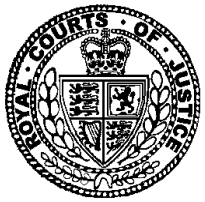

Neutral Citation Number: [2023] EWHC 1499 (Fam)

Case No: FA-2022-000280

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE CENTRAL FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2023

Before:

MR JUSTICE POOLE

- -

A v B (Appeal: Domestic Abuse)

Between:

A **Appellant**

- and -

B

Respondent

- -
- -

Dr Charlotte Proudman and **Ms Elisabeth Traugott** (instructed by Goodman Ray Solicitors) for **the Appellant**
The Respondent in person

Hearing date: 12 June 2023

- -

This appeal was heard in public but the court has directed that no person may publish or communicate information that identifies or is likely to identify either party or their son who is the subject of the proceedings. Any person doing so may be found to be in contempt of court.

Mr Justice Poole:

Introduction

1. This is an appeal against determinations of fact made within private law Children Act proceedings. The proceedings concern the welfare of the parties' son, C. The Appellant mother has made allegations that during her marriage to the Respondent father, he abused her sexually, physically, psychologically, and emotionally, including by controlling and coercive conduct, and that he was physically abusive to C. After a three day hearing the Judge found none of the allegations proved.

2. The Appellant is represented by Dr Proudman, who did not appear in the court below, and Ms Traugott, who did. The Respondent is unrepresented in this appeal but was represented by Counsel in the court below.

3. The Appellant has been given limited permission to appeal, primarily on grounds related to her allegations of sexual abuse, but invites the Court to allow the appeal and, if so, to remit the case for a further finding of fact hearing on all the allegations so that a new judge can consider afresh the whole of the evidence.

Background

4. The Respondent is aged 50, the Appellant 42. The Respondent is of British and Pakistani heritage. His parents both died over twenty years ago. He is particularly close to an auntie, aunt D. The Appellant was born and brought up on an island which is an overseas department of France, but came to live in England when she was aged 18 to train to become a teacher. She completed her training, secured work as a teacher, and now has settled status here. They are both Muslim. Their marriage in 2007 was arranged after an introduction by a cousin of the Respondent who was a work colleague of the Appellant. Her parents and male relatives of the Respondent spoke and agreed to the marriage. The religious ceremony took place on the French island where the Appellant had grown up, only three months after the parties had met. A civil ceremony then took place in England. They had had little social interaction before the marriage. They have had two children but their first child tragically died at the age of nine months. Their surviving child, a boy, C, is aged eight. In 2015, whilst the Appellant was pregnant with C, the couple ceased to have sexual intercourse although they continued to share a bed. Two years after C was born, the Respondent moved out of the marital bedroom. In 2019, the parties attended a joint mediation session with a view to separating. In October 2020, the Appellant and C travelled abroad to the island of the Appellant's birth with the Respondent's knowledge. Two months later, the Respondent received a message via the Appellant's solicitor saying that she would not be returning to England with C because of domestic violence. In fact, I was informed at the appeal hearing, she returned with C in December 2020 but lived in a refuge. In January 2021 the Respondent issued an application for a Child Arrangements Order and a few months later the Appellant made a cross-application. The Court made directions for a finding of fact hearing on the Appellant's allegations. The hearing was conducted by Recorder Roscoe ("the Judge") over three days between 12 and 15 September 2022 following which he handed down judgment on 27 September 2022.

The Allegations and the Judgment

5. The child, C, lives with the Appellant but the Respondent seeks a shared 'lives with' order. The decision to proceed to a separate finding of fact hearing is not under appeal

and I make no observations about it save to observe that even if this appeal is dismissed the final hearing is not due to take place until March 2024. The allegations that the Judge had to determine were as follows:

> "(a) Physical or sexual abuse (of the mother).
> The mother felt a great deal of pressure to meet the father's sexual expectations.
> (b) Violent or threatening behaviour (of C).
> October 2020 the applicant allegedly hit C, the respondent heard this from another room and came in to C crying.
> (c) Controlling and coercive behaviour.
> i. The father was isolating the mother and did not protect the mother from his family isolating her also.
> ii. March 2020 C was taken to see criminal and respondent was not informed of this.
> iii. The respondent stripped of her identity. The applicant did not permit C to be exposed to the respondent's French heritage.
> (d) Psychological, emotional, or other abuse.
> i. The applicant would undermine the respondent for having a caesarean birth, claiming she was not a "real" mother.
> ii. 2014 to 2020: the respondent was denied the right to grieve or visit her son's grave.
> iii. The applicant would degrade the respondent and use derogatory language. For example: "stupid" and "black"."

The Judge described these as "broad clusters of alleged abuse" which "enabled a picture of the relationship to be built up and to help me to see if a pattern of behaviour emerges." The "criminal" referred to at c (ii) was a cousin of the Respondent who had committed a very serious crime. The Appellant alleged that the Respondent had more than once deceived her about this man and his past and, in consequence, C had been introduced to him when he was on day release from prison.

6. The Judge directed himself as to the burden and standard of proof and the core legal principles to be applied when determining allegations of fact. No point is taken about his self-direction on the law. He referred to the Crown Prosecution Service Interim Guidance for Prosecutors, citing an extract from the section on "Myths and stereotypes". The Judge heard evidence from both parties but no other witnesses. He noted that the Appellant had not alleged sexual abuse by the Respondent in her initial application or her first position statement, and not at all until a further position statement in December 2021. He ensured that protective measures were in place throughout the hearing and the Appellant has not suggested that the measures were inadequate.

7. The schedule of allegations was apparently intended to describe patterns of behaviour. Whilst some specific instances are set out in the schedule, the allegation of "physical or sexual abuse" does not include any allegations of specific events, rather, it alleges a continuing state of affairs within the relationship that was abusive. The court would therefore look to the evidence in support to flesh out the general allegation but the Appellant's witness statements contained little detail. The Appellant had made four statements but the third and fourth concerned issues of contact only. Accordingly, the only statements detailing the allegations made were a four and a half page first statement from December 2021 and a seven page statement dated 1 February 2022. The

Appellant's written evidence in relation to the allegation of "physical or sexual abuse" was so concise that it can be quoted in its entirety:

8. From the first statement:

> "6. Between 2014 and 2016 sexual abuse was prevalent within the relationship. The Applicant would manipulate me into "sexually satisfying" him. He would use religion against me saying that the prophet and angels will curse me, and that I will never go to paradise if my husband is unhappy with me. I was no longer fighting one person, I had to fight a system of beliefs which was an impossible task.
> 7. The Applicant also spoke to his family about our personal intimate relations. They people would tell me that "God will be unhappy with [me]" if I didn't fulfil my husband's needs. I was made to feel ashamed and obligated. They would collectively imply I am a bad wife and would peer pressure me into giving in. I feel this was also his way of showing me how I was out numbered and unsupported.
> 8. Given the precarious situation between me and the Applicant I was hesitant and had reservations about starting a family with him, however the Applicant did not believe in contraception. I was forced to conduct our relations in this way, thus our first child was unplanned. Having to raise this child took a significant toll on my mental health, especially in such a toxic environment. I was always seen as tire one who couldn't have children, however this was not true. There was always talk of providing an heir to the Applicant and about considering treatment to make this happen. I felt misunderstood by everyone and didn't feel like I could be open about my preference. I was under a crushing pressure to perform and felt forced to have sexual relations.
> 9. This situation was exacerbated by the fact that our first child was speculated to have had a mitochondrial condition that could only be inherited by the mother. The Applicant spared no detail when telling his family that I could only have 'faulty children'. This was yet another reason to degrade me and situation that could be held over my head like a black cloud."

9. From the second statement:

> "4. Since 2007, I have been subjected to sexual abuse by the Respondent. Whilst my mother and father were staying with us, I was taken into another room where the Respondent would force himself onto me. I did not want to make a big deal or create a fuss in front of my parents as this would be seen as taboo, so I submissively complied. This would happen up to three times a day.
> 5. For religious reasons I had to take a bath following sexual intercourse, this would make it very obvious what had happened to me. I believe this was the Respondent's way of asserting his authority and control over me. I was in a lot of pain and had to grit my teeth through the ordeal to protect my parents. On one

> occasion, my mother silently combed my hair whilst I sat there crying.
> 6. I was extremely embarrassed and humiliated by what was happening to me. There was no real love or intimacy between us. Being around the Respondent was cold and isolating. Therefore, letting him into my personal space felt like a violation of my privacy.
> 7. Before our son C was born in 2015 was the last time the Respondent sexually abused me. For the seven years that I had endured this behaviour I felt objectified and dehumanized. Culturally, a wife is seen as a husband's right, I therefore did not know how to confront this issue or even object, it felt like I had to fight against a culture and society not just a person. The Respondent would tell me "you have to because I am frustrated." There was intense pressure to give my husband 'his rights'.
> 8. Furthermore, in July 2007 after the Respondent and I got married, we lived in the Respondents brother's house. The Respondent hit me with a towel, it left a mark for two days and stung me at the time. When I told the Respondent this, he dismissed me like I hadn't even spoken, I was completely disregarded. As we were sharing a home I could not express myself openly."

The Judge put the discrepancy in dates as between the two statements (2014-16 as opposed to "since 2007") down to an error in transcription. The allegation of physical abuse by striking the Appellant with a towel was not pursued at the finding of fact hearing having been removed at a Pre Hearing Review. Accepting that paragraphs other than those set out above did allege other forms of coercive and controlling behaviour and psychological abuse, and were therefore relevant to patterns of behaviour of which the sexual abuse was said to be a part, the specific evidence of sexual abuse over a seven year period was nevertheless lacking in detail.

10. It will be noted that the allegation of sexual abuse that the Judge was invited to find proved was that the Appellant "felt a great deal of pressure to meet the father's sexual expectations." As I shall describe, when making his findings about alleged sexual abuse, the Judge referred to coercion, manipulation, forced sex, and rape. Sexual abuse may take many different forms and it is important to be clear as to what form of sexual abuse is alleged. The Appellant's skeleton argument refers to pressures on her to submit to intercourse such as cultural expectations, religious observances, pressure from family members, and the arranged marriage. I clarified with Dr Proudman what the Appellant's case had been before the Judge, and what it was now, in relation to the Respondent's role in pressurising the Appellant to meet his sexual desires and expectations. She was anxious to avoid asserting that the Respondent's *intentions* were relevant to whether he had been sexually abusive, but did confirm that the Appellant's case had been and remained that the Respondent exploited the Appellant's isolation and vulnerability, and "weaponised" their shared religion to coerce her into sexual intercourse. It was not that the Appellant felt she had to submit to intercourse only because it was generally expected of her, but rather that the Respondent forced her to do so by threats and coercion related, in part, to their shared religion and culture. Her second witness statement might be read as limiting this sexual abuse to times when other family members were in the house, but that is not the Appellant's case – she alleges that, daily from 2007 to 2015, the Respondent would force her to have intercourse with him. Her references to feeling pressure from others within the Respondent's family were not

intended to cloud the fact that it was the Respondent whom she alleged was coercing her.

11. The Judge noted the Appellant's oral evidence that the first sexual intercourse the parties engaged in was a few weeks after their religious marriage ceremony. They then typically had intercourse three times a day. The Appellant had not felt comfortable having sex with the Respondent because they had not known each other well but she felt she had to do it "if not she would go to hellfire. She felt she had no choice. She did not know it was a choice, thinking it was normal … she felt she could not talk about it." The Judge also recorded that the Appellant said, "I was very tense, I dreaded it. He would say your husband is frustrated and the angels curse women who do not give their husband his rights… and the family made me feel pressured." The undisputed evidence was that on their wedding night the Respondent had advised the Appellant not to talk to anyone other than the Imam and Aunt D about their marriage.

12. Prior to the hearing, the Appellant had alleged that the Respondent had hit their son, C, on one occasion: the allegation being included within the schedule of allegations the Court was asked to determine. In her oral evidence, she alleged that the Respondent had struck C on an almost daily basis. When challenged as to why she had not mentioned this earlier, the Appellant said that she had told her solicitors but they had advised her not to include it in her allegations. The Judge noted that the Appellant's oral evidence was characterised by long silences when she was asked questions.

13. The Judge recorded the Respondent's evidence that he was a devout Sunni Muslim. The great majority of women within his family did not wear a hijab but his own view was that they should. The Appellant wore a hijab prior to their meeting. In some households within his family, men and women are segregated. He and the Appellant were virgins when they married and were very inexperienced sexually. He said that the parties had not had intercourse on their wedding night because the Appellant had been nervous. He said that he and the Appellant had a similar level of religious understanding and observance. Washing after intercourse was something they both expected each other to do, in accordance with religious practice. He accepted that he would recite incantations prior to intercourse, sometimes only in his head, sometimes out loud. The contents of those incantations was not elicited but the Judge recorded the Respondent's evidence that similar incantations or prayers might be spoken before consuming food, for example. There was no evidence that the content of the incantations was threatening or potentially coercive of the Appellant. The Respondent denied that his view was that his religion required a wife to submit to her husband's sexual desires or that he had told the Appellant that she would go to hell if she did not submit to him sexually. He said that it would be contrary to the tenets of his religious beliefs to coerce a person into intercourse and that he did not do so. He characterised the parties' sex life as consensual, with the Appellant sometimes instigating intercourse even though more often he was the instigator. He felt that for the first few years their relationship had been a loving one. The Respondent agreed that the couple had not discussed contraception until after their first child's death. They had ceased intercourse at the Appellant's request in 2015 when the Appellant was pregnant with C. The Judge recorded that he found the Respondent's embarrassment about speaking about sexual matters to be "tangible". He found the Respondent to have been candid in his evidence.

14. The Judge noted that the Appellant had travelled on her own to England aged 18 to train to become a teacher. At the time of the marriage she had been living in England for about 8 years and was a teacher in an Islamic school. She had three aunties who lived in England and she had regular contact with them and her cousins. The Respondent's

parents died a long time ago, before he had met the Appellant. He was close to his aunt D and had other relatives in England.

15. The Judge considered some exchanges of text messages and an email from the Respondent. He considered that the tone and content of this evidence was not at all suggestive of coercion and control, nor any form of abuse.

16. The Judge found that none of the allegations were proved on the balance of probabilities. He dismissed the allegations that the Respondent had hit C, that he isolated the Appellant and did not protect her from his family also isolating her, and that he had stripped her of her identity. He dismissed the allegations of psychological and emotional abuse. Whilst the Judge addressed his findings on each of the clusters of allegations separately, he reminded himself that he "must consider and take into account all of the evidence available. My role here is to survey the evidence on a wide canvass, considering each piece of evidence in the context of all the other evidence." Having reviewed all the evidence he said at [82] "there is inevitably an overlap in the types of alleged behaviour that I need to be alert to when looking to discern a pattern. The following analysis of the clusters of allegations should be considered with that in mind, as I am not looking at them in isolation from each other but rather I look more holistically for evidence of domestic abuse which impinges upon decisions as to C's welfare."

17. The Judge noted that "the absence of corroboration means that I am essentially left with one person's word against another." [87]. He found,

    i) "The mother's evidence is that there was never any conversation at all about sex. The inherent probability of the mother silently submitting to forced sex, often multiple times a day, for several years seems to me to be low. I therefore need to consider whether there is cogent evidence to support that prospect." [88]
    ii) The father's evidence that he would regard it as an abuse of his religion to use it to coerce the Appellant into having intercourse with him was credible. [90-91]
    iii) The fact that the Respondent did not coerce the mother to have intercourse on their wedding night or for a few weeks after the marriage, or again after C's birth in 2015, showed that the father did not feel "that the mother's body was his to use as he wished because that was his right" [92], and was not consistent with "the acts of a man who sought to manipulate, exploit, or interpret religious text to make the mother feel that she ought to have sexual intercourse." [93]
    iv) The Respondent had advised the Appellant that she should only confide with aunt D or the Imam about problems in their marriage but he had not done so to characterise himself as some "elevated religious figure, nor was their any particular vulnerability about the mother from the outset that would have prevented her from exercising her own free will to question what was happening or to tell other people." [94]
    v) "Again, the inherent probability that the mother, as an educated English teacher, would have immediately felt totally unable to speak to anybody apart from the Imam or auntie, once she had been married if she was raped on a frequent basis, seems to me to be low. I consider it more likely than not that the mother would herself have known between 2007 and 2015 what was and was not acceptable behaviour in a marital relationship for people of a mainstream Muslim background. I do not accept her evidence that she did not know sex was a matter of choice or that she did not know any better. She was an educated woman who had spent seven years living in the UK before she chose to marry." [95]

Grounds of Appeal and Permission

18. The Appellant sought permission to appeal the judgment and findings of the Judge on ten grounds. On 27 April 2023 Mrs Justice Morgan gave permission to appeal on grounds 1 and 3 only, refused permission to appeal on ground 2, 4 to 6, and 8 to 10, and directed that the question of permission on ground 7 should be determined at this hearing. The Appellant has not sought to renew the permission application in respect of grounds 2, 4 to 6, and 8 to 10. The grounds for this court to consider are therefore:

> "Ground 1: It was wrong for the Recorder to find that the likelihood of the Appellant being raped by her husband was low because:
> a. "she was an educated English teacher";
> b. she knew that her husband was devoutly Muslim when they married;
> c. if the Respondent had wanted to rape her he would have done it on their wedding night when he accepted that she was too nervous to consummate the marriage;
> d. the Respondent would have continued to rape the Appellant after C was born, the last occasion when the parties were sexually intimate.
> In making these comments the Judge applied rape myths and applied a higher standard of proof in rape in partnerships to stranger rape cases.
>
> Ground 3: It was improper for the Recorder to find that the Appellant submitted to sex multiple times a day freely and willingly where the Respondent admitted that:
> a. their marriage was arranged and they were married within two months of meeting;
> b. on their wedding night (when the marriage was not consummated) he told the Appellant that she could only speak to the imam and to the Respondent's aunt about their marriage;
> c. the Respondent would remind the Appellant to incant a prayers before sex;
> d. the parties never discussed contraception;
> e. the Appellant was expected to wash herself thoroughly each time they had intercourse.
> Ground 7: It was wrong for the Recorder to conclude that the Appellant was not vulnerable or isolated given the circumstances of the parties' marriage and the limited extent of the Appellant's connections in this country."

19. These remaining grounds of appeal do not include any contention that the Judge misdirected himself in law or that there was any procedural or other irregularity that rendered the proceedings unfair. It is not contended that the Judge wrongly recorded the evidence given. As to the findings of fact, none of the extant grounds of appeal concern allegation (b) before the Judge which was that the Respondent had assaulted the parties' child, C. It is nevertheless relevant that the Judge dismissed the allegation included in the Appellant's schedule and the Appellant's wider allegation of persistent physical abuse of C. The Judge's findings that the Appellant's allegations of controlling and coercive behaviour and psychological or emotional abuse were not proved, are not challenged by grounds 1 and 3, and the Judge's express rejection of elements of the

allegations of controlling and coercive conduct are not now the subject of this appeal. However, I do have to consider whether to give permission on ground 7 which concerns the Appellant's isolation and vulnerability which is relevant to the allegations of sexual, psychological and emotional abuse, coercion, and control.

The Law on Appeal

20. FPR 30.12(3) provides that an appeal may be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity. The court may conclude a decision is wrong because of an error of law, because a conclusion was reached on the facts which was not open to the judge on the evidence, because the judge clearly failed to give due weight to some significant matter or clearly gave undue weight to some other matter, or because the judge exercised a discretion which "exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong": *G v G (Minors: Custody Appeal)* [1985] FLR 894.

21. The appellate court must consider the judgment under appeal as a whole. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised the approach as follows:

> "22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law…
>
> 23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."
>
> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis". "

22. The appellate court should be slow to interfere with findings of fact. As Lewison LJ said in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, at paras114 to 115:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…..The reasons for this approach are many. They include,
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

23. More recently Lewison LJ set out the principles to be applied again in *Volpi and ors v Volpi* [2022] EWCA Civ 464 at [2], principles cited by Baker LJ in *T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Domestic abuse

PD12J

24. PD12J of the Family Procedure Rules 2010 at para 3 defines domestic abuse as including "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."

25. The general principle at para 4 of PD12J is that "Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with domestic

abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both parents".

26. The Home Office Statutory Guidance on Domestic Abuse, July 2022, the CPS Guidance on Domestic Abuse, and Chapter 6 of the Equal Treatment Bench Book are all of assistance in guiding the court when considering findings of domestic abuse.

Appellant's Submissions

27. For the Appellant, Dr Proudman and Ms Traugott seek to "reframe" the Appellant's first allegation before the Judge (referring to the Appellant as M and the Respondent as F):

> "M submits that she was subjected to sexual coercion and control that amounted to inter-marital sexual abuse. F took advantage of M's vulnerability by rushing through an arranged marriage and setting out "rules" on their wedding night, creating an atmosphere of fear and secrecy. A dark family secret was hidden from her. Strict Islamic teachings were enforced, including those related to sex. She was forbidden from attending the burial of her first son, who sadly died, because she is a woman. The misogynistic attitudes of the father cannot be explained by pleading cultural relativism. The question is therefore not whether M was "raped" or did not consent, but rather, whether she "submitted" to sex that was humiliating, degrading, threatening, and which she was unable to resist with a broader pattern of coercive and controlling behaviour."

28. It is further submitted that the Judge "fell into legal error by (a) justifying F's sexual control with rape myths and stereotypes and (b) failing to see the parties' sexual relationship within the broader context of their coercive and controlling marriage." The Appellant submits that the Judge's reasoning in relation to his finding that the sexual abuse allegation was not proved, was clearly in error. I refer to his reasoning from paragraph 37 below.

29. The Appellant has been refused permission to appeal in relation to ground 4, which was that the Judge had been wrong to find that the Respondent had not been psychologically abusive when he prevented the Appellant from attending the burial of their child, and ground 5, that the Judge had been wrong to find that the Respondent had not been controlling when failing to disclose the "dark family secret" to the Appellant before their arranged marriage. The Judge did not find allegations of controlling and coercive behaviour or psychological, emotional or other abuse proved. Whilst I have yet to determine permission to appeal under Ground 7 of the Grounds of Appeal, which concerns issues of vulnerability and isolation, I have to proceed on the basis that the Judge's other findings were properly made. Hence, it was not proved that the Respondent had assaulted C, or that he had controlled or coerced the Appellant by stripping her

of her identity or by taking C to see his cousin who had been convicted of a very serious criminal offence, or that he had undermined the Appellant for having a Caesarean delivery, denying her the right to grieve or visit her son's grave, or by using derogatory language. These were important findings because the court is required to consider all of the evidence to examine whether there was a pattern of coercive and controlling behaviour. The allegations of sexual abuse needed to be considered in the context of all the evidence. As the Court of Appeal said in *Re H-N* [2021] EWCA Civ 448 at [45], reducing the field of focus risks robbing the court of "a vantage point from which to view the quality of the alleged perpetrator's behaviour as a whole" and removing "consideration of whether there was a pattern of coercive and controlling behaviour from its assessment." Similarly, the narrow focus of the remaining grounds of this appeal must not obscure the fact that the Judge was considering the whole of the evidence and did not find patterns of coercive and controlling behaviour.

Determination of the Application for Permission to Appeal on Ground 7

30. Ground 7 of the Grounds of Appeal is that the Judge was wrong to conclude that the Appellant was not vulnerable or isolated "given the circumstances of the parties' marriage and the limited extent of the Appellant's connections in this country." The Skeleton Argument on appeal portrays the Appellant as vulnerable – "she could be persuaded to marry a stranger by a work colleague" – and the weaker party in a relationship characterised by a "power imbalance" – "M married a man she barely knew, naively trusting him and his wider family then living in a foreign country isolated from her support network." However, the Judge noted that the Appellant was a professional woman who had come to England several years earlier and had shown her ability to live and work independently here. She had no vulnerability in terms of her immigration status, language, or her ability to function in society and the workplace. She did have family members in England to whom she was close. The Appellant allowed her parents, who still lived on the French island where she had grown up, to decide on whether the marriage should go ahead. The religious marriage took place on that island which was not somewhere with which the Respondent had any prior connection. Dr Proudman and Ms Traugott contend that "It was a legal error for the Recorder not to consider this vulnerability in the judgment." In fact, the Judge did expressly consider the Appellant's vulnerability but found that she had not been particularly vulnerable due to the circumstances of the marriage or her connections in this country [94]. He noted that she was 26, she was a professional, she had carved a life out for herself in England over the previous seven years, she had no material language barriers, she was not isolated and had regular contact with her aunts and cousins. Both parties had agreed to submit to their relatives' guidance on whether the marriage should be arranged and both were equally sexually naïve. This was a question of fact for the Judge to determine. The question on appeal is not whether the Judge might have reached a different conclusion. Here, the Judge was clearly entitled to reach the conclusion he did about the Appellant's vulnerability and isolation due to the circumstances of her marriage and her connections in England, and there is no real prospect of the appeal succeeding on ground 7 nor any other compelling reason why permission should be given on that ground. Permission to appeal on ground 7 of the Grounds of Appeal is therefore refused.

Determination of the Appeal on Grounds 1 and 3

31. In relation to the remaining grounds, 1 and 3, I repeat that the Appellant's case was not only that she silently submitted to intercourse, about three times a day for seven years, but that she did so after the Respondent had used coercion and force to secure her submission. On her case, the fact that the parties were observant Muslims within an arranged marriage gave the Respondent the opportunity to exploit religious and cultural themes to force himself on the unwilling Appellant. The Appellant has not suggested that she said or did anything to resist the Respondent, but it follows from her allegations that even if the Respondent did not meet with resistance, he was consciously coercing or forcing her to comply with his sexual desires and that this was repeated sexual abuse that persisted for several years.

32. There are a number of authorities that are helpful when considering a factual case of the kind alleged by the Appellant, to which I was referred.

    i) In *Re H-N and Others (Domestic Abuse: Finding of Fact hearings)* [2021] EWCA Civ 448, the Court of Appeal stated that where one or both parents asserted that a pattern of coercive and/or controlling behaviour existed, that should be the primary issue for determination unless any particular factual allegation was so serious that it justified determination regardless of any alleged pattern of coercive and/or controlling behaviour. At paragraph 71 of the judgment, it was stated that the court should be concerned with how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not come within the definition of rape, murder, manslaughter or other serious crimes.

    > "Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to "not guilty" in the family context. For example, in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between 'consent' and 'submission' may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault."

    ii) This approach was adopted by Gwynneth Knowles J in her judgment on appeal in *A, D and B, C, E* [2022] EWHC 3089 (Fam).

    iii) The Appellant's allegations have some similarities with the evidence before Hayden J in *F v M* [2021] EWFC 4 (Fam) in which he noted at [39] to [40] how the mother in that case had been,

    > "essentially compliant … she did not tell her husband to stop, she just endured it until it was over. She told the policewoman that she had never been with any other man and she thought that her husband might "because of his culture" consider that a good wife would not refuse her

> husband sex … she described how following sex her husband would immediately go and shower himself in her evidence she said he treated her "like rubbish".
> "Though [M] is clear that F was never physically violent to her, she told the police officer that she had always thought he might be. She described how she was essentially compliant and turned over…"

There is no doubt that such circumstances and behaviour can be found to be abusive.

iv) In *Re BB* [2022] EWHC 108 (Fam) Cobb J was concerned with one of the cases remitted by the Court of Appeal in *Re H-N* (above). Again, some of the evidence was similar to that in the present appeal. Cobb J said at [98],

> "I remind myself that [the mother] had no experience against which to judge this relationship and in all likelihood became co-dependant on her partner in an unhealthy way. I find that her self-esteem and sense of worth has been eroded to the point where she could not look beyond the relationship with the father; she became immunised to the emotional volatility of a relationship which she had come to believe was normal and acceptable. She simply sought to cling to what she knew."

33. Dr Proudman complained that the Judge paid only "lip service" to the need to examine the "wide canvass" of the evidence as a whole and, instead did in fact fall into the trap of examining the allegation of sexual abuse in isolation from other evidence showing patterns of coercive and controlling behaviour, and psychological abuse. I do not agree. The structure of the judgment does allow the submission to be made – the judge analysed the evidence in relation to each head of alleged abuse – but the Judge not only set out the correct legal approach [7(8)] but then reminded himself to look for patterns of behaviour [28], and to consider all the evidence "holistically" rather than considering the allegations in isolation [82]. Having reviewed all the evidence in relation to heads of alleged abuse, the Judge expressed his "overall" view of the credibility of the parties. Looking at the judgment as a whole, he did consider the allegations of sexual abuse in the context of all the evidence, he examined the broad nature of the relationship, as well as considering the credibility of the parties on the wider evidence, not just their evidence on the issue of the alleged sexual abuse.

34. A significant hurdle for the Appellant is that she has been refused permission to appeal in relation to, now, eight of her ten grounds of appeal. I have found that the Judge properly examined all of the evidence looking for patterns of abuse, coercion and control. The findings he made on the allegations of sexual abuse were made in the context of findings that there was no pattern of abuse, coercion, or control in other areas of the relationship of the Respondent's behaviour. Those findings stand. Hence, any pattern of sexual abuse would

stand apart from the other features of the relationship which have been found not to have been abusive or to involve coercion or control.

35. The Appellant's skeleton argument contends that the Judge ignored "indicia of F's control of M's free will", including the expectation of washing after intercourse and the Respondent's failure ever to raise the subject of contraception. However, the evidence before the Judge was that both parties held to religious beliefs and practices by which they would expect to wash after sexual intercourse. The Appellant herself has not alleged that the Respondent made her wash, rather that "for religious reasons I had to take a bath following sexual intercourse" which would mean that those in the house would know she had had intercourse [her second statement, paragraph 5]. Neither party raised the issue of contraception for several years – this was not a question of the Respondent closing down the subject. The Appellant herself had not alleged that the Respondent used the issue of contraception as one of control or coercion. These were matters that the Judge considered in his judgment and the evidence entitled him to find that they were not probative of coercion and control, or sexual abuse.

36. The Judge expressly accepted that religion could be used as a threat or for the purposes of coercion [90] but the Judge rejected the Appellant's allegation that the Respondent had in fact threatened her that she would be condemned were she not to submit to her husband's "rights" to fulfil his sexual desires. His primary reason for rejecting that evidence was that he found the Respondent's assertion that such coercion would be contrary to his religious beliefs and tenets to be credible. The Judge considered credibility in the light of all the evidence and having had the advantage of seeing and hearing the parties give evidence before him. This rejection of the Appellant's allegation of threats based on religious beliefs, was an important finding because it was one very specific allegation that the Appellant had made. As for the incanting of religious phrases or prayers before sex, which the Respondent accepted he sometimes did out loud, there was no evidence from the Appellant that she found that practice to be intimidating, coercive, or that it caused her to submit to intercourse. There was no evidence that she did not expect that kind of behaviour and, on the evidence placed before him, the Judge was entitled to find that it was " common amongst many Muslims". It is right to say that the Judge also concluded that the father had not "intended to use those religious references to coerce the mother". The Appellant complained that the Respondent's intent was not relevant – it was the effect of the use of religious references that mattered. I would not agree that his intent was wholly irrelevant, but I accept that abuse can occur without an intent to abuse. However, in the present case there was no evidence at all before the Judge that the use of incantations was in fact coercive of the Appellant.

37. The Judge was entitled to take into account, as he clearly did, the fact that the Appellant had introduced very serious new allegations of physical abuse by the father of C at the hearing, and that he found that they were not reliable. That strikes me as an important finding in the case. The Appellant made allegations of repeated physical abuse of C by the Respondent which the Judge rejected.

There is no appeal against that finding but it was a finding that went to the Appellant's credibility.

38. The Judge was entitled to take into account the texts and email evidence and to find that they did not reveal any markers of a coercive or controlling relationship.

39. The Judge found that the Respondent's dealings with respect to the "dark family secret" were not deceitful or controlling, and that the very sad circumstances concerning the parties' first son's funeral were not indicative of psychological abuse by him. He was entitled to make those findings on the evidence he had received and, since the Appellant relied heavily on those incidents as evidence of abuse, the Judge's findings were relevant to whether there was sufficient evidence of a pattern of abuse.

40. The Judge's impression of the parties as witnesses was clearly an important part of his judgment. This was a three day hearing and he had ample opportunity to view and hear the parties. He found the Respondent to have been candid. He noted inconsistencies in the Appellant's evidence. He rejected a number of specific and significant allegations made by the Appellant.

41. Hence, the Judge's findings about the nature of the parties' relationship and the Respondent's behaviour, his finding of the absence of any patterns of coercion and control, and his findings on specific allegations as set out above, all weighed in favour of the finding he made in relation to the Appellant's allegations of sexual abuse. However, there are three respects in which the judgment requires further consideration, namely the Judge's reasoning about,

    i) The inherent improbability of the mother submitting in silence to unwanted sexual intercourse so often, for so long;
    ii) The evidence that the Respondent did at times respect the Appellant's requests or feelings about intercourse; and
    iii) The inherent improbability that the Appellant, an educated professional, would (a) not know that her sexual relations with the Respondent, as she says they were, were inappropriate or wrong, and (b) not speak to someone else about what was happening.

Silent Submission

42. At [88] the Judge said, "The inherent probability of the mother silently submitting to forced sex, often multiple times a day, for several years seems to me to be low. I therefore need to consider whether there is cogent evidence to support that prospect." The Judge had taken the legal principles he had to apply to a fact finding hearing from the judgment of Cobb J in *Re B-B* (above) which included the principle that, "The court can have regard to the inherent probabilities of events or occurrences, the more serious or improbable the allegation the greater the need for evidential cogency." As a footnote Cobb J had added that this does "*not* affect the legal standard of proof" [emphasis in the original]. That is an important qualification of which the Judge did not remind himself, but I have considered the judgment under appeal in full and it

is evident that the Judge did apply the civil standard of proof on the balance of probabilities throughout – he set out the standard of proof to be applied at [17(4)] and then concluded that the Appellant's allegations about sexual abuse were not established as being "more likely than not" [96].

43. Of more concern is the Judge's assumption that the mother's allegations of persistent sexual abuse were inherently improbable. The Judge had reminded himself of the possibility of a complainant "freezing with no protest or resistance" [20] and of the "nuances" that might arise from the fact that the parties were a religiously observant married couple [21], and that "everybody is different", but he has here applied a generalisation which tends to suggest that it is unlikely that anybody would repeatedly submit to sexual intercourse without protest or resistance for such an extended period. Not only is that assumption inapt generally, it is particularly inapt to this case. The Appellant placed her silent submission over several years in a particular personal, cultural and religious context: she was living in an arranged marriage which led to certain expectations of her, she was sexually naïve, her husband was also sexually naive, she did not feel able to ask others (beyond perhaps the Imam) about what was happening sexually within their marriage. Whether or not the Appellant's allegations of sexual abuse were supported by the evidence, it is difficult to accept the Judge's generalisation that the mother's continual silent submission over several years was "inherently" improbable. The allegations were certainly serious, but they were not inherently improbable.

44. Nevertheless, it is clear from the judgment as a whole that the Judge did not reach his findings on the basis of any assumption of the inherent improbability of the Appellant's alleged long-term silent submission. Rather, he analysed and weighed the evidence before him. He did so without apparent pre-conceptions, but focusing on the evidence given. I do not accept that this part of his judgment undermines or contaminates the remainder of the judgment or the findings that the Judge made. There was ample evidence on which he could reject the Appellant's allegation that she did in fact submit silently to the Respondent's coercion to engage in sexual intercourse.

Respecting the Appellant's Requests

45. At [92] and [93] the Judge noted that the Respondent had not sought to have intercourse on the wedding night, during the first few weeks of the marriage, or after the mother requested the cessation of intercourse in 2015. He concluded, "If the father felt that the mother's body was his to use as he wished because that was his right, then it is unlikely he would have simply stopped having intercourse with her as soon as C was born in 2015", and "I do not find this consistent with the acts of a man who sought to manipulate, exploit, or interpret religious text to make the mother feel that she ought to have sexual intercourse." The danger with this reasoning, as Dr Proudman argued, is that it might be taken to assume that sexual relations between a couple and, in particular, elements of coercion, submission and consent, will be consistent throughout their relationship. The fact that the Respondent may not have overborne the Appellant's will on one occasion, does not mean that he could not have done so on another.

46. However, in assessing the evidence of the parties, and their characters – which the Judge was in a much better position to do than an appellate judge – he was entitled to take the undisputed evidence of the parties' periods of sexual abstinence into account and to weigh that evidence alongside all the other evidence in the case. For two years they shared the same bed but, at the Appellant's request, did not have intercourse. The Respondent respected that request and there is no evidence that at any point during that time he sought to coerce the Appellant into sexual intercourse. This was not a case in which it was alleged that the Respondent had committed sexual abuse on one or two occasions only – the allegation was that he persistently pressured the Appellant to submit to sexual intercourse with him, disregarding the need to ascertain the Appellant's wishes and consent, every day for several years. It would be wrong to say that unchallenged evidence that he acted in a very different way when aware of the Appellant's nervousness, or her wish not to have sexual relations, had no bearing at all on the allegation that the Respondent's persistent conduct was of a very different nature.

The Appellant's Lack of Insight and Absence of Complaint

47. At [95] the Judge held, that "the inherent probability that the mother as an educated English teacher would have immediately felt totally unable to speak to anybody apart from the Imam or auntie once she had been married if she was raped on a frequent basis, seems to me to be low … I do not accept her evidence that she did not know sex was a matter of choice or that she did not know any better."

48. In Ground 1 of the Grounds of Appeal it is said that it was wrong for the Judge to find that the likelihood of the Appellant "being raped was low because she was an educated English teacher." It would indeed have been wrong for the Judge to have so found, but he did not. Nevertheless, he did refer to the Appellant's education and profession when finding improbable her evidence that (a) she did not know that she had a choice not to submit to being forced by the Respondent to have repeated, frequent sexual intercourse with him, and (b) she did not feel she could speak to anyone about it. At first sight the Judge's reasoning is objectionable. Many victims of sexual abuse within marriage or a partnership will find it difficult to speak to anyone about it. As the judgments in *F v M* and *Re BB* (above) show, there are many reasons why someone might submit to an abusive relationship without insight into what they are suffering until after the relationship has ended, or perhaps long after that. It is very unfortunate that the Judge referred to "inherent probability" in this context.

49. In fact, as the paragraph as a whole demonstrates, consistent with his judgment as a whole, the Judge focused on the evidence in the case, and the character of the Appellant as he assessed it to be, rather than "inherent" probabilities. Indeed, the Judge had reminded himself of the "rape myth" that the victim's culture or religion may justify abuse. He reminded himself that some victims of abuse may face cultural or other barriers that prevent them from seeking help. I am satisfied that the judgment establishes that it was his view of the evidence from and about the Appellant herself that convinced him that it was unlikely that *she* would have not known that having sexual relations with her husband ought to be a

matter of choice and that *she* would not have spoken to someone, such as one of her own aunts or cousins, about what was happening. Having given this matter careful consideration, on balance I accept that the Judge was entitled so to find. The fact that some victims of sexual abuse may not realise they are being abused, or may not speak out, does not preclude a finding that had the alleged abuse occurred to a particular person, *that person* would have known, and would have spoken to someone else about it. Dr Proudman referred to the judgments of Hayden and Cobb J in similar cases as though the Judge in this case was bound to have reached the same conclusions, but each case is determined on its own evidence. Similar allegations do not necessarily lead to similar findings. A court should be cautious for the reasons set out in guidance about rape myths and stereotypes as well as in a number of reported judgments, but it is not precluded from making a finding that a complainant would have realised that the alleged conduct was abusive or would have spoken to someone about what was happening. The Judge had the benefit of hearing three days of evidence. All appropriate special measures were taken to ensure that the Appellant could give her best evidence. The Judge was made aware of and included in his judgment, the risks of making assumptions or findings based on rape myths (applicable to all forms of sexual abuse). He was very mindful of the cultural and religious context within which the Appellant found herself. Some judges might have avoided this reasoning on this point, but the Judge was entitled to find, on the evidence before him, that had the allegations of sexual abuse been true, the Appellant would have known that the abuse was abuse and was not "normal", and that she would have spoken to someone else about it.

Conclusion

50. Notwithstanding the concerns discussed relating to part of the Judge's reasoning, he made findings based on the whole of the evidence, applying the correct legal principles, and made no errors of law or fact that undermined or contaminated his conclusions. I do not regard the judgment as having been rationally unsupportable. The determinations made are not ones that could not reasonably have been made. For the reasons given I refuse permission to appeal on Ground 7 of the Grounds of Appeal and I dismiss the appeal in relation to Grounds 1 and 3. Permission to appeal having been previously refused in relation to the other grounds, the appeal is dismissed.