



Neutral Citation Number: [2022] EWCA Civ 8

Case No: CA-2021-000688

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT GUILDFORD

HH Judge Nisa

GU20C00098

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2022

Before :

LORD JUSTICE BAKER

LADY JUSTICE WHIPPLE

and

MR JUSTICE FRANCIS

S (VULNERABLE PARTY: FAIRNESS OF PROCEEDINGS)

Between :

A

- and -

(1) A LOCAL AUTHORITY

(2) X

(3) Y

(4) S (by her children's guardian)

Suzanne Kelly (instructed by Venters) for the Appellant

Sally Stone QC (instructed by Local Authority Solicitor) for the First Respondent

Poonam Bari (instructed by Child Law Partnership) for the Second Respondent

The Third and Fourth Respondents were not present nor represented.

Hearing date : 23 November 2021

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Tuesday 18 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

LORD JUSTICE BAKER (giving the judgment of the Court):

1.

This is the judgment of the Court to which all members have contributed.

2.

The appeal arises from a fact-finding hearing that took place during January and February 2021 in care proceedings involving a girl, S, then aged 6½. The principal issue arising in the hearing was the cause of injuries sustained by another child, J, a boy then aged 5½, who is not the subject of these proceedings but who became the focus of the proceedings because his injuries were sustained around the weekend of 18 to 19 January 2020 during which he spent a period of time in the care of S's mother X and father Y. At the conclusion of the hearing, HH Judge Nisa found that most of J's injuries had been sustained accidentally but some had been inflicted by J's mother, A, who had been joined as an intervenor. She now appeals to this Court against the findings made against her.

3.

In the period between the fact-finding hearing and the appeal, S, who had been removed from her parents' care, is living with family and is apparently thriving in their care. Meanwhile, in part as a result of the findings, the local authority has started further care proceedings in respect of J and his brother, although they remain at home under an interim supervision order. The future of all three children may therefore be affected significantly by the outcome of this appeal.

Background

4.

In 2019, J and his older brother had been the subject of an assessment by the local authority's children's services as a result of A's misuse of ketamine. Concerns had also been raised about bruises and marks seen on the child at school. In the weeks leading up to the weekend of 18 to 19 January 2020, J spent periods in the care of X and Y, who were friends of A, although there was a dispute at the hearing as to how often this had occurred. In the days before the weekend, J attended school, where staff observed no marks on him. At about 4.30pm on Saturday 18 January, A handed J over to X to spend the night and following day with X, Y and S. At the hearing, there was a dispute between the adults as to whether there had been any marks on J at this point, A saying that there had been no marks, X saying that there had been a mark on the side of his face. Over the next twenty-four hours, according to X and Y, various accidents occurred which they later suggested could have caused some of the marks subsequently seen on J. For example, X alleged that J fell into a ditch while playing in woods and that he had hit a radiator after jumping on a bed. A number of text messages passed between A and X during this period which were adduced in evidence at the hearing. At about 8pm on Sunday 19 January, Y returned J to A's home. It was A's evidence that she then noticed an abrasion on his left forearm, although there were inconsistencies in her various accounts as to what she saw and when. Later that evening, she texted X asking what had happened to J's arm. In reply, X said she had not seen anything.

5.

It was A's evidence that, while getting J dressed for school the following morning, she noticed other marks and bruising on his face and body. It was her further evidence that, on her way to school, she asked another friend whether she could see any marks on J's face and that the friend said that it looked like a slap and advised her to contact social services. At that point, A did not say anything to the school staff about the marks. Instead, she went home and, as the judge found, forty minutes later telephoned her family support worker and then children's services. After that, she telephoned the school and, according to evidence from a member of staff, said that J had been with friends over the weekend and that on his return she had noted marks, and asked the school to log the marks. During the morning there were further phone calls and text messages between A and X.

6.

The local authority instigated an investigation under [s.47](#) of the [Children Act 1989](#). A medical examination of J disclosed a total of twenty-three marks, bruises and abrasions, including a series of marks and abrasions on the left side of his face, amongst which were linear marks extending to his ear, a deep abrasion or burn on the left forearm, various bruises on his buttocks and thighs, and some superficial abrasions on the front of his penis. The conclusion of the examining doctor was that at least some of the injuries were non-accidental.

7.

On discharge from hospital J, accompanied by his older brother, went to stay with grandparents but returned to A's care after three weeks. X was arrested, interviewed and released on bail. Subsequently, the police decided to take no further action with regard to J's injuries. Meanwhile, S had moved to live with a maternal aunt and, in June 2020, the local authority started these care proceedings, relying in part on the injuries sustained by J as evidence that S was likely to suffer significant harm in her parents' care. A series of case management hearings took place, in the course of which A was joined as an intervenor.

8.

The fact-finding hearing was listed for five days but in the event, as a result of X's ill-health, extended over nine days in January and February 2021. The findings sought by the local authority related not only to the injuries sustained by J but also to other matters, including allegations of domestic abuse by Y towards X and A's misuse of ketamine. At the outset of the hearing, representations were made on behalf of A as to the appropriateness of seeking findings about her care of J in proceedings which did not relate to him. The court was asked not to consider any allegations against A which went beyond the single question of identifying the person in whose care the injuries had occurred. The court rejected this argument and counsel acting for A made an application for permission to appeal that decision. That application was dismissed and has not been renewed before this Court.

9.

The hearing proceeded with oral evidence given by seven witnesses including X and A, but not Y, who refused to attend most of the hearing. At the conclusion of the evidence, the hearing was adjourned for written submissions. Judgment was handed down on 1 March.

10.

In her judgment, the judge started by setting out the law as agreed by counsel. She summarised the opinion of the court-appointed expert, Dr Goddard, a consultant paediatrician, that the majority of J's injuries were "concerning for inflicted injury in the form of physical abuse" because of their number and location; that the linear marks on the left cheek were "consistent with a slap"; that marks on the ear "are more commonly seen in abused children"; that J would have cried out in pain after the injury

to the left arm, and that, in the absence of a reasonable explanation, that injury was more likely to be non-accidental.

11.

Turning to the evidence given by the three adults, the judge observed that there were “inconsistencies in every single witness”. She recorded the difficulties the court had experienced as a result of X becoming ill in the middle of her evidence. Later, she had failed to attend on the day allocated for the resumption of her evidence and as a result the hearing was adjourned again for X to attend. The judge stated that “the court gave the indulgence that it ought to have done quite correctly because the evidence of parents is very important and [X’s] evidence was heard in full”. She described aspects of X’s evidence as “quite confused and inconsistent” and “quite extraordinary”. She set out at length her evidence about her relationship with Y, describing how she had initially lied about his behaviour towards her and about his presence in the house over the weekend but finally, on the last day of her evidence when Y was not present in court, had admitted that he had been abusive. The judge observed, however, that “just because she has lied to the court in that regard, it does not mean that all her evidence is a lie”. Having summarised Y’s written statements and police interview, she concluded that he had assaulted X during the weekend when J had been in the house, but was unable to find, as urged by other parties, that J had been “caught up in the crossfire”.

12.

The judge started her summary of A’s evidence by recording that she now accepted that she had lied to the court about the extent of her ketamine abuse. Having considered the evidence about the issue, the judge observed that A

“has lied and it is not in my view because she is embarrassed. She has far more to hide and quite a lot to lose in that regard. Even in her evidence she did not seem to give it the seriousness that she ought to have done. She was still in partial denial but by her attitude she was trying to state that it was something that was wrong with the results I was not impressed by [her] evidence.”

The judge then set out in some detail A’s evidence about what had occurred when J was returned to her on the evening of 19 January. She expressed concern about a number of aspects of this evidence including (1) that A said she had noticed the abrasion on the arm that evening but not the abrasion by the ear; (2) A’s failure to text X the following morning after noticing marks on J’s face; (3) her failure to inform school staff about the marks when she took J to school that morning; and (4) the delay of 40 minutes between dropping him at school and contacting social services about the marks. The judge observed:

“If [A] was so concerned that it was somebody else she would have informed the school immediately. It is very common for [A] and the school to have a dialogue regarding marks on J Hence I would say her actions are surprising that she did not seek some guidance from the school. Instead, she went home and thought about what is it that she can do. It is also surprising how she sees absolutely no marks, no hand slap, no abrasion by the ear, and yet the following morning all that appears and she does nothing about it for a considerable period of time, given that she has known and says that she has seen this as soon as J is woken. I find that very concerning.”

13.

The judge’s analysis of A’s evidence continued:

“I would say that she was very deflective and able to answer the questions in a way that lost the actual question. I would say that her answers were very calculating and I think she certainly started

the campaign to point the finger at [X] in these proceedings to deflect away from herself. To suggest that the majority of these injuries were caused in what I would say was just over a 24-hour period, where this child is having time with a carer who has another child, just a year younger, who has not had any bruises or injuries of note or concern, and then to suggest that this same carer would inflicted those injuries on that child intentionally is, in my view, just too remote, and the evidence does not support that the injuries that this child sustained were all caused during the period of care by X and Y.”

14.

The judge then set out her findings. She concluded that some of the injuries had been sustained accidentally while J was in the care of X and Y but continued:

“However, with regard to the abrasion to the child’s arm ... that injury occurred during the care of X and Y and that injury, as stated by Dr Goddard, would have caused J to cry out, and I would say that he did cry out. Why X did not notice him crying out is most probably because her drug test results indicate that she was likely to have been on drugs during that period of time as well. Therefore she has failed in my view to supervise him adequately.”

Having concluded that other minor marks, including the scratches to the penis, had been sustained accidentally, the judge continued:

“With regard to the slap on the face, I put that down to the intervener on the basis that she failed to report that at the earliest opportunity. She failed to report it to the school. One wonders why she failed to ask the mother in this case immediately when she saw it when J woke up that morning, and then she decides that she will ask someone passing by when she is on her way to school if they can see any marks on his face. Thus I would say it is likely that she caused that injury that morning and on her way to school noticed the marks and then did not know what to do. She checked ... if somebody else could see those, and instead of telling the school she came home and decided to ring social services and to put [X] in the frame.”

15.

The judge observed that X and A had “both done whatever they can to manipulate the evidence and to put each other in the frame”. She continued:

“It has not been a straightforward matter assessing the evidence of all the parties. It has been very conflicting and at times very difficult to assess exactly what the truth of the matter is. I considered carefully whether or not all three should remain in the pool of perpetrators, but I have been able to decipher which injuries, in my view, at least in respect of the most significant injuries are attributable to which of the carers at the time. So in terms of the intervener it is the slap.”

16.

Finally, the judge said:

“Now that leaves the injury regarding the abrasion near the child’s ear. I would say that that happened during the care of [X and Y]. They seem to be adamant that that injury was present when J was collected, yet [X] makes no reference to it to [A] not in any text message or at all, and I think she would have done because it is significant I find that that injury occurred most probably due to the lack of supervision by X and Y....”

17.

Following the judgment, A's counsel asked for clarification about several factual matters and for permission to appeal. In a supplemental judgment, the judge made minor revisions to her findings about A's drug use, added further observations about the "slap" injury, and refused permission to appeal.

18.

A final schedule of findings approved by the judge included the following findings against A:

(1) Two of the injuries to J's face, namely four linear marks over the left cheek and a red mark on the left ear, were inflicted by A after J returned to her care on 19 January 2020 and probably in the morning of 20 January 2020, before he arrived at school. They are likely to have been caused during the same incident when the appellant slapped J.

(2) A deliberately attempted to establish a case to demonstrate that X and/or Y inflicted those injuries knowing that she had inflicted those injuries herself.

(3) A's use of ketamine was higher than she admitted and for a longer period of time. She deliberately attempted to avoid detection of drugs in her hair for the full period of 12 months of testing ordered by the court, including for January 2020 by cutting her hair.

Other findings included that the other injuries to his face and the deep abrasion to his arm were sustained while in the care of X and/or Y and were the result of an unreasonable lack of supervision; that J was likely to have experienced pain and to have reacted immediately after sustaining the abrasion to his arm; that X had lied to implicate A; that Y had assaulted X during the night of 18 to 19 January; that over that weekend Y had been in the house for longer than he and X had admitted; that X had supported Y's case as to his presence in the house to conceal his abuse of her; and that X and Y failed to protect J by returning him to A even though she was in an intoxicated condition.

19.

Following the hearing, S remained within her family. Some months later, the local authority started care proceedings in respect of J and his older brother which are ongoing. The boys remain at home with their mother under an interim supervision order.

The appeal

20.

On 15 July, A's solicitors filed a notice of appeal to this Court, relying on six grounds:

(1) Procedural irregularity/unfairness - The court made findings against the intervener which exceeded those sought in the schedule of findings and did not provide any reason for doing so, and the intervener has had significant findings made against her in proceedings not related to the welfare of her child and in which no relevant social work evidence was produced.

(2) The court departed from the view of the expert Dr Goddard's opinion in respect of the injuries caused to J and provided no reasoned judgment for disregarding Dr Goddard's view and reaching a different conclusion.

(3) The court has erred in its application of the facts.

(4) The court has fallen into speculation and made findings which have no base in facts.

(5) The court has made findings in respect of the injuries which are contradictory and are such that have no basis in the evidence, cannot reasonably be explained or justified and is one that no reasonable judge could have reached.

(6) The court failed to give proper consideration to Y's failure to attend to give evidence and failed to properly draw adverse inferences which would have significantly affected the findings made.

21.

On 24 September, Peter Jackson LJ refused permission to appeal on the first ground but granted permission on grounds 2 to 6. The appeal hearing was fixed for 23 November and directions given for the filing of skeleton arguments.

22.

On 10 November, A's solicitors filed an application for permission to amend the grounds of appeal by adding a new ground based on procedural irregularity/unfairness in the following terms:

"The appellant has cognitive difficulties which were unidentified. Dr Josling [a forensic psychologist] has assessed that the appellant may be assisted by an intermediary and an appointment with Communicourt for assessment is due to take place on 18 November 2021. The court made findings against the appellant in proceedings where the appellant's cognitive issues were not considered or adjustments made to ensure her fair participation. The findings are therefore unsafe."

In addition, they sought permission to file a redacted cognitive and psychological assessment of A and an intermediary assessment from Communicourt once that became available, together with an amended skeleton argument. These various applications were listed for determination at the hearing of the appeal.

The amended ground of appeal: procedural unfairness

23.

In the event, the issue raised in the proposed additional ground of appeal featured prominently at the hearing. In view of the conclusion we have reached, it is convenient to consider this issue first.

24.

The origin of the application to add the new ground of appeal lay in two reports which were prepared in the course of proceedings relating to J and his brother on joint instructions from the local authority and solicitors acting for A and for the children. The copies of the reports filed in support of the application were heavily redacted, although we were told that leading counsel for the local authority had seen unredacted copies of both reports. The first report, dated 28 June 2021, on a cognitive assessment carried out by two psychologists, Dr Gary Taylor and Ms Lucy Howe, included the following passage:

"We are not recommending any special measures to enable [A] to participate in a hearing although she is likely to take benefit from there being regular breaks in the proceedings so that information can be explained to her in words that she can understand. Important information pertaining to the proceedings may need to be explained to her more than once. Professionals should ask her to repeat, using her own words, what has been said to her so that they can confirm her understanding."

The second report, dated 7 September 2021, prepared by Dr Indira Josling, a consultant clinical and forensic psychologist, included the following paragraph:

"[A]'s cognitive functioning assessment showed that she is better at perceptual reasoning than verbal reasoning; she prefers written and verbal information to be presented in clearer formats extra time given to her to assimilate the material. Her full comprehension of what she may be reading may need further support and time and would not necessarily be immediate. I ensured that I gave [A] adequate time on all of her assessments to enable her to do so. I would also question whether she may need a separate assessment for dyslexia which may also present as a learning need. FSIQ score was assessed as being 88, low average. [A] may therefore require an advocate or intermediary in formal meetings, interviews and assessments to help assimilate written and verbal material and her comprehension needs may be better accommodated if other forms of communication were to be used e.g. flow diagrams, charts etc."

25.

On 18 November, A attended an assessment meeting with an intermediary employed by Communicourt Ltd. On 22 November, the day before the appeal hearing, an email was received by A's solicitors from Communicourt in the following terms:

"I am recommending an intermediary for [A]. As she has difficulties with:

- processing long sentences
- understanding court specific terminology
- understanding and responding to complex grammatical structures
- understanding complex vocabulary
- processing simple verbal information
- remembering key dates, and often gets the detailed confused."

26.

On the basis of these assessments, Ms Suzanne Kelly, who represented A before the judge and before this Court, submitted that her client had hidden cognitive difficulties which were not apparent during these proceedings. She informed us that A had been able to give clear instructions and appeared to understand the advice provided and the proceedings. Towards the end of A's evidence, Ms Kelly had some concerns that she might have some difficulties, although it was not clear that these were cognitive issues, as opposed to misunderstanding questions which were long, complex and multifaceted. Ms Kelly added that, as a result of the Covid-19 pandemic, she and her instructing solicitors had never met A in person before the appeal hearing. All instructions had been taken over the telephone.

27.

A attended the fact-finding hearing remotely in accordance with the practice adopted in the family courts during the pandemic. She gave her evidence sitting alone in a room in her solicitor's office. Ms Kelly took us to a number of passages in the transcript which, she submitted, demonstrated that it was recognised that A was on occasions finding giving evidence difficult. Ms Kelly asserted that, had the court been aware of her client's cognitive difficulties, provisions would have been put in place for her and this would have led to a different outcome at the hearing. Thus Ms Kelly submitted that the hearing before the judge was flawed, that A should have had an intermediary present with her in court and that, prior to the court hearing, there should have been a ground rules hearing where submissions could be made as to the best way to receive her evidence.

28.

These assertions are, of course, all made "after the event", after A had serious findings made against her after a long hearing before a Circuit Judge. On behalf of the local authority, Ms Sally Stone QC did

not oppose the application to amend the grounds of appeal, but opposed the appeal on this, and the other, grounds. She relied on the fact that no one had expressed concern about A's cognitive functioning or understanding at any stage in the proceedings up to and including the fact-finding hearing. In that period, A was able to give detailed instructions to her solicitors and to participate fully in the hearing. Ms Stone took us to a number of examples in the transcript where, she suggested, it is clear that the appellant was competent to give evidence. Ms Stone drew attention to A's use of language and to her ability to answer back, for example at one point saying "I'm not having you put words into my mouth". Ms Stone also contended that A's use of various words ("insinuate", "tendency") shows that she had a good command of vocabulary. In the circumstances, Ms Stone submitted that there was no reliable evidence that A was denied a fair trial.

29.

For the mother, Ms Poonam Bhari opposed both the application to amend the grounds and the substantive appeal, adopting the submissions made by Ms Stone.

Discussion

30.

In recent years, courts and tribunals across the English and Welsh legal system have recognised the need to make due provision for vulnerable persons to participate in proceedings. In family proceedings, the rules are set out in Part 3A of the Family Procedure Rules, "Vulnerable Persons: Participation in Proceedings and Giving Evidence", introduced in 2017 and supplemented by Practice Direction 3AA ("PD3AA"). There is no definition of "vulnerability" in the rules, but the provisions plainly extend to persons with comprehension difficulties of the sort identified by Dr Josling in her assessment of A.

31.

It is necessary to set out the rules in some detail. Rule 3A.4, headed "Court's duty to consider how a party can participate in the proceedings", provides:

"(1) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings."

Rule 3A.1, headed "Interpretation", provides that 'participation direction' means:

"(a) a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or

(b) a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8"

32.

Rule 3A.5, headed "Court's duty to consider how a party or a witness can give evidence", provides:

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

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

In the interpretation section in rule 3A.1 it is stated that:

“references to ‘quality of evidence’ are to its quality in terms of completeness, coherence and accuracy; and for this purpose ‘coherence’ refers to a witness’s or a party’s ability in giving evidence to give answers which address the questions put to the witness or the party and which can be understood both individually and collectively.”

33.

Rule 3A.6 makes provisions for protected parties which are not relevant to this appeal. Rule 3A.7, headed “What the court must have regard to”, provides, so far as relevant to this appeal:

“When deciding whether to make one or more participation directions the court must have regard in particular to

...

(b) whether the party or witness

(i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;

....

(c) the nature and extent of the information before the court;

(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

(e) whether a matter is contentious;

(f) the age, maturity and understanding of the party or witness;

...

(j) any characteristic of the party or witness which is relevant to the participation direction which may be made;

(k) whether any measure is available to the court;

(l) the costs of any available measure;

(m) any other matter set out in Practice Direction 3AA.”

34.

Rule 3A.8, headed “Measures”, provides inter alia:

“(1) The measures referred to in this Part are those which

...

(d) provide for a party or witness to participate in proceedings with the aid of an intermediary;

(e) provide for a party or witness to be questioned in court with the assistance of an intermediary, or

(f) do anything else which is set out in Practice Direction 3AA.”

“Intermediary” is defined in rule 3A.1 as meaning:

“a person whose function is to

(a) communicate questions put to a witness or party;

(b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and

(c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions.”

35.

Rule 3A.9, headed “When the duties of the court apply and recording reasons for decisions made under this Part”, provides:

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

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

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

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

36.

Rule 3A.10(1) provides that “an application for directions under this Part may be made on the application form initiating the proceedings or during the proceedings by any person filing an application notice.”

37.

These provisions in the rules are supplemented by PD 3AA. Paragraphs 1.3 and 1.4 of the PD provide:

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

1.4 All parties and their representatives are required to work together with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.”

Paragraph 3.1 gives guidance about the assessment of a person’s vulnerability and its impact on their participation in the proceedings. Sections 4 and 5 of the PD give guidance about participation directions, including, with regard to participation other than by way of giving evidence, directions about the structure and timing of the hearing and the formality of language and, with regard to giving evidence, the convening of a ground rules hearing and directions about the conduct of cross-examination.

38.

These comprehensive provisions are of fundamental importance to the administration of family justice. As paragraph 1.3 of PD 3AA makes clear, the court's duty to identify any party or witness who is a vulnerable person arises not only under the express provisions in Part 3A of the FPR but also under the overriding objective provisions in Part 1. (It is notable that the equivalent, albeit more succinct, provisions subsequently inserted in the Civil Procedure Rules are specifically contained within the overriding objective provisions in Part 1 of those rules supplemented by Practice Direction 1A.) The duty is to identify such persons "at the earliest possible stage", an obligation reinforced in proceedings under Part IV of the Children Act by the requirement in the Public Law Outline in Practice Direction 12A to consider the need for directions as to special measures and intermediaries at the initial case management hearing.

39.

It is equally clear that the duty to identify any party or witness who is a vulnerable person, and to assist the court to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished, extends to all parties to the proceedings and their representatives. It will almost invariably be one of the parties or their representatives, rather than the court, who first identifies that a party or witness is or may be vulnerable. We consider that good practice requires the parties' representatives actively to address the question of whether a party is vulnerable at the outset of care proceedings. Indeed, as social workers will as a matter of course be looking for vulnerabilities in families as part of their practice, it is to be hoped that this issue will be identified before care proceedings are started. We recognise, however, that it is often not easy to identify vulnerabilities and that professionals dealing with urgent and difficult situations in families will have to contend with a large number of issues. For that reason, we consider that, to comply with the obligation under rule 3A.9, the judge conducting the case management hearing at the start of care proceedings should as a matter of course investigate whether there are, or may be, issues engaging Part 3A of the rules and that the parties' advocates should as far as practicable be in a position to respond. Furthermore, rule 3A.9 stipulates that the court's duty continues to the end of the proceedings. There will therefore be other points at which the court may have to address the issue - for example, where another party is joined to the proceedings.

40.

These rules are well established and understood by judges and practitioners. Usually, where a ground rules hearing is convened, experienced advocates will agree on the correct process for which they will seek judicial approval. Of particular importance to many vulnerable witnesses will be the need for frequent breaks and also the need for straightforward questions, rather than several questions wrapped up in one. The judge will be careful to ensure that recommendations made in respect of a vulnerable witness are followed. Intermediaries will sit with the vulnerable witness and will interrupt if a question is considered to be too complicated, and will ask for breaks if deemed necessary. Judges will be careful to ensure that the ground rules established are adhered to. Advocates and judges, for whom digesting large amounts of documents quickly, and sitting for two or more hours without a break are commonplace, must be alive to the fact that most witnesses have never previously experienced the court process and that vulnerable witnesses may become overwhelmed by it.

41.

We have focused on the issue of vulnerability in cases like the present involving parties or witnesses with limited understanding. There are other equally important provisions in Part 3A applying to victims or alleged victims of abuse and intimidation. All such provisions are a key component of the

case management process which ensures compliance with the overriding objective of enabling the court to deal with cases justly. As King LJ observed in *Re N (A Child)* [2019] EWCA Civ 1997 at [53]:

“Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair.”

42.

It does not follow, however, that a failure to comply with these provisions, whether through oversight or inadvertence, will invariably lead to a successful appeal. The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and, secondly, if so, whether as a result the decision was unjust. We are alive to the fact that many witnesses will give their evidence in a way which falls short of the standard that they would have wished for, or their advocates had hoped. Sometimes, this may be because of the very nature of human frailty, at other times it may be because a witness was deliberately deflecting or obfuscating or, worse still, lying.

43.

Returning to the case under appeal, we have considerable sympathy with the judge. We are keenly aware of the pressures on judges hearing complex care proceedings, greatly extended by the problems caused by the Covid-19 pandemic. For reasons which it is unnecessary to spell out in detail here, this case presented the court with a range of challenging case management issues, concerning drug testing, mobile phone records, and police disclosure. Given the particular care which the judge devoted to ensuring that X had a fair opportunity to give her evidence, we feel confident that she would have adopted an equally careful approach to A's evidence had she been aware of her difficulties. In the event, no party or legal representative identified the possibility that A was or might be a vulnerable person because of impaired level of comprehension and we are satisfied that she was fairly treated within the context of what was then known. We acknowledge the difficulties mentioned by Ms Kelly facing A's legal team who, because of the pandemic, were unable to meet their client face to face until the appeal hearing. We observe, with the great benefit of hindsight available to this Court, that legal representatives should be particularly vigilant to detect possible vulnerabilities in their clients when they are unable to meet them in person. In this case, A's difficulties were not immediately evident to Ms Kelly who only became concerned about her client's level of understanding towards the end of the hearing. It is notable that the need for an intermediary was not identified in the initial cognitive assessment carried out by Dr Taylor and Ms Howe in June 2021 and the extent of A's difficulties only became apparent in the subsequent assessments carried out by Dr Josling and Communicourt.

44.

Nevertheless, we have reached the clear conclusion that the failure in this case to identify A's cognitive difficulties and to make appropriate participation directions to ensure that the quality of her evidence was not diminished as a result of vulnerability amounted to a serious procedural irregularity and that as a result the outcome of the hearing was unjust. Of course, conducting the hearing over nine days, the judge was in the best position to make an assessment of the demeanour and competence of the witness, albeit in less than optimal conditions via a video link. But the new material that we have now read has an obvious bearing on the demeanour and credibility of the appellant. In some cases, there will be other evidence supporting the findings so that a flawed assessment of a witness's evidence will not warrant any interference with the decision. In this case, however, the

judge's assessment of A's character and plausibility of the witness were central to her ultimate findings.

45.

In her judgment, the judge observed that assessing the parties' evidence was not a straightforward matter and at times it was "very difficult to identify the truth". The judge's attribution of responsibility for the injuries between X and Y on one hand and A on the other was based on a close analysis of the accounts given by all three adults, each of whom had lied at various points. In our view, there is a significant possibility that this evaluation would have been refined if not revised by knowledge that A had difficulties of comprehension as a result of which the quality of her evidence, as defined in rule 3A.1, was likely to be diminished. As demonstrated in the passages from the judgment cited above, the decision was substantially based on the judge's assessment of A's evidence, from which she drew a number of conclusions adverse to A's credibility. These included conclusions about (1) the reasons A gave for her lies about her ketamine abuse; (2) her apparent failure during her evidence to treat the drug issue with appropriate seriousness; (3) her account of how on the evening of 19 January she had noticed the abrasion to J's arm but not the abrasion on his face; (4) her failure to inform school staff about the injuries, and (5) the delay of forty minutes in reporting the injuries to social services. It is likely that the judge's interpretation of A's acts and omissions on the evening of 19 January and the following morning would have been materially affected by an understanding of A's intellectual and communication problems. Most striking of all is the judge's description of A as being "very deflective" during her oral evidence, "able to answer the question in a way that lost the actual question", manipulative and "very calculating". There is at least a significant possibility that this assessment would have been different had the judge known of A's difficulties as subsequently explained by Dr Josling.

46.

We therefore grant A permission to amend her grounds of appeal and to adduce the evidence relating to her cognitive difficulties cited above, and we allow the appeal on the grounds of procedural irregularity set out in the amended ground. It is important to stress that we are not saying that the judge's findings were wrong - we are not in a position to say that one way or the other. Whilst we agree that, had the appellant been treated as a vulnerable party or witness, a ground rules hearing would have taken place and the hearing conducted differently, that would not necessarily have led to a different outcome. We are allowing the appeal on the basis that the decision was unjust because there are strong reasons to suspect that A did not have a fair opportunity to present her case.

47.

In those circumstances, we have decided that it is neither necessary nor appropriate to consider the remaining grounds for which permission has already been granted. Having concluded that the judge's decision was unjust because of procedural irregularity, there is no point in this Court conducting a critique of the judge's findings. If there is to be a rehearing of the fact-finding hearing, it would be unhelpful for this Court to make any observations about the findings we are setting aside.

48.

Where findings are set aside on appeal on procedural grounds, the normal practice is for a rehearing to take place before a different judge. That may well be appropriate in this case which involves serious allegations of assault of a child which if proved would plainly give rise to a likelihood of significant harm to any child in the care of the perpetrator. We were informed, however, that S is now settled in her family and the local authority has no plan to remove her. We were also told that, in the care proceedings concerning J and his brother, an expert parenting assessment is due to be completed

very shortly. J and his brother remain at home with their mother under interim supervision orders. It may therefore be the case that, notwithstanding the serious allegations which the local authority has rightly brought before the court, a rehearing would be neither proportionate nor in the interests of any of the children in these two proceedings.

49.

We are not in a position to make a decision about this, not least because the proceedings concerning A's children are not before us. It will, however, be a difficult decision involving a number of conflicting issues. Accordingly, the best course is to remit these proceedings to the Family Division Liaison Judge for the South-Eastern Circuit, Williams J, and to invite HHJ Nisa to transfer the proceedings concerning A's children to Williams J so that he can reach a decision as to whether there should be a rehearing of the fact-finding hearing as to the cause of J's injuries and, if so, to allocate the proceedings and the hearings as he thinks fit.