1 March 2017

PRESS SUMMARY

In the matter of EV (A Child) (Scotland)
In the matter of EV (A Child) (No 2) (Scotland) [2017] UKSC 15
On appeal from [2016] CSIH 60

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEAL

These appeals arise out of an application by West Lothian Council ("the local authority") for a permanence order under s.80 of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"), granting it parental responsibilities and rights in relation to a child ("EV"), including the authority to adopt. EV was born on 30 December 2013 and has been in care since her birth. The application is opposed by EV's parents, both of whom have experienced learning difficulties throughout their lives.

Section 84 of the 2007 Act sets out the conditions and considerations applicable to the making of a permanence order. s.84(3) prohibits the making of an order unless the court considers that it would be better for the child that the order be made than that it should not be made. In considering whether to make an order and, if so, what provision the order should make, the need to safeguard and promote the welfare of the child throughout childhood is to be regarded as the paramount consideration (s.84(4)). S.84(5)(b) imposes a duty on the court to have regard to certain factors before making a permanence order. Under s.84(5)(c)(ii), before making a permanence order the court must be satisfied, in relation to each of the parents, that the child's residence with that person is likely to be seriously detrimental to her welfare. The local authority's concerns in relation to EV primarily related to her father, and arose out of allegations concerning his behaviour before she was born. The Lord Ordinary, after hearing 9 days of evidence, granted the permanence order with authority to adopt. He made few findings of fact in relation to the issues in dispute, and none in relation to whether the threshold test in s.84(5)(c)(ii) was satisfied. Instead of considering whether the allegations were relevant to the threshold test; if so, whether they were true; and if so, whether the test was met, his approach was to consider whether the local authority's actions had a proper basis. The Lord Ordinary's decision was upheld by the Inner House, except in relation to the grant of authority to adopt and a related prohibition on contact by the parents. The parents now appeal to the Supreme Court.

On the parents' appeals to the Supreme Court, the local authority argued that if the appeal against the decision of the Inner House were allowed, the application for a permanence order should not be refused, but should be remitted to the Inner House for it to determine the application on the basis of the evidence before the Lord Ordinary (and such further evidence as may be appropriate).

JUDGMENT

The Supreme Court unanimously allows the appeals, and refuses the petition for a permanence order. Lord Reed gives the judgment, with which the rest of the Court agrees.

REASONS FOR THE JUDGMENT

The test under s.84(5)(c)(ii) is a factual threshold test which has to be met before the court reaches the stage of considering whether to make a permanence order under the other provisions of s.84. The judge is the primary decision maker in determining whether the threshold test has been met, and must base his or her determination of that issue on findings of fact. The judge is not exercising a merely supervisory jurisdiction over the approach of the local authority.

S.84(5)(c)(ii) is similar to section 31(2) of the Children Act 1989, which requires the court to be satisfied that the child concerned "is suffering, or is likely to suffer, significant harm" before it can make a care order. Both provisions impose a threshold test, requiring the court to be satisfied of a likelihood. Decisions under s.31(2) of the 1989 Act as to a future likelihood of harm cannot be based merely on allegations or suspicions, but on facts which have been established on a balance of probabilities (*In re J (Children) Care Proceedings: Threshold Criteria*) [2013] UKSC 9).

The approach in *In re J* is also applicable to the 2007 Act. The legislation needs to be construed in a way which strikes a proper balance between the need to safeguard children and the need to respect family life. The requirement that residence with the parent was likely to be "seriously detrimental" indicates depriving parents of their parental authority is a serious matter and should only be done if strict criteria are satisfied. The inclusion of the word "satisfied" as part of the test indicates that suspicions cannot form the basis of the order (and can be contrasted with other statutory language used where suspicion may be enough). If the court finds that the threshold test is satisfied, it must make clear (1) what the nature of the detriment is, which the court is satisfied is likely if the child resides with the parent, (2) why the court is satisfied that it is likely and (3) why the court is satisfied that it is serious. The alleged behaviour about which the local authority was concerned could only be relied on as a basis of a finding that the threshold test was satisfied if the allegations were relevant to that issue and if they were proved on the balance of probabilities to be true **[19-29]**.

The approach of the Lord Ordinary was deficient in a number of respects. He did not determine the threshold issue arising under s.84(5)(c)(ii) but approached the case in a supervisory manner considering whether the local authority's concerns about EV's father were justified. The correct approach would have been to consider whether the allegations were relevant to the issue arising under s.84(5)(c)(ii). If they were, then the Lord Ordinary should have made a finding of fact on the balance of probabilities as to whether the allegations were true. If he was unable to make such a finding, he should not then take them into account in his consideration of the threshold test. Further, the Lord Ordinary did not refer to the matters which he had a duty to consider under s.84(5)(b). It is not clear whether he had in mind the requirement under s.84(4) that the child's welfare is paramount, but that is not in any event a consideration that would arise until the threshold test under s.84(5)(c)(ii) was satisfied **[30-62]**.

The application should not be remitted to be decided again by the Inner House, but refused. It is open to the local authority to commence fresh proceedings as and when that may be appropriate. Remitting the case would require the Inner House to go through nine days' worth of evidence which by now is somewhat stale and which would not take into account intervening events which may be relevant. This is a case where the assessment of the evidence is difficult because of the learning difficulties of the parents and there may be a significant benefit in seeing and hearing the evidence at first instance **[63-66]**.

References in square brackets are to paragraphs in the judgment