Neutral Citation Number: [2021] EWCA Civ 1192

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2021

**Before :**

**LADY JUSTICE KING**
**LORD JUSTICE PETER JACKSON**
and
**SIR PATRICK ELIAS**

- - - - - - - - - - - - - - - - - - - - -

Case No: B4/2021/0679

**Her Honour Judge Hillier**
**LS20C00867**

- - - - - - - - - - - - - - - - - - - - -

**H-D-H (Children)**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Karl Rowley QC** and **Andrew Wynne** (instructed by **Kirklees Council**) for the **Appellant Local Council**
**Will Tyler QC** and **Huw Lippiatt** (instructed by **Ridley and Hall Solicitors**) for the **1st Respondent**
**Deirdre Fottrell QC** and **Louise McCallum** (instructed by **Wilkinson Woodward Solicitors**) for the **Respondent Children by their Children's Guardian**

Hearing date : 1 July 2021

- - - - - - - - - - - - - - - - - - - - -

Case No: B4/2021/0959

**Her Honour Judge Murden**
**LS20C00447**

- - - - - - - - - - - - - - - - - - - - -

**C (A Child)**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Reagan Persaud** (instructed by **City of Wakefield Council**) for the **Appellant Local Authority**
**David Orbaum** (instructed by **JWP Solicitors**) for the **Respondent Mother**
**Alison Moore** (instructed by **Ramsdens Solicitors**) for the **Respondent Child by their Children's Guardian**
**Rhian Wood** (instructed by **Blackfords LLP**) for the **Intervenor** [written submissions only]

Hearing date : 1 July 2021
- - - - - - - - - - - - - - - - - - - - -

## Re H-D-H; Re C (Children: Fact-Finding)

# Approved Judgments

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 30 July 2021.

**Lord Justice Peter Jackson :**

1. On 1 July 2021, we heard these two appeals from the Family Court one after the other. In each case a judge hearing care proceedings made a case management decision that the court would not investigate and make findings of fact about a serious allegation and in each case the local authority appealed. The appeals raise the same question of principle and we now give our judgments on them together. They provide an opportunity for this court to review the long-standing guidance contained in *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam); [2005] 2 FLR 1031 in the light of the current pressures on the Family Court.

2. As there were imminent hearings in both sets of proceedings, the parties needed to know the outcome of their appeals and at the end of the hearings we gave them our decisions. In the first case ('*H-D-H*') we dismissed the appeal, while in the second ('*C*') we allowed it. These are my reasons for agreeing with these results. I will address the issue of principle before taking each case in turn.

*The scope of fact-finding*

3. Decisions about the scope of fact-finding are core case management decisions with particular consequences for the length and cost of proceedings, the impact of the litigation on parties and others, and the allocation of court time. They arise in private law proceedings, including when a court is considering whether there should be a fact-finding hearing in relation to any disputed allegation of domestic abuse under PD12J, and in public law proceedings when the court is considering whether it should investigate a fact alleged as forming part of the threshold or as being relevant to the welfare decision. I will outline the statutory framework, administrative guidance, and the caselaw.

The statutory framework.

4. Starting from first principles, the court must further the overriding objective to deal with cases justly, having regard to the welfare issues involved. Rule 1.2 of the Family Procedure Rules 2010 provides that:

> "Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that it is dealt with expeditiously and fairly;
>
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
>
> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expense; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

5. Rule 1.4 imposes a duty on the court to manage cases actively. Active case management includes identifying the issues at an early stage (1.4(2)(b)(i)), deciding

promptly which issues need investigation and hearing and which do not (1.4(2)(c)(i)), and considering whether the likely benefits of taking a particular step justify the cost of taking it (1.4(2)(h)).

6. The primary legislation, the Children Act 1989, has always recognised the general principle that any delay in determining the question is likely to prejudice the welfare of the child (s. 1(2)). In public law proceedings, this principle is sharpened by s. 32(1), introduced by the Children and Families Act 2014, which requires the court to:

> "(a) draw up a timetable with a view to disposing of the application—
>
> (i) without delay, and
>
> (ii) in any event within twenty-six weeks beginning with the day on which the application was issued; and
>
> (b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to."

Sub-section (3) requires the court to have particular regard to the impact which the timetable would have on the welfare of the child to whom the application relates and on the conduct of the proceedings.

7. The 26-week requirement was introduced as a means of driving down the length of care cases. The philosophy behind it was well expressed in 2011 in this extract from the Foreword to the Family Justice Review by David Norgrove:

> "Here all the dedication to family justice can harm children, not help them. Having read dozens of replies to our consultations I was struck by the way in which almost every group thought things would be better were they allowed to do more, including judges, magistrates, social workers and expert witnesses. Hardly anyone thought they themselves should do less…
>
> The reality of course is that time and money spent on one child means less time and money available to help another… Dedication to achieving the best possible result for one child comes at the hidden expense of another whose case is delayed or whose social worker has to come again to court when they might have been working to help another child to remain safely with their birth family."

8. Another amendment introduced by the 2014 Act is the requirement that a court deciding whether to make a care order must consider the permanence provisions of the care plan: s. 31(3A). By s. 31(3B), permanence provisions concern (a) broadly, the long-term living arrangements for the child, and (b):

> "such of the plan's provisions as set out any of the following—

> (i) the impact on the child concerned of any harm that he or she suffered or was likely to suffer;
>
> (ii) the current and future needs of the child (including needs arising out of that impact);
>
> (iii) the way in which the long-term plan for the upbringing of the child would meet those current and future needs."

Administrative guidance.

9. More recently, the Family Court has again come under heavy workload pressure. In response to the pandemic, Sir Andrew McFarlane, as Head of Family Justice, gave guidance in June 2020 entitled '*The Road Ahead'* and in January 2021 in '*The Road Ahead 2021*'. The key message of the first document advocated a significant change in time management:

> "43. If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear."

10. At paragraph 47, it quoted the elements of the overriding objective and stated:

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

11. At paragraph 49 it spoke of 'Narrowing the Issues', the questions including "for which issues is an oral hearing necessary?"

12. In '*The Road Ahead 2021*', it was said that this guidance continues to apply, and the same is said in the most recent *'View from the President's Chambers'* (July 2021), in which paragraph 43 above is again quoted with the word 'necessary' being underlined where it appears.

13. The pandemic is not the only reason for pressure of work in the Family Court. It had already seen a steep rise in the number of public law cases, leading to the formation of the Public Law Working Group, chaired by Keehan J. The Group's wide-ranging recommendations, largely formulated before the pandemic, were published in March 2021 and endorsed by Sir Andrew McFarlane. One recommendation states:

> "26. Only those issues which inform the ultimate welfare outcome for the child need to be and should be the subject of a

> fact-finding hearing by the court. It should be rare for more than six issues to be relevant."

14. These documents, emanating from or endorsed by the Head of Family Justice, reflect the conditions under which the Family Court is currently working. Their guidance is aptly described in '*The Road Ahead*' as providing "signposts not directions". As would be expected, the signposts point in a similar direction to the statutory and regulatory provisions, but insofar as there may be any limited difference of emphasis, the correct position is that courts must follow the requirements of statute and authoritative case law, and it is to the latter that I next turn.

Case law.

15. The leading authority is *Oxfordshire County Council v DP, RS and BS* (above) – '*Oxfordshire*'. Proceedings were taken after a baby had collapsed in his father's care. He was in cardiac arrest and had a fractured arm. The care plan was for him to live with his mother and to have supervised contact with his father. The father accepted this. He conceded that he might have accidentally injured the child's arm, but denied any culpable behaviour. The local authority wanted to litigate the cause of the child's condition. The father opposed this, arguing that it would be unlawful for the court to do so, but that if it was lawful, the court should decline.

16. The case came before McFarlane J. He held that whether or not a particular fact-finding exercise is conducted is a question for the court's discretion and is not a matter of lawfulness (paragraph 17). He then considered the exercise of the discretion, listing five earlier decisions at first instance and in this court (paragraph 22), before summarising the factors that they identified as relevant:

> "24. 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:
>
> a) The interests of the child (which are relevant but not paramount);
>
> b) The time that the investigation will take;
>
> c) The likely cost to public funds;
>
> d) The evidential result;
>
> e) The necessity or otherwise of the investigation;
>
> f) The relevance of the potential result of the investigation to the future care plans for the child;
>
> g) The impact of any fact finding process upon the other parties;
>
> h) The prospects of a fair trial on the issue;
>
> i) The justice of the case."

17. This non-exhaustive list has proved to be a useful structure for judges making these decisions. Like any list, it can attract commentary and indeed in subsequent paragraphs, MacFarlane J made these further observations:

> "25. I am well familiar with the concept of 'necessity', arising as it does from ECHR Art 8 and, indeed, from the pre Human Rights Act 1998 case law to which I have been referred. It is rightly at the core of [counsel]'s submissions in this case and, without overtly labouring the issue by including substantial descriptive text in this judgment, it is at the forefront of my consideration of the point. Amongst the pertinent questions are: Is there a pressing need for such a hearing? Is the proposed fact finding hearing solely, as [counsel] puts it, 'to seek findings against the father on criminal matters for their own sake'? Is the process, which will be costly and time consuming, with potentially serious consequences for the father if it goes against him, proportionate to any identified need?"

18. He also noted the following matters of relevance to the decision that case:

> "29. …
>
> ii) The gulf between the father's position and the central allegations is indeed wide. I note that in all of the reported cases, the parents had made significant concessions on threshold and/or the factual substrata. That is not the case here;
>
> iii) If there is a real potential for these facts to be litigated in the future then they should be litigated now and not some years hence. The father has made it plain to the guardian [C148] that his eventual aim is unsupervised contact to include staying contact. [Counsel] says that this is in the long term, when either 'B' is seen to be too old to be at risk of this form of abuse and/or is asking for more contact;
>
> iv) The public interest in the identification of the perpetrators of child abuse and the public interest in children knowing the truth about past abuse are important factors (see *Re K (Non-Accidental Injuries: Perpetrator: New Evidence)* [2004] EWCA Civ 1181; [2005] 1 FLR 285).
>
> 30. In addition I am struck by what, with respect to him, I may call the intellectual dishonesty of the father's position. His stance on the factual dispute (which is in effect to accept no culpable behaviour) is completely incompatible with his acceptance of limited, long-term, supervised contact. This, as is candidly admitted, is a 'pragmatic' position to avoid the feared consequences of the proposed investigation. It is a tactical position. It is not child focussed and has no internal logic. The apparent unanimity of view about the final orders hides the

> reality of a very substantial and important factual dispute between the father and the other parties."

19. The outcome was that the fact-finding hearing proceeded.

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.

(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.

(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.

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.

24. It is important for us to affirm that fundamental legal principles do not change in response to workload. At various points in the cases under appeal it has been said that there needs to be 'a culture shift' on the part of professionals away from the 'leave no stone unturned philosophy'. But the proper approach has never been to leave no stone unturned. The desired shift in professional practice can be achieved by paying fresh attention to the fundamental principles of good case management.

25. With these general observations, I now turn to the individual appeals.

*The appeal in H-D-H*

26. At the time proceedings began, the three subject children were aged 14, 13 and 9. The appeal particularly concerns the second child, M, a girl.

27. In 2012, when the children were living with their mother, they were made the subject of a child protection plan for a time due to allegations of excessive physical chastisement.

28. In October 2017, the mother died. At that time her partner, Mr D, was living in the home. The children's older sister S, only 17 at the time, moved in and asked Mr D to leave, which he did. He continued to see the children regularly.

29. S could not cope and the local authority began care proceedings. An interim care order was made and the children were placed in the care of Mr D, who was granted a special

guardianship order in July 2019. The assessment carried out by the local authority reported that the children seemed happy with him. He was known to be a drug user, but he had been abstinent for a short period. He has two children (girls now aged 12 and 7) by a previous relationship, with whom he had sporadic contact: their mother described him to the assessor as "*Jekyll and Hyde*".

30. The current proceedings began after the police were called to the home on 6 December 2020. They found Mr D intoxicated and unable to care for the children. He was arrested for child neglect and the children were placed with their older sister, S.

31. As soon as M came into the care of S, she made very serious sexual allegations against Mr D. She was interviewed on 7 December 2020 and gave a detailed account of behaviour on various recent occasions, including oral rape and other sexual assaults of an extreme nature and involving drugs and alcohol. Mr D was arrested and remains on bail; a charging decision has not yet been made.

32. On 21 December 2020, the local authority issued care proceedings and on 23 December, interim care orders were made on the basis of the children living with S and her partner. Since that time, the youngest child has moved to live with an aunt, and S is to be assessed as a special guardian for the elder two. If that placement cannot continue, the alternative is foster care.

33. The matter was allocated to Her Honour Judge Hillier, who conducted case management hearings on 2 and 25 March 2021. Mr D disputed the allegations made against him by the children of physical and sexual abuse, but he admitted the following:

- Drinking to excess when the children were in his care.
- Using illegal drugs (including crack cocaine) while the children were in his care.
- Allowing and encouraging the children to smoke cigarettes and drink alcohol, in the case of the youngest child when he was 10 years old.
- Failing to prevent the youngest child from accessing pornographic material.
- At times losing his temper and acting inappropriately in front of the children, including shouting loudly, slamming doors and throwing things.
- Struggling with his mental health and at times feeling depressed when the children were in his care.
- Exposing the children to unacceptable conditions when he was arrested on 6th December 2020.
- Being the subject of serious allegations by all the children and particularly by M.

34. The local authority and the Guardian invited the Judge to determine M's allegations. Mr D's position was that none of the children would be returning to his care and that the special guardianship order in his favour could be discharged. He accepted that the children did not want to see him. He did not seek contact within the proceedings, though "the door is always open to future contact if that is what any of the children want".

35. At the first hearing on 2 March, there was some discussion about whether M's allegations should be determined. The Judge expressed scepticism, but listed a further hearing for the question to be argued out on 25 March. At that hearing she ruled that there would not be a fact-finding hearing. She listed the matter for an early final hearing on 6 July with a time estimate of 1 day.

36. The Judge's reasoning, expressed in an extempore judgment, can be summarised in this way:

- The decision had to take account of *Oxfordshire*, *The Road Ahead*, and the report of the Public Law Working Group.
- The court did not underestimate the significance of Mr D's threshold concessions of significant emotional harm and neglect.
- The options for the children are very narrowly limited and the welfare outcome will be exactly the same, whatever findings were made in respect of the disputed allegations.
- Without a fact-finding hearing, welfare orders could be made in early July. A fact-finding hearing would occupy five to eight days, including a decision about whether M should give evidence. It would take place in September or after and the case could be concluded this year.
- Mr D's position had to be considered, both as to the fairness of leaving unresolved allegations hanging over him and as to the unattractiveness of a person walking away scot-free from allegations of this kind.
- *The Road Ahead* calls for very robust case management and a clear consideration of the overriding objective. Priority must be given to issues which are necessary to determine outcome.
- The court is not called upon to analyse the strength of the allegations, but there are very clear recorded allegations and there is no reason to dispute the Guardian's view that they are cogent.
- The children have been emotionally harmed and care planning must reflect that. M will be able to receive therapy based on her account. It is important for a child to be heard by the court, and that is different from being believed. This does not offend against fairness.
- This is not a case where there is an uncertain perpetrator, which might be a factor in favour of a fact-finding hearing.
- There is a public interest in prosecuting sexual offences and it will be for the CPS to determine whether Mr D should be prosecuted. A prosecution may or may not bring a beneficial outcome for M.

37. The Judge concluded:

> "37. What has exercised me most is how the welfare outcome for M and her siblings would be any different if those allegations

were litigated because I think the care planning would be the same. I accept that it may be good for a child to have demonstrated that they are believed if appropriate but I think that is rather different to the obligation to hear M's voice. If I decide that it is not proportionate to litigate the allegations by balancing the factors that I have done that should not be conveyed to M or her siblings as a finding that they did not take place or a finding that I do not believe her.

38. I do not accept the submission that a decision not to litigate would be unfair to M because it would show she was not believed… I always try to hear the voice of children and I have taken the Guardian's views very seriously…

39. I am balancing the things that I have to within the family justice system and I do not accept that a finding today under the overriding objective and giving clear, focussed, robust case management says to a child 'I do not believe you' and it certainly should not be conveyed to her that that is what the Judge is saying, that would just be outrageous. I do not think that the Local Authority and the Guardian fundamentally are saying that I would be doing if I balance everything and say no, it is not proportionate to litigate.

40. I have considered the welfare outcomes for these children. I have weighed the fact that I do not think it is going to make any difference to them because my planning will be very clearly based on their welfare needs and interests as I know them to be. I will hear their voices. They say they do not want to see Mr D and they will not see Mr D. They say they do not want to see some of the other adults and that will of course be heard and acted on. The fathers are not pushing for contact where contact is not wanted. I know that the children want to live with S and I hope that that is the way things can move forward.

41. At the end of the balancing exercise I find that this matter should not be litigated. I have weighed all the matters and I think that this balance firmly tips against litigation in this case…

42. … I do have to look at what was said [in *Oxfordshire*] in the light of the way things are now and the fact that we must not just go through everything, 'leave no stone unturned', look at every single possibility to be proportionate. I am clear that additional threshold findings or factual findings must be relevant to the welfare of the children and I do not think in this case that they would. For those reasons I find that the matter should proceed as a matter where threshold is conceded. That there is no need to litigate within these proceedings the findings in relation to sexual abuse.

> 43. I am not saying that I do not believe them and I am not saying that I believe them.
>
> 44. I make no findings at all and that of course is clear and should be clear to the police and should be clear in terms of any future proceedings involving Mr D. It does not affect his bail conditions, it does not affect the issue of him playing a role in the lives of other children and it does not stop child protection issues for professionals to know that those serious allegations have been made, that they have not been litigated within family proceedings but they may yet be litigated in the criminal arena. That as my judgment this afternoon."

38. On 29 April I gave permission to appeal, and on 1 July we heard the appeal.

39. For the Local Authority, Mr Rowley QC and Mr Wynne asked that the Judge's ruling be set aside and that the matter be listed for a composite fact-finding and welfare hearing before another judge. Their grounds of appeal fall into two parts. The first challenge is to the substance of the Judge's decision and the second is to the fairness of the process, it being said that remarks made by the Judge on 2 March showed that she had a preconceived view that there should not be a fact-finding hearing, and that she did not give the local authority sufficient opportunity to advance its case on 25 March.

40. As to this second strand, I do not accept that the process here was unfair. It is true that the Judge expressed her thinking quite firmly on 2 March, including saying the following to Mr Wynne:

> "… suggesting to me that the wider public policy will only be served by me embarking on a massive hearing in relation to the allegations that M has made against somebody who will not effectively be a party for very much longer are not going to fall on very receptive ground. I recognise fully the fact that M has made the allegations and that M's life may be better in some respects if those allegations could in an ideal world be determined, but M is not going to be seeing Mr D, she's not going to be living with Mr D and her welfare outcome is going to be very much on who can provide for her needs, and I really do urge you to focus on that''

The Judge nonetheless listed the matter for full argument, which took place on 25 March. The transcript of that hearing shows that she clearly grasped the arguments being made by the Local Authority and the Guardian. Although she was somewhat interventionist during the hearing, her judgment shows that she surveyed all the relevant matters.

41. The main plank of Mr Rowley's substantive argument was the extreme seriousness of the alleged conduct and the gulf between that and the concessions. Unresolved allegations of this gravity will create difficulties in planning for the children. A finding would be of value for therapy. The issue affects the interests of other children, particularly Mr D's own daughters. Further, the Judge gave inadequate weight to the public interest in a finding being made in a case where the alleged perpetrator is a court-

appointed special guardian. Mr Rowley did not go so far as to say that a fact-finding hearing was necessary, but he described it as highly desirable.

42. For Mr D, Mr Tyler QC and Mr Lippiatt point out that this was a case management decision in which the Judge directed herself correctly and had all the relevant factors well in mind when coming to a robust and pragmatic decision. She was entitled to place particular emphasis on the fact that litigating M's allegations would not affect the outcome, on the heavy cost to the public purse and court resources, and on the issue of delay, bearing in mind that the 26 week period would end in June. The guidance given in the light of the current situation in the Family Court enjoins judges to give particular weight to the factors of necessity and relevance to future care plans, as identified in the *Oxfordshire* list at (f) and (g). On the other hand, Mr Tyler accepted that where the allegation will have an impact on other existing proceedings, or where there is a real possibility that it will need to be litigated in future proceedings, it may be better to grasp the nettle and resolve it now.

43. For the Guardian, Ms Fottrell QC and Ms McCallum supported the appeal and submitted that a fact-finding hearing was necessary. They placed emphasis on the particular seriousness of the allegations, the welfare of M, and the narrative for all three children. They point out that these children had already suffered the loss of their mother and their experience in the care of Mr D will have a lifelong impact. There is also a public interest in the investigation of the allegations. Ms Fottrell accepted that M's carer, her sister S, believes her allegation against Mr D, as do all professionals working with her. She nonetheless asserted that professionals would be hampered by the lack of a finding from the court in relation to an allegation that the Guardian considered to be cogent. As to welfare, M is willing to give evidence and the Judge was wrong to define welfare only in terms of outcome. A finding of fact would lead to better planning based on the impact on M and her needs. The children will need a narrative to help them understand why they have had another change of carer.

44. Having considered these submissions, I conclude that the Judge's decision was sustainable for the reasons she gave. It is troubling that M's allegations may never be effectively investigated, both from the point of view of her welfare and the public interest. Other things being equal, it would be highly desirable for these allegations to be resolved, but the family court cannot stand in the shoes of the criminal justice system. Although there is a gulf between the allegations and Mr D's concessions, the Judge was right to emphasise the gravity of the concessions. Mr D is on his own admission guilty of a gross breach of trust towards these vulnerable children. That is not only dispositive of the present case, but should prevent him from caring for or having unsupervised contact with other children without there first being substantial professional intervention. The Judge was also entitled to conclude that care planning for the children did not depend upon further findings of fact and to give significant weight to the issues of delay and resource. She weighed other relevant factors in order to reach a conclusion that was open to her. I therefore join in the dismissal of the appeal.

*The appeal in C*

45. The proceedings concern J, a boy born in July 2020. His mother, who is now aged 19, has a learning disability. She has a troubled family history with social services involvement over a number of years. The identity of J's father is not known; two men named by the mother have been tested and excluded.

46. The local authority took proceedings when J was born. When he was a day old he and his mother moved to live with foster carers, Mr and Mrs I, and their own young children. The case was allocated to Her Honour Judge Murden ('the Judge'), who has managed it throughout.

47. When J was three weeks old he suffered a serious head injury, consisting of a subdural haematoma over the left brain convexity and extensive bruising on the left side of the face. Medical opinion is that this appears to be an inflicted injury. During the limited period of time when it must have occurred, J was being cared for at home by the mother and Mr I, with Mrs I being in the vicinity.

48. After a period in hospital, J was moved to foster care, where he remains, awaiting a final determination by the court. The police investigation ended with a decision in January 2021 to take no further action.

49. A psychological and cognitive assessment of the mother in September 2020 concluded that she would have great difficulty in parenting J on her own. However, she had a new partner who was willing to be a joint carer and the local authority considered that this possibility should be pursued. Accordingly IRH hearings in October 2020 and January 2021 were deferred and in February 2021, the local authority applied for a fact-finding hearing to clarify the risks posed by the mother so that a further assessment of the couple could be completed. On 26 April, the Judge granted the local authority's application, joined Mr I as an intervener, and listed the finding of fact hearing on 24 May 2021 with a time estimate of 5 days.

50. However, the hearing did not go ahead. On 17 May, the parties became aware that the mother and her partner had split up. It was alleged that the mother had become pregnant again in January 2021 but had miscarried. There were also difficulties with the attendance of one of the medical witnesses, Dr C.

51. When the matter was heard on 24 May, the Judge revisited the issue of whether it remained necessary to litigate the cause of J's injuries. The local authority maintained that it was, but the other parties now disagreed. The mother had the assistance of an intermediary.

52. The Judge gave an extempore judgment in which she reversed her previous decision and ruled that the court would not conduct a fact-finding hearing. She directed that there should be an IRH on 6 July and a five-day final hearing on 12 July. The resulting case management order contained this recital:

> "AND UPON it being recorded that, as the Court has ordered that it is not necessary or proportionate in the light of recent events and in the light of the delay litigation would cause to J's overall welfare, to determine the causation of J's injuries, no findings have been made against Mr I or the mother within these proceedings in relation to the causation and/or perpetration of the injuries J suffered in foster care."

53. At the hearing on 24 May the mother identified a yet further candidate for paternity of J.

54. In her judgment, the Judge recited the history. She placed some significance on whether findings about the injury were necessary for proof of threshold:

> "4. I had indicated even as early as the point at which I was asked to authorise the instruction of the medical experts, that I did not do so was on the basis I accepted that it was either necessary or proportionate, or that it would be, to litigate those issues fully within the course of these proceedings. There were a number of reasons for that early indication, perhaps most significantly the fact that because these injuries were inflicted after the point at which proceedings were issued so they do not, certainly not automatically, form a part of the threshold criteria. The interim threshold has always been accepted in this case and there is ample evidence about the mother's functioning and lifestyle which are pleaded on the Local Authority's part as part of their threshold document."

55. Despite this, the Judge noted that in April she had agreed with reluctance that a fact-finding hearing should take place. But, as she put it, matters had conspired against the hearing going ahead, with Dr C becoming unavailable. She had intended to reschedule the fact-finding hearing administratively for the week of 12 July, but other events had led to the matter being listed for in-court review. The first was that Mr I and his family had a booked holiday in the week of 12 July. The second was the ending of the mother's relationship with her boyfriend, amid acrimony, and the mother's alleged pregnancy earlier in the year. The Judge commented:

> "15. …I am not making any findings about any of those matters today and nor would it be remotely appropriate for me to do so. But it certainly seems that the mother's personal situation has significantly changed since I made the decision that the fact-finding hearing about these injuries were both proportionate and necessary to resolve the proceedings justly."

56. The Judge considered that she could not maintain the July date because of Mr and Mrs I's holiday and that a fact-finding hearing could not take place before September. She observed:

> "17. It has to be borne in mind that it is absolutely central to my decision-making for this little boy as to whether further delay (it would involve an extension of these already elongated proceedings) is necessary and proportionate to resolve the proceedings justly."

57. The Judge then recorded the competing arguments. The local authority accepted that its care plan did not depend upon the findings, but argued that this teenage mother may well have further children and any findings will be of significant relevance for planning for them. Findings would also be important to allow J to understand his life story.

58. The Guardian's opposition, was described as highly significant by the Judge, who expressed her ultimate decision in this way:

"22. It is right to record that the Guardian understands the Local Authority's position and understands that there may be some benefit to J, in absolute clarity, about what caused his injuries. There is equally absolutely no guarantee that I would be able to make an absolute clear finding about what happened and what did not happen to J in foster care. I struggle to understand why it would help the life story of a little boy growing up to understand that he was injured in foster care, as opposed to a finding that he was so injured and there being a pool of two people who might have caused those injuries. I am afraid I struggle to understand why the process of a fact-finding hearing is so necessary to J's future welfare needs that I should continue to authorise it.

23. The landscape of this case has changed significantly since I made the decision to litigate these issues. If I were to approve the litigation again, essentially I would be signing this little boy up to months of delay, three and a half to four months from now, would be the first time I would be able to consider the case and make orders about his future. The proceedings have been going on all of his life.

24. I recall the case very clearly, as I have already said, making decisions about him in the summer of last year. I would like to make final decisions about him in the summer of this year which would still be over twice the number of weeks that these Courts are supposed to take in order to make decisions for the outcome of children - particularly children as young as J. Time is of the essence.

25 Therefore, I direct myself as to whether it is necessary and proportionate to litigate this discrete issue in J's best interests. Primarily because of the delay but also because of the matters set out in the overriding objective. For example, I refer myself to the use of court time, the division of resources and the need to apply the appropriate amount of court resources to those cases which require them. In my judgment it is pretty clear that the right way forward for this little boy is for me to hear about the plans for him in the week of 12 July, and not embark on the fact-finding exercise that I agreed to investigate a few months ago. That now seems to me to be totally disproportionate to do so.

26 My judgment is that in light of recent events, it is no longer necessary or proportionate for me to litigate the issues of how J came about his injuries whilst in the mother and baby foster placement - I therefore decline to do so.

27 There can be a recording on the face of this order that that was my decision: That there were no findings made about that issue, and that the court felt it was neither necessary nor proportionate to do so in light of recent events. In light of the

> delay that litigating those matters would now cause to this little boy is, in my judgment, entirely contrary to his best interests and his overall welfare. That is my judgment on that issue."

59. The local authority appealed, and I granted permission on 25 June. We are grateful to the parties for the efforts that they made to be ready for hearing on 1 July.

60. The grounds of appeal are that the Judge was wrong to decide that the injuries sustained by the child in the mother and baby placement should not be litigated given their serious and significant nature, their importance for future risk assessments in respect of the mother and/or Mr I, and their importance for J's life story work. Further, she placed undue emphasis on the issue of delay.

61. In developing these arguments, Ms Persaud described the allegations as following the mother unfairly into the future like a shadow, causing chaos for future risk assessments. The mother has had many short relationships and there is a high possibility that she will have future children. The likely findings in these proceedings as framed by the Judge are not of a kind that would justify immediate separation of those children at birth. Litigating J's injuries at a later date will encounter evidential difficulties, with witnesses possibly being unavailable and memory fading. The fact that there will be no criminal proceedings means that the Family Court is the only forum in which to achieve clarity and justice. As there is already to be a five-day hearing, the effect of investigating the injuries will be to extend the hearing to eight days: Dr C is the only medical witness required. Mr I is a professional foster carer with his own young children and there is a public interest in investigating whether he caused the injuries, and, if he did not, a ruling by the court would be fair to him. There is also a public interest in understanding how a child in care and under close supervision came to be seriously injured. A delay of three or four months is significant for J, but it would not narrow the options or remove his ability to attach to a new carer after a final decision. Welfare is not just about placement and contact. In the longer term, to leave this issue unresolved will create difficulties for J in understanding why decisions were made and, perhaps, in deciding whether he wishes to have a relationship with his mother. If he is adopted it is also setting the adopters up for difficulties.

62. Responding for the mother, Mr Orbaum stressed the Judge's deep knowledge of the case. This court should support robust case management. A different judge might have come to a different conclusion, but her decision was not wrong, in fact it was right. It is significant that the interim threshold had been crossed before the injuries were caused. The *Oxfordshire* considerations of necessity and relevance to care planning were important factors, as was delay. The mother is a young person with significant psychological problems, for whom delay is difficult. In the end, the court may not be able to make a clear finding about how the injuries occurred.

63. For the Guardian, Ms Moore echoed these submissions. She emphasised the latitude owed to a judge making a case management decision. The Guardian has been particularly concerned about the effect of further delay for J in already protracted proceedings. The Judge's decision was one that she was entitled to make after carefully weighing all the relevant factors. Findings about the cause of J's injuries are not necessary to inform interim decisions about the need for immediate separation of any future children. Nor are they necessary to determine the threshold in the present case.

64. We received written submissions from Ms Wood on behalf of Mr I. Before the Judge, his position was that a fact-finding hearing was unnecessary and he did not want to be involved in what would inevitably be a stressful and difficult process. The Judge's decision was well-reasoned and supportable. However, the matter is of real importance for Mr I and he seeks a conclusion rather than for the matter to hang over him and his family, to whom it has caused a great deal of anxiety. If it is considered that there is any possibility of a fact-finding hearing in future it would be better for it to take place now when the evidence is fresh.

65. Drawing these matters together, I empathise with the Judge's anxiety about the turn of events in this case. One of the important consequences of judicial continuity is that the judge will be all the more acutely aware of how time is passing while proceedings continue. In J's case, the Judge was right to be concerned that, 11 months after his birth, no decision had been reached about his future and that an important hearing was not going to be fully effective because of the absence of a professional witness. I also fully accept that this court should be very slow to involve itself in a case management decision made by a judge who clearly had a grip of the case. Nevertheless, and essentially for the reasons given by Ms Persaud, I have been driven to the conclusion that this decision to dispense with a fact-finding hearing was wrong.

66. As can be seen above, the hearing on 24 May was scheduled to go ahead but for the absence of Dr C, and the hearing would have been rescheduled for 12 July but for the holiday of Mr and Mrs I. The Judge was entitled to review matters in the light of the separation of the mother and her partner, but it is nevertheless clear that the review was prompted by extraneous factors and it is doubtful that these were adequate reasons for reversing a process that had been considered necessary as recently as April.

67. But the real difficulty with the Judge's decision is that she approached the matter too narrowly and did not take into account all of the relevant matters. Delay was clearly a weighty factor, but it was not the only consideration. The fact that the threshold was likely to be crossed on the basis of the psychological assessment of the mother's disability and psychological profile was also a factor, but it only takes matters so far. In setting up a five-day hearing that excluded consideration of these serious injuries, the Judge must have made the tacit assumption that the mother's case was bound to fail, because she cannot possibly have considered that J could be returned to his mother without knowing whether she had injured him. This state of affairs might not present insuperable difficulties in J's case, but it would certainly place professionals and the court in a real predicament when considering the position of the future children that are likely to be born to the mother. The assertion that those children could be removed at birth on the sole basis of the mother's learning disability and psychological state is at least questionable. Further, a distinctive feature of this case is that this child was injured when under the supervision of a professional foster carer. It is unsatisfactory from the point of view of the public interest, and potentially unjust to both Mr I and the mother, that these unproven allegations should hang over them both indefinitely when it is at least highly possible that they could be satisfactorily clarified.

68. A first key feature of this case is therefore the high likelihood that the cause of the injuries to J will have to be resolved sooner or later; a second is the untenable position of the foster carer. Had the Judge taken account of these matters, she would in my view have been bound to adhere to her previous decision, notwithstanding justified anxiety about the passage of time.

69. The Judge did consider the benefit to J of knowing why he had been removed from his mother. She rather discounted this factor. I think she should have given some weight to it, but that would in itself not invalidate her overall decision. However, in combination with the two matters mentioned above, it supports the conclusion that a fact-finding hearing is necessary and right in this case. I therefore join in allowing the appeal and in remitting the matter to the Judge so that she can conclude the proceedings.

**Sir Patrick Elias**

70. I agree.

**Lady Justice King**

71. I also agree.