Neutral Citation Number: [2025] EWCA Civ 910

Case No: CA-2025-001041

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL
Recorder Hennessy
LV23C50395

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 July 2025

Before :

LORD JUSTICE SINGH
LORD JUSTICE BAKER
and
LORD JUSTICE STUART-SMITH

- -

K AND G (CARE PROCEEDINGS: FACT-FINDING)

- -
- -

Claire Jones (instructed by **Local Authority Solicitor**) for the **Appellant**
Damian Sanders (instructed by **Poole Alcock**) for the **First Respondent**
Taryn Lee KC and Joanne Oakes (instructed by **Alfred Newton Solicitors**) for the **Second Respondent**
Chris Barnes (instructed by **Berkson Family Law Solicitors**) for the **Third and Fourth Respondents, by their Children's Guardian**

Hearing date : 3 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 July 2025 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. This appeal is brought by a local authority against the outcome of a fact-finding hearing in care proceedings involving two children, a girl, "K", now aged 3, and a boy, "G", now aged 2.

2. The appeal is supported by the children's guardian and by the children's parents. All parties seek a rehearing of the fact-finding hearing before another judge.

3. Whether an appeal should be allowed is, however, a decision for the appellate court, not the parties. It will, of course, be unusual for the court to dismiss an appeal which is supported by the other parties. But in my view, this is just such a case.

Background

4. The events which formed the subject of the fact-finding hearing took place in the Spring of 2023. These proceedings have therefore been ongoing for over two years. Parliament has provided that the court conducting care proceedings must draw up a timetable with a view to disposing of the application without delay and in any event within twenty-six weeks: Children Act 1989, s.32(1). Despite the best efforts of judges, many cases take longer than twenty-six weeks, but the delay in these proceedings – which are not yet concluded – is alarming and unacceptable. As will become clear from the summary below, the issues are not complex. Indeed, they fall at the less serious end of the scale for care proceedings. We did not investigate the cause of the delay in any detail – we were told that there had been uncertainties about the scope of the expert evidence. That is often the cause of delay in proceedings, but it is difficult to understand how it can account for or justify a delay on this scale. Whilst the injuries suffered by the child were very concerning and unpleasant, the forensic investigation of the cause of the injuries ought not to have been particularly complicated.

5. Fortunately, the children have been living with members of the extended family throughout the proceedings. It is to be hoped that this has ameliorated the harm they will have suffered as a result of the delay in concluding the case.

6. On 11 May 2023, the mother took G, then aged five months, to the family's GP surgery seeking medical attention for an injury to his ear which was said to have been noticed by the maternal grandfather the day before. After examining the child, the GP referred him for a child protection medical examination which was conducted the following day.

7. The injuries observed at the medical examination were subsequently described by the paediatric expert witness Dr Kunnath as follows:

   (a) two opposing vague semicircular bruises over the right cheek which seemed to come together at the outer aspect of cheek bone but open towards the nose, measuring 2.4 cm in the widest part;

   (b) a small vague bruise over the left cheek over the fleshy part of cheek placed perpendicularly with a length of 2 cm, tapering downwards;

   (c) a large circular bruise measuring over 5 cm diameter at its widest part, over the prominence of left shoulder;

(d) a dark discolouration with possible swelling over the upper half of the left pinna covering most of the upper part of the antihelix, the scapha superior crus and the outer part of the inferior crus;

(e) and (f) two bruises to the left calf.

X-rays and CT scans were taken but revealed no other evidence of injury.

8. The appearance of the bruises on the cheek and shoulder gave rise to concern that they were bite marks. As a result, the matter was referred to the police and social services.

9. Following the initial child protection medical, the mother disclosed three photographs of G showing similar injuries to his left cheek:

(a) one photograph taken on 2 February 2023 showing two diffuse opposing arcs of bruising;

(b) a second taken on 6 March 2023 showing two opposing partial arcs of bruising which were described as individual bruises which are consistent with tooth marks;

(c) a third taken on 18 April 2023 showing a series of red bruises and abrasions.

10. In addition, the parents said that G had an earlier bruise on his left ear on 27 April 2023 which had disappeared after a few days.

11. On 14 June 2023, the local authority started care proceedings in respect of both children. The children were initially accommodated with their maternal grandmother under section 20 of the Children Act 1989 but on 25 May 2023 they moved to live with their maternal grandfather and his partner, in whose care they remain. On 25 June 2023, the children were made subject to interim care orders which remain in place. Throughout the proceedings, the parents have continued to have regular contact with the children, facilitated by the carers. In the course of the proceedings, the parents separated. They are no longer in a relationship.

12. Following an order under Family Procedure Rules Part 25, expert evidence was obtained from Dr Roland Kouble, a forensic and dental surgeon, Mr Rupert Parsons, a consultant odontologist, Dr Mohammed Kunnath, a consultant paediatrician, and Dr Russell Keenan, a consultant haematologist. In his reports, Dr Keenan was able to discount the suggestion that G had an abnormal propensity to bruising and took no further part in the proceedings.

13. In accordance with standard practice, the local authority set out in a "threshold document" the findings it sought in support of its case that the threshold criteria for making a care or supervision order under s.31 of the Children Act 1989 were satisfied, and the parents duly filed responses to the findings sought. As is not uncommon, the document went through various iterations during the proceedings. The version filed four days before the start of the fact-finding hearing was in the following terms:

> "Introduction
>
> 1. At the date protective measures were taken for K and G, there was reasonable cause to believe that G and K had suffered

significant harm and/or was likely to suffer harm in the care of their parents and that harm, or the likelihood of harm, is attributable to the care given to the children if the protective measures were not taken; not being what would be reasonable to expect a parent to give.

2. The nature of the harm/likelihood of harm alleged is physical harm.

Physical harm

3. G was the subject of a child protection medical examination which was carried out … on 11 May 2023.

4. The Court appointed expert paediatrician, Dr Kunnath, has identified the following injuries from the child protection medical [there followed particulars of the injuries as summarised at paragraph 7 above].

5. Following the initial child protection medical, the mother had shared with professionals three photographs of G which were taken previously showing similar injuries to his left cheek [there followed a description of the photographs as summarised at paragraph 9 above].

6. G has been the subject of haematological testing (including blood clotting and genetic testing) which has concluded that the bruising … should be considered to have occurred in a child with a normal blood clotting system.

7. The injuries set out at paragraph 4 above would require a significant amount of force to have caused such injuries compared to normal handling of a child which would have been very painful for G resulting in his crying immediately and loudly until he was picked up and consoled. The … would be different to other cries due to care needs which a reasonable carer would be able to discern.

8. The injuries [the cheeks and shoulder] were caused by a human bite and such injuries were inflicted by the mother or the father.

9. The injury [to the ear] was caused by the pinna being crushed between a hard surface or, in the alternative, a heavy blow directly to the pinna. Such an injury was inflicted by either the mother or the father.

10. The injuries [to the left calf] were inflicted by either the mother or the father.

11. The injuries [shown in the photographs as summarised at paragraph 9 above] were caused by a human bite and such

> injuries were inflicted by the mother or the father. This would have caused G significant discomfort when inflicted.
>
> The local authority reserves the right to amend this threshold document on receipt of further medical evidence."

14. There was then a change of counsel for the local authority. The brief was taken over by Ms Claire Jones, who represented the authority at the hearing before the recorder and subsequently at the appeal hearing. In a case summary filed on behalf of the local authority at the start of the hearing before the recorder, Ms Jones summarised the key issues for the fact-finding hearing as follows:

> "(1) Significant physical injury to the child, G, following his presentation at his GP's practice on 11 May 2023 and subsequent child protection medical examination on 12 May 2025 where injuries were noted as follows (a) bruising to right cheek (b) bruising to left cheek (c) bruising to left shoulder (d) haematoma on left pinna (e) injuries in proximity to each other situated on the middle and lower left leg.
>
> (2) Further injuries were noted from photographs supplied by the mother as follows: (a) bruising to left cheek 2.2.23 (b) bruising to left cheek 6.3.23 (c) bruising and marking to left cheek 18.4.23.
>
> (3) Risk of physical harm to both children.
>
> (4) In the event that either parent is found to have caused the injury, the other parent was aware and has failed to give a truthful account."

In summarising the local authority's case, Ms Jones stated:

> "Pool of perpetrators
>
> The mother and the father each had care or were present when others were caring for the child G during the relevant period and therefore fall within the pool of perpetrators and/or were in a position to be aware of such injuries."

15. The hearing took place over three days between 17 and 21 March 2025. It was listed before Recorder Hennessy, an experienced family judge who had had no previous involvement in the case. The recorder heard oral evidence from Dr Kouble, Mr Parsons, Dr Kunnath, the mother and the father.

16. After the evidence, an amended threshold document was filed by the local authority. The references to the bruising to the left calf in paragraphs 4 and 10 were deleted. A new paragraph 10 was inserted in the following terms:

> "The parents accept that the child had an injury as set out at paragraph 5(d) on 27 April 2023. That injury was similarly (to paragraph 4(d)) caused by the pinna being crushed between a

> hard surface or, in the alternative, a heavy blow or application of force directly to the pinna. Such injury was inflicted by either the mother or the father."

The revised threshold document also included additional findings in the following terms:

> "12. The person who inflicted the injuries to G was aware that they were using excessive and significant force.
>
> 13. In the event that the mother inflicted the injuries, then she is aware that she has caused the injuries and has failed to give a truthful account.
>
> 14. In the event that the father inflicted the injuries, then he is aware that he has caused the injuries and has failed to give a truthful account.
>
> 15. If the injuries were not inflicted by the father, then he failed to protect.
>
> 16. If the injuries were not inflicted by the mother, then she failed to protect.
>
> 17. Both parents have failed to protect and to seek prompt medical attention for G in relation to each of the injuries."

17. Closing submissions were delivered orally and the recorder then reserved judgment.

18. On 11 April the recorder delivered her judgment. In the first section (paragraphs 1 to 24), headed "Introduction", she identified the parties, their representatives, and the witnesses, stating:

> "I do not propose to summarise the whole of the oral evidence that was given to me within the ambit of this judgment, it would make it overly long and convoluted, save to say this: The oral evidence was very largely consistent with the written evidence that I had received from mum and dad, and so was the medical evidence. It was expanded on, explained, but the final opinions of the doctors had already been crystallised and put into writing."

In the second section (paragraphs 25 to 34), headed "Agreed Facts", she summarised the background. In the third section (paragraphs 35 to 43), headed "Legal Framework", she summarised the applicable legal principles, drawing on an agreed summary prepared by counsel. The reported authorities cited in the judgment included two cases in which this Court gave guidance about the correct approach to the identity of the perpetrator of inflicted injuries on children – *Re B (Children: Uncertain Perpetrators)* [2019] EWCA Civ 575 and *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348. It was not suggested to us that there was any material error or omission in this summary.

19. In the next section, paragraphs 44 to 78, the recorder set out passages from the parents' evidence. She recorded that the mother had accepted in cross-examination that:

> "she had an awful lot to cope with at the time these injuries occurred, in that she had K, and she had had G, who had come along as a bit of a surprise, because she told me that she did not know she was pregnant until very shortly before the birth. She was also undertaking her own studies, which required her to attend a placement on a Monday and work during the evenings on a regular basis to take part in tutorials or individual study."

The recorder said that the mother had also accepted that there has been some tension with the father, who was working long hours, because she did not feel she was getting as much support as she needed.

20. During the investigation, the experts had given careful consideration to the possibility that the bite marks had been inflicted by K. Ultimately, this possibility had been rejected. The mother's reaction to this conclusion was described by the recorder in these terms:

> "She accepted that she had originally thought that K may have caused these injuries, and, when she learned via the police investigation that K was not the cause, she used the word "disappointed" to describe when she found out about that, and it was suggested to her in cross-examination that that was a surprising word to use in that context."

The recorder observed "I have to say, I agree", but added:

> "I do understand and I do temper that part of her evidence by the knowledge that actually K was in and out of the frame throughout the course of these proceedings."

21. The recorder then considered the mother's evidence about why she had not done more to investigate the injuries she photographed, and which she discussed with the maternal grandmother in text messages. The recorder observed that she did not have a very satisfactory answer as to why she did not do more about the marks she saw, adding:

> "it did seem to me that that was quite an important thing to address the suggestion that she had just allowed these to happen without real enquiry or real worry."

The recorder noted the mother's evidence that she had never heard him cry in an abnormal way, which the experts said would have occurred if his face was bitten.

22. She concluded her summary of the mother's evidence with the following observations:

> "66. Overall, my impression of her evidence was that she was doing the best she could within the remit of what she recalled, what she brought to mind, and what she could offer and tell me. I do not necessarily form any impression from any of that evidence drawing the conclusions that she was trying to lie or

> make things up, but that is of course a different issue from saying witnesses' memories are perfect or they are recalling, or saying, everything that they know or actually did once know.
>
> 67.There is at least a concern … that these are parents, and I am particularly referring to mum here, who do not see risk or perhaps, as has been put to her, she buried her head in the sand, for example looking at the pregnancy. Did she really not know?"

23. Turning to the father's evidence, the recorder described it as being characterised by denials and the words "I don't know, I don't remember". She continued:

> "69. It was suggested to him at one point that he was simply following a script that him and mum had put together between them, and that he was looking over to her regularly for assistance and help, and was generally unhelpful to the court as a result.
>
> 70. To an extent I think that is true. A lot of his evidence was characterised by denials and 'I don't know'. But I also think there were elements of his evidence that were given very naturally and 'off the cuff', and were very helpful to my enquiry. For example, there was quite considerable enquiry as to whether he was ever alone with these children, did he have the opportunity to do this? Effectively the answer was no, although he corrected himself quite quickly and quite, in my words, 'off the cuff' when he said, 'Actually she did go out shortly before Christmas, she was out about an hour to get her nails done, and I had the children'. It struck me that that was a very honest, instinctive comment, and one which I accept as being factually correct."

24. She recorded his evidence that nighttime feeds had been shared, but added that they "were always in earshot of mum, and certainly it seems to me earshot of mum if there had been this sort of out of the normal crying that is described by the doctors."

25. The recorder said that he "would simply not be drawn on whether he knew who had caused the injury." She continued (paragraph 66):

> "At the end of his evidence, I felt driven to clarify to him what my role was in the case, that I did not want to risk making the wrong decision for his son, and that if, as was the impression I had of him, he had something in his mind that he perhaps wanted to say but was not saying, now was his time to say it. If there was something that he felt he had missed or not covered or not been asked. I wanted to make sure that he had that final opportunity to say something that he might have wanted to. However, he said no, he did not, and therefore of course I left the matter. But that had been the impression I had of him at the end of his evidence, that there might have been something more that he wanted to say and just could not."

She said that to a large extent she agreed with the guardian's counsel who had described the father's evidence as being like "a rabbit in the headlights". She thought he had found it very difficult to give evidence, although some parts of his evidence had been given "very naturally". She concluded:

> "What I simply cannot determine on the evidence is why he presented in that way. I simply do not know, and it is no part of my role to guess, and I am not going to do so."

26. The next section of the judgment, paragraphs 79 to 84, was headed "The Position of the Parties". The recorder noted that the local authority's position was that the injuries were inflicted but that it was an "uncertain perpetrator case … that the court simply cannot decide between the two parents." Each parent argued that, if the court concluded that the injuries were inflicted, the other parent was the perpetrator. For the father, who had declined in evidence to say who he thought had caused the injuries, counsel's argument that the perpetrator was the mother was "based in a very large part on the opportunity for a parent to have done this." The recorder summarised the guardian's position in these terms:

> "… the guardian's position is probably that my conclusion should be that the perpetrator is dad, but it would be open to me to say that it is an uncertain perpetrator. Either of those two courses is open to me, the inference being that I cannot safely conclude that it is mum."

27. In the next two sections – paragraphs 85 to 102, headed "The Medical Evidence", and paragraphs 103 to 105, headed "Findings – Are They Bites?" – the recorder considered some of the expert evidence about the injuries to the cheeks and concluded that the injuries seen in the child protection medical examination and in the earlier photographs were indeed bites. Given the issues raised on this appeal, it is unnecessary to consider this part of the judgment any further.

28. The next section of the judgment, paragraphs 106 to 145, was headed "Who caused them?" Under this heading the recorder addressed in very considerable detail those parts of their evidence in which the experts – in particular Dr Kouble and Mr Parsons – had been asked to compare the marks on G's cheeks with dental casts taken from the parents and K. Mr Parsons had initially thought there was a strong possibility that K could have inflicted the bites, but Dr Kouble always thought this unlikely, and ultimately both experts agreed that she could be excluded. In their written reports, and after an experts' meeting, their position was, in short, that from the dental casts neither parent could be excluded, but that it was less likely to be the mother than the father.

29. Having summarised the experts' evidence, the recorder proceeded to set out her conclusion on the question of perpetrator. Although the medical evidence suggested that it was more likely to be the father than the mother, she concluded that it was not possible on the medical evidence alone to identify a perpetrator. The evidence as to opportunity pointed to the mother being the perpetrator because she was "ever present" and denied ever hearing an abnormal cry. The recorder therefore concluded:

> "On the totality of the evidence, when I put the wider context into the frame, and I ask myself who is on the list, can I identify

> a perpetrator, and, if not, is there a likelihood or a real possibility they should be placed in the pool, I come to the conclusion that both of them are on that list, I cannot clearly identify a perpetrator, and there is a likelihood or a real possibility that they should be placed in the pool."

30. The next section of the judgment, paragraphs 146 to 150, was headed "The Ear Injury". This was considerably shorter than the sections dealing with the bites. The recorder quoted parts of Dr Kunnath's report about the ear and considered but excluded the possibility that it could have been caused by K throwing a toy at G. The recorder concluded:

> "I think I probably have to say this injury is unexplained. We do not know how that was occasioned. We do know that it was a haematoma and an injury, but I think, in light of the remaining findings in this case, I need say probably no more about that."

31. In the final section of the judgment, paragraphs 151 to 161, headed "Conclusion", the recorder added some further comments. She reiterated her finding that there was a reasonable opportunity of each parent being the perpetrator. At paragraph 157, she said:

> "If one considers the opportunity was there for both parents; either mum was the perpetrator, in which case dad may or may not know I suppose; or dad was the perpetrator, and mum must know. But I simply cannot take that finding any further."

She cited a passage from an assessment of the maternal grandfather and his partner in which they had expressed concern about G being harmed in the parents' care through lack of supervision. The recorder added:

> "As an aside, although it does not form the basis of the finding, that in itself may go some way to playing into the findings that I have already made."

Finally, the recorder added, at paragraph 160:

> "As a final comment, I cannot escape the fact that whilst the injuries in February, March and April were noticed by mum, and she took some photographs, the injuries that prompted the medical examination were noticed by her father; and the other injuries noticed by the doctor when he undressed G for the purposes of examining him had not been noticed at all. Again, I have to mention that as to having some misgivings there given the 'failure to protect' argument advanced as an additional argument by the guardian."

32. The recorder's findings can therefore be summarised as follows:

(1) The injuries to the right cheek, left cheek, and left shoulder identified during the CP medical were bite marks.

(2) The injuries identified in the photographs were, on a balance of probabilities, bite marks.

(3) The possible perpetrators of the bite marks were the mother and father. The recorder found she could not identify the perpetrator of the bite marks on a balance of probabilities. There was a real possibility that either the father or the mother had inflicted them, and thus both parents were in the pool of possible perpetrators.

(4) The injury to the ear was "unexplained".

33. After handing down judgment, the recorder made an order in which she "stood the matter down for the parties to reflect on the directions sought from the court for onward timetabling". Although the parties agreed that there would have to be an assessment of the parents to determine the extent of future risks to the children if they return to live with, or have contact with, either parent, there has not yet been any further case management hearing to consider proposals for such an assessment. Instead, on 30 April 2025, the local authority filed a notice of appeal against the recorder's findings, and the other parties filed responses pursuant to CPR PD52C paragraph 19 supporting the proposed appeal. On 3 June, I granted permission to appeal.

The appeal

34. The local authority's grounds of appeal are:

(1) The recorder fell into error as she failed to reference the schedule of findings document at all and further she failed to outline the findings sought by the local authority (as set out in that document and amplified in closing submissions).

(2) She fell into error as she failed to properly and fully analyse the evidence and consequently the court's determinations in respect of the parents.

(3) She failed to properly and fully consider, determine and address the findings sought in relation to paragraphs 13 to 17 of the schedule of findings document in relation to failings on behalf of the parents.

(4) She failed to properly assess and analyse the evidence in relation to the injuries to the left pinna at paragraphs 4d and 5d of the schedule of findings document.

(5) She failed to properly apply the legal framework as to the consideration of inflicted injury in relation to the injuries to the left pinna at paragraphs 4d and 5d of the schedule of findings document and as a consequence erred (was wrong) in determining these to be "unexplained" injuries given the evidence in the case.

35. In support of these grounds, Ms Jones submitted that the recorder had engaged in a linear approach to the findings and failed to evaluate the evidence in a holistic manner. She addressed the injuries generally without reference to the threshold document. As a result, there was no solid factual matrix to enable a thorough risk assessment to be undertaken. Although the local authority's position remained that the perpetrator of the injuries could not be identified on a balance of probabilities and that the recorder had been right to conclude that there was a real possibility that either parent was responsible, Ms Jones contended that the judge's reasoning underpinning her conclusion was deficient. She had recorded a superficial impression of each parent's evidence without

subjecting it to proper analysis in the context of the rest of the evidence. By way of example, Ms Jones in oral submissions cited evidence that the family circumstances had caused arguments leading to "boiling point" in the small flat. The fact that there was no evidentially grounded path to her conclusion made the next step of risk assessment impossible.

36. Ms Jones submitted that the judge had focused on the bite marks and failed to carry out an adequate analysis of the ear injuries. Her conclusion that they were "unexplained" arose as a result of her failure to engage with the extensive evidence about them. Furthermore, she had been wrong not to have considered the evidence about the ear injuries before reaching a decision as to the perpetrator of the bite marks. Similarly, she had failed to engage at all with the findings sought about failure to protect.

37. The local authority's appeal was supported by the children's guardian. On her behalf Mr Chris Barnes, who had not appeared at first instance, did not endorse what he described as the mechanical approach adopted by the local authority to the schedule of findings. It was his submission that, in care proceedings, neither the parties nor the judge is bound by what is in the threshold document. Mr Barnes' principal argument in support of the appeal was that the recorder failed to carry out an adequate analysis of the perpetrator issue and the ear injuries. She had failed to form the necessary clear assessment of the parents' credibility or to weigh her observations about their evidence against the medical evidence as to the cause and consequences of the injuries.

38. Although the guardian, like the local authority, did not invite the court to identify either parent as the perpetrator, it was submitted that there was a course open to the recorder which would have enabled her to identify the father as the perpetrator, or in the alternative, not to identify a perpetrator but to find that both parents remained in the pool of perpetrators. In the event, the recorder's analysis of the perpetrator issue was insufficient, muddled and unclear, so that the pool finding was "unsafe".

39. Mr Barnes submitted that the recorder's consideration of the ear injury was inadequate. This was an additional example of inflicted significant harm that was well supported in the expert evidence. Further, in reaching a conclusion as to the perpetrator of the bite marks before addressing the evidence about the ear, she failed to consider the totality of evidence holistically and approached the injuries in separate compartments. Contrary to her decision that, in the light of her findings about the bite marks, she did not need to say any more about the ear injury, she needed to reach a clearer conclusion about the ear injury before making a finding about the perpetrator of the bite marks. He further submitted that it was incumbent on the judge to address the issue of failure to protect and in that context consider various strands of the evidence, including the fact that the mother had taken several photographs of injuries over a period of weeks without seeking medical advice and only sought medical advice after marks were seen by the grandfather. Mr Barnes submitted that the recorder had failed to engage with these aspects of the evidence.

40. On behalf of the mother, Mr Damian Sanders supported the local authority's appeal, but from a different perspective. It was his submission that the recorder had erred in failing to identify a perpetrator and that she should have found, on the medical evidence, that the bite marks had been inflicted by the father. It is at least arguable that in order to advance this submission, a respondent's notice ought to have been filed on the mother's behalf under CPR rule 52.13, but Mr Sanders was not prevented from pursuing

the argument. He submitted that there were a number of loose ends in the judgment which the recorder had failed to resolve. The overall flaws in the judgment were on such a scale that a complete rehearing was required.

41. In a brief skeleton argument on behalf of the father, Ms Taryn Lee KC, leading trial counsel Ms Joanne Oakes, endorsed the local authority's argument that the judgment lacked the clarity needed for a risk assessment. In oral submissions, however, Ms Lee, without resiling from that position, very properly took up the request from this Court that, in a case where no party was opposing the appeal, it would be of assistance for counsel to identify contrary arguments. She observed that it would be open to this Court to conclude that that there was a sufficiently clear and cogent analysis of the evidence about the bite marks to support the recorder's conclusion that it was not possible to identify a perpetrator on a balance of probabilities but that both parents remained in the pool of perpetrators. It was also open to this Court to conclude that the recorder's treatment of the ear injury was not wrong. Ms Lee acknowledged that, despite the limited findings, it would be possible for suitably qualified professionals to carry out a risk assessment, perhaps using the "Resolutions" model, which facilitates an assessment of whether it is safe to return a child to the care of a parent who denies abusing the child. Such an approach is assisted in cases such as this where there is a supportive extended family.

Discussion and conclusion

42. Under ground 1, the local authority's argument is that the recorder's judgment was fatally flawed because she failed to follow the schedule of findings sought in the threshold document.

43. In *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, [2009] 1 FLR 1145 at paragraph 15, Wall LJ said:

> "a judge … is not required slavishly to adhere to a schedule of proposed findings placed before her by a local authority. To take an obvious example: care proceedings are frequently dynamic and issues emerge in the oral evidence which had not hitherto been known to exist. It would be absurd if such matters had to be ignored."

44. In *Re EY (Fact-Finding Hearing)* [2023] EWCA 1241 at paragraph 72, having cited Wall LJ's dictum in *Re G and B*, I observed:

> "In exercising these powers, however, a judge is of course required to ensure that the process is fair to all parties. In particular, a party against whom findings may be made is entitled to a fair hearing, including sufficient notice of the findings which may be made and the evidence relied on in support. The practice of the local authority filing a threshold document setting out the findings it seeks and identifying the evidence relied on in support addresses that requirement of fairness, and a judge is only entitled to make findings that go beyond those sought in the document if they are within the "known parameters" of the case: *Re W (A Child)* [2016] EWCA Civ 1140; [2017] 1 WLR 2415,

> *Re L (Fact-finding Hearing: Fairness)* [2022] EWCA Civ 169. If a court is considering making findings that go beyond those parameters, the party against whom those findings would be made must be given fair opportunity to challenge them."

45. In some cases, the judge structures the judgment in line with the threshold document. But he or she is not obliged to do so. It all depends on the facts and issues in the case. Provided the judge in a fact-finding hearing ensures that the parties have a fair hearing and delivers a judgment that covers the ground within the known parameters of the case, it does not matter that the structure of the judgment departs from the threshold document. To insist otherwise would be to impose on judges an unnecessary and unhelpful formalistic approach. It will, however, be helpful if the findings made in the judgment are distilled by counsel into a schedule, or similar document, and appended to the court order approved by the judge.

46. If the judge has omitted to deal with an aspect of the findings sought by the local authority, the first option for the parties is to invite the judge to clarify the reasons. In doing so, they must, of course, comply with the guidance given by this Court in the series of cases culminating in *Re YM (Care Proceedings) (Clarification of Reasons)* [2024] EWCA Civ 71, including the observation at paragraph 90(1) of my judgment in that case:

> "A judgment does not need to address every point that has arisen in the case. The court should only be asked to address any omission, ambiguity or deficiency in the reasoning in the judgment if it is material to the decisions that have to be taken in the proceedings."

47. In the present case, it is said that the recorder failed to deal adequately with three aspects of the findings sought by the local authority: (1) the identity of the perpetrator of the bite marks as expressed in paragraph 8 of the threshold document; (2) the injury or injuries to the ear referred to in paragraph 9 of the threshold document and in the amended paragraph 10 of the final version of the document filed after the evidence, and (3) the allegations of failure to protect added in the final version of the document at paragraphs 13 to 17. The local authority could have gone back to the judge seeking clarification about those matters. But having decided that the whole judgment was defective, they elected to proceed by way of appeal.

48. If we shared the local authority's view, expressed in grounds 2 to 5, that these matters amounted to omissions or deficiencies in the reasoning which were material to the decisions about the children's future, it would of course be open to this Court to allow the appeal on those grounds and remit the matter to the recorder to make additional findings. In this case, however, such a course would be unnecessary and wrong.

49. Neither the local authority nor the guardian contend that the recorder was wrong to conclude that she could not identify a perpetrator of the bite marks. The local authority's case at first instance and on appeal has been that no perpetrator could be identified on a balance of probabilities and that there was a real possibility that either parent was the perpetrator. The guardian identified a course of reasoning which would support a finding that the father was the perpetrator, but did not expressly advocate for such a finding, and accepted that the pool finding was open on the evidence. The complaint of

both the local authority and the guardian is that the analysis was insufficiently detailed and lacked coherence.

50. I disagree. In his often-cited judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraph 115, Lewison LJ described the judge's obligation in giving judgment in these terms:

> "He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury."

The recorder's analysis of the issue of the perpetrator of the bite marks plainly satisfies this requirement. Contrary to the submissions advanced on behalf of the local authority and the guardian, the analysis of this issue was sufficiently clear and cogent to enable any reader to understand the basis for the decision. It is true that her reasons are not expressed in the way they would have been had the recorder handed down a written judgment. This was an ex tempore judgment delivered from notes. I acknowledge that there may have been, as Mr Sanders submitted, some loose ends, but not ones which, when examined, cause the judgment to unravel.

51. I do not accept that, in reaching her conclusions about the perpetrator issue at paragraphs 106 to 145, the judge failed to take into account her earlier analysis of the parents' evidence and credibility at paragraphs 44 to 78. On the contrary, the difficulty she had in interpreting the parents' evidence, for the reasons spelt out, in particular, in the passages from the judgment quoted above, plainly contributed to her overall conclusion that she was unable to identify a perpetrator and that both parents were in the pool.

52. The recorder concluded that she was unable to identify which parent was the perpetrator. She reached that conclusion after setting out her analysis of the evidence. Although she plainly did not refer to all of the evidence, her reasoning is sufficient to demonstrate to this Court why she reached her decision. In short, while the medical evidence suggested that the father was more likely to be the perpetrator, the recorder concluded that it was insufficient by itself to support such a finding. Other evidence pointed away from the father being responsible – in particular, that the father was hardly ever alone with the children and that the mother denied ever hearing an abnormal cry. Insofar as it was permissible for the argument to be put on behalf of the mother before this Court that the recorder erred in failing to identify the father as the perpetrator of the injuries, I would reject it. Taking everything into account, and given her concerns about the reliability of the parents' evidence, the judge was unable to identify a perpetrator on a balance of probabilities. That conclusion is unassailable in this Court.

53. The passage in the judgment dealing with the ear injury or injuries is much shorter than those passages dealing with the bite marks. Ms Jones is right to say that it does not refer to some of the evidence about this aspect of the case, including material parts of the

expert evidence. But no judgment recites all of the evidence. As Lewison LJ observed in *Volpi v Volpi and another* [2022] EWCA Civ 464, at paragraph 2:

> "The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it…. The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him…."

It is arguable that the recorder ought to have expanded on her analysis of the evidence about the ear injury, but in my view her reasoning was sufficient to explain the conclusion, open to her on the evidence, that the injury was unexplained.

54. It is also arguable that she ought to have considered the evidence about the ear injury before reaching a decision about the perpetrator of the bite marks. Good practice requires that "a judge in these difficult cases must 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" (per Dame Elisabeth Butler-Sloss P in *Re T* [2004] EWCA Civ 558, [2004] 2 FLR 838 at paragraph 33). But given her conclusion that the ear injury was "unexplained", I am unpersuaded that, had she taken this course, it would have had an impact on her decision about the perpetrator.

55. The recorder did not make a specific finding that either parent had failed to protect G. The only direct reference to failure to protect in the conclusions in the judgment is in paragraph 160, in a brief reference to a submission made by the guardian. It is arguable that she should have addressed this issue. But for my part, I would not allow the appeal on this ground for the following reasons.

56. First, the paragraphs in the final version of the threshold document relating to failure to protect were only added after the evidence. Without a transcript of the evidence – and of the submissions which were delivered orally, not in writing – it is difficult for this Court to discern the extent to which the issue of failure to protect was fully explored in the evidence. It is clear from the judgment (see in particular the passages in paragraphs 56 and 67 quoted above) that it was explored with the mother, but it was not a feature of the local authority case at the outset of the hearing.

57. Secondly, the way in which paragraphs 15 and 16 of the final version of the threshold document are drafted ("if the injuries were not inflicted by the father/mother, then he/she failed to protect.") link the failure to protect with the identity of the perpetrator. Given the recorder's conclusion that she could not identify the perpetrator, it would be unsurprising if she thought it unnecessary to go on to make the finding that the non-perpetrator failed to protect the child.

58. Thirdly, the summaries of the parents' oral evidence in the judgment, which I have quoted at some length above, show that the recorder found it impossible to discern whether the parents were telling the truth about the key issues. I do not accept the premise of Mr Barnes' submissions that she failed to form the necessary clear

assessment of the parents' credibility, or that she failed to weigh her observations about that evidence against the medical evidence. The judgment contains an exposition and analysis of their evidence, in the context of the medical evidence, and a clear explanation as to why the recorder found it impossible to determine where the truth lay. Although she did not expressly say so, it seems likely that this impeded her ability to make a finding on the issue of failure to protect which had been added to the threshold document by the local authority at the end of the hearing. In those circumstances, given her findings that the injuries to G's cheek were inflicted by bites and that the perpetrator was either the father or the mother, it would be unnecessary and disproportionate to allow the appeal on ground 3 and require the recorder to make a specific finding on the issue of failure to protect.

59. Ultimately, she was able to make findings that were sufficient to establish that the threshold criteria under s.31(2) were satisfied, but unable to make more definitive findings because of the problems and limitations of the parents' evidence. The question whether it is in the interests of the children's safety and welfare to be returned to the care of either parent must now be explored in a risk assessment.

60. It is axiomatic, as Lewison LJ said in *Fage*, at paragraph 114, that:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

This principle of judicial restraint by appellate courts extends to decisions by judges at first instance that they are unable to make findings of fact or, although they are able to make findings, unable to conduct a complete evaluation or to draw the inferences from the findings suggested by the parties. In this case, the recorder found as a fact that the bite marks had been inflicted and that there was a real possibility that one of the parents was the perpetrator. She was, however, unable to find on a balance of probabilities that either parent was the perpetrator, or to make any finding as to the cause of the ear injuries. Her evaluation of her findings did not enable her to reach any conclusion as to failure to protect. Her reasoning was set out in a detailed judgment couched in terms to be expected of an ex tempore judgment. As is invariably the case, the judgment did not cite every aspect of the evidence, but was an ample explanation of her reasoning. There is no basis for thinking that she overlooked any material point. Although it would have been preferable from the children's perspective if she had been able to identify the perpetrator of the bite marks, she was unable to do so, and neither the local authority nor the guardian say that conclusion was wrong. In my view, it ought to be possible for a skilled risk assessor, perhaps using the "Resolutions" model, to work with the family on the basis of the recorder's findings and judgment and produce an assessment that will enable the court to conclude these proceedings with a clear plan for the children's future care.

61. For those reasons, I would dismiss this appeal.

LORD JUSTICE STUART-SMITH

62. I agree.

LORD JUSTICE SINGH

63. I also agree.