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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF W AND M (FREEING FOR ADOPTION ORDER: BIAS: SENSE OF GRIEVANCE)

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GILLEN J

[1] I direct that there should be no identification of the name of either of the children in this matter, the names of either of the parents or any other person that may lead to the identification of members of this family.

[2] This is a case which has been extremely well argued on all sides and I am grateful to counsel for their concise written and oral submissions and to those instructing them for the work that has plainly been done in this case since the last substantive hearing.

[3] The applicant in this case is a Community Health and Social Services Trust which I do not propose to identify ("the Trust"). The children who are the subject of this application are W, now aged 12, and M, now aged 10. S is the mother the children and J is the father. A fit person order under the provisions of the Children and Young Persons Act was made in respect of each child on 13 March 1996 and the children have remained in foster care since then, initially with Mr and Mrs M and since Mr M died, with Mrs M alone.

[4] The Trust application is for an order pursuant to Article 18 of the 1987 Adoption (Northern Ireland) Order ("the 1987 Order") freeing W and M for adoption without parental consent.

[5] A similar application came before me in 2005, and in the course of a judgment given on 23 February 2005, I refused the application primarily on the grounds that the Trust had failed to observe the rights of the respondents S and J pursuant to the European Convention of Human Rights and

Fundamental Freedoms and to adhere to the decision-making guidelines and regulations under which Trusts should involve parents in the decision-making process before making decisions. For ease of reference, I have appended to this judgment a copy of my earlier judgment which is unreported namely GILF5223 ("the previous judgment").

Background

[6] I do not intend to repeat the background issues in this case which I found in the earlier decision. Counsel in this matter - Ms Walsh QC who appeared on behalf of the mother with Ms Callaghan, Ms Dinsmore QC who appeared on behalf of the respondent father with Ms McBride, Mr Toner QC who appeared on behalf of the Trust with Ms Simpson and Ms Jordan who appeared on behalf of the guardian ad litem - helpfully and responsibly agreed prior to the hearing that the documentation which had been put forward in the earlier case including the social service reports, the statement of the parents and a report of Professor Tresiliotis of 2 January 2005 could all be admitted without formal proof and that the procedural hearing of the case was confined to oral submissions. At the commencement of the hearing, after I had raised the issue of the attendance of the Trust decision-maker in this matter, time was given to the Trust to consider calling the Director of Child and Community Care Services from the Trust. ("JL"). However after I had adjourned the case for this possibility to be explored, I was satisfied that his health prevented him either attending or giving evidence on commission now or in the foreseeable future. Accordingly the case proceeded, as indicated above, on the basis of the papers before me.

[7] The background to the case, as outlined by me in my previous judgment, was largely not in dispute and accordingly I do not intend to set out paragraphs 4-16 of that judgment other than to record that the matters therein are like factual background of the instant case.

[8] At the previous hearing I was satisfied that there had been a breach of article 11 of the Adoption Agency Regulations (Northern Ireland) 1989 ("the 1989 Regulations") and that the attention given by this Trust to the obligation under regulation 11 of those regulations was perfunctory if not derisory (see paragraph 22(1) of my previous judgment). I was satisfied (see paragraph 23 of my previous judgment) that there had been a flagrant breach of the regulations and a breach of the article 8 rights of these parents pursuant to the European Convention of Human Rights and Fundamental Freedoms ("the convention"). Whilst I recognise that it was necessary to look at the decision-making process as a whole, in my view the views of the parents had been completely ignored at what was a crucial stage namely the decision to implement the recommendation of the Adoption Panel.

[9] I made it expressly clear at paragraph 24 of my previous judgment, that my decision did not prevent the Trust revisiting its decision-making process and mounting a further application if and when they had complied with their obligations under the convention and the regulations governing such applications.

[10] The present application was now brought before me essentially on the basis that the Trust had revisited its decision-making process and had complied both with the regulations and the convention.

[11] The steps taken by the Trust in the wake of my judgment included substantially the following:

A Director of Child and Community Care Services (JL) who had been the subject of criticism in my earlier judgment invited the parents to meet him to discuss their views, wishes and submissions on 7 April 2005 in his office. A minute of that meeting at which both parents and their solicitors attended was before me. It was a lengthy note and the following extracts are particularly relevant, anonymised where appropriate:

> "(JL) introduced himself as the decision-maker for (the Trust) and he also gave a brief explanation to the background of this matter such as the role of the Adoption Panel, Trust decision-maker, court process and the reason why the earlier application had been overturned by Justice Gillen.
>
> JL explained that as the Trust decision-maker, he had sent a letter to (both parents) explaining that the Adoption Panel had made a best interest decision for their children (W and M) to be adopted by (Mrs M) and that he was in agreement with this after reading the file. Now with the change in the adoption procedure all birth parents have to be interviewed by the decision-maker **prior** to any decision being made by the Trust. (JL) apologised to (the parents) for what had taken place and any additional stress that it had caused them."

The note went on to record in detail the views of the parents, their opposition to adoption and their dissatisfaction with the process to date. JL asked a number of pertinent questions about their capacity to care for the children and their views about adoption and long term foster care. Towards the end of the interview as recorded in the notes, the following extract appears:

> "Ms Taggart, solicitor, asked that the least intervention be considered in this case – given the children had been in care for the past ten years. Whilst it was not ideal (from her client's point of view) long term fostering would be her client's wish for her children.
>
> (JL) explained that in the past long term fostering had often been the case, but in recent years, the adoption legislation and the general consensus had moved on and social services are now committed to the policy of permanence which considers that adoption can offer children greater stability in their lives.
>
> (JL) concluded the meeting by thanking (the parents) and their legal representatives for attending the meeting. He hoped that (the parents) felt they had been given the opportunity to express their views. From reading the file it was his impression that both (parents) had worked, as well as they could, with social services over the years to ensure that the care management were sustained in the best interests of their children and he thanked them for that.
>
> (The parents) replied that they were given the option to write to (JL) but felt that they needed to speak to (JL) directly. (The mother) added that she would never give up the fight to keep their children, it was always on her mind and it never goes away."

Subsequently by a letter dated 22 April 2005 JL, described as "(the Trust) decision-maker", wrote to the parents a letter couched in the following terms:

> "Thank you for coming to meet with me on 7 April 2005. I appreciate that it was a very difficult meeting for you both but I sincerely hope that you felt you were given the opportunity to express your views in respect of the future care arrangements for your children (W and M).
>
> Since our meeting I have given careful consideration to what you said and I have also taken account of the following information before reaching my decision:

- History of the Trust's involvement with your family;
- The decision of the Looked After Review on 15 January 2003 to pursue adoption;
- All the information made available to the Adoption Panel;
- The recommendation of the Adoption Panel on 4 June 2003;
- Reports available for the Looked After Review held on 7 April 2005.

I am now therefore writing to confirm my decision as the Trust's decision-maker that adoption is in the best interests of (W and M).

(The Trust) will therefore now proceed to see (sic) a Freeing Order from the court to allow adoption to happen. The court will makes its decision based on information placed before it, including your own views on the matter. In order that these might be properly represented, I would urge you to seek legal advice if you have not already done so."

[12] For the purposes of the earlier hearing, the guardian ad litem had made a report dated 18 January 2005 recommending that an order freeing the children for adoption be made. For the purposes of this hearing, a further report had been made dated 22 November 2005. It once again recommended orders freeing the children for adoption. In the course of that report, reference was made, as had been the case in the earlier report, to the views of the children. Reference to W is found at para 3.1 and bears careful consideration:

"Since my last report W has transferred to secondary school. He has settled well in his school though he finds some teachers 'grumpy'. W's first school results were encouraging. W calls himself (the name of his current carer) and continues to distance himself from his natural family.

W's views remain unchanged since my last interview with him. Indeed his disappointment has hardened his resolve to be legally integrated into the (current carer's family). W continues to refuse to attend contact with his parents. He also stated that he does not want to write to his parents as they might show his letters to other people or change the content of the

> letters. W added that he still would not write even if they did not do these things."

So far as M is concerned, again her views bear quotation:

> "M's views remain unchanged except in relation to contact. She stated that she stopped writing to her parents but was unable to explain why except that she decided to stop.
>
> M wants to be called [the name of the current carers] and stated that she would like to freed for adoption as it would make her feel safer. She is now in primary six and hopes to follow W to (the name of his school)."

[13] Finally, since February 2005, there have been two Looked After Children Reviews. First, on 7 April 2005 and secondly on 4 October 2005. But both parents attended and took part in review on 7 April 2005. The mother only attended the review on 4 October 2005.

Submissions

The Trust case

[14] Mr Toner QC argued that Article 9 of the 1987 Order is clearly complied with by the Trust and that adoption is in the best interests of the children. Secondly he urges on the court that all the other statutory requirements of the 1987 Order are complied with. So far as Article 16(2) was concerned, it was his submission that the consent of the parents was now being unreasonably withheld, both parents having parental responsibility.

(i) Relying on the leading authority of Porter v Magill [2002] 1 AER 506, ("Porter's case") he submitted that having looked at all the circumstances of the case, a fair minded and informed observer would conclude that there was no real possibility or real danger of JL being biased in this matter. The court should observe an objective test when looking at this matter.

(ii) Counsel argued that it must be borne in mind that the decision of this Trust to bring forward an application to free these children for adoption was simply a decision to accept the recommendation of the Adoption Panel. Ultimately it is the decision of the court that would determine whether the application was granted or not. It was his submission that the respondents were elevating bias and procedure in this context into the criteria of the decision by this court.

(iii) Mr Toner expressly denied that there was any objective basis for a sense of grievance or a sense of bias which would justify the hypothetical parents withholding consent. In his view the objective facts precluded any such determination. He submitted that there was no effect whatsoever on the children as a result of these procedural matters and to hold otherwise was to elevate a procedural matter to the role of sole determinate.

(iv) Counsel stoutly denied that there was any evidence that JL had a closed mind in this matter. The Trust he argued are obliged to have a policy for adoption and the reference in memorandum to the policy of permanence merely reflected the references to long term foster care or adoption in the research which showed that adoption can have real benefits. It was Mr Toner's submission that the use of the phrase "I am now therefore writing to confirm my decision" in the letter of 22 April 2005 did not mean that JL was merely paying lip service to the concept of consultation but must be seen in the context of the previous paragraph which had indicated that he had taken account of all the relevant information before reaching his decision.

(v) Finally Mr Toner submitted that Article 8 of the convention required positive considerations of the rights of each individual within the family. An assessment of the best interests of the children "at large" was insufficient. He urged on me that the children's wishes were a particularly compelling factor. The parents had not acted responsibly in respect of contact and there appear to be only limited recognition on their part of the effects that their actions had had on the children. Rehabilitation of the children to their care was simply not possible now or at any stage in the foreseeable future and these circumstances should be particularly telling in ascertaining whether or not the parents were unreasonably withholding their agreement to adoption.

(vi) Mr Toner submitted that the respondents had failed to avail of an opportunity at an early stage to issue judicial review proceedings to challenge the decision of JL within three months of that decision having been made. I pause only to observe that I see no attraction in that submission. I am much more persuaded by the argument of Ms Dinsmore QC adumbrated at paragraph 16(ii) of this judgment that parties are perfectly entitled to raise such matters in the current proceedings within the umbrella of a family division determination.

Submission of first named respondent

[15] Ms Walsh QC in the course of her skeleton argument augmented by oral submissions made the following points:

(i) There was apparent bias on the part of JL. The first named respondent, in her affidavit dated 25 November 2005, asserted that JL, having been the

person who took the previous decision, could not be truly objective and properly unbiased and fair in considering the way he had made the decision in 2003. It was Ms Walsh's submission that in light of the pattern of breaches of the regulations and the parents' article 8 rights of the convention by the Trust and the decision-maker, which I have referred to in my earlier judgment, coupled with the delay at that stage in giving written notification of the decision-maker's decision and a failure to hold a LAC review between January 2003 and November 2003, it was difficult to see how the decision-maker could come to an open and independent view in 2005.

(ii) She drew attention to the fact that in the minute of the meeting of 7 April 2005, the decision-maker referred to the "decision" of the Adoption Panel. This failed to recognise that the Adoption Panel can only make a recommendation which is subject to the decision of the Trust. It was Ms Walsh's submission that JL therefore disclosed a closed mind and was merely going through the motions.

(iii) Drawing attention to the letter of 26 April 2005, he listed the matters he had taken into account when coming to his decision without making any reference to the parents' article 8 rights under the convention. She drew my attention to the words of Kerr LCJ in AR and Homefirst Community Trust (2005) NICA 8 at para 90 where he said:

> 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."

(iv) Ms Walsh went on to submit that in a letter of 22 April 2005, the use of the phrase "I am now therefore writing to confirm my decision" underlined the contents of the second paragraph of the memo of 7 April 2005 which records that JL explained that, as the Trust decision-maker, he had sent a letter to (the parents) explaining that the Adoption Panel had made a best interest decision for their children W and M to be adopted by (the carer) and that he was in agreement with this after reading the file. Coupling this with the lack of reference to any Article 8 rights in that letter, she submitted there was evidence of apparent bias. It was her submission that if apparent bias

was present, the mother was not holding her consent unreasonably because she was entitled to the view that proper procedures ought to be adopted.

(v) Turning to the concept of a sense of grievance or injustice she relied on the words of Waterhouse J in Re BA (wardship and adoption) (1985) FLR 1008 where he commented obiter:

> "A bona fide and reasonable sense of injustice may be a relevant factor affecting the mind of a reasonable parent on the question of consent even though it is difficult to visualise any circumstances in which it could be more than a subsidiary factor."

There is clearly a distinction to be made between the sense of injustice which is irrelevant and the facts which give rise to the sense of injustice. (See Re E (minors) (adoption: parents' consent) (1990) 2 FLR 397. It was her submission that the appearance of bias, the delay in dealing with this matter which has served to entrench the opposition of the children and a breach of the parents article 8 rights all constitute a basis for a sense of injustice and in light of that she was not withholding her consent unreasonably. Dealing with the delay aspect, it was her submission that in 2003 when the decision-maker first took his decision, the children were still having direct contact with their parents. The first freeing case did not come on for hearing until February 2005 by which time the children had stopped wanting direct contact. Counsel drew my attention to the quotation from Professor Tresiliotis in his report of 2 January 2005 when he stated:

> "Added to this has been in my view the generated excitement and anxiety about the court proceedings and the expectation that 'adoption' would bring something new. As we found from one of our studies a kind of build up takes place and for a time it dominates the child's thinking. In the absence of underlying meaningful emotional links the children did not appear to feel that they had much to lose from not attending contact except perhaps presents and sweets."

It was counsel's argument that the delay by the Trust in speedily and properly bringing the freeing cases before the court had severely prejudiced the parents' position. This had led to an entrenched attitude by the children as regards both adoption and even indirect contact providing the further aspect to her justifiable sense of grievance.

Submissions of the second respondent

[16] Ms Dinsmore QC, on behalf of the father, in the course of her skeleton argument augmented by oral submissions, adopted the submissions made by Ms Walsh and in addition made the following points:

(i) The decision by JL was unlawful. The decision had been improperly made.

(ii) Relying on BL (Care Proceedings: Human Rights Claims) [2003] 2 FLR 160 para. 25, Ms Dinsmore submitted that a human rights complaint under the Human Rights Act 1998 can be dealt with in the proceedings themselves and need not be the subject of a separate complaint. Moreover she went on to argue that it was entirely appropriate not to trigger judicial review of the decision of JL at the time the decision had been taken and to await the proceedings which had not yet then been issued. In Re M (Care Proceedings: Judicial Review) [2003] 2 FLT 171 Mumby J had held that it is most unlikely to be a proper use of judicial review proceedings to seek to prevent the commencement of proceedings in which a court had jurisdiction.

(iii) Counsel underlined that it was not necessary to find that JL was biased but rather the test was whether the public is reasonably entitled to entertain doubts as to the independence or impartiality of JL or whether there were ascertainable facts that might raise doubts as to his independence or impartiality. Formerly the test had been whether or not there was a real danger of bias but in light of Porter's case, the test was now whether there was simply a real possibility.

The submissions of the guardian ad litem

[17] In the course of her skeleton argument augmented by oral submissions to me, Ms Jordan made the following additional points:

(a) Relying on Yousef v The Netherlands [2003] 1 FLR 210, counsel urged on me that in judicial decisions where the rights under article 8 of the parents are at stake, the children's' rights must be the paramount consideration. If any balancing of interest is necessary, then the interests of the child must prevail.

(b) In particular she reminded me that Professor Tresiliotis had concluded that there were no meaningful attachments in existence between either child and their mother or father. He had no doubt that the proposed adoption would be in the children's' best interests and more importantly the children wanted it. It was counsel's submission that the parents have not successfully addressed the problems that led to the children's admission into care where they have remained for ten years.

(c) Ms Jordan submitted that even if the court found that there was apparent bias on the decision maker's part, this did not mean that the parents could not be found to be unreasonably withholding their consent to the adoption. Where there are grounds for a parent to have a sense of grievance, that factor has to be weighed alongside the other circumstances of the case and, in particular, the welfare of the child and the advantages of adoption (see Re E (Adoption: Freeing Order) [1995] 1 FLR 382).

(d) She emphasised the wishes and feelings of the children to which I have already adverted earlier in this judgment. She reminded me that W had told Professor Tresiliotis in January 2005 that he did not like contact with his parents because they kept swearing, he liked living with his current carers and he would like to tell the judge that he wanted to live there forever. Similarly M when questioned by him said she would like the judge to be told that she wished to be adopted so that she could change her surname, that she did not like meeting her parents because her father would "embarrass her" and that she wanted to live with her current carers "for ever and ever."

(e) Counsel reminded me that in applying the test under article 6(2) of the 1987 Order the hypothetical reasonable parent must have regard to the welfare of the child and that that must be weighed carefully against any factors raised by them including their sense of alleged grievance.

(f) On the issue of judicial review, counsel submitted that a claim may be made in existing proceedings that there has been a failure to act in a way which is compatible with a person's "Convention rights." All courts have power to deal with alleged breaches of human rights within existing proceedings.

Legal principles governing this decision

(1) Bias

In Re Mediciments and Related Classes of Goods (No. 2) [2001] 1 WLR 700 Lord Phillips of Worth Matravers MR (as he then was) set out the relevant decisions of the European Court at Strasburg on the topic of bias and concluded at 726, paras 83-86:

> "83. We would summarise the principles to be derived from this line of cases as follows:

(i) If a judge is shown to have been influenced by actual bias, his decision must be set aside.

(ii) Where actual bias has not been established the personal impartiality of the judge is to be presumed.

(iii) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside.

(iv) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.

(v) An important consideration in making an objective appraisal of the facts is the desirability the public should remain confident in the administration of justice."

M v London Borough of Islington and L [2002] 1 FLT 95 is authority for the proposition that these principles apply to family proceedings.

(ii) In Porter v Magill [2002] 1 AER 465 the House of Lords also considered the question of bias in a judge. Modifying the previous test for bias established in R v Gough [1993] AC 646, which required that "a real danger" of bias be shown, Lord Hope of Craigavonhead cited with approval the ruling in Re Mediciments and Related Classes of Goods (No. 2) and added at para. 103:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

(iii) There is no general rule requiring that a superior court which sets aside an administration or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently constituted branch of that authority. (See Thomann v Switzerland [1996] 24 E.H.R.R. 553 (paras. 33-36): Ringeisen v Austria (No. 1) [1971] 1 E.H.R.R. 455 (para. 97): Diennet v France [1996] 21 E.H.R.R. 554 (paras. 37-38). The result is that there is now no difference between the common law test of bias and the requirements under art. 6 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention") of an independent and impartial tribunal, the latter being the operative requirement in the present context. In Lawal v Northern Spirit [2004] 1 AER 187, Lord Steyn said at para. 14:

> "Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer."

What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson [2000] 2101 CLR 488 at 509 (para. 53), by Kirkby J when he stated that:

> "A reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

More recently in AWG Group Limited v Morrison [2006] EWCA Civ. 6, [2006] All ER (D) 139 (Jan.). Mummery LJ summarised the situation well in another case of possible bias when he concluded:

> "Efficiency and convenience are not the determinant legal values; the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."

Whilst these authorities are almost all set in the context of judicial decision, I believe the principles can be ready transferred to circumstances such as the instant case albeit a decision of a court is yet to be made. Applying these principles to the present case, I find no evidence whatsoever that could sustain an allegation of bias or apparent bias. I find that there is no rule which requires the Trust in this case to have the decision taken by a different jurisdictional authority or a differently constituted decision maker. So long as the decision maker undertook a fresh consideration of the whole case with an open mind on all the issues raised by the case and was prepared to afford an amble opportunity to the mother and father to put their arguments before him, I consider that there is no basis for an allegation of bias. I have read on several occasions the memorandum of the meeting of 7 April 2005. It is extremely detailed and it is all too clear that both parents were afforded every opportunity to raise any point which they considered relevant. Moreover it is clear that JL prompted them appropriately to deal with the relevant issues in the presence of their solicitors, who were also permitted to intervene. It was made abundantly clear that this interview was being taken prior to any decision being made by the Trust. I find nothing to indicate partiality or prejudice on the part of JL. I accept entirely the submission by Mr Toner that it is necessary for a Trust to have a policy of permanence and that that was the nature of the explanation given by JL to the parents. It most certainly did not disclose any pre-ordained decision or implacable opposition to their

pleas. It is extremely significant that the solicitors on behalf of the parents did not raise any question of bias in this case until early 2006 notwithstanding their first hand knowledge of what had taken place at the meeting and a copy of the following letter of 22 April 2005. Turning to that letter, I am satisfied that it made clear that all the relevant information had been taken into account before reaching the decision. The use of the phrase "I am now therefore writing to confirm my decision" must be seen in the context of the earlier paragraph and meant no more than the decision maker was coming to the same conclusion as hitherto had been the case. In my opinion any fair minded and informed observer, having considered the background facts in this case, would have concluded that there was no real possibility that JL was biased in this instance. That observation is confirmed by the lack of any allegation of bias until several months after the meeting and the letter had taken place.

A bona fide and reasonable sense of injustice may be a relevant factor affecting the mind of a reasonable parent on the question of consent (see Re BA (Wardship and Adoption) [1985] FLR 1008.) Where there are grounds for a parent to have a sense of grievance and I do not consider this to be such a case, that factor has to be weighed alongside the other circumstances of the case and in particular the welfare of the child in the advantages of adoption. In this case I find absolutely no basis for there being a sense of injustice given the wide ranging and comprehensive nature of the meeting between JL, the parents and their solicitors on 7 April 2005. As I have already indicated, that lengthy note persuades me that no stone was left unturned by the parents in urging on JL the issues that were considered relevant to the matter in hand and every opportunity was afforded to the parents in the circumstances including representation at that meeting by their solicitors. I am satisfied that the letter of 22 April 2005 was appropriately drafted and should not have in any way contributed to a sense of grievance or injustice. Even had their been a sense of grievance, which I have concluded there is not, then the circumstances of this case, the background details which I have described, the welfare of children who have after all been in care for ten years due entirely to the incapacity of the parents to care for them, and the obvious advantages of adoption with which I shall deal with subsequently in this judgment, would cause the scales in any weighing operation to fall down heavily in favour of the need for adoption in order to protect the best interests of these children.

I am now fully satisfied that the Trust has complied with the Adoption Agency Regulations (Northern Ireland) 1989 regulation 11(1) and (2)(a) and (b). In my view the right to a family life of these parents has been fully taken into account given the contents of the matters that were fully discussed at the meeting with JL in April 2005. Whilst there is no reference to the article 8 rights under the Convention in the memorandum or in the letter, I am satisfied that the decision taking process now has been such as to ensure that

the views and interests of the parents were made known to and duly taken into account by the Trust and that the parents are now able to exercise in due time any remedies available them. The decision making process had to be looked at as a whole. Given the recent steps that have been taken by the Trust to meet their obligations under the relevant regulations, I am satisfied that this is one of those cases where in any event no outcome other than the course decided upon, namely there should be an application that the children should be freed for adoption, could have been contemplated in light of the length of time these children have been in care the reasons for this and the unchallenged evidence of Professor Tresiliotis.

(iv) I find nothing unlawful about the decision that is being made by JL in this instance given the facts outlined above and I find no authority quoted to me that would suggest the contrary.

(v) Delay can be a cause of a sense of grievance. In this case however it is clear that the views of the children have been steadfast and their desire to remain with their current carers and not to see their parents has been clear for a number of years. I am absolutely satisfied that it is the behaviour of their parents and not the delay itself which has been the primary contributor to this state of affairs. The wishes and feelings of these children are unequivocal as evidenced by their comments to the guardian ad litem as well as to Professor Tresiliotis. In it inconceivable that any measure of delay in itself could have brought about these expressions had it not been for the behaviour of these parents. I therefore do not regard delay as being a cause of grievance in this matter.

[18] I turn now to the substantive application before me under the 1987 Order. Before doing so I remind myself of a number of over-arching principles:

(i) I commence my deliberations by recognising the draconian nature of the legislation which is now being invoked by the Trust. It is difficult to imagine any piece of legislation potentially more invasive than that which enables a court to break irrevocably the bond between parent and child and to take steps irretrievably inconsistent with the aim of reuniting natural parent and child. (See Re T (Freeing Without Consent: Refusal to Dispense with Agreement of the Parent) NI Fam. 6 (unreported, 11 February 2004).

(ii) I recognise that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment do amount to an interference with the right to such protection under article 8 of the Convention (see Johanson v Norway [1996] 23 EHRR 33).

(iii) I have derived great assistance from recent cases in the Court of Appeal in Northern Ireland namely AR v Homefirst Community Trust [2005] NICA 8 ("AR") Homefirst Community Trust and Social Services Trust and SN [2005] NICA 14 ("JN"). In AR Kerr LCJ stated in the course of the judgment of the court:

> "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 on a child's need 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. … But as we have said, this factor must not be isolated from other matters but 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 is being taken from his natural parents, even if he discovers that this was against their will."

(iv) Yousef v The Netherlands [2003] 1 FLR 210 at 221 para. 73, contains an important statement from the ECtHR:

> "The Court reiterates that in judicial decisions where the rights under article 8 (of the Convention) of parents and those of a child are at stake the child's rights must be the paramount consideration. If any balancing of interest is necessary the interest of the child must prevail."

(v) Article 8 of the Convention provides the right to respect for private and family life subject to article 8(2) "that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of … or for the protection of the rights and freedoms of others."

[19] Article 9 of the 1987 Order provides :

> "In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall have regard to the welfare of the child as the most important consideration and shall –

(a) have regard to all the circumstances, full consideration being given to -

(i) the need to be satisfied that adoption or adoption by a particular person or persons, will be in the best interests of the child; and
(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and
(iii) the importance of providing the child with a stable and harmonious home."

Article 9(2) ensures that the wishes and views of the child where the age is appropriate must also be taken into account.

[20] Applying that article to this case, I have absolutely no dobut that the best interests of each of these children demands an order freeing each of them for adoption. Professor Tresiliotis when asked whether adoption was in the best interests of the children, concluded that this was the case because the children have found stability and security in their current home and have developed a strong sense of belonging there whilst being apprehensive about being returned to their parents. They have been there since such a very young age and have forged a very close attachment to their carer. The carer in fact is the only person who has parented them consistently for the last ten years or so though their parents are very familiar figures to them the emotional links appear to be missing according to Professor Tresiliotis. This expert drew out the fundamental difference between foster care and adoption. He emphasised that foster carers only carry parential responsibilities whereas in the case of adopters all parential responsibilities are transferred to them. In his view, having reviewed the literature on the matter, adoption still presents with lower breakdown rates than foster care. The advantages of adoption include much greater emotional security which I believe both these children fundamentally require. He referred to a number of studies which have identified the insecurities, unpredictability and uncertainies surrounding long term foster care. The impermanence of the situation could cause these children a feeling of insecurity. I have no doubt these children require the sense of permanence and emotional certainty which only adoptions could bestow.

[21] Moreover both these children have indicated in a number of ways their wish to be adopted by their carer who has been their de facto mother for the last ten years. W and M are entitled to have their views heard not only because article 12 of the United Nations Convention on the Rights of the

Child demands it, but because it is clearly a cardinal aspect of Article 9 of the Adoption Order.

[22] All of this led to the Professor Tresiliotis to recommend that these children are adopted by their current foster carer. I have no hesitation in accepting that proposal underlined as it is by the views of the Trust and the guardian ad litem.

[23] I then turn to Article 16(2)(b) of the 1987 Order. I must decide whether the Trust have satisfied me on the balance of probabilities that each parent in this case is unreasonably withholding his or her consent. The leading authority on the meaning of the ground and the test that the court should apply is Re W (1971) 2 AER 49. During the course of the leading opinion, Lord Hailsham described the test in this way:

> "The test is reasonableness and nothing else. It is not culpability, it is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if, and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."

[24] In JN, Sheil LJ added at para. 26:

> "In many cases, and this is one of them, there is a tension between what is in the best interests of the child and the question of whether a parent is withholding his or her consent unreasonably. In Re F (2000) 2 FLR at 505-509 Thorpe LJ referred to the joint judgment of Steyn and Hoffmann LJJ in the case of Re C (a minor) (adoption: parental agreement: contact) (1993) 2 FLR 268-272 where they stated:
>
> > 'The characteristics of the notional responsible parent have been expounded on many occasions; see for example Lord Wilberforce in Re D (an infant) (adoption); (parents consent) (1977) AC 602 at 625 ("endowed with a mind and temperament capable of making reasonable decisions").'

> Furthermore although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. All this is well settled by authority. Nevertheless, for those who feel some embarrassment at having to consult the views of so improbable a legal fiction, we venture to observe that precisely the same question may be raised in a demythologised form by the judge asking himself, whether having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appears sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question."

[25] I recognise that the reasonableness of the parents refusal to consent must be judged at the time of the hearing and I am doing that now. I have taken into account all the circumstances of the case to which I have already referred. I have recognised that whilst the welfare of the child must be taken into account it is not the sole or necessarily paramount criterion. I have applied an objective test in the case of each parent. I have recognised that the test is reasonableness and nothing else. I have been wary not to substitute my own view for that of the reasonable parent. I recognise that there is a band of reasonable decisions each of which may be reasonable in any given case. I have come to the conclusion that both these parties are unreasonably withholding their consent for the following reasons:

(i) The history of this case and the abject failure of these parents to resolve their chaotic and problematical lifestyle now renders rehabilitation inconceivable. Children cannot indefinitely wait for parents to change. That principle applies in all cases but never more so than in this instance where these children have been with their current carer for ten years. Many opportunities for rehabilitation have been spurned in the past and consequently I embrace no realistic possibility of success in the future. This is not a case where alternatives have not been explored. On the contrary the history is rife with such opportunities being afforded and spurned.

(ii) The children's views are such that any reasonable parent would take them into account. They are, understandably, adamant that the woman who has cared for them for the last ten years shall be the person with whom they remain.

(iii) Abuse of alcohol has bedevilled the lives of these parents. The guardian ad litem in her latest report records that the father is trying to deal with his alcohol problem and is honest about the level of his addiction. The mother still denies that she has any problems with alcohol. As recently as 7 June 2005 she was drunk and aggressive with a social worker. This is the very kind of behaviour that has caused the children to take objection to meetings with them. I believe that any reasonable parent recognising the long term nature of these difficulties with alcohol and the failure to come to terms with them, could not reasonably withhold consent to these children being adopted into a family which will not expose them to the sequelae of excessive drinking.

[26] I therefore conclude that these parents in all the circumstances are withholding their consent unreasonably.

[27] Turning to Article 18 of the 1997 Order, I am satisfied that these children are in the care of an adoption agency pursuant to the care orders previously made and I am also satisfied that it is likely each of these children will be adopted by their current carer.

[28] I am also of the view that this Trust has accorded due consideration of this couple's rights under article 8 of the Convention and that every reasonable consideration has been given to the prospect of rehabilitation. However the Trust has taken into account the rights of each child to a family life and the social workers have in my view correctly concluded that this can be done only by following the route of adoption. I consider that their response to this case has been a proportionate one to a legitimate aim namely to protect the welfare and interests of these children. Accordingly I am therefore satisfied that the Convention rights of these parents have been adequately recognised and that no outcome other than that which this Trust has decided on, namely adoption, could have been reasonably contemplated in the circumstances.

[29] I accept the evidence that both these parents have been afforded the opportunity to make the appropriate declarations under Article 17(5) of the 1987 Order.

[30] Finally, turning to contact, the fact of the matter is that both W and M are clearly stating they do not now want any direct contact with their parents. They say they do not feel comfortable during contact as the parents ask them a lot of questions. The children added to the guardian ad litem that the father embarrassed them with his behaviour during contact. Consequently the children are still refusing to attend contact at present. I consider that it would be inappropriate, and against the interests of these children, to attempt to force contact upon them and accordingly I make no order affording these parents direct contact pending the adoption proceedings being determined. I

note that whilst both parents corresponded with their children through letters and cards, both children are now refusing to write to their parents. I agree entirely with the Trust's suggestion that information should be exchanged around the time of children's birthdays and whilst the children are currently refusing to participate in this agreement, the passage of time may alter that view particularly when the certainty of adoption is invoked. I entirely share the view of the guardian ad litem that it would not be interests of these children to have any form of contact, direct or indirect, forced upon them. The best that these parents can hope for is that with time their views may develop and mature.

[31] In all the circumstances therefore I make an order freeing these children for adoption.