In the matter of H-W (Children) In the matter of H-W (Children) (No 2) [2022] UKSC 17 On appeal from: [2021] EWCA Civ 1451

Date: 15 June 2022

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any member of their family in connection with these proceedings.

Justices

Lord Hodge (Deputy President), Lord Kitchin, Lord Burrows, Lord Hughes, Dame Siobhan Keegan

Background to the Appeal

These appeals concern care orders made in relation to three children, who are referred to as C, D and E to preserve their anonymity. C, D and E are now aged 14, 11 and nine respectively. The appellants are the children's mother, M, and her partner, F3. In addition to C, D and E, M has three other children. The eldest are A, aged 22, and B, aged 19, both of whom are independent and live outside the family unit. M also has a young child with F3 who is referred to as F. The other children in the family unit have different fathers. C and D's father is referred to as F1, whilst E's father is F2. C, D and E live at home with their mother and F3, who acts as their stepfather. F also lives in the family home **[1], [10]**.

The local authority began its involvement with the family when M herself was a child. She suffered from sexual abuse at the hands of E's father, F2. Aside from F2 and issues of sexual risk, there has also been local authority involvement with the family over many years due to issues of neglect. Court proceedings for the removal of C, D and E from the family home were first attempted in March 2012. This was precipitated by F2 being found in the family home. At that time, the children were not removed from the family home, although A (who was then a child) was made the subject of a care order. An injunction was also made against F2 to prevent him from visiting the family home. In October 2019, the family's case was closed by social services on the basis that the family had made considerable progress and the children were happy **[7]-[10]**.

The current proceedings were triggered by the conduct of A. He is a troubled young man and M was expected by social services to prevent A from staying in the family home and being unsupervised around the children. Nevertheless, A visited the house for short periods. When A was at the house on 18 November 2019, he sexually abused E whilst M and F3 were distracted. This was not reported to social services until 21 November 2019. In March 2020, court proceedings were issued by the local authority seeking care orders, and removal from the home, not only of C, D and E, but also of F. The local authority's case against M and F3 was that they had failed to protect E and the other children from A and failed to notify the social services when he abused E in the home. The local authority's initial application for an emergency protection order to remove C, D and E was refused. However, a non-molestation order was also made against A which (among other things) prevented him from coming to the family home **[1], [11]-[13]**.

The proceedings came to court for hearing before the judge. The judge made certain factual findings in relation to A's assault on E in November 2019 at the threshold criteria stage. Thereafter, a welfare hearing took place. On 26 July 2021, the judge decided that care orders should be made for C, D and E but that the case of F should be adjourned **[14]-[16]**. The Court of Appeal upheld the judge's decision by a majority (Peter Jackson LJ dissenting) **[28]-[32]**.

M and F3 appealed. Their grounds of appeal were refined by the Supreme Court into two questions concerning the making of the care orders for C, D and E. First, in order to decide whether those orders

were proportionate, was it necessary for the judge as a matter of law to assess the likelihood that if left in M's care, (a) the children would suffer sexual harm; (b) the consequences of such harm arising; (c) the possibility of reducing or mitigating the risk of such harm; and (d) the comparative welfare advantages and disadvantages of the options presented. Second, whether the judge erred in law by failing to make any or any proper assessment of those matters **[3]**.

Judgment

The Supreme Court unanimously allows M and F3's appeals and remits the cases for rehearing. This means that a different judge will make a fresh decision on the ultimate outcome for C, D and E. Dame Siobhan Keegan gives the judgment with which all the other members of the Court agree.

Reasons for the Judgment

Legal principles

Applications for a care order such as the present will require the judge to perform three stages of analysis. First, find the relevant primary facts. Second, determine whether the legal threshold for the making of a care order has been crossed under the Children Act 1989. Third, if that threshold has been crossed, decide the proper order to make. Where the judge is considering whether to make a care order in a case such as this, the judge must have regard to the matters set out in Section 1(3) of the Children Act 1989 (which are commonly referred to as the 'welfare checklist'). These include, among other matters, any harm which the child has suffered or is at risk of suffering and the consideration of the range of powers available to the Court **[39] [40]**. The Court's ability to make a care order is an intrusive power which engages article 8 of the European Convention on Human Rights (the right to private and family life). Accordingly, the Court may only make a care order if it is necessary and proportionate to do so. When deciding whether a care order is necessary and proportionate, the judge must evaluate all the available options for the child or children concerned **[45]-[47]**. Where there is an appeal from a care order, the function of an appellate court is to review the judge's findings and to intervene only if they are wrong or if the process of the judge's reasoning was inadequate (as the Supreme Court held in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911). As explained by the majority in In re B, an appellate court is not required to conduct a fresh evaluation of whether a care order is necessary and proportionate **[48]-[50]**.

This case

The appellants, M and F3, argued that the decision of the judge to make the orders in relation to C, D and E was wrong because the judge failed to consider other less interventionist options which would mitigate the risk of sexual harm. The local authority accepted that the judge had not specifically considered the range of powers available to the Court (as required under the welfare checklist). However, the local authority contended that the judge's decision read as whole confirmed that the judge had considered all possible options **[33]-[37]**.

The present case does not involve any challenge to the judge's findings of primary fact. Nor is there any challenge to the judge's conclusion that the legal threshold for the making of a care order has been crossed. Instead, M and F3's appeals concern whether the judge erred in the third stage of his analysis – namely in finding that the care orders were necessary and proportionate **[41]-[42]**. The real issue is not whether the judge reached a conclusion that was wrong, but the adequacy of the judge's process of reasoning in reaching his conclusion **[51]**.

The first issue before the Court was whether it was necessary for the judge as a matter of law to assess matters (a) to (d) set out above. The Court has no hesitation in concluding that the judge was required to assess all four of those matters. Their pertinence is an inevitable consequence of a holistic evaluation in a case of this nature and specifically flow from consideration of the welfare checklist **[52]-[56]**. The second issue before the Court concerns whether the judge erred in law by failing to make any proper assessment of those matters. There is no valid argument in relation to matters (a) to (b) (namely, whether the children

would suffer sexual harm the consequences of such harm arising). This appeal boils down to matters (c) and (d), which concern mitigations and options. The judge';s treatment of the facts and evidence was thorough. However, the judge did not mention the efficacy of the injunction against F2 and the non-molestation order made against A. Moreover, his decision was insufficiently founded on the necessary analysis. Indeed, one looks in vain for the critical side-by-side analysis of the available options and for the evaluative, holistic assessment which the law requires of a judge in such proceedings such **[56]-[61]**.

The process adopted by the judge was therefore flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm. An adjudicating court will need to scrutinise a revised plan and be satisfied as to any mitigations which might address the identified risks. This court is not equipped to conduct that exercise. It would be inappropriate for the Supreme Court as an appellate court to conduct a fresh proportionality assessment. Instead, the only realistic course is to remit the case for rehearing **[62]-[65]**.

References in square brackets are to paragraphs in the judgment