Neutral Citation Number: [2024] EWCA Civ 403

Case No: CA-2024-000547
CA-2024-000554

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NOTTINGHAM
HH Judge Gillespie
NG23C50153

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LADY JUSTICE WHIPPLE
- -

P AND E (CARE PROCEEDINGS: WHETHER TO HOLD FACT-FINDING HEARING)
- -
- -

Matiss Krumins (instructed by **Local Authority solicitor**) for the **First Appellant**
Stephen Abberley (instructed by **Hopkins Solicitors**) for the **Second and Third Appellants (by their children's guardian)**
Elizabeth McGrath KC and Laura Scott (instructed by **Brendan Fleming**) for the **First Respondent**
Claire Howell (instructed by **Rothera Bray**) for the **Second Respondent**
The Third Respondent was not represented at the hearing.

Hearing date : 18 April 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. By separate notices of appeal, a local authority and a children's guardian appeal against a judge's decision in care proceedings that a fact-finding hearing was unnecessary.

The Law

2. The principles to be applied by a judge when deciding whether to hold a fact-finding hearing were set out by McFarlane J (as he then was) in *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam) and more recently were considered, approved and amplified by this Court in *Re H-D-H (Children)* [2021] EWCA Civ 1192.

3. In the *Oxfordshire* case, at paragraph 24, McFarlane J said:

> "The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:
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> (a) The interests of the child (which are relevant but not paramount);
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> (b) The time that the investigation will take;
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> (c) The likely cost to public funds;
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> (d) The evidential result;
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> (e) The necessity or otherwise of the investigation;
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> (f) The relevance of the potential result of the investigation to the future care plans for the child;
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> (g) The impact of any fact finding process upon the other parties;
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> (h) The prospects of a fair trial on the issue;
>
> (i) The justice of the case."

4. In approving this statement in *Re H-D-H*, Peter Jackson LJ (with whom other members of the Court agreed), said:

> "20. It is unnecessary to cite other authority. Although the approach outlined in *Oxfordshire* predates the incorporation of the overriding objective into the Family Procedure Rules and the 26-week requirement, in my judgement it remains valid when read alongside the statutory framework. It helps judges to reach well-reasoned decisions and counsel appearing in the present appeals were content to frame their submissions by reference to it. As Mr Rowley QC put it, the decision, properly applied, has stood the test of time.

21. Many of the factors identified in *Oxfordshire* overlap with each other and the weight to be given to them will vary from case to case. Clearly, *the necessity or otherwise of the investigation* will always be a key issue, particularly in current circumstances. Every fact-finding hearing must produce something of importance for the welfare decision. But the shorthand of necessity does not translate into an obligation to conclude every case as quickly as possible, regardless of other factors, and that is clearly not the intention of the administrative guidance. There will be cases in which the welfare outcome for the child is not confined to the resulting order. Not infrequently, a finding in relation to one child will have implications for the welfare of other children. Sometimes, findings that cross the threshold at a minimum level will not reflect the reality. The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved. McFarlane J put it well in paragraph 21 of *Oxfordshire* when he identified the question as being whether, on the individual facts of each case, it is "right and necessary" to conduct a fact-finding exercise.

22. The factors identified in *Oxfordshire* should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case….For example:

(i) When considering *the welfare of the child*, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.

(ii) *The likely cost to public funds* can extend to the expenditure of court resources and their diversion from other cases.

(iii) *The time that the investigation will take* allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.

(iv) *The evidential result* may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.

(v) *The relevance of the potential result of the investigation to the future care plans for the child* should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.

> (vi) *The impact of any fact finding process upon the other parties* can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.
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> (vii) *The prospects of a fair trial* may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.
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> (viii) *The justice of the case* gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case
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> 23. These are not always easy decisions and the factors typically do not all point the same way: most decisions will have their downsides. However, the court should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case, and identifying where the balance falls and why. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise."

5. These principles have also been the subject of comment in a number of first instance decisions. Understandably counsel and judges sometimes cite these decisions because they illustrate the principles being applied. As this case illustrates, however, there is a danger in seeking to follow too closely another first instance decision which of course will have turned on its own facts. It is to the statement of principles as summarised in the *Oxfordshire* case and considered and approved in *Re H-D-H* to which courts should turn when making these often difficult decisions.

6. One example of a first instance decision which is sometimes cited is the decision of Lieven J in *Derbyshire County Council v AA and Others* [2022] EWHC 3404 (Fam) ("the *Derbyshire* case"). It featured prominently in the judge's reasoning in the present case and in counsel's submissions to this Court. In the *Derbyshire* case, care proceedings had been started in respect of a very young infant, X, who, during a routine standard operation for a tongue tie, was found to be suffering from healing fractures to three adjacent ribs. An application for an interim care or supervision order made at the start of the proceedings was refused and the child remained at home under a complex and very full supervision plan. Throughout the period of supervision over the following sixteen months, no doubts or concerns arose about the parents' care of the child. The general view of the experts instructed in the proceedings was that the injuries were more likely to have been inflicted non-accidentally although the time window for the injuries

included the child's birth. It was agreed by all parties, however, that there were no risk factors or red flags concerning either parent.

7. The case was transferred to Lieven J to determine an application by the parents that the fact-finding hearing, listed for no fewer than nine days, should not go ahead. Lieven J agreed. Having summarised the legal principles, citing from the judgments in the *Oxfordshire* case and *Re H-D-H*, she continued:

> "18. In applying those tests to the facts of this case I have decided that it is neither necessary nor proportionate to hold a finding of fact hearing. The fundamental purpose of public law proceedings is to determine what public law orders are needed for the welfare of the child and to protect the child from future risk. Understanding the facts and circumstances of an alleged non-accidental injury is often critical to the determination of future risk. But here I do not find that is necessary, and even if I made all the findings it would be unlikely to have any material impact on the ultimate orders for X.
>
> 19. There is no evidence here to support any finding of deliberately inflicted injury. The overwhelming probability is that if the court did find a non-accidental injury, it would be a single act of significantly inappropriate handling of a very young baby, rather than any deliberate act or any course of conduct.
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> 20. There has been detailed oversight of the parents and their parenting capacity for well over a year, for once a happy consequence of the delay in this case. That observation has shown that their parenting is entirely positive, and all of the observations give no cause to believe that X is at risk in their care. Importantly, there are no risk factors, or "red flags" of the kind identified in *Re BR (Proof of Facts)* [2015] EWFC 41. In my view, that is particularly significant in making a decision such as that because it is critical to any assessment of future risk. The parents have wholly cooperated with the Local Authority despite strongly refuting the allegations and the very high level of supervision and the significant intrusion in their lives through the supervision plan.
>
> ….
>
> 22. The evidence does not support [the local authority counsel's] proposition that unless the facts are found and the parents accept such findings, the risk will continue. I agree with [the parents' counsel] that even if the Court finds that the facts are made out, the benefits of a fact-finding hearing would be extremely limited. It is highly unlikely that the parents would accept any findings even if I made them, so even if a fact-finding hearing were held, there is a strong possibility that in practical terms we would be no further forward."

8. Lieven J stated that, given the oversight of the family that had already taken place, it was extremely unlikely that any court would remove X from his parents, even if all the facts were found. Furthermore, the parents had agreed to a plan for gradually decreasing supervision over the following months. She concluded:

> "26. I accept that if the parents do not concede threshold, the Court has no power to make a public law order. The supervision plan would therefore not be legally binding. It therefore comes down to a question of whether it is justifiable to hold a 9 day finding of fact hearing in order to determine whether it is appropriate to make a legally binding supervision plan as opposed to an agreed supervision plan. In my view that would be a disproportionate use of court time."

9. At paragraph 27, Lieven J added:

> "It is sometimes argued in these circumstances that the parties and child need to know "the truth" of what has happened. Peter Jackson LJ refers to this at paragraph 22(i) in Re H-D-H. In this case the benefit of finding out what happened is largely illusory. X is too young to know (or care) what happened. I think it highly unlikely that the parents would accept findings even if I made them. I cannot see any justification for a 9-day finding of fact hearing so that at some point in the future X can know "the truth"".

10. In *Re BR*, cited by Lieven L in the *Derbyshire* case, Peter Jackson J (as he then was) had endorsed a list of risk and protective factors as a "framework within which the evidence can be assessed and the facts established". For the purposes of this judgment, it is unnecessary to recite those lists in full. The risk factors include social isolation, history of domestic abuse, past abuse of a child, substance abuse, socioeconomic disadvantage, mental health issues, and parental immaturity. The protective factors include supportive family environment, stable family relationships, adequate housing, access to health care and social services, and community support.

Background

11. The two children who are the subject of the proceedings are E, born in October 2021, and P, born on 5 July 2023. The children's mother was 17 when E was born and 19 at the date of P's birth. The children have different fathers, both of whom took part in the proceedings in the family court, E's father by the Official Solicitor acting as litigation friend. The mother remains in a relationship with P's father, hereafter referred to as "F".

12. In the summer of 2021, the mother and E moved into accommodation provided for teenage mothers, living in a self-contained flat but assisted by 24-hour support staff. F was not able to live at the property but visited frequently and stayed three nights a week. The staff at the unit formed a positive impression of the quality of care provided to E by the mother and F.

13. P's delivery was not straightforward. It was a planned Caesarean section but because of complications the delivery was completed by use of forceps which left marks on the baby's forehead and face. We were told by counsel that there was a delay in disclosure of medical records, including obstetric records, into the proceedings, and that some records are still outstanding.

14. On 19 July 2023, the local authority received a referral from the family GP stating that P, then two weeks old, had been presented at the surgery with discolouration to her lower leg and a bloodshot eye. A social worker attended the surgery and was informed by F that two days earlier while he had been holding P, she had flung her head back and, upon checking her eye, it had appeared bloodshot. A child protection medical examination carried out on 20 and 21 July identified that P had sub-conjunctival haemorrhages and a metaphyseal fracture of the distal left tibia.

15. On 27 July, the local authority started care proceedings in respect of both children. At a hearing on 28 July, the children were made subject of interim care orders on the basis of a care plan that they should be removed from the care of the mother and F and placed with their maternal grandmother. The children remain with their grandmother and have had regular visiting contact with the mother and F. As a result of the removal of the children, the mother was obliged to leave her accommodation. She is currently living with F in temporary accommodation in one room in a shared building.

16. On 4 August, a follow-up skeletal survey revealed that P had a healing fracture to the right fourth posterior rib.

17. At a case management hearing on 6 September 2023, HH Judge Watkins listed the proceedings for a fact-finding hearing over four days in March/April 2024 and made a series of case management directions including joining E's father as a respondent, giving detailed directions about evidence, including the instruction of a consultant paediatrician, a consultant radiologist and a consultant ophthalmologist as expert witnesses.

18. In response to these instructions, expert reports were duly filed by Dr Karl Johnson, consultant radiologist, Dr Peter Morrell, consultant paediatrician, and Mr Richard Markham, consultant ophthalmic surgeon. In summary, the expert's opinions were as follows:

    (1) It was highly unlikely that the sub-conjunctival haemorrhage was attributable to P's birth. A likely cause was compression to the upper part of the body. No timeframe could be given from the appearance of the haemorrhage but it had not been present when the child had undergone medical checks on 12 or 13 July.

    (2) The most likely cause of the metaphyseal fracture was excessive force applied to the left lower leg using a twisting and/or pulling action. Radiological dating of such injuries is difficult but it was estimated that the fracture was no more than 11 days old when seen on X-ray on 21 July.

    (3) The rib fracture was most likely caused by an excessive compressive force to the chest. The radiological appearance was consistent with an injury no older than 4 weeks at the time of the skeletal survey on 4 August.

(4) There was no evidence of any metabolic bone or other disease of deficiency which could account for the fractures.

19. On the basis of this medical evidence, the local authority prepared a threshold document asserting, in summary that:

(1) the injuries are more likely than not to have been inflicted on P on one or more occasion;

(2) the injuries are more likely than not, to have been very painful at the time, causing the child to cry out in pain and the pain thereafter settling over a period of 30 minutes;

(3) the injuries were inflicted by one or other of the parents;

(4) the parent who inflicted the injuries would have been aware that they had inflicted the injuries, and

(5) the parent who did not inflict the injuries would have been aware of the child's pain, they failed to seek timely medical attention and failed to protect the child.

20. On 9 February 2024, a further case management hearing took place before HH Judge Gillespie. She granted the parties permission to instruct a consultant endocrinologist to prepare a further expert report. As a result, it was accepted that the fact-finding hearing which had been listed in March could not go ahead. The judge, however, directed that the matter remain in the list for three days "for a further case management hearing / early final hearing", the purpose being "to consider the proportionality of any findings sought by the local authority in light of the parenting assessment being reported as not identifying any concerns other than the injuries to the child."

21. On 27 February, a parenting assessment completed by a local authority practitioner was filed in the proceedings. As it featured prominently in the judge's reasoning, I shall set out the concluding paragraphs in full later in this judgment.

22. The next hearing took place on 5 March, with judgment being reserved to the following day. The parties' respective positions were summarised by the judge in these terms:

> "The mother and F seek to persuade the court that a finding of fact hearing is neither necessary nor proportionate in light of the glowing parenting assessment, the fact that this is a single-issue case, the evidential issues in relation to a fact-finding hearing and the full commitment of the parents to co-operating with any robust safety plan that would meet the welfare needs of the children. The local authority, supported by the guardian state that it is required to assess future risk and any refusal to hold a fact-finding hearing is tantamount to summarily dismissing the local authority's case and inhibits their ability to protect the children in the future. E's father is neutral on the point."

23. In her judgment, considered in detail below, the judge concluded that a fact-finding hearing was neither necessary nor proportionate. The order made following the hearing further recited that:

> "as a result, the Court will not determine the threshold criteria. As such, the Court will not be able to make any public law orders and therefore there is no basis for ongoing separation of the children from the parents."

The order listed the matter for a final hearing with directions for the local authority to file a child in need plan. Further recitals to the order included, inter alia, that the children needed to return to the mother and F "within a short period of time"; inviting the police to vary the bail conditions to remove any restrictions on parental contact; recording that the mother and F accepted that they "need to resolve their accommodation prior to the children returning and … that the children should remain in the care of the maternal grandmother pending rehabilitation planning" and further recording that the local authority confirmed that it would "use its best endeavours to assist the parents in finding appropriate accommodation." An application by the local authority for permission to appeal was refused by the judge.

24. Notices of appeal to this Court were filed by the local authority on 13 March and the guardian on 13 March, with revised grounds on 19 March. On 20 March, I granted permission to appeal on both applications and ordered that the proceedings be stayed pending determination of the appeal.

The parenting assessment

25. Before summarising the judgment, I return to the parenting assessment filed a week before the hearing on 6 March and which, as will become clear, featured prominently in the judge's reasoning. It contained a number of positive observations about the mother and F. These were summarised in the judgment in these terms:

> "(i) The parents' engagement has been, in general, very encouraging.
>
> (ii) They have presented as polite and respectful to professionals and in the view of the social worker, have been open and honest during the assessment process.
>
> (iii) There were no concerns raised by [staff at the teenage residential unit] during the time the mother and children were living there.
>
> (iv) It was clear that the father was upset that he may have caused P harm and very regretful that he did not put her down.
>
> (v) There have been no identified concerns regarding how the parents handled the children during supervised contact.
>
> (vi) There are no concerns regarding drugs, alcohol or domestic abuse in relation to the parents.
>
> (vii) They had a sound knowledge of safety and meeting a child's basic care needs and the need for stimulation.

(viii) Both children were meeting their milestones and were up to date with immunisations.

(ix) The parents show the children lots of emotional warmth, reassurance and comfort, dividing their time equally between the children.

(x) The parents have adhered to the rules and boundaries of the contact centre and have met the children's needs to a high standard.

(xi) The couple work well together and balance out well.

(xii) While the father had some gaps in his parenting knowledge, he was open to support and advice.

(xiii) The parents have the support of their wider families."

26. The assessment reached the following conclusions and recommendations:

"SUMMARY AND ANALYSIS

During the course of this parenting assessment no concerns have been raised in relation to the mother or F's engagement. They have been polite, respectful and have appeared appreciative of the opportunity to meet with me and in their words be "listened to as young parents". Both the mother and F are a likeable young couple who presented with a strong sense of self-worth and confidence and were by all accounts easy to get along with. It would also appear having viewed current casefiles that both parents have been very cooperative and at no point have presented as hostile or difficult to communicate or engage with when working with other professionals.

This assessment has identified no concerns in relation to the parenting capacity of the mother and F. Whilst it is fair to say that F is very much guided by the mother around some areas of basic care, the couple appear to work well together in meeting the children's needs and I feel, balance out well. More importantly F was able to identify that there were some gaps in his parenting knowledge however felt open to support and advice and happy to follow and learn from the experience the mother's has already gained as a parent.

During my time spent with the mother and F I have no concerns about how they function as a couple. Both appeared respectful of each other and presented with a natural light-heartedness that in my opinion seemed genuine. The mother and F both spoke about previous experiences of being in unhealthy relationships and how this has shaped them as a couple. Additionally, no concerns have been identified in relation to alcohol or drug use

prior to or during the course of this assessment, which would in my experience, often warrant additional worries around a parent's capacity to care for their child/children.

As part of this assessment, I have taken into consideration the contact records compiled by contact supervisors at [the] contact centre. This has been done with the intention of gathering supporting evidence regarding the mother and F's parenting capacity due to the fact that neither child is currently in the care of their parents. No concerns have been identified about the care afforded to the children by the mother and F during family time. They have presented as respectful towards staff, adhered to rules and boundaries set by [the contact centre] and have met the children's needs to a high standard. Whilst family time is undertaken in a supervised setting and a somewhat controlled environment it is fair to acknowledge that because both parents have co-operated well over the course of this assessment process, they have since been able to spend time with the children (with supervision) out in the wider community.

The main reason for this assessment however continues to be a significant concern. P sustained incredibly serious injuries within days of her birth which have since been deemed by medical experts to be non-accidental, inflicted injuries. Neither parent has admitted to knowing how these injuries have been inflicted and both the mother and F are of the view that neither one of them could have caused serious harm to P. The couple have maintained this stance from the onset and have not waivered on their view that the injuries could possibly have been caused either from birth trauma and/or an incident where F handled P roughly in an attempt to stop her lurching out of his arms.

Due to the significance of the injuries and the real possibility that one or both parents could have caused these I am of the view that the evidence needs to be considered by the Court in the hope of determining how these injuries happened. I cannot safely make a recommendation as to how to manage the potential risk of harm to P and E should they be returned to the mother and F's care if the injuries have been inflicted and/or if the Court has not taken a decision as to how they occurred. On balance the reason the children are not with their parents is because of the injuries to P and a conclusion needs to be drawn, if possible, as to how those injuries were caused. I have absolutely no doubt that the mother and F love their children and want the upmost best for them. This has been evidenced in the way they talk about the children and observations made during family time. It is incredibly difficult however to manage risk if professionals are not aware of triggers and stressors which might have an impact on a parent's parental

capacity to meet their child's needs safely or indeed what the actual risks are.

PROTECTIVE FACTORS

- The children are in the care of their maternal grandmother and currently safe from harm
- Parents have worked well with the Local Authority during the course of the assessment process
- Parents have adhered to supervised contact with the children and family time is very positive.
- Parents have been committed to attending family time which has been child centred and afforded the children a high level of consistency. This has also supported a healthy parent/child attachment.
- Parents clearly love their children, and it is evident they want the best outcomes for them.
- No concerns have been identified in relation to parents' capacity to meet the basic care needs of the children.
- Parents appear able to meet the emotional and behavioural needs of the children, specifically E.
- No concerns have been identified in relation to substance or alcohol use
- Parents relationship appears to be healthy and balanced with no evidence of domestic abuse.

RISK FACTORS

- P sustained a series of injuries only days following her birth which medical experts are clear are non-accidental/inflicted
- Neither parent claims to know how the injuries were caused and stand by their own accounts, although these have been discredited by the experts – there is therefore the possibly they have been dishonest about how the injuries were inflicted.
- Parents struggle to accept that the injuries were inflicted
- P and E remain at risk of harm should they be returned to their parents' care at this time because of the unknown details as to how the injuries were caused and by whom.

RECOMMENDATIONS

- Fact Finding Hearing
- Parents to access an appropriate parenting course to support further knowledge and confidence around the ever-changing needs of a child.
- Forensic Risk Assessment to be considered depending on the outcome of the Fact-Finding Hearing."

The judgment

27. In her judgment, the judge set out a summary of the legal principles by reference to the decision of Lieven J in the *Derbyshire* case (which the judge referred to as "*Re AA*"). She started by quoting paragraphs 18 to 20, 22 and 27 of the judgment in that case. She then cited passages from three earlier judgments of this Court which had been cited by Lieven J in the *Derbyshire* case - *K v K* [2022] EWCA Civ 468 (Sir Geoffrey Vos, MR, giving the judgment of the court at paragraph 66), *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (McFarlane J, at paragraph 24), and *H-D-H* [2021] EWCA Civ 1192 (Peter Jackson LJ, at paragraph 22). Under the heading "The current evidence", the judge then summarised the medical evidence set out in the expert reports, and the incident described by F which, she noted, was not accepted by the medical experts as a plausible explanation for P's injuries. She then set out the summary of the parenting assessment which I have recited above.

28. The judge then set out her decision. She began by comparing the facts of the present case with those in the *Derbyshire* case decided by Lieven J:

> "14. It seems to me that the facts of this case very closely mirror those in *Re AA*. Both involve serious fractures to a young child which are deemed to be non-accidental inflicted injuries without adequate explanation. Various experts have rejected the explanation from the father and currently do not consider that any of the injuries could be birth related; that was also the case in *Re AA* although I accept that the timings of those injuries covered the birth window; it remains to be seen if that is the case here. While I accept that in *Re AA* the child was in the care of the parents under full time familial supervision and the children are with their maternal grandmother, the similarities continue. There were no red flags, no risk factors concerning either parent, no suggestion that their care is anything other than positive, they have engaged well and co-operated fully with the local authority. As with *Re AA*, the parents here do not accept that these are inflicted injuries and if I made a finding that they were, neither is likely to accept the findings of the court as also set out by Lieven J. Other than the difference regarding current placement I cannot see what else distinguishes this case from *Re AA*."

29. She then referred to the delay that would be entailed by continuing the proceedings to a fact-finding hearing, noting the pressures in the household where the children are

currently living and the impact on the children of continued separation from the mother and F. She continued:

> "17. I have considered very carefully the relevance of the potential result of the fact finding to the future care plans for the children in light of what is the most positive parenting assessment I have ever read. I do not consider that, at her tender age, knowing 'the truth' means anything to P or her sibling. A finding of fact should not be undertaken unless it is going to make a material difference to the welfare outcome and orders which may be made, and to protect the child from future risk. What is the risk in this case? Even if the court decided that this was an inflicted non-accidental injury, standing back and considering the wider canvas of the evidence I can see no present evidence which could support a finding that these were deliberately, or maliciously inflicted injuries. In those circumstances is it likely that this court would determine that these children should be permanently separated from their birth parents and that rehabilitation was not a realistic option? There is no history of depression, no mental health issues, no drug use, no alcohol use, no domestic abuse in their relationship; in short, none of the usual 'triggers' or risk factors one might expect to see. The parents have wholly engaged and co-operated with the local authority and in fact, as is clear from the police evidence, a range of professionals and I find it difficult to anticipate what a further risk assessment of the parents post fact finding would say in the event that non-accidental findings were made and the parents continued to deny the findings? How much further would a finding of fact take this court when deciding welfare outcomes for these children?
>
> 18. I am afraid that in all the circumstances I do not accept that findings are fundamental to the court's determination as to welfare and the long-term arrangements for these children. I consider that this case can be decided without such a hearing. It is a decision which is within my case management discretion in line with the case law I have set out. I have been assured on behalf of both parents that they would continue to co-operate with the local authority even if there are no public law orders in place and I accept that there would not be. They have the support of their wider families and in particular the grandparents who have been caring for the children and who have been assessed to be protective. They are committed to being guided by professionals regarding a plan for rehabilitation. There is a consistent history of the parents entirely engaging with a wide range of professionals during their children's lifetimes. I am satisfied that they would embrace any course or training they were referred to and would fully engage with any safety plan drawn up by the local authority and with the input of the guardian. They are only too acutely aware of the consequences

> if they do not. I have no reason to doubt all their continued commitment."

30. For these reasons, the judge concluded that it was neither necessary nor proportionate to have a fact-finding hearing, adding in conclusion that she accepted the guardian's submission that there was no formal risk assessment but adding that such an assessment was not required to rehabilitate the children with the mother and F.

The appeal

31. The grounds of appeal put forward by the local authority are as follows:

(1) The judge was wrong in the determination to not hold a fact-finding hearing in respect of the local authority's allegations as she did not properly assess and balance the relevant factors from the case law in determining the decision but focused on the similarities between the current case and the *Derbyshire* case.

(2) The judge was wrong to determine the application to not hold a fact-finding hearing as the decision amounts to a summary dismissal of the local authority's application.

(3) The judge was wrong to determine the application to not hold a fact-finding hearing as the determination involved an assessment of the child's welfare best interests absent an established basis of fact, which would result in the return of the child to the parents' care without an understanding of the risks involved.

Further to and in the alternative

(4) There is a compelling reason to hear this appeal in that the determination by the court that the local authority's threshold is not to be determined in a single issue case of alleged inflicted injury does not have clear guidance on how public authorities are to approach such cases, in respect of investigation and procedure. The children have been separated from their parents for a significant period of time and significant public costs have been incurred in the investigation of the causation of the injuries, both which could be avoided or limited in impact if there was clarity as to how and when the issue of proportionality of fact finding is to be considered and the necessity of local authority intervention in similar cases.

32. The grounds of appeal put forward by the guardian are as follows:

(1) The judge was wrong to hold that because of P's age, knowing 'the truth' would not mean anything to her or her.

(2) The judge had before her expert medical evidence that P had suffered three injuries. The medical expert opinion was that the tibial fracture was caused by excessive force, greater than that used in normal care and handling of a child. The rib fracture was said to have been caused by severe excessive squeezing. The subconjunctival haemorrhages were the consequence of compression of the chest, raising the venous pressure in the upper part of the body as occurs in crush injuries. The experts had rejected the explanation put forward by the parents. It was therefore wrong of the learned judge to hold that there was no evidence that the parents had caused the injuries maliciously or deliberately. The issue of the parents' motivations was a matter to be aired in evidence at a finding of fact hearing. The

material before the court made it entirely foreseeable that the court could have made findings of deliberate or malicious infliction. Such findings would have informed a risk assessment which might have recommended a different welfare outcome for the children than that arrived at by the court.

33. On behalf of the local authority, Mr Matiss Krumins stated that this was a "single issue case" but contended that, as the causation of these serious injuries was in significant dispute, the case could not be properly determined without a fact-finding hearing because any findings would have a significant impact on the final order. Without judicial input, the local authority could not exercise its duties and powers for the protection of these children. Although the parenting assessment had been positive, it was incomplete and could not be concluded until the court's determination as to the cause of the injuries was known. There were a number of matters – risk factors as identified in *Re BR* – that were relevant to the ultimate welfare decision which would have to be assessed in the context of any findings made by the court. Mr Krumins cited, in particular, the young age of the mother and F, a number of occasions in the past when the elder child, E, had suffered minor physical injuries, allegations of domestic abuse between the mother and E's father, concerns about the mother's mental health, and the fact that the mother and F do not at present have any accommodation where they could look after the children.

34. Instead of applying the principles in the *Oxfordshire* case and *Re H-D-H*, the judge had erred in analysing the case by a comparison with Lieven J's decision in the *Derbyshire* case. In fact, on a proper comparison, the facts in the two cases were distinguishable. Unlike in the *Derbyshire* case, there is medical evidence in this case to support a finding of deliberately inflicted harm and a pattern of abusive non-accidental injury. There is a spectrum of findings, ranging from no findings at all and therefore no necessity for state intervention, to the deliberate infliction of the injuries and any alternative findings in between. The findings would be fundamental to whether or not the parents, separately or together, pose a risk of harm to the children and whether or not the parents are able to protect the children from future harm.

35. In expanding his case under his ground four, Mr Krumins submitted that without some guidance from this Court there was a danger that in future whenever a child is injured in a family and the parents comply with the procedural steps, cooperate and outwardly appear to be positive, the children would be returned home without a determination as to the cause of the injuries. In such circumstances, local authorities would be impeded in carrying out their protective functions and might be deterred from initiating proceedings.

36. On behalf of the guardian, Mr Stephen Abberley submitted, under his first ground, that many cases in which non-accidental injury is alleged involve injuries suffered by infants and small, preverbal children who are not able to explain to anyone what has happened to them and that is why the cause of their injuries requires inquiry. The consequences for these children will be not only that they have suffered injuries. Many of the children will spend a significant period being cared for by someone other than their parents. Sometimes these children will not return to the care of their parents at all. There is a statutory imperative in section 1(3)(b) of the Children Act 1989 for the court to consider a child's emotional needs in making decisions about the child's future. For many children who have suffered injury, their emotional needs will often not be served in later life by them remaining in ignorance of what was done to them, and by whom,

when they were very young children. Mr Abberley submitted that the observation of Lieven J in the *Derbyshire* case at paragraph 27 of her judgment ("the benefit of finding out what happened is largely illusory. X is too young to know (or care) what happened") should not be understood to establish a legal principle.

37. In respect of his second ground, Mr Abberley submitted that the untested written evidence before the court, including the expert medical opinions, left open the possibility of a variety of outcomes at a fact-finding hearing, with a variety of consequential welfare outcomes for the children being open to the court thereafter. It seemed likely on the medical evidence that one or other parent, or both of them, knew what had happened. If the court had made such a finding at a finding of fact hearing, that finding could have had an effect on the welfare outcome of the case as the parents might reasonably have been regarded as presenting a risk of future harm to the children. The alternative finding – that the person who caused the injuries did not recognise at the time that they had caused serious harm – would equally have had an impact on the welfare outcome for the children, resulting in at least further work being undertaken with the parents before a decision to return the children to the parents' care. If the court had been able to identify the person responsible for causing the injuries, the welfare outcome for the children would have taken account of this, perhaps by returning the children to the care of one parent, but not the other, at least for the time being. If the court had identified the person responsible for the injuries, the court might also have been able to form a view about the actual or tacit knowledge of the other parent, informing assessment of the protective capacity of the parent who was not responsible for causing the injuries.

38. Mr Abberley therefore submitted that there were various conceivable welfare outcomes for these children arising from the findings of fact open to the court. The court's decision not to hold a finding of fact hearing deprived the court of the opportunity to make findings that would enable an informed and reliable risk assessment before deciding on the welfare outcome for the children. Moreover, by refusing to hold a hearing at which the local authority might have been able to persuade the court that the threshold criteria were satisfied, the court effectively brought about the end of the proceedings, leaving the local authority to manage the children's placement with the parents on an uninformed and potentially risk-laden basis.

39. Responding on behalf of the mother, Ms Elizabeth McGrath KC, leading Ms Laura Scott, acknowledged that the judge's decision was robust but submitted that it properly protected the children's welfare interests. In a well-crafted written argument supported by thoughtful oral submissions, Ms McGrath submitted that, although the judge had considered Lieven J's judgment in the *Derbyshire* case, she had properly applied the correct principles identified in the *Oxfordshire* case and endorsed by this Court in *Re H-D-H*. Ms McGrath demonstrated that, although the judge had not structured her analysis by reference to the factors identified by McFarlane J in the *Oxfordshire* case, she had in fact considered all of the factors before concluding that, in the light of their high level of engagement, there was no doubt that the parents would fully cooperate with whatever support and monitoring the local authority considered appropriate so that the children's needs could be met under the child in need provisions in section 17 of the 1989 Act, or by being made subject to child protection plans without the need for any public law orders under section 31.

40. Ms McGrath accepted that other tribunals might have come to a different conclusion but submitted that the judge's evaluation of the factors was within her discretion, and that in the circumstances her decision was one with which this Court ought not interfere. It was conceded that the judge had been dismissive of the importance of P needing to know the truth but submitted that this was but one element of the evaluation. The judge was entitled to conclude that a factor of much greater importance to the children's interests was the harm which would result from a further delay before decisions could be made about their future. In oral submissions, Ms McGrath emphasised the impact to the children of being removed from the care of their mother, with whom they had always lived, and the ongoing harm caused by continued separation and the restrictions on their relationship with the mother, and F, imposed through the requirements that contact be confined to visiting contact and supervised. She also stressed the uniformly positive comments made by professionals about the quality of care provided by the mother.

41. Ms McGrath drew attention to deficiencies in the disclosure of the hospital records and details of the complications in P's delivery which have not to date been considered by the medical expert witnesses, but which would, in the event of the appeal succeeding, require further investigation before a fact-finding hearing could take place and possibly the instruction of an obstetrician as an additional expert. She also drew attention to the fact that P had been diagnosed as suffering from positional talipes and that the parents had been advised to carry out stretching physio exercises on the child's feet several times a day, a matter which would also require further consideration by the expert witnesses if the appeal were allowed and before a fact-finding hearing could take place. These matters would add to the delay before any decision could be taken about the children's future care.

42. Ms Claire Howell, appearing at the appeal hearing on behalf of F, made substantially the same submissions in opposing the appeal, stressing that the decision had been within the judge's discretion, that she had identified and applied the correct principles, and taken all relevant matters into account. Both Ms McGrath and Ms Howell pointed out that the additional risk factors cited by Mr Krumins in his submissions to this Court had not been relied on by the local authority at the hearing before the judge where the argument had been that this was a "single issue case", though they accepted that some of those matters had been mentioned in the guardian's solicitor's submissions.

Discussion and conclusion

43. The judge's decision in this case was a case management decision and therefore the circumstances in which this Court can interfere are limited. An appeal can only succeed if we are satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. That is a high hurdle. In my view, however, the appellants have plainly crossed the hurdle in this case.

44. The judge was right to give careful consideration to the question whether a fact-finding hearing was necessary. But she took the wrong approach in reaching her decision by comparing the facts of the present case with those in the *Derbyshire* case. It was not correct to say that the facts of this case "very closely mirror" those in the *Derbyshire* case. There are plainly some similarities. In both cases, a young child sustained injuries

in the care of his or her parents. The parents have been unable to provide an explanation as to how the injuries occurred. In other respects, social workers have formed a positive view of the quality of the parents' care of their children. The children are suffering harm as a result of the delay in concluding these proceedings which have already continued beyond the 26 week period in which such proceedings are expected to be concluded.

45. In other respects, however, there are material differences between the two cases. In the *Derbyshire* case, the child had sustained fractures to three adjacent ribs. Lieven J was therefore able to conclude that the fractures had been sustained in a single incident. In the present case, however, the medical evidence indicated that the injuries would have been sustained or inflicted in at least two acts through different mechanisms – one (or possibly two) involving compression of the chest causing the sub-conjunctival haemorrhage and the rib fracture and another involving a twisting and/or pulling action to the left lower leg causing the metaphyseal fracture of the tibia.

46. In the *Derbyshire* case, Lieven J concluded that there was "no evidence … to support any finding of deliberately inflicted injury". In the present case, there plainly is evidence which is capable of supporting a finding that the injuries were inflicted deliberately, although no such finding could be made without consideration of all of the evidence.

47. In the *Derbyshire* case, Lieven J was able to conclude that "the overwhelming probability is that if the court did find a non-accidental injury it would be a single act of significantly inappropriate handling of a very young baby, rather than any deliberate act or any course of conduct." In the present case, it is plainly possible that after a fact-finding hearing the court could conclude that the injuries were sustained as a result of "significantly inappropriate handling" but the judge was in no position to conclude at the case management hearing that such an outcome was the "overwhelming probability". It will be unusual for a court to be in a position to reach such a conclusion at a case management hearing. It is axiomatic, as Dame Elizabeth Butler-Sloss P observed in ***Re T*** [2004] EWCA Civ 558, [2004] 2 FLR 838 at paragraph 33:

> "a judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

That evaluation will normally have to be done at the fact-finding hearing when a judge has not only read all the written evidence but also heard witnesses being cross-examined on the issues in dispute.

48. In the *Derbyshire* case, following discovery of the fractures, the child had remained in the care of his parents throughout the proceedings without any interim public law order. The court therefore had evidence of a prolonged period – 16 months – following the fractures when the child had come to no harm in the care of his parents. On the contrary, he had thrived. In contrast, P and E have been in the care of their grandmother under interim care orders since the start of the proceedings and their contact with the mother and F has been professionally supervised. Although there was very positive evidence about the care given to E by the mother and F before P's injuries, and subsequently

positive reports of their supervised contact with the children after they were placed with the grandmother, the judge did not have evidence about the parents' care of the two children after the injuries were discovered.

49. In the *Derbyshire* case, Lieven J was able to conclude that there were no risk factors of the sort identified in *Re BR*. In submissions to this court, Mr Krumins identified a number of risk factors, including injuries sustained by E in the care of his mother, the history of domestic abuse between the mother and E's father, concerns about the mother's mental health, and the young age of the parents. Apart from a reference to E's injuries in the children's solicitor's position statement, it seems that none of these matters were drawn to the attention of the judge during submissions on this issue. It would be unfair, therefore, to criticise her for concluding that "there were no red flags, no risk factors concerning either parent". For the most part, the points now relied on by the local authority were not put before the judge.

50. What undoubtedly was before the judge, however, was the parenting assessment filed shortly before the hearing. She plainly took it into account. Indeed, she described it as "the most positive parenting assessment I have ever read". The assessment was undoubtedly positive, as demonstrated by the judge's summary set out above. But central to the conclusions and recommendations of the assessment were the author's observation that "P sustained incredibly serious injuries within days of her birth which have since been deemed by medical experts to be non-accidental, inflicted injuries". She concluded that she could not "safely make a recommendation as to how to manage the potential risk of harm to P and E should they be returned to the mother and F's care if the injuries have been inflicted and/or if the Court has not taken a decision as to how they occurred", and that it would be "incredibly difficult … to manage risk if professionals are not aware of triggers and stressor which might have an impact on a parent's parental capacity to meet their child's needs safely or indeed what the actual risks are." None of these observations were mentioned in the judge's summary of the assessment and, so far as I can see, they did not feature in her analysis.

51. This was a fatal flaw in the judge's reasoning. The author of the parenting assessment was plainly right to say that, without a finding as to how these serious injuries to a very young baby had occurred, she could not safely make any recommendation as to how to manage the potential risk of harm to the children in future. In his submissions to this court, Mr Abberley illustrated how various possible findings might influence future planning for the children's care. Without any findings, the extent of any risk to the children remains unknown, and appropriate safeguards to manage that risk cannot be identified.

52. I do not agree with the characterisation of these proceedings as a single issue case. The matters on which the local authority relied in support of its case that the threshold criteria under s.31 were satisfied may have occurred on one occasion, but the assessment of the children's welfare needs in the light of any findings made about those matters would have to be undertaken in the context of the wide canvas of evidence about the family and the parents' capacity to care for the children safely. The risk factors identified by Mr Krumins may not, by themselves, justify an order under s.31, but are plainly relevant to the decision about what order should be made in the light of findings made about the causation of the injuries.

53. Although the judge was plainly seeking to apply the correct legal principles, I agree with the appellants' submission that she erred in basing her decision on a comparison with the *Derbyshire* case. Decisions of this sort should be made by a careful application of the principles derived from the case law. Comparison with decisions of other judges at first instance are unlikely to be helpful because inevitably each case turns on its own facts. And there is a danger that the comparison will be inaccurate. Here the judge concluded that "other than the difference regarding current placement, I cannot see what else distinguishes this case from [the *Derbyshire* case]". In fact, as noted above, there were a number of significant differences which the judge overlooked.

54. There is always a danger with checklists of the sort set out in the Oxfordshire case that each factor will be seen as attracting equal weight. Some factors, however, if present, are likely always to carry greater weight. As Peter Jackson observed in *H-D-H*, "clearly, the necessity or otherwise of the investigation will always be a key issue." In *Re H-W (Care Proceedings: Further Fact-Finding Hearing)* [2023] EWCA Civ 149, this Court concluded that the necessity or otherwise of the investigation and the relevance of the potential result of the investigation to the future care plans for the children were, on the facts of that case, "the magnetic factors in deciding whether or not to allow a further fact-finding hearing". In my view they were also the decisive factors in the present case and the judge was wrong to reject the local authority's submission that findings were "fundamental". Of course, the adverse effect on the children resulting from a further delay in reaching decisions about their future welfare is a very important factor. The costs of the proceedings, and the impact on the expenditure of resources on other cases, are also relevant. For those reasons, if the judge had been right to conclude that the potential result of the fact-finding hearing would have no material impact on future care plans for the children, her decision would in all probability not have been open to challenge. In those circumstances, the importance of the children having a clear narrative about what happened, although a matter of importance, would probably not have justified continuing the proceedings to a full hearing. But for the reasons set out in the parenting assessment, the fact-finding hearing is necessary to provide a greater understanding of the risks of future harm and without that understanding it will not be possible to make plans for the future care of the children which safeguard their welfare.

55. Ms McGrath told the Court of the relief with which the judge's decision had been received by the parents. I regret that, by reversing the decision, we will be causing them further distress and anxiety. Nothing I have said in this judgment, however, should be regarded as providing any indication about the outcome of the fact-finding hearing or the ultimate decision as to the children's future care. It is, of course, possible that at the fact-finding hearing the court will conclude that the local authority has not proved the facts on which it relies in support of the threshold. The parents' representatives will plainly raise a number of issues, including points arising out of the mother's obstetric history to which Ms McGrath referred in submissions. It is also possible that, if findings are made, the court will conclude, after the necessary risk assessment, that the children can be safely returned to the parents. All those are matters to be determined in due course.

56. If my Lord and my Lady agree, I would allow the appeals, set aside the order of 6 March 2024, make an order that the fact-finding hearing should proceed, and remit the proceedings to the Designated Family Judge, inviting him to assume responsibility in

the hope that he will be able to arrange an urgent case management hearing to give directions for the fact-finding hearing.

LORD JUSTICE LEWIS

57. I agree.

LADY JUSTICE WHIPPLE

58. I also agree.