A PRACTICAL GUIDE TO Re H-N

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18 May 2021

1. Introduction

- The Court of Appeal handed down its long awaited decision in 4 conjoined appeals in Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 on 30 March 2021.

- The appeals all raised issues related to consideration of allegations of domestic abuse in private law proceedings. The court took 'the opportunity to give more general guidance about matters which commonly arise in the Family Court and are of great importance'. This talk is concerned with that guidance and the practical issues arising from the judgment.

- Before considering the guidance the court came to the following decisions in the 4 appeals while bearing in mind the court's caveat to the decisions in the actual appeals.

- 'our decisions on the various appeals very much turn on long-established principles of fairness or the ordinary approach to judicial fact-finding. None of the four appeal decisions purports to establish 'new law'. They therefore do not establish any legally binding precedent.' [18}

2. **Re B-B**:

- An appeal against the making of a consent order granting a father contact with his child was allowed.

- The judge (HHJ Scarratt) made a number of wholly inappropriate comments to the mother at a hearing which was adjourned, the trial being unable to proceed as listed. Not only to have her child taken from her but to have her adopted and, on two further occasions, to refer the case to social services.

- The issue before the court was whether, notwithstanding the fact that the consent order was made a number of months later at a further hearing, the impact of those comments was such that the court could not be satisfied that the mother's consent to the order had been 'genuinely and freely' given.

- The court held that, notwithstanding the pressure the judge was under and the failure of the parties to comply with the court's case management orders for the preparation of the case, the impact of the judge's comments upon a young mother must not be under-estimated.'

- 'It is hard to see how the mother, faced with the prospect of a hearing in front of the same judge, would have felt herself to have retained any real negotiating boundaries about contact. One can understand that the mother may have felt that she had little option but to settle, particularly given the judge's opening remarks questioning the point of a fact-finding hearing and his refusal to hear the allegations of controlling and coercive behaviour.'

3. **Re H:**

- An appeal against an order made in September 2019 was dismissed.

- The judge (HHJ Tolson QC) found an allegation of rape to be 'not proven' and declined to determine allegations of financial and emotional abuse. The judge made an order for contact.

- Extensive unsupervised contact has continued until the present and has recently been confirmed following a second fact-finding hearing, before a different judge, when further allegations against the father were held to be unfounded.

- The Local Authority wrote to the Court of Appeal to stress the importance to the child of continuing contact. The mother does not wish contact to stop and was unable to tell the court what, in those circumstances, the purpose would be in remitting the case for a retrial.

- The appeal was dismissed as being academic. The court emphasised that had there been a purpose to hearing the appeal, it would not have hesitated to do so.

- In this case there was later a further FFH and a different judge (HHJ Cox) found an allegation made by the mother of sexually inappropriate behaviour by the father was not true.

4. **Re T:**

- An appeal against the making of an order for contact was allowed. At trial, the judge (HHJ Evans-Gordon) did not find allegations of anal rape to have been proved and held that a number of incidents of violence on the part of the father against the mother had been minor.

- The issue was whether the judge should: (i) have made the finding sought of anal rape; and (ii) whether she had failed properly to recognise the significance of admitted incidents of violence as evidence of a pattern of controlling and coercive behaviour. The court held that the judge had been entitled to conclude that the allegation of anal rape had not been made out, for the reasons she gave.

- However, having determined that the allegations of anal rape were not made out, the judge did not then step back and appreciate the significance of the matters which she did find to have been proved.

- As a consequence, the judge failed to appreciate the true significance and seriousness of the father's behaviour or to consider whether the findings established a pattern of coercive and/or controlling behaviour.

- One of the allegations the judge has found to be proven was 'the plastic bag incident'. The father came up behind the mother when she was sitting on the floor with T on her knee and, without warning, put a plastic bag over the mother's head. The father said, 'This is how you should die'

- The judge also made findings against the mother and found this was a mutually abusive relationship and there was now no risk with the parties having separated.

- The Court of Appeal highlighted both the plastic bag finding and a further finding of strangulation and concluded the judge did not appreciate the significance of the findings she had made against the father.

5. **Re H-N:**

- An appeal was allowed against case management orders made consequent upon the judge having declined to make a finding of rape and having indicated that certain admitted incidents of abuse against the mother should not be taken into account.

- The issue was whether the judge (HHJ Tolson QC) had failed to look at the pattern of control and the abuse which were demonstrated even on the basis of the father's admissions alone.

- It was held that the judge had discounted the father's admissions of domestic abuse perpetrated over a significant period of time and had underestimated the significance, both for the mother and for H-N, of the fact that the father had wrongfully retained H-N abroad for a period of 8 months.

- The judge commented that such allegations are 'increasingly common' and, whilst emphasising that he was not making a political point, expressed his belief that 'it is necessary to factor in the effects of a system which encourages allegations of domestic abuse'.

- The judge referred to what he regarded as the significant advantages to a litigant in 'portraying herself as a victim of serious domestic abuse' by reference to the availability of public funding in such circumstances and to what he described as 'professional sympathy'.

- The judge expressed the view that this mother is a victim of domestic abuse by virtue of the father's 'minor' admissions and expressed the hope that she would retain public funding for the next stage of the case. The Court of Appeal said such comments were inappropriate and should not have been made.

- The court found the judge's analysis to be seriously flawed in many respects and allowed the appeal.

6. The Binary analysis still applies.

- The court make it clear that the binary analysis still applies that means each allegation is either found to be 'proved' or 'not proved [5] and the burden of establishing truth is on the parent who makes the allegation.

- Thus, the court discharges a great responsibility with risks arising on both sides of a decision.

- 'If, in reality, the abuse did occur but there is a lack of evidence to prove it, the court's subsequent orders may risk exposing the child and parent to further abuse. Conversely, if alleged abuse did not in fact occur, but the court finds the allegation proved, orders significantly limiting the 'perpetrating' parent's future relationship with their child may be imposed.' [6]'

7. Deciding on whether or not to hold a fact-finding hearing is important and not straightforward.

- The court is also aware that 'Family judges and magistrates also have the responsibility at an earlier stage of proceedings in deciding whether or not it is necessary to conduct a fact-finding hearing and, if so, which of a range of allegations that may be before the court should be the focus of that exercise.

- Such 'case management' decisions may not be straight forward, yet they too may have a long-lasting impact on the outcome of the court case and the final orders that are, or are not, made.' [7]

8. The decision should be taken at an early stage and not every case requires a fact-finding hearing.

- The court also reminds us that not every case requires a fact-finding hearing even where domestic abuse is alleged [8] PDJ12.19 and emphasises 'it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take.'

- The judgment does not really get to grips with the practical reality of how such decision can be made at an early stage. There are 2 current significant delays in getting to that point

i. Courts are often taking many months to list a first hearing.

ii. CAFCASS are taking up to 40 working days to provide a safeguarding report.

iii. There are a number of reasons why the first hearing may be adjourned (e.g. incomplete safeguarding report, one or both parties not sent notice of hearing, technological problems with remote hearing) and then the case has to be relisted in a FHDRA list often leading to months of further delay.

9. Factors to take into account when deciding whether there should be a finding of fact hearing [35]-[40];

- Paras 5, 6 and 17 PD12J apply.

- It is important for the court to have regard to the need for procedural proportionality at all times, both before and during any fact-finding process. 'Necessary' in PD12J paras 16 and 17 is key word as is the overriding objective.

- The proper approach to deciding whether there should be a fact-finding hearing is necessary is

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'.

- CAFCASS suggested that they could assist the court by providing a enhanced safeguarding letter. Given CAFCASS is currently struggling to provide a safeguarding letter within 40 days this currently seems to be a recipe for further delay. The Court of Appeal said the suggestion might be considered by those reviewing PD12J.

10. PD12J remains fit for purpose

- The court reminds any reader that PD12J sets out a step by step template that courts are required to follow.

Para 3 Definitions of 'domestic abuse', 'coercive behaviour' and 'controlling behaviour'.
Paras 11-14 – First Hearing/ FHDRA
Paras 16 to 19 – Is it necessary to hold a fact-finding hearing?
Para 19 – Evidence to be obtained for a fact-finding hearing?
Paras 25 to 27 – Should interim contact be ordered prior to a fact-finding hearing?
Paras 28 to 31 – The court's task at a fact-finding hearing.
Paras 32-34 – Steps to be taken where domestic abuse has occurred.
Paras 35-37 - Factors to be taken into account when determining whether to make child arrangements order in all cases where domestic violence or abuse has occurred.
Para 38-39 – Directions as to how contact is to proceed.

- The court remains of the view that PD12J is fit for purpose [28]. This is significant as the effectiveness of PD12J has been questioned.

'Each of these appeals are examples in differing ways of the importance of the modern judiciary having a proper understanding of the nature of domestic abuse and in particular of controlling and coercive behaviour and of its impact on both the victims and the children caught up in the atmosphere engendered in such a household. Training together with a proper application of PD12J largely ensures that such errors are the exception rather than the rule, but that that is the case does not lessen the impact on those individuals affected when things do go wrong.'

11. The court highlights out some of the current private law initiatives particularly

a. The Harm Panel Report which the Ministry of Justice is moving to implement [20]. It was interesting to read that there is a move to implement Integrated Domestic Abuse Courts [12].

b. The Private Law Working Group's April 2020 report, whose recommendations are starting to be piloted [19].

The Harm Panel Report is an impressive document but had attracted some criticism. It's not clear which parts of the reports are going to be implemented and who has made the relevant decisions about implementation, but a judgment is probably not the right place to find all of this out.

12. Patterns of Behaviour – Coercive and/or Controlling Behaviour

- The court explicitly recognizes the need of the court in certain cases to focus on a pattern of behaviour and undertakes a short historical review of the law [23]-[28].

- The court's view is that the concept of coercive and/or coercive behaviour is central to the modern definition of domestic abuse. The court endorses the recent judgment of Hayden J in F v M [2021] EWFC 4 as being of value both 'because of the illustration that its facts provide of what is meant by coercive and controlling behaviour, but also because of the valuable exercise that the judge has undertaken in highlighting at paragraph 60 the statutory guidance published by the Home Office pursuant to Section 77 (1) of the Serious Crime Act 2015 which identified paradigm behaviours of controlling and coercive behaviour. That guidance is relevant to the evaluation of evidence in the Family Court.' [29] & [30}.

- A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

i) Is directed against, or witnessed by, the child;

ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;

iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;

iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men [31}.

13. Not all unpleasant behaviour is abuse

It is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour.

The court endorsed the approach taken by Peter Jackson LJ in Re L (Relocation: Second Appeal) [2017] EWCA Civ 2121 (paragraph 61):

"Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim…' and 'controlling behaviour' as behaviour 'designed to make a person subordinate…' In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict." [32]

This is likely to be an issue that can only be decided by the trial judge but inevitably there will also be arguments in the early stages of proceedings as to whether the alleged behaviour is relevant to the safety of interim contact.

14. The challenges presented by Scott Schedules as a means of pleading [41]-[49]

- In the submissions to the court there was effective unanimity that the value of Scott Schedules in domestic abuse cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid [43].

- The principled concern arose from an asserted need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time.

- Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents. [44]

- The pragmatic concern was that the very process of directed selection, produces a false portrayal of the couple's relationship [45].

- Everyone seemed to agree about the problem but the solution was difficult to identify. The court pointed to a narrative statement as the way forward and pointed to further work needing to be done by the Private Law Working Group [48-49].

- The way forward may be longer narrative statements with judges at PTR identifying the factual issues rather than it all being laid out in a schedule. This will increase the workload on the court at PTR.

- It may be that scott schedules are still used where there are allegations relating to specific isolated events only.

- There will be plenty of cases coming before the court now listed for a fact-finding hearing where the directions have focussed on single allegations within scott schedules but the judge at final hearing may feel there is a pattern of controlling or coercive behaviour

underlying the single allegations. If the fact-finding hearing judge wants to now consider a pattern of behaviour will that hearing need to be adjourned to allow the other parent time to reply to and analyse the allegation of a pattern of controlling or coercive behaviour.?

15. Court's Approach to Controlling and Coercive Behaviour [50]-[59]

- In the meantime, cases must still be heard and with an increased focus on controlling and coercive behaviour as identified earlier in this judgment. The Court accepted that judges will inevitably be faced with difficult case management decisions as they balance the need for a proper application of PD12J with the damage caused to children by delay.

- The court accepted that 'the overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court.

- The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact.

- Practitioners and courts should expect an analysis of whether there has been coercive and/or controlling behaviour in the vast majority of cases.

16. The 'Situational' Analysis of Little or No Relevance

- I read the situational analysis as saying when these parties were together there was conflict and abuse but now they are separated it is very unlikely this will happen again so domestic abuse is of little relevance to child arrangements.

- The approach of regarding coercive or controlling incidents that occurred between the adults when they were together in a close relationship as being 'in the past', and therefore of little or no relevance in terms of establishing a risk of future harm, should, the court believes, also be considered to be 'old fashioned' and no longer acceptable.

- 'The fact that there may in the future be no longer any risk of assault, because an injunction has been granted, or that the opportunity for inter-marital or inter-partnership rape may no longer arise, does not mean that a pattern of coercive or controlling behaviour of that nature, adopted by one partner towards another, where this is proved, will not manifest itself in some other, albeit more subtle, manner so as to cause further harm or otherwise suborn the independence of the victim in the future and impact upon the welfare of the children of the family.'

- A judge who fails expressly to consider the issue may be held on appeal to have fallen into error.

- It has not been uncommon to encounter judgments where domestic abuse said to have happened in the past is regarded as situational and not relevant to future child arrangements as the risk is reduced or eliminated. The situational analysis was part of HHJ Tolson QC's first instance judgment in Re H-N. The Court of Appeal expressly disapproves of this in the context of coercive or controlling behaviour.

17. If court is considering coercive and/or controlling behaviour it may not be necessary to consider specific allegations

- The court's expectation was that in cases where an alleged pattern of coercive and/or controlling behaviour falls for determination, and the court has made that issue its primary focus, the need to determine a range of subsidiary date-specific factual allegations will cease to be 'necessary' (unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour).

- This is very surprising to read to this author. If the allegation of the pattern of behaviour is not made out does that mean the person alleging abuse will not be able to rely on the specific factual allegations [56].

- The answer is in para 59 'unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).'

- So the question arises as to what is the category of lesser allegations that might not be tried.

- Applying my own experience it will put alleged victims of domestic abuse in an incredibly difficult position if they have to decide whether to proceed with an allegation of coercive or controlling behaviour or less 'serious' allegations. If the bar of seriousness is rape then presumably single allegations of physical assault are not as serious and will not be considered if an allegation of controlling and/or coercive behaviour is pursued.

- I expect practically the guidance in para 56 may not always be followed but a judge following this guidance is likely to be beyond criticism

18. The Court's Resources

- The judgment refers to the court's resources on a number of occasions. Put simply there are more cases than the court can deal with and the number of applications is one the rise. For March 2021 CAFCASS has confirmed that private law applications have risen by a third again and this is on top of a relentless tide of previous increases.

- It has always been intended that PD12J should be read together with the overriding objective as set out in Family Procedure Rules 2010 r.1.1 of which PD12J is a part.

- In the January 2021 edition of the Road Ahead
  In these times, each of these elements is important, but particular emphasis should be afforded to identifying the 'welfare issues involved', dealing with a case proportionately in terms of 'allotting to it an appropriate share of the court's resources' and ensuring an 'equal footing' between parties."

- The context is
  "The Family Court was not coping with the pre-COVID workload and radical steps aimed at changing professional culture and working practices were about to be launched when the pandemic struck."

- "If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely

determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear."

19. The relevance of criminal law concepts.

- Re R is reaffirmed 'what matters in a fact-finding hearing are the findings of fact'. The Family court should be concerned to determine 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 strict 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.

- It feels as times reading this judgment that the court is straining to continue justify the distinction or separation of criminal concepts and family law concepts.

- Is the answer as simple as sometimes those concepts are helpful and sometimes they are not and that depends on the facts of the case.

20. Credibility - An individual does not have to be blameless to be the victim of domestic abuse.

- In Re H-N the Court of Appeal accepted the submissions of the mother's counsel that the hearing, rather than a fact-finding on the limited issues in dispute and a determination as to whether this was an abusive relationship, became a binary choice between:
- "[a] relationship characterised by the deeply-controlling father described by the mother, a relationship in which she was blameless and under his spell? Or [b] is the problem in this case the deeply-troubled mother with mental health difficulties unrelated to the father's behaviour and responsible herself for the wild, unboundaried behaviour described by the father?"

- The Court of Appeal was clear that 'It goes without saying that an individual does not have to be 'blameless' to be the victim of domestic abuse and neither was that the mother's case.' [217]
- 'Although the judge said that he was 'not to be thought to be seen to be trespassing on the ground of the psychiatric assessment which is to come', in our judgment he did just that with the focus turning both to the mother's mental stability and to her skills as a mother and a homemaker rather than whether she was the victim of domestic abuse.'

- The court's view was that 'A consideration of credibility will necessitate a wide consideration of all the circumstances.'

- In Re H-N. 'In our judgment, the judge failed properly to analyse the evidence and to draw together the threads of the admissions made by the father including his retention of H-N in France. When this is put against the intensity of the judicial focus having rested on the mother's ability as a parent and her vulnerable mental health rather than on the allegations of domestic abuse, it leaves one unclear as to whether what the judge was in fact seeing in the presentation of this mother was not an intelligent manipulative mother making up allegations for her own ends, but a woman who, whilst she has undoubtedly suffered mental health issues, was demonstrating both in her behaviour during the course of the relationship

and her presentation in court, the classic signs of a person who has been the victim of domestic abuse and in particular a controlling and coercive relationship.' [221]

21. The approach to appeals against fact-finding [75]-[78]

- Piglowska v Piglowski [1999] 2 FLR 763 and G v G (minors: custody appeal) [1985] 1 WLR 647 are re-affirmed.

- 'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

- '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 but also of a reserved judgment based upon notes, such as was given by the District Judge. 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……Full allowance is to be afforded to the trial judge who has heard the evidence and been exposed to the parties and the detail of each case over an extended period.'

- The court's guidance speaks for itself but the fact three of these appeals were allowed shows that a focussed and well argued appeal can be allowed. Providing advice on which appeals might be successful will continue to be difficult.

22. The impact of what judges say can be important and relevant

In Re B-B there was no justification for the judge to say that 'if this goes on the child will be taken into care and adopted'. Nor was there any justification for the judge twice referring to the possibility of reporting the case to social services. Whilst we have in mind that, between the making of the order and the intervention of the pandemic, the order was implemented by both parties, nevertheless in our judgment, the impact of the things said by the judge to the mother cannot be underestimated. 'It is hard to imagine a more serious and frightening prospect for any mother, let alone a young, single mother, than that of having her child taken off her and placed for adoption.' {110]

It would normally be necessary for a party in circumstances such as this to adduce evidence showing a causal link between the procedural irregularity at an earlier hearing and the agreement of a consent order at a later hearing; but the facts of this case are exceptional and an inference can properly be drawn that the mother's wish to reach agreement on a consent order reflected the extreme anxiety she must have felt as a result of what happened at the March hearing [112].

The Court of Appeal do not make any reference to any complaint or disciplinary procedures arising out of this judgment. It is difficult to think that if a social work manager said something like this then they would escape a disciplinary process.

23. The proper approach to academic appeals

As recently as 2019, Peter Jackson LJ considered the issue of the proper approach to academic appeals in children's cases in J-S (Children) [2019] EWCA Civ 894.

In that case, as in the present case, permission to appeal had been granted on the basis that there was a compelling reason for the appeal to be heard in order for guidance to be given (in that case in relation to the use of electronic tagging).

Peter Jackson LJ concluded that the case did not satisfy the Hutcheson v Popdog Ltd test and declined to give guidance and dismissed the academic appeal saying that 'the priority must now be to further the children's welfare by conventional means'.

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18 May 2021