Neutral Citation Number: **[2020] EWFC 59**

IN THE FAMILY COURT SITTING AT BIRMINGHAM **Case No:BM19C00293**
IN THE MATTER OF THE CHILDREN ACT 1989

Birmingham Family Court
33 Bull Street, Birmingham B4 6DS

Date: 14th July 2020

Before:
HER HONOUR JUDGE KATHERINE TUCKER

IN THE MATTER OF M AND Z (CHILDREN)

Between

A LOCAL AUTHORITY **Applicant**

and

YS

1st Respondent

and

ZI

2nd Respondent

and

M AND Z

Respondent Children

Andrew Lorie counsel (instructed by a Local Authority) for the Applicant
Greg Rogers counsel (instructed by Bailey Wright and Co.) for the First Respondent mother
Michelle Brown counsel (instructed by Rashid and Co.) for the Second Respondent father
Andrew Bainham counsel (instructed by Carvill and Johnson) for the children

Hearing date: 24th June 2020

APPROVED JUDGMENT

1. On 25 November 2019 the applicant local authority applied for a care order in respect of two children, 'M' and 'Z' who are now aged five and one year and nine months respectively. A contested hearing then took place. At the end of that hearing the Court made an interim care order and sanctioned the removal of the children from their parents' care.

Previous care proceedings BM19C00224

2. The current application for a care order was issued shortly after previous care proceedings concerning the same children had ended and they had returned to their parents' care after a period of time in foster care.

3. Those proceedings had been issued on 19th August 2019 under case number BM19C00224 ('the previous proceedings'). On 3rd August Z had been taken to her GP with a swelling to her head. On admission to hospital, it was ascertained that she had sustained a fracture to her skull. The information with which I have been provided in these current proceedings (BM19C00293) is that the treating physicians who initially saw her were not satisfied that the fracture was consistent with the history given by the parents.

4. Within those proceedings medical evidence was filed from treating clinicians:

   (i) Dr A, Consultant Paediatrician, H Hospital, 07.08.19 (H83 and addendum dated 31.10.19 at H143);

   (ii) Mr N, Consultant Opthalmic Surgeon, 03.09.19 at H87;

   (iii) Mr S, Paediatric Consultant Neurosurgeon, B C Hospital, 13.08.19 at H88;

   (iv) Dr N, Specialist Doctor in Neurosurgery, B C Hospital, 27.08.18 at H149.

5. During the course of the previous proceedings, the Court determined that it was necessary, in order to resolve the proceedings justly, to instruct a consultant radiologist. A jointly instructed expert, Dr O, Paediatric Radiologist, provided a report dated 13 October 2019. He concluded that the parents' explanation(s) was/were a possible cause of the fracture. In his report, he stated however, that it was,

   "not possible to prove radiologically whether the fracture had been caused by impact after a fall, nor whether the cause was accidental or non-accidental".

   Other parts of his report are reproduced below.

6. A hearing took place on 29 October 2019. At that hearing the Court granted a seven-day period for the local to authority to consider, "whether it seeks permission to withdraw the proceedings". I note that the Order made following the hearing on 29 October 2019 recorded that the issues in the case included the following:

   a. The causation of the skull fracture suffered by Z, whether accidental or non-accidental, and *whether Z has bone fragility that may affect her propensity to sustain fractures*; (italics added); and
   b. the identity of the perpetrator in the event that the skull fracture was caused non-accidentally.

7. The final hearing in the previous proceedings took place on 12 November 2019. There was no judgment given at that hearing. The Order made following that hearing was as

follows:

"The local authority having withdrawn the application the court makes no order."

8. The children returned home on 8 November 2019.

9. During the course of the current proceedings I have sought to ascertain as accurately and clearly as possible, what had occurred at the hearing on the 12th November 2019. Unfortunately, the Judge who had case managed and heard the proceedings is not currently at work and is not able to consider this matter. Having spoken to the DFJ, I have listened to the tape recording of that hearing, and provided a note of it to counsel instructed in the present proceedings. The quality of the recording is not particularly good. It was not considered necessary or proportionate either by myself, or the parties, to obtain a transcript of the hearing. The following appeared clearly from the transcript:

a. No Judgment was given.

b. Counsel for the local authority opened the hearing and introduced the parties and representatives, it appears, including the Guardian.

c. Counsel for the local authority stated that on 29th October 2019 there had been a hearing and "consideration was given to whether Dr O … finalise report …" He appears to refer to the need to check whether all documents had been seen by Dr O. He then stated that it became clear that Dr O had seen all necessary material and that the local authority was given 7 days to consider whether findings would be sought and what they would be.

d. Counsel for the local authority referred to the case summary and an application to withdraw the proceedings. I have seen and read the case summary. Counsel stated that he considered that the case was in "the first category of cases – where threshold cannot be met … cannot be met on the basis of Dr O…" He stated that the application was an appropriate application on behalf of the LA and that there had been communication on 7th November 2019 to other parties.

e. There was reference to an existing care order, the children returning on 8th November and that all were in support of the application.

f. There was some short discussion with the Judge and there appeared to be a suggestion that there would now be some medical attention given as to how to manage a situation with a child with potentially brittle bones, the local authority stating that steps had been taken to start or undertake that investigation.

g. There was discussion about the Judge's ability to view evidence sent on a disc.

h. The Judge stated that both parents needed to be extremely careful with the child pending investigation into brittle bones. She stated that the social worker should be reassured that the action the LA took in the summer on the information it then had was highly appropriate and that 'these things happen rarely' (which appears to be a reference to 'brittle bones').

The current proceedings

10. On 25 November 2019 the local authority issued a second set of care proceedings, the current proceedings, in which they sought care orders in respect of the children. On 21 November 2019 while working with his class teacher, M made a number of statements suggesting that his father hit his mother that his mother hit him and that his mother hit the baby. That is a brief summary of some of the evidence I heard. The precise evidence given regarding those statements during the contested ICO hearing is recorded in the ICO Judgment. As a result of what he said that day, and a visit by police to the family home on the same evening, the children were placed into police protection and the second set of care proceedings was issued.

11. A contested interim care hearing took place over three days. At the end of that hearing I gave an oral judgement (the ICO Judgment). I granted the interim care order and I sanctioned the removal of the children from their parents' care.

12. This Judgment must be read alongside the ICO Judgment. In the ICO Judgment I stated, at paragraph 11, as follows:

"by the end of the care proceedings the cause of Z's injury had not been determined by the court and nor had any expert stated what they believe the actual cause was."

As far as I am aware, there was no appeal against the ICO Judgment. I have informed the advocates in the current proceedings that my recollection, and only that, was that I was informed during the ICO hearing that no determination was made as to the causation of Z's skull fracture.

13. The local authority amended its threshold document and, in the revised threshold document dated 18th May 2020 has set out that it seeks findings regarding Z's skull fracture as follows:

a. That one or other of the parents inflicted the injury which caused the skull fracture;

b. That the parents failed to present Z to hospital promptly following the injury to her head; and

c. That the parents deliberately misled professionals by failing to give a full account of the events which led to the injury which caused the skull fracture.

14. At a case management hearing on 10 June 2020, counsel for the parents gave notice that they sought to challenge the local authority's right to seek to re-open the issue of how the skull fracture was caused and the court's jurisdiction to hear it.

The Issue for determination

15. The case was listed for a further hearing before me in order to determine whether the court could lawfully, or should, consider the causation of Z's skull fracture within these current proceedings. (That issue is phrased slightly differently in each of the written submissions of the parties, but I do not consider that there is any significance in the different formulations: the previous sentence accurately identifies the issue).

The submissions made by the parties

The parents

16. The arguments for both parents were advanced, primarily, by counsel for mother. Father's counsel, having had the prior opportunity to consider the written submissions and then to hear oral submissions on behalf of the mother, did not add significantly to them.

17. On behalf of the parents, it was submitted that if the local authority, in the previous proceedings, and the Court, accepted that the criteria in s.31 of the Children Act 1989 (CA 1989) could not be satisfied, the parents were entitled to a finding that the injury to Z had an innocent explanation (see skeleton argument on behalf of mother at paragraph 9); those proceedings concluded with the sealing of the final order in which 'no order' was made on the application.

18. In those circumstances, the Court should now accept that the causation of the skull fracture has been determined: in a 'binary' system, the Court determined that the cause of the injury was accidental.

19. Furthermore, the Court should not now re-open that determination. On the evidence currently before the Court, and on the correct application of relevant legal principles, there is not any, or any sufficiently compelling reason to consider that a rehearing of the issue will result in a different finding. It was contended that a Part 25 application to permit further expert evidence amounted to an impermissible attempt to find and place before the Court a potential justification for a rehearing of that determined issue.

20. Having had the opportunity to consider the note of the recording of the hearing of 12 November 2019, it was further submitted that it was clear that the local authority had taken the view that it could not satisfy threshold criteria and that therefore this was a 'category 1' type case (i.e. one where threshold could not be proved, rather than a 'category 2' case where the local authority *may* not have been able to satisfy threshold) and that that submission was accepted by the Judge. My attention was drawn to the fact that no written application appeared to have been filed in accordance with rule 29.4(3) of the Family Procedure Rules 2010, but rather that an oral application was made pursuant to r.29(4)(4). I was invited to consider the case of *F (A Minor) (Care Order: Withdrawal of Application)* [1993] 2 FLR 9 FD, and the following footnote to r.29.4 on page 1883 of the Family Court Practice 2019:

    "The court must not entertain an oral request for leave to withdraw proceedings in the absence of the children's Guardian, even if his legal representative is present"

21. It was submitted that it did not appear that any other party, in particular the Guardian, took issue with the local authority's submission that it could not satisfy threshold. It was submitted that it would appear that no party, or indeed, the Court even so much as hinted that this was anything other than a category 1 case and furthermore that that was supported by the absence of a Judgment.

Local Authority and Guardian

22. That analysis was challenged by both the local authority and by the Guardian on behalf of the children.

23. The local authority and Guardian submitted that it was clear that no factual determination had been made. Furthermore, it was submitted that if a finding had been made that the cause of the skull fracture was accidental, the court should now revisit that factual determination. Further, it was submitted that the principles of *res judicata* did not apply in such a way as to prohibit the consideration of that issue.

Guardian

24. On behalf of the Guardian, it was submitted that there is an important distinction between a decision to permit withdrawal of care proceedings, and the determination of a fact which was in dispute within those proceedings: in this case there had been no determination within the previous proceedings that the injury sustained by Z had an accidental cause which would exonerate the parents. It was submitted that it was clear that the Judge did not conduct any fact-finding, that the inconclusive evidence of Dr O was not tested in court by cross-examination and neither was the account given by the parents so tested.

    Furthermore, it was submitted that it was clear that the judge was simply invited to approve the local authority's recently taken decision to seek approval to withdraw the proceedings: that is not tantamount to a determination on the facts. On the contrary, it was submitted that it was merely an, "evaluation of whether the authority would be acting reasonably and properly in withdrawing its application". It was submitted on behalf of the Guardian that it was likely, or was the case in the previous proceedings, that the local authority and court had reached the conclusion that it was unclear whether the local authority would be able to establish facts relevant to threshold on the basis of the <u>then available</u> evidence, and that it was in the best interests of the children that the local authority be permitted to withdraw the proceedings.

25. That submission was maintained after counsel had had the opportunity to consider the note which I prepared after listening to the recording of the hearing of 12 November 2019: the reasoning given by the judge to permit the local authority to withdraw its application was unclear (it was not articulated) and is likely to remain unclear as the Judge is currently not at work. Furthermore, whilst it was accepted that it appears that the local authority had submitted that this was a case in the first category of withdrawal applications, there was no evidence that the judge expressly accepted that categorisation or submission. It was submitted that at its highest, the Judge had implicitly accepted it. The Guardian, however, suggested that that would not be an appropriate interpretation of what had occurred. The Guardian maintained the submission advanced that this was a second category case.

26. In those circumstances, it was submitted on behalf of the Guardian that the court could and indeed should, having regard to its inquisitorial duty in children cases, determine within these proceedings the factual causation of Z's skull fracture and the other issues raised by the local authority within its revised threshold document. Alternatively, the Guardian submitted that the court could and should, in the light of the further injury to Z and that which was said by M, review the conclusions reached in the previous

proceedings, not least because the overriding concern should be to seek to get things right for the children. That applied, not only in respect of the uncertainty surrounding causation of the skull fracture, but also in respect of other potentially linked issues which were not resolved following the withdrawal of the earlier proceedings, including whether the fracture could have arisen from a lack of appropriate supervision and whether there was a failure to seek proper and prompt medical treatment for Z. It was submitted that within these proceedings those issues will be relevant to the determination of whether the children are at risk of suffering significant harm attributable to the care of their parents.

Local authority

27. The submissions on behalf of the local authority focused in detail on the application of the doctrine of *res judicata* to the present proceedings. The submissions advanced by the local authority in writing set out in detail the relevant principles of that doctrine, in particular issue estoppel (where a particular issue forming a necessary ingredient in a cause of action previously litigated and determined between parties could not then be re-litigated in subsequent proceedings between the same parties, notwithstanding that that second set of proceedings involved a different cause of action). In oral submissions, however, counsel on behalf of mother accepted that the manner in which the principles of *res judicata* and issue estoppel in particular apply in cases concerning children is different to that which applies in other jurisdictions. All counsel accepted in the course of oral submissions that in cases concerning children there is an important need for 'principled flexibility' to be applied.

28. In oral submissions the local authority advanced very similar arguments to those advanced on behalf of the Guardian. It was submitted that no findings were made by the Judge, further that it was open to the parents to have requested the court go on to determine the causation of Z's skull fracture, but they did not do so and in those circumstances, it was clear that there was no determination as to that issue.

29. In common with the Guardian, the local authority invited me to determine that I could and should consider that issue in these proceedings. Alternatively, the local authority also invited me to consider, if there had been a factual determination that the causation of the skull fracture was accidental, to re-open that issue.

30. Having considered my notes of the hearing of 12th November 2019 the local authority made the further following submissions:

    a. it was clear that at that hearing no findings was sought or made by any party, and the court was not required to make findings in order to grant permission to withdraw the proceedings or to bring the case to a close of its own motion;

    b. the fact that the local authority considered that the case was in the first category, where threshold could not be met, on the basis of the evidence of Dr O, was based on the evidence then before it and the court; an analogy could be drawn between that situation and that in a criminal case where no further action is taken due to a lack of evidence, rather than a lack of guilt;

c. the note of the hearing is silent as to which category of case the judge considered that the case fell within;

d. it was unclear from the note whether the judge gave permission for the local authority to withdraw its application, or, whether the court brought the proceedings to a close of its own motion. Having regard to the Order, permission to withdraw is not recorded but there is reference to the local authority having withdrawn its application. It was submitted that the order of 'no order' was consistent with the case being in the second category. The local authority drew my attention to the fact that the reasoning of the court is unclear; no judgment is given as to the merits of the trust's application; no judgment is given as to the allegations regarding the skull fracture; there is no analysis of the children's welfare.

The Law

31. Rule 29.4(2) Family Procedure Rules 2010 (FPR 2010) provides that a local authority may only withdraw an application with the permission of the Court. An application to withdraw proceedings involving a question in respect to the upbringing of a child brings into play s.1(1) of the CA 1989.

32. In *A Local Authority v X,Y and Z (Permission to Withdraw)* [2017] EWHC 3741 (Fam) MacDonald J stated as follows:

"Where an application for permission to withdraw is mounted in proceedings in which the local authority is unable to satisfy the threshold criteria pursuant to s 31(2) of the Children Act 1989, then that application must succeed. However, where on the evidence before the court the local authority could satisfy the threshold criteria, then the court must consider whether withdrawal is consistent with the welfare of the child such that no order is required pursuant to s 1(5) of the Children Act 1989 (see *Redbridge LBC v B and C and A (Through His Children's Guardian)* [2011] 2 FLR 117)."

In the *Redbridge* case, (cited by MacDonald J above) Mr Justice Hedley had stated that:

"If the local authority could not prove the threshold criteria, then of course their application would succeed without more as otherwise I would have no alternative but to dismiss the proceedings. If, however, the threshold could be established, then the application would really depend upon the court concluding under Section 1(5) of the Children Act 1989 that no order was necessary; that is to say on the basis that withdrawal was consistent with the welfare needs of A - see *L.B. Southwark -v- Y* [1993] 2 FLR 559 and *WSCC -v- M, F and others* [2010] EWHC 1914 (FAM)."

33. The Court should carefully consider such an application in each particular case, having regard to the facts and circumstances specific to it. In particular, when doing so in the second category of case, it should consider whether there is some 'solid advantage' to the child to be derived from continuing the proceedings. The granting of permission does not simply involve 'rubber stamping' a request. The Court is tasked with conducting an, 'objective and dispassionate check on whether the local authority should

be entitled to disengage from proceedings' (per MacDonald J in *A Local Authority v X,Y and Z (Permission to Withdraw)* [2017] EWHC 3741 (Fam) [paragraph 53]).

34. In order to undertake that check the Court should consider the relevant facts and circumstances, identified and set out by Pauffley J in *Re C (A child – Application for dismissal or withdrawal of proceedings) (No3)* [2017] EWFC 37 as: the interests of the child, the time the investigation will take, the likely cost to public funds, the evidential result, necessity or otherwise of the investigation, relevance of the result to future care plans, fair trial and justice of the case.

35. There is no suggestion in the submissions made that it is a requirement of the Court's role, in that analysis, to determine facts in dispute; when asked to consider an application for permission to withdraw proceedings, the Court's role is to apply the above factors and to consider whether it is in the best interests of the children that the proceedings should continue or not. I do not preclude the possibility that in some cases it may, on analysis, be found to be necessary to determine a fact or facts as part of that consideration.

36. I also recognise that the submission made on behalf of the parents in this case is that, having permitted the local authority to withdraw the proceedings, in the context of the 'binary system' where facts are either proved or not, it must follow that the implicit finding of the Court was that the cause of the accident was accidental or that the parents were exonerated.

37. The standard of proof in proceedings concerning children is the balance of probability, no more, no less. A fact is proved; or, it is not. In proceedings for a care order the burden of proof rests on the local authority (*Re B (Care Proceedings: Standard of proof)* [2008] UKHL 35). Facts must be proved on the basis of evidence (which may include inferences which can properly be drawn from primary evidence), but not on mere suspicion or speculation (*Re A (Fact Finding: Disputed findings))* [2011] 1 FLR 1817).

38. A Judge sitting in the Family Court may reconsider findings of fact made within the same set of proceedings or at any time thereafter.
A finding of fact is not, in a strict sense, "an order", but it may comprise the determination of an issue which is crucial to the disposal of the proceedings and is susceptible to appeal. Such a finding of fact is integral to the order on which it is based and, accordingly, comes within the scope and purpose of section 31F(6) of the Matrimonial and Family Proceedings Act 1984. (*See Re B (Split Hearing: Jurisdiction) [2000] 1 FLR 334, Re E (Children: Re-opening Findings of Fact)* [2019] EWCA Civ 1447).

39. When considering whether to reopen determination of findings of fact a three-stage process applies:

(i) First, at stage I, the court must consider whether it will permit *any* reconsideration or review of, or challenge to, the relevant earlier findings. This will require there to be, *"some real reason to believe that the earlier findings require re-visiting … Solid grounds for challenge".* It will be of importance to consider whether there is any new evidence or information which may cast doubt upon the accuracy of the original findings.

(ii) Secondly, at stage II, the court will be required to determine the extent of the investigation and evidence concerning the review.

(iii) Thirdly, at stage III there will be the hearing of the review, in which the evidential burden falls on those who seek to displace the earlier ruling, whilst the legal burden of proof remains throughout where it was at the outset.

See *Re AD & AM (Fact-finding hearing) (Application for re-hearing)* [2016] EWHC 326; *Birmingham City Council v H* [2005] EWHC 2885; *Re ZZ (Children) (Care Proceedings: Review of Findings* [2014] EWFC 9; *Re LG (Re-Opening of Fact Finding)* [2017] EWHC 2626.

40. It is important to note that the test which the court must apply is *not* whether the applicant stands a real prospect of disturbing the original findings: rather, there must be some *real reason* to believe the earlier findings require revisiting. Mere speculation and hope are not enough. There must be solid grounds for challenge (*A v Northamptonshire County Council)* [2018] EWHC 3244).

41. In my judgment, these principles have been developed in order to achieve a careful balance between two important, albeit sometimes conflicting, public interest requirements (*Re E (Children: Re-opening Findings of Fact)* [2019] EWCA Civ 1447). First is the principle that there should be finality in litigation: facts and issues determined in a competent jurisdiction following a fair hearing of those matters should not be revisited or re-litigated. Secondly, the requirement embedded within a fair and just society, that it is important to be able to identify accurately those who cause serious injuries to children, wherever that identification is possible. Recognition of that tension assists in understanding and advancing the 'principled flexibility' so important in this area of law. That approach does not, in truth, denote a lack of rigour when properly applied. On the contrary, it is one example of the way in which clear, yet flexible legislation and rules are applied in order to achieve just and good outcomes for children and their families.

42. An understanding of the matters set out in the preceding paragraph also assists in understanding the basis upon which findings of fact in children's cases may be revisited and why it is said that there is no strict rule of issue estoppel. Determined facts in children's cases can be reconsidered in an appropriate case: failure to do so may mean that the first principle of finality in litigation takes precedence over the second and prevents it being achieved, to the detriment, ultimately of a child or children. A decision, however, to permit the re-opening of issues previously litigated, must be based on sound reasons, applying relevant law so that the first principle of finality of litigation is not entirely lost on the basis of possibilities or speculation alone.

Analysis and Conclusions

43. Prior to determining the issue identified at paragraph 15 above in this case, I considered that the submissions made on behalf of the parents clearly, albeit implicitly, called for further consideration of the sentence set out in my Judgment given following the contested ICO hearing. I have set that out at paragraph 12 above.

44. At that point in time, I concluded, albeit at an interim stage of the proceedings, on the evidence then before me and, from memory, on the basis of (unchallenged) submissions made by the local authority, that the cause of Z's skull fracture had not been determined in the previous proceedings.

45. I have not, expressly, been asked to revisit that statement. Implicitly, however, I have been so asked.

46. I have adopted the following analysis:

(i) First, I have set to one side the Part 25 application. Whether I should even consider that application, and if I should, whether I should grant it, is a matter which, in my judgment, can only properly be determined *after* my conclusions in respect of the issues set out below.

(ii) I sought to identify, so far as possible, that which occurred at the hearing on 12th November 2019 before the Judge.

(iii) Thirdly, I have considered whether there was any factual determination as to the cause of Z's skull fracture in the previous proceedings and, if so, what that finding was.

(iv) Fourthly, I considered whether, in the light of my conclusion in respect of (ii) and (iii) above, I should entertain a reconsideration of that which I set out in the ICO Judgment.

(v) Fifthly, depending on the outcome of (iii) and (iv) above, I considered whether, if there was a factual determination as to the causation of Z's skull fracture, what it was, and, then, whether I should reconsider it within these proceedings.

(vi) Then, and only then, have I turned to the Part 25 application.

The hearing before the judge on 12th November 2019: what occurred?

47. In my judgment, all that is clear following the hearing before the Judge on 12th November 2019 is that the proceedings in case number BM19C00224 came to an end, the children already having returned home.

48. No Judgment was given. There does not appear to have been any formal consideration given to the question of whether permission to withdraw should be granted, or what, if any order should be made as a result. Furthermore, the actual Order made by the Court

after the hearing recorded that

"The local authority having withdrawn their application the court makes no order."

I accept that the fact that there was no Judgment, tends to militate in favour of the suggestion that this was a case where it was considered (per the local authority submission) that threshold could not be proved. The terms of the Order made however, are more consistent with the contrary submission for reasons expanded upon below.

49. The recitals recorded the following:

"AND UPON the local authority having been granted 7 days to consider its position at the hearing of 29th October 2019 following receipt of the report of Dr O and confirmation that they had received all necessary evidence for the finalisation of their report. The Court being aware that the local authority may seek to withdraw this application.

AND UPON all parties consenting to the local authority application to withdraw the application for a care order in respect of both children.

AND UPON the interim care order in respect of the children made on 21st August 2019 being discharged by way of the application being withdrawn.

AND UPON the Court being informed that the children were returned to the care of the parents on 8th November 2019."

50. The parties' positions were recorded in the following terms:

"The local authority previously sought 7 days following confirmation at court that Dr O had received all the relevant material in advance of providing their report. The local authority subsequently having reviewed the updating evidence and confirmed their intention to apply to withdraw care proceedings. The children remained under an interim care order and were returned home to the parents on 8th November 2019. The local authority position being that the threshold criteria pursuant to s.31 of the Children Act 1989 are not met.

The mother supports the application of the local authority to withdraw care proceedings.

The father supports the application of the local authority to withdraw care proceedings.

The children's guardian supports the application of the local authority to withdraw care proceedings."

51. It would appear from the submissions made that the local authority considered that the case fell into the first category of cases, namely that at that point in time, on the basis of the evidence before the Court, it could not establish threshold. The Judge neither dissented from, nor appeared to expressly accede to, that submission. Nonetheless, before her, she allowed the proceedings to come to an end.

52. It also appears clear that she considered that there was a real possibility that Z had 'brittle bones'. The Judge made the observations I have set out at paragraph 9 above. In addition, the Order of 29th October 2019 records the following as an issue,

" ... whether Z has bone fragility that may affect her propensity to sustain fractures"

53. In Dr O's report, he stated in the Executive Summary as follows:

"There is an abnormal number of Wormian bones (accessory skull bones lodged between conventional skull bones) in Z's skull. This may be a normal variant, but it is also an observation that is more frequently made in children suffering from osteogenesis imperfecta (group of genetic disorders that cause bone fragility). The diagnosis of osteogenesis imperfecta cannot be made on this basis, but the finding should in my opinion prompt further medical investigation, and I am aware that such investigation has been instigated."

54. Further, at paragraphs 6.6 to 6.10 of the report Dr O stated as follows:

"There is an abnormal number of Wormian bones in Z's skull. This may be a normal variant, but it is also an observation that is more frequently made in children suffering from osteogenesis imperfecta.The diagnosis of osteogenesis imperfecta cannot be made on this basis, but the finding should I my opinion prompt further medical investigation.

There is no established system of objective radiological investigations for predicting fracture risk in young children.

Regarding medical conditions that may be associated with fragile bones, I can only comment on the presence of any radiological sign of subjectively low bone density, and of any in-born metabolic (e.g. nutritional deficiency), cancerous, or infectious disease. In my opinion, there is no subjective evidence of low bone density, not evidence of abnormal shape or size of any bone, and no evidence of any focal bone abnormality apart from the fracture and the Wormian bones. Hence bone fragility cannot be diagnosed based on the radiological findings alone.

My further assessment assumes that the bones were not abnormally fragile. It must however be acknowledged that bones may be abnormally fragile without any sign of the same on x-rays or scans. Therefore, if other experts conclude that the bones were fragile, then my assumption does not hold and my further opinions may need to be revised.

It is in my opinion the province of an expert paediatrician, endocrinologist or geneticist, taking all medical facts into consideration, to assess the likelihood of bone fragility and to advise on the need for any further investigation of the same."

55. The exchange in the hearing on 12th November 2019 between counsel for the local authority and the Judge suggests that an investigation had been initiated into whether Z had abnormal bone fragility. Furthermore, the Judge cautioned the parents to be extremely careful with the child in the meantime.

56. There was no clear identification of the basis upon which the proceedings were permitted to end. The explicit robust analysis which might have been expected is not evident. Nonetheless, having regard to the provisions of the Order, it would appear that all agreed that the Court was being asked to sanction withdrawal of the proceedings. Furthermore, the fact that 'no order' was made, suggests that, contrary to the submission made by the local authority, this was a case in which the Court concluded "… under Section 1(5) of the Children Act 1989 that no order was necessary; that is to say on the basis that withdrawal was consistent with the welfare needs of" Z (per Hedley J in the *Redbridge* case); alternatively, that the Court concluded that "withdrawal [was] consistent with the welfare of the child such that no order [was] required pursuant to s 1(5) of the Children Act 1989" (per Macdonald J as set out above). Some might dismiss this analysis as speculation. I agree that nothing is certain. This conclusion is not however based on mere speculation; it is, in my judgment, the best structured analysis that can be done after considering the Orders, the evidence and the recording of the hearing. Sadly, the Judge who determined the case cannot, at this time, consider the issue.

Were findings of fact made? What were they? Were they implicit in the Order made?

57. That being so, were any findings made?

58. I do not consider that any findings of fact were made by the Court. At its highest, there may have been a conclusion reached that Z might have 'brittle bones', that hypothesis requiring further investigation. No oral evidence was heard. The parents did not ask to give evidence and establish the truth (on the balance of probabilities) of their account. The Guardian did not invite further consideration of the evidence or seek to disprove the truth of their account. Nor did the local authority or the Court. All agreed that the local authority should be permitted to withdraw the proceedings. No more. No less. I accept that that occurred within a binary system where facts are found or not. However, in this instance, all sidestepped the impact of that binary system by not actively pursuing determination of disputed allegations, consenting to the local authority, in lay terms, 'walking away' from that contest in the light of the evidence then available. All agreed that no order was the right order in the light of the application to withdraw. There should have been a more structured analysis and reasoning. There was not. No one appealed.

Should I revisit that which I said at paragraph 12 of the ICO Judgment?

59. I can see no solid grounds upon which the Court should re-visit the statement made and recorded at paragraph 12 above. Having now considered what occurred in the previous proceedings, it now does not seem that the cause of Z's injury had been determined by the Court in the previous proceedings. I consider that no findings were made. Furthermore, no expert stated what they believed the actual cause was.

60. Conversely, there are, in my judgment, solid and compelling reasons for considering that further investigation of the events of summer 2019 should take place. First and foremost, new information has come to light which was not available on 12th November 2019. M spoke to his class teacher as described in the ICO Judgment. In addition, Z sustained a further injury to her face.

61. That evidence is potentially relevant, not only to the question of how Z came to have sustained a fracture to her skull, but also, potentially to the other issues identified in the revised threshold and set out above.

62. The new information is not speculation/ hope. The new information is words spoken by a child and a further injury to his sister's face, within days of the children returning home. These, in my judgment are 'solid grounds' for reopening the issues the local authority raises in the revised threshold document.

Alternative conclusion: re-opening of issues determined before

63. I have concluded that no finding was made as to the cause of Z's skull fracture.

64. However, if that analysis is flawed, (for example, if I am wrong as to what occurred on 12th November 2019, or, had I concluded that a finding had been made as to the causation of the skull fracture Z sustained which exonerated the parents from blame) I consider that I would have determined that there should be a reconsideration/ review/ challenge to those earlier findings in light of the further evidence which is now available. There are in my judgment solid grounds for doing so: M has talked to his class teacher about events at home, something which he had not done before. That which he has said, against the background of Z's injury both in the summer of 2019 and that seen in November 2019, requires the Court to look again at that which occurred in the summer of 2019.

65. As I set out in the ICO Judgment, the objective, ultimately, is to reach the best welfare decision for these children, against as full and as accurate a picture of their lived experiences as possible. My alternative conclusion would be that the right approach is to re-visit any finding made by the judge in the previous proceedings. It may not be possible to answer all the questions there are in this case. It is however, in my judgment, imperative to try to do so; to maintain an open mind, to exercise professional curiosity, to try to understand more and reach the right decision for this family.

66. In summary, my conclusion is this:

a. So far as it is possible to tell, the judge gave permission for the proceedings to be withdrawn;

b. She made 'no order', and on balance, I consider that this suggested that the case was one where there was uncertainty as to whether threshold had been established;

c. It was an active consideration before the Court on 12 November 2019 that there was evidence that Z may have abnormal bone fragility;

d. No one pursued the determination of any specific findings of fact;

e. No findings of fact were made; and

f. Even if they were, this Court should now re-visit findings which were made in the light of the new information which became apparent in November 2019 after the

children had returned home.

67. In the light of this Judgment, I now:

(i) invite requests for clarification or reconsideration of any aspect of this Judgment if any party considers that is required;

(ii) In respect of my alternative conclusion, invite any further submissions as to the extent of the investigation into any determination of fact made by the judge (if any party wishes to make them);

(iii) Invite any further submissions regarding the Part 25 application.