Neutral Citation: [2016] NIFam 11

Ref: **McB10009**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **28/06/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

APPEAL FROM THE FAMILY CARE CENTRE
SITTING AT OMAGH/DUNGANNON

ADOPTION (NORTHERN IRELAND) ORDER 1987

WHSCT

Applicant/Respondent

and

N

Appellant/Respondent

and

M

Respondent

McBRIDE J

Application

[1] This is an appeal by the first named respondent mother from a decision of Her Honour Judge McReynolds sitting in the Family Care Centre at Omagh/Dungannon on 6 January 2016, whereby she made an Order freeing the subject child, a 3 year old boy, who is referred to by the pseudonym of Joe, for adoption without parental agreement, in accordance with Article 18 of the Adoption (Northern Ireland) Order 1987, on the ground that the respondents, the child's natural parents, were withholding their agreement unreasonably. The identities of the parties have been anonymised in order to protect the interests of the child to whom this judgment relates. Nothing must be published or reported which allows this child or any related adults to be identified in any way.

[2] The Trust was represented by Susanne Simpson QC and Andrew Magee; the mother was represented by Ms McCartan; the father was represented by Mr O'Brien and the Guardian ad Litem was represented by Ms Casey. I am grateful to all counsel for their well-researched and comprehensive oral and written submissions.

Procedure on Appeal

[3] All the parties agreed that the appeal would proceed on the basis of submissions only. In these circumstances, the parties agreed that the test to be applied by this court was that of an appellate court as set out by Lord Neuberger in Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33. He stated at paragraph 87:

> "… Save in exceptional cases, every appeal is limited to a review rather than a rehearing and the appeal will be allowed only where the decision of the lower court was 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'."

[4] Further, at paragraphs 93 and 94 he stated:

> "93. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).
>
> 94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an

> appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal.

Background

[5] The background facts are succinctly set out by the learned trial judge at paragraphs [2] – [12] of her judgment. In summary, Joe was born in late 2012 when the appellate was aged 19 years and the respondent father was aged 16 years. Both parents had troubled backgrounds and both had been subject to social services' intervention. Joe remained with his parents from birth until 21 March 2013 when he was the subject of an Emergency Protection Order and was removed to foster care.

[6] There were concerns about the inconsistent care provided by the respondents to the child, resulting in his basic care and safety needs not being met appropriately, thereby subjecting him to significant risk. This arose due to concerns about: the mother's fluctuating mental health and the impact it had on her ability to care for her child; the parents' young age; non-attendance and non-engagement in work identified by the Trust and poor housekeeping skills resulting in rodents within the home and lack of finances to purchase basic heating.

[7] A Care Order was granted on 18 November 2013 and a Care Plan of Permanence by Adoption was approved. No one was or is available to provide a kinship placement.

[8] Joe has been with his current foster carers since March 2013. They were subsequently approved as prospective adopters for him. Accordingly, Joe is in a duly approved placement with his proposed adoptive parents.

[9] The parents were assessed by Dr Andrea Shortland, Clinical and Forensic Psychologist, who prepared a report dated 30 October 2013 on the joint instructions of the parents and the Guardian ad Litem in the context of the original Care Order. She found, upon psychological assessment of the appellant that she was struggling with many psychological difficulties. At paragraph [16] she stated her,

"…psychometric profile suggested that whilst she had the necessary basic cognitive and mentalisation skills to parent; her levels of psychological distress and underlying and habitual approaches to coping, thinking, feeling and relating are likely to undermine her ability to parent effectively".

Her conclusion at paragraph [230] was;

> "I am of the opinion that N is not currently in a position to have Joe returned to her care."

[10] She recommended that the appellant's own psychological needs needed to be met first before giving consideration to her approach to parenting. In this regard she recommended therapy which typically would take between 12 and 18 months to complete. She concluded at paragraph [237]:

> "I do not believe that N would be able to make the necessary changes within a timescale appropriate for Joe."

[11] A Freeing application was commenced in July 2014. The hearing date in May 2015 was vacated. At that time the Guardian ad Litem reported to the court in her report dated 11 February 2015, at paragraph 12.28 that the parents had made positive changes in their lifestyle and opined that the court may consider adjourning the proceedings to allow Dr Shortland to update her assessment and to consider the progress the parents had made within the context and the current circumstances of the case.

[12] Dr Shortland provided an updated report dated 27 April 2015 and reported:

> "78. In summary, N appears to be functioning better in that there have been no mental hospital admissions, self-harm or suicide attempts requiring treatment, or anger outbursts dealing with police or other professional attention. N has maintained a relationship with M consistently attended fortnightly contact with Joe, maintained a home and managed a brief period of employment although this does not appear to have been sustainable for her."

[13] Dr Shortland noted, however, that these changes were likely to be related to situational factors. She also opined that N did not appear to have made significant changes in her underlying psychological functioning. She concluded at paragraphs [86] and [87] that she had significant ongoing concerns in respect of N's ability to meet Joe's needs as his main carer giver and further opined that N's psychological difficulties were likely to limit here ability to prioritise and meet Joe's needs effectively. Dr Shortland felt that further change could be assisted by the mother undertaking therapeutic work. She believed that such work could take 12-18 months to complete. In her view this would 'likely fall outside of Joe's timescales'. At paragraph [110] she concluded:

> "I am also particularly mindful that Joe has already experienced significant disruptions and neglect in his first year of life and presents as a very active child who struggles to sustain his attention. The toddler CARE index assessment and reports of other professionals suggest that Joe is very securely attached to (the foster

> mother) and settled within the family. I would therefore be very cautious about disrupting this care giving environment and attachments at this stage of his development. Furthermore, I am not confident that N would be able to sustain engagement in this very emotionally challenging work. N is likely to become very easily overwhelmed intellectually and emotionally with such work. In addition, it would be particularly difficult for N to trust the therapists sufficiently within the child protection context as information would need to be shared between professionals about her progress."

[14] Following adjournment of the case the Trust agreed to fund and facilitate the therapeutic work recommended by Dr Shortland. This work commenced in August 2015 with David Smith, Psychotherapist. By report dated 30 November 2015 he reported that N had been attending for psychodynamic psychotherapy for a total of 3 months. Her attendance had been very consistent and she had engaged well. Although he indicated that therapy was 'a big ask' of N and represented a huge challenge for her there were encouraging clinical indicators. In conclusion he noted,

"it is still very early days – and there remains much work to done in order to maintain and build, in a robust and sustainable way'.

He felt a minimum treatment plan would be of 12 to 18 months duration.

[15] The case proceeded on a contested basis before Her Honour Judge McReynolds. She heard oral evidence from Ms Dolan, Social Worker, N the mother, M the father and Ms Granleese, Guardian ad Litem.

[16] The appellant appealed the decision of Her Honour Judge McReynolds by way of Notice of Appeal dated 25 January 2016. The only additional evidence been placed before this court by agreement is an updated report of David Smith dated 8 April 2016. Mr Smith notes in his report that since January 2016 there has been a marked change in the attendance of N at the sessions. Her current pregnancy has proved to be an obstacle to consistent ongoing treatment. Given that N cannot maintain the current frequency of engagement it was his professional view, expressed at paragraph [17] that,

"a minimum 2-year overall period of treatment, since therapy began in September 2015, is indicated in this case –and this in turn will depend upon the extent of any future absence from, or disruption to the therapy".

The applicable law to Freeing for Adoption applications

[17] The provisions of the Adoption (Northern Ireland) Order 1987 which are relevant to the present appeal are as follows:

> **"Duty to promote welfare of child**
>
> Article 9
>
> In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard 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; and
>
> (b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

[18] Article 18 deals with freeing a child for adoption without parental agreement. It states:

> "Where on an application by an adoption agency, an authorised court is satisfied in the case of each parent or guardian of a child that his agreement to the making of an adoption order should be dispensed with and on a ground specified in Article 16(2) the court shall make an order declaring the child free for adoption."

[19] Article 16 of the 1987 Order deals with the issue of parental agreement. It states:

> "16.—(1) An adoption order shall not be made unless—

(a) the child is free for adoption …

(b) in the case of each parent or guardian of … the child the court is satisfied that—

(i) he freely, and with full understanding of what is involved, agrees—

(aa) either generally in respect of the adoption of the child or only in respect of the adoption of the child by a specified person, and

(ab) either unconditionally or subject only to a condition with respect to the religious persuasion in which the child is to be brought up,

to the making of an adoption order; or

(ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2).

(2) The grounds mentioned in paragraph (1)(b)(ii) are that the parent or guardian—

…

(b) is withholding his agreement unreasonably."

The Convention

[20] With the coming into force of the Human Rights Act 1988, the 1987 Order must now, if possible be construed and applied, so that it complies with the Convention.

[21] Article 8 of the European Convention of Human Rights provides for respect for family life and any interference with this right, by a public authority must be "in accordance with law" and "necessary in a democratic society … for the protection of health or morals, or the protection of the rights and freedom of others".

[22] An adoption order or an order freeing a child for adoption, with its termination of formal legal ties between parents and child, by its nature, represents an interference with Article 8 rights. Such interference can only be justified if it is:

(i) in accordance with law;

(ii) is for a legitimate aim; and

(iii) is necessary.

[23] Freeing for adoption in the absence of parental agreement is permitted under the Adoption Order and therefore, is in accordance with law. Secondly, it is in pursuit of a legitimate aim, namely safeguarding the best interests of the child.

[24] In relation to the question of when adoption is "necessary" or proportionate for the purposes of justifying interference with the Article 8 rights involved, there has, recently, been a considerable body of jurisprudence. The European Court of Human Rights has set out stringent requirements in respect of the proportionality doctrine when family ties are broken in order to allow adoption. In YC v United Kingdom [2012] 65 EHRR 967 at paragraph 134, the court stated:

> "Family ties may only be severed in very exceptional circumstances and everything must be done to preserve personal relations and, where appropriate to "rebuild the family". It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under Article 8 to insist that such ties remain."

[25] The matter has also been considered in domestic jurisprudence. In Re C and B (Care Order: Future Harm) [2001] 1 FLR 611 at paragraph 34 Hale LJ said:

> "Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact in relationship between child or children with their families is only justified by the overriding necessity of the interest of the child."

[26] In Down Lisburn SHCT v H and Another [2006] UKHL 36 Lord Carswell noted that freeing orders are "draconian" in nature and at paragraph 33 Lady Hale stated:

> "A public authority must not interfere with the (Article 8) rights unless three conditions are satisfied, first that it in accordance with the law; second that it for a legitimate aim, in this case safeguarding the best interests of the child: and finally that it is necessary in a democratic society – that is that the interference is for relevant and

> sufficient reasons and proportionate to the legitimate aim pursued … the European Court of Human Rights … has consistently held that the object of the authorities must be to restore the child to her family as soon as practicable: measures which hindered such as prohibiting contact or placing the child a long way away may well violate Article 8."

[27] In Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911 the Supreme Court justices when considering the question of "necessity" or the proportionality question, used very striking language. Lord Wilson at paragraph 34 indicated that "a high degree of justification" was required for an adoption order to be made and at paragraph [48], stated adoption must be the only "viable option". Lord Neuberger at paragraphs [76]-[79] and paragraphs [104]-[105] held that "necessary" meant "nothing else will do", where there was "no other course possible", a "last resort", made only in "exceptional circumstances", where "all else fails", and "the court must consider all options which carries with it the implication that the most extreme option should only be adopted if another would not be in her interests". Lord Kerr at paragraph [30] agreed with Lord Wilson's reference to a "high degree of justification" before an order could be made and also agreed with Lady Hale's view that the test for severing the relationship of parent and child could only be satisfied in exceptional circumstances where "nothing else will do". Lord Clarke agreed at paragraph [135] that only in the case of necessity would an adoption order be proportionate. Baroness Hale stated at paragraph [145] that all the justices were agreed that "a court can only separate a child from her parents if satisfied that it is necessary to do so, that "nothing else will do". She elaborated on this at paragraphs [195-198] and [215] concluding that the test for severing the ties of family is "very strict: only in exceptional circumstances or motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do. In many cases … it will be necessary to explore and attempt alternative solutions".

[28] The views of the Supreme Court Justices have been further considered in a number of subsequent Court of Appeal decisions in particular in Re B-S (Children) (Adoption Order: Leave to Oppose) [2013] 1 WLR 563.

[29] In Re B-S, Sir James Munby, after reviewing the language used by the Supreme Court justices in relation to the test for necessity stated at paragraph [23]:

> "Behind all this there lies the well-established principle … that the court should adopt the "least interventionist" approach."

[30] In seeking to adopt the least interventionist approach the court needs to consider all the alternative options which range from no order through to the return of a child with the assistance of a Family Assistance Order or subject to Supervision Order, Care Order, long term foster placement under a Care Order or Adoption

Order. The evidence must then address all the options which are "realistically possible" and must contain an analysis of the arguments for and against each option. Thereafter, "the judicial task is to evaluate all the options, undertaking a global, holistic and multifaceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option", as per Re BS paragraph [44].

[31] The court needs only to address options which are "realistically possible". This appears from the language used by the Supreme Court Justices and has been emphasised in a number of subsequent Court of Appeal decisions. In Re R [2015] 1 FLR 715, the President outlined at paragraph [59] that the court's function, in undertaking a balancing exercise which pitted the pros and cons of each option against the other related only to those options which were realistically possible.

[32] Further in M v Blackburn with Darwin Borough Council and others [2015] 1 WLR 2441 Ryder LJ explained at paragraphs [33] and [34]

"nothing else will do" …is a description of the conclusion of a process of deductive reasoning within which there has been a careful consideration of each of the realistic options that are available on the facts so that there is no other comparable option that will meet the best interests of the child ….."

" ...what has to be determined is not simply whether any other course is possible but whether there is another course which is possible and in the child's interests"

[33] The question therefore is not whether it is better for the child to be adopted but whether there is another less draconian option which is capable of safeguarding the best interests of the child.

[34] There will however be some cases where adoption is proportionate, as was explained by the Strasbourg Court in R& H v United Kingdom [2012] 54 EHRR 2,

"88 … Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents … Equally the court has observed that, when a considerable period of time has passed since a child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited …"

Unreasonably withholding agreement

[35] At the lower court and at this court, the appellant and the second named respondent father have each withheld consent to the freeing application. In these

circumstances before the court could make an order freeing the child for adoption it must be satisfied that the appellant and the second named respondent are each withholding his/her consent unreasonably.

[36] There is a considerable volume of jurisprudence in relation to this question. In Re W (An Infant) 1971 2 All ER 49 Lord Hailsham, in outlining the test said:

> "The test is 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 must take it into account. It is decisive in those cases where a reasonable parent would so regard it."

[37] Recently in this jurisdiction Morgan LCJ recently considered the question In the Matter of TM and RM (Freeing) [2010] NI Family 23. At paragraph 6 he noted that the leading authorities on the test the court should apply are Re W (An Infant) [1971], Re C (A Minor) (Adoption: Parental Agreement, Contact) [1993] 2 Family Law Reports 260 and Down and Lisburn Trust v H and R [2006] UKHL 36, in particular paragraphs 69-70 which expressly approved the test proposed by Lords Steyn and Hoffman in Re C, which he then set out as follows:

> "…making the freeing order, the judge had to decide that the mother was 'withholding her agreement unreasonably'. This question had to be answered according to an objective standard. …
>
> The characteristics of the notional reasonable parent have been expounded on many occasions … The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham said in In Re W …:
>
> > 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'
>
> 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. … 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 appear 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."

[38] Whilst the welfare of the child must be taken into account it is not the sole or the paramount consideration. There are a number of other relevant factors which can be taken into account in considering the question of reasonableness.

[39] In Re BA (Wardship and Adoption) [1985] 1 FLR 1008 at page 1032, the court held that 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. Both Re E (A Minor) (Adoption: Parental Agreement) [1992] FLR 397 at 398 and Re E (Adoption: Freeing Order) [1995] 1FLR 382 at 389 demonstrate that the sense of grievance is only relevant when it is based on reason and not emotion.

[40] The possibility or otherwise of the future rehabilitation of the child to the natural parent is a crucial consideration. In Re H: Re W (Adoption: Parental Agreement) [1983] FLR 614 at 616 the court stated:

> "Where the natural parent presented himself as someone capable of parenting the child, this was a factor which the hypothetical reasonable parent should take into account …".

[41] Contact may also be a relevant factor to be taken into account. It can provide the basis of future rehabilitation and/or continuing contact may be of benefit to the child. As was stated in Re H: Re W:

> "The chance of a successful reintroduction to, or the continuance of contact with, the natural parent would be a critical factor in assessing the reaction of the hypothetical reasonable parent."

The submissions of the parties

The mother (appellant)

[42] The appellant mother, N, submitted both, in the court below and in this court that:

(a) adoption was not "necessary"; and

(b) She was not withholding her agreement unreasonably.

[43] In relation to the "necessity" test, the appellant submitted that there was another realistic or viable option available to meet the child's needs, namely rehabilitation. The appellant pointed to the significant improvement she had made in relation to her home life, her relationship with her partner, her mental health, her commitment to contact and her constructive engagement with the psychotherapist, David Smith. These improvements were acknowledged by Dr Shortland, the Guardian ad Litem and the learned trial judge.

[44] In all the circumstances, the appellant submitted that there was potential for a successful parenting assessment to take place and upon completion of same the child could be rehabilitated to the care of the parents.

[45] The appellant accepted that if the court found rehabilitation was not a realistic option, then adoption would be necessary and she did not seek to argue that long term fostering would, in the circumstances be a realistic option.

[46] The appellant, secondly, submitted that she was not withholding her agreement unreasonably as she had a legitimate sense of grievance because of the Trust's failure to progress therapeutic work for her in a timely manner.

[47] Dr Shortland had recommended therapeutic work in her original report dated 30 October 2013. She considered such work was a necessary pre-cursor to a parenting assessment. The estimated time for the work was 12-18 months. The applicant submitted that the work was not progressed by the Trust between the making of the final care order and the issue of freeing proceedings. It did not commence until August 2015. She submitted, if the work had been commenced immediately after Dr Shortland's report then it could have been completed by her by the date of the freeing order hearing. At that stage she could therefore have been in a position to have shown to the court that she had completed this work successfully and would have been in a position to commence parenting work, which was likely to be completed successfully in a short time frame. Hence rehabilitation of the child to her care could have been achieved in a matter of months after the date of the freeing hearing in the County Court. In such circumstances the County Court would have been likely to adjourn the case to allow the parenting work to proceed and if it had proved successful, the child would have been rehabilitated to her care. As the work was not provided in a timely manner the appellant submits that the Trust denied her the opportunity to parent the child.

[48] The appellant submits that the Trust's failure to progress the therapeutic work was a breach of their duty under Article 27(7) of the Children (Northern Ireland) Order 1995 which states:

> "… any authority looking after a child shall make arrangements to enable him to live with –
>
> (a) a person falling within paragraph 4 (a parent of the child) … unless that would not be reasonably practicable or consistent with his welfare".

The appellant further alleges that the Trust was in breach of its obligations set out in the European and domestic jurisprudence as it failed to take steps to attempt to reunite the family. In all these circumstances, it is submitted by the appellant that she is not unreasonable in withholding her agreement to Joe being freed for adoption. She submits the learned trial judge erred in failing to give any or adequate regard to her legitimate sense of grievance and in particular did not consider the issue in her judgment.

The Trust's submissions.

[49] The Trust submitted, in the court below and this court, that adoption was necessary as rehabilitation was not a realistic option. The Trust relied on the expert evidence of Dr Shortland to show that there was no certainty the mother could provide adequate parenting in the future, as the positive changes made by the appellant were situational. Accordingly, any increase in stressors such as childcare responsibilities could lead to deterioration in her circumstances and mental health and her ability to parent. In these circumstances the Trust submitted rehabilitation was not a realistic option as there was no evidence to show the mother would be able to achieve sufficient change to parent Joe successfully.

[50] The Trust also relied on the view expressed by Dr Shortland at paragraph 110 of her report dated 27 April 2015 that therapeutic work "…. is likely to take 12 to 18 months to complete and is therefore likely to fall outside Joe's timescales," as evidence rehabilitation was not a realistic option in this case. Given that the timescale of the therapeutic work was 12 to 18 and the timescale for a parenting assessment was approximately 6 months it would therefore be at least 2 years before rehabilitation could occur. The Trust submitted that this would be an inordinate delay for a 3 year old child who had been in care since aged 6 months. As of the time of the appeal hearing the updated report from Dr Smith noted that the timescale for the work would now be longer and in real terms the earliest point at which the child could be rehabilitated would be 2018. In these circumstances the Trust submitted that rehabilitation was not a realistic option, as it was not within Joe's timescales.

[51] In relation to the question of unreasonably withholding consent the Trust denied that the appellant had a legitimate sense of grievance. The Trust submitted that it had no duty to offer her therapeutic work and relied on dicta in Re G (A Minor) (Interim Care Order: Residential Assessment) [2016] 1 AC 576 at paragraph 24 where Lord Scott said:-

> "There is no Article 8 right to be made a better parent at public expense".

Further, the Trust submitted that the care plan was adoption and this plan had been approved by the Court granting the Care Order. In those circumstances it was under no duty to offer therapeutic assistance to the mother to enable her to have the child rehabilitated to her care.

[52] The Trust further submitted that even if it was under a duty, it was not in breach of the duty. Article 27(7) only required the Trust to do what was "reasonably practicable". They relied on dicta of Maguire J in Western Health and Social Services Trust v K and L [2015] NI Fam 15, at paragraph 88:-

> "Article 8 does not require that domestic authorities made endless attempts at family reunification; it only requires that they take all necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents …"

[53] The Trust submitted that it had sought to enable the mother to access suitable therapy but delay had arisen due to circumstances beyond its control. In particular the appellant had been detained in hospital from 29 December 2013 until 2 January 2014 . Thereafter on 25 July 2014 the Social Worker had contacted the appellant's GP in an attempt to progress work. The work did not commence until August 2015 for a variety of reasons, none of which was due to the actions or inactions of the Trust. In all the circumstances the Trust submitted it had done everything "reasonably practicable" to assist the mother.

[54] In all the circumstances, the Trust submitted the mother had no legitimate sense of grievance. Even if she had, this was only one factor for the court to take into account. When this factor was weighed against the other factors, in particular the welfare of the child, it submitted that the mother's decision to withhold agreement was clearly unreasonable.

[55] The Trust therefore submitted that the learned trial judge had applied the correct legal tests and on the facts was entitled to find that the appellant was unreasonably withholding her consent and secondly, she was entitled to find that adoption was necessary in all the circumstances as rehabilitation was not a realistic option.

Father's submissions.

[56] The father supported the appellant's case, in this court and the court below, on the basis that rehabilitation was a realistic option given the improvements made by the appellant and by the father. He further submitted that the mother had a legitimate sense of grievance because the delay in providing therapeutic work to her effectively denied her the opportunity to show she and he could together parent the child.

Guardian ad Litem's submissions.

[57] The Guardian ad Litem submitted that adoption was necessary. Whilst acknowledging improvements in the parents' situation and the mother's engagement with therapy, the Guardian ad Litem opined that the evidence was not strong enough to establish that the couple could achieve and/or sustain change to parent Joe, either at all or at least within a timetable that was appropriate to the child's needs.

Judge's findings and Order.

[58] The learned trial judge heard oral evidence from Ms Dolan, Social Worker, the appellant mother, the father and Ms Granleese, Guardian ad Litem. She also had before her a number of reports prepared by the Western Health and Social Care Trust, affidavits filed by the parents, reports from the Guardian ad Litem dated 11 February 2015 and 18 May 2015, reports from Dr Shortland dated 30 October 2013 and 27 April 2015 and reports from David Smith dated 22 September 2015 and 30 November 2015.

[59] As appears from the judgment, the learned trial judge set out the relevant legal provisions, relevant case law and at paragraph 43 identified three questions the court was required to address:

(i) Which order is in the best interests of Joe?

(ii) If it is adoption, are the respondents withholding their consent unreasonably?

(iii) Is adoption a proportionate measure, in accordance with 3(b) and the further case law?

[60] The parties do not appeal the learned trial judge's findings in relation to question 1.

[61] The learned trial judge dealt with question 2 (unreasonably withholding agreement) at paragraphs 50-60 of the judgment. After considering the level of contact the parents had enjoyed with Joe, she concluded that the parents' desire to

maintain contact with Joe was not a reason to withhold consent to adoption as this was a case for post adoption contact. She found that a reasonable parent should be able to appreciate Joe's needs for security and support throughout childhood and then to adulthood and therefore recognise that it was in his best interest to be freed for adoption. The parents' refusal to consent was therefore unreasonable.

[62] The learned trial judge did not in the judgment consider the question whether the parents had a legitimate sense of grievance and if so, whether this would have been a basis on which it could be held that they were not unreasonably withholding their consent.

[63] She did at paragraph [63] of the judgment consider the criticism of the Trust in respect of sourcing work for the appellant mother. The court concluded that there were no deficiencies on the part of the Trust which gave rise to any breach of the parents' Convention rights.

[64] In determining question 3, namely whether adoption was necessary, the learned trial judge considered whether rehabilitation was a realistic option. At paragraph [22] of the judgment she concluded after carefully and earnestly considering all the evidence that she was not satisfied to the requisite standard that rehabilitation of Joe to the respondent parents was a realistic aspiration during his formative years. In particular she had regard to the evidence relating to timescales and viability set out in paragraphs [110] and [127]-[129] of the second report of Dr Shortland. At paragraph [36] the learned trial judge stated:-

> "I have concluded that the period necessitated by the personal therapeutic work in respect of the respondent mother … means it is highly unlikely rehabilitation of Joe could be contemplated within a timescale which is viable in terms of securing him a stable childhood with appropriate attachments. It is acknowledged that parenting work could not commence until the respondent mother's personal work was complete."

[65] The learned trial judge then proceeded to balance the pros and cons of long-term fostering vis a vis adoption and held that adoption was the only option which would meet the needs of the child and concluded at paragraph [62]:-

> "I am satisfied that adoption is the only option which will meet his immediate needs for stable, consistent, nurturing parenting by parents who are suitably qualified and experienced. It is therefore the conclusion of the court that this is a case in which adoption is necessary and nothing else will do".

Consideration

[66] In an application for freeing for adoption, in the absence of parental agreement, the court is required to address three questions, namely:-

(a) Is adoption in the best interests of the child?– (Article 9 Welfare Test).

(b) If so, given that adoption represents an interference with Article 8 rights, can this interference be justified on the basis it is-

  (i) in accordance with the law;

  (ii) in pursuit of the legitimate aim; and

  (iii) is necessary/proportionate?

(c) If so, has it been established by the Trust that the parents are unreasonably withholding their agreement to adoption?

[67] The learned trial judge correctly identified these three questions. The appellant accepts that the "best interests" test was met in the present case. She submits however that the learned trial judge erred in finding that –

(a) adoption was necessary and

(b) that the appellant and the respondent father were each withholding his/her consent to adoption unreasonably;

Is adoption "necessary"?

[68] The jurisprudence in relation to the test to be applied has been set out in paragraphs [20]–[34] above. The appellant makes no criticism of the learned trial judge's statement of the legal principles. The issue arising on appeal, is whether the learned trial judge erred in applying the law to the facts. The appellant submits that she failed to give adequate consideration to the fact that rehabilitation was an option open to the court and in these circumstances the court erroneously found that adoption was necessary.

[69] In determining whether, in the words of Lady Hale in Re B "nothing else will do", the court is required to consider the various options available to it before it can properly come to a decision that nothing other than adoption will do. As was made clear, however in Re B and in a number of subsequent Court of Appeal decisions, the other options must be "realistic" or "viable options".

[70] In determining whether rehabilitation is a realistic option useful guidance is given in South Eastern Health & Social Services Trust v LS and PN [2009] NI Fam 14. Weir J refused an application for an order freeing the subject children for adoption on the basis that the mother and her partner had completed a PAMS assessment with encouraging results. He was of the view that there was a very real possibility that adequate parenting could be achieved within a reasonable period by the mother and her partner.

[71] Rehabilitation is therefore a realistic or viable option if the evidence establishes; first there is a real possibility that adequate parenting can be achieved and second, such can be achieved within a reasonable period.

[72] In the present case the appellant has made significant improvements which have been noted by the Guardian ad Litem, Dr Shortland and the lower Court. Both the Guardian ad Litem and Dr Shortland however, note some caution is required. In particular Dr Shortland refers to the fact that much of the improvement may be related to situational factors and further that the appellant had not made significant changes in her underlying psychological function. The Guardian ad Litem concluded that the evidence was not strong enough to establish that the couple would ultimately be able to achieve and sustain sufficient change to parent Joe successfully or at all or at least within a timescale appropriate to Joe's needs.

[73] Notwithstanding this, on the basis of the evidence before this court and in particular the comments of Dr Shortland recommending that the appellant be given therapeutic work to enable her to make the necessary changes required to parent another child in the future, it is this court's view that there is therefore a real possibility adequate parenting can be achieved by the appellant.

[74] For the option of rehabilitation of Joe to the parents' care to be realistic however, the appellant must also show that this can be achieved within a reasonable period.

[75] At the date of the hearing before the lower court, David Smith in his report dated 30 November 2015 at paragraph [15], indicated the therapeutic work was a pre-requisite to any realistic attempt by the appellant to parent a young child. He opined that the therapy would take a minimum of 12-18 months. Therefore, given that a parenting assessment would probably take 6 months, the earliest date at which Joe could have been rehabilitated to his mother as of the date of the lower court was June 2017.

[76] As of the date of the hearing before this court the more recent report of David Smith dated 8 April 2016 outlines that because of the appellant's current pregnancy proving to be an obstacle to consistent ongoing treatment of her psychological difficulties, it was his professional view that the total minimum period in therapy required was 2 years. Given that the appellant has only completed 7 months of

therapy to date this would mean that the earliest date Joe could be rehabilitated to her care at the present time would be April/May 2018.

[77] Joe has been in care since 6 months of age. He is presently aged 3. Dr Shortland noted at paragraph 110 in her second report –

> "the …work is likely to take 12-18 months to complete and is therefore likely to fall outside of Joe's timescales. I am also particularly mindful that Joe has already experienced significant disruptions and neglect and his first year of life presents as a very active child … I would therefore be very cautious about disrupting his care giving environment and attachments at this stage of his development."

[78] In light of the evidence of Dr Shortland and David Smith, this court is satisfied that the timescales for rehabilitation are not within the interests of the child and for this reason, I consider rehabilitation is not a realistic option.

[79] The learned trial judge considered whether rehabilitation was realistic and in particular had regard to the evidence about the timescales and viability set out in paragraphs [110] and [127]-[129] of Dr Shortland's second report. Her conclusion was that rehabilitation of Joe to the parents was not a realistic aspiration during his formative years.

[80] The learned trial judge applied the test laid down by the Strasbourg Court and concluded on the basis of the expert evidence that it was satisfied. In all the circumstances the learned trial judge's conclusion on proportionality was a view which I consider was right. In accordance with the appellate Judge's role as set out in Re B, this appeal, on this limb, must therefore be dismissed.

[81] Given that the parties accepted that there was no other viable option to adoption save rehabilitation, it is unnecessary for this court to assess the balancing exercise carried out by the lower Court between adoption and long-term fostering.

Unreasonably withholding consent

[82] In considering this question no criticism is made of the learned trial judge's statement of the relevant law. The appellant does however submit that the learned trial judge erred as she did not give adequate consideration to, (a) the mother's legitimate sense of grievance arising as a result of the Trust's failure to provide her with therapeutic work in a timely manner and (b) the level of contact she had with the child.

[83] As appears from paragraphs [35]-[41], in determining whether a parent has been unreasonable in withholding consent the court is entitled to have regard to a number of factors including welfare, contact, prospect of rehabilitation and any legitimate sense of grievance.

[84] In considering the question of whether the respondent parents were withholding their consent unreasonably, the learned trial judge after considering the contact the respondents had, the prospects of rehabilitation, the fact that this was a case for direct post-adoption contact, and the welfare of the child concluded that their consent was being unreasonably withheld. She further held that there were no deficiencies on the part of the Trust in relation to sourcing work for the respondent mother which gave rise to any issues in the context of the Convention rights of the parents.

[85] It is clear that the learned trial judge applied the correct test and there was ample evidence to support the conclusion she reached in relation to this question.

[86] As has already been set out above there was evidence on which the learned trial judge was entitled to conclude that there was no prospect of rehabilitation. Further there was evidence that contact with the parents would continue to be met through the provision of post-adoption contact. In addition there was a wealth of evidence that it was in the child's welfare to be adopted and the mother did not dispute the fact adoption was in the child's best interests. The only other matter which the parents relied on in seeking to establish that they were not being unreasonable in withholding their agreement was their legitimate sense of grievance arising out of the alleged failure of the Trust to provide the mother with therapeutic work in a timely manner.

[87] Interesting legal issues arise regarding the nature and extent of the Trust's duty to enable the appellant to parent. The Trust submitted it owed no duty to the mother to facilitate therapeutic work and relied on dicta in Re G and the fact the care plan of adoption was approved by the court which granted the care order. In contrast the mother relied on Article 27 (7) of the Children (NI) Order 1995 and the domestic and European jurisprudence to impose upon the Trust a duty to provide her with therapeutic work as this was part of their duty to rebuild families where possible. This is not a matter on which it is necessary for this court to reach a decision for reasons which are set out below.

[88] Having considered the evidence in this case, it is clear that although the Trust did not act immediately following the recommendations made by Dr Shortland in October, the Trust did seek to assist the appellant in accessing therapeutic work. Delay arose due to circumstances which were not the fault of the Trust. In all the circumstances this court concludes that there was no breach of any duty imposed upon the Trust under Article 27(7) of the Children (Northern Ireland) Order or of any duty imposed on the Trust under Article 8 to "take all necessary steps that can reasonably be demanded to facilitate the reunion of the child and his

or her parents" – R&H v UK. In these circumstances this court is satisfied that the Trust would not be in breach of any duty imposed under the domestic legislation or under domestic or European jurisprudence. Consequently, the parents do not have a legitimate sense of grievance.

[89] Whilst the court accepts that two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable, it finds that on the facts in the present case, there is only one reasonable view and that is that the child Joe should be adopted. This is in accordance with his welfare, in circumstances where there is no realistic prospect of rehabilitation, no legitimate sense of grievance and where the connection with the parents will be continued through direct post-adoption contact.

[90] It is the view of this court the learned trial judge's decision cannot be faulted on its statement of the law or its application to the facts and in those circumstances this limb of the appeal must also be dismissed.

Conclusion

[91] This court recognises the genuine love that both parents have for their child and the desire that they have that Joe be rehabilitated to their care. It is encouraging to read that the parents have made significant improvements and that the appellant in particular has engaged in a difficult treatment plan of therapy. It is the view of this court that the appellants may be capable of parenting a child in the future although this is something that must be tested. Given this potential and the fact that the mother is presently pregnant it is the hope of this court that the mother will engage fully in the therapy which is being provided for her so that she may have the opportunity to parent.