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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant/Respondent

and

A MOTHER

Respondent/Appellant

and

A CHILD'S COURT GUARDIAN

Notice Party

IN THE MATTER OF SE (A CHILD AGED 5 YEARS)

Ms M Connolly KC with Ms J Cunningham (instructed by Denis Humphrey Solicitors) for the Appellant Mother
Ms J Lindsay KC with Ms C McCloskey (instructed by the Directorate of Legal Services) for the Respondent Trust
Ms L Murphy KC with Ms V Ross (instructed by David Russell Solicitors) for the Children's Court Guardian as Notice Party

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Before: Keegan LCJ, McCloskey LJ and Kinney J

KEEGAN LCJ and McCLOSKEY LJ (*delivering the judgment of the court)*

Introduction

[1] This appeal arises in a family case and concerns the relevant Health Trust's obligation in relation to the religious upbringing of a child in care, subject to an interim care order. The appeal is from a decision of Mr Justice McFarland ("the judge") issued on 30 May 2024 and finalised by order of 28 June 2024, whereby he granted an

application for declaratory relief made by a Health and Social Care Trust ("the Trust") in relation to arrangements for the religious upbringing of the subject child.

[2] We have applied the same cypher SE as the judge did to the child as this is a family case and so anonymity is applied. Nothing must be published which would identify either the child or her family.

The terms of the order made

[3] Para [2] is the operative part of the order the judge made. It is framed in the following terms:

> "2. The relief sought in the application is granted in the following terms:
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> (i) Upon the application of the Health and Social Care Trust pursuant to Article 173 of the Children (Northern Ireland) Order 1995 for leave to apply to the court to exercise its inherent jurisdiction in respect of the subject child;
>
> (ii) And upon the court granting leave to the Health and Social Care Trust to make an application that the court should exercise its inherent jurisdiction in respect of the subject child;
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> (iii) Upon the court being satisfied that the arrangements proposed for the child by the applicant Health and Social Care Trust are in her best interests;
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> (iv) The court exercises its inherent jurisdiction to declare that the arrangements proposed by the applicant Health and Social Care Trust are in her best interests;
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> (v) The court declares that the child shall be permitted to attend church services and church based social activities which have a spiritual content whilst in her current foster placement and to engage in spiritual activities in the foster home which include:
>
> (a) Sunday morning church service;
>
> (b) Sunday evening church service on occasions when children are involved;

(c) Social church activities such as quizzes and meals;

(d) Saying grace before meals and joining the foster family in prayer in the home;

(e) Joining the [family members] in the foster home in singing hymns and being read Bible stories;

(f) Attendance at children's camps and clubs during the summer holidays."

Factual background

[4] The subject child is now just over five years of age. She has been in a short-term foster placement since August 2023. The foster family are active members of a Pentecostal Church. The mother is an agnostic. Therefore, difficulties have arisen concerning the ability of SE to engage in public acts of worship, private acts of family worship and general engagement with the foster family's social activities which are largely centred around the church. The mother objects to SE receiving any form of religious instruction.

[5] The Trust applied for a care order in October 2023. The father of the child has not been identified, save that it is said that he is in England. He has in any event, never had contact with SE and is not named on the child's birth certificate. Therefore, he does not have parental responsibility.

[6] As to the mother, she has unfortunately a history of mental health difficulties and drug misuse. This background resulted in the mother losing custody of the child. Prior to being removed into care the child was voluntarily accommodated under the auspices of a safety plan with the maternal grandmother. However, in July 2023 the mother had a drug overdose and hospital admissions.

[7] It is reported that a further drug overdose occurred in late August which required the mother's hospital admission. In addition, the maternal grandmother felt unable to cope with the demands of caring for SE and so she was placed in care. Initially, SE was placed with her current carers under a voluntary arrangement. This placement allowed SE to start her primary one year at a school where she had been enrolled by the mother. The maintenance of this school placement was extremely important to the mother. Hence, the school placement could be secured in the identified foster placement. The only difficulty arose because the foster carers were a Christian family and church attenders. Their religious convictions and practice conflicted with the mother's agnostic views. When the mother was advised of this, she was receptive to trying to reach an accommodation on the issue. She took that

approach, having made the Trust aware of her agnosticism. So, at this early stage of the placement it is recorded that there were no major issues arising.

[8] However, as time progressed fracture lines emerged. The first fissure formed as a result of changing contact arrangements. That transpired because initially contact occurred between the child and the maternal grandmother on a Sunday. This facilitated the foster carers attending church with their family. This arrangement broke down as a result of some difficulties with the grandmother's regulation of her behaviour at contact. Hence, the facility of the grandmother looking after the child on Sundays was removed. Contact was facilitated with the mother but unfortunately, given her own mental health vulnerability, that too has been erratic. She has not had direct contact with SE since 1 February 2024 and she does not feel herself strong enough to avail of indirect contact.

[9] It is clear that some contact arrangements also addressed the issue of religious observance. In particular, we were referred to a contact sheet which records the mother discussing this issue with the child with the social workers' blessing. This was in December 2023, when the mother discussed her belief that one does not know if there is a God.

[10] Prior to the issue of the declaratory relief application, some accommodations were made on an *ad hoc* basis. Predictably difficulties persisted between the mother and social services when attempting to resolve issues of religious observance particularly during important religious milestones including Christmas and Easter. The informal arrangement could not be sustained due to the uncertainty it caused and the ensuing stress which the foster carers experienced which led to potential placement breakdown. This resulted in the following more formal steps being taken to tackle the issue.

[11] The Trust convened a "Placement Under Pressure" meeting on 21 March 2024 followed by a "Placement Disruption" meeting a week later to try and reach a more permanent solution to the issues given the stress that these arrangements were causing the foster carer. No resolution was found at these meetings, and it is reported to us that due to these circumstances, the foster carers felt that they would have to terminate the placement by the end of May 2024 unless a satisfactory arrangement could be found.

[12] That was the position that the judge was faced with when he heard this case at first instance. Thus, he records the following in his judgment at para [13]:

> "[13] The Trust is seeking the relief to prevent the breakdown of the placement. As part of its contingency planning alternative foster carers have been identified but none of these placements are close to the present location, and SE will be required to move school. At this stage the religious persuasion of these potential placements has not

been explored in detail and it is unclear if the issue will not re-emerge with a change of placement."

[13] As we understand it the substantive case remains before the Family Care Centre and is timetabled for a hearing on 21 March 2025. That is for a hearing of the care order application. However, we were also told that the care plan has now changed to one of permanence through adoption and that there is a "Best Interests Panel" meeting scheduled on 21 January 2025 in relation to that. Furthermore, if adoption is approved for this child, it is the Trust's stated plan that proceedings in the Care Centre may be consolidated with Freeing for Adoption proceedings.

[14] Finally, by way of background, we note that the current carers are not presenting as permanent carers for this child. However, they have undertaken to keep the child until a permanent adoptive placement is identified. At the time of writing, the mother opposes the Trust's plan and Ms Connolly informed us that she continues to experience fragility and difficulties within her own life. It is within the above factual matrix that we turn to examine the grounds of appeal.

Grounds of appeal

[15] The appeal notice that was filed in this case of 6 August 2024 contained a large number of repetitive appeal grounds. Helpfully, in the skeleton argument filed on behalf of the appellant, Ms Connolly abandoned one ground (e) but the other grounds remained to be argued.

[16] At the outset of this hearing, we alerted the parties to the fact that we did not consider that the remaining grounds were sufficiently focused. Therefore, following a collaborative debate between counsel and the court, the grounds of appeal (without objection from any of the other parties) were distilled by Ms Connolly into three core questions as follows:

(i) Was the judge wrong to place within the bracket of material considerations the mother's lack of availability at contact as a reason to grant the declaratory relief?

(ii) Was the order itself disproportionate, given its breadth in circumstances where further compromise could have been made on religious observance?

(iii) Did the judge fail to give adequate consideration to the fact that this was a short-term placement?

We will deal with each of these arguments in turn, but before we do so, we refer to the relevant law in this area.

The law

[17] Article 52(6)(a) of the Children (Northern Ireland) Order 1995, ("the 1995 Order") states that:

> "52-(6) While a care order is in force with respect to a child, the authority designated by the order shall not –
>
> (a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made."

[18] Article 49(1) of the 1995 Order defines care order to include interim care order. Article 18(1)(a) and Article 26(1)-(3) of the 1995 Order provides further illumination as to the duties on any authority as follows:

> "18.—(1) It shall be the general duty of every authority … -
>
> (a) to safeguard and promote the welfare of children within its area who are in need;"
>
> **"**26.—(1) Every authority looking after a child shall—
>
> (a) safeguard and promote his welfare; and
>
> (b) ...
>
> (2) Before making any decision with respect to a child whom it is looking after, or proposing to look after, an authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of—
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> (a) the child;
>
> (b) his parents;
>
> (c) any person who is not a parent of his but who has parental responsibility for him; and
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> (d) any other persons whose wishes and feelings the authority considers to be relevant,
>
> regarding the matter to be decided.
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> (3) In making any such decision an authority shall give due consideration—

(a) having regard to his age and understanding, to such wishes and feelings of the child as the authority has been able to ascertain;

(b) to such wishes and feelings of any person mentioned in paragraph (2)(b) to (d) as the authority has been able to ascertain; and

(c) to the child's religious persuasion, racial origin and cultural and linguistic background."

[19] In relation to this question, the court is determining a question with regard to the upbringing of a child, the welfare of the child is the paramount consideration pursuant to Article 3 of the 1995 Order.

[20] Moving to the declaratory relief aspect of this case, any such application is guided by the following articles, Article 173(2) and (3) of the 1995 Order which require the Trust to seek the leave of the court before bringing the proceedings. The court should only grant leave if:

"(a) the result which the authority wishes to achieve could not be achieved through the making of any order …; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm."

[21] It is well known that the inherent jurisdiction is sparingly used given the comprehensive framework provided by the 1995 Order. This is discussed most recently in *SV (A Minor) v PV & Anor (Rev 1)* [2023] NICA 41 in the context of parental responsibility. In *SV* this court referenced the helpful passage from *Butterworth's Family Law Service*, Chapter 47, para 6635.1 which refers as follows:

"Section 100(2)(d) of the CA 1989 prevents the High Court from exercising its inherent jurisdiction 'for the purposes of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.' In other words, while the High Court may make orders under its inherent jurisdiction in respect of a child, in doing so, it must not confer any aspect of parental responsibility upon a local authority that the authority does not already have. This is less likely to cause problems where the child is in care, since the local authority will already have parental responsibility. Hence, the

> determination of a particular question by the court, for example, obtaining a return order against abducting parents, will not be contrary to section 110(2)(d).
>
> Similarly, the court is free to determine the scope and extent of parental responsibility and can, for instance, make orders giving leave for a child in care to be interviewed by the father's solicitor to prepare a defence to criminal charges per Hale J in *Re N (Minors)* (Kerr: Leave to interview child) [1995] 1FLR 825. If the local authority do not have parental responsibility for the child, the High Court may not use its inherent jurisdiction to make orders which in any way confer parental responsibility upon the authority. Hence, for example, while the court could sanction a named couple to look after the child it could not authorise a local authority to place the child, nor a fortiori to place the child with a view to adoption. It has, however, been held wrong that section 100 be restrictively interpreted and that it is perfectly proper for a local authority to invite the court to exercise its inherent jurisdiction to protect children even if the exercise of that power would be an invasion of a person's parental responsibility, for example, by restricting a non-family member from contacting or communicating with the child in question per Thorpe J in *Devon County Council v S* [1994] Fam 169."

[22] In *FS v RS and JS* [2020] EWFC 63, Sir James Munby dealt with a rather unusual case whereby an adult sought maintenance from his parents. The facts are obviously different from this case but, nonetheless, we remind ourselves of what Sir James said about the inherent jurisdiction in a passage from paras [100] and [101] of that decision as follows:

> "100. Before going any further a few general remarks about the inherent jurisdiction may not be out of place. Counsel remind me of Lord Donaldson of Lymington MR's famous description (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 13) of the common law - here, the inherent jurisdiction - as the 'great safety net which lies behind all statute law, and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole.' But the choice of metaphor is revealing: the inherent jurisdiction is a safety net, not a springboard. And Lord Donaldson would have been the first to acknowledge that the inherent jurisdiction, whatever its theoretical reach, is, in settled practice,

> recognised as being subject to limitations on what the court can and should do. For an example, see his observations in *In Re R* (*A Minor) (Wardship: Criminal Proceedings*) [1991] Fam 56.
>
> 101. I recognise of course that, as Singer J said in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, relief can be granted in what he acknowledged was a "novel" case. As he said:
>
> > 'the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy ... the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values.'"

[23] Summarising, Sir James emphasised the flexibility of the inherent jurisdiction to meet welfare demands.

[24] The specific issue we have to deal with relates to religious upbringing of a child in care. There is sparsity of direct domestic authority on this. One case referred to is that of *Re T* [2001] NIFam 4. In that case the child was placed with foster carers with a view to adoption. This was, it should be said, not under an interim care order scenario but rather a more permanent placement. The foster carers were of the Protestant faith and the mother of the Roman Catholic faith, and she objected to the placement. Gillen J was clear in making the declaratory order that he did that the child's welfare was paramount and although the Trust's decision-making was circumscribed by the 1995 Order, the court could act under its inherent jurisdiction, where the child's welfare demanded it.

[25] Similarly, in *Re P* [2000] Fam 15 Ward LJ enunciated the principle of the paramountcy of the child's welfare within the fourth principle set out in his judgment:

> "…in the jurisprudence of human rights, the right to practice one's religion is subservient to the need in a democratic society to put welfare first."

[26] The above qualification in the case of a child reflects the welfare principle adumbrated by Munby LJ in *Re G* [2012] EWCA Civ 1233. This was a private law dispute between parents about the upbringing of their children. Both parents being members of the orthodox Jewish faith, but the mother after separation, had changed her religious persuasion. Helpfully, Munby LJ provides guidance as to how to evaluate welfare in this area at para [27] as follows:

> "Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach."

[27] In his judgment at first instance McFarland J also referred to a decision of Baker J in *Re A and D* [2010] EWHC 2503, when analysing how all of this fits within Article 52(6)(a). In particular, we highlight para [75] where Baker J said:

> "75. In my judgement, the local authority's duty under section 33(6)(a), (the mirror section in England & Wales that we are dealing with), like all its statutory duties under the Children Act, is subject to its overriding duty under section 17(1) and section 22(3) (the sections set out above by us) ... to safeguard and promote the welfare of children within their area who are in need."

[28] Finally, and obviously, we record that the welfare checklist exists to assist any court by way of ready reckoner as to the issues which are relevant. Article 3(3) reads that a court must take into the following:

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
>
> (b) his physical, emotional and educational needs;
>
> (c) the likely effect on him of any change in his circumstances;
>
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
>
> (e) any harm which he has suffered or is at risk of suffering;

(f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;

(g) the range of powers available to the court under this Order in the proceedings in question."

The Convention Rights issues

[29] In addition to the above, there are the Convention Rights issues in play in this case. As such, it is appropriate to outline the basic legal framework. The effect of the Human Rights Act 1998 ("HRA 1998") is that certain (not all) of the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (the "Convention/ECHR") and its Protocols form part of the domestic law of the United Kingdom and, in consequence, can, in accordance with the structures established by HRA 1998, be invoked before UK courts in certain circumstances. These may be described as the "protected Convention rights."

[30] Two of the protected Convention rights feature in these proceedings. The first is article 8, which provides:

"***Right to respect for private and family life***

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[31] Article 8 protects two separate rights: the right to respect for private life and the right to respect for family life. In some cases, the line dividing these to discrete rights may be blurred and in certain cases both rights may be invoked. Given its family life limb, article 8, inevitably, features with frequency in family and children's courts.

[32] Attention must be paid to the two words "respect for." These words are frequently overlooked in article 8 debates. They make clear that article 8 does not guarantee either a right to private life or a right to family life. That is not the text of article 8 by virtue of the words "respect for", which in this context are words of limitation.

[33] The European Court of Human Rights ("ECtHR") has consistently held that where the respective interests of a child and those of a parent come into conflict, article 8 requires the domestic authorities to strike a fair balance between those conflicting interests and, in doing so, to attach particular importance to the best interests of the child: see for example *Sommerfeld v Germany* (Application No. 31871/96) [2003] ECHR 341, para [64]. Another theme of the court's jurisprudence is that while the best interests of the child generally dictate the maintenance of ties with the child's family this is not appropriate where the family has proved particularly unfit, albeit severance normally requires very exceptional circumstances following all reasonable attempts to preserve personal relations and rebuild the family: *Gnahore v France* (Application No. 40031/98) [2000] ECHR 420. In principle it is possible to sever family ties against the will of the child, particularly where the child's best interests require development in a stable environment avoiding threat to the child's health and development (see for example *Elsholz v Germany* (Application No. 25735/94) [2000] ECHR 371, para [50].

[34] Another recurring theme of the ECtHR jurisprudence is the recognition of a wide margin of appreciation in the decision making of authorities in the removal of children into care: see *K and T v Finland* (Application No. 25702/94) [2000] ECHR 174, para [151]. This is particularly so where the final decision has been preceded by attempted less intrusive measures entailing, for example, family support or preventive steps: see *RMS v Spain* (Application No. 28775/12) [2013] ECHR 555, para [86]. In a non-parental care situation, restrictions on parental access will be scrutinised strictly: see for example *Johansen v Norway* (Application No. 17383/90) [1996] ECHR 31, para [64]. Fair and accessible decision-making procedures represent one of the general themes of the Strasbourg Court's case law (*see CAO v Secretary of State for the Home Department* [2024] UKSC 32, para [56]).

[35] The ECtHR has also emphasised the importance of decision-making procedures. The duty on the relevant public authority in this respect is one of means and not result. The court will scrutinize, in particular, whether this has ensured that the views and interests of the natural parents are ascertained and taken into account: see particularly *TP and KM v United Kingdom* (Application No. 28945/95) [2001] ECHR 332, para [72]]. Natural parents must not be punished for pursuing judicial remedies and delays in judicial processes are to be avoided.

[36] In one of the leading recent decisions in this sphere, that of the Grand Chamber in *Strand Lobben v Norway* (Application No. 372813/13) [2019] ECHR 615, it was held (by a majority of 13/4) that the process applied by the national authority culminating in the withdrawal of parental responsibilities and consent to adoption contravened article 8(1) on the particular facts due to the lack of a genuine exercise in balancing the interests of the child and those of his biological family and a failure to seriously contemplate the possibility of the child's reunification with his biological family. A careful study of the core of this decision, at para [220], highlights that it is intensely fact sensitive in nature. Other criticisms of the procedure of the national authority are contained in paras [221]-[225].

[37] It is well established that article 8 does not merely require the State to abstain from interference with family life. Rather there may in addition be positive obligations in certain contexts and circumstances. For example, the ECtHR has held that this positive obligation obliged the national authority to provide a natural (non-custodial) father with an opportunity for consultation before placing the child in adoptive care: *Keegan v Ireland (*Application No. 16969/90) [1994] ECHR 18 and, in another case, to take sufficient steps to ensure compliance with court orders relating to a father's right of access to his child: *Hokkanen v Finland* (Application No. 19823/92) [1994] ECHR 32.

[38] This court has had occasion to consider article 8 from time to time in the family law sphere and in other cases. We reference but one recent example from this court dealing with article 8, in the family law context, which is illustrative of the principles to be applied, namely *AU v Belfast Health & Social Care Trust* [2024] NICA 1, paras [21] and [22]:

> "[21] Of course, article 8 of the European Convention on Human Rights ("ECHR") also contains a positive obligation to promote family life. The promotion of contact is part and parcel of that obligation within the family law sphere is part and parcel of that obligation within the family law sphere. Proportionality which is central to the approach of the ECHR requires a reasonable relationship between the means employed with the aim sought to be realised. This requirement is particularly important in child law. One illustration of the point is that plans which propose to achieve the permanent separation of a child from parents must be proportionate to the need for child protection. Similarly, plans for the suspension of contact must be proportionate to the best interests of the child. Otherwise, the positive obligation to promote family life is compromised.
>
> [22] These legal principles are explained in the case of *KA v Finland* [2003] 1 FLR 696. The ECtHR had to consider a claim in respect of breaches of article 8 and held:
>
> > 'As the court has reiterated time and again, the taking of a child into public care should normally be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and any measures implementing such care should be consistent with the ultimate aim of reuniting the natural parent and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably

> feasible will begin to weigh on the responsible authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child. … a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation. The possibilities of reunification will be progressively diminished and eventually destroyed if the biological parents and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur.'"

[39] Article 8 also arose for consideration in two comparatively recent cases outside of the family law sphere. The relevant passages are noteworthy because they address article 8 in general terms, extending beyond their particular litigation contexts. In the first of these, *Re Ni Chuinneagain* [2022] NICA 56, para [49], the emphasis is on the private life limb of article 8:

> "Article 8 ECHR has been variously described as elusive and amorphous. It is, as Stanley Burnton J memorably remarked, 'the least defined and most unruly' of the Convention rights in *R (Wright) v Secretary of State for Health* [2006] EWHC 2886 (Admin); [2007] 1 All ER 825 (para [60]). In *R (on the application of Countryside Alliance and others and others v Her Majesty's Attorney General and another* [2007] UKHL 52 at paras [91]-[94], Lord Rodger provided a valuable resume of the jurisprudential evolution of article 8 ECHR:
>
> > 'Undoubtedly, the early decisions of the European Court on 'private life' in article 8(1) tended to concern sexual and emotional relationships within an intimate circle - for which people want privacy. Article 8(1) guarantees a prima facie right to such privacy. If someone complains of a violation of that right,

> the essential touchstone may well be whether the person in question had a reasonable expectation of privacy: *Campbell v MGN Ltd* [2004] 2 AC 457, 466, para 21, per Lord Nicholls of Birkenhead.
>
> But the European Human Rights Commission long ago rejected any Anglo-Saxon notion that the right to respect for private life was to be equated with the right to privacy. In *X v Iceland* (1976) 5 DR 86 the applicant complained that a law prohibiting the keeping of dogs in Reykjavik violated his article 8(1) rights. The European Court held that the right to respect for private life did not end at a right to privacy, but comprised also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality. Sadly, it did not extend to developing relationships with dogs and so the Commission rejected his application as inadmissible.'

It soon became clear that article 8 was not concerned merely to protect relationships in a narrow domestic field. In *Niemietz v Germany* (1992) 16 EHRR 97, 111, para 29, the Court held:

> 'it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.'

So, article 8(1) had been violated by a search of the office where the applicant pursued his profession as a lawyer, since 'it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.'"

We draw attention to these passages in our consideration of whether in the present case the mother's right to respect for her private life arises; and, if so, whether any interference has been established.

[40] In the second of these cases, *Re Said* [2023] NICA 49, this court stated at paras [49] and [52]:

> "[49] It is trite that the question of whether a person's right to respect for their private life, guaranteed by article 8(1) ECHR via section 6 of the Human Rights Act, has been, or may be, infringed is intrinsically fact and context sensitive. The associated, and logically anterior, question, is whether the subject matter of a person's complaint constitutes something which this limb of article 8(1) is designed to protect.
> …
> [52] We remind ourselves of the decision of the House of Lords in *R (Countryside Alliance) v HM Attorney General and Another* [2007] UKHL 52 and Lord Bingham's concise exposition of the private life element of article 8(1) at para [10]:
>
> > '… the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.'
>
> The House decided unanimously that the activity of fox hunting did not fall within the scope of this Convention right, *inter alia,* because of its public character and the lack of analogy with any of the categories summarised in para [53] *infra.* We refer also to the analysis of Lord Hope at para [54] and that of Lord Rodger of Earlsferry at paras [90]-[109]."

Baroness Hale, for her part, evaluated article 8 at para [116] thus:

> 'Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which

> people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity.'"

One particular reason for highlighting para [49] of *Said* will become clear *infra* at paras [69]-[73]. It is also appropriate to highlight the passage quoted from the judgment of Baroness Hale as this draws attention to the potential for close association between the two limbs of article 8, depending on the context.

[41] Article 9 ECHR is the second of the Convention rights featuring in these proceedings. Its text is as follows:

> "***Freedom of thought, conscience and religion***
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The right to freedom of thought, conscience and religion is expressed in unqualified terms. In contrast, the right of freedom to manifest one's religion or beliefs is expressly qualified. The qualifications are those specified in article 8(2).

[42] In *Kokkinakis v Greece* [1993] 17 EHRR 397, one of the leading cases in this sphere, the ECtHR said the following of article 9, at para [31]:

> "It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."

To like effect, in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, one of the major Supreme Court decisions in this field, Lord Nicholls stated, at para [15]:

> "… Religious and other beliefs and convictions are part of the humanity of every individual."

It should also be noted that article 9, in common with article 10 ECHR, is the subject of special treatment in HRA 1998: see sections 12 and 13.

[43] In any given case, the attraction of seeking to frame one's case within the unqualified compartment of article 9 is that the article 9(2) limitations, or qualifications, are bypassed. However, the ECtHR has been restrictive in its approach. One pertinent illustration, closely analogous to the present case, is found in *Hoffman v Austria* [1993] 17 EHRR 293, where the ECtHR made clear that a children's custody dispute between parents of different religious belief belonged to the realm of article 8 and not article 9.

[44] The close association between articles 8 and 9 ECHR in certain contexts is illustrated in *Ibrahim v Norway* [2021] ECHR 1060, where the daughter of a mother of Muslim faith was adopted by a family of practicing Christians. The child was in care from the age of one. The adoption order was made when aged four. The adoptive parents intended to baptise the child. By a unanimous decision the Grand Chamber held that there had been a breach of the mother's article 8 rights, applying essentially the same reasoning as in *Strand Lobben*. Given the context of the present appeal, the judgment is especially noteworthy for its treatment of the article 9 issues.

[45] The reasoning in para [140] is striking:

> "Turning then to article 9, which the applicant did invoke in her original application, the Court recognises that her views attained the "level of cogency, seriousness, cohesion and importance" so as to fall within the scope of the guarantees embodied in this provision (see, among other authorities, *İzzettin Doğan and Others v Turkey* [GC], no. 62649/10, § 68, 26 April 2016). The Court also considers that for a parent to bring his or her child up in line with

> one's own religious or philosophical convictions may be regarded as a way to "manifest his religion or belief, in ... teaching, practice and observance" (emphasis added here). It is clear that when the child lives with his or her biological parent, the latter may exercise article 9 rights in everyday life through the manner of enjoyment of his or her article 8 rights. To some degree he or she may also be able to continue doing so where the child has been compulsorily taken into public care, for example through the manner of assuming parental responsibilities or contact rights aimed at facilitating reunion. The compulsory taking into care of a child inevitably entails limitations on the freedom of the biological parent to manifest his or her religious or other philosophical convictions in his or her own upbringing of the child. **However, for the reasons stated below the Court does not find it necessary in the instant case to determine the scope of article 9 and its applicability to the matters complained of."**
> [Our emphasis]

[46] In the following two passages the court adopted the interesting approach of examining the applicant's case through the lens of article 8 "interpreted and applied in the light of article 9." In one sense, therefore, the court was identifying the dominant Convention right in play, while recognising the legitimacy and operation of another Convention right in the particular context.

[47] At para [149] the court, reflecting the principle (and truism) that the adoption of a child extinguishes any pre-existing family life, emphasised:

> "The Court reiterates that an adoption will as a rule entail the severance of family ties to a degree that, according to its case-law, is permissible only in very exceptional circumstances and could only be justified if motivated by an overriding requirement pertaining to the child's best interests (see *Strand Lobben and Others*, §§ 206 and 207, quoted at paragraph 145 above). That is so since it is in the very nature of adoption that no real prospects of rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family (ibid., § 209). Given the nature of the issues and the seriousness of the interests at stake, a stricter scrutiny is necessarily called for in respect of such decisions (ibid., §§ 209 and 211)."

[48] At para [151] the court coined the phrase "the primordial interest of the child in the decision-making process." In its determination of the case, the court diagnosed

a breach of article 8(1), adopting essentially the same reasoning as in *Strand Lobben*: see paras [151]–[154]. In summary, there had been a failure by the domestic authorities to undertake a genuine exercise of balancing the interests of the child with those of its biological family.

[49] At para [155] the court turned to examine the religious belief issue. It acknowledged that the Norwegian High Court had identified this as one of the "weighty considerations" to be balanced with the assessment of the child's best interests. The issue was not simply "religion and religious conversion" but extended to ethnicity and culture. The High Court had also taken into account Article 20(3) of the UN Convention on the Rights of the Child (although we point out that this instrument is not incorporated in domestic law) "… due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" when possible, measures for a child, including adoption, are being contemplated. Efforts had been made by the domestic authorities to find a more culturally suitable placement. However, there had been a failure to take due account of the mother's interest in allowing her child to retain "at least some ties to his cultural and religious origins": para [161].

[50] The court summarised its decision at para [162]:

> "Having regard to all of the above considerations, the court is not satisfied that in depriving the applicant of her parental responsibility in respect of X and authorising his adoption by the foster parents, the domestic authorities attached sufficient weight to the applicant's right to respect for family life, in particular to the mother and child's mutual interest in maintaining their family ties and personal relations and hence the possibility for them to maintain contact. The reasons advanced in support of the decision were not sufficient to demonstrate that the circumstances of the case were so exceptional as to justify a complete and definite severance of the ties between X and the applicant, or that the decision to that effect was motivated by an overriding requirement pertaining to X's best interests. Emphasising the gravity of the interference and the seriousness of the interests at stake, the court also considers that the decision-making process leading to the applicant's ties with X being definitively cut off, was not conducted in such a way as to ensure that all of her views and interests were duly taken into account. There has accordingly been a violation of article 8."

This passage draws together the main criteria most frequently applied by the ECtHR in its determination of article 8 challenges in cases of this kind, whether the context be that of care or adoption.

[51] One of the noteworthy themes of the article 9 jurisprudence is that of judicial restraint in enquiry into the genuineness of any professed belief. The Supreme Court made this clear in *Williamson*. In the instant case McFarland J, correctly, did not interrogate this issue.

[52] In common with article 8 ECHR, one discrete facet of article 9 is the positive obligation on the State which can be triggered in certain circumstances. The relevant authorities have a responsibility to ensure that those who espouse a belief protected by article 9 can effectively enjoy their rights, particularly where the belief is religious in nature: see *Kokkinakis* at para [33] (*supra*) and *Refah Partisi v Turkey (No 2)* [2003] 37 EHRR 1 para [91]. Simultaneously, however, the State is obliged to balance the right of individuals to religious expression against the rights enjoyed by other members of society, illustrated perhaps most clearly in a decision of the ECtHR upholding a law criminalising the practice of parental chastisement of children notwithstanding the parents' claim that this law was in conflict with their religious belief (see *Wetjen & Others v Germany* [2018] ECHR 261).

Consideration

[53] There is no real dispute that the only option for a Trust seeking this type of declaratory relief is recourse to the inherent jurisdiction. This is a last resort when there is no other option. The core consideration is - do the facts of this case satisfy the statutory test found in Article 171(3)(b)? There must be a reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child, she is likely to suffer significant harm. In this case the judge found that the child would suffer significant emotional harm on the basis of the evidence he had before him were the application not to be granted in that she would have to move placement and school.

[54] This case does not call for any radical departure of principle as to utilisation of the inherent jurisdiction. Rather, it involves consideration of whether the requirements of Article 173 were met as the judge decided they were. Two simple questions arise. Firstly, the court must decide whether the authority's case could be achieved through the making of some other order. Secondly, there must be reasonable cause to believe that if the court's inherent jurisdiction is not exercised the child is likely to suffer significant harm.

[55] In answering the questions required by Article 173 of the 1995 Order we bear in mind that the judge at first instance considered the evidence in some detail. It is accepted that the judge applied the correct legal tests. There is no challenge to the judge's power to make an order in favour of the Trust under the inherent jurisdiction. Therefore, this appeal is limited to how the judge assessed the evidence and evaluated the competing arguments in reaching his conclusion. In truth, Ms Connolly's argument boils down to an attack on the breadth of the order made under the court's inherent jurisdiction rather than the making of an order at all.

[56] In this regard much turned during the hearing before us on the notes of the formal Placement Disruption meeting of 28 March 2024. Ms Connolly, in support of her argument that the order made was disproportionate, referred to one section of the discussion where the following is recorded:

> "ES advised restrictions seemed to be getting more and more and they do not feel they are in a position to protect the boys any more. ES gave example of going to a Lego fun day in a church and SE remarked about being in a church. ES advised if it was only Sundays they could manage that."

["ES" is a reference to the foster carer]

[57] We are not at all satisfied that this is a fulsome note of the meeting, much less a note that we could rely on as absolute authority for the suggestion that the foster carers may have been willing to compromise on certain aspects of religious observance which then found expression in the order made by the judge. In addition, this note conflicts with the reality of this family's wider religious observance practices, which are not confined to church activities. Therefore, the argument made by Ms Connolly in reliance on the pithy note of one meeting referred to above cannot succeed.

[58] Further, we consider that the judge was right to look at a change of placement as a significant factor in this case. He rightly recorded that this child has had a turbulent upbringing in recent years. Also, that she has now achieved a stability in her current placement that was absent from the recent period in her mother's care. The point in relation to the child losing her school and companionship were she to have to move to satisfy the religious upbringing of her placement, the judge considered to be outweighed by the need for stability. He, therefore, decided that any move at this stage was likely to cause harm, having undertaken the welfare evaluation on a holistic basis. Thus, the judge determined that notwithstanding the Trust's failure to ensure the child was being brought up on the basis of her mother's religious beliefs, the welfare of the child demanded that the court exercise its inherent jurisdiction in relation to how parental responsibility should be exercised thereby permitting the child to engage in the religious practices of the foster carers.

[59] We find no error in law in relation to this evaluation by the judge. The judge was conscious of the strictures that Article 173 imposed. However, he then faithfully applied the facts of this case to the law. The said facts are particularly stark in that the child was settled, in a placement that facilitated her attendance at the mother's choice of school, and in a placement where she was happy. In those circumstances, it cannot be said the judge was wrong in deciding that he should grant leave for declaratory relief, and that there would be significant emotional harm caused if he did not grant the relief because the child would have to move placement.

[60] In addition, we consider that the judge was entitled when conducting his evaluation to place within the mix the mother's lack of availability at contact. Whilst he corrected certain errors on this issue in his original judgment, these were far from fatal, and this was undoubtedly a factor which should be taken into account.

[61] Finally, we have considered the point which, we think, had potentially most traction, namely that the judge failed to give adequate consideration to the fact that this was a short-term placement. The judge does refer to this issue as it is a relevant consideration. Thus, he has not left what is a material consideration out of account. However, this cannot be a factor that trumps all else. True it is, as Ms Connolly says, that foster carers could have an effective veto over arrangements in some circumstances.

[62] However, the outcomes in cases of this nature will invariably depend on the particular facts. The facts of this case, which are uncontentious, are undeniably adverse to the mother. Unfortunately, due to her own mental health deterioration, she was unavailable and remains unavailable to this child. Therefore, the foster carers' position is one which was sustainable after an overall and holistic welfare evaluation in this case. That is not to say that in other cases where the parent may be more stable that the Trust would not reach a different conclusion and potentially move a child to another foster placement, particularly if the child was in a short-term placement (or be found to have acted unlawfully if they did not do so). However, we are quite clear that the facts of this case do not support any such challenge to the judge's decision. Overall, we find that the judge's decision cannot in any respect be said to be wrong applying domestic law principles.

[63] Turning to the Convention arguments, the factual matrix to which the article 8 and article 9 ECHR issues must be applied in this case has the main ingredients set out in the background section above. Summarising, the child has been in foster care since August 2023. The mother last had direct contact with her child in February 2024. In October 2023 the Trust applied for a care order, proposing significantly reduced mother/child contact and the mother has not availed of any direct contact since 1 February 2024.

[64] While there has been some indirect contact, McFarland J observed that this is "… not really an adequate or effective substitute when explaining a belief system to a five-year-old child" (at para [32]): this was not challenged before this court. Furthermore, the social work reports indicate that on one occasion the child's grandmother conveyed to the child her mother's preference for not attending church with her foster parents. Since the commencement of the foster placement, the child – with the exception of any Sundays when contact with her mother occurred – has been attending Sunday morning church services and Sunday school with her foster parents and their two children and, occasionally, special event services. In addition, Bible stories are read to the children at night on occasions.

[65] The only contentious aspect of the foster placement with which this court is concerned is its religious observance dimension. It is not in dispute that it has been manifestly in the child's best interests that she should have had the benefit of this placement since its inception and continues to do so. Furthermore, facilities for reasonable contact by the child's mother have been available throughout and the mother has availed of these when able to do so. In these circumstances there can be no question of a breach of the mother's right to respect for family life or private life under article 8 ECHR.

[66] There remains the question of whether the religious observance dimension of the fostering arrangements breaches the mother's freedom of thought and conscience under article 9 ECHR. The following factors inform this court's determination of this issue: in the circumstances which have prevailed and continue to prevail, there has been no realistic alternative to the child attending the church and Sunday school activities weekly; there is no suggestion that there has been any coercion of the child; there is no indication that these activities have affected the child adversely; on the contrary, it is apparent to this court that these activities provide the child with a setting within which to engage with other children in a manner that is positively beneficial to the child's well-being and development; the mother has had opportunities to communicate her agnosticism to the child; the mother's freedom of espousal of agnosticism is unimpaired; the mother will remain free to convey her agnosticism to her child; and the grandmother has contributed to this exercise and may have further opportunities to do so.

[67] This court considers that in para [140] of *Ibrahim* (para [44] *supra)* the ECtHR was not promulgating an absolute principle that in every case where a parent wishes their child to be reared in accordance with the parents' philosophical conviction article 9 will apply. We take note of the important word "may" in this passage, together with the final sentence and, finally, the familiar theme of fact sensitivity. Furthermore, any absolute rule or principle of this kind would be incompatible with key elements of the ECHR philosophy, namely the balancing of conflicting interests and the intrinsic fact sensitivity of every case.

[68] We are satisfied that article 9 applies to the mother's situation because it protects the belief or conviction, namely agnosticism, which she espouses. However, the evidential foundation upon which the mother's article 9 case is advanced is manifestly slender. We consider that by virtue of the combination of facts and factors rehearsed in the immediately preceding paragraph no interference with the mother's freedom of belief and/or conscience has been demonstrated.

Human rights taxonomy

[69] In every human rights case, practitioners must first focus on the following two questions: does article 'XY' ECHR apply to the situation of the claimant? Is what the claimant is seeking to have respected protected by article XY ECHR? This is especially important in article 8 cases given the elasticity of what is protected by this Convention

provision. All claims, propositions and arguments should be formulated from the perspective of the "apply to" question, which is invariably the starting point. If article 'XY' ECHR does not apply to the factual situation under scrutiny, that is the end of the matter.

[70] However, where the "apply to" question invites an affirmative answer – which at the claim formulation stage means an arguably affirmative answer – the analysis then moves logically to a next stage, namely that of considering whether there has been an interference with article 'XY.' If this gives rise to a negative answer, that is the end of the enquiry. On the other hand, if this elicits a positive answer then, in the case of the qualified ECHR rights – article 8 being a paradigm example – the analysis proceeds to a further stage, namely an examination of whether any of the specified qualifications applies. It is only at this, the final, stage that considerations of proportionality arise, and a balancing exercise must be undertaken.

[71] All of the foregoing is reflected in a brief but important passage in one of the earliest decisions of the House of Lords following the introduction of HRA 1998. In the landmark decision of *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, one finds the following pithy statement in the speech of Lord Steyn at para [28]:

> "It is … important that cases involving Convention rights must be analysed in the correct way."

[72] In short, a carefully structured and staged analysis is essential in every Convention case. One further illustration, again taken from the highest judicial level, is instructive. In *R v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent)* [2004] UKHL 27, which concerned an immigration removal decision, Lord Bingham formulated the following template at para [17]:

> "In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

[73] As we have explained above, the application of this template in a given case must be preceded by the "apply to" question – which did not arise in *Razgar* where this issue was not contested (see paras [9]–[10]).

Conclusion

[74] We add an observation for the benefit of practitioners. The procedure, which was applied to this case at first instance, namely following the joint invitation of all parties, a judicial paper exercise supplemented by oral submissions, may have been the only feasible course in this case given the vulnerabilities of the mother and the other exigencies prevailing. However, this procedure will not be apt in all cases of this nature as other cases may well require oral evidence and further examination of facts.

[75] For the reasons given, which align with and extend beyond those of McFarland J, we affirm his order and dismiss the appeal on all grounds.