Neutral Citation Number: [2024] EWCA Civ 126

Case No: CA-2023-001846

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WORTHING
Her Honour Judge Earley

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2024

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE WHIPPLE
and
MR JUSTICE COBB

- -

Between :

M	**Appellant**
- and -	
X Local Authority	**Respondent**

- -

Re O (Description of Sexual Abuse)

- -

Deirdre Fottrell KC (who did not appear below) **and Charmaine Wilson** (instructed by **Brighton & Hove Law**) for the Appellant
Ruth Webber (who did not appear below) (instructed by **Local Authority Legal Services**) for the Respondent

Hearing date : **1 February 2024**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cobb :

Overview

1. This appeal focuses on a finding of 'sexual abuse' contained in a judgment delivered at the conclusion of a final hearing in care proceedings under Part IV of the Children Act 1989 ('CA 1989'). In the judgment under review, handed down by Her Honour Judge Earley following an eight-day contested hearing, the specific term 'sexual abuse' was applied to describe the repeated, albeit unintentional and negligent, exposure of a young child to adult sexual material, including adult nudity and pornography, using mobile smartphones and other electronic devices. This finding supported the Judge's conclusion that the statutory threshold criteria contained in section 31 CA 1989 was established, namely that "the care given to the child" was not "what it would be reasonable to expect a parent to give to [her]": section 31(2)(b)(ii) CA 1989.

2. The appeal concerns a girl, O, now aged seven. The appellant is her mother ('the mother'), who is represented on the appeal by Deirdre Fottrell KC (who did not appear below), and Charmaine Wilson. The local authority (the applicant in the care proceedings) is represented on the appeal by Ruth Webber (who also did not appear below). In the proceedings in the Family Court, O's father ('the father'), O's paternal grandmother, O's maternal grandparents, and O herself (by her Children's Guardian) were parties and legally represented. None of these other parties to the proceedings have appeared on the appeal; the Children's Guardian has filed a short position statement indicating her support for the local authority's argument on the appeal.

3. By the primary Ground of Appeal the mother asserts that the Judge was wrong to find that unintentional and negligent exposure of a child to adult sexual material constitutes 'sexual abuse'; in this regard, she argues that the Judge incorrectly interpreted and/or applied the definition of sexual abuse as set out in the statutory guidance issued by the Department for Education, 'Working Together to Safeguard Children' (the 'DfE Guidance'). The 2018 edition of the DfE Guidance was in force at the time of the judgment; it has now been revised (December 2023) but the definition has remained unchanged. By a second, subsidiary, Ground of Appeal the mother complains of procedural unfairness, in that the Judge introduced and relied on guidance published by the NSPCC (and specifically the definition of sexual abuse contained therein) following the circulation of her draft judgment; this second complaint is that the NSPCC definition extended the parties' use and understanding of the term sexual abuse beyond the scope of the finding sought by the local authority in the case.

4. At the hearing before the Family Court it was conceded by the parents that the section 31 CA 1989 'threshold criteria' were established on a number of grounds. There is no appeal against the findings of fact, nor the ultimate outcome of the case (see §17 below). However, the conclusion that the mother and father had sexually abused O has, it is acknowledged, potentially important consequences for both parents; permission to appeal was accordingly granted by Peter Jackson LJ on 20 November 2023.

Factual background

5. The factual background laid out in the paragraphs which follow is taken in large measure from the Judge's judgment.

6. O is the only child of the mother and the father. She has two younger maternal half-siblings, one of whom was born only in the last few weeks. The mother, while acknowledging the many proven deficits of her parenting thus far, is concerned that the Judge's finding that O had been sexually abused in her care will materially adversely impact upon local authority assessment and planning in relation to her newborn child.

7. The parents separated when O was very young. The Judge found that O:

> "…experienced trauma as a result of the neglectful and chaotic parenting she received up until June 2022. [O] has had years of instability and frequent changes of carer and home." (Judgment paragraph 65).

Both parents have a history of illicit drug use which continued through the period in which the care proceedings were before the court. The mother suffers from mental ill-health; specifically she has a complex post-traumatic stress disorder as a result of a sexual assault upon her when she was a teenager. The mother has also been the victim of serious domestic abuse in many forms from more than one partner in her adult life. The mother formed a relationship with a man ('KS') in early 2021; this was (in the Judge's finding) an abusive relationship. The mother made and retracted several allegations of domestic abuse against KS in the period under review before the Family Court. At all material times, following the separation of the parents, the father has lived with his mother (i.e., O's paternal grandmother).

8. In 2020, a child protection investigation was conducted arising from concerns that O may have been sexually abused. The concerns arose, in particular, from O's displays of sexualised behaviour. The investigation was ultimately inconclusive.

9. From February 2021 to October 2021, O lived predominately with her father and paternal grandmother. In this period the father bought O a mobile phone (specifically, a smartphone, with internet access and facility for software apps). This was, apparently, not her first mobile phone even though she was barely five years old. The father claimed to have purchased the device so that O could access a gaming platform called 'Roblox'; the Judge recorded that the PEGI [Pan European Game Information] rating for Roblox is 7+ years. When O's mobile phone was retrieved by the police on 28 May 2022 (see §11 below), it transpired that a number of other apps had been installed on O's phone, some of which have a minimum age requirement far beyond O's years; they included Facebook Messenger (minimum age 13 years), which the mother claimed had been logged into the father's account when the phone was retrieved, and TikTok (minimum age 13 years), which the Judge specifically found the father had installed. The police later confirmed (following analysis of the phone) that O had received 'stickers' from an unknown person via a chat on TikTok; 'stickers' should only be capable of being created by those who are aged 16 years and older. Further, the father accepted that he had allowed O access to YouTube, and had not put parental controls in place. These findings understandably materially informed the Judge's conclusion that the father had neglected his responsibility as a parent to keep O safe from inappropriate online material.

10. O moved to live with her mother and KS for a period in October 2021, before returning to her father in January 2022. After her return to her father's care, O continued to see her mother.

11. On 28 May 2022 O attempted to send to her mother, using her mobile phone, a photograph of her eye which, she complained, was sore. Inadvertently, she in fact sent her mother at least four intimate photographs and/or videos of herself, some in sexualised poses. The mother contacted the police who attended the paternal grandmother's home and removed O, transferring her to her mother's care. When O's mobile phone was later analysed by the police, over one hundred intimate and sexualised photographs and videos of O were found. It was accepted at the hearing that the photographs and videos had been taken by O herself, at the father's home, probably over a five day period in May 2022.

12. The evidence revealed, and the Judge found, that the father had first become aware of images of O in similar poses stored on her mobile phone some weeks prior to 28 May 2022. The Judge records that the father's evidence on this issue was internally inconsistent; his case at the hearing was that he had seen some images of O in sexualised poses, was shocked, and had deleted them, but he had told no-one of this discovery and did not discuss the images with O. The Judge found that the father had culpably failed to take any action to safeguard O and/or prevent a continuation of her behaviour. It was the father's stated position at the hearing in the Family Court that the issues surrounding the photographs and videos were being "blown out of proportion" and that "all children do these things".

13. After removal from her father's care, O was physically examined; bruising on her inner thigh was found in a location which, in the opinion of the doctors, was unlikely to be accidental. Nothing else was identified on medical examination which indicated that O had been sexually abused by any form of physical contact. An account of a tree-climbing accident was given to the Judge by the paternal grandmother to explain the bruising. In the final analysis the Judge concluded that there was "insufficient cogent evidence on which [she] could conclude that these bruises were inflicted upon [O] by an adult". Concerns were nonetheless raised by the doctors about O's sexualised presentation at the medical examination. She attended (with her mother) with perfectly applied adult-style make up and was over familiar with the adults in the room. Indeed the Judge recorded that O's sexualised behaviour was generally "developmentally unusual", and registered as 'amber' on the Hackett Continuum (the Hackett Continuum is a 2010 guide for professionals responding to children who display sexualised behaviour). O has never suggested to any person that she has been sexually abused by any form of physical contact, and "when directly asked if anyone asked her to make the videos of herself, she said no; when asked if anyone else was present, she said no" (Judgment: paragraph 21).

14. Prior to the final hearing, the local authority prepared and filed a detailed schedule of proposed findings of fact; altogether twenty-two findings were sought covering a range of matters relevant to the parents' lives, and its impact on their care of O. Featured among them were illicit drug use (by both parents) and the history of domestic abuse within the mother's relationships. The local authority sought a number of findings under the heading "sexual abuse in 2022"; one of those specific findings (finding no.5) was that "[O]'s sexualised behaviour is caused by exposure to inappropriate sexual conduct and/or sexual abuse". This alleged finding (no.5) was

non-specific as to whether the exposure to inappropriate sexual conduct had taken place in the father's and/or the mother's homes; the judge rightly treated that as a matter about which findings could properly be made. A separate finding (finding no.13) sought was that:

> "The combination of sexualised behaviour and the bruising to her inner thighs indicates that [O]'s exposure to inappropriate sexual conduct and/or sexual abuse most likely occurred while she was in the care of her father or the paternal grandmother or the mother".

15. It is relevant to point out here that, by the end of the hearing, the local authority had apparently refined its stance on a finding of sexual abuse, and was specifically asserting (among other findings) that:

> "… the creation of these images [by O] is evidence of [O] having been sexually abused and [the local authority] assert that the perpetrator of this abuse is likely to have been [the father]." (Judgment: paragraph 41).

16. The hearing before the Judge had been set up as a composite hearing, to deal with the historic factual issues, and the section 31 CA 1989 threshold criteria, before going on to consider welfare issues and ultimate outcome. The final hearing of the local authority's application lasted altogether eight court days.

The judgment

17. On the final day of the hearing (10 July 2023), following counsel's submissions, the Judge informed the parties of her decision in respect of O's permanent placement, namely that she would live with her maternal grandparents under a Special Guardianship Order. She reserved her more detailed review of the specific threshold findings, and her decision on the nature of the final order, until she had concluded the preparation of her reasoned judgment.

18. She circulated a judgment in draft on 4 August 2023. In a case in which many factual issues had been raised within the large volume of papers filed, and the lengthy oral evidence, the Judge rightly confirmed that:

> "It is not feasible or necessary for me to determine all these issues within this judgment. I have focused on the issues which are necessary to determine in relation to threshold and [O]'s future placement." (Judgment: paragraph 15).

19. The Judge summarised the key issues at paragraph 8 and 18 of the judgment:

> "[8] It is agreed by all parties that [O] suffered harm by being exposed to domestic abuse within her mother's relationships. Her father, … accepts he is a habitual user of cannabis and this use is ongoing to date. It is accepted by all parties that [O] has exhibited sexualised behaviours; the reason(s) for these behaviours are not agreed…

> [18] … [the mother] accepts that [O] was exposed to domestic abuse in her relationship with KS. I am satisfied that [O] was caused significant harm by living in a household where there was significant domestic abuse. … [O] was also at risk of significant physical harm from KS's volatile and aggressive behaviours".

20. Much of the narrative discussion in the judgment focuses on O's sexualised behaviour, the alleged sexual abuse, and the repeated exposure of O to inappropriate adult sexual material. In the judgment the Judge reproduced (at paragraph 23) the definition of sexual abuse which is contained in the DfE Guidance. The Judge specifically referenced in this regard MacDonald J's Herculean judgment in *Re P (Sexual Abuse: Finding of Fact Hearing*) [2019] EWFC 27 in which he too, at [4], had reproduced and relied on the same text. That definition reads as follows:

> "Sexual abuse: Involves forcing or enticing a child or young person to take part in sexual activities, not necessarily involving a high level of violence, whether or not the child is aware of what is happening. The activities may involve physical contact, including assault by penetration (for example, rape or oral sex) or non-penetrative acts such as masturbation, kissing, rubbing and touching outside of clothing. They may also include non-contact activities, such as involving children in looking at, or in the production of, sexual images, watching sexual activities, encouraging children to behave in sexually inappropriate ways, or grooming a child in preparation for abuse. Sexual abuse can take place online, and technology can be used to facilitate offline abuse." (Emphasis by underlining added).

21. The following specific findings of fact based on the evidence before the court can be drawn from the judgment:

    i) The father accepted that he regularly watched adult pornography on his own smartphone and sometimes on the television, via his X-Box; he stated he would watch pornography up to three times a day, morning and evening;

    ii) The mother had asserted (and the Judge found) that the father scrolled through adult pornographic images on his phone "all the time";

    iii) O has seen pornographic images in her father's home;

    iv) The father accepted that he received sexual images of naked adult females to his phone via the app Snapchat. He also sent naked images of himself to an adult female or females. Two of the deleted images retrieved from O's mobile phone were of a naked adult female in sexually provocative poses; it transpired at the hearing that the father had used O's mobile phone to screenshot the images which had been sent to him by Snapchat. The Judge found that the images of the adult female posing naked are similar to O's poses in the images she had taken of herself; the father is reported by the Judge to have been unable to see a connection;

v) O had described watching pornographic material on her father's phone with women dressed as police officers touching a man's genitals;

vi) In one of the videos recorded by O, the father is heard in the background asking O to "put her knickers back on";

vii) The father was aware that O was taking sexually explicit images of herself for more than a month prior to 28 May 2022; he failed to take any action (see §12 above);

viii) The mother and KS created on their smartphones and uploaded to the internet their own sexual images / videos, posting them on the 'Only Fans' subscription website (commonly used for uploaded user-generated pornography);

ix) O had informed other children in her current placement that she had seen a 'dirty video' of her mum and KS on her mother's phone; the mother did not accept that this was possible but accepted that KS had sexual images/videos of the mother on his phone. Importantly in this respect the Judge found that it was "likely that [O] was given a phone [by the mother and/or KS] to either keep her quiet or to distract her from what was happening [i.e., domestic abuse], and she was inappropriately able to access and view sexual content of her mother and KS".

22. The evidence summarised above led the Judge to the global finding that:

> "… both parents have exposed [O] to sexually inappropriate material and this led to confusion in her young and impressionable mind as to what was appropriate for herself" (Judgment paragraph 45).

23. The Judge drew these factual findings and admissions into a schedule of altogether fourteen "findings in respect of threshold" (at paragraph 61 of the judgment) including:

i) "[O] has been repeatedly exposed to inappropriate adult sexual material whilst in the care of [the father];

ii) [O] has also been exposed to inappropriate sexual material whilst in the care of [the mother];

iii) Exposure to this material constitutes sexual abuse and caused [O] significant emotional harm;

iv) As a result of viewing this material [O] has engaged in sexualised behaviour by creating multiple (100+) images / videos of her naked body…"

24. The Judge developed the finding set out at §23(iii) above in the following way (at paragraph 53 of the judgment):

> "I am satisfied that the parents' actions in exposing [O] to such material <u>amounts to sexual abuse</u>. I do not find that either parent <u>intended such abuse to take place, however</u>

> they neglected their daughter by failing to ensure that she was safeguarded from their adult sexual activity". (Emphasis by underlining added).

This paragraph was later distilled into a further specific finding "in respect of threshold" which was recorded as such, with the fourteen others, in the final court order. The finding, and its reflection in the consequent order, are the focus of this appeal.

25. Following the circulation of the draft judgment, the father's legal team, in line with the guidance in *English v Emery Reimbold & Strick Ltd.* [2002] EWCA Civ 605, sought clarification in writing of the finding which I have reproduced at §23(iii) above (and [53] of the judgment: §24 above) that O had been "sexually abused". Specifically, they questioned why the Judge had found 'sexual abuse' and not 'sexual harm' as a result of "exposure to sexually inappropriate material" (see §14 above). When the final version of the judgment was circulated on 21 August 2023, the Judge had not changed the content of the draft materially save to add the following words to paragraph 53 (immediately following on from the words which I have reproduced at §24 above):

> "The NSPCC definition of child sexual abuse (updated 16 May 2023) includes: "Not taking proper measures to prevent a child being exposed to sexual activities by others". In my judgment this is consistent with the Working Together to Safeguard Children definition of non-contact sexual abuse as including 'involving children in looking at or … watching sexual activities'."

26. The NSPCC (May 2023) definition of sexual abuse, to which the Judge referred, reads (in full) as follows:

> "Child sexual abuse (CSA) is when a child is forced or persuaded to take part in sexual activities. This may involve physical contact or non-contact activities and can happen online or offline (Department for Education, 2018; Department of Health 2017; Scottish Government, 2021a; Wales Safeguarding Procedures Project Board, 2020). Children and young people may not always understand that they are being sexually abused.
>
> **Contact Abuse** involves activities where an abuser makes physical contact with a child. It includes:
>
> - sexual touching of any part of the body, whether the child is wearing clothes or not
> - forcing or encouraging a child to take part in sexual activity making a child take their clothes off or touch someone else's genitals

- rape or penetration by putting an object or body part inside a child's mouth, vagina or anus.

Non-contact Abuse involves activities where there is no physical contact. It includes:

- flashing at a child
- encouraging or forcing a child to watch or hear sexual acts
- not taking proper measures to prevent a child being exposed to sexual activities by others
- making a child masturbate while others watch
- persuading a child to make, view or distribute child abuse images (such as performing sexual acts over the internet, sexting or showing pornography to a child)
- making, viewing or distributing child abuse images
- allowing someone else to make, view or distribute child abuse images
- meeting a child following grooming with the intent of abusing them (even if abuse did not take place)
- sexually exploiting a child for money, power or status (child sexual exploitation)." (Emphasis by underlining added).

27. In summary, therefore, the Judge did not find that physical contact sexual abuse had taken place; nor did she find that any adult had been directly involved in encouraging O to create sexually explicit material. As mentioned above, the challenges to the judgment are:

    i) The Judge's characterisation of the parents' conduct in negligently and unintentionally allowing O access to pornography and other sexually explicit material on their phones as 'sexual abuse';

    ii) That no specific reference had been made to the NSPCC Guidance/definition in the hearing or in the draft judgment; it appeared for the first time in the perfected judgment.

The arguments on appeal

28. By this appeal, the mother does not seek to disturb the ultimate outcome for O; the mother has conceded that she is not in a position to care for O at present. However, Ms Fottrell contends that the Judge was wrong to characterise the mother's conduct as sexual abuse; she relies – as the Judge herself had done – on the DfE Guidance, and submits that an element of intention or positive action on the part of an adult

perpetrator must be shown before a finding of sexual abuse can be made. In this regard she focuses on the verbs used in the opening sentence of the DfE Guidance "forcing or enticing" of a child or young person to take part in sexual activities (see §20 above). Ms Fottrell argues that the NSPCC Guidance is to like effect ("when a child is forced or persuaded to take part in sexual activities": see §26 above).

29. Ms Fottrell relies on a number of authorities in which the issue of fact-finding, and the use of generic labels to describe those facts or events, have been considered. She reminded us that Family Court judges have been cautioned (through decisions of this Court and the Family Division) in recent years against being drawn into the analysis of factual evidence, and the description of events revealed by the evidence, by reference to criminal concepts and labels. She helpfully took us to *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198, in which McFarlane LJ (as he then was) said at [62]:

> "The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established."

30. She highlighted Hickinbottom LJ's remark from the same case: "what matters in a fact-finding hearing are the findings of fact" (*Re R* at [67]), and suggested that unhelpful generic labels can serve to 'obfuscate' the more nuanced fact finding process, and are indeed unnecessary. She suggested that in the later judgment of *A v B* [2023] EWCA Civ 360, [2023] 1 WLR 2387, Sir Andrew McFarlane P at [20] extended the caution beyond criminal law concepts:

> "Whilst the focus of those decisions [*Re R* and others] was upon the proposition that the definitions in question were those applicable under the criminal law, the mischief which, it has been held, should be avoided applies in equal measure <u>to any alternative definitions that may be promulgated</u>" (Emphasis by underlining added).

All of this had a further echo, suggested Ms Fottrell, in *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 at [71]:

> "The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes".

31. Ms Fottrell conceded that O had suffered significant sexual harm and emotional harm through exposure to adult sexual material, but challenged the description of that harm as sexual abuse which, she maintains, has wrongly and inappropriately elevated the seriousness of the finding beyond that which the facts portray, and is thus misleading. She emphasised that there is a danger in this case (and others like it) of using the term sexual abuse as shorthand for the outcome of the factual determination, without a

person or agency receiving that information having any real understanding of what is meant by it.

32. On the second ground of appeal, Ms Fottrell argued that the Judge was wrong to adopt and apply the NSPCC Guidance either at all, or without giving the parties the opportunity to comment upon it; she argued that this offended against the approach advocated by this court in *Re G & B (Fact-Finding Hearing)* [2009] EWCA Civ 10 at [16]:

> "Where, as here, the local authority had prepared its Schedule of proposed findings with some care, and where the fact finding hearing had itself been the subject of a directions appointment at which the parents had agreed not to apply for various witnesses to attend for cross-examination, it requires very good reasons, in my judgment, for the judge to depart from the schedule of proposed findings. Furthermore, if the judge is, as it were, to go "off piste", and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised."

33. Ms Webber, in reply, argued that what the Judge had found as facts about the parents' conduct was properly described as sexual abuse. She disputed that there is, or should be, any need for the court to assign any element of intention or positive action to the role of a perpetrator of sexual abuse before a finding of sexual abuse under section 31(9) CA 1989 can be made. The key passages of both the DfE Guidance and the NSPCC Guidance documents which apply to these facts in the context of 'non-contact' sexual abuse do not require intention or action on the part of the perpetrator. She argued that it was necessary to read the opening sentences of the definitions in both documents as applying to 'contact' sexual abuse only. Ms Webber maintains that the Judge was faithful to the DfE Guidance insofar as it contemplates that a child may be "involved" through omission or commission "in looking at, or in the production of, sexual images, watching sexual activities", and to the NSPCC Guidance in that, on the clear facts found by the Judge, the parents did not take "proper measures to prevent a child being exposed to sexual activities by others".

Discussion

34. As I have mentioned at §14 and §15 above, the local authority had ultimately advanced its case at the final hearing on the basis that O had probably suffered from some form of physical contact sexual abuse (as the Guidance documents to which the Judge referred so describe it), and that the perpetrator of that abuse was probably the father. On the evidence, it was open to the Judge to find that she was "not satisfied" that O had been "sexually abused by inappropriate touching"; furthermore, it was equally open to the Judge to conclude that no adult had been directly involved in encouraging O to create the sexually explicit material found on her mobile phone. The Judge was therefore left to consider the extensive and repeated exposure of this young child to adult sexual images and activities, adult nudity and adult pornography,

albeit (in the Judge's finding) in an unintended and negligent way, and to consider whether this amounted to sexual abuse.

35. The Judge's key factual findings in this regard, which I have rehearsed at §21 above, are clear. The Judge was surely left in no doubt but that the father was a regular/daily and unguarded user of his mobile phone and X-Box in the household where O lived to access adult pornography and to trade sexual images with unknown females. He seems to have taken no real precautions to shield O from his actions; indeed in using O's mobile phone for storing sexual images (however briefly) he was directly and deliberately creating an obvious risk that his daughter would see them. The mother and KS separately used their mobile phones for intimate sexual photography and videography, and then as a means by which to publish their material on the internet; the Judge was entitled on the evidence to conclude that O probably had access to this material when the mother's and/or KS's mobile phones were given to her (in the Judge's finding) either to "keep her quiet or to distract her from what was happening" in the mother's household. In my judgment, the conduct of both these parents in enabling O to access pornography and images and videos of sexual activity reasonably freely was particularly egregious.

36. The exposure of impressionable children and young people to online pornography and digital images/videos of adult sexual material carries with it well-recognised and significant adverse implications for their mental health and personal development. Among the recognised risks, children – certainly of the age of O in this case – are not developmentally mature enough to understand and process what they see. They may well come to view the pornographic and adult sexualised behaviour as normal and acceptable; this may lead them – as it apparently led O – to imitate those behaviours by acting out what they themselves have observed. In O's case, she chose to capture her own sexualised images on her mobile phone camera, just like her parents. There can be little doubt that, looked at from the perspective of O herself, she was truly 'abused' by the experiences of observing a range of adult sexual activity, nudity, and imagery which both of her parents had negligently enabled.

37. The Judge's factual findings were explicitly targeted towards the 'threshold criteria' in section 31 CA 1989. We were reminded in this appeal of the comments of Dame Elizabeth Butler Sloss P, giving the judgment of the court, in *Re U (A Child) (Dept for Education and Skills Intervening)* [2005] Fam 134 at [26]:

> "It is for the purpose of satisfying that threshold that the local authority seeks to prove specific facts against the parent or parents. Only if it succeeds in that task can its application for a care or supervision order proceed. Thus the preliminary issue of fact constitutes the gateway to a judicial discretion as to what steps should be taken to protect the child and to promote his welfare".

This was echoed by Sir Andrew McFarlane P in *Re R* at [86] some years later when he referred to the 'overarching purpose of public law proceedings'.

38. In reaching her conclusions about the threshold, the Judge homed in on the 'harm' to O. 'Harm' is defined in the CA 1989 (at section 31(9)) thus:

> "*"harm"* means ill-treatment or the impairment of health or development [including, for example, impairment suffered from seeing or hearing the ill-treatment of another];
>
> *"development"* means physical, intellectual, emotional, social or behavioural development;
>
> *"health"* means physical or mental health; and
>
> *"ill-treatment"* includes sexual abuse and forms of ill-treatment which are not physical." (Emphasis by underlining added).

Further, section 31(2) poses the question of whether the harm is attributable to unreasonable parenting.

39. In this appeal, Ms Fottrell was right, in my judgment, to accept (see §31 above) that O had suffered sexual harm and emotional harm as a consequence of her experiences, representing failures of parenting in both homes; she accepted that children often experience multiple forms of harm as a result sometimes of even a single set of experiences. The essential question is whether the Judge was right to describe O's experiences, and her findings about the prevalence and accessibility of adult sexual material in both parents' households, as sexual abuse of O?

40. It can be seen (reference §38 above) that a finding of sexual abuse is a specific finding of a particular type of harm identified within the broader statutory definition of 'harm' and 'ill-treatment'. The use of this categorisation ('sexual abuse') in this case can therefore, in my judgment, be distinguished from those cases where Family Court judges have incautiously used labels such 'rape', 'murder', 'manslaughter' – imported from the criminal jurisdiction – to describe the facts before them.

41. I accept that there is a risk (which McFarlane LJ discussed albeit in a different context in *Re R* at [65]) that the label 'sexual abuse', just like any other generic term, may be misunderstood by the lay parties, by the professionals in the case, and/or by those outside of this process who may nonetheless be told of it. If the finding is misunderstood it could itself cause upset and even harm. I also accept that much important context and detail is lost when judges and professionals use generic terms such as 'sexual abuse', or indeed 'physical abuse' or 'emotional abuse', to describe a wide range of conduct, events, actions, and omissions on the part of parents. I recognise the particular risk which arises in this case that 'sexual abuse' may more obviously bring to mind 'contact' sexual abuse rather than 'non-contact' sexual abuse, and in that sense it could be said to be potentially, inadvertently, misleading. But that is not a reason for judges to avoid using the term which statute has exceptionally provided; it is 'exceptional' because (apart from the heading to para.4 of Schedule 2, where it is used as a broad synonym for ill-treatment) it is the only appearance of the term in the text of the CA 1989, and it is, materially, included in this context. Judges in the Family Court are accustomed to making an evaluation of the evidence, and where possible reaching findings on the facts; judges always need to think about whether describing the conduct alleged by reference to a generic label will add to an understanding of the facts. I would counsel against over-analysis. Judges should use

descriptions that they consider appropriate to describe their findings and to convey their nature and relative gravity.

42. The DfE and NSPCC Guidance documents referenced by the Judge undoubtedly contain much within them which is valuable for child protection organisations and associated safeguarding agencies in fulfilling their child welfare duties. I have already commented on the value of the definitions of sexual abuse within each piece of Guidance in helpfully distinguishing between 'contact' and 'non-contact' sexual abuse. There is, as the Judge observed, much in common between the definitions in the two Guidance documents; they both address the involvement of dependent and developmentally immature children and adolescents in sexual activities which they do not fully comprehend. The issues raised by this appeal have served well to underline that 'non-contact' sexual abuse may be no less pernicious than 'contact' sexual abuse. In a world where technology makes ever easier the ability of children and young people to access online pornography and other adult sexual material, there is, perhaps, all the greater need to ensure that our language, and specifically the term 'sexual abuse', reflects the seriousness of the harm to which they are thus exposed.

43. However, the definition sections of the Guidance documents (referred to in the DfE Guidance as a Glossary) have their limitations too. First, it should be noted that the definitions are of course not intended to be legal definitions; they are not binding on the courts and they should not be construed as if they were legal documents. Secondly, they do not purport to provide an exhaustive list of the wide range of activities which may constitute abuse. Thirdly, and perhaps most importantly, the competing submissions of counsel in this appeal revealed internal inconsistencies in both Guidance documents. The opening sentences of the definition of sexual abuse in each document do not sit comfortably with the illustrations of 'non-contact' abuse which follow (see the passages underlined above at §20 (DfE), and §26 (NSPCC) respectively). By way of illustration, the NSPCC Guidance opens with the generic description of child sexual abuse as occurring: "when a child is forced or persuaded to take part in sexual activities", but this sentence does not correspond at all with the illustration of 'non-contact' sexual abuse which is relevant in this case, namely a parent or carer "not taking proper measures to prevent a child being exposed to sexual activities by others".

44. The second Ground of Appeal does not, in my judgment, advance the mother's cause further. The local authority had drafted its schedule of findings reasonably broadly, encompassing non-specific allegations of sexual abuse alongside "exposure to inappropriate sexual conduct". That the Judge found that O had been sexually abused by non-contact abuse is within the scope of proposed finding no.5 (see §14 above). Put another way, the ultimate finding of the court was not so radically different from that pleaded by the local authority that it engaged the requirement for the Judge to give the parties the opportunity to address her further following the conclusion of the lengthy hearing. The fact that the local authority did not specifically seek the finding of non-contact sexual abuse arising from exposure to sexual material does not mean that, in this quasi-inquisitorial process, the Judge could not or should not make this finding. When responding to the request for clarity from the father, the Judge merely identified one of source materials (the NSPCC Guidance document) which had informed her view. In amplifying her judgment in this way she did not fall into procedural error.

45. Overall, the judgment represents an impressive distillation of a significant volume of written and oral evidence into a well-crafted and logically structured account. The Judge's recital and analysis of the factual material was focused and thorough; she made clear findings of fact, concentrating on those issues which were relevant to her ultimate decision; she faithfully applied the relevant principles of law, which she rehearsed succinctly. Appropriately assisted by the Guidance documents, she reached the clear conclusion that the facts supported a finding that O had been sexually abused, which in turn explained in a material way how the threshold had been crossed. For the reasons set out herein, the Judge cannot in my judgment be faulted for describing the behaviour of the parents in relation to this young child as 'sexual abuse'.

Conclusion

46. For the reasons which I have set out above, I would dismiss this appeal.

Lady Justice Whipple

47. I agree.

Lord Justice Peter Jackson

48. I also agree.