IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
No. 221: 2017

BETWEEN

JT & ET

Applicants

and

THE DIRECTOR OF CHILD AND FAMILY SERVICES

First Respondent

and

THE ATTORNEY GENERAL

Second Respondent

and

THE COMMISSIONER OF POLICE

Third Respondent

and

THE MINISTER OF SOCIAL DEVELOPMENT AND SPORTS

Fourth Respondent

Date of Hearing: 15th and 16th January 2018
Date of Judgment: 5th February 2018

Mr. Mark Pettingill, Chancery Legal, for the Applicants
Ms. Wendy Greenidge, Crown Counsel, for the Respondents

Ruling of Kessaram, AJ

1. This case concerns the removal of a three year-old male child (who I shall refer to as "X") from the care of his parents (who I shall refer to as "Mr. T and Mrs. T", the Applicants in these proceedings). The removal was effected by certain members of the Bermuda Police Service ("the BPS") on 3rd May 2017 acting pursuant to the powers conferred on them by s. 41 Children Act 1998 ("the Act"). The case also concerns the powers and duties of the Director of the Department of Child and Family Services ("the Director" and "the DCFS" respectively) when making an application for an emergency protection order ("EPO") under s. 39 of the Act. The focus of this part of the case is on the decision of the Director made on 4th May 2017 to apply to the Family Court for an EPO with respect to X following the taking of the child into the custody by the BPS on 3rd May. That application was accordingly made and an EPO was granted by Family Court[1] on the same day. The

[1] Ms. Maxanne Anderson JP presiding.

case also concerns the powers and duties of the Family Court when it exercised its powers under s. 39 to make the EPO.

2. The proceedings take the form of an application for declarations in relation to the three decisions referred to above. The application is made under Order 53 (Applications for Judicial Review). At the outset of the hearing an application was made by the Respondents to strike out the application against the Director and the Family Court ostensibly (although not expressed as such) on the basis that it was an abuse of the process of the Court. The basis of the application was that the decision of the Family Court to make an EPO rendered *res judicata* the decision of the Director to apply for an EPO and that decision could not be reopened in these proceedings. As against the Family Court it was also submitted that the principle of *res judicata* applied. I did not consider that these applications possessed any merit and dismissed them. I was concerned, however, whether an application for judicial review of the Family Court's decision was the appropriate way to proceed until it was made clear by counsel for Mr. and Mrs. T that there is no appeal under the Act against the making of or refusal to make an EPO: s. 40(9) of the Act.

3. In this regard I have had regard to and adopt the dicta of Munby J in the UK case of *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam) at [40] where he stated:

> "*There is now a long line of cases showing that judicial review is not normally an appropriate remedy in cases where emergency protection or care proceedings are either threatened or on foot . . . . But each of those cases proceeded on the assumption that the FPC (or the Family Division on appeal from the FPC) would be able to do full justice to the parties within the EPO or care proceedings. Here, by contrast, the Family Division is powerless to act. It is by no means obvious to me that judicial review would not lie, in an appropriate case, to correct error or injustice. The cases to which I have referred should not, as it seems to me, be read as necessarily precluding such an application in an appropriate case. There are, after all, other family law contexts in which the absence of any effective right of appeal has prompted the court to acknowledge that judicial review is or may be an appropriate remedy . . . As I said in R (Marsh) v Lincoln District Magistrates' Court, at para [50], speaking of the Administrative Court:*
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> > *'It is the historic and vital function of this Court when exercising its supervisory jurisdiction over justices to ensure, if not that justice is done, at the very least that demonstrated injustice is not allowed to continue uncorrected"*".

4. The Applicants' argument in respect of each decision was concerned with the exercise of the discretion given to each of the Respondents by the legislature when acting in their official capacities under the Act. It is said that the Respondents "*unreasonably exercised*" their discretions under the Children Act 1998; and declarations are sought to this effect. Orders of certiorari are also sought quashing each of the decisions. In fact, the child was returned to its parents on 5th May 2017 as soon as the DCFS were satisfied that the injuries which gave rise to the suspicion of child abuse were consistent with accidental causes; and the EPO was discharged on the application of the Director on 11th May 2017. In those circumstances, the

application for certiorari is redundant. The claims for declarations will have some usefulness if granted. It has been intimated that further proceedings may follow if the claims for the declarations sought are successful.

5. There is one reported case in Bermuda which deals (in a limited way) with the issues which arise for decision in this case, i.e., the case of *AW v Director of Child and Family Services* [2008] Bda LR 42[2]. I mention this because there was no evidence of the existence of any manual or protocol explaining those provisions of the Children Act 1998 which deal with the protection of children; and which explain how the Act is to be interpreted and applied.

6. There is mention in the evidence of the DCFS (Affidavit of Annisha J. Peets) of an assessment tool called the Structured Decision Making Screening and Response Time Assessment. But this is not designed to explain what must be established before a court for the granting of an EPO. As its name implies, it is designed to enable the DCFS to classify the type of abuse that is reported and determine the appropriate time frame for responsive action to be taken. The same observations apply *mutatis mutandis* with respect to the exercise by the BPS of s. 41 powers.

7. Notwithstanding the lack of Bermuda case law, there is a large body of case law in the UK dealing with the issues that arise in this case. Such case law provides useful guidance as to what is required to be established before an EPO can properly be granted and what considerations are to be borne in mind in the making of such an order. These UK decisions have a direct bearing on the application of our legislation given that the structure of the child protection regime and the legal concepts such as "*significant harm*" (and much of the statutory language generally) is similar, if not the same, in both jurisdictions.

8. One other feature of this case deserves preliminary mention, i.e., the duties of those in professional or official positions with respect to a child who are obliged to report child abuse to the DCFS. Under s. 20 of the Act a distinction is made between the obligations of ordinary members of the public to report child abuse and those of the specified classes of professionals and officials. An ordinary member of the public has a duty to report information indicating that a child is suffering child abuse. However, the duty on physicians, school teachers and police officers (amongst the other classes of persons specified in s. 20(2)) is qualified by the requirement that he or she have "*reasonable grounds to suspect that a child is suffering or has suffered*" child abuse (or to use the statutory language "*significant harm*"). The Act provides immunity from civil actions to those who report child abuse unless such reporting is done falsely and maliciously: s. 20(4) of the Act. The Act also provides anonymity to those who report: s. 20(6) of the Act. These protections are justified as they remove any fear of repercussions or reprisals to those who report; and are designed to remove any hindrances to the making of reports of child abuse. However, the obligation to make a report is not to be taken lightly; as a well-meaning but mistaken report is capable of setting in motion (unnecessarily, if care is not taken) the whole machinery of the system designed to protect children (the DCFS, the BPS and the Family Court); and, more importantly, can have a

[2] There is another Bermuda case involving an appeal against a Care Order made under the Act (*RB and MB v The Family Court Worshipful Stoneham & Panel and The Director of Child and Family Services and CR* [2014] SC (Bda) 87 App) but it deals with other issues.

devastating and indelible impact on the life of the child suspected to be the victim of child abuse and his/her parents or family. The Act does not contain any sanctions for those professionals *et al* who fail to use reasonable care in making reports of child abuse. The only sanctions are for false and malicious reporting. The explanation and justification for this state of affairs may be that sanctions for negligent reporting would act as a deterrent to those who would otherwise report a case of suspected child abuse; and that the system contains other protections for the suspected victim and his family against the unjustified intervention of the public authorities in their lives.

9. What this case shows, however, is that those built-in checks on a misguided report of child abuse being acted on against a family can also fail.

10. In carrying out the exercise of assessing the decisions made by the Respondents I remind myself that hindsight is 20/20 vision; and that it is easy to be wise after the fact. I must also bear in mind what was said by McFarlane J in *Re X: Emergency Protection Orders* [2006] EWHC 510 (Fam) at [19] (and quoted in the case of *Williams et al v London Borough of Hackney* [2015] EWHC 2629) which is equally applicable in Bermuda:

> "*The child protection system depends upon the skill, insight and sheer hard work of front line social workers. Underlying those key features, there is a need for social workers to feel supported and valued by the courts, the state and the general populace to a far greater degree than is normally the case. Working in overstretched teams with limited resources, social workers frequently have to make crucial decisions, with important implications, on issues of child protection; often of necessity these decisions must be based upon the available information which may be inchoate or partial. There are often risks to a child flowing from every available option (risk of harm if the child stays at home, risk of emotional harm at least if the child is removed). It is said that in these situations, social workers are 'damned if they do, and damned if they don't' take action. Despite these difficulties, it is my experience that very frequently social workers 'get it right' and take the right action, for the right reasons, based upon a professional and wise evaluation of the available information. Such cases sadly do not hit the headlines, or warrant lengthy scrutiny in a High Court judgment. I say 'sadly' because there is a need for successful social work, of which there are many daily examples, to be applauded and made known to the public at large*".

11. The removal by a public authority of a child from its family is nevertheless an extreme form of state interference with family life and calls for compelling justification: *X v Liverpool City Council* [2003] EWCA (Civ) 1173. Such an act has been described as "*Draconian*" and an "*extremely harsh*" measure requiring "*exceptional justification*" and "*extraordinarily compelling reasons*". It can only be justified where the welfare of the child requires it and no other less drastic form of intervention is appropriate in the circumstances. This is the case whether the removal is by the Police exercising s. 41 powers or pursuant to an EPO made under s. 39 of the Act (or indeed under a Care Order made under s. 25 of the Act).

The Facts

12. On 2nd May 2017 Mrs. T obtained a telephone call from the head of X's nursery school who informed her that X was complaining that his right wrist was hurting him. Mrs. T, who is an attorney admitted to the New York State Bar but who was working as a philanthropic project manager in Bermuda, arranged for her nanny to pick up X while she arranged for her pediatrician to see X on an emergency basis. The appointment with the pediatrician, Dr. Peter Perinchief, was fixed for 11:30 a.m. that day. When Mrs. T with her nanny and X attended the pediatrician's office Dr. Perinchief diagnosed a suspected fracture of the wrist and advised them to take X to the hospital for an X-ray. Mrs. T questioned the diagnosis but says "[Dr. Perinchief] *became aggressive saying the injury was suspicious*". Mrs. T called her husband and asked him to accompany them to the hospital, which he did.
13. At the hospital the child was seen by Dr. Ranjini Patton, a medical doctor and Emergency Room Physician at the KEMH. In her affidavit Dr. Patton stated that she examined the patient's history and examined him and concluded that he was suffering from "nursemaid's elbow". In her affidavit she states that:

    "*This is a common injury in young children which potentially occurs as a result of pulling on the arm. It goes back into place usually pretty easily as in the case of* [X*] with minor manipulation of the arm. The injury does not require x-rays just observation to make sure the child begins to use the arm again normally.* [X] *began using his arm within 5 minutes*".
14. Dr. Patton goes on to state that she telephoned Dr. Perinchief to let him know that his patient had a nursemaid's elbow and that she was sending the patient home[3]. She stated in her affidavit "*He was in agreement*". Dr. Patton's evidence was that she was aware that X had a prior episode of nursemaid's elbow[4] and that it is a common problem. She explains that some children will get it multiple times and that she instructs parents how to put it back into place. Dr. Patton was also aware at the time of treatment on 2nd May 2017 that X had a history of tibia fracture in the past. She goes on to state:

    "*This is another fracture that can occur relatively commonly in toddlers, so much to* [sic] *the fact that it is nicknamed a "toddlers fracture".*
15. This part of Dr. Patton's evidence concludes with the observation "*In my experience it is a fracture that social services may be called on* [sic] *by someone who is not familiar with this type of fracture*".
16. Dr. Patton's credentials are impressive. She completed residencies in Emergency Medicine, Internal Medicine and Pediatrics. She has worked in multiple hospitals for 18 years. She was a Pediatric Section Chief at Potomac Hospital Emergency Department in Virginia in the United States for 5 years dealing primarily with children. She was also an Emergency Department Director for 4 years in Florida.

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[3] A "*Visit Summary*" recording the material facts of X's visit to the Emergency Department of KEMH including the diagnosis of Nursemaid's Elbow was faxed by KEMH (Dr. Patton) to Dr. Perinchief at 1:16 p.m. on 2nd May. A copy of this document was included in the Trial Bundle compiled by the Applicants at Tab 13. It was either this document or the Discharge Instructions at Tab 14 (or both) which were shown by Mr. and Mrs. T to the DCFS and the Police at their residence on 3rd May when the Police were seeking to exercise their s. 41 powers.

[4] In fact Dr. Patton was the physician who treated X for the previous incident of Nursemaid's Elbow: see her e-mail to Colleen English (copied to Maureen Trew *et al*) on 5th May 2017 (Exhibit "DC4" to the affidavit of Danielle Cross).

17. She also states in her affidavit what she observed on 2nd May 2017 of X's parents, namely, that "*They were concerned and interactive appropriately. They were very softly spoken with their son and loving. I did not have any concerns that this child had been abused in any way and indicated this fact when I spoke with Dr. Perinchief*".
18. Dr. Perinchief's affidavit regarding the events of 2nd May 2017 is surprisingly brief. It does, however, acknowledge that he sent the child for an X-ray to the and states that "*There was no fracture but he did have a dislocated right elbow which was manually reduced in the emergency department. This was discussed with the emergency department physician and the child was discharged*". In this statement Dr. Perinchief appears to accept unequivocally that in fact the child did not have a fracture. Although this may have been his view at the time he swore his affidavit, what his nurse said on 3rd May to the DCFS (who were then investigating a report of child abuse) led the DCFS to conclude that there was a difference of medical opinion as to the proper diagnosis of X's complaint and that Dr. Perinchief did not accept that there was no fracture and no need for an X-ray.
19. Mrs. T returned home with the child and contacted the child's nursery school to relay what had happened; and informed the school that X would be returning to school the next day which is what happened.
20. The next day, 3rd May 2017, Annisha Peets, Acting Screening Coordinator at the DCFS assigned to the Intake Team, received a call at the DCFS on the "*Kidsline*" at 1:35 pm. She described the call as "*a reported concern relating to minor child,* [X]*, attending school on 2nd May, 2017 in pain, crying and holding his right arm to keep it immobile*". She documented the report which she says was "*followed officially by a child protection referral form detailing concerns related to the incident which was received by the Department at 3:13 p.m. via email*". Neither the DCFS' documentation of the oral report on the Kidsline or the child protection referral form received by e-mail were produced at the hearing.[5] The DCFS began acting on the report.
21. The DCFS (Ashlee-Kiel Talbot, a Social Worker Assistant assigned to work with Ms. Cross) made contact with Dr. Perinchief's office at 2:00 p.m. on 3rd May 2017 by telephone. Ms. Talbot spoke to Dr. Perinchief's nurse as Dr. Perinchief had left for the day. It was relayed to Ms. Talbot by the nurse that X and his mother had attended at Dr. Perinchief's office on 2nd May 2017 with X exhibiting a swollen wrist with pain which was thought to be a fracture. It was reported to Ms. Talbot by the nurse that "[Mrs. T] *stated that the injury may have been her fault*". Ms. Talbot was informed of the referral to the Emergency Department of the KEMH for an X-ray. Ms. Talbot also recounts being told by the nurse "*there was concern regarding the number of previous injuries to* [X]". This information was relayed to the DCFS staff.

The DCFS's Knowledge X's History of Medical Treatment and Previous Reports of Child Abuse

[5] Under s. 20 of the Act the identity of the maker of the report cannot be revealed. I do not read s. 20, however, as precluding disclosure of the reports in court proceedings related to the making of an EPO unless to do so would be to enable the maker of the report to be identified. There was no argument at the hearing as to whether disclosure of the reports of child abuse in this case could be compelled.

22. The child had been the subject of previous referrals to the DCFS and this was taken into account by the DCFS in its evaluation of the 3rd May 2017 child abuse report. It was this history and the new report on 3rd May 2017 which caused the authorities to decide to remove X from the care of his parents on 3rd May 2017. The Supervisor of the Intake Team of DCFS, Maureen Trew, whose recommendation or decision it was to take X into protective custody, recounts in her affidavit (para. 5):

> "*I was informed during the discussion with the Coordinators that this was his* [X's] *fourth visit to KEMH for an injury. The number of reported injuries was considered unusual for a three year old. Based on this information the case was screened in using our Structured Decision Making Assessment Tool that would require a 24 hour response from the time it was reported. Following this discussion with the Coordinators, I contacted the Director, Mr. Alfred Maybury to inform him of the concerns. He agreed that* [X] *and his sister should be removed under Section 41 of the Children Act 1998*".

23. This is confirmed by Danielle Cross, a Social Worker in the DCFS assigned to the Investigations Team ("*The recommendation* [for removal of X] *was based on the previous history and the new* referral": para. 10.

24. Ms. Cross recounted in her affidavit the DCFS' knowledge of previous reports (referred to as "*referrals*") as follows:

> "*On December 1, 2014 a child protection referral reported that* [X] *was admitted to King Edward II* [sic] *Memorial Hospital (KEMH) for a fractured Tibia. The case was screened-out from the Department.* [I should add that this expression was explained in the course of the hearing as meaning the case was treated as unsubstantiated]. *On October 24 2016 a second child protection referral was reported that* [X] *presented to KEMH Emergency Department with an Unknown-Elbow-Forearm Sprain vs occult fracture. The referral also reported that there were two other ER visits: June 30, 2016 – Nursemaid's Elbow and November 30, 2014 – Tibia Shaft Spiral. The visit on June 30, 2016 was not reported to the Department. The outcome of the physical abuse investigation was categorized as unsubstantiated and the case was closed on February 4, 2016* [a mistake for 2017]."

25. To summarize this information, there were two previous reports of child abuse to the DCFS before 3rd May 2017: one on 1st December 2014 (fractured tibia) which was unsubstantiated as child abuse; and one on 24th October 2016 with an unspecified diagnosis ("*Unknown-Elbow-Forearm Sprain vs occult fracture*"); but which was eventually (some 3 months later, i.e., on 4th February 2017) categorized also as unsubstantiated. The second report (i.e., the report of 24th October 2016) also referred to a visit to the Emergency Department of the KEMH by X on 30th June 2016 with a diagnosis of Nursemaid's Elbow.

26. So all in all there were three prior attendances at the hospital over a period of 2 years. Two of these three attendances were the subject of child abuse reports – 1st December 2014 and 24th October 2016. The 30th June 2016 attendance was not the subject of a child abuse report. The diagnosis was Nursemaid's Elbow. Both attendances which were the subject of child abuse reports were eventually determined to be unsubstantiated reports. In other words, there was nothing in the

DCFS' files to substantiate a finding that X had been the victim of child abuse in the past.

27. As part of the investigation of the 24th October 2016 report of child abuse Dr. Perinchief was consulted by DCFS. This is recorded in the Application for an Emergency Protection Order (dated 4th May 2017). The Application notes that Dr. Perinchief "*found the number of 'mishaps' unusual given* [X's] *age; however, there was no physical evidence to suggest that the injuries were more than accidents*". The DCFS also contacted X's day care. As the Application for and EPO states "*no child protection concerns were reported*". The case was closed on 4th February 2017.

28. (Dr. Perinchief's affidavit also contains a record of seeing X in his office on 8th August 2015 with the complaint of "*immobility of the right arm*". An X-ray was taken which revealed "*no bony injury*". Dr. Perinchief observed on this occasion "*Clinical swelling of the right wrist*". He did not make a report of child abuse to the DCFS in relation to this office visit).

29. Dr. Perinchief recites in his affidavit the previous occasions on which the child was treated medically commencing with treatment at the hospital on 30th November 2014 for a fracture of the left tibia. In relation to this occasion he stated "*Automatic referral was made to the child protection team*". The use of the word "*automatic*" is of concern. It suggests that there was no evaluation of the facts surrounding the injury to determine whether it was the result of child abuse. As noted above, the obligation to report that is imposed by the Act on a person carrying out professional duties in relation to a child only arises where the professional "*has reasonable grounds to suspect*" child abuse. The evidence in this case, particularly the evidence of Dr. Patton, suggests that tibial fracture is common in young children; so much so that it is called a "*toddlers fracture*". As she explains, a lay person ("*someone who is not familiar with this type of fracture*") may consider it to be evidence of child abuse. But she as a medical practitioner would not have considered it to be so without more.

30. This Court is not entitled to know who made the report of child abuse to the DCFS on 3rd May 2017 using the Kidsline. However, anyone in the categories of professionals or officials specified in s. 20(2) of the Act (medical, educational, social workers, child care workers, the police, etc.) would have no obligation to report child abuse unless the circumstances supported a reasonable suspicion of child abuse. Whether a person has reasonable grounds to suspect will depend on the knowledge, skill and experience of the professional or official who is called upon to make that determination.

The DCFS Investigation Following the 3rd May Report of Child Abuse

31. No-one at DCFS actually spoke with Dr. Perinchief or Dr. Patton regarding the 3rd May report of child abuse. The DCFS only spoke to Dr. Perinchief's nurse (on 3rd May 2017) because Dr. Perinchief had left for the day when the DCFS called his office. I have already set out in [21] above the details of what Ashlee-Kiel Talbot of the DCFS says was reported to her by Dr. Perinchief's nurse.

32. A further piece of information was obtained by the DCFS[6] from Dr. Perinchief's office before the decision was made to take X into protective custody, i.e., that no X-ray was actually taken at the Emergency Department of the KEMH on 2nd May 2017[7]. Ms. Talbot recounts (para. 5) being instructed (by Annisha Peets) "*to contact Dr. Perinchief's office again to arrange for a Skeletal x-ray for* [X] *since the x-ray was not conducted when* [X] *attended the hospital on May 2nd, 2017*".

33. What is surprising is that Dr. Perinchief's nurse never mentioned what occurred at the on 2nd May save for the fact that an X-ray had not been carried out at the KEMH and Dr. Perinchief's "*concern regarding the number of previous injuries to* [X]"[8]. The information given to the DCFS only describes what happened from the time Dr. Perinchief saw X in his office up to the time X was referred to the Emergency Department of the KEMH for an X-ray. In particular, it does not appear that the DCFS were informed by Dr. Perinchief's office of the diagnosis of Dr. Patton at the KEMH, the treatment administered by Dr. Patton and Dr. Patton's views concerning the likelihood of X's injuries (then or in the past) having been caused by child abuse.

34. All of these things were known by Dr. Perinchief. They were communicated to him by Dr. Patton on 2nd May 2017, the day before the DCFS spoke to his nurse. Dr. Perinchief must have communicated some of the information of what occurred at the KEMH to his nurse in order for the nurse to be able to report to the DCFS that no X-ray was carried out at the hospital. No explanation is given by Dr. Perinchief in his affidavit about these matters.

35. The DCFS spoke to Dr. Perinchief's office twice on 3rd May. On the first occasion the DCFS called to find out what Dr. Perinchief knew about the reported injury and to receive his recommendations[9]. The DCFS spoke to Dr. Perinchief's office again later the same day to arrange a skeletal X-ray of X which his nurse reported had not been done.

36. Dr. Perinchief knew that Dr. Patton had dismissed the need for an X-ray, a decision which he gave the impression to Dr. Patton of having accepted at the time[10]. The evidence appears to suggest, however, that Dr. Perinchief did not agree that there was no need for an X-ray; and did not agree that there was no reason to suspect child abuse.

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[6] It is not clear who at the DCFS obtained this information, although the evidence suggests is was Maureen Trew, the DCFS Supervisor on this case.

[7] Ashlee-Kiel Talbot spoke to Dr. Perinchief's office and describes what she was told in para. 4 of her affidavit. In para. 5 she notes that that the X-ray recommended by Dr. Perinchief was not conducted without stating expressly that this is part of the information she received from Dr. Perinchief's nurse. Annisha Peets reports (para. 10) that the information that no X-ray was taken came from Dr. Perinchief's office.

[8] See: Ashlee-Kiel Talbot's affidavit at para. 5; and Annisha Peets' affidavit at para. 9.

[9] See the affidavit of Ashlee-Kiel Talbot (para. 3) where she states "*I was directed to contact Dr. Perinchief . . . to ascertain if* [X] *had been seen by him and what, if any, were the recommendations*".

[10] Dr. Patton states at para. 4 of her affidavit: "*I telephoned Dr. Perinchief to let him know that his patient had a nursemaid's elbow and that I was sending the patient home. <u>He was in agreement</u>*" (my emphasis). Dr. Perinchief appears to have accepted Dr. Patton's diagnosis and treatment of X. He stated in his affidavit (para. 9): "*There was no fracture but he did have a dislocated right elbow which was manually reduced in the emergency department. This was discussed with the emergency department physician and the child was discharged*".

37. It is possible that Dr. Perinchief did not communicate all of what he learned from Dr. Patton to his nurse. However, he did communicate some of the information, namely, the fact that an X-ray was not taken at the KEMH. This fact and the concern expressed by his nurse to the DCFS when they called on 3rd May regarding the number of previous injuries indicates that, if all of the information was not communicated to his nurse, this may have been because Dr. Perinchief continued to suspect child abuse.
38. When the DCFS contacted Dr. Perinchief's office later that day to arrange the taking of an X-ray, the nurse told Ashlee Talbot "*the form could be collected the following* day": (para. 5 of Ashlee Talbot's affidavit).
39. This court does not know whether the taking of a further X-ray required Dr. Perinchief's authorization, and if so, whether it was provided by Dr. Perinchief; or whether Dr. Perinchief's nurse could and did authorize the taking of the X-ray (which seems unlikely); or whether all that Dr. Perinchief's office provided was a blank form. There is no evidence of Dr. Perinchief's nurse before the Court; and Dr. Perinchief's affidavit does not shed any light on these issues. This much is clear, however: Dr. Perinchief's office facilitated the taking of an X-ray with knowledge of the DCFS' purpose in requesting it (i.e., the investigation of a report of suspected child abuse) which X-ray Dr. Perinchief knew was considered by Dr. Patton to be unnecessary.
40. The course of the investigation by the DCFS of a case of suspected child abuse may have been altered; or (at least) the injury may have been seen from a different perspective by the DCFS if Dr. Perinchief or his nurse had at least communicated to the DCFS what Dr. Perinchief knew on 3rd May about the injury, i.e., that it was the opinion of another physician that this was not a fracture and there was no need for an X-ray. Had Dr. Perinchief or his office been inclined to be more forthcoming, he might also have relayed to the DCFS directly or through his nurse that another physician (i.e., Dr. Patton) (having examined X, having treated him for the injury; and having seen him interacting with his parents) held no concerns that X had been abused in any way[11].
41. It is clear that Dr. Perinchief disagreed with Dr. Patton's views at the time (although not saying so expressly in his affidavit): (a) about the need for an X-ray and (b) whether a suspicion of child abuse was justified. Dr Perinchief continued to hold this view in October 2017 when he swore his affidavit in which he stated (para. 10): "*Based on the unusual frequency of presentations for right arm problems between August 2015 and May 2017 (a total of four episodes), the left Tibial fracture in 2014 and the dislocated right elbow (May 2017) I concluded that there was a need for a referral to Social Services/Child Protection authorities for further investigation*". That he held this view is relevant to the further events in May 2017 which are described below.

[11] Dr. Patton stated in her affidavit that at the same time as she told Dr. Perinchief on the telephone that his patient had nursemaid's elbow and that she was sending the patient home, she indicated to him that she had no concerns X had been abused. She said (para. 5): "*During the visit in the Emergency Department both parents were with* [X]. *They were concerned and interactive appropriately. They were very softly spoken with their son and loving. I did not have any concerns that this child had been abused in any way and indicated this fact when I spoke with Dr. Perinchief*".

42. Following the second call to Dr. Perinchief's office on 3rd May 2017 an appointment for the X-ray of X was made at the KEMH for the following day, 4th May. The DCFS considered that the circumstances warranted taking X into protective custody immediately. Maureen Trew the DCFS Supervisor on this case discussed the matter with her colleagues involved in the case. Using the Structured Decision Making Assessment Tool employed by the DCFS, it was determined that a response was required within 24 hours of the report of suspected child abuse. The Director of the DCFS, Mr. Alfred Maybury, was contacted and informed of the DCFS' concerns. He agreed that X (and his sister) should be removed from the care of their parents and that this should be done under s. 41 of the Act, i.e., that the Bermuda Police Service should take the children into protective custody.

43. Danielle Cross contacted Detective Constable Bernadette Lawrence at approximately 14:50 hours on 3rd May 2017 requesting "*assistance from Police to remove a child from his parent's home because of suspected physical abuse*"[12]. When DC Lawrence asked to be told the facts she was informed that X had sustained a tibia fracture to his leg in December, 2014 as well as an elbow forearm sprain in October, 2016. She states (para. 4) that she was further informed that "*the DCFS had received information that the child in question had recently sustained a fracture to his right arm, all whilst in the custody of his parents*". This was untrue. At the most all that could be said is that it was uncertain whether the injury to X consisted of a fracture or simply a dislocated elbow. Danielle Cross admits (para.14) that she informed Mr. and Mrs. T at their residence on 3rd May that "*a referral was received for* [X] *reporting that he had a fracture . . .*".

44. DC Lawrence went to the residence of X along with another police constable and met up with the DCFS staff assigned to the case. The Police had assumed that a Care Order had been issued by the Court and that the Police were there to enforce it. It was then that she was informed by Danielle Cross (who was in the company of Ashlee-Kiel Talbot) that there was no Care Order and that the DCFS were "*relying on the Police to detain the child in accordance with Section 41 of the Children Act*": para. 5, DC Bernadette Lawrence. DC Lawrence proceeded to the house ("*to further assess the situation*") with the DCFS staff. They were met at the door by the nanny who was in charge of looking after X. The nanny was invited to call the parents, which she did. The parents arrived 10 to 20 minutes later together with a lawyer. When DC Lawrence explained the reason for their presence at the residence, the parents resisted handing over their son. A discussion ensued about the circumstances of the previous reports of physical abuse and the circumstances leading up to the instant report. Mrs. T explained how the recent injury occurred ("*she was playing with her son who was accustomed to playing rough and she might have pulled his hand inadvertently, causing injury*"); and tried to get the Police to call Dr. Patton when it was clear that they had not yet spoken to her. Mrs. T then showed the Police X's KEMH Discharge Instructions in which the diagnosis of nursemaid's elbow is recorded and the treating physician at the Emergency Department (Dr. Patton). It was at this point that the Police and the DCFS became

[12] Affidavit of DC Bernadette Lawrence at para. 3.

aware that another medical professional held a different view as to the nature of the injury.

45. At that point the Police sought further instructions from a higher authority in the BPS, Chief Inspector Naimah Astwood. As DC Lawrence described it "*a request had been made to have the Police detain the child*" under s. 41 Children Act 1998. DC Lawrence told the Chief Inspector "*that based on her assessment of the situation there were other options to explore*". DC Lawrence was told she should act according to her assessment of the circumstances.

46. DC Lawrence then spoke with the DCFS staff. This is how she described what she said to them: "*I subsequently had a conversation with both Social Workers present and enquired whether they could, in light of the absence of the Court Order, implement some safety measures to ensure the welfare and safety of the child without actually removing the child from the residence at that time*". DC Lawrence says she then received a telephone call from Detective Sergeant Karema Flood to whom she recounted the circumstances and of her request of the Social Workers to see if there was some other way of protecting the safety of the child without removing the child. DC Lawrence says she was told by DS Flood that "*as a result of the information provided by the DCFS the Police had the authority to detain the child under Section 41 of the Act*".

47. DC Lawrence goes on to state that Police Sergeant Jackson then arrived at the residence. She apprised him of the situation and he expressed agreement with her view that alternative measures should be sought. PS Jackson observed the child playing in the house. DC Lawrence was clear in her evidence that "*based on her understanding of Section 41 of the Act, my observation of* [X] *at the residence during this time did not satisfy me that he was suffering any significant harm at the time*".

48. Although she does not say so expressly, it is clear to me that DC Lawrence (had she been asked) would have also denied the existence of any circumstances indicating the likelihood of physical abuse occurring to X at the hands of Mr. and Mrs. T. She stated (para. 16) "*In light of these factors, I was of the opinion that, instead of enacting Section 41, the child could have been left in the custody of his parents at that time, and still could have been facilitated by the DCFS intervention measures, pending any subsequent court order by the Department*".

49. That was not to happen. The next Police Officer to arrive at the residence was Duty Inspector Glasgow. He says he heard on his two-way radio that officers of the BPS were having some difficulty exercising their powers under s. 41 of the Act and attended at the residence. There he spoke with the Police officers and DCFS staff members present. He states that he was made aware of X's previous injuries and that "*the child had recently sustained a fracture to his right arm*". That was incorrect. At that stage that question was the subject of professional disagreement between two trained physicians. The actual facts are as described earlier in this judgment. Duty Inspector Glasgow does not recount being told the salient facts regarding this disagreement. It does not appear that he was aware that the KEMH Discharge Instructions (which was available for inspection) showed that the nature of the most recent injury was nursemaid's elbow. From his affidavit it appears (as

he admits) that he attended at the residence "*to assist the officers in their efforts to get the parents to comply with the police officers to take the child* [X] *to a place of safety*"[13]. In the next sentence in his affidavit he explains his thinking as to his duty under s. 41: "*Upon my arrival I spoke with the parents and explained that whilst this is a difficult part of our job, it was our duty to act in the interest of the child who may or may not have been abused*".

50. Mrs. T states (para. 8) that Danielle Cross of the DCFS and DC Lawrence "*confirmed that Child Services did not have the authority to take a child and a Police Officer said it was under his authority that* [X] *was being taken*". She then states that she asked "*this Police Officer*" (who in all likelihood was Duty Inspector Glasgow) if he had spoken to Dr. Patton to ascertain the facts since [X] was being taken under his authority. She says (para. 9): "*He shrugged his shoulders and replied 'Ms. I just got here"*". She goes on to state (para. 9): "*I continued to press how he could authorize the taking of a child without knowing the facts but none of the police officers demonstrated any interest in answering that question*".
51. Duty Inspector Glasgow makes mention of one additional fact before the child was taken by the Police. He states (para. 6) that the parents contacted another lawyer by telephone. Inspector Glasgow was handed the phone. He says (para. 6): "*I spoke to a person identifying themselves as a lawyer from Marshall Diel and Myers. They advised me that they had spoken to their client and advised them to comply with the authorities*".
52. The reaction of the parents to the taking of their son is described by Duty Inspector Glasgow. He states (in the same paragraph) "*Both parents were clearly upset and distraught with the prospect of having to hand over their child to the authorities but they agreed to comply*".
53. X was placed in the care of the Director of the DCFS as provided for in s. 41 of the Act and placed by him with foster parents. Efforts were made on behalf of the parents to see if the child could be put in the care of a family friend but that was ruled out by the DCFS on the basis that the friend would not be considered a neutral placement. It was then requested by Mrs. T that the foster parent and X be put up at a hotel at the parent's expense. It was suggested that she and her husband would occupy an adjacent room. They were informed that this would not be possible. The child was taken away from his home and from the care of his parents. He was "*visibly upset*" (Danielle Cross, para. 22) although he did settle down later. Arrangements were made for his care by foster parents and checks were made with them by DCFS personnel to see how he was adjusting.
54. The next day (4th May) a decision was made to apply to the Family Court for an EPO. This is described by Annisha Peets to be "*the typical Departmental practice following a removal under Section 41 of the Children Act 1998*": para. 14.
55. That day an attempt was also made to have an X-ray of X taken at the KEMH. However, X was resistant and the attempt was abandoned.

The Second Report of Suspected Child Abuse on 4th May

[13] Danielle Cross confirms that Inspector Glasgow viewed his role as being "*to conduct a removal of a child*": see para. 21 of Danielle Cross' affidavit. Remarkably, he did not consider that his role was to investigate the facts to determine whether the BPS powers under s. 41ought to be exercised in this case.

56. Annisha Peets stated (para. 15): "*On May 4, 2017, at approximately 11:50 am the Department received a second child protection referral for* [X]". It is not clear how this report was made (whether on the Kidsline or otherwise); or whether the decision to apply to the Family Court was triggered by this further report. However, the statement of Annisha Peets (that it was "*typical Departmental practice*" to make an application for an EPO following a s. 41 detention by the Police) indicates that it is more likely that the application for an EPO would have occurred despite the further report. The further report did not suggest that there had been another incident of suspected child abuse. It arose out of the incident on 2nd May of which the DCFS was already aware.

57. This Court cannot compel disclosure of the identity of the person who made the 4th May report. Dr. Perinchief admitted in his affidavit that there was a need for a report to be made. He stated (para. 10) "*Based on the unusual frequency of presentations for right arm problems between August 2015 (a total of four episodes), the left Tibial fracture in 2014 and the dislocated right elbow (May 2017) and the dislocated right elbow (May 2017) I concluded that there was a need for a referral to Social Services/Child Protection authorities for further investigation*" (my emphasis). There is a distinct similarity between the basis of Dr. Perinchief's concern as expressed in this statement and the terms of the new report on 4th May as described by Annisha Peets. She states (para. 15): "*The referral indicated that it was unusual for a child of* [X's] *age to have sustained this number of injuries and that explanations for two (2) of the injuries were not convincing*". Dr. Perinchief was in a unique position to know of the child's previous injuries and to form an opinion regarding the explanations given for them. The affidavit of Annisha Peets (who records the making of the second report) implies that the report contained a medical opinion implying that it was made by a medically trained person. She states in the immediately following paragraph (para. 16) referring to the report: "*Due to the conflicting medical assessments . . .*".

58. The statement in Dr. Perinchief's affidavit indicates that he disagreed with the opinion of Dr. Patton. It is not clear what the extent of this disagreement was at the time (i.e., on 2nd May 2017). He may have accepted Dr. Patton's diagnosis of nursemaid's elbow (as he clearly did by the time he swore his affidavit) and that there was no need for an X-ray. If so, it may be that his only disagreement was with Dr. Patton's opinion as to the cause of the child's nursemaid's elbow. It seems more likely, however, that he disagreed with the diagnosis of nursemaid's elbow and still believed that an X-ray was required to determine whether there was a fracture; and still suspected that child abuse was the cause. This is evident from the fact that when the DCFS contacted Dr. Perinchief's office for the first time on 3rd May the point was apparently emphasized by Dr. Perinchief's nurse that no X-ray was taken when the child attended at the Emergency Department. When the DCFS later that day contacted Dr. Perinchief's office to arrange for the taking of the X-ray, the office did not question the need for and (was prepared to and did facilitate) the taking of an X-ray.

59. If this is the case, it is curious that Dr. Perinchief appears from the evidence to have agreed with Dr. Patton's assessment of nursemaid's elbow without the need for an X-ray (as stated by Dr. Patton in her affidavit at para. 4) on 2nd May, two days before.

60. Annisha Peets states that (para. 16) due to the conflicting medical assessments and the number of previous injuries she made contact with Wee Care Pediatrics to request an independent consultation of the child's medical file by a "*neutral*" physician. (The use of the word "*neutral*" is further indicative of the DCFS' perception of a conflict between Dr. Patton and Dr. Perinchief). Peets explains that "*As part of the investigation, the Department sought to determine whether or not there was a medical explanation that could accurately account for the number of injuries the child had sustained that would negate the need for any future investigation, or whether the number of injuries was indicative of plausible physical abuse of the child*".

61. An appointment was arranged with the independent physician for 11:30 a.m. the next day, 5th May 2017. The child's medical records were requested by the neutral physician.

62. Notwithstanding the unresolved conflict between the medical assessments the DCFS arranged for an application for an EPO to be made in the Family Court. The arrangements were made prior to 11:53 a.m. on 4th May when Danielle Cross e-mailed Mr. Pettingill, who (it was confirmed to the DCFS) would be acting for them in this matter. Mr. Pettingill was informed that the hearing had been arranged for 2:30 p.m. that day in Family Court No. 2. At 1:40 p.m. that day the DCFS Court report was e-mailed to Mr. Pettingill.

63. The contents of the DCFS report, i.e., the Application for and Emergency Protection Order, are worth noting. The following statements are relevant to the matters for decision in this case:

    a) The application states that it was made under s. 39 Children Act 1998 as read with s. 3(b), i.e., reasonable cause to believe that there was a substantial risk the child would suffer physical harm inflicted or caused by a parent of the child or caused by the failure of a parent to supervise and protect the child adequately.

    b) The basis for the belief was that X had suffered four injuries that required medical attention, the most recent of which occurred on 2nd May, 2017. The application stated that "*The Department is concerned that the number of injuries recorded on a young child heightens suspicion and may be an indicator of risk of further physical harm".*

    c) The Application/Report describes the "*Sources of Information*" on which it is based. Notable by its absence is any reference to Dr. Patton as a source of information. The Application/Report does, however, (as referenced below) refer to the "*The inconsistency in medical opinions regarding the child's diagnoses and questionable cause of the injuries*".

    d) The application details the previous reports and attendances at the KEMH:

        (i) The report of suspected child abuse following the admission of X on 1 December 2014 and his treatment for a fractured tibia; and it

noted that "*as a result of the doctor's determination*" the report was "*screened out*" from the DCFS, i.e., treated as unsubstantiated;

(ii) The unreported injury of nursemaid's elbow in June 2016 which came to the DCFS' attention during the investigation of the following report;

(iii) The report of suspected child abuse following X's presentation at the Emergency Department of the KEMH on 24th October 2016 with "*Unknown-Elbow-Forearm Sprain vs. Occult Fracture*. This was fully investigated by the DCFS and was determined to be an unsubstantiated case of physical abuse on 4th February 2017. The investigation included (a) obtaining a report by Dr. Oleksak which stated that X's complaint may have been the result of his previous Nursemaid's Elbow in June 2016; (b) a home visit which revealed "*no concerns*"; (c) collateral contact with X's day-care which revealed "*no child protection concerns*"; and (d) collateral contact with Dr. Perinchief, who noted that the number of "*mishaps*" was unusual given X's age but that "*there was no physical evidence to suggest that the injuries were more than accidents*".

(iv) The report made on 3rd May 2017 relating to the incident on 2nd May 2017.

e) The Application describes X's arrival at school crying and holding his right arm; the visit to Dr. Perinchief's office; the referral by Dr. Perinchief to the KEMH for an X-ray; the diagnosis at the KEMH of nursemaid's elbow and the fact that no X-ray was conducted; and the observation that "*this number of injuries is unusual for a three year old*". It described the "*unannounced home visit*" on 3rd May 2017; the explanation of Mrs. T as to how the injury could have happened; and the conclusion that "*As a result of the previous injuries and conflicting information received from the medical professionals regarding* [X's] *most recent incident, it was decided that* [X] *be placed in the care of the Director of the Department of Child and Family Services under the Children Act 1998 section 41*".

f) The Application/Report to the Court contained an "*Assessment*" which stated:

> "*The Department of Child and Family Services acknowledges that the previous injuries were not substantiated for abuse or neglect, however, there is concern that at three years old,* [X] *has had four injuries requiring medical attention and there is uncertainty regarding the diagnosis of this most recent injury on May 2, 2017. The inconsistency in medical opinions regarding the child's diagnoses and questionable cause of the injuries leaves question as to whether the child may be susceptible to, or at risk of, future harm. Whilst* [X] *was observed in his home as being happy, active and playful, the Department would like for*

him to remain in a vetted foster placement as the investigation remains in the initial phase of gathering further information from medical professionals to ascertain any possible causes of [X's] *injuries and ascertain his ongoing safety*.

g) Under the heading "*Plan of Care*" the Application/Report outlined the DCFS' recommendations. They included:
   (i) making X the subject of an EPO;
   (ii) provision of all of X's (and his sister's) medical records to the DCFS;
   (iii) full medical check-ups to be performed on X and his sister including a skeletal examination;
   (iv) the DCFS making a referral for X and his sister to the Child Development Program;
   (v) the DCFS to schedule supervised visits for Mr. and Mrs. T with X as deemed necessary and appropriate by the DCFS.

h) Under the heading "*Recommendations*" the Application/Report states: "*The Department of Child and Family services is petitioning the Family Court for an Emergency Order for the benefit of minor child,* [X], *under the Children Act 1998 Section 39 read with Section 3(b) whereby it was reported to the Department that three year old* [X] *has sustained four injuries that required medical attention, the most recent of which occurred on May 2, 2017. The Department is concerned that the number of injuries recorded on a young child heightens suspicion and may be an indicator of risk of further physical harm. The Department of Child and Family Services recommends that the above Plan of Care be implemented under Section 31 of the Children Act 1998*".

i) The Application was signed on behalf of DCFS by Danielle Cross and Maureen Trew.

64. The hearing before the Family Court was attended by Mr. and Mrs. T and their lawyer, Mr. Pettingill, and certain representatives of DCFS. After hearing the Department's application and what Mr. Pettingill had to say on behalf of the parents, the Family Court ordered that X be made the subject of a 28-day EPO. The EPO recorded the reasons for making the Order as follows: "*Having regard to the frequency of injuries and given* [X's] *age and the inconsistency in medical opinions regarding* [X's] *cause of injuries; THE COURT IS SATISFIED THAT there is reasonable cause to believe that the child is likely to suffer significant harm if he is not removed to accommodations provided by or on behalf of the Director of Child & Family Services*".

65. The Court accordingly ordered:
   a) "[X] *shall be the subject of an Emergency Protection Order for a period of twenty-eight (28) days.*
   b) *"*[Mr. and Mrs. T] *shall provide the Department of Child & Family Services with* [X's and his sister's] *full medical records.*
   c) *"*[X and his sister] *shall have full medical check-ups including a skeletal examination.*

d) "*The Department of Child & Family Services shall make referral to the Child Development Programme for the children*"*;*

e) "*The Department of Child & Family Services shall schedule supervised visits for* [Mr. and Mrs. T] *with* [X] *as deemed necessary and appropriate by the Director.*

f) "*This matter shall be reviewed on Wednesday, 31st May 2017 at 9:30 a.m. in Family Court No. 2*".

66. It may be appropriate to pause at this point to say something about the reasons given by the Family Court for its decision to grant the EPO (which was granted in exactly the same terms as were recommended by the DCFS and for the same reasons as advanced by the DCFS). It does not appear that the Family Court was referred to any case law on the subject of EPOs by the DCFS. The DCFS were not represented by an attorney; but that does not excuse the DCFS from having some familiarity with the law applicable in the sphere in which it operates when it decides to advocate for itself; especially when its actions can have such a dramatic and intrusive effect on the lives of members of the community as in this case.

67. The Family Court judge is a lawyer and it would be reasonable to expect that she would have some familiarity with the law in this area; especially if she were regularly deciding such cases. I do not have any knowledge of the frequency of such cases expect that I was made aware by Ms. Greenidge that EPOs are very rare. Where a judge is hearing a case he or she can usually rely on counsel for the parties (who are officers of the court) to guide him/her as to the law where the law is not in dispute when he or she is uncertain of the legal ground upon which he or she is proceeding.

68. There is no separate document apart from the EPO itself setting out the reasoning of the judge and explaining how she arrived at her conclusion. The EPO stated that it was based upon "*the frequency of injuries . . .* [X's] *age and the inconsistency in the medical opinions regarding* [X's] *injuries*". It can safely be assumed that the Judge accepted the factual content of the DCFS' Application/Report as establishing a sufficient basis for making the Order. The judge may have been comforted in knowing (as appears to be the case) that the facts were not seriously in contention between the parties. What would have been useful to the judge, however, was some guidance (either from her own experience or from the advocates) as to what considerations should be taken into account in exercising the powers of the Court under s. 39 and how the discretion given to the judge ought to be exercised. Without this guidance the judge could not know whether she was proceeding in the way the law requires such powers to be exercised.

69. What occurred after the making of the EPO is only relevant to the extent that it throws light on what occurred prior to it and illuminates the circumstances in which the EPO was made (and, before that, the s. 41 decision of the BPS). In order to keep this judgment within reasonable bounds as to its length I have left out in my description of what occurred after the making of the EPO descriptions of the efforts made by the DCFS to reduce the impact of the EPO on X and his family, e.g., by arranging for X to have the things he would need

to be comfortable and at ease in the foster parents' home; and to arrange a supervised visit, etc. It is evident that the DCFS were caring and attentive to the needs of X at all times following the making of the EPO and acted diligently to promote what they considered to be the best interests of the child in the circumstances in which he was placed. X was returned to his parents in the evening of 5th May 2017 as soon as it was confirmed by the independent doctor that the injuries that were suspected to be the result of child abuse were consistent with accidental causes.

70. Dr. Patton called the DCFS in the evening of 4th May 2017 (the same day as the Court EPO application but after the hearing) and spoke to the on-call DCFS staff member (Mrs. Colleen English-Degrilla, the Supervisor of Medical Social Workers) to express her concern about the removal of X from the care of his parents; and e-mailed to her a written report[14] of her attendance on X at the KEMH highlighting the fact that in her view the child's injuries did not indicate that he was abused in any way. As noted above, Dr. Patton was not referenced in the Application as a source of information for the recommendations made by the DCFS. No-one at the DCFS had spoken to her notwithstanding that the DCFS was aware that she saw the child at the KEMH on referral from Dr. Perinchief for an X-ray; and that she diagnosed nursemaid's elbow[15].

71. Dr. Patton's report was forwarded by Mrs. English-Degrilla to the relevant persons at the DCFS (Maureen Trew, Danielle Cross and Annisha Peets) in the morning of 5th May 2017.

72. At 11:30 a.m. on 5th May Danielle Cross and Annisha Peets attended at Wee Care Pediatrics for a consultation with Dr. Stephen West. Dr. West reviewed the medical records of X that had been obtained from Dr. Perinchief's office. He reported that the explanation given for the cause of the tibial fracture (i.e., essentially that it was an accident) was consistent with the injury. Dr. West also reported that it was common to have another Nursemaid's Elbow after having one; and that it was unfortunate but possible for X to have had that many incidents of Nursemaid's Elbow. He stated that it appeared from the medical records that X had had four possible incidents of Nursemaid's Elbow. Dr. West said he would consult with the Head of Radiology at the KEMH to determine whether a skeletal survey was necessary. He said that a skeletal survey may be helpful to identify previous injuries. Dr. West also stated that "*it should be recommended that caregivers should avoid pulling on* [X's] *arms or picking him up by the arms*".

73. A supervised visit had been arranged for Mr. and Mrs. T to see X for that day. The visit took place around mid-day on 5th May 2017. During the visit Mr. and Mrs. T were informed by DCFS that a consultation with an independent

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[14] Dr. Patton's report is exhibited to the affidavit of Danielle Cross as Exhibit "DC5". (her report states that she attended X on 3rd May, but it was actually on 2nd May)

[15] This was apparent from the KEMH Discharge Instructions shown to the DCFS at the residence of Mr. and Mrs. T on the date of X's detention by the DCFS. The Discharge Instructions shows the diagnosis of Nursemaid's Elbow and the name of Dr. Patton as the physician providing the care of X at the Emergency Department.

physician was scheduled and that the independent physician would consult with the Head of Radiology at the KEMH to determine if "*a skeletal survey*" was necessary. The parents were also informed that "*if the independent physician provided written documentation regarding* [X's] *injuries and if the Director is in agreement then X will be returned home that day*".

74. Dr. Patton sent a further e-mail to the DCFS (including Maureen Trew, Danielle Cross and Annisha Peets) at 4:43 p.m. on 5th May in which she related to the DCFS personnel that she had spoken to a friend of hers (Dr. Patricia Morgan) a child abuse specialist "*who does not have any concern that these injuries are abuse*". She stated further "*I know you all have a difficult job to do but hopefully* [X] *can be supervised inside his own home. Please let me know if you need her contact information or if you have any further questions. I am at work now and am able to review all of his charts. Upon review I see I was the physician who took care of him last year June for the same problem. Nursemaids elbow can reoccur in a little over 10 percent of children. Sometimes I even teach the parents how to put it back into place. Please call me at 239-1761. Thank you very much*".

75. Dr. Patton called the DCFS (Mrs. Trew) in the afternoon of 5th May 2017 asking if she had received her report. She was told that the report had been received "*but it was not signed and it was not on KEMH letterhead*"[16]. Dr. Patton agreed to send a signed copy on the KEMH letterhead and asked when X would be returned to his parents. She was told that there was no release and that the case could not be discussed with her. At 5:57 p.m. 5th May Dr. Patton sent her signed report to Mrs. Trew[17]; and at 6:12 p.m. on 5th May Dr. Patton sent the signed report to Danielle Cross[18].

76. Ms. Trew received an e-mail from Dr. Daniel Stovell[19] on the same day (5th May 2017) at 5:48 p.m. in which Dr. Stovell indicated that he had discussed the case with Dr. West, Dr. Oleksak and Dr. Patton. He stated that "*Based on the description of the injuries and the reported circumstances he determined that it was suggestive of accidents and not child abuse*".

77. At 7:31 p.m. on 5th May Danielle Cross received an e-mail from Dr. West stating that "*based on the history and medical information provided to me by the Department of Child and Family Services, and without personally examining the child, it is my opinion that it would certainly be possible for the injuries discussed to have been related to accidental causes. . . In my opinion the tibial fracture at 11 months of age in relation to the mechanism of injury reported was most likely a childhood accidental spiral tibial (CAST) fracture. Again this is a common accidental injury in toddlers and certainly can be recurrent. I do not feel that any further investigations are warranted in this child*".

78. At between 8:30 p.m. and 8:45 p.m. on 5th May the DCFS returned X to his parents. This occurred under s. 39(7)(a) of the Act, i.e., on the basis that it

[16] Affidavit of Maureen Trew, para. 12.
[17] Exhibit "MT3" to the affidavit of Maureen Trew.
[18] Exhibit "DC5" to the affidavit of Danielle Cross.
[19] Exhibit "MT2" to the affidavit of Maureen Trew.

appeared to the Director that it was safe for the child to be returned. Mr. and Mrs. T were given a "*Safety Plan*" signed by Ms. Cross and Ms. Peets outlining the advice of Dr. West with regard to the handling of X.

79. On 9th May 2017 it appears that proceedings were commenced by Mr. and Mrs. T for judicial review of the decisions of the Family Court and the Director.

The Discharge of the EPO

80. On 11th May 2017 the DCFS applied to the Family Court to discharge the EPO. The document entitled "Application to Discharge Emergency Protection Order" stated the application was made "*after documentation from an independent paediatrician reported that it is possible for the injuries to be related to accidental causes and that any further investigations were not warranted".* The application to discharge the EPO contained the same history of previous injuries as the application for the EPO and added to this what the DCFS learned from its investigations following the making of the EPO. These findings are set out in the Discharge Application. It references the following:
    a) The letter from Daniel Stovell dated 5th May reporting that his conversations with Dr. West, Dr. Oleksak and Dr. Patton about the injuries and circumstances were suggestive of true accidents rather than child abuse;
    b) The letter from Dr. Patton dated 5th May 2017 reporting that she did not have any concerns that X had been abused in any way;
    c) A medical report from Dr. Ryan Bates of Wee Care Paediatrics reporting on a medical check-up conducted on 5th May 2017 on X's sister which recorded no concerns;
    d) A letter dated 10th May from Dr. Oleksak reporting that there was no indication of the need for a skeletal survey and that X's injuries did not indicate anything outside the accidental spectrum and were not indicative of parental neglect.
    e) Another letter from Dr. Oleksak dated 10th May 2017 relating to his observations of X's sister indicating that there was no reason for a skeletal survey of her.

81. The Discharge Application contains this statement (under the heading "Assessment") explaining the decision to remove X from his home: "*Initially the Department of Child and Family Services <u>had serious concerns</u> regarding* [X] *having several injuries at a young age and it was recommended that he be removed from the home and placed in a neutral placement <u>to allow the Department to carry out an investigation</u>. A consultation was held with an independent physician, as <u>there was a concern with the conflicting information received from two medical professionals</u> . . ".* The DCFS Discharge Application goes on to state that its investigations showed that "*Nursemaid's Elbow is a common injury and after one . . . the child is vulnerable to having another*"; and that as a result of these findings the "*investigation was categorized as unsubstantiated whereby there was no evidence of physical abuse or neglect*".

The Removal of X under s. 41 Children Act 1998

82. It is clear that the DCFS made the decision that X be removed from the care of his parents for his safety on 3rd May 2017 and relied upon the BPS to effect the removal.

83. Part V of the Act is entitled "Protection of Children". Section 41 provides as follows:

> "*41. Where a police officer has reasonable and probable grounds to believe that a child is suffering, or is likely to suffer, significant harm, the police officer may detain the child and shall forthwith take such reasonable steps as are necessary to –*
>
> a) *notify the Director of the detention and also where practicable –*
>
> *(i) the child's parents;*
>
> (ii) *every person who is not a parent of his but who has parental responsibility for him; and*
>
> (iii) *any other person with whom the child was living immediately before such detention; and*
>
> b) *deliver the child to the Director or make appropriate arrangements for the temporary detention of the child until the Director assumes responsibility for the care of the child*".

84. The Police are not the agents of the DCFS when it comes to the exercise of s. 41 powers. While in many situations they are properly called upon to assist the DCFS perform its duties to protect children from abuse, for the purposes of s. 41 they must make their own determinations as to whether the circumstances warrant their intervention. Before a police officer can properly and lawfully detain a child under this section he must have reasonable and probable grounds to believe that the child is suffering or will suffer harm (as a result of one or other of the forms of abuse specified in the Act) if not detained. The exercise of this power does not require the sanction of the court. It is an extraordinary power not even the DCFS possesses. Before the DCFS can remove a child from those who have lawful custody it must seek an Order of the Court. The Police, however, can detain a child without the need to first persuade a judge to make such an order. This gives some indication as to the kind of circumstances in which the powers of the police under s. 41 are to be exercised. They are most often emergency situations in which the circumstances in which the child is found speak for themselves as to the suffering of a child from abuse or the existence of a danger of child abuse. This was the case in *AW v The Director of Child and Family Services* [2008] Bda L.R. 42.

85. In the language of the statute the Police must have "*reasonable and probable grounds to believe that a child is suffering, or is likely to suffer, significant harm*". The use of the word "*believe*" is to be contrasted with the use of the verb "*suspect*" (which is used in another part of the Act in relation to the reporting of child abuse). For it to have been within the powers of the Police to detain X under s. 41 they must have actually believed that there was a probability (as opposed to a possibility) of significant harm being suffered by X if he was not detained; and must have reasonable grounds for such belief, i.e., such belief must be grounded in objective facts.

86. The facts of this case show that the circumstances existing at the residence of Mr. and Mrs. T on 3rd May 2017 did not measure up to the requirements of s. 41. Quite the contrary. The Police Officers (when made aware of the absence of a Care Order and that their presence was requested to exercise s. 41 powers) had serious

doubts as to whether they should take the children into custody; and enquired of the DCFS as to whether some other (meaning less drastic) measures could be taken by the DCFS.

87. However, the Police Officers, who questioned the justification for the exercise of their powers under s. 41[20], were overridden by a superior officer who arrived after matters had been in progress for approximately 2 hours; with the result that X was taken into protective custody and delivered to the Director (or as he directed) pursuant to s. 41(b) of the Act without any proper basis for such an extreme step. The overriding decision to detain X was not based on any information that Officers (DC Lawrence and PS Jackson) did not already possess.

88. As the evidence showed, the DCFS which at the time of arrival at the residence possessed more information about the case than the Police, put the case no higher than one requiring further investigation; and could have possessed no more than a suspicion of physical abuse. Any suspicions the DCFS possessed before their arrival at the child's residence could only have been weakened when the parents of X produced to the DCFS and the Police the KEMH Discharge Instructions and/or the Visit Summary which disclosed (a) that the diagnosis made by the KEMH (without the need for an X-ray) was one of nursemaid's elbow (not a fracture as the DCFS may have suspected on the basis of conversations with Dr. Perinchief's nurse); and (b) recommended a follow up visit with Dr. Perinchief in 2-3 days to "*Recheck today's complaints*": see Discharge Instructions at Tab 14 of the Applicant's Trial Bundle.

89. Assuming that all the information that the DCFS had when they arrived at the residence of Mr. and Mrs. T on 3rd May and obtained from Mr. and Mrs. T at the premises was possessed by the BPS, it would not have amounted to reasonable and probable grounds to believe that X was suffering from child abuse or that he would be likely to suffer child abuse, if not detained. It is clear from the evidence that DC Lawrence and PS Jackson did not in fact believe that such reasonable and probable grounds existed. They expressed doubts as to whether detaining X was justified.

90. The eventual and overriding decision to detain X pursuant to s. 41 of the Act was it seems based on a misapprehension of the role of the BPS on the day in question and what the section requires. Inspector Glasgow stated (para. 3) his reasons for attending at the parents residence: "*I heard on my two way radio that the officers were having some difficulty as the parents were initially non-compliant*"; and (para. 6) "*I attended to assist the officers in their efforts to get the parents to comply with the police officers to take the child*". He states further on (para. 6) "*I spoke to the parents and explained . . . it was our duty to act in the interest of the child who may or may not have been abused*". While correctly stating the primacy of the interests of the child, this explanation (a) conflicts with the evidence of DC Lawrence and PS Jackson who had not yet decided to detain X and, it seems, may have actually decided against it; (b) is silent as to the threshold criteria to be met for a s. 41 removal and suggests that Inspector Glasgow may have believed that any perceived risk irrespective of the probability of it occurring would justify removal.

[20] DS Lawrence and PS Jackson may have actually decided not to exercise their s. 41 powers: see the affidavit of DS Lawrence at para. 12 -13; and the affidavit of PS Jackson at para. 4.

91. The information Inspector Glasgow had about the case was given to him on arrival at the residence. This was not a case like *AW v The Director of Child and Family Services* where the visual images presented to the Police on arrival at the scene spoke for themselves. He stated (para. 5) "*I was made aware that two and a half (2 ½) year old,* [X], *. . . had sustained a tibia shaft fracture to his leg in December, 2014. He also suffered an elbow forearm sprain in October, 2016. Department of Child and Family Services had received information that the child in question had recently sustained a fracture to his right arm, all whilst in the custody of his parents*". Apart from its brevity, the information given to the police (regarding the most recent incident) was incorrect. It had not been determined that X had sustained a fracture on 2nd May. No X-ray had been conducted to determine whether or not a fracture had been suffered. On the contrary, it was the opinion of one physician that there was no fracture; that the injury was a dislocated elbow; the implication being that it could have been accidental. This was disclosed on the Discharge Instructions and Visit Summary that was shown to the BPS and the DCFS at the residence.

92. The removal of a child from the care of his parents is a serious matter whether it is effected by the Police or by the Director of the DCFS. It will ordinarily require to be authorized by an Order of a Court as a safeguard. Under s. 41, however, the Police are given the power to remove children without the intervention of the Court. Judicial dicta concerning the use of such a power indicates that it should only be used in emergency situations where the circumstances are such that it is not practicable to protect the child from the real and immediate danger the child is facing by the other processes available under the Act. As was said in *Williams et al v London Borough of Hackney* [2015] EWHC 2629: "*. . . unless the urgency requires otherwise, local authorities should apply for an EPO in preference to reliance on the emergency powers of the police in order to ensure the safeguard of court scrutiny*".

93. The circumstances of this case did not in my view warrant the exercise of the powers of the Police under s. 41. I am compelled to find, therefore, that the detention of X by the BPS was an unreasonable exercise of its discretion.

The Decision of the Director to Apply for an EPO

94. The substantive part of s. 39 of the Act under the heading "*Emergency protection* orders" provides as follows:

> "*39(1) On the application of the Director for an order under this section with respect to a child, the court may make the order if, but only if, it is satisfied that –*
>
> (i) *there is reasonable cause to believe that the child is likely to suffer significant harm if –*
>
> *(i) he is not removed to accommodation provided by or on behalf of the Director; or*
>
> *(ii) he does not remain in the place in which he is then being accommodated; or*
>
> (ii) *enquiries are being made with respect to the child under section 42(1)(b), and those enquiries are being frustrated by access to the child being unreasonably refused to a person seeking access and that the Director has*

reasonable cause to believe that access to the child is required as a matter of urgency."

95. The Children Act 1998 provides the Family Court with a range of possible orders that may be made where there are reasonable grounds for believing or suspecting that a child is or is likely to be the victim of abuse. In deciding how to discharge his statutory responsibilities to protect children from abuse the Director must choose which one or more of these orders is the most appropriate to meet the circumstances of a particular case. The Director's discretion is to be exercised in accordance with the principles applicable to the exercise of his discretion contained in the Act (first and foremost, the welfare principle in s. 6); and those developed by the common law including the principle (stated in *Langley*) that '*the removal of children from those who have custody of them is an extreme form of interference with family life and calls for compelling justification*".

96. In making the decision whether to apply to the Family Court for a child protection order and, if so, what order to seek the Director was required to consider the effectiveness and proportionality of the measures available under the Act to the circumstances of the case before him. Where an EPO is being considered the Director must be satisfied that nothing less would protect the interests of the child. As was stated in the case of *Re B (a Child) (FC)* 2013 UKSC 33 in a case relating to the making of a Care Order (but which is in my view applicable on the issue of proportionality to the making of an EPO):

> "*[77] It seems to me to be inherent in s. 1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. That is reinforced by the requirement in s. 1(3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests*".

97. Likewise, s. 39 of the Bermuda Act empowers the Court to make an EPO "*if, but only if, it is satisfied that"* (in the circumstances of this case) removal from his parents to other accommodation is what is required to protect the child from the danger of abuse.

98. The making of such a decision is not a linear process. However, it seems to me that at an early stage the Director was required to consider the facts of the case before him in order to satisfy himself that the Family Court could properly find that the facts give reasonable cause to believe that X would be likely to suffer significant harm at the hands of his parents and that his removal to other accommodation was an appropriate measure in the circumstances.

99. Regretfully, it does not appear that these considerations formed part of the process of the Director in making the decision to apply for the EPO in this case.

100. In coming to this conclusion I bear in mind the respect that should be shown for the Director's decision by a court reviewing such a decision. It was said in *X v Liverpool City* Council:

> "*It is important to keep in mind that the function of the court in deciding whether the council's decision to seek an EPO was proportionate is one of review. But it is not a full-blown review on the merits. As Lord Steyn said in*

R (on the application of Daly) v Secretary of State for the Home Dept. [2001] UKHL 26 at [28] . . . 'the respective roles of judges and administrators are fundamentally distinct and will remain so . . .' *In appropriate cases, judges should show some deference to decision makers: see per Lord Walker of Gestingthorpe in R (on the application of ProLife Alliance) v British Broadcasting Corp [2003] UKHL 23 at [132]*".

101. Dyson LJ went on to quote with approval a passage in the third edition of *Judicial Review Handbook* (2001) para. 58.2 which is relevant in this context:

> "*Hand in hand with proportionality principles is a concept of 'latitude' which recognizes that the Court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a 'flexi-principle'. The latitude connotes the appropriate degree of deference by court to public body. . . .".*

102. Nevertheless it was noted in the passage from *Judicial Review Handbook* quoted in *X v Liverpool County Council* that: "*The need for deference should not be overstated. It remains the role and responsibility of the Court to decide whether, in its judgment, the requirement of proportionality is satisfied*". In a case heard in the European Court of Human Rights (*Venema v Netherlands* [2003] 1 FCR 153 dealing with art. 8 of the ECHR[21], namely, a person's right to respect for his private and family life, etc. and the margin of appreciation to be allowed to national authorities) it was stated: "*The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. While national authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the court must still be satisfied in the circumstances of the case that there existed circumstances justifying such a measure*".

103. The Application for an Emergency Protection Order which sets out the DCFS' case to the Family Court makes it plain that the circumstances presented to the DCFS raised a doubt as to whether X had ever been the subject of child abuse and whether the injury which prompted the application for an EPO was the result of child abuse. As stated in the Application:

> "*As a result of previous injuries and conflicting information received from the medical professionals regarding* [X's] *most recent incident, it was decided that* X *be placed in the care of the Director of the Department of Child and Family Services under the Children Act 1998 section 41*".

104. The Application notes further:

> "*The Department of Child and Family Services acknowledges that the previous injuries were not substantiated for abuse or neglect, however, there*

[21] Although the European Convention on Human Rights is not part of Bermuda's domestic law, the Children Act 1998 should be interpreted in a way that is consistent with its provisions including art. 8: Kawaley J (as he then was) *Marshall v Wakefield et al* [2009] Bda LR 25.

is a concern that at three years old X *has had four injuries requiring medical attention and there is uncertainty regarding the diagnosis of this most recent injury on May 2, 2017. The inconsistency in medical opinions regarding the child's diagnoses and questionable cause of the injuries leaves question as to whether the child may be susceptible to, or at risk of, future harm. Whilst* X *was observed in his home as being happy, active and playful, the Department would like for him to remain in a vetted foster placement as the investigation remains in the initial phase of gathering further information from medical professionals to ascertain any possible causes of* X's *injuries and ascertain his ongoing safety*" (my emphasis).

105. Dr. Perinchief described the 2nd May injury against the backdrop of the previous injuries as "*unusual*"; and concluded that the case was appropriate to report to the DCFS "*for further investigation*": (para. 10).
106. In my view, the existence in the mind of the DCFS of a "*question as to whether the child may be susceptible to, or at risk of, future harm*" falls well short of having "*reasonable cause to believe that the child was likely to suffer significant harm*"; which is the threshold the DCFS would have needed to cross in order to be able to satisfy the Family Court to make an EPO. At most (and I hesitate to make any such finding) the facts presented to the DCFS may have been the foundation for a suspicion of possible child abuse. Even if so, one could still properly question whether such a suspicion would have been reasonable in the context of everything the DCFS knew about this family including the history of previous injuries reported and unreported. The evidence shows that the next day independent medical advice was obtained from Wee Care Pediatrics which erased the suspicion of child abuse from the mind of the DCFS and cleared the way for X to be returned that evening to his parents. The EPO was subsequently discharged on the application of the DCFS on 11th May 2017.
107. There are other aspects of the Application (apart from the failure to apply the statutory test for an EPO) which are of concern. It does not appear from the evidence that any consideration was given to a less drastic means of resolving the conflict of medical opinions, i.e., a child assessment order under s. 37 of the Act which would not have involved any transfer of parental responsibility or removal of X from the care of his parents. It was the uncertainty as to the correct diagnosis of X that was at the heart of the DCFS' concern. As stated in the Application (under the heading "*Assessment*") "*there is uncertainty regarding the diagnosis of this most recent injury on May 2, 2017*". The DCFS did not believe that there was an immediate threat of harm to the child. As noted above, the furthest the DCFS were prepared to go was to say that there was a "*question as to whether the child may be susceptible to, or at risk of, future harm*".
108. Whether the right diagnosis was a fracture or nursemaid's elbow, a further question would still have required to be answered, i.e., whether the injury was accidental or inflicted with the intention of causing harm. The only other fracture (child's previous injury of tibial fracture on or about 1st December 2014) (which was reported as suspected child abuse) was not found to be child abuse. The two subsequent injuries (which were immediately prior to the 2nd May incident and

which were similar to the 2nd May injury) were also unsubstantiated as acts of child abuse. The most recent of these two immediately preceding injuries (on 24th October 2016) was fully investigated. In those circumstances, a child assessment order could have been considered (assuming no other reasonable way of resolving the difference was available) if the parents were not willing to undertake to have the child examined by an independent physician voluntarily to resolve the uncertainty.

109. I do not think it necessary to deal with these matters at length in this judgment as it is sufficient for me to deal with the application against the Director by making the findings made above. However, there is nothing in the Application to indicate why (if it was the case) the DCFS considered that no other measure available under the Act, e.g., a Child Assessment Order, would have been an appropriate response. It was the duty of the Director to consider whether the protection of X (assuming that some measure of protection was warranted) could have been achieved by a less interventionist approach. If authority for this proposition is required, it can be found in the words of Thorpe LJ in the case of *Re B (Care: Interference with Family Life)* [2003] EWCA Civ 786 in relation to a care order (but which is also applicable in the case of an EPO):

> "*where the application is for a care order empowering the local authority to remove a child or children from the family, the judge in modern times may not make such an order without considering the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Art. 8 rights of the adult members of the family and of the children of the family. Accordingly, he must not sanction such an interference with family life unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children*".

110. Although the European Convention of Human Rights is not part of Bermuda's domestic law (our own Constitution does not contain a provision similar to Art. 8), our Children Act 1998 was enacted against the backdrop of Britain's agreement to adhere to the ECHR, an agreement made on behalf of itself and Bermuda. Unless to do so would conflict with some other provision of Bermuda's statute law, the 1998 Act must, therefore, be construed and applied in a way that is consistent with the provisions of the ECHR.

111. In the circumstances, allowing a minimal certain degree of latitude to the Director in the exercise of a discretion which properly belongs to him (minimal because the effect of the decision he was called upon to make entailed a serious intrusion by the state in the private and family life of the Applicants), I am bound to find that the exercise of the Director's discretion in deciding to make an application for an EPO was unreasonable.

The Decision of the Family Court

112. Regretfully, the Family Court also failed to handle this case in accordance with the requirements of the Act. There is no separate document containing in written form

the reasoning of the Family Court[22] in arriving at its decision to make an EPO; and there is no note of what actually transpired before the Family Court judge. It has not been suggested in these proceedings that there was any other basis on which the Family Court could have found as it did. The terms of the Order show that the decision was based entirely on the reasons put forward by the DCFS. As explained above, there was no sufficient basis put forward by the DCFS for an EPO in this case. Accordingly, it was wrong in my view for the Family Court to have accepted the DCFS' case as having been made out. There was simply no basis for the Court to find that there was reasonable cause to believe that significant harm would likely be suffered by X if left in the care of his parents. As was stated in *Re X: Emergency Protection Order*:

> "*Lack of information, or the need for assessment, can never, of themselves, establish the existence of 'a genuine emergency' within which there is a need to provide protection for a child. What is needed is positive evidence sufficient to establish the threshold in s. 44 ('reasonable cause to believe . . . significant harm')".*

113. It is not necessary for me to go further than this. However, it may be helpful to note also that an EPO can be made for a period of up to 28 days: s. 40. Having regard to the principle that any intrusion by the state in family life that may be justified under the Act should be of a nature that is the least intrusive in the circumstances, one can also take issue with the decision to make an EPO in this case for the maximum period allowable under the Act. Especially is this so when it is considered that the aim of the DCFS was to institute protective measures pending a consultation with by a neutral physician; and that an appointment had been arranged for such a consultation to take place the next day. It may have been the recommendation of the neutral physician (as it happened, it was not considered necessary) that a skeletal survey be carried out which would have taken further time. But 28 days was excessive in all the circumstances.

114. The Act allows the Director to review the necessity of continuing the separation of the child from his parents pursuant to an EPO and to return the child if he considers it safe to do so: s. 39(7); without seeking a variation of the EPO by the Family Court. In fact this is what happened on 5th May when the opinion of the neutral physician was obtained indicating that the injuries (past and present) were consistent with accidental causes. In this regard the DCFS are to be commended for properly fulfilled its continuing duty to keep the case under review "*so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety*"[23] . However, it was the duty of the Family Court to consider before making an EPO what period of time it should last. It does not appear that any question was raised by the Family Court as to why 28 days was necessary.

Conclusion

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[22] See *Re X: Emergency Protection Orders* [2006] EWHC 510 at [56] where Mcfarlane J said: "*The need to give detailed reasons is important not only as a means of explaining the decision to the interested parties. It is important because the very process of giving reasons requires the tribunal to consider its decision in a structured manner, matching evidential material against the relevant statutory criteria*".

[23] Munby J in *X Council v B* at [49] subparagraph (iv).

115. In the circumstances, I grant the following declarations:
    a) That the Police Commissioner (acting by his officers) on 3rd May 2017 improperly exercised his discretion under s. 41 Children Act in deciding to detain X;
    b) That the Director of Child and Family Services on 4th May 2017 improperly exercised his discretion in deciding to seek an emergency protection order under s. 39 Children Act in respect of X;
    c) That the Family Court improperly exercised its discretion on 4th May 2017 in granting the Director's application for an emergency protection order in respect of X under s. 39 Children Act 1998.

Postscript

116. At [7] above I referred to the guidance that could be obtained from the decisions of UK courts as to how our corresponding provisions of the Children Act 1998 should be interpreted and applied. It was suggested by counsel for the Applicants in the course of the hearing of this case that this may be an opportunity for such guidance to be given to the DCFS and the Family Court. In *X Council v B* Munby J. summarized at [57] what he considered to be the important points to be borne in mind with regard to EPOs. In *Re X: Emergency Protection Orders* McFarlane J noted that "*The 14 key points made by Munby J in X Council v B should be copied and made available to the justices hearing an EPO on each and every occasion such an application is made*". I would endorse that statement for the guidance of the Family Court and the DCFS whenever an EPO is being sought in this jurisdiction.

DATED THIS 5th day of February 2018.

_____

David Kessaram, Assistant Justice