
- 104) Other specific allegations made by the mother – blocking doors with his legs, leaving the children alone in the park, telling the mother she was not allowed to leave, demanding money – are also denied by the father. He said he has not said to her that she is incapable of raising the children on her own as this would simply be untrue. He did give the children reassurance they needed that they would not be taken away again as they had been in 2019.

- 105) The father denied any discussion about the way men are treated in Africa compared to women and said he had no idea what the mother was talking about in relation to her claim that he said he took part in a ‘virility ceremony’ other than she might be confusing it with traditional virginity festivals that historically took place in the part of Africa where he grew up and which she may have found out about online. The father said he was sickened at the suggestion that C could be placed at risk of FGM in his care.

Police interview of the father 13.12.21

- 106) On 29 November the father received a note from the police asking him to attend for voluntary interview, which he did on 13 December. I have seen the recording of that interview.
- 107) In summary the father gave an account consistent with his statement and evidence. He was asked who would initiate sex and replied that generally the mother would by putting her leg on him or taking her underwear off. He said sex last took place at the Festival in July 2018. He denied raping the mother following B’s birth, saying they always waited for 3 months “*as recommended*”. “*If [the mother] didn’t want sex, there was no sex.*” He said he would know if the mother did not want sex – she would turn the other way. He described her grabbing him and arousing him during sex. He did not recall her ever putting her arm over her face. He denied forcibly removing her underwear.

The mother’s evidence

- 108) The mother gave evidence over the course of some 5 hours. I got the impression that she found it an extremely difficult experience. There were long pauses while she appeared to collect herself. She clearly found it difficult talking about intimate and highly personal matters.
- 109) Finding out about the father having HIV had come as a massive shock. She had believed the father when he told her the medication she had found was not his and that he did not have HIV. As she was negative for HIV during pregnancy, she thought he must be telling the truth. She had done research around the subject when expecting C.
- 110) The mother said she was not told by the father in November 2017 she was completely safe from HIV. When she went to the sexual health clinic the following day she was terrified she had HIV. The clinic advised using protection and annual testing if she remained in the relationship even if the father continued taking his medication and his viral load remained undetectable because there could be ‘blips’ if it interacted with other medication or grapefruit juice, apparently.
- 111) The mother’s evidence was that when she spoke to the father in November 2017, he did not seem to know he could not transmit HIV. The clinic told her, she said, that he could not have known that in any event before 2016 when a 10-year study confirmed that medication and undetectable viral load meant it could not be transmitted. The clinic told the mother, she said, that before those findings were made medical professionals were unable to advise that HIV could not be transmitted under those circumstances.
- 112) I asked for further information on this point which I deal with below.
- 113) At times I found the mother’s evidence difficult to understand. In particular there seemed to be lack of clarity around what for her was consensual and non-

consensual sex. I asked her some questions about this (because she seemed to struggle to answer clearly about this issue under cross-examination). The upshot was that she thought there were three different ‘categories’:

- a) at the start of the relationship sex had been entirely consensual and unproblematic;
 - b) that seemed to change once the children were born when she was less happy about sexual relations but agreed – this she still described as consensual;
 - c) then there were occasions after the birth of B in particular when sex took place without her agreement, in particular between November 2017 and summer 2018, when although she would not expressly say no she signified by her body language (twisting away), keeping her underwear on, placing her arm across her face and, more recently her body too and crying that she was not agreeing to what was happening.
- 114) However, the mother also described consensual sex in which she placed her arm across her face. It seemed, for her, it was non-consensual when she left her underwear on and pressed her bottom into the mattress to stop him removing it. Later in her evidence the mother seemed to be saying the difference between consensual and non-consensual sex was when she placed her arm across her face.
- 115) The mother also talked about wanting more affection rather than just the sex act, which is what it seemed to amount to from her perspective.
- 116) The mother told me that the father removed her underwear to have sex after B was born more than once a month. She started putting her arm across her face because she did not really want to be there. She said she cried when he forced her. At other times she was just disengaged.
- 117) Mr Langrish challenged the plausibility of the father, at 5’11”, being able to press his shoulder into the mother’s chest, she being 5’3”, while penetrating her. The mother said her eyes were closed, when she opened them she was aware of his other shoulder by her chin and she could feel the sensation of his shoulder in her chest.
- 118) The mother said the father still pressured her for sex after she contracted thrush in summer 2018, however he accepted it when she said she could not have sex and did not try to remove her underwear. He continued to ask when she would be better.
- 119) Mr Langrish pointed out that during a consultation for thrush on 21 January 2019 the mother had said that condoms were used, contradicting her evidence that all sex was unprotected. The mother sought to explain this by saying she found intimate questions difficult. As Mr Langrish pointed out, it is difficult to see why she would find answering no to the question any more difficult than answering yes. Elsewhere in the same document there is a note ‘contraception – none’.
- 120) Part of the thrush condition was a painful lump on the vagina. In evidence the mother told me, for the first time, that she felt that was caused by the father having forceful sex with her.
- 121) Mr Langrish challenged the mother’s evidence that the father left her money for sex. The mother told me the money would appear on the bedside cabinet after

sex happened which seemed odd. She said she had never suggested he was paying her for sex but that is how it felt to her.

- 122) The mother told me she went to Scotland in May 2019 because that is where most of her support network was. She said at that point she had no contemplation of court proceedings. She confirmed the advice she received about returning to England was not legal advice but given by the refuge manager.
- 123) Questioned about why, if her allegations were true, she returned to the family home, the mother told me when treated badly she didn't always just walk away. She gave the example of being brought up in an abusive family yet lacking strength to completely break contact with her mother until she was 33.
- 124) As to her reasons for leaving in July 2021, the mother told me that the father stealing from his employer was the last straw. She accepted at that point sexual harm was not on the list of reasons – she had her own bedroom. The mother agreed she could have waited until the end of term but was finding it increasingly difficult to live in the same house as the father. She said she felt she could not wait.
- 125) Mr Langrish challenged the mother about her changing position in relation to contact. She maintained that her position has always been that contact could take place provided there were sufficient safeguards. In relation to her shift at the hearing on 27 September to contact at a contact centre (the father having surrendered his passports as the only safeguard required at the hearing on 6 September), the mother told me Cafcass had said she should not be bullied about contact and if she allowed direct or indirect contact they would report to social services as she would not be keeping the children safe.
- 126) The mother reiterated in evidence that she did feel the father was using these proceedings as a form of abuse. He had not given her a chance to sort out contact with him. He would know, she said, that if he had given her time and space there would have been a different way of resolving it.
- 127) The mother accepted that contact had been going well although maintained that the children, especially C, had been frightened of their father.
- 128) Mr Ward-Prowse asked the mother questions directed to her understanding of the impact on the children of being removed from their home on two occasions. The other told me the children loved it in Scotland and, when they came back to the south coast, asked if they could go back and live there.
- 129) During the three months they were in Scotland the children had contact with their father once. The mother said she did have internet and accepted the situation was “*not great*” and might have been upsetting for them.
- 130) Asked about the impact of being returned to their family home in August 2019 the mother said she had considered that and that was why the children were now undergoing counselling. It appeared (for the first time) that A had completed his counselling, B was in the middle of it and, once that was finished, C would start. After some questioning by me it transpired that counselling for children is offered as a matter of routine by the refuge. The mother accepted that the agenda for that counselling would be to address the trauma of being exposed to domestic abuse. I wondered why, if the children were truly as happy following the move to the north of England as the mother suggests, it was thought necessary

for them to undergo counselling and what the impact on them of that might be. The mother said she had agreed to counselling “*in case there were any issues*”. I am at all not sure that is a sound basis for counselling. It all sounded far too casual, without clear purpose and unplanned. It has also been done without any consultation with the father, the mother telling me she didn’t think of asking or even telling him.

- 131) The mother told me she would want contact at the contact centre to continue for a few months. She was concerned what longer contact in the community “*would look like*”.
- 132) In re-examination by Mr Smith the mother told me how difficult she had found these proceedings and talking to anybody about intimate matters. She was struggling to eat and her hair was falling out.
- 133) The mother denied that she had ever initiated sex at any point in the relationship. She denied grabbing and arousing the father during sex.
- 134) Mr Smith asked about the suggestion of “*cracking-down*” on the boys and the mother repeated that she understood this to mean physical chastisement, referring to the two occasions she had mentioned (A and the fridge incident and B being smacked on the leg in May 2019).
- 135) I then asked the mother why two incidents of physical chastisement would reasonably lead her to conclude that when the father talked about “*cracking-down*” that meant physical chastisement. The mother then told me that she had seen the father hitting A when trying to escape up the stairs to get away from him. This seemed to have happened after the move to Bournemouth in July 2017 but before the move to Scotland in May 2019 and when, she thought, A was about 6 (so around 2017). She told me the father had on this occasion hit A a lot of times. I asked how many and she was not sure but it seemed perhaps 10 times. I asked whether he hit him hard and she said he did. He hit A with his hand on his back, bottom and legs. She was not sure whether it left any marks – she did not look. She did not intervene. She left A upstairs with the father and went up to him later. He was ok. She gave him a hug and said “*mummy’s here*”. She did not check him for marks and no bruises appeared over the following hours and days. She did not report the incident to anybody.
- 136) Mr Langrish suggests this is a complete and obvious fabrication. I have to say I agree.

The father’s evidence

- 137) The father’s evidence was measured and articulate. He came across (as he did in police interview) as mild-mannered, considered and reasonable. I had in mind throughout that these are characteristics often displayed by controlling individuals who perpetrate domestic abuse. Or, of course, it may have been a true reflection of the father’s character.
- 138) The father started by repeating his regret for failing to disclose his HIV status, saying he understood the mother’s suffering and distress that resulted and saying there was no way he could properly express his apology and how he felt about his actions. He had not been man enough to tell the mother. He did not conceal it for anyone’s benefit. He remembered there being some medication in the house in Ireland which had been left there and which was taken to the pharmacy, but he

did not recall any conversation about it being for HIV. This was the only situation about which he had not been transparent with the mother.

- 139) He was concerned that the children's friendships, as well as their relationship with him, had been fractured by the moves that had taken place. He was grateful that contact had been re-established. Although the distance added time and cost, seeing the children he described as being "*like heaven*", which filled him with joy and hope.
- 140) The father was criticised for describing the mother in his statement as an "*unemployed housewife*", this being cited as an example of the subservient view he has of her and an example of controlling behaviour. The father acknowledged it could have been worded differently to reflect that fact that, as he suggested, the mother is a full-time mother.
- 141) The father denied leaving his tips as reward for sex. There was no connection. The tips were what they were – variable in amount and sometimes non-existent.
- 142) In relation to the allegations of rape, the father told me he had never seen the mother place her arm over her face or, more latterly, over her body. He did not see her cry. He maintained there were occasions she did initiate sex. If he was not sure she was happy they would not have sex.
- 143) When they moved to England in July 2017 the south coast had been the mother's first choice. Even though it was more expensive, job opportunities were better than in Scotland.
- 144) On other matters the father maintained the position set out in his statements. His evidence was consistent throughout. In particular, he maintained the only incident of physical chastisement was when he smacked B on the bottom (not leg) in 2019. It was not hard and was done to get B's attention when he would not stop playing with C after being asked.

The parties' submissions

- 145) Mr Smith asked me to consider the mother's character – her difficulty confronting people and not always walking away from situations – coupled with the fact that she was looking back through the prism of non-disclosure of HIV status (and so may for example see the father's comments about breast milk in a different light).
- 146) Clearly there are two starkly conflicting accounts of the sexual relationship between the parents which cannot be fused. One of them has to be lying. It was, said Mr Smith, inconceivable that the mother's account to the police and in evidence was not a true and accurate reflection of her lived experience. It is difficult to see how the father would possibly think this was a consensual act. The duty on him was to take active steps to ensure she was consenting.
- 147) The picture was one of financial isolation. He was in control of the finances.
- 148) The evidence of chastisement of the children is supported by the photograph seen by the police in May 2019.
- 149) The mother mitigates her criticism of the father by, for example, saying that he did not always take his bike to the park (in relation to the allegation he left the children alone there while he went off for a bike ride).

- 150) Mr Langrish said that this relationship never recovered from the unearthing of the father's mistake. About this he gave candid remorseful evidence and did not seek to hide or minimise the impact directly on the mother and indirectly on the children. It was more likely that the father had been advised he could not transmit HIV. The mother has not produced evidence to support her assertion that this advice could not have been given before 2016. This was designed to show him in as reckless a light as possible.
- 151) A crucial piece of evidence, says Mr Langrish, is the surgery note of 10 February 2019 which sums up the mother's position at a point when she did not know what to do. That was markedly different to what she was saying in April 2019 when she knows what she is going to be doing. That is the reason for the difference in the accounts, Mr Langrish submitted.
- 152) The mother's lies and changing position about contact suggests, Mr Langrish says, that the mother is 'canny'. The police are noted to say that she planned her exit on 9 July 2021 well. It was only when things started not to go her way that the mother pursued her case with the police and Cafcass.
- 153) And, says Mr Langrish, the mother has a tendency to move the goal posts to suit her, for example the grenade thrown in right at the end of her lengthy evidence of a very serious assault by the father on A. In contrast the father has remained consistent throughout and has never lost his politeness. The texts he sent in July/August 2021 belie the suggesting of a controlling monster, as does the manner in which he gave his evidence.
- 154) They carried on sharing a bed until May 2019 with no attempt by the father to force sex (noting the comment to the GP in February 2019 that their sex-life was non-existent).
- 155) Some of the allegations made by the mother were simply absurd (for example, trying to rescue the plant, or the suggestion that he said she didn't go to church was controlling behaviour, or that she was an unemployed housewife).
- 156) Would the children be as unconcerned during contact as they obviously are if what the mother said about the father's treatment of them were true?
- 157) Was there really financial abuse when she always had at least £1500 in her account and a car?
- 158) Mr Ward-Prowse maintained a neutral position on behalf of the children. He pointed out that it is open to the court to make a finding of sexual abuse short of rape.
- 159) So far as the HIV concealment is concerned, there had been some discussion how that fitted into the definitions of controlling and coercive behaviour but, said Mr Ward-Prowse, I need not concern myself with that as the wider definition of abuse encompasses psychological, emotional or other abuse. The question is whether in his concealment he subjected her to abuse in the wider sense.

Additional evidence concerning HIV transmission advice

- 160) I asked Mr Smith to send to me any evidence supporting the mother's contention that advice about non-transmissibility of HIV was unavailable before 2016.
- 161) The mother's solicitors have sent to me a 2012 report which starts by saying that it was known that being on antiretroviral therapy (ART) reduces the risk of HIV

transmission through sex, however it remained unknown what the absolute risk of transmission is in a person on ART with most recent measured HIV plasma load < 50c/mL in the absence of condom use. The purpose of the study was to provide missing information on the absolute risk of transmission in those circumstances. The conclusion of that report was that there was very strong evidence that virally suppressive ART reduces infectiousness of people with HIV through heterosexual sex. The ongoing PARTNER study would provide missing information in several key areas, including to more precisely estimate the absolute risk of HIV transmission using ART alone.

- 162) The result of the 10-year PARTNER study in 2016 was confirmation that a person living with HIV who takes treatment that lowers the virus in their body to 'undetectable' levels is unable to pass HIV on to their partners, even when engaging in sex without condoms.
- 163) Because the father said he was effectively given this advice in 2008 I went back to the *British HIV Association, BASHH and FSRH guidelines for the management of the sexual and reproductive health of people living with HIV infection 2008* (sending a link to the parties' legal representatives).
- 164) At paragraph 4.6.1 of the 2008 guidelines it is said that there had been several advances in the field of HIV transmission science. In general, and in short-term casual relationships, advice and support on safer sex and the use of condoms to reduce the transmission or acquisition of HIV or other STIs was still recommended. However, couples in long-term monogamous relationships may wish for information to make decisions about whether or not to cease using barrier protection. There was, it was said, currently no UK guidance on counselling on HIV transmission in the era of HAART (highly active antiretroviral therapy), Because this was an increasingly important and controversial area it was anticipated detailed guidance would be developed in the near future. The report presented the currently available evidence which may be useful in guiding consultations and discussions.
- 165) At paragraph 4.6.2 is was said:

“Studies have shown that the risk of HIV transmission correlates with the level of plasma HIV RNA for sexual [49,173] and mother-to-child [174,175] transmission. It is now well established that treatment with HAART reduces HIV infectiousness [35,176]. Extrapolations from epidemiological and biological data have led Swiss experts to the opinion that individuals with chronically suppressed viral loads taking HAART and with no STIs are not sexually infectious if certain key criteria are met [177]. The Swiss experts state that viral load suppression must be for at least 6 months and that the person must be on effective suppressive therapy under regular clinical follow-up. Although the precise transmission risk on suppressive ART is not known, prospective studies have shown no transmissions between sero-different couples if viral loads were undetectable [50,178]. Similarly, during therapy the concentration of HIV diminishes in both semen [37] and cervico-vaginal fluid [35,38]. Mathematical modelling of transmission data by Chakraborty et al. [179] shows that as the viral load in semen reduces, the transmission rate per sexual act reduces exponentially to approach zero. Although there is compelling evidence to reach similar conclusions to the Swiss where oral

and vaginal intercourse are concerned, gaps exist in currently available evidence regarding the transmission risk of anal intercourse – which is practised not only by MSM but also by a significant minority of heterosexuals, who may be unwilling to disclose this to healthcare workers. There would also be concern about the interpretation of this statement by individuals who might make decisions about their infectiousness based on incorrect assumptions, e.g. about the presence of STIs if they were asymptomatic, or who have multiple casual partners.

Nevertheless, providing information on HIV transmission to HIV-positive individuals is vital, and clear information based on the evidence must be provided in ways where the possibility of ambiguity does not arise. Time should be made available for detailed counselling and information provision, which can support PLHA to develop and maintain healthy and fulfilling sexual relationships, including the choice of procreation. Key areas of discussion are included as follows with a summation of the evidence to date in each case.”

- 166) My conclusion based on this evidence is that, although the position was made clear by the 2016 study, it would have been reasonable in 2008 to advise a HIV + patient who had undetectable viral loads and was using ART that vaginal sex with a long-term partner was likely to be safe, although there should be discussion about barrier protection. I do not conclude however that the advice was likely to have been as clear cut then as the father suggests.

Legal framework

- 167) Although a cautious approach is taken in domestic abuse cases to ensure the safety of children and potential victims pending findings of fact, the position remains that a party making an allegation of abuse has the burden of proving it.
- 168) The burden of proof is the balance of probabilities – is it more likely than not that what is alleged happened.
- 169) The court takes into account all the relevant and admissible evidence it has read and heard and does not compartmentalise it, nor does it take into account suspicion or speculation. The court is entitled as a matter of common sense to have regard to the inherent probability or improbability of something happening in deciding whether it satisfied it did.
- 170) The consequence of a finding is binary. If a positive finding is made, the court proceeds on the basis that what is found happened. If a finding sought is not proved, the court proceeds on the basis that it did not happen. However, a finding that an allegation is not proved is not the same as finding that it was deliberately fabricated. The burden of proving fabrication is on the person alleging it.
- 171) It is important for the court to make an assessment of the credibility of the parties as witnesses. The court may have regard to a witness’s demeanour when giving evidence, but credibility and reliability are better assessed by reference to the content of their evidence rather than the way they give it, including internal and external consistency or inconsistency.
- 172) The fact that a witness had lied about one thing does not mean they have lied about everything. Witnesses may lie for different reasons. And a lie does not corroborate an allegation unless it is found on evidence to be a lie, was deliberate, it related to a material issue and was motivated by desire to avoid the truth.

- 173) The court will have regard to the fact that memory is fallible. That is a matter of reliability rather than credibility.
- 174) I am asked to make findings of rape. I bear in mind that the criminal law requires:
- a) lack of reasonable belief in consent;
 - b) the need to take active steps to establish consent.
- 175) In relation to the question of HIV concealment and consent, it is common ground that failure to disclose HIV+ status does not vitiate consent: *R v B* [2006] EWCA Civ 2945.
- 176) I set out at paragraphs 114 to 115 of my October judgment the definition of controlling and coercive behaviour in PD 12J which I repeat here:
- “coercive behaviour” means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim
- “controlling behaviour” means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour
- “domestic abuse” includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment
- 177) I referred the parties to the very recent decision of Peel J in *GK v PR* [2021] EWFC 106 as a good example of the treatment of allegations of rape, including the need to consider and weigh police and medical evidence, the need to avoid minimising the impact of behaviours on a victim, the need to consider the totality of the evidence and factoring in the impact on a victim of traumatic abuse when assessing her evidence as a vulnerable witness.
- 178) On only one point would I respectfully disagree with an obiter comment by Peel J. At paragraph 40 of his judgment he said he could not accept that intentional misconduct is a pre-requisite for a finding of abusive behaviour. Peel J had been referred to *Re T* [2017] EWCA Civ 1889, where it had been said “...*none of the authorities require that a positive intent to molest must be established*”. *Re T* was a case relating to proceedings for a non-molestation injunction under section 42 of the Family Law Act 1996. ‘Molesting’ is not defined in the 1996 Act.
- 179) Controlling and coercive behaviour is defined in PD12J in terms of behaviour used (coercive) or designed (controlling) to harm a victim. In my view, to prove controlling or coercive behaviour (rather than more widely defined domestic abuse) does require an element of intent on the part of the perpetrator to bring about the harmful effects of their behaviour.

Analysis, findings and conclusion

- 180) This has been a troubling and difficult case. Experience shows that victims of domestic abuse, who are by definition vulnerable witnesses, sometimes find it difficult to talk about intimate and highly personal information, particularly allegations of sexual abuse. Because victims live in a state of fear, with patterns of abusively controlling behaviour, it is not uncommon for dates and incidents to become confused. Lived experiences are revealed over sometimes lengthy periods, including during court proceedings and, in my recent experience, in the course of giving evidence. Sometimes this iterative process is a matter of victims gaining the independence and courage to talk about their experience. Sometimes something is said which triggers a victim to be able to speak.
- 181) And, as Peel J pointed out in *GK v PR*, there is a risk of considering a victim's evidence as appearing (in that case) pre-prepared and 'dissociated' without considering whether or to what extent trauma induced vulnerability may have caused or contributed to her presentation.
- 182) Conversely, as I have mentioned, perpetrators of domestic abuse are usually controlling and manipulative individuals adept at adapting their presentation to appear calm, reasonable, polite and consistent (after all it is much easier to say something didn't happen, and maintain that as a consistent position, than make and sustain consistently positive allegations of abuse).
- 183) In short, there is a danger when assessing witness credibility of seeing victims of domestic abuse as poor witnesses, lacking credibility, and perpetrators as good, consistent, witnesses.
- 184) Judges asked to make findings in relation to allegations of domestic abuse will I am sure give themselves that health warning, as I do in this case.
- 185) Having said all that, I have come to the conclusion that, save only for the admitted concealment of HIV+ status, the mother's allegations of abuse which are disputed have not been proved by her to the requisite standard.
- 186) My essential reasons are these, first of all in relation to the mother's evidence:
- a) It is clear that this marriage was doomed from the moment the father disclosed to the mother his HIV+ status.
 - b) Perfectly understandably the mother was frightened by what she learned and had a deep sense of distrust in the father. He was no longer the person she thought he was. From this point the mother struggled between maintaining the relationship and ending it.
 - c) That was her position in February 2019 when she spoke to her GP.
 - d) By April 2019 however the mother had clearly resolved to leave the father. She took steps which she concealed from him. The question is whether she did so out of fear of him or to secure her own ends.
 - e) It was obviously wrong of the mother to effectively abduct the children to Scotland in May 2019 without letting the father know where they were (or at least the area), just as it was wrong in July 2021.
 - f) The mother's case and allegations against the father has changed. I accept that by May 2019 the mother no longer wished to be in a sexual relationship

with the father, but I do not accept that risk of sexual abuse was a reason to leave then any more than it was in July 2021. It is common ground they had not had sex since summer 2018. Although he may have been asking when she would be well enough to resume their sexual relationship, even on the mother's case he did not force the issue. The mother accepted he was not a sexual risk in July 2021.

- g) The timing of the mother's disclosures to the police and GP strike me as more consistent with pre-planning and justifying her departures.
- h) The mother's initial attitude towards contact (whatever may have been said to her later by Cafcass to change her mind) is entirely inconsistent with her case that she was in abject fear of the father.
- i) Her surreptitious return to the family home to collect her possessions, albeit accompanied by her sister and brother, also strikes me as inconsistent with the picture she paints of fear. She said did not want the court or the father to know about her allegations of rape for fear of the father's response. Why then effectively break into the family home, armed with bolt-cutters to remove bikes, rather than make some other more careful arrangement? There has been no indication that the father has been uncooperative in any respect.
- j) Then there was the mother's unheralded evidence about the father assaulting A in about 2017. Given the detail given by the mother in her lengthy statements about what sometimes might appear to be relatively minor matters it is utterly incomprehensible that she would omit an assault far more serious as described than the two she did mention. I had the distinct impression that the mother was making this allegation in an attempt to answer my question: why 'cracking-down' on the boys necessarily meant physical chastisement. I had the distinct impression that she was making this up as she went along. It would also be incomprehensible, and inherently improbable, knowing that she is a careful mother, that she would not check A for marks or bruising after such an assault or, indeed, intervene earlier than she said she did.
- k) I remind myself that the fact that the mother has lied about this matter does not necessarily mean she has lied about everything. That said, the fact that she was prepared, as I find it, to lie on oath about such an important matter in order to reinforce her case against the father blows a pretty large hole in her credibility and must call into question the reliability of her evidence more generally.
- l) While I accept that incidents of otherwise seemingly insignificant behaviours may add up to a pattern of controlling or coercive behaviour when considered in their totality and in terms of the impact on the victim, I am concerned in this case that some things said or done by the mother have been portrayed in the worst possible light and characterised as controlling behaviour when that is simply not the case. Mr Langrish gave some examples.
- m) I weigh in the balance what appeared to be convincing evidence by the mother of rape. But there is serious reason to doubt her credibility in my view.

- n) I also bear in mind the only piece of potentially independent evidence concerning physical abuse of the children – the photograph of the handprint on B’s leg seen by a police officer but not adduced by the mother in evidence. Following the hearing the mother’s solicitor emailed me (on 29 December while I was preparing this judgment) to say he had been sent images by the mother. I took the view that it would be wrong to admit those in evidence as it would require re-opening the evidence. If the mother had images they should have been produced in advance of the hearing.
- 187) There is also, in my judgment, good reason to prefer the evidence of the father:
- a) Even trying to see the father as a controlled, controlling and manipulative man, I find myself quite unable to characterise him in that way. He presents as entirely reasonable and mild-mannered.
 - b) Lest it be thought that is simply how he presents to me and professionals, my view is reinforced by the private texts between him and the mother in July and August 2021, after she left the home without telling him. We see a man concerned about the mother and the children, asking with great patience when he might see the children, concerned not to appear ‘pesky’. Mr Langrish wondered whether he or any of us might be quite so moderate were we in the same position. I see his point. These were not the texts of somebody manipulating a situation to appear reasonable later. They were private texts which the father had no reason to think would become the subject of evidence and scrutiny. They reflect truly, in my view, who he is. And that is entirely at odds with the picture of him painted by the mother.
 - c) I consider the father’s regretful and apologetic attitude to his concealment of his HIV+ status to be genuine and not motivated by desire to appear in a more positive light. Undoubtedly this was a gross deception. It was entirely wrong of the father to enter into a sexual relationship with the mother without telling her the true position so that she could consider for herself whether she was prepared to continue and, if so, what precautions they might sensibly take to stay safe. I am prepared to accept that the father had been told, in accordance with the state of medical knowledge at the time, that it was unlikely he would transmit HIV to the mother (or children) if his viral load remained undetectable and he used ART. I also accept that the father tried to genuinely reassure the mother when telling her of his HIV+ status and that his reassurances were lost in the perfectly reasonable feelings of mistrust, betrayal and fear the disclosure engendered.
 - d) I also take into account as part of the totality of the evidence the children’s reactions to the father in contact. If indeed the father was a figure of fear, as described by the mother, it is surprising to see the unreservedly positive and anxiety-free response of the children to the father in contact, especially after such a long break.
- 188) My conclusion is that the mother, unhappy with the marriage following the father’s disclosure of his HIV status, sought reasons to justify her departure, both in May 2019 and July 2021. I do not accept that the mother’s allegations of rape, of controlling and coercive behaviour or of unreasonable physical chastisement

of the children are made out. I find that she has fabricated her allegations against the father.

- 189) I make clear that, abhorrent and abusive though it was in terms of emotional and psychological impact on the mother, the father's non-disclosure of his HIV+ status does not in itself create a risk to the children (or to the mother) and should not be seen as an impediment therefore to an ongoing and unrestricted relationship with the children through contact.
- 190) That concludes this judgment.