Neutral Citation Number: [2024] EWCA Civ 71

Case No: CA-2023-002288

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT CHELMSFORD
HH Judge Shanks
CM22C05001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE GREEN
and
LORD JUSTICE MALES

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YM (CARE PROCEEDINGS) (CLARIFICATION OF REASONS)

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Richard O'Sullivan and **Srishti Suresh** (instructed by **Local Authority Solicitor**) for the **Appellant**
Deirdre Fottrell KC and Maggie Jones (instructed by **Anthony King Solicitors**) for the **First Respondent**
Brendan Roche KC (instructed by **Panesar and Co**) for the **Second Respondent**
Sarah Duxbury (instructed by **BTMK Solicitors**) for the **Fifth Respondent by his children's guardian**
The Third and Fourth Respondents were not present nor represented at the hearing.

Hearing date : 23 January 2024

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 8 February 2024.

LORD JUSTICE BAKER :

Introduction

1. In this appeal, brought by a local authority against findings made in care proceedings concerning a small boy, hereafter referred to as Y, this Court is confronted again with a case in which problems have arisen as a result of requests by the parties for clarification of the reasons given by the judge for her findings at the end of a lengthy fact-finding hearing.

2. The practice of seeking clarifications finds its origins in the decision of this Court in *English v Emery Reimbold & Strick* [2002] EWCA Civ 605. In an effort to prevent unnecessary appeals being launched on the ground of the absence of reasons, Lord Phillips MR, giving the judgment of the Court, proposed the following course:

> "If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course."

3. In due course, this practice was applied to family cases – see *Re T (A Child)* [2002] EWCA Civ 1736 and *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, [2003] 2 FLR 1038. In *Re T*, Arden LJ said, at paragraph 50:

> "In a complex case, it might well be prudent, and certainly not out of place, for the judge, having handed down or delivered judgment, to ask the advocates whether there are any matters which he has not covered. Even if he does not do this, an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware or then believes exists."

This passage was cited by the then President of the Family Division, Sir Nicholas Wall, in *Re M (Children)* [2008] EWCA Civ 1261 who added that it was "high time that the Family Bar woke up" to the decision in *English v Emery Reimbold & Strick*.

4. In *Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205, reported as a Practice Note, Munby LJ (at paragraph 16) characterised the practice not as a matter of courtesy but as a professional obligation:

> "It is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

5. Perhaps unsurprisingly in the light of the Practice Note, it has become increasingly common for counsel at the conclusion of a fact-finding hearing in care proceedings to submit requests for clarification of the judge's reasons. In some cases, the requests are entirely appropriate and not infrequently the responses obviate the need for an appeal. In a series of recent cases, however, this Court has expressed concern about excessive and unnecessary requests for clarification – see in particular *Re I (Children)* [2019] EWCA Civ 898, *Re O (A Child) (Judgment: Adequacy of Reasons)* [2021] EWCA Civ 149, *Re F and G (Children) (Sexual Abuse Allegations)* [2022] EWCA Civ 1002, *Re C, D and E: (Care Proceedings: Adequacy of Reasons)* [2023] EWCA Civ 334, *Re T and Others (Children) (Adequacy of Reasons)* [2023] EWCA Civ 757 and most recently *Re J, P and Q (Care Proceedings)* [2024] EWCA Civ 22.

6. In *Re I*, King LJ noted that

> "requests for extensive clarification, going well beyond the perimeters identified in the authorities, have become commonplace in both children and financial remedy cases in the Family Court. It has become, as we understand it, almost routine for a draft judgment to be followed up with extensive requests for 'clarification' which in many cases can be regarded as nothing other than an attempt to reargue the case or, as here, water down the judge's judgment."

At paragraph 38, she observed:

> "The family court is overwhelmed with care cases. Judges at all levels often move seamlessly from one trial to the next without judgment writing time between them. Routine requests for clarification running to a number of pages are not only ordinarily inappropriate, but hugely burdensome on the judges who have, weeks later, to revisit the evidence and their judgment when their thoughts and concerns have long since moved onto other cases. This is not conducive to the interests of justice."

7. In *Re A, B and C (Fact-finding: Gonorrhoea)* [2023] EWCA Civ 437, Coulson LJ, whilst agreeing that the requests for clarification in that case had been "properly conducted" and "an extremely valuable exercise", observed :

> "In my experience, the practice in family cases of making oral and written requests to the judge for clarification of matters in his or her judgment can sometimes amount to no more than an illegitimate attempt to reargue the case, or to bamboozle the judge into errors or inconsistencies."

8. It is right, of course, as Peter Jackson LJ said in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407 at paragraph 60, that "a judgment that does not fairly set out a party's case and give adequate reasons for rejecting it is bound to be vulnerable." But a judgment in family proceedings, like any other civil judgment, does not have to cover every aspect of the evidence nor every point raised in submissions. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraph 115, Lewison LJ expressed this well-established practice in these terms:

> "The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. 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. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

9. The delivery of a judgment is not a transactional process. Its contents are not open to negotiation. Just as the trial is "not a dress rehearsal" but rather "the first and last night of the show" (per Lewison LJ in *Fage UK Ltd v Chobani UK Ltd*, supra, at paragraph 114), so the judgment is not a draft paper for discussion but the definitive recording of the judge's decisions and the reasons for reaching them. It is therefore inappropriate to use a request for clarifications to reiterate submissions or re-argue the case, or to cite a part of the evidence not mentioned in the judgment and on the basis of that evidence ask the judge to reconsider the findings. In my view it is also inappropriate to couple a request for clarifications with a warning that an application for permission to appeal will be made if the clarification is not provided. I regret to say that this case provides examples of all of these inappropriate requests.

10. The danger is that an unchecked and ill-disciplined process may lead the judge to make statements by way of attempted clarification that water down, undermine or even contradict findings made in the judgment. That is precisely what the appellant local authority, supported by the child's guardian, contend has happened in this case. As a result, they seek a retrial of the fact-finding hearing. In circumstances where the previous fact-finding hearing lasted fourteen days, and to date the proceedings have been ongoing for over two years, that is an alarming proposition.

Summary of Background

11. For the purposes of the appeal, the facts can be summarised briefly. Y's parents met in 2019 and are in their late twenties. Both parents have cognitive difficulties and as a result have been assisted by intermediaries during these proceedings. As I said at the end of the hearing, this Court is grateful to the intermediaries for the work they have done in this difficult and sensitive case.

12. On 10 September 2021, Y was born by Caesarean section after the mother experienced difficulties during labour. Following discharge from hospital, Y and his parents lived with the maternal grandparents until early October 2021, when they moved into a one-bedroom flat. Although the mother and the grandmother have had a fractious relationship in the past, the grandmother provided considerable support with childcare, especially when Y and his parents were living in her home. By contrast, the father provided relatively little direct parenting support. It was the mother's evidence that there was only one brief occasion, lasting about twenty minutes, when she left Y in the

father's sole care. There were other occasions when he looked after Y while she was in the flat.

13. It was the mother's evidence that on 3 October 2021, when Y was aged three and a half weeks, she noticed marks on his left forearm and right elbow. She sent photographs of the marks to the maternal grandmother. At that time, the marks were not brought to the attention of any medical professionals.

14. On 4 November 2021, the mother observed further extensive bruising to Y's right forearm. She again sent photographs of the bruising to the grandmother who advised her to contact the GP. The mother contacted the surgery about a rash on Y's arm, chest and head. The GP advised the mother to take Y to hospital. The mother did not follow this advice. According to the maternal grandmother, the mother told her that she made this decision after talking to the father. In the subsequent proceedings, the father described an incident in which he thought the bruises had been sustained accidentally while he was holding Y as he was standing up from a chair.

15. On 24 November 2021, ZZ, a work colleague of the father, stayed overnight at the family home. According to the parents, he was the only person to have stayed with the parents following Y's birth and had visited the family on only one earlier occasion. In the proceedings there was extensive evidence about what happened that evening, which as summarised below the judge set out in her judgment.

16. On the following day, 25 November, Y was taken to hospital by the mother who complained that he was unable to move his right leg. He was observed to have bruising on his back. Radiological examination revealed that he had sustained a fracture of the right tibial metaphysis along with soft tissue swelling, which medical evidence indicated was likely caused by excessive shearing force such as yanking or pulling of the limb (described in the medical reports as a "bucket handle fracture"), and fractures to his left posterior 6th rib in the lateral aspect and to his lateral 12th rib, both said to have been caused by compression/squeezing or a direct blow.

17. The hospital staff contacted the local authority children's services and, following his discharge from hospital on 9 December 2021, Y was placed into foster care pursuant to an agreement between the local authority and his parents under s.20 of the Children Act 1989. The police started an investigation in the course of which they interviewed the parents, maternal grandmother, and ZZ.

18. On 5 January 2022, the local authority started care proceedings and Y was made subject of an interim care order on 18 January. Case management directions were given for a fact-finding hearing, including permission to instruct a number of medical expert witnesses. In addition to the parents and the child, the maternal grandparents were joined as respondents and separately represented and ZZ was joined as an intervenor. The local authority prepared a detailed schedule setting out twenty-four findings which it invited the judge to make. In short, they sought findings that:

    (1) the fractures and bruises identified on admission to hospital, and the bruises and abrasions shown on the photographs taken on 3 October and 4 November, were inflicted by one (or more) of the following: the mother, the father, the maternal grandmother, the maternal grandfather or, in the case of the injuries seen on admission to hospital, ZZ;

(2) all of the injuries were the consequence of the application of excessive and inappropriate force;

(3) in the event that the injuries were not caused by the mother and/or the father, they failed to protect Y and both failed to seek timely medical attention for the injuries, and

(4) as a consequence, the threshold criteria under s.31(2) of the Children Act 1989 were satisfied.

19. A fact-finding hearing was initially listed in October 2022 – eleven months after the child was admitted to hospital – but was adjourned at the pretrial review when the father successfully applied to instruct an expert to undertake genetic testing. The hearing eventually took place over fourteen days between April and July 2023. Nine witnesses gave oral evidence. The hearing was delayed by the requirement to allow regular breaks in the hearing in accordance with the established practice in cases where one or more of the parties is assisted by an intermediary. By the end of the hearing, the local authority was no longer seeking findings against the grandparents or ZZ.

20. On 31 July 2023, the judge delivered an oral judgment in which she found that all of the injuries had been inflicted by the father. In the order made at the conclusion of the hearing, the judge listed the case for a further case management hearing on 4 September 2023 and for final hearing over nine days in January 2024. The purpose of the hearing in September was stated to be for formal handing down of the judgment, consideration of any requests for clarification and applications for permission to appeal, and general timetabling. Amongst other case management directions, the judge directed the local authority to apply by 7 August for a transcript of the judgment, the cost to be borne equally by the local authority and the five respondents. It was recorded that the transcript would be amended to include a section on the law which the judge had omitted.

21. I set out the subsequent events in more detail below. At this stage, suffice it to say that initial requests for clarification were submitted during August to which the judge declined to respond until the transcript was produced, save to confirm that she had made three findings which the local authority pointed out had been omitted from the judgment, in particular a finding about the mother's failure to seek medical advice for Y. In the event, the local authority did not apply for the transcript as directed and the hearing on 4 September was adjourned.

22. On 6 October, the parties received a written version of the judgment, based on a transcript of the judgment delivered orally but omitting some parts and introducing others, including the section on the law and details of the finding of failure to protect.

23. At a case management hearing on 12 October, the parties sought additional clarification of the judgment. On 19 October, the judge delivered a supplemental judgment in response to those requests.

24. At a further case management hearing on 7 November 2023, the father, supported by the local authority and guardian, sought yet further clarification of the judgment. The judge responded to those requests the same day. On 9 November, an application by the

local authority for permission to appeal was refused. The judge extended time for filing a notice of appeal to this Court to 14 November.

25. On 29 November 2023, the local authority filed a notice of appeal out of time against the judge's findings and seeking a rehearing. On 7 December, I extended time for filing the appeal notice, granted permission to appeal and stayed the proceedings pending determination of the appeal. On 13 December, I varied the terms of the stay to permit a hearing about Y's interim placement to go ahead. At a hearing on 14 December, all parties agreed that Y should move to live with his maternal grandparents under the interim care order.

The judgment

26. As this appeal is based principally on perceived differences and inconsistencies in the judge's reasoning between the original judgment and the responses to requests for clarification, it is necessary to set out the relevant parts of the judgment and the subsequent "clarifications" in some detail.

27. No note of the oral judgment delivered on 31 July was included in the appeal bundle. It was common ground that the written version of the judgment provided to the parties on 6 October 2023 differed in a number of respects from the oral judgment delivered on 31 July.

28. In the written judgment, there was no initial summary of the background. Instead, after a brief introduction, the judge recorded that there was a comprehensive opening note provided by the local authority and timelines prepared on behalf of the authority and the mother. She then embarked on a lengthy exposition of the evidence.

29. In paragraphs 7 to 40, she set out a survey of the medical evidence. No treating clinician had been called but expert evidence had been provided by five witnesses of whom two. Dr Lavanya Vitta, a paediatric radiologist, and Dr Ide Ojo, a paediatrician, had given oral evidence. A report from a haematologist concluded that Y had no abnormality or disorder of the blood clotting system. Another report from an obstetrician advised that the fractures to Y's ribs were unlikely to have been caused at birth. In a third written report, a clinical geneticist identified a family history of a mild connective tissue disorder on the hypermobile spectrum which might explain a greater degree of bruising "after a precipitant force" but would not explain the fractures in the absence of a clear description of an incident.

30. In her report, Dr Vitta had expressed the opinion that the metaphyseal fracture had been sustained in the period of fourteen days prior to the X-ray taken on admission to hospital on 25 November. (The judge erroneously recorded in paragraph 20 of the judgment that her opinion was that the fracture was "about two weeks old" on 25 November. I am satisfied that this was a simple slip which had no bearing on the judge's ultimate analysis). The rib fractures were at least ten to fourteen days old as at 26 November and four weeks old at the date of a follow-up scan on 10 December. The judge recorded Dr Vitta's observations in her report that she found no radiological evidence to suggest an underlying bone or metabolic disease. It was also her opinion that normal handing or rough handling had not caused these fractures.

31. The judge then recited Dr Vitta's oral evidence, including the following points. She was unable to say whether the rib fractures had been caused at the same time or at different times. A child's ribs are pliable and do not break easily. A lot of force had been exerted. As for the leg injuries, she was not able to say if the soft tissue swelling was sustained at the same time as the leg fracture. A metaphyseal fracture can be caused if a child is held at the chest and shaken. The fracture and swelling could have been caused at the same time if the lower leg was pulled, squeezed and jerked.

32. In her report, Dr Ojo advised that bruising was rare in children aged 10 weeks and that the injuries on Y's arms shown in the photographs from October and early November were likely to have been caused non-accidentally. At paragraph 141 of her report (quoted by the judge at paragraph 35 of the judgment), Dr Ojo concluded:

> "In my opinion, none of the injuries described is as a result of rough handling by an adult. The injuries were likely inflicted through the use of significant force over and above the force required for the normal handling of a baby at the age Y presented."

33. At paragraphs 145 to 149, in response to a query about Y's presentation when each injury occurred, Dr Ojo had described the pain and discomfort which the child would have suffered and how he would have cried as a result. The judge did not recite the paragraphs relating to the presentation following the bruises but recorded the doctor's evidence about the fractures:

> "In respect of the metaphyseal fracture, her evidence was that at the time that injury was caused a child would cry and would be distressed (para 149). In respect of the rib fractures, (para.148) of her report, she says:
>
> > "Rib fractures are very painful injuries. They are usually caused by forceful squeezing or compression of the chest. The force would have caused Y severe pain and he would have cried out in distress. There would be a change in his colour, such as the child going blue or pale. He would have had difficulty breathing and irritation to the chest lining due to the fracture of the ribs. Taking deep breaths while crying or feeding would have caused Y more chest pain."

34. The judge recorded Dr Ojo's conclusion

> "that the rib fractures and the bucket handle fracture are injuries which were inflicted. She had considered the bruising as a combination of injuries, unusual in a child of this age, which has driven her to reach her conclusion that the bruising is non-accidental."

35. Over the following 118 paragraphs, the judge recited at considerable length the evidence given by the other witnesses – the social worker, the mother, the father, the grandparents, and ZZ. It is only necessary to note the following points which were of particular relevance to her ultimate decision and to the issues raised on appeal.

36. The judge recorded the mother's evidence about the bruises seen at the start of November. The photographs which she had taken and sent to her mother were included in the court bundle. There had been a period of about thirty minutes between the time she had seen Y unbruised and then bruised. During that period, he had been with the father. She said she had been shocked when she saw the bruises. The judge continued:

> "The father had told her that he thought he might have caught Y under his ribcage and caught his arm when they were in the bedroom. She had contacted her mother. She was a new mum and she did not know what to do. She could not remember if her mum had told her to take Y to the hospital but she might have told her to do that or to take him to the doctor, but she had not done it. She had taken what the father had told her at face value and had believed him."

37. The mother's evidence about the evening of 24 November, as recorded in the judgment, was that Y was "just his normal happy self" until she heard him scream while alone in the living room with ZZ. She and the father ran into the room to find Y "lying on his back, not in the position in which he had been left" and ZZ sitting on the sofa. He "said nothing and just had a blank expression on his face". She and the father took Y into the bedroom and, on taking off his clothes, noticed that his leg was swollen and not moving. She rang her mother who advised her to call 111 or go to hospital if there was an issue during the night. On the following morning, his leg was still swollen and that afternoon she took him to her parents' house and after speaking to her parents decided to take him to hospital.

38. Cross-examined about the hospital record of what she had said to the doctor, she agreed that she had said that she thought the father was sometimes a bit "rough", by which she meant "heavy-handed". He did not know how to handle a baby. He would spend most of his time playing video games and would get frustrated but not lose his temper. She denied inflicting the rib injuries and did not know how they had occurred. She said she believed that ZZ had caused the leg fracture.

39. In the course of her recital of the father's evidence, the judge recorded that he was 100% sure that he had caused the November bruises and described an incident when he had been lying on the sofa with Y and in the act of getting up while holding the baby close to his chest Y had whimpered. He had noticed the mark on his arm which made him feel shocked and distraught. The mother had been shocked when he described what had happened and told him not to do it again.

40. The judge set out at length the father's evidence about the evening of 24 November. Y had been left with ZZ in the living room, propped up in a corner of the sofa. He and the mother were in the kitchen when they heard a loud scream – "not like a normal scream" – and on entering the room found Y on his back on the sofa with ZZ on his mobile phone. When they examined Y, he "was not using his leg properly". The mother phoned the grandmother. The father went to bed because he was working the next morning. When they woke up, he and ZZ left the house. Nothing was said about Y. He thought the fracture had been caused by ZZ.

41. When recounting the grandmother's evidence, the judge recorded her account of the phone call from the mother on the evening of 24 November and the advice she had then

given. At paragraph 144 of the judgment, the judge added this from the grandmother's evidence:

> "[The mother] did come round at about 3 o'clock in the afternoon of 25 November. Her husband had come home from work about thirty to forty minutes later and it was at that point that they had looked at Y's leg. At [the grandfather's] suggestion, [the mother] took Y to hospital. [The grandfather] had said they were not doctors."

42. In her recital of ZZ's evidence, the judge noted that he had denied that Y had screamed while he was alone with him in the living room on the evening of 24 November. He agreed that he had been left with the baby for about three to five minutes. Y had been on the sofa next to him but had started wriggling so ZZ put a cushion next to him to stop him falling. While the parents were in the bedroom, Y became unsettled so he knocked on the bedroom door and told the parents that Y might need a feed. ZZ described how the father, having made up a bottle, picked Y up under his ribs "quite tightly". Y had screamed and the mother came into the room and asked what had happened. The father had said that he did not know. The parents had taken Y into the bedroom and they had all settled for the night. After that, ZZ did not hear any screaming or crying.

43. After her exposition of the evidence, the judge inserted in the written judgment a summary of relevant legal principles which she had omitted when delivering it orally. Next, she made some brief observations about the manner in which the principal witnesses had given evidence, noting that the mother had been nervous and voluble, whereas the father was quite reserved and passive; that she had the impression that the parents were loyal to each other; that the grandparents were open, honest and reliable; and that ZZ had been doing his best to recall events which happened quite a long time ago.

44. Under the heading "The Wider Canvas", the judge then made a number of observations which contributed to her ultimate conclusion. She recorded the mother's description of the parents' relationship as being "volatile" and that the father said that they "bickered". She continued:

> "[The father] is described as a father who was not hands-on and … nervous around his son, not knowing how to handle him …. The mother had conversations with him about being heavy-handed as did the maternal grandfather. The mother has downplayed that yet [it] is what she observed. [The social worker's] note of her visit [on 7] December 2021 … records that the mother appeared scared to allow [the father] to look after Y."

45. The judge then referred to a recording made by the mother in which the father said he "would like to swing him by the legs and smash his head against the wall". The recording had been heard by the grandparents who were clear that he had been referring to Y. The grandfather gave evidence that when he challenged the father about it, he replied that he had said it to wind the mother up. Separately, ZZ had given evidence that he had heard the father say that when Y cried he felt like picking him up and smashing him against the wall. In his evidence the father agreed that he found being a

parent a little difficult but he denied saying anything about smashing Y against the wall. He denied saying anything about that to ZZ and said that in the recording he had not been referring to Y. The judge made the following comment about the mother recording what the father said:

> "…[it]is an unusual thing to have done if there were no good reason. It is not disputed that she made that recording. Why would she do that if she [did] not consider it to be important?"

46. In the concluding section of her judgment the judge set out her findings. Having summarised again the evidence about the injuries, she concluded (at paragraph 191):

> "… I accept the medical opinion. They are not explained by rough handling but rather by the use of excessive force. They were injuries which were inflicted."

47. Under the heading "Perpetrator", the judge set out her findings as to who had inflicted the injuries:

> "192. The only persons who could have inflicted these injuries are the mother and the father. Neither say the other caused the injuries. Can I find which one of them it was? I remind myself that the standard of proof is the balance of probabilities. Any findings I make must be based on evidence and not speculation. The father was a working man and absent from the home for long periods. During that time the mother had the care of the child and her day was punctuated with periods of time spent with her mother. When the father was not at work the parents were together. There was one occasion when the father was on his own with the child whilst the mother went to drop off a friend. This amounted to about 20 minutes. There were times when both were in the flat and the father was effectively left to care whilst the mother was in the bathroom or shower. The mother was seen by professionals as caring of Y and attentive to his needs. She is described by both the father and the maternal grandparents as caring and coping well and being attuned to his needs. She was a parent who sought advice. In contrast, the father is seen as nervous around the child, is seen to have handled the child "roughly", was someone who got frustrated when gaming, breaking remote controls and damaging the fabric of the flat. The recording taken by the mother and played to the maternal grandparents is a worrying piece of evidence – would like to take him by the legs and smash his head against the wall. I do not accept it was said "to wind up" the mother. The mother, in her evidence and no doubt through loyalty to the father, has downplayed that recording. The recording made by the mother and heard by the grandparents uses language very similar to the words ZZ recalls as said to him by the father – when Y cries I feel like picking him up and smashing against the wall. I accept ZZ's evidence in that regard.

> 193. There is too the evidence of the grandmother that her daughter had told her '[the father] had lost his temper', that there were arguments so bad that her daughter had talked about coming home. The grandmother also said in evidence that her daughter 'had a go at [the father] for being rough with the child and she would pull him up about it.'
>
> 194. On the balance of probabilities, I am satisfied that the perpetrator of the injuries is the child's father …."

The clarifications process

48. After the hearing at which the oral judgment was delivered, Mr Richard O'Sullivan, counsel for the local authority, sent an email direct to the judge (copied to the other barristers, solicitors, and local authority team manager) attaching the local authority schedule reflecting the findings made and raising the following queries:

> "I would be grateful if the court could confirm findings 21 and 24 have also been made as I am not sure that these were specifically dealt with in the judgment. In addition, I would be very grateful if the court could clarify the position in respect of finding 23 in so far as it relates to [the mother].
>
> My note of the judgment records that whilst the [mother] had downplayed the threats made to Y by [the father] the court was unable to find that [she] was 'covering up for the father', but the court did not state explicitly whether there had been a failure to protect on [her] behalf or a failure to seek medical attention for the injuries suffered by Y (i.e. finding 23). In the circumstances I would be very grateful if the court could clarify what findings if any the court has made in respect of this issue with reasons ideally addressing the way matter is framed in paragraph 98 of the LA's closing submissions and what appears to be implicit from the judgment that the bucket handle fracture was sustained on the evening of 24 November and that medical attention should have been sought in respect of the November bruising.
>
> I apologise for not seeking clarification on these points whilst in court."

(Finding 21 related to the pain and discomfort Y had suffered as a result of the injuries. Finding 24 was that, in the light of the other findings, the threshold under s.31(2) of the Children Act 1989 was crossed.)

49. On 8 August Ms Sarah Duxbury, counsel for the guardian, sent the following email to the judge, copied to the parties' representatives:

> "Further to your judgment on 31 July 2023:

> Please could you expand on why you have concluded that the Father is the perpetrator of the injuries and why you have excluded the Mother from the pool.
>
> Given that, the Father only had sole care of the child for 20 mins (when the Mother dropped a friend off) and at all other times he had care the of child with the Mother, please could you expand on why you have concluded that the Mother is not covering up for the Father."

50. On 15 August, Mr O'Sullivan sent a further email to the judge gently seeking a response to the two emails set out above. On 20 August, the judge replied "Yes – allegations 21, 23 and 24 were found." She asked the local authority to confirm that it had applied for a transcript of her judgment.

51. On 31 August, Mr O'Sullivan, who had been on leave, replied saying that the local authority had not applied for a transcript, that the father's solicitors had applied for one but the transcribers had not received the tape recording. Mr O'Sullivan told the judge that the local authority was keen to avoid further delay and would not support an adjournment of the case management hearing listed on 4 September pending production of the transcript. The judge replied that it was a pity that the local authority had not applied for a transcript "as envisaged", that she needed the transcript before dealing with any request for clarification, and that this should be completed before dealing with case management issues. The hearing on 4 September was taken out of the list. Over the following days, a series of further emails passed between the advocates and the judge about the progress of the transcript. On 12 September, the judge informed the parties: "I now have the transcript and will deal with it as soon as I am able".

52. On 6 October, the judge sent the approved written judgment to the parties. It was based on the transcript of the oral judgment but included a number of corrections and additions. Without seeing a note of the oral judgment, the precise extent of the amendments is unclear. Although this was not raised in the appeal hearing, I infer that, in response to the local authority's query about finding 21 in its schedule, relating to the pain and discomfort suffered by Y as a result of the injuries, the judge added the following sentence to paragraph 191:

> "They are injuries which would have caused the child to suffer. Dr Ojo deal [sic] with how his likely presentation would have been at the time of the various injuries (paras 145-149 report 13 October 2022) – crying, discomfort in particular."

53. What is clear, however, and of particular relevance to this appeal, is that the written judgment included the following additional paragraph:

> "195. Y should have had medical attention for his injuries. Hs parents should have ensured that he did but they did not do so. In respect of the extensive bruising to his arm the mother certainly showed it to others but when she had a telephone consultation with the family's general practitioner she was advised to take him to a paediatrician but having consulted the father did not act upon the advice. In respect of the bucket handle

> fracture it was only at the insistence of the grandfather that the child was taken to hospital."

54. In an email the judge informed the parties that the case had been relisted on 12 October and asked for any requests for clarification to be submitted by 4pm on 10 October. This request precipitated requests from several parties.

(1) On 8 October, Mr Nicholas O'Brien, counsel for the paternal grandfather, submitted a list of suggested corrections and the following request for clarification of paragraph 195:

> "Having regard to *Re L-W* [2019] EWCA Civ 159 … clarification is sought as to the basis on which the mother is alleged to have failed to protect Y from harm e.g. was it knowledge or reasonable grounds to suspect that the father was hurting or likely to hurt Y or was it only the reluctance to get Y prompt medical treatment (as set out in para 195) or some combination?"

(2) On 10 October, Mr Brendan Roche KC on behalf of the father submitted a further list of suggested corrections, and added:

> "I also agree with Mr O'Brien that it would be helpful to know in greater detail what you have decided on the issue of failure to protect and the knowledge of the parents and grandparents."

(3) Later that evening, Mr O'Sullivan submitted a request for clarification of seven points. So far as relevant to this appeal, I set out those requests below when recording the judge's response.

(4) Finally, on 11 October, Ms Maggie Jones sent an email to the judge raising a number of issues. She started with this observation:

> "With apologies for the delay in responding.
>
> In respect of paragraph 195 of the transcript of your judgment under the heading "Failure to Protect" it should be noted (1) that M always sought advice from [the maternal grandparents], and had taken Y to hospital on at least 2 occasions when she had concerns and (2) that she says that she did not take Y to hospital about the marks on his arm because they were fading
>
> You also state in paragraph 195 that it was only at the "insistence" of the grandfather that the child was taken to hospital.
>
> Please could you deal with the following evidence."

Ms Jones then cited a number of passages from the written evidence and continued:

> "It is clear from this evidence that M sought advice from the MGPs when she was concerned about Y in any way, and did so

> on 24 & 25 November, discussing the position with them and taking Y to hospital following discussions and on their advice. The evidence does not suggest that she delayed seeking advice or taking Y to hospital, or that it was only on the "insistence" of GF that she took him to hospital.
>
> The suggestion that M did not seek medical advice in respect of Y or only took him to hospital reluctantly or on the "insistence" of GF is not borne out by the evidence."

Ms Jones then recited paragraph 144 of the judgment (quoted at … above) and continued:

> "We would seek clarification in respect of paragraph 195, which, as I understand, was not part of your oral judgment on 31 July. We would say that there is not the evidence to suggest that M failed to protect/seek medical advice, either generally or on 24/25 November."

55. At the case management hearing on 12 October, the judge informed the parties that she would respond to their request for clarification in a supplemental judgment. Further directions were given, including an order that the parents and grandparents file statements by 31 October responding to the findings and setting out proposals for Y's future care. The proceedings were listed for a further case management hearing on 7 November to consider, inter alia, any application for permission to appeal, applications for further assessments, and the grandmother's application for an interim child arrangements order.

56. The judge's clarification response, sent to the parties on 19 October, contained three sections, responding respectively to (1) the local authority, (2) the guardian, and (3) the mother, father and grandparents with regard to failure to protect.

57. The seven questions raised by the local authority all related to the events of 24 November and the metaphyseal fracture. It is unnecessary to set out questions and responses in full. The following summary will suffice for the purposes of this appeal.

(1) In response to an inquiry whether it was found that the fracture was sustained after the parents removed Y from the living room where ZZ was sitting, the judge replied:

> "There is no evidence of an event involving a mechanism such as would cause the fracture while Y was with ZZ who was occupied scrolling through Facebook with the television on. The fracture was sustained at some point after the parents had arrived home."

(2) In reply to a question whether the court therefore did not accept the parents' account of hearing Y scream while in the room with ZZ, the judge replied:

> "ZZ was not responsible for the fracture. His account was of believing Y needed a bottle, whinging - screaming when his

> father picked him up from the sofa and starting to cry more when his father took him to the bedroom. This was a straightforward account. I reject the parents' evidence they heard a scream causing them to rush to the living room."

(3) Asked whether on the parents' evidence she accepted that the mother was with Y at all material times on 25 November after he was removed from the living room, the judge replied "yes, unless she visited the bathroom", adding that there was no evidence that she did so.

(4) In response to a question how the injury could have been caused by the father without the mother knowing he had done so, the judge responded that the mechanism described by Dr Vitta – a jerking-type movement – "may well go unobserved."

(5) Counsel pointed out that when delivering her oral judgment, the judge had said that she could not find on a balance of probabilities that the mother was covering up for the father, but this passage was omitted from the written judgment. The judge responded that she could not find on a balance of probabilities that the mother was covering up for the father, nor did she consider that the mother colluded with the father in blaming ZZ.

58. In response to the guardian's request to expand on why she had concluded that the father was the perpetrator and excluded the mother from the pool, the judge referred to the wider canvas, including the positive observations made of the mother by family members and others – "loving and attuned, if anything over-protective". She added:

> "The evidence shows that when anything appears to have been "wrong" with her son she has not sought to conceal the fact but rather has sought advice. There are only the occasions referred to above when she has not ensured Y has had medical advice in a timely way – not taking him to a paediatrician as advised and delaying in respect of the swelling to his leg and it subsequently transpiring, he had sustained a fracture."

In response to a further query from the guardian as to why, given that the father had only looked after the child by himself for twenty minutes, she had concluded that the mother was not covering up for the father, the judge cited, first, the mother's cognitive difficulties which "would likely impact upon her ability to question" and, secondly, "her actions when she noticed anything 'wrong' with the child [which] are not consistent with her covering up for father."

59. In reply to the various queries raised by the family members about the failure to protect finding in paragraph 195 of the written judgment, the judge referred at some length to the evidence about the mother's failure to follow the grandparents' advice in respect of the November bruises and the delay of fifteen hours in seeking medical attention for the leg injury noticed on the evening of 24 November.

60. On 31 October, the father filed a statement, in accordance with the court's earlier direction, responding to the judge's findings and setting out his proposals for Y's future

care. The statement contains further evidence about how he and the mother had cared for Y and about the events of 24 November. It included the following passage (at paragraph 5):

> "I am really struggling with the judge's decision because I have never intentionally or knowingly hurt Y. I love him too much to ever hurt him. I am also sure that I have never lost my temper with him, at any time since he was born. I accept I was very nervous as a first- time father, and I do not argue with the notion that I may have roughly handled Y through inexperience or ignorance of how to do so properly. There were very few times that I was on my own with Y. I also immediately told [the mother] on the only occasion that I thought I had caused the marks to Y's arm, and I would have told her if anything else had happened. If I had thought that Y was hurt at any other time, the first thing that I would have done was told [the mother]."

61. It had plainly not been anticipated that there would be any further request for clarification. On 2 November, however, Mr Roche filed a position statement seeking further clarification. Under a heading "Inflicted or not?", he wrote:

> "The court found that all the injuries were inflicted but nowhere defined what exactly was meant by the term "inflicted". Looking at the way in which "inflicted" is used in the judgment, particularly the several places where it is used in contrast to "accidental", it seems that "inflicted" should be taken to mean "non-accidental" … The finding that the injuries were non-accidental or inflicted is sufficient for the satisfaction of the threshold criteria but does not indicate the level of culpability of the perpetrator which is important for assessments undertaken during the welfare stage of the proceedings."

62. Mr Roche then cited a lengthy passage from the judgment of Ryder LJ in *Re S (Split Hearing)* [2014] EWCA Civ 25, paragraphs 17 to 20. Of particular relevance is paragraph 19 where Ryder LJ observed:

> "The term 'non-accidental injury' may be a term of art used by clinicians as a shorthand and I make no criticism of its use but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and / or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of section 31(2)"

63. Mr Roche observed that the father "has always denied knowingly causing Y harm and continues to do so in his latest statement at paragraph 5". He then put forward his three further requests for clarification.

(1) "The court is invited to clarify its judgment by expressly accepting that the father did not deliberately harm Y and did not realise that he had harmed Y, save on the occasion in early November 2021 when he thought, probably correctly, that he had bruised Y's arm."

(2) "The court is asked to find that, on the balance of probabilities, the father was not angry or frustrated when he caused the bucket handle fracture on 24th November 2021."

(3) "We invite the court to clarify its judgment, by expressly accepting the evidence of Dr Saggar that Y may have hypermobile EDS or the milder form of hypermobile spectrum disorder, HSD, and therefore may suffer a greater degree of bruising and bleeding after suffering a force that initiates capillary bleeding."

Although the first and third requests are expressed as invitations to "clarify", they are all, in reality, invitations to make further findings.

64. Mr Roche supported these requests by further submissions, over four pages, drawing on the findings in the judgment, the October clarifications, and various parts of the evidence. Amongst his comments was the observation that one of the father's main concerns about the judgment was that it contained no mention of his cognitive difficulties. He set out a table comparing the psychological test results of the parents, and asserted that it was clear that the father's cognitive ability is significantly lower than the mother's. He continued,

> "If [the mother], a much more experienced and attuned parent, was unaware of [the father] injuring Y, then it is more probable than not that [the father], with his greater cognitive difficulties, bordering on a learning disability, and his inexperience as a parent, did not know he had injured Y either."

He then submitted:

> "If [the father] caused [the metaphyseal fracture], as the court has found, it was caused without malice, through his inept rough or forceful handling of the baby."

He made further submissions and the bruising.

65. In respect of each request, Mr Roche added that, if the court declined to give the clarification sought, "we seek permission to appeal".

66. The judge responded to the further requests in a written document which was, I understand, handed down at the hearing on 7 November. As her responses were a major factor in the decision to bring this appeal, I shall set out the document in full.

> "FURTHER CLARIFICATION OF JUDGMENT OF 31.7.2023
> AT REQUEST OF FATHER

(The necessity of clarification on these issues being supported by the Local Authority and Guardian for the purposes of the updating family assessments)

1. The court is invited to clarify its judgment by expressly accepting that the father did not deliberately harm Y and did not realise that he had harmed Y, save on the occasion in early November 2021 when he thought, probably correctly, that he had bruised Y's arm.

Finding

The word inflicted was used in my Judgment, but I did not say the injuries were deliberately inflicted. Mr Roche correctly refers me to the case of Re S (Split Hearing) [2014] EWCA Civ 25, [2014] 1 FLR 1421 with which I am familiar. The element of wrong may involve a lack of care. Importantly I remind myself that this is the first child of both parents. The father was an inexperienced parent, described by the maternal grandfather as something of a spectator, who found parenting a small baby difficult. The injuries were the result of a lack of care borne through inexperience as a parent which, together with his cognitive difficulties, meant he was unlikely to have the awareness and attunement to the handling of a child, in particular the careful handling referenced in the expert reports. He simply did not get it right, and did not recognise any harm had been caused.

2. The court is asked to find that, on the balance of probabilities, the father was not angry or frustrated when he caused the bucket handle fracture on 24th November 2021.

Finding

There is no evidence to support any assertion that at the time of the incident with the leg the father presented as angry or frustrated.

3. We invite the court to clarify its Judgment, by expressly accepting the evidence of Dr Saggar that Y may have hypermobile EDS or the milder form of hypermobile spectrum disorder, HSD, and therefore may suffer a greater degree of bruising and bleeding after suffering a force that initiates capillary bleeding.

Finding

In my Judgment, I specifically referenced all of the expert evidence, including that opined by Dr Saggar, who did not give oral evidence, and his evidence was not challenged. Dr Saggar has a niche and specific practice as a geneticist. Dr Ojo is a

> Consultant Community Paediatrician. Dr Saggar's opinion is preferred, where there is a difference between the two experts, in the area of his specialism. I accept his expert evidence.
>
> 4. The Local Authority then sought clarification on the extent to which the Court had considered the injuries separately or determined one of the injuries and used that in terms of propensity to have caused the other injuries.
>
> Finding
>
> Dr Ojo considered it was relevant to consider the constellation of injuries. The wrongdoing on the part of the father was in terms of lack of care."

67. Following this final response, the local authority applied for permission to appeal.

68. Pausing there, it can be seen that this litany of requests and responses contains examples of both good and bad practice. Some clarification or amplification of the reasoning in the judgment was plainly required. The local authority was right to point out that the judge had not dealt with the issue of failure to protect. It was also plainly right to inquire whether the judge had found that the mother was covering up for the father as a sentence in the oral judgment to the effect that she was not covering up was removed from the written version. But a number of the other requests were inappropriate. The email sent on behalf of the mother on 11 October identifying certain aspects of the evidence and inviting the judge to reconsider her findings was a glaring example of using the process to reargue the case. The final request on behalf of the father took the whole process to another level. It sought findings that had not been raised previously, made fresh submissions in support of those findings, relied on additional evidence filed by the father, and warned that, if the judge declined to make the clarifications sought, an application would be made for permission to appeal.

69. Overall, the scale of this clarification exercise was wholly unreasonable. I calculate (although I may have lost count) that there were no fewer than seven requests for clarification between 31 July and 7 November. I am sure that counsel were not intending to "bamboozle" the judge (to use Coulson LJ's word) by their repeated requests but she would certainly be forgiven for feeling bamboozled. In some instances, counsel were plainly trying to lead the judge to refine her judgment so that her ultimate findings were closer to the outcome favoured by their client. The question for this Court is whether at the end of this chaotic process the integrity of the judgment has been fatally undermined.

The Appeal

70. The local authority's appeal was supported by the children's guardian but opposed by the mother and father, who were represented at the appeal hearing, and by the grandparents, on whose behalf brief written submissions were made.

71. The local authority put forward five grounds of appeal.

(1) The finding that all the injuries suffered by Y were the consequence of a 'lack of care' by the father was not supported by the expert medical opinion.

(2) The medical records and expert evidence did not support the court's finding that the parents would have been unaware that Y had suffered significant injuries.

(3) The finding that the father had not intended to cause injury to Y was incompatible with the weight that the court had attached to previous threats of harm made by the father to Y, which the judge relied upon in concluding that the father had caused all of the injuries.

(4) The judge failed to sufficiently consider whether the father could have caused each injury suffered by Y, determining the issue of perpetration on grounds of propensity rather than opportunity, and failing to have sufficient regard to the absence of opportunity to cause injury without being detected by the mother.

(5) The finding that the mother was unaware that the father had injured Y on the evening of 24 November 2021 and had therefore not colluded with the father to blame ZZ for the leg fracture supported by the expert medical opinion, as to how Y would have reacted following this injury, or by the evidence provided by his parents.

It is convenient to deal first with grounds (1), (3), and (4), which concern the findings against the father alone, and then grounds (2) and (5), which concern both parents.

72. To a very considerable extent, all of the grounds are based on perceived differences and inconsistencies between the original judgment and the responses to requests for clarification. In their oral submissions to this Court, Mr O'Sullivan and Ms Suresh frankly acknowledged that the local authority had not been minded to appeal following delivery of the judgment but asserted that they had been obliged to do so in the light of the subsequent clarifications. It was the local authority's view that the judge's ultimate analysis did not reflect the evidence and failed to provide an accurate basis on which assessments could safely be conducted to enable decisions to be made about the child's future and the parents' role in his care. For that reason, the local authority, supported by the guardian, sought a rehearing of the fact-finding hearing before a different judge.

73. As I observed at the start of this judgment, given the extensive delays that have already occurred in these proceedings, the prospect of such a rehearing is alarming. Under s.32(1) of the Children Act 1989, a court dealing an application under Part IV of the Act must draw up a timetable for disposing of the application without delay and in any event within twenty-six weeks. That period may only be extended if the court considers it necessary to enable the court to resolve the proceedings justly, having regard to the impact on the child and the duration and conduct of the proceedings: s.32(5) and (6). These proceedings have already lasted over two years. S.1(2) of the Act requires the court to have regard to the principle that any delay in determining any question relating to the child's upbringing is likely to prejudice the child's welfare. Any further delay in concluding these proceedings is likely to have an adverse impact on Y. He was only ten weeks old when removed from his parents' care. He is now aged two and a half. The first fact-finding hearing lasted fourteen days. One would hope that a retrial would be very much shorter, but even if it were listed for only, say, five days it would not be heard for several months and, with a final welfare hearing to follow after assessments,

it is unlikely that the case would be concluded before Y's third birthday and possibly not before the end of this year.

74. All courts in family proceedings are required to comply with the overriding objective, expressed in the Family Procedure Rules as being to enable the court to deal with cases justly, having regard to any welfare issues involved. That includes ensuring that the case is dealt with expeditiously and fairly. On behalf of the mother, Ms Deidre Fottrell KC, leading Ms Jones on the appeal, pointed out the grave difficulties her client with her cognitive difficulties would face participating and giving evidence again so long after the event. Mr Roche made the same point on behalf of the father. The overriding objective also requires the court to deal with a case in ways which are proportionate to the nature, importance and complexity of the issues, and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. The family courts are burdened with a large backlog of cases. This Court must not add to it without good reason.

75. Nevertheless, it would be incumbent on us to order a retrial if we thought that the local authority's analysis of the outcome of the fact-finding exercise was correct. If a judge in the course of responding to requests for clarification makes statements which plainly contradict what is said in the judgment, that may undermine the findings to a degree which amounts to a serious irregularity so as to justify an appeal. But the fact that one word or phrase in the clarifications response, taken in isolation, is capable of a different interpretation from what is said in the judgment should not inevitably lead to such an outcome. What is said in the responses must always be read in the context of the findings in the judgment.

76. The starting point for analysing the judge's findings is the judgment where the judge's fundamental finding about the cause of the injuries was set out in paragraph 191:

> "I accept the medical opinion. They are not explained by rough handling but rather by the use of excessive force. They were injuries which were inflicted."

Everything said by the judge in her responses to requests for clarification must be interpreted in the light of that clear finding.

77. The schedule of findings sought by the local authority did not invite the judge to make an express finding as to the state of mind of the perpetrator of the injuries and the judge did not do so. The word "inflict" can mean "cause intentionally" or alternatively simply "cause", depending on the context. So far as I can see, the words "intend" and "intent" do not appear in the judgment nor in any of the responses to requests for clarification. Having regard to the judge's reasons in paragraph 192 of the judgment for identifying the father as the perpetrator, which included the evidence about his expressions of frustration, it would be reasonable to infer from the judgment that the judge concluded that he had inflicted the injuries in momentary frustration. But the father's state of mind when inflicting the injuries was not expressly considered in the judgment nor raised in the requests for clarification, or the judge's responses. until Mr Roche's position statement dated 2 November.

78. The local authority's first and third grounds of appeal are based on perceived inconsistencies between the judge's response to the points raised in that position

statement and the judgment. Under the first ground, it is submitted that the statement in the 7 November clarification that "the injuries were the result of a lack of care" was inconsistent with the expert evidence and in particular the opinion of Dr Ojo that "none of the injuries [was] a result of rough handling by an adult [but rather] were likely inflicted through the use of significant force over and above the force required for the normal handling of a baby". Under the third ground it is submitted that the finding that the father had not intended to injure Y was incompatible with the weight that the court attached to the threats of harm he had uttered which the judge relied on when concluding he was the perpetrator of all the injuries.

79. Taken in isolation, the phrase "lack of care" in the 7 November clarification response might be thought to be inconsistent with the basic finding in the judgment, based on Dr Ojo's evidence, that the injuries were not explained by rough handling but rather by the use of excessive force. But the 7 November clarifications were provided in response to the requests set out in Mr Roche's position statement in which he cited the passage from Ryder LJ's judgment in *Re S (Split Hearing)* [2014] EWCA Civ 25 quoted above. Ryder LJ distinguished between an injury which is caused unintentionally and an injury "which involves an element of wrong", and added:

> "That element of wrong *may involve a lack of care* and / or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction [my emphasis.]"

The judge's response to Mr Roche's invitation to accept that the father did not deliberately harm Y indicates that she considered the father's conduct to lie at the less serious end of the spectrum of the "element of wrong" identified by Ryder LJ. She reached that conclusion on the basis of the evidence that he was an inexperienced parent who found looking after a small baby difficult. That, coupled with his cognitive difficulties meant that he was unlikely to have the awareness and attunement needed to handle a small baby and did not recognise the harm he had caused.

80. I do not accept the submission by Mr O'Sullivan and Ms Suresh under ground one that this assessment amounted to a rejection of the expert evidence or a substitution or modification of her basic finding that the injury was inflicted by the father using excessive force. Although one might debate whether there is a distinction between an injury caused by rough handling and an injury caused through lack of care, it would be wholly disproportionate to overturn the findings and order a rehearing on the basis of any perceived contradiction on this issue. The judge's finding as to the father's state of mind as set out in the 7 November clarification was open to her on the totality of evidence.

81. The perceived inconsistency highlighted in the second ground is between the judge's reliance on the father's expressions of frustration when concluding in paragraph 192 of the judgment that he was the perpetrator of the injuries and her statement in the 7 November clarification that there was "no evidence to support any assertion that at the time Y sustained his leg injury the father presented as angry or frustrated". Taken in isolation, the latter is correct – there was indeed no evidence as to the father's presentation when the leg injury was sustained. The judge did not go on to consider whether she could or should infer that it had been inflicted in a moment of frustration. On the evidence it would have been open to her to draw that inference, but she did not do so. I accept that there is arguably some inconsistency between the reasoning in the

judgment and the subsequent clarification. I do not, however, accept Mr O'Sullivan's and Ms Suresh's submission that any inconsistency is sufficiently serious to require this Court to set aside the findings. It would again be wholly disproportionate to overturn the findings and order a rehearing on that basis.

82. The judge's overall conclusion can be shortly summarised as follows. The child sustained serious injuries on more than one occasion. They were not caused by rough handling. They were inflicted by the father using excessive force. He did not inflict them deliberately out of malice but rather because, as a result of his inexperience and cognitive difficulties, he did not know how to handle a small child and did not recognise the harm he had caused. This conclusion was based on the judge's assessment of the totality of the evidence after a very long hearing in which she heard evidence from the key witnesses. As the trial judge, she was in a unique position to carry out that assessment and there are no compelling reasons for this Court to interfere. It is a coherent conclusion which is plainly sufficient for the purposes of future assessments.

83. There is no merit in the fourth ground of appeal. It is correct that the father spent very little time alone with the child and there were therefore limited occasions when he could have caused the injuries in the mother's absence. But it was the local authority's case that the injuries were caused by either the mother or the father. The fact that the father was not often alone with the child did not prevent the local authority identifying him as a possible perpetrator. It is difficult to see on what basis it is now said that the judge was wrong to make a finding that the local authority always asserted was open to her. Once again, it would be wholly disproportionate to overturn the finding as to perpetrator – a finding which no party is seeking to challenge – on the ground that she made it "holistically" rather than re-considering each injury separately.

84. I turn to the remaining grounds which involve both parents. It is said that the medical evidence did not support the finding that the parents would have been unaware of that Y had suffered significant injuries. It was certainly Dr Ojo's opinion, set out in paragraphs 148-9 of her report quoted above, that Y would have cried in distress on sustaining his rib and metaphyseal fractures, although Ms Fottrell and Mr Roche both cited a comment in her oral evidence (not mentioned in the judgment) that every child reacts differently to pain and injuries. Mr O' Sullivan and Ms Suresh submitted that there was no evidence that the parents were incapable of discerning that Y was in pain and pointed to the judge's observation – part of her reasoning for concluding she was not the perpetrator – that the mother was "loving and attuned – if anything, over-protective".

85. In my view these submissions do not fully reflect the judge's findings about the parents' state of mind. She found that, because of his inexperience and cognitive difficulties, the father was unaware of the harm he had caused. The mother was unaware that the father had inflicted injuries on Y but was aware that things were "wrong" with Y and phoned her mother about it, as she always did when faced with a problem. It was not for Dr Ojo to express a view whether these parents, with their characteristics and difficulties, would or should have realised that Y had sustained injuries. It was a matter for the judge to assess on the totality of the evidence.

86. The fifth ground of appeal overlaps the second and addresses the finding that the mother was unaware that the father had injured Y. It is submitted that if, as the court has found, the father was responsible for all of the injuries, then the mother must have known that

he had caused injury to Y, took no steps to protect him from further injury and was complicit in attempts to blame ZZ for an injury that she must have known that he did not cause. It is this ground of appeal on which Ms Duxbury for the guardian particularly focused. She pointed out that the judge failed to deal with the issue of collusion at all in her judgment and only mentioned it in one line in her October clarification.

87. The lengthy schedule of findings sought by the local authority did not include an allegation that the parents had colluded to blame ZZ. The judge rejected the parents' evidence that they heard Y scream while he was alone in the living room with ZZ. She found that the mother was loyal to the father and had "downplayed" the significance of the recording she took and played to the grandparents. But she "could not find on the balance of probabilities that mother was covering up for father" and did "not consider that mother colluded with father in blaming ZZ". It would certainly have been open to the judge to reach the opposite conclusion on the evidence, but she was not bound to do so.

88. Unsurprisingly, Ms Fottrell responding to grounds (2) and (5) on behalf of the mother relied on the well-established principle that an appellate court should not interfere with a judge's assessment of evidence or findings unless there is a very clear justification for doing so. Here, the judge's findings about the parents were, once again, based on her careful scrutiny of their evidence. There is no justification for interfering with her assessment. I accept that the judge's treatment of the collusion issue was perfunctory. But given the extensive findings which the judge has made, including the finding that the mother failed to seek medical attention for a child, it would be wholly disproportionate and unnecessary to direct a rehearing for that issue to be reconsidered.

89. In her submissions to this Court, Ms Fottrell acknowledged that the judgment may have benefitted from being more thoroughly and fully reasoned and that a different judge may well have provided a more expansive and detailed analysis. The fact that the judge's reasoning is spread across three different documents is, as Ms Fottrell put it, less than ideal. But her findings were based on her scrutiny of the evidence which she, as the trial judge, was uniquely able to assess. The written judgment, amplified by the responses to requests for clarification, provides a sufficient explanation of the reasons for her findings. I am not persuaded that they are undermined by any significant or material inconsistencies. In those circumstances, therefore, I would dismiss the appeal.

90. Finally I return to the vexed issue of requests for clarification. It may be, as Ms Fottrell suggested during the appeal hearing, that it takes time for the messages from reported cases in this Court to get through. But, if I may adopt the words of Sir Nicholas Wall P quoted above, it is high time they did. This case illustrates that the procedure is still being misused. I would therefore draw the following lessons to be learned from this case, in the context of other cases which have involved similar examples of the practice being misused:

    (1) 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. In care proceedings, the decisions are whether the threshold criteria for making orders under s.31(2) are satisfied and, if so, what orders should be made to meet the child's welfare needs.

(2) When making a request for clarification of any perceived omission, ambiguity or deficiency in the reasoning in the judgment, counsel should therefore identify why the clarification is material to the decisions that have to be taken in the proceedings.

(3) Counsel should never use a request for clarification as an opportunity to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings.

(4) Requests for clarification should not be sent in separately by the parties but rather in a single document compiled by one of the advocates. If necessary, there should be an advocates meeting to compile the document. Save in exceptional circumstances, there should never be repeated requests for clarification.

(5) Judges should only respond to requests for clarification that are material to the decisions that have to be taken in the proceedings.

91. The purpose of the process of clarifications is to head off unnecessary appeals. In a number of recent cases, the misuse of the process has had the opposite effect. I hope that hereafter counsel will confine requests to matters which are material to the proceedings and that judges will deal robustly with requests that exceed what is permissible.

LORD JUSTICE GREEN

92. I agree that the appeal should be dismissed for the reasons given by Lord Justice Baker and with the further observations of Lord Justice Males.

LORD JUSTICE MALES

93. I agree with the judgment of Lord Justice Baker. However, I wish to say something about the practice of 'requesting clarification' of fact finding judgments which appears to have become a real problem in family cases.

94. First, I acknowledge that counsel may sometimes be on the horns of a dilemma. If no request for clarification is made on those rare occasions when a judgment is patently inadequate, criticism may be made if a complaint of inadequate reasons is made for the first time on appeal. Nevertheless, this court has warned repeatedly against the inappropriate use of the 'request for clarification' procedure. It was suggested by counsel that the message may not have got through to family law practitioners as yet, but if that is so, it is high time that it did.

95. Second, a 'request for clarification' should not be used as a means of attempting to water down findings which have been made in the judgment, still less to negotiate with the judge about what needs to be said in order to avoid an appeal. Whether or not that was the intention, it appears to have been the result of the process in the present case. In my judgment the only possible interpretation of what the judge said at [191] to [193] of her judgment is that the father was the perpetrator of non-accidental injury, and that his actions were intentional, albeit the result of a momentary loss of temper rather than any pre-planned malice. Otherwise the judge's references to the father's habit of destroying his remote control in a fit of temper and his comment about wanting to injure the child as her rationale for finding him to be the perpetrator do not make sense. In

those circumstances I can see no justification for asking for clarification whether the injuries were deliberately caused.

96. Third, if a judge proposes to 'clarify' a finding, she should ensure that the clarification clarifies rather than obscures what is said in the judgment. If, which should only happen very rarely, a judge intends to modify or withdraw what is said in the judgment, the clarification should make that explicit and should explain why the judge has changed her mind. Otherwise this court will proceed on the basis that the approved transcript of the judgment contains the judge's findings and that what is said by way of clarification is intended to add to but not to change those findings. In the present case, the judge said nothing in her clarification to indicate that she had changed her mind about what she had said at [191] to [193]. Whatever may be the true interpretation of some aspects of her 'clarification', which I have not found easy to determine, those findings stand.

97. Fourth, I would suggest that it is always necessary to have firmly in mind that the purpose of a fact finding hearing is limited to determining those facts which are necessary in order to make decisions about a child's future. It is not necessary or even desirable for judgments to make findings about everything which has been in issue in the course of the hearing. Whether clarification is necessary in order for a decision to be made about a child's future should be the touchstone. If clarification is sought, counsel should explain why it is necessary in order for such decisions to be made. That will assist in focusing minds as to whether clarification is really necessary. If no such explanation is advanced, or if the explanation is unconvincing, judges may safely conclude that it is not.

98. Finally, I agree that to direct a fresh fact finding hearing in this case would be disproportionate and, frankly, disastrous. A fresh hearing could take place no earlier than mid-2024 and would be concerned with events as long ago as October and November 2021. Despite the shortcomings of the original judgment and the unsatisfactory nature of the process of clarification which followed, it is unrealistic to think that such a fresh hearing would provide a clearer picture than is now available or would result in a more just outcome. Given both parents' cognitive difficulties, there is very little prospect that they would be able to participate properly in such a hearing. As it is, the findings made are that there were serious and significant failings by both parents. That is self-evidently so in the case of the father. Realistically, Ms Fottrell accepted that even though the judge did not make the full extent of the findings sought by the local authority against the mother, the findings which she did make were themselves serious and significant.

99. It is on this basis that decisions must now be made about the future care of this child, while recognising also that considerable time has passed and that a careful assessment of both parents as they now are will need to be made in order to determine what role they can safely play in their child's's life.