Neutral Citation No: [2023] NICA 9	*Ref:* **KEE12043**
	ICOS No: **18/56745/02/A01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **10/02/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION

Between:

A FATHER

Appellant;

and

A MOTHER

Respondent.

IN THE MATTER OF FX (A CHILD)

Mr Martin O'Rourke KC with Mr Mulvenna (instructed by McCourt McGlone, Solicitors) for the Father
Ms Margaret-Ann Dinsmore KC with Ms Boal (instructed by Carson Thompson, Solicitors) for the Mother

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Before: Keegan LCJ, McCloskey LJ and Kinney J

KEEGAN LCJ (*delivering the judgment of the court*)

We have anonymised this case as it involves a child and arises in the context of children's proceedings. Nothing should be published which would identify the child or her family. We refer to the child as FX which was a cypher used at first instance.

Introduction

[1] This is an appeal from the decision of McFarland J ("the judge") of 7 October 2022. The appeal arises on foot of an application brought by the father for a residence order and a contact order in respect of his daughter, who at the time of the judgment at first instance, was 7½ years of age. These applications were brought

pursuant to Article 8 of the Children (Northern Ireland) Order 1995 ("the Children Order").

[2] Prior to determining whether a residence or contact order should be made the judge was required to adjudicate upon allegations of sexual abuse made against the father. The parties agreed that there would be a split hearing to first determine the material facts before the final welfare disposal. This was in accordance with a well-established "split trial" procedure, see *Re B (Split Hearing): Jurisdiction* [2001] FLR 333 and *In the matter of H (A Child)* [2011] EWCA Civ 741.

[3] This is an appeal from the first stage determination of facts. The appeal is brought as of right as it falls within the terms of section 35(2)(g)(i) of the Judicature (Northern Ireland) Act 1978 concerning as it does residence and contact with minors.

[4] The judge reached this determination after a hearing which spanned two days on 28 and 29 September 2022. During the hearing the judge heard evidence from a number of witnesses including the mother and the father. He also considered the source material in relation to disclosures made by the child to a variety of sources.

[5] The judge provided a written judgment which explains his determination after the "fact finding" hearing. The outcome he reached is expressed as follows:

> "In all the circumstances, for the reasons that I have set out above, I am satisfied that it is more likely than not the father sexually touched his daughter FX with his finger to the vaginal area for the purposes of his sexual gratification."

Factual Background

[6] The mother and father are married parents, now separated. They married in 2012. They lived for a relatively short time together after the birth of the subject child in 2015. The separation date referred to in the papers is 14 February 2016 when the father announced to the mother that he had feelings for another woman. It follows that the parties lived together for a short period of time with FX. Prior to the birth of FX fissures in the marital relationship were caused when in 2013 father engaged in inappropriate text messages with the mother's niece who was 13-14 years at the time. The judge at first instance also helpfully in his judgment sets out the content of text messages that the appellant sent to his niece at paras [14]-[18] of the judgment which we will not repeat. The theme of them is encapsulated in one text in the following terms between the father and his teenage niece:

> "Sry jus me being random lol only u could pull off lookin cute in them jammers lol xxx."

[7] The sending of the texts was admitted by the father. However, he denied that that they were inappropriate. Following discovery of the texts the mother had concerns but decided to continue with the marriage and FX was subsequently born.

[8] As we have observed, the marriage broke down when FX was a very young child. This resulted in an arrangement whereby the child lived with the mother but had contact with the father. Instrumental in the management and arrangement of this contact were the father's parents with whom the father lived. An agreement was reached whereby contact was a number of times a week between the father and FX.

[9] At para 7 of the mother's statement of evidence she says that to begin with FX had contact with the father supervised by his parents or sometimes just his father at their home. Some further discourse on the arrangements is provided which we summarise as follows. Contact took place on a Tuesday from 8am to 3pm and on a Tuesday evening the applicant and his father came to babysit while she was taking Boys Brigade. On that day the appellant came to her house at approximately 5:15pm. His father followed at approximately 6:30pm and they both stayed until she arrived home at about 8:30pm. The mother states that from November 2017 she took the child to the appellant's parents' home at 6:30pm and collected her after Boys Brigade. The Wednesday contact was between 8am and 6:30pm.

[10] It also appears that FX had contact at her grandparents' home with the appellant on a Sunday from 8am to 4pm. We acknowledge that the father takes some issue with the mother's narrative. For present purposes the most relevant area of disagreement relates to the quality of the contact and the level of supervision. It is not productive or necessary to rehearse the specifics of the differences between the parents any further. Suffice to say that after the separation of the parties the father enjoyed a relatively high level of contact with the child which involved a level of supervision and incorporated contact with the grandparents.

[11] During the autumn of 2017 the mother met another man with whom she formed a relationship. After becoming engaged in March 2019 the mother and her new partner married in 2020. They have a young child who now lives with the mother and her new husband and FX in the same household.

[12] Further material facts may be briefly mentioned as follows. It is apparent that there was some delay in achieving a divorce between the mother and the father. The mother clearly has a strong religious tradition in her background and wanted the husband to petition for divorce rather than her. This seemed to cause some friction prior to the divorce being finalised. We need say no more about this issue as it did not form the focus of the appeal. Rather, the focus was on how the child's disclosures were made, to whom they were made, and how they were assessed by the judge. The father maintains that errors were made at each stage and that the judge's finding of sexual abuse is erroneous. To fully understand this claim, the chronology and sequencing of the disclosures require some explanation.

The disclosures by FX of the alleged sexual abuse

[13] The first point in time when disclosures were made by the child was 2 March 2018. FX was coming 3 years of age. She made a disclosure in relation to her father's behaviour to her to the mother. The circumstances which frame the disclosure are as follows. FX had not had contact with the appellant since 28 February 2018. The events occurred on a Friday. FX had gone to the mother's sister's house for a sleepover. As the mother was getting her ready to go to the aunt's home, she says that FX said to her words to the effect "I don't like it when dad hurts my bum." The mother was concerned about this and telephoned her sister asking her to keep an eye on FX that evening.

[14] When the mother went to collect FX at her sister's house the following day, Saturday 3 March, she reports noticing a foul smell from the child. The mother says she then took FX to get changed. Her recorded observations from changing the child were that "the area around her vagina and bottom was raw red." The mother said she asked FX what had happened. In reply FX is reported as saying that dad had hurt her. Specifically, the mother reports FX as saying; "he hurt me with his finger." The mother then says that she asked FX if the father was putting cream on or if daddy was taking her to the toilet. FX is recorded by the mother as replying "no." to these questions.

[15] As a result of these disclosures the mother and her sister brought FX to be examined on the same day by an out of hours doctor, Dr Pilkington. The record of this examination is found in various places in the trial bundle. The doctor subsequently filed a statement.

[16] The core contemporaneous material is comprised in a "call incident report" the main ingredients of which we will highlight as follows. The report confirms that the consultation took place on 3 March 2018. It then sets out the history that was provided by the mother which tallies with the evidence we have summarised above.

[17] Dr Pilkington's examination notes record the following:

> "On exam: mild erythema around vaginal and anal areas – looks inflamed. Treat with concern … very wary about being examined, did not want to lie down and not happy for me to examine her. Once I examined her and she seemed comfortable that I was only looking she seemed more ok with the exam."

[18] The diagnosis reached by Dr Pilkington is "inflamed skin in groin." In terms of treatment Dr Pilkington records: "treat with Canesten IIC." Dr Pilkington also records what FX said to her as follows:

> "Had discussion with PT. I asked her if anyone has touched her down below and she said her daddy – I asked what happened and she said 'he put his finger in there.' I asked did it hurt and she said 'yes.' I asked her if she told daddy if it hurt and she said she did and told him to stop. I asked if he stopped and she said 'no.'

[19] The ensuing advice to the mother and aunt who were present with FX is also recorded in the following terms:

> "Advised that they need to report this to the police as they are obviously concerned regarding previous grooming and I am now very concerned based on answers from child. Advised that they would need to make statements and her daughter would need to be examined forensically. Mum and aunt happy that needs to be reported to police and they will go straight to the police station and report it now. I advised them I would make notes of the consult and all conversations in this record."

[20] The subsequent statement of Dr Pilkington is dated 18 July 2018. This statement confirms the history we have discussed and also and specifically records:

> "I asked what happened and she said he put his finger in there, and pointed to her underwear region."

[21] The mother followed the advice of Dr Pilkington and made contact with the police. The police attended at her home on 3 March 2018 at approximately 7pm. An officer recorded the interview on body worn video in relation to the complaint. On the same night, her niece to whom the father had sent the inappropriate text messages in 2013 made a formal complaint against him. The appellant was subsequently charged with harassment in or about August 2021 and, ultimately, received an adult caution for the inappropriate text messaging that he sent to the teenage child.

[22] As a result of the above disclosures FX was referred to the Rowan Centre. This is a specialist facility which deals with victims of alleged sexual abuse. At the Rowan Centre FX was examined by two doctors, Dr Forbes and Dr Alison Livingstone, consultant paediatrician. This involved an examination of the anogenital area in the supine frog leg position using a colposcope.

[23] Drs Forbes and Livingstone prepared a report which contains the following information. The child was recorded as being generally co-operative. Inspection of her pants revealed some yellow staining. She had mild erythema around her labia majora. She had a prominent urethral orifice. The hymen was closed but gradually

opened to show a crescentic sleeve like hymen with no breaks, tears or interruptions seen. There was a general malodour from her genital area. The anus was examined with the legs flexed over her abdomen and there were no abnormalities seen. She had swabs sent for forensic analysis from the vulva area and a throat swab.

[24] In addition, the child made a further disclosure to Dr Forbes during the examination which is recorded as follows:

> "While inspecting her genital area and unprompted FX said 'daddy put his fingers in there.' Dr Forbes asked was it sore and she said 'yes.' I asked "in where" and she put her hand down pointing to her pubic area."

[25] The summary provided in the report by Dr Livingstone is as follows:

> "FX aged almost three years has made a disclosure of digital penetration by her father. This disclosure was repeated to ourselves during examination of her genital area. The mother reports she also has made a disclosure of the father kissing her with an open mouth and putting his tongue in her mouth and pulling her trousers down and that she has seen his genitalia. These disclosures would be of significant concern. Anogenital examination today showed no abnormality but this would be entirely consistent with her history of digital touching of the genital area which is unlikely to result in any physical signs. I have arranged to review her at the Rowan in two weeks' time to repeat her STI screen."

[26] The mother's statement of evidence provides some further evidence of disclosures as follows. It states that in or about 18 March 2018 FX had a nightmare and told her she was going to tell the ladies (referring to the police officers). The mother asked her what she was going to tell them. She said how "daddy kissed her with his tongue in her mouth and how he made her pull his trousers too." She was able to describe what his private area was like when asked by the mother.

[27] The mother also records that on Monday 19 March 2018 as she was getting FX out of the bath, she started talking about it again. At this point she said that daddy quickly pulled up her trousers before Granda Roy came into the bedroom. In any event, as a result of all of the disclosures made to her the mother made contact with social services who advised that no contact should take place between the appellant and the child. That is the current position.

[28] The mother also refers to the fact that on 26 April 2022 she received a call from the court children's officer, Paul Hughes, to arrange a meeting with the child on 5 May 2022. The next day whilst FX had just started talking about meeting the

social worker she ran behind a parked car and wet herself. She said that she was afraid and it was too late to get to the bathroom and she was anxious. After this it appears that she referred to her dad as "bad dad."

[29] In addition, FX's aunt provided evidence that she had overheard FX speaking to her child saying that "daddy's bum looks like slime." The mother said that on 4 March 2018 during a normal interaction FX kissed her with her mouth open. When her mother said that we kiss with our mouths closed FX responded, "daddy doesn't and he puts his tongue in my mouth and it is yuck." That day when being bathed the mother said that she asked FX if she could check her bum and FX declined saying "daddy hurt me with his finger." The mother asked if FX had asked him to stop and she replied that she did but daddy just laughed. The mother, in her evidence said, that she then asked FX if she had ever seen daddy's bum and FX in the course of her reply was said to describe her daddy's bum as "grapes, banana and sometimes yoghurt and slime." The aunt was not in the immediate vicinity of where this conversation took place but was in an adjacent room. She said that she overheard FX saying banana, grapes and yoghurt.

[30] A further instance was reported when FX started school in September 2019. For her first homework it was recorded that when drawing her family, she drew the father with a penis stating that that "is where the slime and yoghurt comes from."

The Achieving Best Evidence ("ABE") interviews

[31] FX undertook two ABE interviews with police and social services on 7 March 2018 and on 13 March 2018. We have had the benefit of reading the transcript of these interviews. This was obviously a challenging process for professionals given that the child was only three years of age. The child needed a registered intermediary. It was also obvious that she needed her mother who was present at the ABE. Overall, it is clear upon reading the transcripts that the child was hard to focus and settle. It is in that context that the disclosures made at ABE interview must be assessed. We summarise the salient parts of the transcripts which were recorded by the judge:

[32] At the first interview on 7 March 2018 FX gave the following responses in answer to questions:

> "A: He didn't stop it.
>
> Q: Who didn't stop it?
>
> A: Daddy.
>
> Q: What did he do? Did you tell the doctor that daddy did something to you?

A: Yes, I told him not to do that to me.

Q: What did you want mummy to tell?

A: Him not to do it. He kept doing it to me.

Q: Doing what to you?

A: He kept hitting me.

Q: Hitting you where?

A: In his bedroom.

Q: In his bedroom, where in his bedroom?

A: On the sofa.

Q: What was he doing on the sofa?

A: He was hitting me, me on it, and it hurted.

Q: Can you tell me what he hurt you with?

A: I don't want to. With his finger.

Q: And what did he do with his finger?

A: He laughed."

[33] Within the second interview on 13 March 2018 FX was reported to spontaneously say without being asked "daddy hurt my bum." The following exchanges follow up on this exclamation in these terms:

"Q: Can you tell me, so what did daddy do?

A: He hurt my bum.

Q: How did daddy hurt your bum?

A: His finger.

Q. … Do you remember whose house were you in whenever daddy hurt your bum?

A. My mummy's.

Q: I've got lots of paper to draw on.

A: Daddy hurt my bum."

The father's police interviews

[34] The father was arrested on 13 March 2018 and interviewed by the police under caution in the presence of his solicitor. During the interview he refuted any suggestion of sexual abuse or sexual assault of the child. He said that he was concerned about the mother's position in relation to matters because he thought that the mother had, in effect, been coercing, as he put it, or coaching the child. During interview the father maintained that FX never saw him naked. The father described a pleasant and uneventful contact on 28 February 2018 when FX was at his parents' house. He said that she was there when he came home from work and they had their evening meal together. He said that he had not noticed any redness or bad smells. In answer to questions, the father said that the only time he would touch FX in her private area would be if there was redness and he was applying cream. He said there was a sofa in his bedroom and FX had been there with him but not for long. He denied all of the allegations made that were put to him and asserted that the mother was "putting her up to that."

[35] The father was reinterviewed by the police on 30 May 2018, again under caution, with his solicitor present. During this interview he confirmed that he would have been present with FX in his bedroom alone and that he did on occasion take her to the toilet alone stating that FX would often require two people and would insist that another would wash her hands.

The criminal proceedings

[36] The father was charged with three criminal offences pursuant to the disclosures made by FX. Ultimately, the criminal trial did not proceed. This outcome followed various rulings of the trial judge, His Honour Judge Lynch KC. Essentially, he declined to admit the ABE interviews as examination in chief or to admit the evidence of the mother and the GP in relation to the disclosures made.

[37] The judgment of Judge Lynch contains the rationale for his decision as follows:

> "The delay in this case is substantial and hard to justify. It took 19 months for the case to be returned for trial. No explanation has been provided, but whatever it may be is unimportant in the context of the issue I have to decide. In *Maliki* a delay of 14 months to trial was regarded as the basis, in itself, as our reason for excluding the evidence. At age three at the time of the ABE and possibly as young

> as two years eight months at the time of the alleged offence, the complainant has been alive longer after the offence/interview than before. There is no possibility, in my view, that a meaningful cross-examination of her could be undertaken by the defence. As observed supra the jury could never be sure whether she had any memory of the event(s) the prosecution [rely] upon to establish the guilt of the accused. I am of the view that the evidence of the complainant, insofar as it can be said to establish any facts whatsoever should not therefore be admitted under Article 76 of PACE. Although, in addition, to the delay there were breaches of the Code I referred to above they would not, in themselves, in my opinion, have sufficed to have had the ABE excluded."

[38] Judge Lynch then refers to the hearsay evidence which formed the basis of the prosecution case. His conclusion in relation to the hearsay statements is as follows:

> "The statements themselves, taken in isolation, are vague, require considerable interpretation and are interdependent upon each other and of the ABE of the complainant. I have come to the conclusion that applying my discretionary powers under Article 18 or Article 76 PACE, the hearsay applications should not be acceded to. The court was left with a general feeling of concern. The case was based upon a series of inferences to be drawn from pieces of evidence that are nebulous and require considerable interpretation to come to a conclusion of guilt. Then there are the problems concerning the delay and co-breaches. When everything is taken into account I came to the above conclusions."

The hearing before McFarland J

[39] This hearing took place over two days as we have said. The judge heard the evidence that we have summarised above. In addition, an agreed Statement of Facts was put before the court by the parties. This statement reads as follows:

> "The following facts are agreed by the parties:
>
> (i) Dr Pilkington carried out an examination of FX on 3 March 2018. Dr Pilkington asked the child if anyone had touched her down below and she said "daddy." FX stated, "he put his finger in there" and pointed to her underwear region. Dr Pilkington asked her did it hurt, and she said

"yes." Dr Pilkington asked her if she told her daddy it hurt and she said she did and told him to stop. Dr Pilkington asked if he stopped and FX said "no." Dr Pilkington said these disclosures were unprompted with no interruptions from her mother, who was in attendance during this discussion.

(ii) Dr Pilkington found redness in the vaginal area. She advised the matter should be reported to police.

(iii) Dr Forbes carried out a joint medical examination with Dr Livingstone. It is agreed that the child was examined in the supine position (on her back) with her legs parted to the side. For the genital examination, she was calm and co-operative. Whilst her genitals were examined FX said unprompted "daddy put his fingers in there." Dr Forbes asked, "was it sore" she said "yes." Dr Livingstone asked in where? FX indicated by putting her hands down to the pubic area. It is accepted that this report can be admitted without formal proof. It is agreed that the physical findings are neutral in relation to the allegations of the touching of the genital area by the applicant.

(iv) The statement of Kerry Martin dated 21 June 2019 is agreed. Kerry Martin's handwritten notes outline an initial discussion which took place with the respondent, which is not included within her formal statement of evidence.

(v) The transcript of the body worn footage is agreed.

(vi) The transcript of the memory stick is agreed.

(vii) It is agreed that the transcript of the ABE interviews of FX, 2-7 March 2018 and 13 March 2018 can be admitted without the need for formal proof.

(viii) The father was interviewed under caution on 13 March 2018 and 30 May 2018 in relation to the allegations concerning the subject child. It is agreed that the transcripts of those interviews can

be admitted and represent the applicant's responses after caution.

(ix) It is agreed that the applicant sent text messages as set out in pages 54 to 58 of Disclosure Bundle 2 to his niece. It is agreed that there was a criminal prosecution in relation to the conduct of the respondent towards his niece, whilst she was a child aged 12-14. The depositions are before the court, and it is agreed that the applicant accepted a caution for harassment."

[40] The above agreed facts obviously frame the case. Of particular significance is the fact that the medical evidence was admitted by agreement.

[41] At this juncture we record the assessment made by McFarland J of each of the parties. First, in relation to the father his conclusions are found at paras [25] and [26]. The judge's view was that when the father was asked about the text messages to his niece:

> "[25] He was evasive in his answers and this must be seen in the context of his police interview when he lied to police about the messages, and then as late as May 2022 his explanation to the court welfare officer also was a lying account."
>
> [26] I have no real hesitation in finding that the father was engaging in a grooming exercise with a view to sexual exploitation of this girl who was in her early teens."

[42] Further findings of fact made by McFarland J are contained in paras [54], [55] and [65] of the judgment as follows. Next, as regards the disclosures:

> "[54] The words uttered by FX have been remembered and, in some instances, recorded by the various parties who heard them. Obviously, the mother and her sister could not be regarded as independent but having heard and seen both give evidence, I am satisfied that they are both honest and accurate witnesses. There would have been turmoil within the household at the time FX made the disclosures and it is perfectly understandable that the full dialogue or the sequencing was not remembered and then re-told in exact detail. For similar reasons, it would explain why when matters had been reported to the police and then recorded into police statements that some

> words were overlooked and there were discrepancies between the statements given to police and what is remembered now. That in no way undermines the overall accuracy of the evidence from both the mother and the aunt.
>
> [55] The child made disclosures in similar terms to three doctors, a police officer and a social worker and her words were written down by the doctors and recorded by the police so there is no doubt about the accuracy of what had been said by FX to them…"

[43] Finally, we highlight the judge's assessment of the mother's credibility and how he dealt with potential alternative explanations for the disclosures as follows:

> "[65] Having seen and heard the mother I do not consider that she was being in any way malevolent in her approach."
>
> …
>
> [68] I reject the suggestion that the mother has deliberately coached the child to invent these accusations against the father. The number and nature of the disclosures made over a period of time to many different people, and the consistent thread that runs through these disclosures, would make it unlikely that the mother has, to adopt the words of the father, put FX up to making up these allegations.
> …
>
> [70] There is absolutely no suggestion in any form that the child has been exposed to pornography either in her mother's home or her parental grandparents' home. The father has denied ever being naked in FX's presence, and there is no suggestion that any other male would have been naked in her presence. She was able to give a reasonably accurate description of the adult male genitalia to her mother in March 2018 and was able to draw her father with a penis in September 2019 for class-work when in P1. Her reference to slime to both IC and her mother may have been a reference to urine (notwithstanding the fact that the father denies such a possibility). I find it difficult to consider any rational explanation for the reference to yoghurt and its obvious

> connotations with ejaculate, other than FX recounting what she had observed."

Grounds of Appeal

[44] The appeal notice is dated 12 October 2022. In this document six grounds of appeal are raised. The grounds are undoubtedly overlapping as they all deal with how a family court should assess hearsay evidence of sexual abuse allegations from a young child (here 3 years of age) which are denied in circumstances where the father cannot actually challenge the child.

[45] This issue arises in many family law cases. It requires some careful superintendence by a family judge to ensure the fairness of the process for those accused of such serious allegations which have lifelong effects on relationships with children.

[46] In truth, the appeal boils down, as Mr O'Rourke frankly accepted, to a number of simple propositions. The main issue is whether the judge has committed an error of law in how he dealt with the hearsay evidence of the child's disclosures to a range of different people.

[47] The further point that Mr O'Rourke advances is that the judge "misinterpreted" the medical evidence from Dr Pilkington and thereby improperly imported into the case a sexual aspect to the touching. This specific point is comprised in ground 6 of the appeal as follows:

> "In the circumstances, the court's reliance on the hearsay evidence was in a factual matrix which the court had misconstrued. Since the only evidence to support the allegation of sexual touching emanated from the hearsay accounts of persons who were not independent, it was unfair to the appellant to rely on this evidence to come to the conclusions reached by the trial judge.

[48] During submissions Mr O'Rourke stated that his argument was essentially that the judge had misconstrued the medical evidence and then not properly assessed the hearsay evidence. He was frank enough to say that there was little that turned on the judge's assessment of the alternatives in this case given the fact that he had considered the father's case and discounted it in terms of coaching or innocent touch.

[49] The appellate test established by the Supreme Court in *Re B (A Child)* [2013] UKSC 33, endorsed by *Re H-W* [2022] UKSC 17 is simply whether or not the judge was wrong. A fact-finding determination calls for an analysis as to whether the judge was wrong in his interpretation of the evidence.

Consideration

[50] The first, and rather obvious, point to make is that this case arises in the family law jurisdiction. Whilst there was a previous criminal trial which ended in a discontinuance against the appellant that does not mean that the family court is absolved from considering the issue of whether the father in this case has sexually abused his child. This court is well aware of how these matters arise and the care and sensitivity needed to deal with them. In the family courts a child of this age would not give evidence. Rather, the evidence of a child's disclosures is usually admitted by way of hearsay. Then it is the task of a judge to interpret the evidence and weigh the various strengths and weaknesses in the context of a case as a whole. The standard of proof also differs from a criminal trial as in a family case it is on the balance of probabilities.

[51] In this jurisdiction statutory imprimatur for the admission of hearsay is found in The Children (Admissibility of Hearsay Evidence) Order (Northern Ireland) 1996. Article 2 of the Order states:

> "2. In—
>
> (a) civil proceedings before the High Court or a county court; and
>
> (b) civil proceedings under the Children (Northern Ireland) Order 1995 or under the Child Support (Northern Ireland) Order 1991 in a magistrates' court
>
> evidence given in connection with the upbringing, maintenance or welfare of a child shall be admissible notwithstanding any rule of law relating to hearsay."

[52] It flows from the law that admission of hearsay evidence in children's proceedings is uncontroversial. Any issues that arise usually relate to interpretation of the evidence and the weight to be applied to it by the judge. When estimating the weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. Whilst not specifically of application in family cases the court may utilise Article 5 of the Civil Evidence (Northern Ireland) Order 1997 by way of guide when considering hearsay evidence. Regard may be had in particular to the following matters:

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; and

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

[53] The authoritative text *Hershman & McFarlane, The Children Act and Practice* provides a useful summary of the equivalent legislation in England & Wales in Volume 1 Section C [2933] as follows:

> "The effect of the Children (Admissibility of Evidence) Order 1993 in family proceedings is that the rule against hearsay does not apply to those courts when hearing evidence connected with a child's upbringing, maintenance or welfare, either in the public or private law fields.
>
> A party to proceedings relating to a child no longer has a right to challenge the admissibility of evidence connected with the child on the ground that it is hearsay. However, the courts will have to assess the weight which may attach to such evidence. In *Re W (Minors) (Wardship: Evidence)*, [1990] 1 FLR 203 Neill LJ observed:
>
> > 'hearsay evidence is admissible as a matter of law, but… this evidence and the use to which it is put has to be handled with the greatest care and in such a way that, unless the interests of the child make it necessary, the rules of natural justice and the rights of the parents are fully and properly observed.'
>
> In *R v B County Council ex-parte P* [1991] 2All ER 65 Butler-Sloss LJ held that the effect of the original 1990 Order was to apply those observations more widely, outside the wardship jurisdiction, stating:

> 'A court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon.'
>
> Even in cases where the Civil Evidence Act 1995 does not strictly apply, when assessing the weight to be attached to hearsay evidence, a court may have regard to the matters set out in s 4 of that Act.
>
> It should be noted that the evidence admitted by the 1993 Order is not confined to evidence of what the child has said. The evidence may record or report the previous statement of any person, and applies to any evidence.
>
> Put simply, first-hand hearsay is evidence by B that he heard A make a statement. The evidence which may be admitted under the Order is not confined to first-hand hearsay evidence and allows second, third or remoter hearsay evidence to be given. However, the further the evidence is from the original source of the statement, the less weight the court is likely to attach to it.
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> Where serious allegations of abuse are made by adult witnesses, the court should expect them to give oral evidence, or at least make a full statement, rather than accept a hearsay account of what they have said."

[54] The legal authorities provided to us all reiterate the care that needs to be taken when considering hearsay evidence and the safeguards that should be in the mind of any judge. This is well travelled ground and so we need not discuss the authorities any further. In any event the cases that we have been referred to are fact sensitive. The points of principle that we bear in mind are usefully distilled in the decision of Black LJ in *Re W (Fact Finding Hearing: Hearsay Evidence)* [2013] EWCA Civ 1374.

[55] In *Re W* an application was made for a care order based upon one of the children's disclosures of sexual abuse by their father. Those allegations were later retracted through written letters from the child, however, the case proceeded to a fact-finding hearing based upon the hearsay evidence of the child's disclosures to a social worker when she was an adult and what she had said as a child.

[56] In a core passage found at para [31] Black LJ says as follows:

> "Miss Heaton submitted, quite rightly, that it is impossible for a judgment to set out all the nuances

> arising in the hearing or to deal with every aspect of the evidence that the judge has weighed in the balance in arriving at conclusions. This has been underlined by higher authority than me and I have made every allowance for it. However, it does have to be apparent from the judgment that the judge has taken into account all the central features that are relevant to the decision that he or she is making, both the positive and the negative. What that meant here was, in my view, that the judgment had to show first, which features of the evidence the judge considered to be significant in pointing towards there having been abuse, secondly, that these features had been considered critically in the light of the features that undermined that hypothesis or pointed away from it, and thirdly, why it was, having weighed all of this up, the judge found the local authority's case established."

[57] The simple lesson to be taken from above passage is that a trial judge must faithfully consider all of the evidence, critically analyse it, and then explain his or her reasoning for the findings made. We endorse the words of Black LJ that a judgment does not have to set out all of the nuances arising from the hearing. However, a judgment has to deal with the core issues. In this case clearly the judge had to explain how the hearsay evidence that was admitted should be interpreted and then weighed to reach a conclusion.

[58] Mr O'Rourke maintains that there is a foundational problem inherent in the judge's ruling in that he does not state that the child actually made the relevant statements to the persons concerned. We find this argument to be strained at best and misguided at worst. It is plain particularly from paras [54] and [55] of the judgment that the judge has reached his decision on the basis of the accuracy of the statements provided by those to whom the child made the disclosures. In doing so it is obvious to us that he accepted that FX had made the disclosures to her mother, medical professionals and police. This appeal point achieves no traction whatsoever.

[59] The next limb of appeal, which Mr O'Rourke focussed most energy upon, engages the question whether the judge "misinterpreted" Dr Pilkington's evidence to mean that the child had been digitally penetrated and therefore a sexually inappropriate touch rather than an innocent touch. In support of this claim Mr O'Rourke maintained in argument that, in fact, the child had said to Dr Pilkington that the father had put his fingers "in there" rather than "inside." Therefore, the argument made on behalf of the appellant, is that the court's alleged incorrect analysis of Dr Pilkington's evidence had a consequential effect on the court's reasoning as the improper finding of inappropriate penetrative touch polluted the overall consideration of the case.

[60] We fail to see the force of this argument in the context of the judicial exercise under scrutiny. The judge was tasked to consider the evidence and interpret it. This is pre-eminently an evaluative exercise which clearly allows the judge a margin of discretion. In our view, it cannot be suggested that he strayed beyond the notional range of reasonable decisions in interpreting the evidence given.

[61] It was plainly open to the judge to decide that the disclosure made by FX to Dr Pilkington was to the effect that FX was saying that she had been subject to inappropriate sexual activity by way of her father putting his fingers into her genital area. The words "inside" and "in there", objectively interpreted in the context uttered, each are more likely to mean penetrative touching rather than simple touching to the genital area. The judge was alive to all relevant possible meanings and reached a plainly sustainable view on the facts of this case. In the overall context we do not see that the judge can be faulted for how he interpreted the evidence.

[62] Ms Dinsmore rightly stressed the point was that the doctor examining the child was sufficiently concerned to refer the matter through the mother to the police. It stretches credulity that the doctor would have taken this course if she had thought that the touching was an innocent non-sexual touch. We consider that the judgment of the judge, particularly the paragraphs that we have referred to at [40]-[42] above, illustrates the fact that he gave full consideration to the evidence. He evaluated the evidence and reached a conclusion which was within his remit and cannot be categorised as wrong.

[63] Summarising, the judge's conclusion was plainly one which was open to him to reach on the evidence before him. There can be no argument made that the judge has gone beyond the boundaries of what would be reasonable or rational in reaching this conclusion. As such, this core argument is without any merit whatsoever and leaves very little else of substance in this appeal. However, we will deal with some of the subsidiary arguments as follows.

[64] Properly analysed, the remaining appeal points boil down a claim that the judge would have been better to specifically refer to the fact that the evidence was hearsay and to the statutory regime for the admission of hearsay before deciding that he had satisfied himself that the child had made the disclosures and before satisfying himself that they were reliable and credible and that there was no other explanation. The answer to that claim is encapsulated by Black LJ in *Re W* when she said that "a judge cannot be expected to set out the nuances of every case."

[65] What the judgment of McFarland J demonstrates is that the judge considered all relevant evidence. He did not leave anything out of account. It is beyond argument that everyone knew that this case was essentially concerned with how the judge would interpret and weigh up hearsay evidence. Therefore, the judge's brief reference to hearsay is not a fatal flaw. Critically, this case also proceeded on the basis of the agreed Statement of Facts which we have referred to at para [38] above.

There are always arguments that can be made on appeal about better ways of expressing decisions. But, the litmus test is whether it is clear to an observer how the judge reached his conclusion. In our estimation, this judgment is crystal clear. The judge decided that the child had made the disclosures to a variety of people. He was entitled to do so. The judge decided that this was touching with a sexual element. We consider that he was entitled to do so. It is clear to us that the judge considered all of the pitfalls when assessing the hearsay evidence, such as reliability, contamination, coaching and innocent explanations. Overall, we consider that he applied the requisite level of caution to his assessment of the hearsay evidence. In our view this judgment is thorough and careful and cannot be categorised as wrong for the reasons we have given.

Conclusion

[66] Accordingly, we dismiss the appeal. This means that the fact-finding decision of the judge that the child suffered from sexual abuse perpetrated by her father stands. The case will therefore return to the judge to determine what order, if any, he should make pursuant to the father's application for relief under the Children Order.