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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

A R

Appellant

and

HOMEFIRST COMMUNITY TRUST

Respondent

Before Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

Introduction

[1] J R (J) was born on 9 December 2003. He is the fourth child born to Mrs A R (Mrs R). Her eldest child, M V (M), who was born on 25 May 1991, is in long term foster care. Her other children, V, born on 2 November 1998, and J-L, born on 24 September 1999, have been adopted. Happily they have been adopted by the same family and live together. J has now been placed with this family and lives with his brother and sister as part of the same family unit.

[2] Mrs R has had long standing problems with alcohol. She began drinking in her teenage years and, except for some sporadic periods of abstinence, she continued to drink heavily until June 2002 at least. Apart from one or two

lapses in the recent past, she claims to have been sober since December 2002. It will be necessary to say something more of her drinking habit presently. The father of Mrs R's three youngest children is G R (Mr R). He also has had a pronounced alcohol problem. These difficulties eventually led to the children being taken into care.

[3] When it became known to the social services that Mrs R was pregnant with J, a child protection case conference was held on 24 September 2003 at which it was decided that the baby's name should be placed on the child protection register under the categories of 'potential emotional abuse' and 'potential for neglect'. On the day after the baby was born the trust applied for an emergency protection order. Within a few days of his birth J was removed from the care of his mother. He has not returned to her care since that time. At the time that the matter came before the Family Proceedings Court the trust was aware that Mrs R was being treated by a consultant psychiatrist, Dr Ciaran Mulholland, and that she was under the care of the community psychiatric nurse, Sister Fahy. As will become clear later in this judgment, these professionals had most frequent contact with Mrs R. Instead of turning to them for advice, the trust decided to engage Dr Neal Quigley, a consultant psychiatrist who had not previously met Mrs R, to advise after examination on 18 November 2003. Events might have taken a dramatically different turn if those professionals who had most regular contact with Mrs R had been asked to advise at this early and, as it proved, critical stage. If the Family Proceedings Court had been aware of the views of Dr Mulholland and Sister Fahy and in particular of the optimism that they shared that Mrs R, despite what had gone before, would be able to give J proper care, it might well have refused the interim care order. As it was, the court was not made aware of the views of these two professionals and it made an interim order placing the child in the care of the trust until 13 January 2004. That order was made on 16 December 2003. The trust had indicated to the court that it did not intend to make any residential assessment of the mother's ability to care for the child and it proposed that contact between the child and the mother should be limited to one and a half hours per week. The court was, not surprisingly, dissatisfied with this proposal and ultimately, by a majority, ordered that contact with the mother should take place four times per week. The dissentient on the panel indicated that even more generous contact should have been allowed.

[4] The Family Proceedings Court transferred the case to the Family Care Centre with a view to its onward transmission to the High Court and on 13 January 2004 His Honour Judge Markey QC duly transferred the case to the High Court. The matter was set down for a preliminary hearing on 26 February 2004 in relation to the issues of residential assessment and contact. No order was made then but McLaughlin J indicated that the trust should think again about how the future care of the child might be handled. It was not possible to proceed with the full hearing at that time as discovery had

only just been provided by the trust and the judge required time to consider this. The case was adjourned until 22 April 2004. At the resumed hearing on that date Dr Mulholland gave evidence. The matter was again adjourned until 21 June. The hearing occupied four days between that date and 24 June. The judge gave judgment on 5 July 2004.

[5] Three issues were at stake on the hearing of the application: - first, the trust's application for a care order (this was opposed by the mother); second, the mother's application that there should be a residential assessment (in other words, that her parenting skills and capacity should be tested in a residential setting); and, finally, her application for contact. McLaughlin J granted the application for the care order. He did not make an order for residential assessment. He did not deal with the issue of contact at the time that he delivered his judgment. After the judgment had been delivered the trust reduced the level of contact. Mrs R was dissatisfied with this and on 2 September 2004 she duly applied for enlarged contact pending the hearing of this appeal. On 24 September the judge ordered that contact between mother and child should take place fortnightly. Mrs R appeals against the judge's ruling on all three issues.

Factual background

[6] Mr R is the father of V, J-L and J. He and Mrs R were married in 1999. Before their marriage both Mr and Mrs R suffered from significant alcohol problems. Mr R's first contact with the community addiction team of the social services was in 1991 and Mrs R in 1996. After their marriage the problems with alcohol continued. Periods of abstinence were followed by periods of binge drinking and episodes of domestic violence. These are well documented in various social work reports. Mrs R was able to abstain from alcohol during her pregnancies with V and J-L but, unfortunately, relapsed into heavy drinking shortly after the children were born.

[7] V and J-L were placed in care as a temporary arrangement a number of times. It is clear that they had suffered as a result of their parents' alcoholism. On occasions they witnessed domestic violence. Eventually in 2000 they were taken into care on a permanent basis and were adopted on 18 June 2003 after a freeing application. Neither Mr R nor Mrs R has had any direct contact with their older children since the adoption. Annual indirect contact takes place. Mrs R has been more scrupulous in availing of this than Mr R.

The social work and medical reports

[8] D H (Mrs H), a social worker with the trust, prepared a report for the hearing on 16 December 2003. In it she documented the recent history of relations between Mr and Mrs R and their contact with the trust. The couple separated in November 2003, Mrs R having obtained non-molestation and

occupational orders on 4 November. They have not lived together since. Mrs H stated in the report that the trust had reached the opinion that J was likely to suffer significant harm if he remained in the care of his mother. That opinion was based on the trust's assessment of the history of the family and on the report of 18 November 2003 from Dr Quigley,.

[9] Dr Quigley prepared reports on both Mr R and Mrs R, acting on joint instructions from the trust's and the parents' solicitors. He recorded Mrs R's claim that her pregnancy with J had been planned. Indeed her husband had had a vasectomy reversed in order that she might become pregnant. He also recorded that Mrs R had not drunk alcohol since December 2002. Dr Quigley considered that she had the "salient features of alcohol dependence". In the past this had led to "an inability to prioritise the needs of her children before her own". The critical passages from Dr Quigley's report are as follows: -

> "With regard to the triggers that may lead to a relapse in drinking, the two major ones in Mrs R' case are the ending of her pregnancy (this being the major motivating factor for abstinence, certainly during her two previous pregnancies) and her relationship with her husband. Mrs R' insight into both of these appears to be somewhat limited. She considers that she will continue to remain sober after the birth of her child. However, while it is impossible to predict the future with complete confidence, previous history is the best guide to the future and is unsupportive in her case. I also feel that it is much less likely that Mrs R will be able to maintain sobriety, should she and her husband be reconciled.
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> …
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> It is not possible to be categorical as to Mrs R's prognosis. It is to her credit that she has sustained sobriety for the duration of her pregnancy. However it must be acknowledged that she has achieved this on two previous occasions (during V and Jordan's pregnancies) returning to drink immediately afterwards.
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> …
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> An objective assessment of her case would have to acknowledge that, on balance, the likelihood is that she will begin drinking again; this is based on

> her previous history and her reinstatements after prolonged periods of abstinence – and in particular after the sobriety during her two previous pregnancies. Against that must be set Mrs R's experience of losing the care of V and Jordan, which I feel has undoubtedly concentrated her mind; and her (currently short-lived) separation from her husband. Should she maintain sobriety for a significant period (perhaps twelve months) after her delivery, her long term prospects may be viewed with more confidence."

[10] On 18 December 2003 the trust held a review of the case. This was styled a 'looked after children's review'. At that meeting it was decided to present J to the Northern Board adoption panel to seek what was described as "a best interest decision in respect of adoption" for the child. The parents were informed of this on 6 January 2004. Both opposed the proposal that J be considered for adoption.

[11] Mrs H prepared a further report on 13 January 2004. She recorded that Mrs R continued to abstain from alcohol. She had availed of extensive support from a number of agencies. Among these was the community addiction team who reported that Mrs R seemed fine. A consultant psychiatrist, Dr Ciaran Mulholland (the doctor who gave evidence in the hearing in April 2004), saw Mrs R every two weeks. Contact between Mrs R and J, as ordered by the court, was taking place four times per week and was, according to Mrs H, "going well". A further report was prepared by Mrs H on 9 February 2004. In this she recorded that Mrs R maintained sobriety. This position was maintained when Mrs H reported again on 19 February.

[12] On 26 February 2004, at a hearing of the trust's application for a renewal of an interim care order, McLaughlin J asked the trust to review the case. On 26 March 2004 the trust decided that it would seek reports from Dr Mulholland, Dr Quigley and Mrs Priscilla Corbett, an adoption development worker. In fact no further report from Dr Quigley was ever obtained.

[13] In a report dated 19 April 2004 Mrs H conducted a far-reaching review of the case. This dealt extensively with Mrs R's history and the difficulties that she had experienced in looking after M and the other two children. In this report Mrs H set out findings of various researchers in relation to the effects of separation on children between the ages of six months and four years and the tendency of young children to become attached to the principal care-giver. She concluded that it was important that a decision be taken on the permanent future for J before he was six months old in order "to ensure that he [was] given the best opportunity to form attachments with a main care-

giver". She recorded that the Northern Board adoption panel had unanimously agreed that adoption was in J's best interest.

[14] On the question of a residential assessment Mrs H observed that a number of formal assessments of Mrs R had been carried out since 1995. These, together with the trust's "knowledge and insight", gained from its long term relationship with the appellant, enabled Mrs H to say that Mrs R needed "to consolidate and integrate changes into her daily life, personality, thinking process and coping mechanisms". Whether she would be capable of this would require evaluation over a period of three to five years. Mrs H therefore expressed the following opinion on the issue of whether Mrs R should have a residential assessment: -

> "It is the trust's opinion that a further assessment will not contribute to or add any new information or insight into the trust's decision making process for JR. It would only disrupt J and further delay the process, disadvantaging J's development and capacity to attach to his main care-giver."

[15] Priscilla Corbett, an adoption development officer with the trust, provided a report dated 15 April 2004. It is pertinent to note Mrs Corbett's description of the role of an adoption development officer. It is to assist the trust "in developing and implementing permanence (*sic*) plans for children looked after by trusts". She was asked by the principal officer with responsibility for the management of the case to provide a report outlining the impact of delay in care planning for J on the child himself and on his siblings, V and J-L. In preparing her report Mrs Corbett met Mr and Mrs X, the adoptive parents of J-L and V. These were of course also the prospective permanent carers for J. Clearly, therefore, the perspective of the report was focused on the requirements of the children and not on the interests of the mother. It is, we believe, important that this be recognised from the outset because this report played a significant part in the judge's decision.

[16] Mrs Corbett quoted extensively from academic works on the question of the impact of separation on young children from their carers and concluded that it was crucial that further delay in J's moving to his permanent home be avoided. She expressed the view that because of Mrs R's "lengthy history of mental illness and alcohol abuse and her past inability to meet the needs of any of her three older children … Mrs R will be unable to safely parent J within a timescale which meets his need for permanence". This was a damning assessment of the chances of Mrs R playing any part in the life of her infant son who was then just four months old. It was clear that Mrs Corbett had concluded that Mrs R should not be allowed any further significant contact with J. This condemnation had been made by Mrs Corbett without

having spoken to Mrs R or having considered any report from the consultant psychiatrist who was treating her.

[17]Dr Mulholland prepared a report on Mrs R dated 19 April 2004, again on the joint instructions of her solicitors and solicitors acting for the trust. Mrs R informed him that her marriage had completely broken down and that there was no prospect of reconciliation. While acknowledging that Mrs R had neglected her children in the past, Dr Mulholland expressed the view that there was no reason to believe that she would not be an adequate parent if she continued to abstain from alcohol. On this subject he said, "She appears to have good insight into her problems and recognises that she must avoid alcohol in the future." On the topic of her reconciling with her husband, Dr Mulholland had this to say: -

> "**6) Her insight into triggers that may lead to relapse**
>
> The key trigger here would be any reconciliation with Mr R. Mrs R recognises this and it is one of the reasons why she does not wish to reconcile. She plans to make her own [way] in the world from now and hopes to bring up her child (J) and recognises that any reconciliation with Mr R would put all of this in jeopardy.
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> It was noted in the past that Mrs R appeared to be capable of abstaining from alcohol during her pregnancies but would relapse very quickly after delivery. Indeed the relapse occurred within a matter of days or weeks. On this occasion there has been no such relapse and one would hope that this particular point has been overcome."

[18] Dr Mulholland gave his final conclusions as follows: -

> "In my opinion Mrs R has done very well over recent months. Undoubtedly she is alcohol dependent and indeed her condition could be viewed as being at the severe end of the spectrum. Her past history indicates great difficulties in controlling her alcohol intake and in her ability to prevent her alcohol intake affecting every area of her life.
>
> On the other hand, over the course of the last year she has abstained from alcohol and has worked co-

> operatively with others in order to overcome her problems. She is always polite and listens to advice. It appears to me that she is well motivated at the present time and has good insight into her condition. Given this I would be cautiously optimistic that she will continue to abstain from alcohol over the coming weeks, months and years."

[19] Despite Dr Mulholland's assessment that Mrs R had good insight into her condition, the next report from Mrs H, dated 30 April 2004 and prepared for a court hearing scheduled for 15 May, contained the following comment: -

> "Mrs R lacks insight and struggles to accept responsibility for abusing alcohol and failing to provide her other three children with a safe and secure home life without domestic violence."

[20] This was a remarkable statement. Remarkable firstly because Mrs H had stated in the preamble to her report that she had drawn on information from, among others, Dr Mulholland. Nowhere in her report does she discuss why she had reached a conclusion diametrically different from the psychiatrist who was seeing and treating Mrs R on a fortnightly basis. The statement was also remarkable because it appeared to attribute blame to Mrs R not only for her alcoholism but also for the domestic violence of which, so far as one can judge, she was the principal victim.

[21] In her report, Mrs H flatly stated that Mrs R was unable to look after J; that there was no need for a residential assessment; and that "the trust's plan for J is permanency and therefore an increase in contact is not conducive with permanency planning". Again, we find these statements remarkable. The trust's plans for J required to be sanctioned by the court. The tenor of Mrs H's report on this occasion partakes strongly of a pre-emption of the court's decision. It is absolutely clear that the possibility of Mrs R' rights prevailing did not enter Mrs H's or the trust's thinking. One can perhaps understand why the trust and Mrs H in particular felt that Mrs R would be unfitted to care properly for J. Mrs H had had considerable experience with V and J-L and had, no doubt, undertaken sterling work in having those young children cared for by foster parents and ultimately adopted. Naturally, she would not want to have that experience repeated with J. For reasons that we will develop later in this judgment, we are convinced that Mrs H was not sufficiently alive to Mrs R' rights under the European Convention on Human Rights and Fundamental Freedoms. We suspect that this arose because of a lack of training in the fundamental impact that the Convention has on the type of decision that the trust and Mrs H had to take in this case. To the extent that she was not properly trained or advised on the implications of the

convention and the Human Rights Act 1998, she is not to be faulted. As we shall discuss later in this judgment, however, the failure of the trust's officers to be sufficiently alive to the requirements of the convention and the jurisprudence of the European Court of Human Rights has had profound and unfortunate consequences in this case.

[22] Mrs R' solicitors engaged an independent social worker, Marcella Leonard, and she reported on 7 June 2004. In summary, her conclusion was that Mrs R had demonstrated a capacity to change her previous addictive cycle of behaviour. In particular Mrs Leonard was impressed by the appellant's sobriety over the 18 months before she reported. Her medication had been increased and this had led to a more positive mental state. According to Mrs Leonard, Mrs R appeared to have a greater degree of insight into her past, her alcoholism, the dysfunctional relationship that she had had with Mr R and the poor parenting of her three older children. Although Mrs Leonard accepted that the concerns expressed about the appellant's ability to cope as a single mother were reasonable, she felt that Mrs R should be given the chance to demonstrate her ability to cope in her own domestic setting and at outpatients' clinics and during appointments with the community addiction team.

[23] Mrs H provided another report on 15 June 2004. We have to say that we are concerned about the tenor of this report. In it Mrs H appeared to us to be arguing a case rather than attempting to make a balanced judgment. She reported claims made by Mr R about Mrs R' association with another man that were roundly were denied by Mrs R. It is not suggested that these claims have ever been substantiated. We cannot understand why they were included in the report if Mrs H did not consider that there was any substance in them and she has never suggested that she did. More disturbingly, however, Mrs H took up a number of points in Mrs Leonard's report and sought to counter these in a frankly adversarial fashion. We deprecate this approach. We are convinced that it stemmed from the fact that the trust had decided on its plan for the future of J and were determined to resist any suggestions that might impede implementation of those plans. While Mrs Leonard's report was thoughtful and reflective, acknowledging that Mrs R had failed to display good parenting skills in the past and had provided ample reason for concern on the part of the trust, Mrs H in her report of 15 June made no concession whatever to a contrary view as to how the future of J might be dealt with. All comment about Mrs R was entirely negative. She referred to her attending M's birthday late and speaking to a friend on the telephone in the course of the contact on this occasion. She cited these as 'indicators' of Mrs R' poor ability to 'parent' J adequately. No allowance whatever was made for the contrary views of Dr Mulholland and Mrs Leonard.

Further material furnished for the appellant

[24] In advance of the hearings before McLaughlin J on 22 April 2004 and 21 June 2004 Mrs R furnished two statements dated respectively 19 April and 12 May. In these statements Mrs R highlighted the fact that she had remained sober since J's birth and that she had substantial support networks in the form of various groups including Alcoholics Anonymous, the community addictions team, Dr Mulholland and her family. She asserted her intention to divorce her husband. She protested that she was not being given the chance to demonstrate her parenting skills by the trust. To this end she sought the opportunity in a residential care setting to show that she was capable of looking after J.

[25] The appellant's mother also submitted a statement to the court. In it she pointed out that she had not been prepared previously to support her daughter because of her drinking habits but that, since the birth of J, she had shown a responsible attitude and was well motivated. For that reason both parents were now willing to provide support.

The guardian ad litem reports

[26] The first report from the guardian ad litem, P McD (Mrs McD), was provided for a court hearing on 19 February 2004. In it Mrs McD echoed the words of Dr Quigley that the best predictor of future behaviour was past behaviour. Apart from this, Mrs McD felt that Mrs R had failed to recognise the impact that her behaviour had had on her other children, particularly M. She concluded that there was not "enough change in her attitude or indeed an ability to put the needs of her children above her own to warrant a fresh assessment". This is an interesting conclusion. It implies that if there had been a sufficient change in Mrs R' attitude, a fresh assessment might have been justified. This of course contrasts with the approach of the trust. They considered that they already knew enough about Mrs R' capabilities. A residential assessment was unnecessary, in their view.

[27] Within a very short time of her first report, however, the guardian ad litem had moved closer to the trust's position on this question. In a report dated 24 February she said that while a residential assessment would provide information on Mrs R' ability to care for her child "from a practical point of view", the quality of her practical parenting skills was not in question while she was abstaining from alcohol and the only thing that would prove whether she could be a capable parent was "the passage of time". To give this opportunity to Mrs R, however, would involve a "potential risk" to J. The guardian ad litem therefore concluded: -

> "… it is a matter of balancing the potential gains of being further informed of the validity of the concerns which such a residential assessment

> would provide against the consequences for the child of the passage of time. It is my view that it is not in the best interests of the child that this assessment should take place."

[28] While the guardian ad litem's primary concern must of course be to secure what is in the best interests of the child, we consider that this statement betrays a failure on the part of the guardian to appreciate that a decision that J should be separated from his mother involved an interference with her rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms. The balancing exercise referred to in the paragraph quoted ought to have been cast differently so as to cater for those rights.

[29] The next report from the guardian ad litem is dated 20 April 2004. She stated that she had seen a number of reports and had interviewed a number of people for the purpose of the report. She had considered Ms Corbett's report but does not appear to have seen that of Dr Mulholland. Her conclusions remained as before.

[30] Yet another report was produced by the guardian on 12 May 2004. We have found some of this report difficult to understand. For instance, the following: -

> "In the past Mrs R failed to cope with the demands made upon her by her children as they grew older. She demonstrated that she had unrealistic expectations of them as highlighted by M's parentified attitude to his mother. She has not availed of her contact visits with him to try to undo and change for the better some of the damage which has been done to him. Instead she has further reinforced this parentified attitude through inappropriate sharing of information and failure to meet his need to be lovingly parented by her."

[31] This is at best unnecessarily obscure because of the use of jargon and at worst meaningless. If a problem existed in relation to Mrs R's contact with M, and if this was relevant to the issue as to whether J should be allowed to live with his mother, it should have been simply expressed. We find it impossible to deduce from this passage whether M's attitude to his mother or her treatment of him should have played any part in the decision as to whether J should be allowed to live with his mother. Mrs McD remained of the view that no assessment of Mrs R's ability to look after her son should be undertaken. Again she appears to have reached that view without

considering Dr Mulholland's report and without having any regard for Mrs R's article 8 rights.

[32] A final report was provided by the guardian dated 14 June 2004. Before preparing this report Mrs McD had spoken to Marcella Leonard and had considered her report. She does not appear to have had any contact with Dr Mulholland or to have seen his report. This is unfortunate because her views as to Mrs R's capacity to carry out parenting duties might well have been affected if she had been aware of his opinion. In particular, it would have been helpful if Mrs McD had been aware that Dr Mulholland had expressed cautious optimism that Mrs R would have been able to maintain her sobriety. Interestingly, in what appears to be something of a retreat from her earlier position, Mrs McD agreed with Ms Leonard that a residential assessment would be helpful in obtaining an insight into the emotional bond between Mrs R and J, although this would have to be also assessed in the mother's home. Because of the time required to carry out these assessments, however, the guardian remained of the view that they should not be carried out.

The hearing on 22 April 2004

[33] At this hearing Dr Mulholland gave evidence that there had been a marked improvement in Mrs R's attendance at clinics held by him and in her general compliance with treatment. As of April 2004, he described her as very compliant with treatment regimes. He reported that both he and Sister Fahy were optimistic as to Mrs R' future progress. He considered that she had "taken on board the nature of her problem, taken on board what has happened in the past and has decided for her own personal internal reasons that she should stay away from alcohol". She now had good insight into her failings in the past. She recognised that any reconciliation with Mr R would jeopardise her sobriety and did not intend to return to him. On the question of residential assessment Dr Mulholland said that while this would involve an artificial environment, it would nevertheless provide "some test of her abilities to maintain her sobriety whilst caring for her child".

[34] Dr Mulholland, in answer to cross examination by Mrs Dinsmore QC for the guardian, made what to us appears to be a very important point. While acknowledging that the past behaviour of someone such as Mrs R provides some guidance as to what may happen in the future, he said that one should not "get too hung up" on that notion since it was not always an infallible guide. We consider that this point was well made. It would be quite wrong to condemn Mrs R solely on the basis of what had happened in the past. Of course that experience must be closely taken into account in evaluating the risks to J should he be returned to his mother's care but her efforts to put that past behind her and to avoid the mistakes that she made before must also form part of the assessment of the proper course for the future.

[35] In answer to the judge, Dr Mulholland said that Mrs R had made considerable progress and that he had no reason to believe that that progress was going to falter. This was dependent on a number of factors; one of these was the level of contact that she had with him and Sister Fahy and he expected that this would continue at the same level for years to come.

[36] Mrs R also gave evidence at this hearing. She confirmed that she had been agreeable to a residential assessment with J. She had also agreed to be seen by Dr Quigley on behalf of the trust, even though he was not the psychiatrist that she normally saw. She was also prepared to agree to any conditions that the trust would impose if J had been allowed to go home with her.

[37] Mrs R's evidence was interrupted by the judge. It appears that, before coming into court, he had not appreciated that he was to be asked to decide whether a residential assessment should take place and whether the level of contact between J and his mother should be increased. He had believed that the case had merely been listed for review. When he discovered that it was due to be heard on the two issues of residential assessment and contact, he said that he had not had sufficient time to prepare for the case. Some exchanges took place between the judge and counsel and between the judge and Mrs R but, although the judge voiced doubts about the value of a residential assessment in Mrs R's case, he did not reach any final decision on that question nor did he deal with the application for an increase in the level of contact. Counsel for the trust proposed that the case be adjourned and these matters were therefore left in abeyance for determination on the full hearing of the trust's application for a care order.

The hearing in June 2004

[38] Mr Toner QC opened the case for the trust at the hearing that began on 21 June 2004. Unfortunately, no written care plan had been produced by the trust for the hearing. It is suggested that an outline of the plan was to be found in Mr Toner's opening. If so, the care plan is not easily identified from the transcript of the opening and it was not referred to explicitly by Mr Toner. We were told that the trust did not have time to prepare the plan. We find this statement difficult to accept. A care plan such as was proposed in the present case would have required little in the way of preparation. At the very least, the trust should have explained to the judge that a care plan had not been prepared and Mr Toner ought to have outlined the proposed care plan specifically in his opening. He did not do so. Nor did he refer at any point to Mrs R's article 8 rights. Before this court Mr Toner accepted that these rights were engaged and that the care plan proposed by the trust interfered with them but at no point in his opening did he deal with what we regard as a critical issue in the case. In view of the extensive jurisprudence on this subject

and the centrality of the issue to the matters that the learned judge had to decide, we find this omission surprising.

[39] We wish to express our strong disapproval of the failure of the trust to present a written care plan. In *Re S (Minors) (Care Order Implementation of Care Plan); Re W (minors) (Care Order: adequacy of Care Plan)* [2002] 1 FLR Lord Nicholls at paragraph 99, dealing with the need for a care plan, stated: -

> "[99] Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future. The degree of firmness to be expected, as well as the amount of detail in the plan, will vary from case to case depending on how far the local authority can foresee what will be best for the child at that time. This is necessarily so. But making a care order is always a serious interference in the lives of the child and his parents. Although Art 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Art 8: see *TP and KM v United Kingdom* [2001] 2 FLR 549, para 72. If the parents and the child's guardian are to have a fair and adequate opportunity to make representations to the court on whether a care order should be made, the care plan must be appropriately specific."

[40] We respectfully agree with this statement. A departure from the requirement to put a formal care plan before the court should take place only in exceptional circumstances. No such circumstances existed here. Where a court is faced with an application to make a permanent care order and no care plan has been presented, it should normally adjourn the hearing until it is available. We deplore the failure of the trust to produce a care plan or to explain to the judge why none had been prepared.

[41] Mrs H gave evidence for the trust. She said that she did not believe that Mrs R had accepted responsibility for the fact that M, V and J-L had had to be taken into care. This was surprising. Firstly, Dr Mulholland had not been challenged by Mr Toner on his evidence at the hearing on 22 April that Mrs R did now have insight into her failings in the past. (Mr Toner had indicated to McLaughlin J at the start of the hearing on 21 June that it had been agreed that

Dr Mulholland's evidence in April should be incorporated in to the evidence for the June hearing.) Secondly, Mrs H made no reference to Dr Mulholland's evidence on this point. It is not clear whether she had failed to realise that her evidence on this quite crucial issue differed sharply from the expert who might be supposed to be best placed to give an opinion on it or whether she was not given the opportunity in her direct examination to deal with it.

[42] A substantial part of Mrs H's direct evidence was taken up with an examination of historical events relating in particular to Mrs R's handling of M. We find this approach difficult to understand. There was no dispute as to the failings of Mrs R in the past. We are unable to appreciate what importance was placed on this by the trust other than to create a negative picture of Mrs R. If that was the purpose of adducing this evidence we cannot accept that it was appropriate. It is the duty of the trust to remain impartial in the presentation of its care plan to the court. It should not take up a *parti-pris* position. It is difficult to avoid the impression that this is precisely what the trust did in this case. At no point did Mrs H refer to Mrs R's article 8 rights, although it should be said in fairness that she was not asked about these by Mr Toner, and, as we have said, she may well not have received proper training on this subject. She evinced a determination that the child should not be placed in Mrs R's care that seemed to go well beyond any impartial assessment of the merits of the case. This is perhaps best exemplified by the following exchange between Mr Toner and the witness: -

> "Mr Toner: If Mrs R stays off alcohol is she capable, do you think, of meeting the physical needs of J?
>
> Mrs H: No, it is the trust's decision that permanency is in the best interest for J and that is based upon Mrs R has (*sic*) a chronic and severe alcohol problem and although she has started to make some changes for herself, the changes need to be long term and embedded and integrated into her daily living and daily routine and it would be the trust's opinion that that is not within the timescale for J."

[43] Mrs H's answer bore no relation to the question asked of her. She had been asked whether Mrs R could meet J's physical needs if she remained sober. There had never been any doubt about that. Indeed, one of the reasons that the trust had resisted a residential placement was that it asserted that her practical parenting ability was not in question if she remained sober. Yet, so anxious was Mrs H to promote and stand steadfastly by the trust's plan that J should go to long term care with the X family that she simply repeated what

that plan was and the reasons that the trust had espoused it, rather than deal with the issue that counsel for the trust had raised.

[44] Towards the end of Mrs H's direct evidence the issue of residential care again came up. The judge intervened to say, "I thought that I had heard all of this the last time", and when reminded by Mr Toner that the issue was still live, said, "Yes, well I still think it is live, but I thought we had dealt with it. I mean the evidence was that it wasn't going to achieve very much because we knew she could look after the baby". We think that this interjection was unfortunate. The witnesses who had commented on this were far from unanimous as to the value of the residential assessment – see, in particular, paragraphs [22] and [33] above. It would be wrong to suppose that the judge failed to take these views into account in reaching his final decision on this matter but the interjection may have created the impression that he thought that the matter did not warrant careful study.

[45] Mrs H was cross examined by Ms McGrenera QC for Mrs R. She was asked what consideration the trust had given to its primary duty to encourage rehabilitation of the child with its mother. She suggested that this was considered as part of the case conference discussion but did not refer to any record of such discussion and the matter was, perhaps unfortunately, not pursued.

[46] Mrs Leonard gave evidence. She said that Mrs R had been very open and honest about the level of her addiction. It was important, she said, that Mrs R had been able to maintain sobriety during her pregnancy and the seven months since. She had gone through most of the stages that must be passed in order to deal effectively with her dependence on alcohol. She agreed with Dr Mulholland that Mrs R was acting out of internal motivation *i.e.* she recognised that she must do something to deal with her addiction for the sake of her health rather than simply as a means of gaining custody of her son.

[47] Mrs Leonard gave evidence that although residential assessments took place in a somewhat artificial atmosphere and were designed primarily to test practical parenting skills, they could nevertheless provide some insight into how Mrs R was coping emotionally with the demands of looking after a baby. She felt that the assessment, if it was to take place, should be undertaken right away. It would take up to three months. On leaving the residential assessment centre, contact with the child should be supervised.

[48] The community psychiatric nurse, Sister Fahy also gave evidence. She told the court that initially Mrs R was quite ambivalent about her abuse of alcohol, tending to blame external factors such as social services having removed her older children from her care. Within the last two years, however, she had changed substantially. She now accepted that the children had been removed because of her drinking. She had greater insight into her

illness. As a consequence she was now internally motivated to deal with her drinking problem. Sister Fahy was optimistic for the future, pointing out that Mrs R had coped with the enormously stressful experience of having J removed from her without resorting to alcohol. She believed that the experience of having V and J-L freed for adoption was pivotal in motivating Mrs R to change her life.

[49] Much of the cross examination of Mrs Fahy by Mr Toner and Mrs Dinsmore was preoccupied with an examination of the difficulties that Mrs R had experienced in the past. For the reasons that we have given earlier, we do not consider that this was at all helpful. The past problems of Mrs R, her responsibility for her children having been brought into care and her lack of insight into her condition had all been accepted by the witnesses who had given evidence. Unnecessary repetition of those problems served no useful purpose. But a question from Mrs Dinsmore did have the perhaps unintended benefit of eliciting from Sister Fahy an answer that we have found extremely significant, especially since she was the professional who had most frequent contact with Mrs R. This is what she said: -

> "I am very much aware that there is a little boy … in this equation. I have children of my own and I have grandchildren of my own and I am very much into protecting children and if I thought that there was any danger to this child, any immediate danger, any danger at all to this child, I would not be here supporting Mrs R. But I believe that in my opinion, in my professional opinion I believe that Mrs R has changed within the last eighteen months. That she is now more internally motivated. I can't comment on her parenting skills because I haven't been present when she has been with her children so I am not able to comment on that … but from the addiction point of view I am very much aware that she had made positive changes on this occasion and that she is actually well motivated in maintaining those changes."

[50] This was powerful evidence from an experienced nurse who had perhaps the best opportunity to witness the progress that Mrs R had made over the preceding months and the motivation for the changes that she had observed. It ought, in our opinion, to have weighed heavily with the judge in his decision as to whether a care order should be made.

[51] Mrs R and her mother both gave evidence along the lines of the statements referred to at paragraphs [24] and [25] above. A great deal of the cross examination by Mr Toner concentrated on a contact visit by Mrs R to M

on the occasion of his thirteenth birthday. While this was of some relevance to the issues in the case, its importance in deciding whether a care order should have been made in relation to J was, in our judgment, peripheral.

[52] The final witness was the guardian ad litem. Again much of this witness's evidence dwelt on the shortcomings of Mrs R in relation to the older children. The episode on M's thirteenth birthday again featured strongly. We have to say that this incident, although it reflected badly on Mrs R in that it appears that she was late for the visit on this important occasion and spent some time during the visit talking on her mobile phone, should not have been elevated to the position of pre-eminence that it appears to have occupied in the hearing and, ultimately, in the judge's decision.

[53] Mrs McD gave evidence that she had "gone through a lot of soul searching" to reach the decisions that she had made. She said that she believed that Mrs R had not moved significantly in terms of her ability to understand and meet the emotional needs of a child. It appeared that this view was formed on the basis of one interview with Mrs R, however.

The judge's decision

[54] The judge summarised the testimony of the witnesses who had given evidence and stated that he had been impressed by the evidence of Sister Fahy and Mrs C, the appellant's mother. He acknowledged the efforts that Mrs R had made but ultimately concluded that it was in the best interests of J that a decision be taken promptly to achieve a state of permanence for him. He concluded, therefore, that the care order should be made.

[55] It is clear that the judge was strongly exercised by the behaviour and attitude of Mrs R towards M. This is evident from the following passage from his judgment: -

> "[23] One of the methods by which the Trust sought to demonstrate the continuing deficits of AR in parenting was by reference to her continuing treatment and attitude to MV. I am satisfied by the evidence which I have heard, which was contradicted on a number of occasions by AR, that she has not been a good timekeeper, on at least quite a few occasions, and has been significantly late on at least two, since contact became supervised about six months ago. She also appears to have had the attitude on a number of occasions that she was entitled to be given lifts to and from the contact by social workers even though travel warrants were provided for her.

> One particular episode was dwelt upon, namely the events surrounding the day of MV's thirteenth birthday. The normal pattern is for AR to have contact with MV once per fortnight for one hour between 4.00-5.00pm. On the day of his birthday she did not turn up at the appointed meeting place and the social worker had to telephone her to be told by AR that she had failed to make the rendezvous because she had fallen asleep. She eventually arrived at contact 40 minutes late. In view of the fact that it was his birthday and so much of the allocated period had been missed, the contact was extended but for a significant period towards the end of the contact AR spent the time on her mobile telephone. I am satisfied that on other occasions she was distracted by the use of her mobile phone during these short, and what should have been precious, periods of contact. She was observed on a number of occasions composing text messages and otherwise using the phone. When this evidence was given by Miss H there were interruptions whilst AR passed instructions to counsel and she flatly contradicted this version of events. Later production of contemporaneous contact records showed that she was quite wrong about that and I am satisfied that Miss H evidence was accurate. I am also satisfied that AR was fully aware of the point that was being made by the giving of this evidence despite her later protestations when she was in the witness box."

[56] We do not underestimate the importance of these matters in forming a judgment as to the reliability and conscientiousness of Mrs R but they must be set against the weight of the evidence from those who knew her best and had the most frequent contact with her. One must also keep in mind, we think, that Mrs R was obviously anxious that she be seen in the best possible light so that her reluctance to accept the criticisms made of her in relation to this visit may be, perhaps, not as significant in the overall scheme of things as the judge appears to have found it to be.

[57] The judge clearly attached a great deal of weight to the evidence of the guardian ad litem. He dealt with her evidence in the following paragraphs: -

> "[24] The Guardian ad Litem Ms McD was, as in so many cases, a critical witness. She has had long

connections with the family stretching back through the care proceedings involving each of the older children. She acted in the care proceedings in respect of all of them, the freeing proceedings in respect of the middle children and the current proceedings. She is also a highly experienced Guardian. I am satisfied that she has agonised over the recommendation which she has made to the court that I should approve the care plans of the Trust, reject any proposals for a further assessment, avoid further delay and ensure the rapid placement of JR in a permanent home away from his mother. I am also satisfied that she has taken into account, and given full weight to all of the many changes in the life of AR. Her conclusion was ultimately influenced by her assessment of the inadequacies of the emotional care which AR is able to offer JR. Her evidence is particularly important because of her detailed knowledge of MV over several years. She told me that the interaction of AR with MV holds the key to her opinion of AR's parenting. She has discussed his state with his therapist, Miss McCambridge, and reported that it is considered MV is "parentified", that his mother is unavailable to him emotionally and that this has been catastrophic for the development of MV. He is constantly anxious for her welfare, whether she has returned to drinking, whether GR is still a feature in her life and is concerned less he should return to the matrimonial home. He is able to appreciate the potential of GR to trigger a return to alcohol by AR.

[25] Miss McD stated further that AR was fully aware of MV's fragile emotional state. She has had the opportunity to redress her past wrongs towards him and to assist in repairing the damage but there is no evidence that she has taken this on board or taken steps to correct the damage. Further, she believes that AR has further damaged him by engaging in inappropriate conversations with him, such as telling him that GR had wrecked the house and the proposed ultimate fate of JR. Although she sees him for just one hour per fortnight she felt that being late, or keeping bad

time, was particularly significant because she was fully aware of the distress and upset which he suffered when he was awaiting her arrival for contact. Lateness can cause anxiety and concern because he was aware of all of the bad reasons that might contribute to it. She was particularly struck by the description of the events on his birthday and of the reference to the use of her mobile phone during such a short contact period. She thought that the events on his birthday spoke for themselves because of what being late did to him. Not seeing fit to turn up on time and being distracted by her phone was a further insult to his emotional security. This pattern had continued despite being asked to consider her approach to contact with MV and to understand the damage that might be caused. Ultimately the Guardian felt that she had not demonstrated a capacity to absorb advice she had been given or to act upon it.

[26] In the light of the continuing inability to empathise with MV Miss McD thought there was nothing to indicate there could be an early resolution of this deficit. She did not accept that three months therapy could turn around her present inability to make necessary changes to alter her parenting ability significantly. Ultimately, after much soul-searching, she had determined that, even if AR could change sufficiently, the timescale involved in reaching a sufficient state of certainty and reassurance about it could not be consistent with the needs of JR. She emphasised that a delay of up to six months to complete the residential assessment, therapy and some observation in the community and not to have any guarantee, on the balance of probability, of a satisfactory outcome, would be too dangerous for JR. She felt that the prospect of good parenting emerging in that timescale was not strong enough and the better option for him would be to accept the care planning outlined by the Trust. This would have the additional reassurance that, although he would be removed from the care of his mother, he would be able to grow up with his brother and sister and the close connection with blood relatives would assist in providing him with

> the security and sense of permanence to which he is entitled."

[58] Mrs McD's evidence was clearly important but we question whether it should have been accorded the weight that the judge gave it. It was, as we have said, based on one interview with Mrs R. Moreover, it relied critically on Mrs McD's judgment on how Mrs R had behaved towards her other children. For the reasons that we have given earlier we consider that this was of less significance than the evidence given by such witnesses as Dr Mulholland and Sister Fahy about how Mrs R had acquired insight into her previous shortcomings and had taken steps to deal with them. Finally, we are far from convinced that Mrs McD was possessed of the expertise necessary to make a confident judgment as to whether Mrs R had the capacity "to absorb advice … or to act upon it". It appears to us that those who had observed Mrs R over a long period, who were intimately connected with her treatment and who had the specialist knowledge to make a professional judgment on this issue were in an obviously superior position to that of Mrs McD.

[59] The judge was heavily influenced by the need to deal with the case promptly so that a settled future for J could be secured. This was understandable. The desirability of having a permanent placement was obvious. But this was not the only factor to be taken into account. Mrs R's article 8 rights and the positive duty to take measures to facilitate family reunification were also factors that had to be considered. The judge made no direct reference to these in his judgment. He expressed his final conclusions in this way: -

> "[41] After trying to make this process as child-centred as possible, ensuring that JR's needs are the paramount consideration and balancing all of the evidence and the principles which I am required to take into account, I have reached the conclusion that it is essential to achieve a state of permanence for JR at this stage and not to delay that decision further. Should I direct the therapeutic and residential assessments requested by AR I cannot be sure of the outcome. Applying the balance of probabilities to the evidence, and having regard to the protracted history, the difficulties in shaking off the spectre of alcoholism and the demonstrated emotional detachment of AR I am unable to say that delay is likely, on the probabilities, to enable AR to demonstrate her capacity to parent safely. I am unwilling to allow a further period of 3-6 months to pass with all of the uncertainty and potential damage that would

> accompany such a delay. I am satisfied that the best interests of JR require that he should move as quickly as possible to a permanent home. The fact that one is readily available now and that it will enable him to grow up with his brother and sister in a placement which has been successful for them, gives added impetus to that decision.
>
> [42] I am satisfied that to do so would be both necessary and proportionate. The right of the mother to respect for her family life is of course a most important consideration but I must also take into account the right of JR to a family life which is secure, permanent and will ensure his physical and emotional development. I am satisfied after trying to balance all of these factors that the appropriate step is to make the Care Order sought by the Trust, refuse to direct the residential and therapeutic assessments requested by AR and to approve the Trust's proposed care planning for him. A supervision order would not suffice as the Trust would not have parental responsibility and clearly their continuing intervention is necessary for the future until permanence can be achieved for him: for that reason a No Order order is not an option either."

[60] The reference to the mother's right to respect for a family life in paragraph [42] clearly alludes to the appellant's article 8 rights but we believe that this subject required more elaborate consideration by the judge. In two skeleton arguments counsel for Mrs R had outlined the nature of these rights and made appropriate reference to authority. We shall deal with these later in this judgment.

The statutory framework

[61] Article 3 (1) of the Children (Northern Ireland) Order 1995 deals with the paramountcy of importance of the child's welfare in determining questions relating to a child's upbringing or the administration of property. It provides:

> "*Child's welfare to be paramount consideration*
>
> 3. - (1) Where a court determines any question with respect to-
>
> (a) the upbringing of a child; or

(b) The administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

[62] The need to avoid delay in making an order relating to a child is recognised in paragraph (2) of article 3 which provides: -

"(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

[63] The 'welfare checklist' *i.e.* the matters to be taken into account by the court in making certain orders (under articles 7 & 8 and Part V) is set out in paragraph 3 which provides: -

"(3) …, a court shall have regard in particular to-

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
(g) the range of powers available to the court under this Order in the proceedings in question."

[64] The option of making no order is dealt with in paragraph (5) as follows: -

"Where a court is considering whether or not to make one or more orders under this Order with

respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

[65] Care orders are dealt with in article 50. So far as is relevant it provides: -

"*Care orders and supervision orders*

50. - (1) On the application of any authority or authorised person, the court may make an order-

(a) placing the child with respect to whom the application is made in the care of a designated authority; or
(b) putting him under the supervision of a designated authority.

(2) A court may only make a care or a supervision order if it is satisfied-

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to-

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
(ii) the child's being beyond parental control."

[66] It is to be noted that the making of a care order involves a two-stage process. First, the court must consider whether or not the criteria for making a care order (generally referred to as the 'threshold criteria') have been satisfied. Secondly, if the threshold criteria have been satisfied, the court must then consider whether a care order should be made in light of the care plan, the welfare checklist in article 3(3) of the Order, the no order principle enshrined in article 3(5) of the 1995 Order, together with consideration of the range of possible orders including any order under article 8 (residence, contact and other orders with respect to children).

[67] In the present case the trust relied on the proposition that the child was likely to suffer significant harm. In *Re H and R (Child Sex Abuse: Standard of Proof)* [1996] 1 FLR 80, Lord Nicholls of Birkenhead dealt with what is meant by the expression 'likely to suffer harm' at page 95: -

> "In my view, therefore, the context shows that in section 31 (2) (a) [the equivalent provision in England and Wales] 'likely' is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case. By parity of reasoning, the expression likely to suffer significant harm bears the same meaning elsewhere in the Act; for instance, in sections 43, 44 and 46. Likely also bears a similar meaning, for a similar reason, in the requirement in s 31 (2) (b) that the harm or likelihood of harm must be attributable to the care given to the child or 'likely' to be given to him if the order were not made."

[68] In the present case Ms McGrenera did not dispute that the threshold provided for in article 50 (2) (a) had been reached in that it could not be disputed that there was a real possibility of harm to J, in light of the appellant's previous history. She disputed the basis on which the trust had said that the threshold had been passed and criticised the judge for having accepted all the threshold criteria advanced by the trust. For reasons that will appear, we do not find it necessary to deal with this argument.

[69] Article 57 of the Order deals with interim care orders. It provides in paragraphs (1) and (2): -

> "*Interim orders*
>
> 57. - (1) Where-
>
> (a) in any proceedings on an application for a care or a supervision order, the proceedings are adjourned; or
>
> (b) the court gives a direction under Article 56(1),
>
> the court may make an interim care order or an interim supervision order with respect to the child concerned.

> (2) A court shall not make an interim care order or interim supervision order under this Article unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in Article 50(2)."

[70] The power to direct that a residential assessment should be undertaken derives from article 57 (6) which provides: -

> "(6) Where the court makes an interim care order or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment."

[71] In effect, the appellant's submission in the present case was that the judge should have declined to make the care order that the trust had applied for; instead he ought to have made an interim order so as to permit a residential assessment order under article 57 (6). The phrase "other assessment" in that paragraph gives the court the power to direct a residential assessment of the child with members of his family – see *Re C (Interim Care Order: Residential assessment)* [1997] 1 FLR 1997. That case is also authority for the proposition that the court could have recourse to those powers to enable it to obtain the information necessary for its decision as to whether to make the care order. Ms McGrenera's argument on this point was that the judge ought to have invoked those powers rather than accede to the trust's argument that the residential assessment was not necessary.

Article 8 of ECHR

[72] Article 8 of the European Convention on Human Rights and Fundamental Freedoms provides: -

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary for a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of crime and disorder, for the protection of health or morals or

> for the protection of the rights and freedom of others".

[73] By virtue of section 6 of the Human Rights Act 1998 it is unlawful for a public authority to act in a way that is incompatible with a convention right. Both the trust and the court are constituted public authorities for the purpose of this section. The appellant argues that the actions of the trust in seeking a care order that effectively prevented her from having contact with her child or the opportunity to establish that she is or could become capable of caring properly for J violate her article 8 rights. She also argues that the court, in making the care order, likewise acted in breach of those rights. Finally, she argues that neither the trust nor the court had sufficient regard for the nature of the rights that arise under article 8 and made no proper evaluation of those rights in balancing them against what they perceived to be the interests of J.

Review of the exercise of discretion on appeal

[74] In *G v G (Minors: Custody Appeal)* [1985] 2 All ER 225 the House of Lords held that the principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children were the same as those which applied to the Court of Appeal's general appellate jurisdiction. It was pointed out that the judge at first instance was often faced with choosing the best of two or more imperfect solutions. The Court of Appeal should therefore only intervene when it considered that the judge at first instance had exceeded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge had not chosen. Gillen J held in *McG v McG* [2002] unreported that the same approach should be followed in appeals to the Family Division of the High Court from decisions of the Family Proceedings Court.

[75] The same principle was expressed slightly differently in *Charles Osenton & Co v Johnston* [1942] AC 130 at 138 by Viscount Simon LC: -

> "The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty which arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original

> discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

[76] This passage was quoted with approval by Lord Bridge in *G v G* and does not detract in any significant way from the principle as expressed by Lord Fraser who delivered the leading speech in that case. It does highlight, however, that a reversal of the judge's order may be justified where the wrongful exercise of discretion derives from a failure to give sufficient weight to a relevant consideration. This is of particular significance in the present case where the appellant claims that the learned trial judge failed to give sufficient weight to her article 8 rights. In this context it is right that this court, while exercising appropriate restraint in reviewing the decision of the learned trial judge, should keep in mind the words of Bridge LJ in *Re F (a minor) (Wardship Appeal)* [1976] Fam 238, 266D: -

> "If in any discretion case concerning children the appellate court can clearly detect that a conclusion which is neither dependent on nor justified by the trial judge's advantage in seeing and hearing witnesses, is vitiated by an error in the balancing exercise, I should be very reluctant to hold that it is powerless to intervene."

The appellant's convention rights

[77] It is accepted by all the parties that the removal of J from his mother constitutes interference with her article 8 rights. In *KA v Finland* 1 FLR 696, ECtHR held that mutual enjoyment by a parent and child of each other's company constitutes a fundamental element of family life. Interference with that fundamental element of family life will be a violation of article 8 unless it is 'in accordance with the law', pursues an aim or aims that are legitimate under article 8(2) and can be regarded as 'necessary in a democratic society'. The fact that a child could be placed in a more beneficial environment for his upbringing will not alone justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the 'necessity' for such an interference with the parents' right under article 8 of the Convention to enjoy a family life with their child.

[78] The removal of a child from his parents is recognised in Strasbourg jurisprudence and in domestic case law as a draconian measure, to be

undertaken only in the most compelling of circumstances. In particular the state authorities must explore alternative measures to avoid such a drastic course. Only where it can be demonstrated that no other option is feasible will such a choice be justified. This is particularly so in the case of a newly born child.

[79] In *Re C and B* [2001] 1 FLR 611 (a case which bears many striking similarities to the present case) the Court of Appeal in England and Wales allowed an appeal against a care order made in respect of the two youngest children of a family, the youngest being a new born child. In fact the outcome of the case did not depend on the appellant's article 8 rights, although Hale LJ, delivering the main judgment, made passing reference to these. The case is interesting for present purposes in its discussion of the proper approach to the removal of a newly born child where older siblings are in care. Two older children of the family had been taken into care under orders based on actual harm to the elder child and the likelihood of such harm to the younger child. A social worker then reported on the third child, aged 10 months, and an interim care order was made on the basis that there was a likelihood he would suffer similar significant harm in the future even though all the evidence indicated he was currently doing well. The mother then gave birth to her fourth child and an emergency protection order was made the same day, and both younger children were placed with the same foster carers. The county court judge made care orders in respect of the two younger children, gave permission for the local authority to refuse contact between the parents and all four children, and imposed a 2-year prohibition on any application by the parents for contact or to discharge the care orders without permission of the court. The parents appealed.

[80] It was held that although there was no immediate harm to the two younger children, there was evidence which entitled the judge to find that there was a real possibility of future harm. However, the action taken must be a proportionate response to the nature and gravity of the feared harm. At paragraph 31 of her judgment Hale LJ said: -

> "…one comes back to the principle of proportionality. The principle has to be that the local authority works to support, and eventually to reunite, the family, unless the risks are so high that the child's welfare requires alternative family care. I cannot accept Mr Dugdale's submission that this was a case for a care order with a care plan of adoption or nothing. There could have been other options. There could have been time taken to explore those other options."

[81] In the present case there were likewise other options. Quite apart from the residential assessment suggestion, J could have been returned to his mother's care on a supervision order with strong conditions as to monitoring and support. Or the judge could have made no order or another interim order so as to allow the appellant longer to prove that she had forsaken alcohol and acquired the insight necessary to care for the emotional well being of her child. The rejection of these options could only have been justified on the basis that the risks of them not succeeding were so high that no alternative to the care order could be contemplated. But this was not the situation here. Dr Mulholland, Mrs Leonard and Sister Fahy all believed that Mrs R should be given a chance to prove herself. Even Dr Quigley, the expert engaged by the trust to advise them whether there was a prospect of Mrs R being capable of looking after J, did not dismiss that prospect outright. While he thought that, on balance, she was likely to begin drinking again, he found it impossible to be categorical as to Mrs R's prognosis.

[82] Although the factual background to the case of *Re H (Interim Care Order)* [2003] 1 FCR 350 was significantly different from the present (not least because the child was nineteen months old at the time that an interim care order was made and had lived with his mother until that time) the judgment of Thorpe LJ contains useful guidance as to the circumstances in which removal of a young child from the care of his parents should be contemplated. In that case the Court of Appeal held that the rights of parents protected by articles 6 and 8 of the convention forbade premature determination of the case unless the welfare of the child demanded it. Now that was said, of course, in the context of the removal of a child at an interim hearing but the approach of the court is characteristic of the course that will normally be adopted where it is proposed to remove a young child from its parents.

[83] This approach is also to be found in the case law of the European Court. In *K and T v Finland* [2001] FLR 707 the court held that extraordinarily compelling reasons were needed to justify physical removal of a baby from the care of its mother, against her will, immediately after birth. Such extreme action could only be undertaken when all alternative avenues had been explored. At paragraph 168 the court said: -

> "… when such a drastic measure for the mother, depriving her absolutely of her new-born child immediately on birth, was contemplated, it was incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible."

[84] This statement provides important guidance for all family courts that are invited to authorise the taking into care of newborn babies. Firstly, the radical nature of such a course must be recognised. It is a step only to be contemplated in the most exceptional of circumstances. Secondly, it should not be considered unless convincing evidence is produced that every feasible alternative had been examined and rejected for sound reasons. Where substantial professional testimony opposes the removal of the child from his parent, the court should be very slow to accede to a care plan that involves the separation of the child from his parents.

[85] Perhaps the most eloquent and emphatic statement to this effect is to be found in the words of Munby J in *Re M (Care Proceedings: Judicial Review)* [2003] 2 FLR 171, 183: -

> "At the risk of unnecessary repetition I emphasise that the removal of a child from his mother at or shortly after birth is a draconian and extremely harsh measure which demands 'extraordinarily compelling' justification. The fullest possible information must be given to the court. The evidence in support of the application for such an order must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning."

[86] The language of Munby J in this passage echoes what was said by ECtHR in *P, C and S v United Kingdom* (2002) 35 EHRR 31, [2002] 2 FLR 631: -

> "116. The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the Court must still be satisfied in the circumstances of the case that there existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to

> implementation of a care measure (see *K and T v Finland* [2001] ECHR 25702/94 at para 166; *Kutzner v Germany* [2002] ECHR 46544/99 at para 67). Furthermore, the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved (*K and T v Finland* [2001] ECHR 25702/94 at para 168)."

[87] Of course it is true that Mrs R participated in the procedure that led to the care order being made but that does not derogate from the force of the principle that only in the most unusual and rare circumstances should an order be made by the court that has the effect of separating a new born child from its parents. We do not consider that such circumstances existed in the present case. It is true that Mrs R, by reason of her alcoholism and lack of insight, had been unable to care for her children in the past but there were several factors that called for a different view to be taken of her capacity to care for J. In the first place she had remained sober for a significantly longer period than with her previous pregnancies. She had displayed a much greater insight into her difficulties than before, according to Dr Mulholland and Sister Fahy, the two professionals with whom she was most frequently in contact and she had the support of her mother that had previously been withheld. It was unquestionably true that there remained a significant risk of her lapsing again into drinking but it was equally undeniable that there was a chance that she would not. While that chance remained, her child should not have been taken from her.

[88] We are satisfied that the trust did not explore alternatives to the care order in any meaningful way. All of the evidence before us points inexorably to the conclusion that the trust had decided at an early stage that the only feasible option for J was adoption. From the beginning, the trust wanted to restrict the contact that he would have with his mother. On this discrete issue the trust was acting well outside established guidelines given unambiguously by the courts in a number of cases. It will suffice to refer once again to Munby J in *Re M (Care Proceedings: Judicial Review)*. At paragraph 44 (iv) of his judgment he said: -

> "If a baby is to be removed from his mother, one would normally expect arrangements to be made by the local authority to facilitate contact on a regular and generous basis. It is a dreadful thing to take a baby away from his mother: dreadful for the

> mother, dreadful for the father and dreadful for the baby. If the State, in the guise of a local authority, seeks to intervene so drastically in a family's life - and at a time when, *ex hypothesi*, its case against the parents has not yet even been established - then the very least the State can do is to make generous arrangements for contact. And those arrangements must be driven by the needs of the family, not stunted by lack of resources. Typically, if this is what the parents want, one will be looking to contact most days of the week and for lengthy periods. And local authorities must be sensitive to the wishes of a mother who wants to breast-feed and must make suitable arrangements to enable her to do so - and when I say breast-feed I mean just that, I do not mean merely bottle-feeding expressed breast milk. Nothing less will meet the imperative demands of the European Convention. Contact two or three times a week for a couple of hours a time is simply not enough if parents reasonably want more."

[89] There could hardly be a more marked contrast between what was said by Munby J to be the minimum necessary to meet the 'imperative demands of the European Convention' and the level of contact proposed by the trust in this case. Not only does this provide further evidence of the trust's failure to recognise the article 8 rights of Mrs R, it is, as we have said, indicative of the trust's determination from the outset that no alternative to adoption for J was to be considered. We accept, of course, that this determination was motivated by what the trust conceived was the compelling need to make permanent arrangements for J at the earliest possible moment. This is what appears to have influenced the learned trial judge most in approving the care order. We will need to deal with that issue presently but we must emphasise that the need for permanence cannot be considered in isolation from Mrs R's article 8 rights.

[90] In all the great volume of written material generated by the trust in this case we have been unable to find a single reference to article 8. If the trust had addressed the issue of Mrs R's convention rights (as it certainly should have done) there would surely have been some mention of this in the papers. We are driven to the conclusion that the trust did not consider the question of the appellant's article 8 rights at any stage. Mr Toner somewhat diffidently suggested that the exercise that the trust had engaged in duplicated the procedure that would have been followed if it had recognised that Mrs R's article 8 rights were in play. We cannot accept that argument. For the reasons that we have already given, we have concluded that the appellant's article 8

rights were infringed. The trust's procedures were therefore not efficacious to protect her convention rights. Quite apart from that consideration, however, we consider that it is a virtually impossible task to ensure protection of these rights without explicit recognition that these rights were engaged. Where a decision maker has failed to recognise that the convention rights of those affected by the decision taken are engaged, it will be difficult to establish that there has not been an infringement of those rights. As this court recently said in *Re Jennifer Connor's application* [2004] NICA 45, such cases will be confined to those where no outcome other than the course decided upon could be contemplated. Plainly this is not such a case.

The need for permanence

[91] It is unsurprising that research into the subject discloses that it is desirable that permanent arrangements be made for a child as soon as possible. Uncertainty as to his future, even for a very young child, can be deeply unsettling. Changes to daily routine will have an impact and a child needs to feel secure as to who his carers are. It is not difficult to imagine how disturbing it must be for a child to be taken from a caring environment and placed with someone who is unfamiliar to him. It is therefore entirely proper that this factor should have weighed heavily with the trust and with the judge in deciding what was best for J. But, as we have said, this factor must not be isolated from other matters that should be taken into account in this difficult decision. It is important also to recognise that the long term welfare of a child can be affected by the knowledge that he has been taken from his natural parents, particularly if he discovers that this was against their will.

[92] So, while there may be many cases in which prompt decisions as to the placement of children are warranted, this is not inevitably or invariably the best course. In *C v Solihull MBC* [1993] 1 FLR 290 Ward J said that while normally delay in making arrangements for a child is adverse to his interests, where it is required to fully investigate the matters necessary to ensure that the right decision is taken, delay is not only not wrong, it should be supported. In that case an order had been made by justices in a family proceedings court returning a six months old child to her parents with an unconditional supervision order to the local authority. In allowing an appeal against the order of the justices on the basis that the justices should have made an interim residence order, conditional upon the parents undertaking a programme of assessment and co-operating with the local authority, Ward J said: -

> "… delay is ordinarily inimicable to the welfare of the child, but that planned and purposeful delay may well be beneficial. A delay of a final decision for the purpose of ascertaining the result of an

> assessment is proper delay and is to be encouraged."

[93] We consider that in the present case there were sound reasons to postpone the decision as to where J should ultimately be placed. As the judge rightly observed, it might be many years before Mrs R could finally demonstrate that she had completely overcome her problems with alcohol and lack of insight, but it does not inevitably follow that no delay in deciding what should become of J was warranted. There was already cause for optimism and with close supervision it is at least distinctly possible that Mrs R would have been able to care for her son. It may well be that the trust, Sister Fahy and Dr Mulholland would have been involved in monitoring Mrs R for many years but this, we believe, would have been the better course than taking the child away from his mother. Although a decision on J's future that would have allowed permanent arrangements to be made was desirable, this did not, in our opinion, outweigh the need to give Mrs R the chance to prove herself. Taking into account 'the imperative demands' of the convention in relation to her article 8 rights, the need to have matters settled for J should not have been allowed to predominate to the extent that the mother's convention rights could be disregarded.

[94] In so concluding we have borne in mind that the court is required by article 3 (1) of the 1995 Order, when determining any question with respect to the upbringing of a child, to treat the child's welfare as its paramount consideration. We are also conscious of the reminder in article 3 (2) that delay in determining such a question is likely to prejudice the welfare of the child. The paramountcy of importance of the child's welfare was also recognised recently by ECtHR in *Yousef v the Netherlands* [2003] 1 FLR 210 at paragraph 73: -

> "73. The Court reiterates that in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail (see *Elsholz v. Germany* [GC], no. 25735/94, § 52, ECHR 2000-VIII, and *T.P. and K.M. v. the United Kingdom [GC]*, no. 28945/95, § 72, ECHR 2001-V)."

[95] Although the court must treat the child's welfare as paramount, this does not mean that it should exclude from its consideration other factors such as the article 8 rights of the parent. While these cannot prevail over the welfare of the child, they must be taken into account. A decision to delay the arrangements for J would, of course, have carried the risk of prejudice to him but set against that risk must be the consideration that, in general, a child

should be with his natural parent. While according J's welfare the paramountcy of importance that it required, we do not consider that this pointed overwhelmingly in the direction of a care order being made.

Events since the order

[96] Two reports from Mrs H dated September 2004 and January 2005 were presented to the court. Ms McGrenera accepted that these should be considered by us since they contained material that was plainly relevant to the decision whether a care order should be made. As Gillen J held in *Re T and P* [2001] 9 BNIL 32 the question whether a child is suffering or is likely to suffer harm is to be addressed at the date of the application for the care order. Likewise, it appears to us, that a decision as to what provision should be made for the child, if it is concluded that the threshold criteria have been met, must be determined at the date of the application, or, as in this case, the appeal from the decision to make the order.

[97] Sadly, it appears that Mrs R has lapsed from her sobriety since the order was made. We have not heard evidence about those lapses and are therefore not in a position to gauge their significance. We were told by Ms McGrenera that they were isolated incidents that occurred because of her despair at the outcome of the application for the care order. Whether they herald more problems for her in the future we have no means of knowing. We can only express the hope that they do not. In any event, it should be made clear to Mrs R that the information contained in these reports and the further submission of the guardian ad litem based on them have played no part in the conclusions that we have reached.

[98] The event of overwhelming significance that has occurred since the order was made and which must predominate in our decision as to what should now be done in this tragic case, is the placement of J with the X family where he now lives with his natural siblings, V and J-L. We have been told that he has settled in well to that environment and has formed a close attachment to Mrs J as his principal carer. He also enjoys a good relationship with his brother and sister and they with him. The awful dilemma that this court must now confront is whether to disturb that happy relationship, notwithstanding our conclusion that this situation should not have arisen.

Conclusions

[99] We have concluded that a care order in the terms sought by the trust should not have been made in this case. We do not consider it necessary or profitable to enter the debate as to whether the judge was right to accept all of the threshold criteria advanced by the trust in light of our conclusion that the care order should not have been made.

[100] The principal reason for our conclusion that the care order should not have been made is that it involved an infringement of Mrs R' article 8 rights. We are satisfied that the trust had decided at a very early stage that J's long term interests lay in being placed for adoption and that they have resolutely adhered to that plan throughout. We are likewise satisfied that they did not at any stage consider Mrs R' convention rights. Indeed, we believe that it is likely that the question of her rights under article 8 simply did not occur to the officers of the trust who were involved in advising on J's future. We find this profoundly disturbing. This should have been pre-eminent in the trust's approach to the case. Had it been, we believe that it is likely that an entirely different course would have been followed.

[101] Mrs R's article 8 rights required that her child should not be taken from her unless every feasible alternative was thoroughly explored and rejected for good reason. This clearly did not happen. We do not suggest that a residential assessment was the only alternative. Indeed, there may well be force in the suggestion that not a great deal would have been learned about Mrs R's capacity from such an assessment. But, clearly, other options were available – most notably, rehabilitation of the child with his mother subject to a stringent supervision order.

[102] We have concluded that the guardian ad litem also failed to have regard to Mrs R's convention rights. While, of course, the primary focus of Mrs McD's concern must have been J's welfare, she should also have been conscious that a recommendation by her that J should be removed from his mother's care might violate her article 8 rights. We are satisfied that these were either not considered at all by her or that she failed to give them sufficient weight.

[103] Although we have been critical of some of the actions of the trust and the guardian ad litem, we of course accept that they acted from entirely worthy motives. At all times they have been concerned to ensure that the best decision for J's future was taken. Unfortunately, they fell into error because, plainly, they were unaware of the requirements of the convention in relation to Mrs R and, we believe, because they failed to appreciate that, while the welfare of the child was a matter of paramount importance, it was not the only factor that had to be taken into account.

[104] We have decided that Mrs R's convention rights were infringed and that the care order should not have been made. It does not follow, however, that we should reverse the order of the learned judge. As we have said, the matter of overwhelming importance now is that J has been living with his new family for seven months and is happy with them. His siblings have established a bond with him and he is happy in a loving family background. We are reluctantly driven to the conclusion that the disruption to his young life that would come about by his being taken from that environment is such

that we cannot sanction it. This, we recognize, is a tragedy for Mrs R. It is doubly so because, as we have concluded, she should have been given a chance to show that the faith that Dr Mulholland, Sister Fahy, Mrs Leonard and her own mother have expressed in her was not misplaced. Far more importantly she has lost that most precious of life's gifts, the chance to rear one's own child. She is not to be blamed for this loss. But, however, sympathetic we are of her plight, we must keep faith with our statutory obligation to treat J's welfare as paramount. For that reason we must refuse her application that the care order be dismantled and that J be returned to her care. It follows that we must also refuse her application for an order that a residential assessment take place. We will give counsel the opportunity to make submissions on the level of contact that should occur in light of that decision.

[105] We feel it necessary to say that we have considerable sympathy with the judge in the way that he was required to deal with this case. A great volume of material required to be assimilated over a very short time and the fragmented hearing must have made the task that he had to perform, already by its nature extremely difficult, truly formidable. By the time that the matter finally came before him for determination, J had already been away from his mother for more than six months. The tide of opinion from the trust and the guardian ad litem ran strongly against Mrs R and the emphasis placed by the trust and its advisers on the urgent need for permanent arrangements to be made for J must have made the course that they so strongly recommended almost irresistible. It is clear that the judge gave the matter much careful and anxious thought. We have reached a different conclusion as to whether a care order should have been made but we can fully understand why he reached the decision that he did.