Hilary Term
[2017] UKSC 15
On appeal from: [2016] CSIH 60

JUDGMENT

In the matter of EV (A Child) (Scotland)
In the matter of EV (A Child) (No 2) (Scotland)

before

Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

1 March 2017

Heard on 12 January 2017

Appellant (KV (Father))
Janys M Scott QC
Julian Aitken
(Instructed by KW Law)

Respondent
Catherine Dowdalls QC
Mary V Loudon
(Instructed by West Lothian Council Legal Services)

Appellant (MB (Mother))
Kenneth Campbell QC
Julianna Cartwright
(Instructed by Aitkens, The Family Law Solicitors)

LORD REED: (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agree)

1. These appeals arise out of an application for a permanence order under section 80 of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"), with authority to adopt, brought by West Lothian Council ("the local authority") in December 2014. The application relates to a child, "EV", who was born on 30 December 2013, and has been in care since her birth. It is opposed by the child's parents, to whom I shall refer as the mother and father. The application was granted by the Lord Ordinary on 31 March 2016, following a preliminary proof of one day and a further proof of eight days. His decision was upheld by the Second Division, other than in relation to the grant of authority to adopt and a related prohibition on contact by the parents, on 20 July 2016. Permission to appeal to this court was granted to each of the parents by an Extra Division on 14 October 2016.

The issues in the appeals

2. The Extra Division identified a single issue which satisfied the criterion in section 40A of the Court of Session Act 1988 for the grant of permission to appeal, namely an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time. That issue was whether the guidance given in the case of *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9; [2013] 1 AC 680 is applicable in Scotland, where different legislation applies. The grant of permission was not, however, restricted to that issue, since it was closely interconnected with the other grounds of appeal.

3. In the event, at the hearing of the appeals, there was no issue between the parties in relation to *In re J.* They agree that the decision of the majority in that case, encapsulated in Lord Hope's "golden rule" (to which I shall return), applies equally to the legislation with which these appeals are concerned. The point which prompted the grant of permission to appeal does not, therefore, require to be decided. It is nevertheless appropriate, given the uncertainty implicit in the grant of permission, to make some observations about the issue. I shall do so at a later point.

4. Neither the Lord Ordinary nor the Second Division followed the approach laid down in *In re J.* The first question which arises is whether their decisions can nevertheless be supported. If not, the second question is whether the case should be remitted to the Inner House for it to determine the application on the basis of the evidence led before the Lord Ordinary and such further evidence as may be appropriate, or whether the application should simply be refused.

The statutory framework

5. The legislation governing the making of a permanence order is contained in sections 80 to 84 of the 2007 Act. Section 80 permits the granting of a permanence order, defined as an order consisting of the mandatory provision specified in section 81, such of the ancillary provisions specified in section 82 as the court thinks fit, and, if the conditions in section 83 are met, provision granting authority for the child to be adopted. The mandatory provision is a provision vesting in the local authority the parental right to have the child living with them or otherwise to regulate the child's residence, and the parental responsibility to provide guidance to the child. The ancillary provisions are provisions vesting other parental rights and responsibilities in the local authority or in another person, and extinguishing parental rights and responsibilities previously vested in a parent or guardian of the child. The parental right in respect of the child's residence which was previously vested in a parent or guardian is automatically extinguished: section 87.

6. In relation to section 80, it is important to note section 80(3):

> "In making a permanence order in respect of a child, the appropriate court must secure that each parental responsibility and parental right in respect of the child vests in a person."

Parental responsibilities and parental rights include the responsibility and the right, respectively, "if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis": Children (Scotland) Act 1995, sections 1(1)(c) and 2(1)(c). If, therefore, the court makes a permanence order, it must ensure that there is someone who has the responsibility and right to maintain personal relations and direct contact with the child. That person must be someone other than the local authority: section 82(1)(a) and (b).

7. The conditions laid down in section 83 for the granting of authority for adoption lay down crucial tests, which were discussed in the case of *R v Stirling Council* [2016] CSIH 36; 2016 SLT 689, paras 16-18. They include a requirement that the court must be satisfied that the child has been, or is likely to be, placed for adoption.

8. Section 84 sets out the conditions and considerations applicable to the making of a permanence order. In relation to these, section 84(1), read with section 84(2), enables the court to make a permanence order without the consent of the child where the child is aged under 12, as was the position in this case.

9. Section 84(3) to (5) is in the following terms:

> "(3) The court may not make a permanence order in respect of a child unless it considers that it would be better for the child that the order be made than that it should not be made.
>
> (4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration.
>
> (5) Before making a permanence order, the court must -
>
> (a) after taking account of the child's age and maturity, so far as is reasonably practicable -
>
> (i) give the child the opportunity to indicate whether the child wishes to express any views, and
>
> (ii) if the child does so wish, give the child the opportunity to express them,
>
> (b) have regard to -
>
> (i) any such views the child may express,
>
> (ii) the child's religious persuasion, racial origin and cultural and linguistic background, and
>
> (iii) the likely effect on the child of the making of the order, and
>
> (c) be satisfied that -

> (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the [Children (Scotland) Act 1995] to have the child living with the person or otherwise to regulate the child's residence, or
>
> (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child."

10. These three subsections are of a different character from one another, and are to be applied in different ways. Section 84(5) is particularly complex. Subsections (a) and (b)(i) impose duties in respect of ascertaining and considering the views of the child, so far as is reasonably practicable. In the present case, given the very young age of the child, those duties did not arise. Subsection (b)(ii) and (iii) impose duties to have regard to specified factors. In the present case, two of the factors mentioned in subsection (b)(ii) are relevant, namely the child's racial origin and cultural and linguistic background.

11. Section 84(5)(c) is of a different nature. It lays down a factual test in each of subsections (c)(i) and (ii). One or other of those tests must be satisfied before a permanence order can be made. Section 84(5)(c) therefore imposes a threshold test. It has to be addressed, and satisfied, before any issue requires to be considered under the other provisions of section 84. In the present case, it was paragraph (c)(ii) which was relevant, since both parents had the right mentioned in paragraph (c)(i). It was therefore necessary, before a permanence order could be made, for the court to be satisfied, in relation to each of the parents, that the child's residence with that person was likely to be seriously detrimental to her welfare.

12. Section 84(3) arises only if the test in section 84(5)(c) is met. It imposes a prohibition on the making of a permanence order unless a specified requirement is met, namely that it would be better for the child that the order be made than that it should not be made.

13. Section 84(4) applies when the court is "considering whether to make a permanence order and, if so, what provision the order should make". It has no bearing on the test imposed by section 84(5)(c), since (1) that is a factual test which cannot be affected by treating the child's welfare as the paramount consideration, and (2) the test must be satisfied before the court reaches the stage of considering whether to make a permanence order. Once that stage is reached, however, section 84(4) is plainly important.

The relevant Scottish case law

14. In *TW v Aberdeenshire Council* [2012] CSIH 37; 2013 SC 108, the Extra Division correctly rejected an argument that sections 84(3) and (4) had a particular core status. It said that subsections (3), (4) and (5) impose separate requirements, all of which have a bearing on whether a permanence order should be made. Lord Bonomy, giving the opinion of the court, stated at para 13:

> "It is ... difficult to envisage circumstances in which a court, faced with an application for a permanence order, would not first of all address the factors that arise under subsection (5)(c), in this case paragraph (c)(ii), and any other matters arising under subsection (5), always bearing in mind the requirement of subsection (4) to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration, and only then consider the application of the 'no order principle' in subsection (3), again keeping subsection (4) in mind."

15. The statement that section 84(5)(c) raises factors which have to be addressed does not make clear its true significance: it lays down factual tests which must be satisfied before a permanence order can be made. The passage is also mistaken in stating that subsection (4) has to be borne in mind when addressing subsection (5): I have explained why subsection (4) does not affect the test imposed by subsection (5)(c), and it is equally incapable of affecting the duty to have regard to the matters mentioned in subsection (5)(a) and (b). Nevertheless, the passage provides clear guidance as to the need to address the issue arising under subsection (5)(c) before considering subsections (3) and (4).

16. Clearer guidance was provided by Lord Drummond Young, giving the opinion of the Extra Division in *R v Stirling Council.* At para 13, Lord Drummond Young stated:

> "Thus section 84 imposes two critical conditions if a permanence order is to be made in a case where the natural parent does not consent. First, in terms of subsection (3), the court must consider that it would be better for the child that the order should be made than that it should not be made; that decision must be made in the light of the requirement of subsection (4) that the welfare of the child throughout childhood is to be the paramount consideration. Secondly, in terms of subsection (5)(c)(ii), the court must be satisfied that

> the child's residence with the parent is, or is likely to be, seriously detrimental to his or her welfare. Of the two conditions, that in subsection (5)(c)(ii) is the more fundamental: it imposes a threshold test, in the sense that, if it is not satisfied, the court is not permitted to dispense with the parent's consent. It is only if the test is satisfied that the court requires to go on to consider the welfare of the child ... The critical point is that the requirements of subsection (5) set a threshold test, and unless that test is satisfied no permanence order can be made and any further consideration of the other provisions of section 84 is irrelevant."

Subject to the observation, in relation to the first sentence, that section 84 applies to all applications for a permanence order, and that no question of parental consent arises unless authority for adoption is sought, I respectfully agree.

17. Lord Drummond Young added at para 15:

> "The threshold test is in our opinion a matter of fundamental importance, and we must express regret at the manner in which section 84 of the Adoption and Children (Scotland) Act 2007 is structured. In that section the fundamental threshold provision comes at the end, after the subsections dealing with the welfare of the child. It would clearly be more sensible to state the threshold test at an earlier point, before the welfare provisions, because the threshold test must be satisfied before any of the other provisions becomes relevant. As matters stand there is an obvious risk that the sheriff will fail to appreciate the fundamental importance of the criterion in subsection (5). That is what appears to have happened in the present case."

And also, as will appear, in the present case.

The judge's function

18. In determining the issue arising under section 84(5)(c)(ii), and indeed the other issues arising under that section, the judge is the primary decision-maker. He is wholly responsible for deciding the issues arising under the legislation on the basis of his own findings on the evidence. His role is not that of a judge exercising a supervisory jurisdiction (as, for example, in an application for judicial review),

assessing whether the local authority had a reasonable basis for its concerns and its consequent actions.

19. In this regard, guidance can be taken from decisions concerned with the similar judicial function in relation to the corresponding threshold test in England and Wales. Section 31(2) of the Children Act 1989 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 or supervision order. Such orders place a child in the care or under the supervision of a local authority, and for those purposes the local authority is given parental responsibility for the child. Section 31(2) shares with section 84(5)(c)(ii) of the 2007 Act the fact that it imposes a threshold test for the making of orders concerned with the care of children, the requirement that the court must be satisfied, and the provision that the matter of which the court must be satisfied is a likelihood: in the English provision, a likelihood of significant harm to the child, and in the Scottish provision, a likelihood of serious detriment to the child's welfare.

20. The case of *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35; [2009] AC 11 concerned the question whether the threshold condition in section 31(2) of the 1989 Act was satisfied. Lady Hale emphasised at para 57 the importance of keeping separate the roles of the courts and the local authorities. Having explained the functions of local authorities in the protection of children from harm, her Ladyship continued:

> "The task of the court is to hear the evidence put forward on behalf of all the parties to the case and to decide, first, whether the threshold criteria are met and, second, what order if any will be best for the child. While the local authority may well take preliminary or preventive action based upon reasonable suspicions or beliefs, it is the court's task when authorising permanent intervention in the legal relationship between parent and child to decide whether those suspicions are well founded ...
>
> To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and their families from the intervention of the state, however well intentioned that intervention may be. It is to confuse the role of the local authority, in assessing and managing risk, in planning for the child, and deciding what action to initiate, with the role of the court in deciding where the truth lies and what the legal

> consequences should be. I do not underestimate the difficulty of deciding where the truth lies but that is what the courts are for." (paras 58-59)

21. In the later case of *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17; [2010] 1 AC 678, again concerned with section 31(2) of the 1989 Act, Lady Hale emphasised that the decision whether to make an order interfering with individual rights must be taken by an independent and impartial court. In order to bring home to judges that their role is not merely supervisory, she drew an analogy with criminal proceedings:

> "Social workers are the detectives. They amass a great deal of information about a child and his family. They assess risk factors. They devise plans. They put the evidence which they have assembled before a court and ask for an order.
>
> ... The court subjects the evidence of the local authority to critical scrutiny, finds what the facts are, makes predictions based upon the facts, and balances a range of considerations in deciding what will be best for the child. We should no more expect every case which a local authority brings to court to result in an order than we should expect every prosecution brought by the CPS to result in a conviction. The standard of proof may be different, but the roles of the social workers and the prosecutors are similar. They bring to court those cases where there is a good case to answer. It is for the court to decide whether the case is made out." (paras 18-19)

The application of the threshold test

22. It follows that decisions under section 31(2) of the 1989 Act as to a future likelihood of harm cannot be based merely on allegations or suspicions: a conclusion that harm is likely must be based on findings of fact. Lady Hale put the matter in this way in *In re J*, para 49:

> "Care courts are often told that the best predictor of the future is the past. But prediction is only possible where the past facts are proved. A real possibility that something has happened in the past is not enough to predict that it will happen in the future. It may be the fact that a judge has found that there is a real possibility that something has happened. But that is not

> sufficient for this purpose. A finding of a real possibility that a child has suffered harm does not establish that he has. A finding of a real possibility that the harm which a child has suffered is 'non-accidental' does not establish that it was. A finding of a real possibility that this parent harmed a child does not establish that she did. Only a finding that he has, it was, or she did, as the case may be, can be sufficient to found a prediction that because it has happened in the past the same is likely to happen in the future. Care courts need to hear this message loud and clear."

23. Facts have to be established on a balance of probabilities. Lord Hoffmann explained this in *In re B*, para 2:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

More recently, in *In re J*, Lord Hope said that "the golden rule must surely be that a prediction of future harm has to be based on facts that have been proved on a balance of probabilities" (para 84).

24. This does not require the courts to do anything unusual. As Lord Nicholls of Birkenhead remarked in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 589, to resolve disputed issues of relevant fact in order to reach a conclusion on the issue it has to decide is a commonplace exercise carried out daily by courts. Lady Hale put the point more pithily in the passage cited from *In re B*: deciding where the truth lies is what the courts are for.

25. The considerations which led to these conclusions in the English cases are equally applicable to the Scottish legislation. Foremost among them is the need to construe the legislation in a way which strikes a proper balance between the need to safeguard children and the need to respect family life: a consideration which applies

equally to the making of permanence orders under the Scottish legislation. As Lady Hale said in *In re B*, para 54:

> "The threshold is there to protect both the children and their parents from unjustified intervention in their lives. It would provide no protection at all if it could be established on the basis of unsubstantiated suspicions: that is, where a judge cannot say that there is no real possibility that abuse took place, so concludes that there is a real possibility that it did. In other words, the alleged perpetrator would have to prove that it did not."

26. A second consideration is the wording of the test itself, and comparison with the wording of other provisions, such as those concerned with orders of an emergency character. In that regard, the most significant terms - "satisfied" and "likely" - are common to both the Scottish and the English provisions. In particular, as Lord Nicholls observed in *In re H* at pp 585-586, the need for the court to be judicially "satisfied" is an indication that unresolved doubts and suspicions cannot form the basis of the order, and can be contrasted with the statutory language used where suspicion may be enough (as, for example, in relation to orders under sections 35 and 37 of the Children's Hearings (Scotland) Act 2011). It also indicates that the burden of proof rests on the party seeking the order.

27. The requirement in the threshold test that residence with the parent should be not merely detrimental to the welfare of the child, but "seriously" detrimental, is also of crucial importance. In *R v Stirling Council*, Lord Drummond Young referred at para 14 to several decisions of the House of Lords and of this court concerned with the corresponding issue arising under the English threshold test, namely whether there is a likelihood of "significant" harm. They included the case of *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, where the English authorities are reviewed. As Lord Drummond Young noted, the fundamental point is that depriving the parents of a child of their parental authority at common law is a most serious matter, and it should only be done if strict criteria are satisfied. It is, emphatically, not enough to show that a child would benefit from being brought up elsewhere. This is made clear in the speech of Lord Templeman in *In re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, 812:

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered."

28. The implications of that statement were considered in *In re L (Care: Threshold Criteria* [2007] 1 FLR 2050, a case which, like the present case, concerned parents with learning difficulties. Hedley J, having quoted Lord Templeman, continued:

> "It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance [semble: province] of the state to spare children all the consequences of defective parenting." (para 50)

He concluded that the children were suffering, and likely to suffer, some harm to their intellectual development as a result of their parents' inadequacies, but that it was not of a character or significance to justify compulsory intervention.

29. Finally, in relation to the application of the legislation, it is important that the court's reasoning should demonstrate that it has applied the legislation correctly. This requires more than the formulaic repetition of the statutory language. It should be apparent that the court has analysed the arguments for and against making a permanence order (including the various provisions which might realistically be under consideration) and, where appropriate, an order granting authority for adoption. Its reasons for preferring one option to the potential alternatives should be explained. In order to carry out this task, the court requires evidence which addresses all the options which are realistically available and analyses the arguments for and against each option. If the court finds that the threshold test is satisfied, it should be clear (1) what is the nature of the detriment 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 Lord Ordinary's opinion

30. Considered in the light of the foregoing, the Lord Ordinary's opinion is, unfortunately, deficient in a number of respects. In fairness, it should be stressed that, since he gave judgment before the decision of the Inner House in *R v Stirling Council*, he did not have the benefit of the guidance provided in that case.

31. The Lord Ordinary did not set out in his opinion the material provisions of sections 80 to 84 of the 2007 Act, or identify the separate conditions, each of which has to be satisfied before a permanence order, or an order granting authority for adoption, can be made. He did not distinguish in his opinion between the making of a permanence order and the granting of authority for adoption. He did not refer to the case of *In re J*, although this court was informed that it had been relied on by counsel for the parents. His general approach was to consider whether the local authority's actions had been justified, in the sense that they had responded in a reasonable manner to concerns for which an evidential basis existed. As a consequence, he made few findings of fact in relation to the issues in dispute, and none in relation to the threshold issue arising under section 84(5)(c)(ii).

32. It was a matter of agreement before the Lord Ordinary that the child's parents lived together. Both parents had experienced learning difficulties throughout their lives. It was also agreed that on the date of the child's birth, a child protection order was granted by the Sheriff on the ex parte application of the local authority, with a condition that there should be no contact between the father and the child. That condition has remained in place ever since. The Lord Ordinary was provided with reasoned decisions maintaining that condition. The first was taken by a children's hearing on 10 January 2014, when an interim compulsory supervision order was made. Later decisions were taken during February, March, April and May 2014 when the interim compulsory supervision order was continued, and on 12 June 2014, when a compulsory supervision order was made. None of that reasoning is referred to in the Lord Ordinary's opinion, with the consequence that the decision to deny the father all contact with his child over the entirety of her life to date (with the exception of one hour, for the purposes of these proceedings), is unexplained.

33. It was also agreed that on 10 January 2014 the children's hearing decided to refer the grounds of referral to the Sheriff for proof, and that on 23 May 2014 amended grounds of referral were held to be established. The Lord Ordinary was provided with the amended grounds of referral, but his opinion does not explain what they were.

34. It was also agreed that a parenting capacity assessment was carried out in relation to the mother. The Lord Ordinary was provided with a copy of the assessment report. No such assessment was carried out in relation to the father. The Lord Ordinary's opinion does not explain why that was. The Lord Ordinary also narrates that he was provided with a copy of a report prepared by a Dr Coupar, but the opinion contains no indication of the subject-matter of the report.

35. The Lord Ordinary explains that the primary source of the local authority's concerns in relation to the child arose as a result of the relationship between her parents. There were three main causes for these concerns, all of them arising out of

what the Lord Ordinary described as "perceived concerns about the behaviour of [the father]". The first concern, which appears to have been of particular importance to the local authority, related to "criminal charges of alleged sexual conduct ... brought in England in 2010". The Lord Ordinary does not explain what those charges were. Whatever they may have been, they were dropped within a short period of being made, because the complainant had given inconsistent and contradictory accounts. The police did not pass the case to the Crown Prosecution Service. It appears that the complainant was a vulnerable female person who suffered from learning difficulties. According to the father's affidavit, she was a friend of his who had wanted to have a sexual relationship with him. He had not been interested. She then made allegations to the police that he had raped her. This court has been informed that they were both aged about 19 at the time. The Lord Ordinary narrates that he heard evidence from a police officer that the father had given a statement in which he accepted that he had had consensual sex with the complainant. The father also gave evidence before the Lord Ordinary. He accepted that he had said what was recorded in the statement, but denied that it was true.

36. Having narrated this evidence, and expressed reservations about the evidence given by the father in relation to this matter, the Lord Ordinary stated:

> "In these circumstances it appears to me to be established on the balance of probabilities that the concerns harboured by the petitioners in relation to the [father's]'s sexual proclivities were justified. In arriving at that conclusion I should make it clear that I am making no finding in relation to whether or not the sexual allegations made in 2010 were true or not. The relevancy or otherwise of these allegations is not a matter for me, nor have I heard any evidence in relation to the relevancy of these matters. My finding is confined to concluding that, notwithstanding the lack of any criminal conviction, there was material available to the petitioners at the time of the child EV's birth relative to the [father]'s behaviour towards vulnerable females which they could not ignore and were required to have consideration of when formulating a policy or plan towards the ongoing care of the child EV." (para 20)

37. This passage epitomises the Lord Ordinary's misunderstanding of his function. As previously explained, it was not his function to determine whether the (unexplained) concerns harboured by the local authority about the father's "sexual proclivities" (whatever may have been meant by that phrase) were justified. The conclusion stated in the last sentence is irrelevant to the task which he had to perform. The entire discussion of this topic is beside the point unless the allegations are relevant to the issues which the Lord Ordinary had to determine. The allegations concern the father's sexual behaviour with another adult with learning difficulties,

three years before the child was born. The Lord Ordinary does not address the question whether, or how, they might be relevant to the question whether the child's residing with her parents would be seriously detrimental to her welfare. If the allegations are relevant, however, then the Lord Ordinary has to make a finding of fact, on the balance of probabilities, as to whether the allegations are true. If he is unable to make such a finding, then he has to find that the allegations are unproved, and dismiss them from his mind.

38. The Lord Ordinary noted that a subsidiary matter arising out of these allegations concerned the period before the allegations were dropped, when the father was briefly on police bail. The father accepted in his evidence that he had entered the college where the complainant was studying. This was reported to the police, as there was a bail condition not to approach the college. There was also evidence that the father had admitted the complainant to his home. This was regarded by the police as a breach of a bail condition not to approach the complainant. The father accepted in his evidence that these events had occurred. No criminal charges were brought. The Lord Ordinary appears to have accepted that the father had contravened his bail conditions, although the way in which he expressed his conclusion again shied away from making a finding of fact: he said that it appeared to him that there was "evidence before the court to support the proposition". He did not address the question whether the breaches were relevant to the issue arising under section 84(5)(c)(ii). It is difficult to see what significance they could have had.

39. The second matter of concern to the local authority was an allegation concerning the mother's daughter from a previous relationship, whom I shall refer to as MP. MP did not live with her mother, but was in care. Evidence was given by the social worker responsible for EV that she (the social worker) had been told that other workers in a homeless unit where the mother had once stayed had been told by the mother that the father had said to her that he would like to have sex with MP, who was aged about eight at the time. The social worker also said that, at a meeting she attended, the father had adopted the position that he should not have said this out loud. The mother, in her evidence, said that she accepted the father's assurance that the statement was either not said or, if it was, was uttered as a joke. The Lord Ordinary says nothing about whether this matter was addressed in the father's evidence, or, if it was, what he said about it. Nor does the Lord Ordinary make any finding about this matter, beyond saying that "regard required to be had to that remark by the [local authority]". Whether that statement was intended to bear the implication that the remark was actually made is not clear. The Lord Ordinary does not address the significance of this matter in relation to the threshold test. That would depend on what inferences should be drawn from the remark, if it was made: inferences which might not be as straightforward as in the case of a man with normal social skills. Was it meant to be a joke? Or was it a serious expression of sexual desire?

40. The third matter of concern to the local authority was described by the Lord Ordinary as follows:

> "The third concern in relation to the [father] were threats made by him to social workers in August 2013 that he would kill a support worker and social worker in the event that they refused to allow him and the [mother] to have the baby after its birth. In the same vein threats, or a message of a threatening nature, made by the [father] to the [mother] also in August 2013. These threats were reported to the police, were the subject of a criminal prosecution and resulted in [a] conviction." (para 13)

In relation to the first of these matters, the Lord Ordinary states that the threats against social workers were spoken to by the two persons against whom the threats were uttered. The father accepted that he made the utterances, but said that they were merely hot air or said in the heat of the moment.

41. Before this court, it was common ground that the Lord Ordinary had misunderstood the evidence in relation to this matter. According to counsel, there was only one incident involving a threat, not two. There was no evidence from social workers who had been threatened. The matter arose out of a telephone call which the father had made to the mother when she was in a car with a social worker in August 2013, four months before the child was born. There were already plans for the child to be removed from the parents as soon as she was born. The father said to the mother over the telephone something to the effect that he would kill social work staff if he and she did not get custody. Evidence that this had occurred was given by a social worker who had not been present. It was agreed that the father pled guilty to a charge under section 127(1) of the Communications Act 2003 in relation to this matter and was fined £135. It is agreed that this is his only criminal conviction.

42. The Lord Ordinary considered the relevance of this matter, as he understood it, only in relation to the actions taken by the local authority. His conclusion was that "there being evidence of the threats being uttered ... they were factors which the [local authority] required to have regard to". The real question, if it was found that a threatening statement had been made, was how much significance, if any, should be attached to it by the court when considering whether the child's residence with her father was likely to be seriously detrimental to her welfare. Both the court and the local authority should maintain a sense of perspective: if this was merely a momentary expression of anger by a father who had much to be angry about, it should not be given exaggerated importance in determining the child's future.

43. In the light of all this evidence, the Lord Ordinary stated that "there was plainly established before the court evidence of the concerns which caused the [local authority] to proceed down the route of permanence which ultimately led to the presentation of this petition to the court". Once again, the Lord Ordinary's focus appears to have been on assessing whether the local authority's actions had a proper basis.

44. So far as the care of the child was concerned, the Lord Ordinary explained that the local authority's views were critically dependent on the fact that her parents were a couple. It had been made clear to the mother that, if she left EV's father, the local authority would reassess the case. Although the mother would have difficulties caring for a young child, efforts could be made to assist her and thereafter assess her suitability as a custodian for her child. Her unwillingness to leave the father rendered that course of action impossible, in the view of the local authority.

45. In relation to the parenting skills of the mother, the Lord Ordinary said that there was evidence, which he accepted, of a lack of engagement with social workers, and of an inability to grasp more than basic parenting skills. An expert in social work practice named Helen Stirling, giving evidence on behalf of the mother, said that, even with extensive support from social workers, the mother "might only even master physical care tasks, and not manage the more complex tasks of meeting EV's emotional and social needs".

46. In relation to these matters, it is relevant to note that the mother had two children by a previous partner, one of them being the child MP referred to earlier. She and her partner looked after those children (born in 2004 and 2007), without significant support from the local authority, until October 2012, when the couple separated and the children went to live with their father. In 2013 their father died, and the children were accommodated by the local authority, but continued to have regular contact with their mother. The mother's relationship with EV's father was a factor in the local authority's decision that the children should not be in her care. This court was informed that the mother has now been prevented even from having contact with the children.

47. So far as EV's father is concerned, the Lord Ordinary stated that the social workers were concerned about his ability to acquire parenting skills and to cooperate with them. As mentioned earlier, however, the local authority had carried out no parenting assessment. The father had been permitted to see the child for one hour, for the purpose of allowing observation of his interaction with the child by an expert witness instructed on his behalf. The Lord Ordinary found the witness's evidence of limited utility, since it was based on a single contact session. The Lord Ordinary noted that it was not suggested on the father's behalf that he was able to demonstrate the parenting skills required for the care of the child.

48. The Lord Ordinary said very little in his opinion about the child herself, and her particular needs. This court was told that the child may have global developmental delay. It is unclear whether that matter was raised before the Lord Ordinary. If it was, he made no finding about it. If that is correct, however, then it is something which may be relevant to the ability of the parents to care for her, and also to the prospects of her being adopted. It may also bear on the question, which can arise in cases involving parents with learning difficulties, whether the child's residing with them might harm her own intellectual development.

49. Nor did the Lord Ordinary explain whether the alternative to her residing with her parents was, or was not, a permanent placement, with carers who were committed to her safety, welfare and wellbeing, where she would receive a high standard of care until adulthood. In fact, as this court was informed, it is not envisaged that she will continue to reside with the foster carer with whom she has lived since she was three days old, since her foster carer does not intend to adopt her; and the local authority has not found any adoptive placement for her. The Lord Ordinary did not make any finding as to whether she was likely to be placed for adoption. Nor did he say anything said about her racial, cultural and linguistic background. She is of mixed race, her mother being white and her father being a Sri Lankan whose first language is Tamil. As explained earlier, the court is under a statutory duty, under section 84(5)(b)(ii) of the 2007 Act, to have regard to the child's racial origin and cultural and linguistic background.

50. The Lord Ordinary then turned to the issue of contact, noting that there was evidence that the child derived no significant benefit from contact with her mother, and that the father had had contact with the child on only one occasion. Unsurprisingly in the circumstances, it was conceded that there was no existing bond between the child and her father (nor, of course, is she likely to have an existing bond with any potential adoptive parents). The Lord Ordinary made an order prohibiting contact between the child and her parents. The result was that there was no person in whom the parental responsibility and parental right in respect of contact was vested, contrary to the statutory duty of the court, under section 80(3) of the 2007 Act, to "secure that each parental responsibility and parental right in respect of the child vests in a person".

51. Finally, the Lord Ordinary said that he should mention that there was some evidence in relation to the parents' difficulties in coping with financial matters and in relation to consistent maintenance of appropriate standards of cleanliness and hygiene in their accommodation. He found these matters proved, but said that they were of less significance than the concern with which he had dealt at greater length (ie the concerns about the father's behaviour).

52. The Lord Ordinary completed his opinion by expressing his conclusion as follows:

> "I am satisfied that both for the safety and welfare of the child throughout her childhood it is necessary that the orders sought should be granted." (para 28)

That conclusion dealt with the basic permanence order and the grant of authority for adoption without differentiation. In expressing his conclusion in that way, the Lord Ordinary may have had in mind the paramount consideration mentioned in section 84(4), namely the need to safeguard and promote the welfare of the child throughout childhood. As Lord Drummond Young explained, that issue did not arise unless and until the test in section 84(5)(c)(ii) was satisfied. Or he may have had in mind the test under section 83(2)(d) for dispensing with parental consent to adoption, namely that the welfare of the child requires it. It is impossible to say.

53. What can be said, however, is that the Lord Ordinary did not address the threshold issue arising under section 84(5)(c)(ii). Nor was any reference made to the matters to which section 84(5)(b)(ii) and (iii) required regard to be had. Equally importantly, the Lord Ordinary did not support his conclusion by an analysis of the benefits and detriments of the available options. Although much was said about the local authority's concerns about the father's behaviour years earlier, nothing was said, for example, about how the child's current foster care arrangements were working, or about the prospects of a suitable adoptive placement being found. There was no analysis of the merits of her living with a foster carer who has no intention of adopting her, as compared with her living with her parents. At the most basic level, the possibility of her parents' being able to offer her a permanent home might have been a relevant factor, particularly if the prospects of her being adopted were poor, to set against the negative factors.

The proceedings in the Inner House

54. Before the Extra Division, it was conceded that the Lord Ordinary's decision to grant authority for adoption could not be supported. So far as the permanence order was concerned, the Lord Justice-Clerk, giving the opinion of the court, treated the deficiencies of the Lord Ordinary's opinion as more apparent than real. She said that the Lord Ordinary, as the family judge, could safely be taken to have a sound understanding of the relevant law. This was supported by his having recorded counsel's agreement that the correct interpretation of "the legal test for the making of a permanence order", as he put it, was that set out in *TW v Aberdeenshire Council.* The Lord Ordinary's conclusion, set out at para 52 above, was glossed as addressing the issue raised by section 84(5)(c)(ii):

> "His reference not only to welfare but to the child's safety indicates that he had the issue of serious detriment at the forefront of his mind. He specifically said that he had concern as to the welfare of the child throughout her childhood. His reference to necessity indicates that he had proper regard to the proportionality of his decision. We are satisfied that the Lord Ordinary both identified and applied the correct test" (para 30)

55. With great respect, I am unable to agree. Section 84(5)(c)(ii) does not refer to safety. Nor does it refer to the welfare of the child throughout childhood: that is a phrase which appears in section 84(4). The use of that phrase suggests that the Lord Ordinary's conclusion may have been expressed with section 84(4) in mind, but, notwithstanding his reference to *TW v Aberdeenshire Council*, there is nothing to indicate that he was addressing the threshold test in section 84(5)(c)(ii). In the absence of any indication in his opinion that he identified and addressed the correct test, he cannot be assumed to have done so merely because he is a specialist judge.

56. The Second Division treated the Lord Ordinary's focus on the local authority's concerns about the father as being of less importance than it appeared, since "this was against a background of accepted deficiencies in the parents' ability to provide basic elements of care". In that regard, the Lord Justice-Clerk said that it was not disputed that both parents had serious learning difficulties and would require considerable support from the local authority. She said that the Lord Ordinary had accepted the evidence of Helen Stirling to the effect that, even with support, it was likely that the mother "would not" manage the tasks of meeting the child's emotional and social needs. The Lord Ordinary had noted that it was not suggested that the father was able to show the necessary parenting skills required for the care of the child. Of less significance, but proven nonetheless, was that the parents had difficulties with financial matters, and in consistent maintenance of appropriate standards of cleanliness and hygiene in their accommodation.

57. In relation to these matters, the Lord Ordinary did not find that the threshold test in section 84(5)(c)(ii) was met on the basis of deficiencies in the care which the child might receive if residing with her parents. Ms Stirling's evidence in relation to the mother was that she "might not" manage the more complex tasks. It also has to be borne in mind that the mother had brought up her two older children with her previous partner. So far as the father is concerned, it was not for him to show that he possessed the necessary parenting skills. The onus lay on the local authority to demonstrate that he did not, and that any resulting risk to the welfare of the child could not be addressed by the provision of support. The local authority was not in a position to adduce evidence on the point, having failed to carry out a parenting assessment. There was no finding as to the level of assistance which the parents might require. The issues relating to financial management and cleanliness were treated by the Lord Ordinary as being of relatively minor significance.

58. Turning to the local authority's concerns about the father's behaviour, the Lord Justice-Clerk described these as "serious concerns, established in evidence". It is true that the Lord Ordinary accepted that the concern relating to a threatening statement had been established in evidence, although he misunderstood the evidence about this, as explained earlier, and did not address the question of its significance in relation to the threshold test. It also appears to be correct to say that the breaches of bail were established. Unlike the Lord Ordinary, the Lord Justice-Clerk considered their relevance, and concluded that they suggested "a lack of thought as to the consequences of his actions, and an inability to learn from his mistakes". That is a reasonable conclusion, but it is of little apparent significance in relation to the threshold test.

59. In relation to the charges made against the father following a complaint by a woman with learning difficulties, the Lord Justice-Clerk stated that "the Lord Ordinary was careful to recognise that he was not in a position to determine whether there had been any truth in the criminal charges ... and that he should not attempt to do so". As previously explained, however, the Lord Ordinary could only take the father's alleged behaviour into account if he was satisfied, on a balance of probabilities, that the father had actually behaved as alleged, and that his proved behaviour was relevant to the question in issue. In that regard, the Lord Justice-Clerk concluded that the Lord Ordinary "considered that the [father] had a relationship with the complainer, contrary to denials made at various stages, including denials made on oath". That way of putting the matter, however, leads to the question: what does it have to do with the making of a permanence order, if a young man with learning difficulties had a relationship with a young woman with similar difficulties several years before his child was born, and lied when asked about it afterwards? The whole point of the concern was the allegation that the father's behaviour was of a criminal character: indeed, although the nature of the charges is unexplained, it is known that the complaint was of rape. As earlier explained, that could only be relied on as the basis of a finding that the threshold test was satisfied, if, in the first place, the allegation was proved to be true. The Lord Ordinary expressly stated that he was "making no finding in relation to whether the sexual allegations made in 2010 were true or not".

60. In relation to the remaining concern, arising from the father's alleged statement relating to MP, the Lord Justice-Clerk inferred from the Lord Ordinary's opinion that he had accepted that the statement had been made. She related this acceptance to the Lord Ordinary's reference, in his conclusion, to EV's "safety". It appears, from the Lord Justice-Clerk's linking the allegation concerning MP to EV's safety, that she understood the Lord Ordinary to be implying that the father might sexually assault his own child. If the Lord Ordinary intended to imply that there was a real possibility that the father would sexually assault his daughter, then it is far from clear from what he wrote in his opinion. Such an important finding should not be left as a matter of inference.

61. The Lord Justice-Clerk continued:

> "Even if we had not been satisfied as to the adequacy of the Lord Ordinary's expressed opinion, had the matter been at large for this court, we would have made a permanence order. Set against the background of the [parents'] continuing lack of parental skills, the findings in relation to the three areas of concern are sufficient to meet the threshold test. The comments made in respect of the [mother's] eight year old daughter raise grave concerns. It is plain from the Lord Ordinary's account of the way in which the [father] gave evidence and the nature of the evidence given, that the [father] is unreliable and lacks understanding of the significance of his sexual conduct. The parents reside together, and the [mother] has made it clear that there is no prospect of that situation changing. Were the child to reside with her, the child would also be residing with the [father]. Such a situation would run the risk of serious detriment to her welfare. Taking account of all the matters upon which the Lord Ordinary made findings, we are satisfied that not only has the threshold test been met, but also that it would be better for the child that the order be made than that no order be made." (para 41)

The only alteration which the court therefore made to the Lord Ordinary's order, other than quashing the grant of authority for adoption, was to remove a prohibition on contact by the parents, which the Lord Ordinary had imposed in anticipation of adoption.

62. It is entirely understandable that the Second Division should have sought to avoid further delay in determining the future of this young child. Nevertheless, with the greatest respect, the Lord Ordinary's opinion did not provide a satisfactory basis for the Inner House to grant the application itself. In relying on the Lord Ordinary's opinion to justify the conclusion that the threshold test had been met and that a permanence order should be made, the Second Division rendered their conclusion vulnerable to some of the same criticisms as his opinion. It involved taking account of unproved allegations of criminal conduct, contrary to the guidance given in *In re J,* which it is now conceded should be followed when applying the Scottish legislation. It involved finding that the threshold test was satisfied without clearly explaining what exactly the apprehended detriment was, why it was considered serious, and why it was considered likely (a "risk" of serious detriment not being enough). It involved no consideration of the child's racial origin and cultural and linguistic background, to which the court is required by statute to have regard. It involved the same failure as the Lord Ordinary's opinion to explain satisfactorily

why a permanence order should be made, on the basis of a reasoned analysis of the available options and an assessment of their respective pros and cons.

What next?

63. It is clear that the appeals must be allowed. Parties were divided as to what should happen next. The local authority wishes the case to be remitted to the Inner House, so that it can re-consider the reclaiming motions on the basis of the transcript of the evidence led before the Lord Ordinary, the documentary evidence before him, and such additional evidence as may be necessary and appropriate. The mother and father, on the other hand, would prefer the application for the permanence order to be refused.

64. The prospect of the Inner House having to go through nine days' worth of evidence and determine the application on that basis is unattractive, for several reasons. The evidence is now somewhat stale, the proof having been heard over a year ago. Events during the intervening period may be relevant, particularly given that the case concerns a young child. More importantly, as the Lord Ordinary made clear, the case is also one where an assessment of the evidence of the parents is particularly difficult, because of their learning difficulties. In particular, an assessment of the significance of the statement concerning MP, if proved to have been made, may well be influenced by the impression which the court forms of the father. Much may turn on whether, if proved to have been made, it is regarded as signifying a real possibility that KV would sexually abuse his daughter.

65. This is therefore a case where there may be a significant benefit in seeing and hearing the evidence, rather than reading a transcription of it. So far as can be judged from the opinions below, the evidence led may in any event have failed to focus adequately on the child herself and her needs, as distinct from the concerns held by the local authority about what the father may have said or done several years ago (for the most part, in unrelated contexts). It is also apparent that the local authority still considers that adoption is the best option for the child, and will therefore need to make a further application to the court in any event.

66. In these circumstances, the most sensible way forward is for this court to allow the appeals and refuse the petition, leaving it to the local authority to commence fresh proceedings as and when that may be appropriate. That will also allow parties - in particular, the local authority - an opportunity to ensure that the evidence provided to the court focuses on matters which are truly relevant to the issues which the court has to determine. The local authority will also have an opportunity to reconsider whether to carry out a parenting assessment in respect of the father.