Re F-H (Children) [2008] EWCA Civ 1249 (10 September 2008)

Case No: B4/2008/1253

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY, FAMILY DIVISION
(HER HONOUR JUDGE HUGHES QC)
(LOWER COURT No: FD07C00429)

Royal Courts of Justice
Strand, London, WC2A 2LL

10th September 2008

B e f o r e :

LORD JUSTICE LONGMORE
and
LORD JUSTICE WILSON

IN THE MATTER OF F-H (Children)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Ms Joanna Dodson QC and Mr Alistair Perkins (instructed by the London Borough of Brent) appeared on behalf of the Appellant Local Authority.
The First Respondent Mother made no appearance at the hearing.
Mr Gregory Dowell (instructed by Messrs Makanda Bart) appeared on behalf of the Second Respondent, the father of the younger three children.
Miss Susan George (instructed by Messrs McMillen Hamilton McCarthy) appeared on behalf of the Third, Fourth, Fifth and Sixth Respondents, the children by their Children's Guardian.
Mr Alexander Verdan QC appeared on behalf of the Intervener.

HTML VERSION OF JUDGMENT

Lord Justice Wilson:

1. In what circumstances is it appropriate for a judge, at the outset of a pre-arranged fact-finding hearing, to decline to conduct it? Such is the question raised in this appeal. On 8 April 2008 Her Honour Judge Hughes QC, sitting in the Principal Registry of the Family Division, ruled that the fact-finding hearing which had been arranged for her then to conduct was unnecessary, inappropriate and disproportionate. So she declined to conduct it.

2. The care proceedings which were before the judge relate to four children but they have an older, now adult, sibling or half-sibling, who plays a central role in this appeal. I will call the adult sibling A and the four children B, C, D and E. A is a man who was born on 22 November 1988 and so is aged 19. He now lives independently of the rest of the family. B is a girl who was born on 26 August 1991 and so is aged 17. C is a girl who was born on 11 September 1996 and so attains the age of 12 tomorrow. D is a girl who was born on 5 September 1998 and so attained the age of ten last Thursday. E is a boy who was born on

21 May 2000 and so is aged eight. All five of them were born to the mother. A and B have one father; C, D and E have another. For many years the father of A and B has played no active part in family life; and he has taken no part in the proceedings. The father of C, D and E, who was and perhaps remains married to the mother, lived with her and the five children until about 2001; and since then he has had some contact with his three children.

3. In the care proceedings the London Borough of Brent ("the local authority") are the applicants. The mother is the first respondent. The father of C, D and E is the second respondent. The four children, by their Children's Guardian, Mr Taylor, are the third, fourth, fifth and sixth respondents. A is the Intervener.

4. Since 28 July 2007 B has been living in a children's home run by the local authority. Since 17 August 2007 C, D and E have been living with foster parents: the girls, C and D, have been living in one foster home and the boy, E, has been living in another. Since 13 September 2007 the placements of all four children have been regulated by successive interim care orders. In the proceedings the real issue surrounds the future placement not of B, who it is accepted should not return to live with the mother, but of C, D and E. The mother wishes them to return to her care; and they wish to do so. Initially their father supported the mother's application and put himself forward as a candidate to care for them only in the event that her request to be allowed to care for them was to be refused. Now he puts himself forward as a candidate to care for them in any event.

5. The mother accepts that in various respects she provided a turbulent and dysfunctional home for the children. While the father of the younger children remained living in it, there appear to have been a number of incidents of violence between him and the mother, to which the five children were exposed. But even following his departure, there were, as the mother accepts, frequent violent incidents between her and B, and between A and B, to which the three younger children were again apparently exposed; and there were occasions when B tried to harm herself.

6. In September 2005 there was a serious incident at the primary school which E, then aged five, had begun to attend. Summoned by the mother, the police were told by E that his headmaster had punched him, kicked him and crushed his legs. The school's version was that E already had a history of violence and that the headmaster had needed physically to restrain him. But the mother also alleged that the headmaster had assaulted E sexually. Over the years there seem to have been other occasions, of which Mr Verdan has reminded us this afternoon, when the mother, accurately or inaccurately, accused others, such as her step-father and a shopkeeper, of sexually abusing one or other of the children. Indeed the father of the younger children contends that in 2000 the mother falsely accused him of having sexually abused B in order to support her application for independent accommodation.

7. But a central part of the alleged history, and certainly the precipitant to the removal of the children into care in the summer of 2007, was an allegation that A had sexually abused the four younger children. The allegation surfaced in the course of a serious incident on 27 July 2007 when, having apparently attempted to cut her wrists, B was taken in handcuffs by ambulance to hospital and there alleged, among other things, that until 2006, when he had left the home, and perhaps also more recently, A had sexually abused her. The local authority, already aware of the family, were reintroduced to it; and B's allegations were a principal reason for her removal, upon discharge from hospital on 28 July, into a children's home. At that time B agreed to participate in a formal interview by a police officer and a social worker pursuant to ABE guidelines but her interview did not take place until 28 November 2007. The delay appears to have been attributable in part to B's extreme volatility and in part, according to the local authority, to the application at one stage of pressure by the mother to B not to make, or to continue to make, allegations against A.

8. In the course of the ABE interview ultimately undertaken with her B alleged that on a number of occasions between about 2003 and 2006 A had anally raped her, had attempted to rape her vaginally, had digitally penetrated her vagina and had unsuccessfully encouraged her to perform oral sexual acts upon him.

9. Meanwhile the three younger children had also articulated allegations of sexual abuse against A. It may well be that, unfortunately, their first interlocutor in that respect was the mother herself. On 7 August 2007 the mother told the social worker that both D and E had told her

that A had made them touch his penis. On 17 August 2007 D and E participated in ABE interviews; for some reason the ABE interview with C occurred much later, namely on 17 January 2008. In his interview E alleged that in 2002, when he was aged two, A had exposed his penis to him and told him to touch it. In her interview D alleged that A had exposed his penis to her, that it was hard and that he had encouraged her to masturbate him. In her interview C alleged that between about 2001 and 2004 A had licked her vagina on about four occasions, had digitally penetrated it, had exposed his penis to her and had simulated sexual intercourse with her.

10. At interlocutory hearings in the autumn 2007 it was accepted by the court, and apparently on all sides, that the application for care orders called for a lengthy, separate fact-finding hearing prior to the outcome hearing. It was acknowledged that many features of the mother's parenting, including the alleged history of violent conflict within her home, would need to be considered; but it was accepted that there would be few disputed issues between the local authority and the mother in relation thereto. The primary focus of the fact-finding hearing was to be the allegations of sexual abuse made by the four younger children against A: whether the abuse had occurred in the various respects alleged by the children; if it had occurred, the attitude of the mother to its occurrence and the extent, if at all, to which she had culpably failed to protect them from it; and, if it had not occurred, the genesis of their false allegations and, in particular and in the light of the mother's alleged history of making allegations of abuse which might or might not have been true, her own role, if any, in their production.

11. On 2 November 2007 His Honour Judge Altman directed that the fact-finding hearing should take place over 12 days beginning on 28 January 2008. It was known, however, that the police were investigating the allegations against A; and in the event delays attendant upon their investigation and their reluctance to release evidence to the family court until it was concluded led on 14 January 2008 to Judge Altman's vacation of that hearing and to his refixing of it, again for 12 days but to begin on Monday 7 April 2008, before Judge Hughes, and on the basis that that first day would be devoted to her reading of the voluminous documents. At the hearing on 14 January A was permitted to intervene in the proceedings in order to enable him to defend himself at the fact-finding hearing against the allegations made by the children.

12. On 7 February, 14 February and 31 March 2008 there were yet further interlocutory hearings. Although the first of them, conducted by Her Honour Judge Cox, was primarily directed to the mother's opposition to the continuation of the interim care orders referable to the three youngest children, being opposition which Judge Cox ultimately overruled, all three hearings provided an opportunity for the court to give further directions in order to make the fact-finding hearing as effective and comprehensive as possible. At the first of them, attended by counsel for all parties but not at the relevant part of it by counsel for A, Judge Cox was told that all parties agreed the need that the fact-finding hearing in relation to the allegations against A should take place. At the last hearing, however, conducted by Judge Altman, A, who had by then secured the advantage of representation by Mr Verdan QC, applied to the court to reconsider the need for the fact-finding hearing to embrace enquiry into the allegations against A. It may with the benefit of hindsight seem unfortunate that, instead of adjudicating upon that application, Judge Altman adjourned it for consideration by Judge Hughes at the outset of the substantive hearing. I suspect that his failure to adjudicate upon it was attributable either to lack of time on that day or to the fact that the fact-finding hearing was due to commence only one week later, with the result that it might have seemed appropriate for Judge Hughes, in the light of her seisin of the substantive hearing, to adjudicate upon its ambit. Judge Altman also stood over for consideration by Judge Hughes A's alternative application, namely that, were the allegations against him to be investigated, B should be directed to give oral evidence to the court and in particular to be cross-examined on his behalf.

13. Final preparations were made on all sides for the hearing to begin before Judge Hughes on Tuesday 8 April 2008. Sensing the likelihood that the judge would accede to A's application for B to be directed to give oral evidence, the guardian showed her the courtroom in which the judge was to preside. In the event, however, the guardian reported to the court that, while apparently amenable in principle to giving oral evidence, B wished to give it not physically in court but by video-link.

14. It is important to note the broad content of the position statements filed for the use of Judge Hughes and in particular the stance which the local authority were taking in relation to the allegations of sexual abuse against A. Their stance in relation to B was that her allegations were true but that at one stage, in August 2007, the mother had applied inappropriate pressure upon her to retract her allegations; in relation to C, that her allegations were true; in relation to D, that she had, as she claimed, been exposed to some inappropriate sexual contact by A but that the mother had encouraged her to embellish her account of it; in relation to E, that his allegation was false and that the mother had encouraged him to concoct it; and, in relation to B, C and to some extent D, that the mother had culpably failed to protect them from A's abuse. By her position statement, the mother alleged that she believed the allegations of B, C and D against A and accepted that she had failed to protect them from it; but she denied that she had applied pressure upon B to retract her allegations or that she had encouraged either D to embellish her allegations or E to concoct his allegations even if they were false. Neither the father nor, of course, the guardian at that stage offered a view on the proper determination of the factual issues. For his part, however, A entirely denied the allegations made against him.

15. I should not give the impression that the position statements only raised allegations in relation to A's alleged sexual abuse of the children. In the local authority's position statement there was a summary of the major incidents of violence in the mother's home to which I have referred; in her position statement the mother accepted that some, but not all, of them had occurred. I need, however, to identify two subsidiary allegations which were raised in the statements and which, in that they were denied, were ostensibly also fit for determination at the fact-finding hearing: one was the local authority's allegation, which the mother denied, that she had frequently and unnecessarily moved the children's home and had thereby caused unnecessary unsettlement to them; the other was their allegation, denied by the father of the younger children, that during and in particular following the end of the marriage he had culpably failed to take reasonable steps to protect his children from the harm which he knew or must have known that they were suffering in the mother's home.

16. Of the mass of important material which Judge Hughes will have noted in the course of her reading throughout 7 April, I refer to two features: first that the police were continuing to investigate the allegations against A and that they had not yet decided whether to charge him in that regard; second that the local authority had commissioned an independent Multi-Disciplinary Assessment Consortium, namely "Vista", to compile, in the light of all the relevant historical facts of the case, a comprehensive risk assessment for the use of the court at the outcome stage, to include reference to the personalities, vulnerabilities and needs of the three younger children, to the personalities of their parents and their respective capacities to care for them and in particular to the likely safety or otherwise of the children if returned to the care of the mother and the likely adequacy or otherwise of her care of them.

17. At the outset of the hearing on 8 April 2008 Mr Verdan made his application to the judge to revisit the decision to include within the fact-finding hearing an enquiry into the allegations against A. Mr Perkins, counsel for the local authority, strongly opposed the application. Counsel for the mother made no submission upon it. Counsel for the father of the younger children urged the judge to reject it. Inevitably, however, the submissions made by counsel on behalf of the four children, by their guardian, were significant. We have a full transcript of all that was said in court on that day; counsel for the guardian at first seemed to be ambivalent about the proper disposal of the application but, in the light of comments made by the judge in the course of the dialogue, she took instructions from the guardian and then announced that he agreed with the judge's indication that Mr Verdan's application should succeed.

18. Thereupon the judge retired in order to prepare a short judgment explaining her reasons for declining to hear the allegations of sexual abuse against A. She returned to court with copies of her written judgment and read it out in court. In effect the judge gave five reasons for her decision. In what follows I recast only her numbering and her reference to names:

> "1. The mother accepts sexual abuse occurred in the household and the children are telling the truth. She further admits she failed to protect them. It does not seem to me that my view, having heard days of evidence (perhaps to the detriment of any vestige of any relationships remaining in the family), will inform therapists who can view the videos for themselves and reach their

> own conclusions and may take the case on a worst scenario basis if they feel it appropriate to do so.
> 2. This aspect is only one aspect of the allegations against the mother and threshold under s.31 of the Children Act can be reached in numerous other ways.
> 3. I am only to have the benefit of hearing [B] and not any of the other three children. A difficulty in this case is how the allegations against [A] came to light, namely that the mother was deputed to speak to the children first and when she reported what they said, the social worker or police took over. It is a fact that [E] says what happened to him, being required to touch [A's] penis, occurred when he was two. When the police officer said it was five years ago, [E] adopted that.
> 4. Neither [B] nor [A] are to be a part of the mother's household in the future, whether or not the three younger children are, and detailed findings in respect of them do not seem to me what is required. The mother can develop skills of how to protect children in her care assuming the worst case scenario. The three younger children can be given instruction in how to keep themselves safe and meaningful sexual education without the need for findings in their cases.
> 5. There may be criminal proceedings and this case should not provide [B] or [A] with a forum for a dress rehearsal. Should the police bring proceedings, a jury will decide the veracity of [B's] evidence to the appropriate standard. In my view, it is not the role of this court and based on these facts to carry out such a limited fact-finding exercise at this stage."

The judge concluded by saying that it would be "unnecessary, inappropriate and disproportionate" to seek to find facts in relation to the allegations against A.

19. This afternoon Mr Verdan has submitted to us that, although not articulated with any clarity in any of her five reasons which I have quoted above, there was another most important reason for the judge's conclusion, namely that, following her perusal of the papers, she had reached the view that it was highly unlikely that the allegations against A would ever be able to be found proved even to the civil standard. My first reaction to his submission is that, had such been a reason for the judge's conclusions, it would be likely to have found its way into the judgment, which she had prepared in her chambers. Secondly, when Mr Verdan has bidden us to consider aspects of the exchanges in court prior to judgment, as transcribed, and to infer from some of the judge's comments that she had formed that view about the unlikelihood of proof, I have found myself unable to subscribe to his construction of the relevant exchanges: in my view the judge was only highlighting what was obvious, namely that the enquiry would be difficult and that its outcome would be uncertain. Thirdly, it seems to me that, had the judge formed that view, it would sit most uncomfortably with the first expressed reason for her decision, namely that the mother believed that the allegations were true. Fourthly, the local authority had filed for the use of the judge a report from a child and adolescent psychiatrist, who had watched the full ABE videotaped interviews and, with the benefit of his expertise, had suggested the way in which the court might approach its enquiry into the veracity of what each of the children had then said; and, in relation at any rate to the two older children, his recommendation to the court was that it might properly find their allegations to be credible. I do not accept that the judge could possibly have formed a view that these allegations were highly unlikely to be proved; and I reject the suggestion that any such consideration played any part in her reasoning.

20. The judge then adjourned the hearing for two days, namely until 10 April 2008, on the footing that the parties should use the intervening day in order to draft what the judge hoped would be a threshold document to which, in the light of her ruling, all parties could subscribe. But she made clear that, were there to be other allegations, unrelated to those against A, which the local authority wished to pursue and which one or other of the parents did not accept, she was in principle ready to use part of the lengthy period allocated to the hearing in order to determine them.

21. In the event the threshold document was largely agreed. It is, however, the local authority's case that the judge's refusal to conduct the enquiry into the allegations against A had gravely compromised its utility. Curiously its opening paragraph records a concession on the part of

the parents only that what followed was sufficient to cross the threshold to the making of *interim* care orders, namely that the material gave rise to reasonable grounds for believing that the four children were suffering, or likely to suffer, significant harm within the meaning of s.31 of the Children Act 1989. In the document counsel sought to identify the large amount of material relating to violence within the home which the mother accepted as true and the lesser amount of such material which she did not so accept. In relation to the allegations of sexual abuse on the part of A, the parties of course followed the line set for them by the judge. They recited what each of the four children alleged; that the mother believed the allegations (including by then apparently those of E); that the mother accepted that she had failed to protect the children from abuse by A; that the local authority alleged that the mother had sought to press B to retract her allegations against A and had encouraged D and E to embellish and concoct their allegations against him; and that the mother denied these last allegations. Into an appendix to the threshold document counsel placed two disputed allegations, unrelated to the allegations against A, which they apparently agreed that the judge should be invited to resolve. They were the two subsidiary allegations which I have identified at [15] above, namely against the mother that she frequently and unnecessarily moved the children's home and against the father of the younger children that he failed to take reasonable steps to protect them.

22. We have a transcript only of part of the proceedings before the judge when the hearing resumed on 10 April 2008. Mr Perkins presented the threshold document to the judge and identified the two issues upon which he invited her to hear evidence and reach a determination. The judge expressed her doubt as to whether enquiry into those issues would be helpful and suggested whether, in relation to the mother's alleged moves of home, it might not be sufficient for the document to follow the lines which the judge had set for the allegations against A, namely for the respective positions of the parties to be recited but to remain unresolved. In this regard, as he had two days earlier, Mr Perkins sought to press upon the judge the need for Vista, when conducting the risk assessment, to have findings as to past events upon which to work. The judge's response to him was as follows:

> "I mean I heard you say the other day that it is for me to make the findings and not Vista. But … Vista might look at my judgment and think 'well, we have talked to the mother and we cannot see … how … the judge [reached] that conclusion.' The judge is not the jury, you know."

At that point our transcript ends. But we know from the judge's order made on that day that in the result she also declined to determine the two subsidiary issues. The primary decision of the judge, reached two days earlier, was recorded in the order in the following, stark terms:

> "The local authority shall be prohibited from seeking within these proceedings to establish any findings of sexual abuse against the intervener; it being considered by the court in all the circumstances of this case to be unnecessary, inappropriate and disproportionate."

23. By the end of the hearing on 10 April 2008 the local authority were minded, if permitted, to appeal to this court against the judge's refusal to determine the issues in relation to A and perhaps also the two subsidiary issues. They asked her to permit them to appeal and she refused to do so. In the event, however, they then resolved that the delay consequent upon any appeal to this court would so prejudice the timely despatch of the proceedings that they would not approach this court for permission. They revived their aspiration to appeal only following a further lengthy hearing before Judge Altman, which led to his delivery of a judgment dated 23 May 2008. That hearing appears to have been the occasion of a further substantial attempt on behalf of the mother to oppose the continuation of interim care orders referable to C, D and E in order that they might return to her care. In the event Judge Altman resolved to continue to keep them in foster care under further interim care orders. One of the witnesses at the hearing before him was the clinical director of Vista. He told the judge that the risk assessment was at an early stage; that the absence of fact-finding by Judge Hughes had not to date presented problems but that it might in the future do so; that there was a need to find out what had happened in the household; and that Vista proposed to try to form a judgment as to whether A had sexually abused the children. He also gave evidence that, at an interview with the mother which he and a colleague had conducted on 16 April 2008, she had told them that she did not know whether she actually believed the allegations which the children had made against A.

24. There is no need to dwell on the content of Judge Altman's judgment. He is a close colleague of Judge Hughes and referred to her refusal to conduct the fact-finding hearing with appropriate respect and measure. But in my view he was unable in judgment to hide -- just as we are told that in the course of the hearing he appeared unable to hide -- his concern that Judge Hughes' ruling had left those charged with deciding whether the three younger children should return to live with the mother, namely in particular the court but also the professionals such as Vista, the guardian and indeed the local authority themselves, in an extremely difficult, if not in an impossible, position. The difficulties to which he gently alluded were the catalyst to the filing by the local authority, six days later, of a Notice of Appeal against the rulings of Judge Hughes made in particular on 8, but also on 10, April. In such circumstances my Lord and I decided at an early stage of this afternoon's hearing to extend the local authority's time for appealing against those rulings.

25. In this appeal the live argument comes from the local authority on the one hand and from A on the other. Both the mother, by a written submission lodged by her counsel, and the father of the younger children, by Mr Dowell, express neutrality in relation to the appeal, although Mr Dowell stresses the father's natural concern at the prospect of further delay in the overall despatch of the proceedings. The position of the guardian, as explained to us by Miss George, is to oppose the local authority's appeal and, in her very short submission, she has also referred to the prospect of further delay and the general principle that delay damages the interests of children who are the subject of care proceedings.

26. There is no doubt that in family proceedings the court has a discretion whether to hear evidence in relation to disputed matters of fact with a view to determining them. In A County Council v DP and Others [2005] EWHC 1593, [2005] 2 FLR 1031, McFarlane J, at [24], helpfully identified, by reference to previous authorities, nine matters which the court should bear in mind before deciding whether to conduct a particular fact-finding exercise. I have no doubt that, notwithstanding that in the present case a decision had been made in the exercise of such a discretion to arrange for the disputed facts, in relation in particular to the allegations against A, to be determined at the hearing fixed to begin on 7 April 2008, Judge Hughes also even at that stage retained a discretion to decline to conduct it. Nevertheless in my view additional considerations fall to be weighed by a judge who is considering, at the outset of a prearranged fact-finding hearing, whether in effect to abort it. That judge should weigh, with appropriate respect, the previous decision that the exercise should be undertaken and should ask whether any fresh circumstances, or at least any circumstances freshly discovered, should lead her or him to depart from the chosen forensic course. Equally she or he should weigh the costs already incurred in the assembly of the case on all sides and the degree to which a refusal at that stage to conduct the hearing would waste them. Furthermore she or he should weigh any special features such as, in the present case, the facts that a girl then aged 16 had been shown the court room, that she had participated in discussions with the guardian as to the way in which she would prefer to give evidence and that she was thus expecting that she would imminently be giving oral evidence in some way or another, although the judge should not on the other hand ignore the girl's likely apprehension at that prospect. What needs, however, to be avoided at all costs is a sudden decision to abort the hearing in circumstances in which, later, the findings not then made might after all be considered to be necessary. So a judge in the position of Judge Hughes on 8 April should in my view act most cautiously before putting the forensic programme into reverse.

27. As a result of her distinguished practice at the family bar as well as her successful years on the bench, Judge Hughes has vast experience of proceedings in relation to children; indeed, were I to seek to identify the characteristic most admired in her, it would be her instinct for how best to achieve their efficient despatch. On this occasion, however, I am of the view that her instinct led her into error.

28. It was surely irrelevant for the judge to consider, as her second reason, that the threshold to the making of a care order under s.31 of the Act could be crossed by reference to many matters other than those, even if established, in relation to sexual abuse on the part of A. The fact that certain material need not be considered before a conclusion is reached that the court has *power* to make a care order in no way supports a conclusion that it does not need to be considered before deciding whether the *optimum outcome* for the children is to make such an order. An allied, but quite different, situation arises when a judge who surveys the whole case reasonably considers that, by reference to agreed matters of historical fact, the chance of the

court's approval of a child's return to his parents is so remote as to render it unnecessary for it to embark upon an attempt to resolve other, disputed matters relating to their care of him; in such circumstances one would not expect a fact-finding hearing to have been arranged in the first place but, if arranged, it might be a valid exercise of a judge's discretion to decide at the outset of the fact-finding hearing not to conduct it after all. But such a situation was far from that which obtained in the present case: here, as the judge knew, three children, all of an age at which their views would be of great importance, were pressing to return to the care of the mother in circumstances in which, at the hearing before Judge Cox only two months previously, even the Children's Guardian had, albeit unsuccessfully, supported the mother's bid to secure their immediate return without further forensic enquiry. So in the present case there was a very live issue as to whether the children should be returned to the mother, with the result that their safety from sexual abuse in the event of return, not just from abuse on the part of A who, as the judge observed, might well be able to be prevented from coming into contact with them, was a matter of crucial importance. The judge's observation at the start of her expression of her fourth reason, namely that neither A nor indeed B was in any event to be part of the mother's future household, was therefore of scant relevance.

29. Of course I share the judge's distaste at the prospect that B would give oral evidence against her brother and, to a lesser extent, that the younger children would give evidence, albeit only through their ABE interviews already conducted, against their half-brother. The judge's point about the added prejudice to any resumption of relations between them and A following such evidence may also have been valid -- so far as it went.

30. The judge was also entitled, in her fifth reason, to refer to the criminal proceedings which might be brought against A and, if so, which would probably require B then to give oral evidence against him in that forum. I do not, however, accept that the possibility, as it then was, of criminal proceedings against A was a matter which should have helped to dissuade the judge from conducting the fact-finding hearing. At the end of this judgment, in the light of the fact that we have been told that A has indeed now been charged with committing offences against B and the younger children and that his trial is fixed to take place on 8 December 2008, I will return to the difficulties which that impending trial now presents. It is obvious, however, that, in the light of the different standard of proof, the result of criminal proceedings may not obviate the need for an analogous enquiry in family proceedings. Were A to be convicted in the criminal proceedings, then, assuming reasonable specificity of the basis of his conviction, there would probably be no need for further enquiry in the family proceedings as opposed, of course, to a most important assessment of the consequences of the jury's verdict in terms of the needs of the abused children and of the capacity of the mother to serve them. Equally, however, the local authority may learn that an acquittal in criminal proceedings has followed so comprehensive an implosion of the prosecution case that it would be highly unlikely that the allegations could be established even to the satisfaction of the family court on the balance of probabilities. But in my experience there is a common, median outcome of such criminal proceedings in which, although the defendant has been acquitted, the evidence against him, as presented to the jury, was nevertheless considered by the relevant professionals to have carried a cogency reasonably likely to attract its acceptance on the balance of probabilities; in such circumstances the need for an enquiry in the family proceedings will remain and, if they have been lengthily delayed until the criminal proceedings have been determined, such may prove to have been highly unfortunate.

31. No doubt, as she indicated in part of her third reason, the judge's task of determining the facts in relation to the allegations against A would have been difficult. It seems clear that her decision, probably unopposed, would have been that, albeit by video-link, B should indeed give oral evidence to her. The evidence of the three younger children, however, would have been confined to their ABE interviews. The other witnesses giving oral evidence would have been A, the mother and the child and adolescent psychiatrist to whom I have referred. But the difficulty of the exercise should not have contributed to its abandonment. As part of her fifth reason the judge stated that it was "not the role of this court" to carry out the exercise. Two days later she echoed her remark by observing, with only the most superficial validity, that the judge was not the jury. But in In Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS Intervening) [2008] UKHL 35, [2008] 3 WLR 1, Baroness Hale recently said, in an analogous context, at [59]: "I do not underestimate the difficulty of deciding where the truth lies but that is what the courts are for."

32. In the course of articulation of her first reason the judge pointed out that "therapists", and I believe that by that word she intended to include Vista who was about to embark on the risk assessment, could view the videotaped interviews for themselves "and reach their own conclusions and may take the case on a worst scenario basis if they feel it appropriate to do so". Again in explaining her third reason the judge referred to the possibility that the mother could develop protective skills "assuming the worst case scenario". In my view it was wrong for the judge to consider it preferable that the "therapists" should reach their own conclusions. The responsibility for choosing the optimum future programme for the children lies with the court; and it is a necessary incident to the discharge of its responsibility that it should decide what the relevant facts are so that it can make the wisest choice. Furthermore the proposition that therapists, assessors and other professionals should work "on a worst scenario basis" seems to me, on analysis, entirely misconceived. I have no doubt that, by her reference to a worst scenario basis, the judge was referring to the hypothesis that A *had* sexually abused the children rather than to a hypothesis -- bad enough -- that for example the mother had encouraged E and to a lesser extent D to make false allegations of sexual abuse. But for the courts and other professionals to work on the basis that any or all of these four children *had* been sexually abused in circumstances in which (if it be the case) they *had not* been sexually abused, had falsely alleged that they had been sexually abused and had been encouraged by their mother to make that false allegation, would be shockingly inappropriate. Nowhere in her judgment did the judge grapple with the fact that, although it was said that the mother believed the allegations of the children, the local authority did not believe the allegations of E and maintained that, in grave dereliction of her maternal responsibilities, the mother had encouraged E to concoct his false allegation, had encouraged D falsely to embellish her allegation and, conversely, had at one stage put pressure on B to retract her true allegation. How can it be said that the court did not need to determine the validity of these grave criticisms of the mother prior to reaching any decision to return the younger children to her?

33. In care proceedings the courts determine facts, whether at a bespoke fact-finding hearing or otherwise, in order to provide *terra firma* upon which the courts and the professionals called upon to advise them can all operate. They need not just *firm* ground but, for obvious reasons, the *same* ground upon which to operate. The judge considered, in my view mistakenly, that it was sufficient that the mother believed that the allegations of all four children were true. The judge did not even hear the mother give oral evidence before concluding, as the first reason for her decision, that it sufficed that the mother believed them; she merely accepted from the position statement filed on her behalf that the mother believed the allegations. Even if the mother did genuinely believe the allegations, I have said enough to indicate that such was an entirely insufficient foundation for the future work of the court and its professional witnesses in the proceedings. In the event, however, as I have indicated at [23] above, the mother admitted to the experts at Vista only eight days after the judge's determination that she did not know whether she believed the allegations against A. By proceeding primarily by reference to the mother's perceived belief in the truth of the allegations, the judge had laid the foundations for future work in the case not in concrete but in sand; and, only eight days later, the mother's admission to the professionals had washed the sand away.

34. In the course of his submissions this afternoon Mr Verdan has taken us in some detail through three or four interim reports by Vista with a view to seeking to persuade us that, for its part, Vista sees no real need for the veracity of the allegations against A to be determined by the court prior to the compilation of its final report. My first reaction to that suggestion has been to remind myself that, in the last analysis, what matters is not what Vista considers that it needs but what the court considers that it, the court, needs in order that it can properly discharge its responsibilities to these children. But in my view the analysis which Mr Verdan has sought to conduct in relation to the reports does not support his proposition that Vista regards itself as able to formulate comprehensive recommendations without the need for the disputed facts in relation to A to be determined. For example, at the end of its report dated 17 July 2008, it says:

> "Findings are, therefore, required from the court with regard to the various allegations and this should enable the social services department to form appropriate care plans for the children in the context of the conclusions of this assessment."

And, towards the conclusion of a report dated as recently as 1 September 2008, it stated (albeit with a slightly puzzling opening sentence):

> "In our view it is less about whether or not there are findings in respect of [A]. What we would hope to draw the professionals' attention to is the lack of clarity and the uncertainty around profoundly disturbing allegations of sexual abuse of children and rape between adults. It is essential that for professionals working with this family to be able to position themselves reasonably regarding these issues in order to make the appropriate interventions for the children. In effect the professionals working with these children are unable to effectively plan and move forward with this family without such findings."

35. My conclusion is that, insofar as it is possible to do so, facts need to be found as to whether the four children were sexually abused by A and that the judge's order, drafted in arresting terms to the effect that the local authority be precluded from making the allegations, should be set aside. In relation to the two subsidiary issues which on 10 April the judge also refused to determine, I consider that on balance she was acting within the ambit of her discretion in concluding that an enquiry into whether the mother had subjected the children to more frequent changes of home than were necessary was, even if it resulted in a finding to that effect, so unlikely to prove significant at the outcome stage that she would decline to conduct it. In that, however, the father of the younger children has been putting himself forward as a carer for the children, I consider that there was no good reason for declining to rule upon the local authority's allegations against him that he failed to take reasonable steps to save his children from continuing to suffer in the mother's home. No doubt that issue would not, on its own, deserve a bespoke fact-finding hearing but might rather be determined at the outcome stage were his candidacy for their care to appear live.

36. I have referred to the fact that the criminal proceedings against A are due to be heard on 8 December 2008. Equally, in the family proceedings, Judge Altman, with undisguised apprehension, has now directed that he should conduct the outcome hearing over 12 days beginning on 10 November 2008. It would, I suppose, be possible to direct that that hearing be used instead to perform the exercise which should have been performed in April 2008. Nevertheless the proximity of the criminal proceedings, as presently fixed, is stark. My experience as a judge of the Division was that it was generally unwise for the family court to await the outcome of criminal proceedings in the hope that either a conviction or what I have described in [30] above as an implosion of the prosecution case would in effect resolve matters for the purposes of the family proceedings. On the occasions when I determined to await the outcome of the criminal proceedings, I sometimes later found that they had been lengthily and unexpectedly adjourned, that I had apparently committed the family court to a delay beyond that which I had contemplated and that my unpalatable task was to alter course, to confront my wastage of time to date and to direct that I should conduct the fact-finding exercise promptly and irrespective of the progress of the criminal proceedings. Nevertheless, in that in the present case the criminal proceedings are expected to take place only 28 days after the hearing before Judge Altman, I consider that it would be absurd, possibly prejudicial to the criminal proceedings and perhaps even abusive to B, that the fact-finding exercise should be conducted at that hearing by Judge Altman. My proposal is that we should direct that the hearing fixed to begin on 10 November be vacated and that, in lieu, a directions hearing be conducted by Judge Altman in the first week of the Hilary Term 2009. He can then survey the result or otherwise of the criminal proceedings and determine, in the light thereof, how best to proceed. Although it has been suggested that we might transfer the proceedings to the High Court, I would far prefer to leave it in the hands of Judge Altman, who, as the Designated Family Judge for London, is the senior circuit judge in the Principal Registry.

Lord Justice Longmore:

37. I agree.

Order: Application for permission granted; appeal allowed