insurance rates because, on average, they live longer than do men. It is feared moreover that the judgment might, by analogy, prevent other characteristics from being taken into account in insurance matters in the future. Notably, a similar provision to Article 5(2) is to be found in the Commission's proposal for a new Equal Treatment Directive (COM (2008) 426) regarding age and disability.

But if, to some, the result of the case appears to be dramatic, to others, the reasoning of the Court will come as a relief. The judgment appears indeed to confirm that the Charter is a codification and not an independent source of rights which is meant, henceforth, to supersede the general principles of EU law. The Court's justification for using the Charter as a ground for judicial review was that EU fundamental rights as general principles have been *incorporated* in the Charter. This is an important reiteration of the status quo. The preamble of the Charter indeed specifies that the document *reaffirms* the rights as they result from a number of sources, including the ECHR and the constitutional traditions common to the Member States. However, insofar as it suggests that all EU fundamental rights are now to be found in the Charter, the language of "incorporation" is unfortunate, although it would be rather premature to attach a definite meaning to the Court's characterisation. AG Kokott by contrast described the document as a "summary of the fundamental rights guaranteed at Union level" (at [28]), which clearly leaves scope for the Court to continue developing new rights as general principles of EU law.

The judgment is an important reminder that the EU legislator must be mindful of fundamental rights in the drafting of legislation and a further step towards the creation of a "social Europe". It also clarifies the Court's perception of the Charter as the main *formal* but not *material* source of fundamental rights protection in the EU. This fulfils the objective of visibility and simplicity that the adoption of the Charter was meant to achieve while preserving the drafters' original intention as to the nature of that document. Finally, and irrespective of its legal merits, the decision that the Directive is incompatible with the Charter is bound to have a financial cost, and a practical question arises as to who will bear it: the consumer, the insurance sector, or both?

EVA NANOPOULOS

UNCERTAIN PERPETRATORS AND SIBLINGS AT RISK

WHERE care proceedings are brought in respect of a child who is the victim of non-accidental injury inflicted by a parent, a care or

https://doi.org/10.1017/S0008197311000791 Published online by Cambridge University Press

supervision order may be made even where it cannot be established which parent was responsible. The child *is suffering* significant harm attributable to his not receiving the care it would have been reasonable for a parent to give to him (*Lancashire C.C.* v. *B.* [2000] 2 A.C. 147). But where does this leave a sibling or half-sibling also at risk? The Children Act 1989, section 31(2) provided expressly for the protection of unharmed children. It incorporated a new element in the threshold for state intervention where the child concerned is *likely* to suffer significant harm. However the House of Lords has pronounced that, in relying on this prospective limb of the statutory threshold, the local authority must prove the allegations on which it is relying. It must establish that there is a *real possibility* of such future harm by proving the key allegations to the ordinary standard of balance of probabilities (*Re H. (Minors) (Sexual Abuse)* [1996] A.C. 563; *Re B. (Children: Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 A.C. 11). In *Re S-B. (Children)* [2009] UKSC 17, [2010] 1 A.C. 678, Lady Hale made remarks to the effect that the threshold will *not* be crossed in relation to a second or subsequent child unless the identity of the perpetrator of the first child's injuries is proved.

Re F. (A Child) [2011] EWCA Civ 258 concerned a baby boy. His parents were engaged to be married, but the father had a history. In 2004 a care order was made in relation to an earlier child of his by a different mother. That child had been injured either by the mother or by him but it had not been established which it was. Now in his new relationship, the father did not seek to conceal his past. When his new partner fell pregnant, the couple notified the relevant local authority of this and of the 2004 proceedings in which the father was found to be in the "pool of perpetrators" viz a *possible* perpetrator but not a proven one.

The authority indicated that it would apply for an interim care order after the baby's birth. Its plan was that the child should live with the mother; the father should leave and undergo a risk assessment. This was not acceptable to the parents and, within a day or two of the birth, the authority applied unsuccessfully for an interim care order. It relied *solely* on the previous proceedings giving rise to reasonable grounds for believing that the baby was likely to suffer significant harm if left in the care of the parents. The judge gave permission to appeal. The authority, acknowledging that its appeal must fail on the state of the authorities, sought to persuade the Court of Appeal to grant permission to appeal to the Supreme Court. Refusing permission, Wilson LJ declined to hold that there should be a relaxation of the principle of proven factual foundation in uncertain perpetrator cases. For him the requirement was a "bulwark against the state's removal of a child from his family" which he considered "very precious".

https://doi.org/10.1017/S0008197311000791 Published online by Cambridge University Press

All child protection cases involve a delicate balance between striving to ensure safety of children while not violating rights of families to be free from unjustified state intrusion. It might be argued that the interests of parents in the pool of perpetrators can be adequately protected at the *welfare stage* of care proceedings when, the threshold having been crossed, the court must decide what order to make. So, the argument goes, full account can be taken of the evidence concerning the possibilities of perpetration at that stage. But, at the *threshold stage*, *possible* perpetration should be sufficient because the second child is indubitably still at risk. Precisely what weight should be given at the welfare hearing to a parent being in the pool in relation to an *injured* child is something which Wilson L.J. admitted had exercised him for some years. But this issue becomes yet more complex when the question is what weight should be given to that fact in relation to a *second* child where the threshold is crossed *for other reasons* in relation to that child.

The Court of Appeal declined to give guidance on this and the issue must surely be canvassed before the Supreme Court. This will not now happen in *Re F.* as the authority has since obtained an interim care order on the quite different basis that the parents were abusing drugs while caring for the child. But return to the Supreme Court in another case it must, especially in the light of that Court's ruling in *Re S-B.* that, highly desirable though it is to have a clear finding on perpetration, judges should not strain to make it. Neither should they comment in percentage terms about the relative chances of perpetration if they genuinely cannot make an identification.

Despite the overwhelming desire not to leave children at risk, there are formidable objections to abandoning the requirement of proof of perpetration when that alone is the basis of the proceedings. Illogical though it may seem, a distinction may need to be made between parents who remain together and those who separate and, more often than not, between siblings and half-siblings. Let us suppose that the parents stay together. A younger sibling is already in the household or is born into it. In these circumstances the threshold *should* be crossed. What we have here is proof that one of two parents, both still in the household, has injured a child. It should be possible to rely on this despite no finding of which one it was. The real possibility of harm to the second child *does* have a factual foundation. What if instead, as in *Re F.*, the parents separate and, say, the mother acquires a new partner? She has another child, half-sibling to the injured child. In this situation the certainty of a risk has been replaced by the possibility of one. There are sound policy reasons why the threshold should *not* be crossed in these circumstances if *the only finding* against the mother is that she was a possible perpetrator. Must she forever run the gauntlet of care proceedings for her second, third, fourth or fifth child? This is surely not a

https://doi.org/10.1017/S0008197311000791 Published online by Cambridge University Press

proportionate response to risk, especially if we postulate that she was indeed the "innocent" party, leaving aside any issues of failure to protect. The present position, that the authority must have other concerns which enable it to cross the threshold, is defensible.

The current law is causing consternation but this may be an overreaction. First, in the great majority of cases it *will* be possible for a judge to identify the perpetrator on the balance of probabilities. Secondly, as *Re F.* demonstrates, it will be a comparatively unusual case in which the only fact relied upon is a parent being in a pool of perpetrators. There will usually be other substantial causes for concern. It is right that the authority should have the onus of demonstrating what they are.

ANDREW BAINHAM

DEFINING "DOMESTIC VIOLENCE": HOUSING LAW AND BEYOND

SECTION 177(1) of the Housing Act 1996 provides that "it is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him, or against – (a) a person who normally resides with him as a member of his family, or (b) any other person who might reasonably be expected to reside with him". Whether it is reasonable for a person to continue to occupy given accommodation governs decisions, first, about whether that individual is homeless at all and, second, whether he or (more usually) she is "intentionally homeless", in which case the statutory duties of the local authority are minimal. Section 177(1) ensures that, whether the victim has fled the home following domestic violence or remains there despite it, she is eligible for rehousing. The term "domestic violence" used here originates in the Housing (Homeless Persons) Act 1977, one of several statutes enacted following 1975's landmark Parliamentary Select Committee on Violence in Marriage.

The question for the Supreme Court in *Yemshaw* v. *London Borough of Hounslow* [2011] UKSC 3, [2011] 1 W.L.R. 433 was what "domestic violence" means here. The Act provides no comprehensive definition, but does specify (in s.177(1A)) that "violence" means "(a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is 'domestic violence' if it is from a person who is associated with the victim". The concept of an "associated person" is borrowed from the Family Law Act 1996, Part IV, concerning eligibility to apply for non-molestation and occupation orders under that Act. But what is "violence"? In particular, is it

https://doi.org/10.1017/S0008197311000791 Published online by Cambridge University Press