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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF CRAIGAVON, FAMILY CARE CENTRE

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995
IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER 1987

Between:

THE MOTHER and THE FATHER

Appellants

-and-

SOUTHERN HEALTH AND SOCIAL CARE TRUST

Respondent

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Ms McGrenera KC with Ms Walkingshaw (instructed by Pat Vernon Solicitors) for the Appellants
Ms Murphy KC with Ms Austin (instructed by directorate of Legal Services) for the Trust
Mr Magee KC with Ms Hyland BL (instructed by Deirdre Lavery Solicitors) for the Children's Court Guardian

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McLAUGHLIN J

Introduction

[1] This is an appeal by the parents of the child from a series of orders dated 5 November 2024 made by His Honour Judge McGurgan sitting in Craigavon Family Care Centre. The orders were:

(i) A care order pursuant to Article 50 of the Children (NI) Order 1995 that the child remain in the care of the Trust until he attains the age of 18.

(ii) An order approving the Trust's care plan for the adoption of the child.

(iii) An order pursuant to Article 18(1) Adoption (NI) Order 1987, freeing the child for adoption and dispensing with parental consent on the ground that it had been unreasonably withheld by both parents.

(iv) An order terminating the appointment of the Children's Court Guardian.

[2] There is some dispute about whether the appeal was out of time and the appellants have applied to extend time, insofar as it was necessary to do so. I have dealt with this issue separately below.

Governing legal principles

[3] The statutory provisions governing the making of a care order and freeing order are not in dispute.

[4] Pursuant to Article 50(2) of the Children (NI) Order 1995, prior to making a care order, the court must be satisfied that the threshold criteria for doing so have been established on the facts, namely that the child is suffering or is likely to suffer significant harm and that the harm, or likelihood of harm, is attributable to the care given to the child or likely to be given to the child if the order was not made and that the care is not what it would be reasonable to expect a parent to give.

[5] If satisfied that the threshold criteria have been met, the focus of the court must turn to the welfare of the child and determine whether any order should be made. In accordance with Article 3(1) of the 1995 Order, the welfare of the child must be the court's paramount consideration. The court must also apply the "no order principle" in Article 3(5), whereby it should not make any order unless it is first satisfied that to do so would be better for the child than to make no order. In making that assessment, the court will have regard to all of the circumstances of the case but must consider in particular, the welfare factors set out in Article 3(3), namely:

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
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> (b) his physical, emotional and educational needs;
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> (c) the likely effect on him of any change in his circumstances;
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> (d) his age, sex, background and any characteristics of his which the court considers relevant;
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> (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."

[6] In making that assessment and when determining whether a care order should be made, the court will scrutinise carefully the Trust's care plan for the child. The level of detail within the care plan will depend upon the circumstances of the case and the extent and nature of any uncertainties which exist about the future care of the child.

[7] The application of these statutory powers and principles in this jurisdiction were explained by Gillen J in *Re R & D* [2003] NIJB 229, which remains a leading authority.

[8] Where the court is considering any course of action in relation to the adoption of a child the court is subject to a separate and similar statutory duty under Article 9 of the Adoption (NI) Order 1987 to regard the welfare of the child as the most important consideration. Insofar as it is practicable to do so, the court must first ascertain and give due consideration to the wishes and feelings of the child, having regard to his age and understanding **(Article 9(b)**). It must also have regard to all of the circumstances of the case, with "full consideration" being given to:

"9(a)(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."

[9] An adoption order in relation to a child may only be made where a court has first made an order that the child should be free for adoption (**Article 16(1)**). A freeing order may be made with the agreement of both parents (**Article 17(1)**) or where the agreement of one or both parties is dispensed with on one of the grounds set out in Article 16(2). In this case, the relevant ground relied upon by the Trust is that the parents are withholding agreement unreasonably (**Article 16(2)(b)**).

[10] In two relevant decisions in recent years, the Supreme Court has given authoritative guidance on the interpretation and application of the equivalent provisions of the Children Act 1989 in relation to applications for care orders and freeing orders.

[11] In *Re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, the Supreme Court addressed a number of aspects of care proceedings, including the approach to the Article 50 threshold criteria, the role of article 8 at this stage of the proceedings and the role of an appellate court in reviewing a decision in care proceedings. While there were some differences in the views of the justices, the judgment which reflects the views of the majority on the key issues was given by Lord Wilson.

[12] In determining the correct approach to a threshold decision, the court affirmed that the concept of "harm" in Article 50 (as defined by Article 2(2) 1995 Order) includes both "ill-treatment" or "impairment of health or development." "Health" includes both physical and mental health and "development" includes physical, intellectual, emotional, social and behavioural development. Ill-treatment is an absolute concept. By contrast, Article 50(3) makes clear that impairment of development is a relative concept, requiring a comparison with the development which could reasonably be expected of a similar child. In determining whether the harm suffered is significant, the court undertakes a fact specific inquiry which will include both the nature of the risks and the likelihood of those risks materialising. Significant harm requires something unusual, over and above human failure or inadequacy. The court must assess the existence and extent of a causative connection between the parenting ability of the parents and the ill-treatment or impairment of development likely to be suffered by the child. In doing so, it is not sufficient that the parents may have unusual parenting styles; demonstrate eccentricities; hold extreme views or even have engaged in criminality. The focus at the threshold stage is not upon whether a better alternative exists for the child, but whether the child is likely to suffer significant harm if they remain in the care of the parents (eg Lord Wilson, at paras 25-28).

[13] The Supreme Court in *Re B* also made clear that a decision on threshold did not amount to an interference with the article 8 rights of either the parents or the child. An interference only occurred at the welfare stage if the court decided to make any order. If it does so, a court is required to ensure that the order is necessary and proportionate to ensuring the welfare of the child (eg Lord Wilson, at para [29]). In the case of an application for a care order in which there is a care plan for adoption, Lord Wilson explained at [34]:

> "34. … Yet, while in every such case the trial judge should ….. consider the proportionality of adoption to the identified risks, he is likely to find that domestic law runs broadly in parallel with the demands of article 8. Thus domestic law makes clear that: (a) it is not enough that it would be better for the child to be adopted than to live with his natural family (In *re S-B (Children) (Care Proceedings: Standard of Proof*) [2010] 1 AC 678, para 7); and (b) a parent's consent to the making of an adoption order can be dispensed with only if the child's welfare so

> requires (section 52(1)(b) of the Adoption and Children Act 2002). There is therefore no point in making a care order with a view to adoption unless there are good grounds for considering that this statutory test will be satisfied. The same thread therefore runs through both domestic law and Convention law, namely that the interests of the child must render it necessary to make an adoption order. The word "requires" in section 52(1)(b) "was plainly chosen as best conveying … the essence of the Strasbourg jurisprudence": In *re P (Children) (Adoption: Parental Consent)* [2009] PTSR 150, para 125."

[14] Lord Wilson's observations were made in the context of the statutory test under section 52(1)(b) of the Adoption and Children Act 2002 which uses slightly different language to Articles 16 and 18 Adoption (NI) Order 1987. However, as set out below, the substance of the test remains the same, in light of the common requirements of the Convention.

[15] In *Re B*, the Supreme Court also considered the question of the standard of appellate review in care order proceedings. Ultimately, it concluded that at the threshold stage, the review of a decision on whether the Article 50 threshold for intervention had been reached "should be conducted by reference to simply whether it was wrong" (per Lord Wilson, at para [44]). Similarly, at the welfare stage the review of a decision whether or not to make a care order is also based upon whether the court was "wrong." The Supreme Court noted that the application of this test is likely to be more complex than its formulation. At both stages, the court will be required to examine whether the judge made an error of principle or whether the decision is unjust because the judge made a serious procedural error or incorrectly understood or omitted to consider materials etc. The review of the decision at the welfare stage is also required to consider whether the requirements of the Convention were correctly followed by the judge, applying the principles of appellate review of a proportionality assessment, rather than a fresh assessment on the merits (eg. *Re Abortion Services (Safe Access Zones)(Northern Ireland) Bill* [2023] AC 505, at [28]-[33], per Lord Reed PSC; *Dalston Projects v Secretary of State for Transport* [2025] UKSC 30), at [142]-[148]).

[16] In *Re H-W (Children)* [2022] 1 WLR 3243, the Supreme Court considered again the appellate standard of review in proceedings in care proceedings. Like this case, *Re H-W*, involved a care plan for adoption. At para [39], the Supreme Court confirmed the three stages of decision making in a care order application: (i) fact finding; (ii) threshold and (iii) welfare. The case involved an application for a care order for a number of children after sexual abuse had been perpetrated against one of them by a family member. The appeal concerned the third stage in which the key issue was the proportionality of a care order in relation to all children in light of potentially less intrusive measures which may have been available to the judge.

[17] In explaining the correct approach to proportionality, the Supreme Court emphasised the legal effect of a care order, namely, to confer parental responsibility upon the Trust and also to restrict the exercise of parental responsibility by parents to the extent determined by the Trust. A care order was therefore a significant interference with the private and family life of the parents, and the order could only be made where it was necessary and proportionate to the aim of enabling the child or children to grow up free from harm. A care order with a plan for adoption was the most intrusive form of care order insofar as it established the legal pathway to the child being freed for adoption and thus the severance of the parent-child legal relationship with limited, if any, post adoption contact. At para [47], the Supreme Court expressly approved the following post *Re B* summary of principle. It had been stated by McFarlane LJ at para [44] of *Re G (Care Proceedings: Welfare Evaluation)* [2014] FLR 670 to describe the task of a first instance judge considering the welfare stage of a care order application:

> "47. …. The judicial task is to evaluate all the options, undertaking a global, holistic and … multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option … 'What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.'"

[18] The Supreme Court held that this approach represented "the accepted standard for the manner in which a contemplated child protection order must be tested against the requirement that it be necessary and proportionate" (at para 47). It also reaffirmed the decision in *Re B* that the standard of review on appeal from a decision to make a care order, including an appeal on the ground of disproportionality, was whether the decision was wrong. It added the following observations:

> "48. The very clear decision in *Re B*, albeit by majority, is that the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of rehearing. It follows that it is not incumbent upon an appellate court to undertake a fresh evaluation for itself of the question of necessity and proportionality. For the reasons clearly stated by, in particular, Lord Neuberger PSC at paras 83–90, such is contrary to principle, as well as undesirable in practice…
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> 49. In a case where the judge has adopted the correct approach to the issue of necessity and proportionality, the

> appellate court's function is accordingly, as explained in *Re B*, to review his findings and to intervene only if it takes the view that he was wrong. In conducting that review, an appellate court will have clearly in mind the advantages that the judge has over any subsequent court…
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> 51. On this appeal the real issue is not whether the appellate court is satisfied that the judge reached a conclusion which was wrong. The question is rather concerned with the adequacy of the judge's process of reasoning in reaching his conclusion. This appeal asks the question whether the judge did go through the rigorous process described at para 47 above or whether he proceeded too directly from his finding that the threshold criteria were met to the conclusion that it followed that a care order ought to be made. If, on appeal, it is found that a judge has unduly telescoped the process, and has not made the side-by-side analysis of the pros and cons of each alternative to a care order, then the likely conclusion is that his decision is, for that reason, flawed and ought to be set aside."

[19] In the event, the Supreme Court in *Re H-W* found that the judge had not adequately assessed the range of powers available to the court as required by the equivalent of Article 3(3)(g) of the mandatory statutory welfare factors.

[20] In this jurisdiction, the leading authority on the interpretation and application of these principles is the decision of the Court of Appeal in *A Health Trust v A Mother and Father* [2022] NICA 63. The Court of Appeal allowed an appeal against the decision of Larkin J, who refused to make an order freeing the child for adoption. A full care order had previously been made in respect of the child, and the judge favoured the continuation of long-term foster care arrangements rather than adoption. The child had been removed from parental care shortly after birth. By the time of the decision of Larkin J, the child had been in foster care for approximately four years. In the interim years, a further sibling had been born to the couple who was ultimately returned to parental care following a positive residential and community assessment.

[21] In allowing the appeal, the Court of Appeal affirmed the appellate standard of review and requirements of a first instance judge in the following terms:

> "[25] The appellate test flows from *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 approved in *H-W Children* [2022] UKSC 17 and is simply whether the judge was wrong. The judge may be wrong by

> misapplying the law or where he or she does not properly assess the various options for a child in a case such as this.
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> [33] Every case is fact specific but the ultimate task in a freeing for adoption case is for a court, having analysed all of the options side by side, to reach a decision which is in the best interests of a particular child. In our view there was ample material in relation to the benefits of adoption for Joy which the judge has not reflected in his analysis."

[22] In the event, the Court of Appeal concluded that the judge had not conducted a sufficient analysis of all of the available options, in particular the benefits of adoption. To this extent, the judge had been "wrong", because he had not followed the correct procedure or taken account of all of the relevant information when refusing to make the freeing order.

[23] In an application for a freeing order, the test for dispensing with parental consent under Articles 18 and 16(2)(b) of the Adoption (NI) Order 1987, must be considered separately from the decision on a care order. However, there will inevitably be some overlap between the two issues, particularly in a case such as this where both applications are before the court at the same time. Nevertheless, in *A Health Trust v A Mother and Father* [2022] NICA 63, the Court of Appeal reiterated the need for separate consideration of the question of whether parental consent should be dispensed with. Where the ground relied upon was that consent was unreasonably withheld, the Court of Appeal (at [35) affirmed the test established by the House of Lords in *Down and Lisburn HSCT v H & Anor* [2006] UKHL, at [67]–[70], per Lord Carswell, which included the following:

> "… 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 the question." (per Lord Carswell in *Down & Lisburn HSCT*)

[24] The test for whether consent has been unreasonably withheld is an objective one, but which has subjective elements insofar as it takes account of the individual

circumstances of the parent and asks whether a reasonable parent in their position would provide consent.

[25] As appears clear from the above, article 8 will be engaged both at the welfare stage of an application for a care order and also when a court is considering whether to make a freeing order. In both cases, the order may only be made where the court is satisfied that the order is necessary and proportionate in furtherance of the aim of establishing the permanent living arrangements for the child, in light of the extent of the interference with article 8 rights. For this purpose, the best interests of the child is the guiding principle, and the welfare of the child is the paramount consideration. In every such case, the court should explain its decision, having regard to Convention requirements. A failure to do so may amount to a sufficiently serious error to justify appellate review (see eg *A Health Trust v A Mother and Father* [2022] NICA 63 (at [41]).

[26] There are numerous decisions of the Strasbourg Court in this area. A review of the key decisions illustrates the following principles, which must guide the exercise of a court's power to make care orders and/or freeing orders.

[27] In *KA v Finland* [2003] 1 FCR 201, the court drew a distinction between the initial decision to take a child into care and the subsequent review of those arrangements, during the currency of the care proceedings, in order to assess the possibility of reunification. At the stage of taking a child into care, it described the principles as follows:

> "[92] The court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8. An interference with that right constitutes a violation of this provision unless it is 'in accordance with the law', pursues an aim or aims that are legitimate under Art 8(2) and can be regarded as 'necessary in a democratic society'. The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the 'necessity' for such an interference with the parents' right under art 8 of the Convention to enjoy a family life with their child.
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> [93] In determining whether such a 'necessity' existed in the given circumstances at the given time, the court will consider whether the reasons adduced to justify these

> measures were relevant and sufficient for the purpose of art 8(2) of the Convention…"

[28] Where the care arrangements are continued and further intrusive measures are under consideration (eg. a reduction in contact), closer scrutiny will be applied to the justification put forward by the state authorities. In addition, the state authorities are subject to a positive duty to take measures to facilitate the reunification of the family and to keep under review progress towards that objective. However, the attainment of that objective is not an absolute obligation. The principles were explained as follows:

> "[138] 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. After a considerable period of time has passed since the 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.
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> [139] Whereas the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into public care, 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…"

[See also *K & T v Finland* [2001] 2 FLR 707, at 154 et seq.]

[29] The ECtHR applied these principles in *R & H v UK* [2011] 2 FLR 1236, which concerned a freeing order made by the Northern Ireland High Court. The court made clear that the positive duty under article 8 did not require that the authorities

make "endless attempts" at reunification. It expressed the duty in the following terms:

> "81. …The court would also recall that, while national authorities enjoy a wide margin of appreciation in deciding whether a child should be taken into care, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Elsholz v Germany* (Application No 25735/94) (2002) 34 EHRR 58, [2000] 2 FLR 486, para 49, and *Kutzner v Germany* (Application No 46544/99) (2002) 35 EHRR 25, para 67). For these reasons, measures which deprive biological parents of the parental responsibilities and authorise adoption should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests (see *Aune v Norway* (Application No 52502/07) (unreported) 28 October 2010, para 66; Johansen, cited above, para 78 and, mutatis mutandis, *P, C and S v United Kingdom*, para 118). However, mistaken judgments or assessments by professionals do not per se render childcare measures incompatible with the requirements of Art 8 of the European Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children vis-à-vis members of their family are proved, retrospectively, to have been misguided (*RK and AK v United Kingdom* (Application No 38000/05) (2008) 48 EHRR 707, [2009] 1 FLR 274, para 36).
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> …
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> 88. … it is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that she be placed permanently in a new family. 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 (*Pini and Others v Romania*, nos. 78028/01 and 78030/01, § 155, ECHR 2004 V (extracts)). 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 (see, mutatis mutandis, *K and T v Finland*, cited above, § 155; *Hofmann v Germany (dec.)*, no. 66516/01, 28 August 2007). Similar considerations must also apply when a child has been taken from his or her parents."

[30] The ECtHR described the applicable principle in similar terms in *YC v UK* [2012] 55 EHRR 967, where it stated:

> "134. The court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that 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 be maintained."

[31] The key principle which emerges from the ECtHR caselaw is that any decision to take a child into public care amounts to an article 8 interference, which must be justified. The relevant public interest is the welfare of the child, thus requiring account to be taken of the strong public interest in maintaining natural family ties and relationships alongside the need for the child to grow up in a safe environment. Any order must be necessary and proportionate to the individual circumstances of the child. A freeing order is the most intrusive form of interference and therefore requires particularly careful scrutiny of the circumstances and clear justification. The best interests and welfare of the child are the primary considerations. However, justification requires something more than merely an assessment that it would be

better for the child to be adopted than to remain with the parents. The focus must be upon the harm to which the child is likely to be exposed if returned to parental care. The proportionality assessment should therefore be conducted with a focus upon the harm identified at the fact finding and threshold stages.

Extension of time

[32] The appellants have applied for an extension of time to appeal. Both orders were made on 5 November 2024. The statutory time limits for appeal to the High Court from the Family Care Centre are:

(i) 14 days for the care order [Rule 4.23 Family Proceedings Rules (NI) 1996].

(ii) 21 days for the freeing order [Order 55, Rule 2(1) Rules of the Court of Judicature (NI) 1980].

Accordingly, the deadlines for an appeal to the High Court against the care order and freeing order were 19 and 26 November 2024 respectively.

[33] Rule 4.23(3) requires that in an appeal to the High Court against a care order, the appeal notice shall be "filed and served" within 14 days of decision below. The High Court has power to extend time for such further period as it may direct (Rule 4.23(3)(c)). For an appeal to the High Court against a freeing order, Order 55, requires that the appellant "lodge" (Rule 2(1)) and "serve" (Rule 3) the appeal notice within 21 days of the decision below. The court has power to extend time for an appeal pursuant to Order 3, Rule 5(1).

[34] While both sets of Rules require that the notice of appeal is both filed in court and served upon the other parties, neither prescribes the sequence in which they should occur. In *Magill v Ulster Independent Hospital* [2010] NICA 33, Girvan LJ analysed the similar procedural requirements under Order 59, Rule 4 for an appeal from the High Court to the Court of Appeal. He explained that the correct sequence was first for service of the notice of appeal upon affected parties and thereafter for it to be lodged in court. He stated that awaiting authentication of the notice from the office prior to service was "pointless" and may "put the appeal out of time." The clear principle emphasised by Girvan LJ is that a valid appeal requires <u>both</u> service and filing of the appeal notice.

[35] In this case, the appellants prepared a single notice of appeal against both orders made on 5 November 2024. The deadlines for appeal were 19 November 2024 (care order) and 26 November 2024 (freeing order). The notice of appeal was signed on 29 November 2024, filed in court on 4 December 2024 but was not served on either the Trust or the Guardian until 20 January 2025. Each stage of the appeal process was therefore out of time in both appeals. The appeal was not complete until 20 January 2025, which was just under nine weeks and eight weeks out of time

for the care order and freeing order respectively. No application for an extension of time was made within time, nor for a stay of the orders below.

[36] The application to extend time was grounded upon an affidavit of Mr Patrick Vernon, solicitor, sworn on 5 February 2024. In summary, he averred that following the decision of HHJ McGurgan, there was a breakdown in relations between both parents and their respective counsel. It was therefore necessary to instruct a new team of counsel. He averred that in light of the breakdown it was not appropriate to instruct the previous counsel to advise upon or prepare grounds of appeal. During this period, it was also necessary to apply for and to secure legal aid for an appeal. The legal aid application was made and granted on 29 November 2024. During this period, the priorities of the parents also lay in maintaining existing levels of contact with the child, pending appeal. The notice of appeal was drafted by new counsel and signed by Mr Vernon on 29 November 2024 and was then filed in the High Court on 5 December 2024. The delay between filing and serving represented the vast majority of the delay (six weeks, four days) and was explained as an "administrative oversight" on the part of Mr Vernon's office. No further detail or explanation was provided, either on affidavit or in submissions.

[37] The leading authority in this jurisdiction on extensions of time under Order 3, Rule 5(1), is *Davis v Northern Ireland Carriers* [1979] NI 19. While the court will take account of all of the circumstances of the case, including the underlying merits of the claim/appeal, the factors identified in *Davies* are:

(i) Whether time was sped and whether the application was made before expiry of the time limit;

(ii) The nature and extent of any default on the part of the party seeking the extension;

(iii) The effect on the other parties of granting the extension and whether costs are an adequate remedy;

(iv) Whether a hearing on the merits has taken place;

(v) Whether the proceedings raise a point of substance, which may not otherwise be put forward.

(vi) Whether the proceedings raise a point of broader public rather than particular importance which may be of assistance to other proceedings, rather than simply the parties.

(vii) The Rules of Court are there to be obeyed.

[38] The Court of Appeal has recently reviewed and affirmed these principles *in Mahmud v Home Office* [2023] NICA 4, in the context of an appeal to the High Court

in a judicial review of an immigration decision. The court observed that the *Davis* principles should not be applied in a mechanistic manner, nor should they be regarded as an exhaustive list of relevant considerations (at [11]). In addition, any application of those principles should also take account of the overriding objective in Order 1A, Rule 3 and any obligation upon the court or other state authorities arising under the Human Rights Act 1998.

[39] The *Davis* principles have also been confirmed and applied by the NI Court of Appeal in the context of appeals in children and family proceedings in *Berisha & Berisha* [2024] NICA 81 and *A Father ("EF") v A Health and Social Care Trust* [2025] NICA 26.

[40] In *JG's Application* [2014] NIFam 2, at [12]–[23], Maguire J analysed the application of the *Davis* principles in the context of an appeal against a decision under the Children (NI) Order 1995. He formulated a list of considerations which, in substance, replicate those set out in *Davis*, but also emphasise the importance of the impact which the delay has had upon the child or children in question and any obligations arising under the Human Rights Act.

[41] The decision in *JG* was followed and applied recently by Mc Farland J in *A Mother v A Health and Social Care Trust* [2023] NI Fam 14, which concerned an extension of time to appeal a Freeing Order. The appeal was filed just under four months out of time and the extension application was ultimately refused. McFarland J again emphasised the need to apply a holistic rather than mechanistic approach to the assessment of relevant considerations. He appears to have been particularly influenced by the extent of delay, the impact on the child during that period, the merits of the appeal and the absence of any meaningful explanation by the appellant.

[42] Two further general points of principle are important. First, the statutory rights to appeal against both a care order and a freeing order are unqualified rights. They are exercisable subject only to the procedural requirements for an appeal, which includes the court's power to extend time. There is no requirement to obtain leave to appeal, nor do the relevant statutes restrict the permissible grounds of appeal, save that it is an appeal on a point of law only. Subject to compliance with the procedural requirements, parents therefore have a statutory right to pursue an appeal against a decision that their child should be taken into care or freed for adoption. Second, the statutory time periods prescribed for both forms of appeal are short. They are respectively one third and one half of the six week period allowed under Order 59, Rule 4 for appeals from the High Court to the Court of Appeal. Both of these periods reflect the importance which the legislature has placed upon the need for prompt action in cases concerning the welfare of children and are consistent with the statutory presumption in Article 3(2) of the 1995 Order that delay in determining any question is likely to prejudice the welfare of the child.

[43] Turning to the facts of this case, it is clear that the appeal does not raise any issue or point of law of broader public interest, as opposed to the interests of the parties. This is not to understate the importance of the issues for the parties. As set out above, the orders made in this case represent the most serious interference with the article 8 rights of the parents and child which can arise under the Children Order. Accordingly, if an extension is not granted, the order below will continue in force and have lifelong effects for both parents and the child. The issues at stake could not therefore be more profound for all concerned.

[44] It is clear that the overall period of delay (ie 7–8 weeks) is substantial, when compared with the statutory time periods of 14 and 21 days. However, I consider that it is important to look beyond those headline dates. In the first instance, it is important to recognise that both the care order and the freeing order were made on the same date, following a single hearing, rather than two sequential hearings, as occurred in *A Mother v A Health and Social Care Trust* [2023] NI Fam 14 (See chronology at para [9]). Since the care plan was for adoption, there was an obvious overlap between the two sets of proceedings and they were, in substance, treated as one set out proceedings. It is therefore somewhat artificial to treat the two appeal periods differently. For example, if the appeal against both orders had been perfected after 20 days, it would be difficult to conceive of circumstances in which a court would refuse to extend time for the care order appeal, but yet hear the appeal against the freeing order. I do not therefore consider it to be inappropriate to focus upon the later appeal period when considering the extent of delay.

[45] Considering the reasons for the delay, it is clear that the parents were not inactive during the relevant period. The primary explanation for delay during the appeal period was the fact that there was a breakdown in the relationships between both parents and their respective counsel. While no details have been provided about the reasons for the breakdown, this is an unfortunate occurrence which is not unknown, particularly in this area where so much is at stake for the parents and the effects of the order are lifelong in nature. It is difficult for the court to attribute "blame" for these events, save to say that the parents did manage to secure alternative representation, make a legal aid application, secure legal aid, provide instructions to appeal and approve a draft notice of appeal, by Friday 29 November, which was three days beyond the 21 day appeal period. No explanation has been provided as to why the Notice was not filed the same day. However, it is of note that the parents were represented by Mr Vernon throughout this period and it is reasonable to infer that responsibility for taking the necessary procedural steps to perfect the appeal lay with him. The Notice was ultimately filed on Wednesday 4 December, which represents a further delay of three working days and a total delay of eight days in completing the first procedural stage in bringing an appeal.

[46] The parents were therefore not inactive during this period. They were clearly alert to both the right to appeal and the requisite timeframe. While they did not complete the key steps which were within their control within that time, their delay was modest, and it is difficult for the court to attribute blame in circumstances where

there appears to have been a bona fide breakdown in relationships within their previous counsel.

[47] The delay between filing the appeal on 4 December 2024 and serving it on 20 January 2025 is much more difficult to explain. Indeed, no meaningful explanation has been provided, save that Mr Vernon attributes it to an "administrative oversight" within his office. This is a highly regrettable omission. While the acts or omissions of a legal representative which result in a time limit being missed will not, on their own, provide grounds for an extension, it is clearly a relevant factor and, in this case, there is no material before the court on which it could attribute this delay to any act or omission on the part of the parents. Unlike other forms of civil proceedings, the possibility of recovering damages from the legal representative is not an effective alternative remedy and this has been candidly accepted by the Trust in submissions. Similarly, neither the Trust nor the Guardian have identified any prejudice to their ability to conduct the appeal, as a result of the delay. This is different to the potential prejudice to the child, which is considered below.

[48] In reaching an overall view on whether to extend time, I must also consider the effect of the delay upon the child and his welfare interests. In this case, the Trust has again acknowledged candidly that the delay in serving proceedings has not affected its planning for the future placement of the child. Following the making of the care order and freeing order, no application was made to stay those orders or to stay the implementation of the care plan. This may have been on account of the breakdown in relationships between the parents and previous counsel. The Trust therefore commenced implementation of its plan for phased reduction of parental contact. However, as pointed out by the Guardian, this has not been implemented in full and parental contact has continued. The Guardian therefore considers that the delay has been prejudicial to the child. However, this comment must be considered in light of the Guardian's support for both Trust applications and its view that both orders are in the best interests of the child and reflect his welfare needs. The result is that the prejudicial effects of the delay has perhaps been more keenly felt by the parents themselves, in the form of reduced contact, rather than the child for whom the care plan has progressed – which has been assessed to be in his best interests.

[49] Taking account of all of these factors and applying a holistic approach, I consider that it is appropriate to extend time for appeal against both the care order and the freeing order. In doing so, I give particular weight to the fact that steps were taken by the parents to appeal reasonably promptly and that the very substantial part of the delay is attributable to the omission of their solicitor rather than any conduct on their part. I also give weight to the lifelong consequences of the orders for both the child and the parents and also the severity of interference of those orders with the article 8 rights of both. While I consider that the delay is likely to have had some prejudicial effect upon the child insofar as it has prolonged the uncertainty over his future placement, I have no information to suggest that any such effect will be long lasting or that it will have a decisive influence on his future

prospects, particularly when compared against the overall duration of the care proceedings to date. The child was taken into care shortly after his birth in December 2022. By the time the orders were made, nearly two years had therefore already lapsed. The extent of any prejudice to the child from the parents' delay should also be assessed against that baseline.

[50] On balance and taking account of all factors, I consider that it is appropriate to extend time for the period of 8–9 weeks, during which the Trust care plan was already being implemented (albeit not completed) and which was attributable primarily to the omissions of the parents' solicitor rather than their own default. Time is therefore extended for the appeals against both orders until the 20 January 2025, when the appeals were perfected by service upon the Trust and Guardian.

Background to Trust intervention

[51] The child was born in December 2022. On the same date, the Trust filed an application for an interim care order, which was granted on 15 December 2022. A Guardian ad Litem was also appointed on 15 December 2022.

[52] The mother has three older children who were born in 2015, 2017 and 2020. All three children have been the subject of care orders and have ultimately been placed for adoption. The adoption of the third child was finalised in 2022, during the course of her pregnancy with the child. The Trust has had continuing and ongoing involvement with the mother since the birth of her first child in 2015. The Trust's concerns about the mother during the period of its involvement with that were summarised in its report supporting the interim care order application in respect of this child. They were "a chaotic lifestyle, drug and alcohol misuse, poor engagement with mental health services, limited intellectual ability, poor emotional capacity to address her difficulties and abusive relationships." Assessments undertaken during the proceedings leading to the adoption of her third child were considered by the Trust as evidencing "poor engagement with services, lifestyle concerns regarding relationships and drug/alcohol misuse." Rehabilitation of the third child to the mother's care was ruled out and a freeing order was made shortly before the birth of this child.

[53] The father also has three other children, none of whom are in his care. His eldest child, born in 2014, is in the care of his mother. His second child, also born in 2014 and his third child born in May 2016 were adopted in 2017. Between 2011 and 2021, he had a history of 31 convictions for criminal offences which were indicative of a propensity for violence and/or aggression. He also has a non-conviction history of violence and aggression, including domestic incidents with his family and a history of mental health difficulties, including active suicidal intent in late 2014. He had a history of adverse childhood experiences. The trauma associated with those experiences negatively impacted upon his stability in adulthood. His relationship with the mother commenced in June 2021. His problems with drug and alcohol misuse continued during the course of the mother's pregnancy with this child and

he attended initial assessments with the Community Addictions Team in June 2022. He was subsequently discharged and failed to attend face to face appointments. At the time of the Trust's intervention the Trust considered that he lacked insight into the depth of the mother's difficulties and was unable to be the primary protective parent.

[54] The Trust's application for an ICO was founded upon a series of risks of harm to the child, which may be summarised as follows:

(i) Exposure to domestic violence, poor mental health and recreational drug misuse.

(ii) Exposure to physical aggression and hostility on at least one occasion during pregnancy.

(iii) The ability of both parents to act protectively in order to safeguard the child from harm.

(iv) Limited family support.

(v) The mother was unable to identify any family member as capable of providing a support network. Those identified by the father were unable to progress with kinship assessments.

(vi) The mother's limited past engagement with social services, together with her presentation towards or ability to accept advice from social work professionals.

(vii) Minimisation and non-acceptance of risk factors associated with lifestyle.

(viii) Inability of the mother to regulate her emotions in interactions with both professionals and others, resulting in concern about their ability to work in partnership with services in future years.

(ix) Risk to the child of suffering physical and emotional harm due to domestic violence in the parents' relationship.

(x) Limitations in the mother's cognitive ability and insight into the Trust's concerns with resulting risks to the safety and well-being of the child, including the risk of neglect.

[55] On the basis of these facts and materials, the court considered that there were reasonable grounds for believing that there was a likelihood of significant harm, if the child was returned to the parents' care and it made an interim care order. The child was therefore discharged from hospital into a foster placement and has

remained in the care of the foster carers since that time. In June 2024, the foster carers asked to be considered as prospective adoptive parents for the child.

Parental assessments, therapy and education work

[56] Between the birth of the child and the decision below, a large number of assessments were undertaken involving one or both parents, together with offers of both therapeutic and education work, some of which was completed by the relevant parent, but some of which was not. A summary of the work undertaken and/or offered is as follows:

Dec 2022 - Nov 2024	Ongoing social work assessment by the Trust.
Dec 2022 - Feb 2024	Comprehensive parenting assessment.
2022 - May 2024	Primary Mental Health Team treatment of the mother: weekly during pregnancy; fortnightly until June 2023; monthly until August 2024.
Jan 2023 - Feb 2023	Personality Disorder Service. Eight sessions completed by mother.
Apr 2023 - May 2023	Incredible Baby Years Programme (both parents – six sessions).
Apr 2023 - May 2023	Dialectical Behaviour Therapy (DBT) – mother. One session attended. Mother unable to continue with group work. 1:1 sessions unavailable.
Apr 2023	Hair follicle testing for both parents. Testing was conducted against a range of drug groups. Both parents returned negative results for each drug group tested.
June 2023 - July 2023	Relapse Intervention and Prevention Programme (father). No prior professional help. Unsuitable for addiction therapy due to self-reported abstinence. Six sessions completed. Positive Engagement Programme completed.
Aug 2023 - Nov 2023	Clinical psychology assessment by Dr Pollock (mother and father). Previous assessment carried out on mother for previous care proceedings.
Oct 2023	Trauma counselling referral (father). Agreed to commence therapy at conclusion of independent social worker risk assessment. Referral not ultimately taken up.

Jan 2024	Healthy Relationship Educative Programme undertaken by independent social worker (father). Programme ceased after 4/7 sessions due to unwillingness to continue, lack of insight and inappropriate motivation by father.
Jan 2024 - May 2024	Women's Aid counselling (mother).
Mar 2024	Independent social worker parental risk assessment (father).
Apr 2024	Hair follicle test (mother and father). Both parents tested positive for cannabis indicating regular cannabis use over a three-month period.

Factual background and key relevant events

[57] Since this appeal proceeds on a point of law only and since this court is not the primary fact finding tribunal, it is not proposed to set out a detailed set of factual findings. The findings of fact made by HHJ McGurgan are set out in his detailed judgment below. However, the chronology of events remains important to the grounds of appeal. A summary of key relevant events is therefore set out below. Of particular importance to the grounds of appeal is the developing deterioration in relationships between the parents and Trust officials, including events during the Autumn/Winter 2023 and a major scalding incident suffered by the child while in the charge of his foster carers in March 2024.

[58] On 15 December 2022, an interim care order was made by District Judge (MC) Keown in Craigavon Family Proceedings Court and a Guardian ad Litem was appointed to represent the interests of the child. The court had the benefit of a detailed social worker report dated 24 November 2022 which described the concerns summarised above. The case was then transferred to the Family Care Centre. In a report dated 6 March 2023, the Guardian expressed support for the making and maintenance of the ICO. Recommendations were made by the Guardian for therapeutic and educative work for both the father and mother, together with recommendations for psychological assessments and hair follicle drug testing for both parents. The report stated:

> "… [the parents] need to address their own issues before they can be in a position to fully meet their child's needs. This includes: alcohol/substance misuse; domestic violence and aggression; mental health issues; previous trauma and how that has affected their ability to parent and nurture their child. They need to demonstrate a period of abstinence, a commitment to contact and an ability to engage meaningfully in the services and

> assessments offered, all of which, at this point, they appear willing and motivated to do."

[59] On 21 April 2023, both parents were subject to hair follicle testing for a range of drug groups. Negative results were returned for both parents for each drug group tested.

[60] In a court social worker report dated 9 June 2023, the Trust noted that recommendations following expert assessments of each parent remained outstanding. The Trust committed to developing a programme of work over a six-month period once the recommendations were received. The objective of the programme was "… working towards rehabilitation if they maintain their current progress." The parents had recently completed successfully the Incredible Baby Years Programme. The Trust commended the commitment of the parents to contact (attending 72 out of a possible 73 appointments) and proposed to increase one of the four weekly contact sessions from three hours to five hours. The report records that the Trust "appreciate and acknowledge the level of commitment and work completed by [the parents] to date, and are commended for their level of engagement thus far…" The need to continue assessments and to sustain progress was noted by the Trust along with the following comment:

> "It is important that [the parents] continue to engage openly and honestly with the Trust in order for the plan of rehabilitation to be achieved. It is essential that [the parents] remain abstinent from alcohol and drugs, maintain appropriate home conditions and an appropriate lifestyle."

[61] In August 2023, Dr Philip Pollock conducted a psychological assessment of the father. He made recommendations for educative and therapy work. He recommended an assessment of contact, following which, consideration should be given to a residential assessment of parenting capacity. If sufficient progress was made during the assessment of contact and a residential assessment did not appear to be necessary, then a comprehensive parenting assessment "would be appropriate." He recommended monitoring of the parental relationship and warned that "if [the father] returns to any form of substance misuse as a means of coping, this choice would significantly inflate risk of harm to others including [the child]…" He made a similar observation in relation to the father resorting to criminal conduct or "any form of violence towards property or people", including if the child was present.

[62] At a LAC review on 28 September 2023, the Trust decided that the weekly five hour contact session could take place in the parents' home, supervised by Trust staff. The care plan remained for concurrent care, with a view to progressing rehabilitation to parental care. It was recorded that the parents had raised a concern about the child's presentation during some contact. His fingernails and ears appeared unclean

and animal hair appeared to be present on his clothing. The Trust recorded no concerns about the level of care afforded to the child in placement but did raise the parents' concerns with the foster carers and encouraged the parents to complete basic care tasks during their own family visits. Unannounced home visits during this period raised no concerns about alcohol or drug use by the parents and the Trust recognised the positive steps taken by the parents to make lifestyle changes and prioritise the welfare of their son.

[63] Between September-December 2023, a number of events occurred which appear to have coincided with a deterioration in relationships between the parents and Trust staff.

[64] On the day of September 2023 LAC review, the mother contacted the Trust after the meeting to discuss an incident which had occurred the previous day and which had resulted in a Facebook post by a third party and associated commentary. The incident involved a confrontation on a public bus between the mother and a number of young persons who were vaping and apparently blowing smoke in the mother's face. The incident was captured by one of the young persons on video and later posted on Facebook. The video captured the father stating that "she'll pull your head off when you get off the bus, wait you'll see…" and the mother presenting in a verbally and emotionally volatile state threatening to harm and to kill the minors. A home visit was conducted by staff to discuss the footage. Recorded concerns by the Trust included the inability of the mother to implement educative work she had already undertaken relating to emotional regulation and the inability of the father to act in a calming or protective manner to de-escalate the situation. The Trust also considered that the father's response during the visit was to minimise the significance of the incident or of the insight which it offered into the lifestyle and behaviour of the parents in the absence of Trust staff.

[65] On 16 November 2023, the Trust received an anonymous report that the mother was taking Pregabalin tablets and smoking cannabis on a daily basis. It was also reported that she had been seen pushing the child's pram while under the influence and using cocaine. The Trust undertook an unannounced home visit that afternoon. Upon arrival, the father was sleeping but was easily awoken and engaged in dialogue with officials. The Trust reassured the parents that they had previously held no such concerns or observed problems during contact. The parents speculated that the report may have been made maliciously by a neighbour. They denied drug use and referred to the fact that they have regular contact with other family members who were likely to have noticed and reported any signs of drug use by the parents.

[66] The following day, the mother contacted the Trust in a highly distressed and emotionally dysregulated state. She advised of a separate incident which had the previous day (ie. the day of the Trust's home visit). The mother advised that after the Trust visit she had made contact with a woman who she believed may have been responsible for the anonymous report of drugs use. The woman confirmed to the

mother that she had been behind the referral. The parents then presented themselves at this woman's door but she had not answered. A short time later the woman's boyfriend appeared outside the parents' home, at which point the father had left the house and chased this man down the street. The father appears to have been armed with a weapon during the chase. The father had attempted to gain entry into the other person's property but was unsuccessful. Police later attended at the parents' home and the father was arrested.

[67] In late November 2023, Dr Pollock prepared an updated psychological assessment of the mother. He had previously examined her during care proceedings for previous children. He noted her prior background which had impacted her capacity to parent a child in a safe manner. Although improvement had been made upon her prior substance misuse, he noted, amongst other matters, that there remained a "risk that personality-based difficulties might resurface or become activated, particularly when the mother is stressed, if relationship stress occurs or if adverse events affect her."

[68] On 18 December 2023, the father's sister informed the Trust that she was no longer willing to remain within the support network for the parents. This appears to have been prompted by a disagreement between her and the mother over photographs taken at a birthday event for the child. When informed of this decision, the mother contacted the paternal aunt and threatened to cause disruption in her own family life. The paternal aunt expressed to the Trust her concerns about her ability to sustain long-term relationships with the parents and hence act as a protective/supportive influence, if the child was returned to their care. During subsequent discussion with Trust staff, the parents expressed the desire to continue assessment on their own, without the involvement of a support network. The following day the paternal aunt informed the Trust of further hostile communications from the mother and her inability to remain in a support network in the longer term. The parents later advised the Trust that they had retracted their consent for drug testing unless requested by the court. Further concerns were shared with the Trust by the paternal aunt following Christmas 2023, including concerns about the ability of the parents to sustain lifestyle changes, about the parental relationship and about continued drug use by the parents.

[69] A further anonymous report of parental drug use was received on 31 January 2024. Trust staff carried out an unannounced home visit that afternoon. The door was answered by the mother after 15-20 minutes. The father was found lying face down on the sofa and proved to be very difficult to arouse, notwithstanding being called loudly and shaken forcefully. Staff were asked to leave and the door was slammed closed behind them by the mother. The parental aunt informed Trust staff that afternoon of further abusive and threatening messages she had received from the father. Trust staff were later shown more and continuing abusive messages from the father sent on multiple occasions during February 2024.

[70] In early March 2024, the parents declined fingernail drug testing, which the Trust had considered potentially more reliable than hair follicle testing. The father also communicated reluctance and unwillingness to continue educative work which was ongoing at that time. The mother engaged in confrontational meetings with Trust staff about the role which had previously been played and may in the future be played in the child's life by the paternal aunt. The parents complained about the necessity for further hair follicle testing, despite having previously requested such a test. Pending delays in securing legal aid authority for hair follicle testing, the father indicated he was minded to cut his hair. An anonymous report was received in late March 2024, that the father had smoked cannabis after disembarking from a public train. On 27 March 2024, the parents underwent hair follicle drugs testing. The results were received on 15 April 2024, showing regular use of cannabis by both parents consistently over a three-month period. The parents later advised that the positive test occurred due to passive exposure with a friend on one occasion. The testing company, Randox, later confirmed that this explanation was not consistent with the test results.

[71] As a result of events during late 2023 – early 2024, the Trust altered contact arrangements on three occasions:

(i) Following the bus incident, all community contact was to be supervised and contact in Trust premises or at the family home remained semi-supervised.

(ii) Following the incident of neighbour aggression in late November 2023, all community contact ceased.

(iii) In February 2024, following concerns about continued parental drug use, all contact reverted to Trust premises with full supervision by Trust staff. While the total number of hours of contact per week was maintained, it was spread over four equal contact sessions of 3.5 hours each.

[72] On 25 March 2024, the child suffered a serious and traumatic scalding injury when it was reported that he had pulled a bath of hot water over him himself as the foster carer was preparing to bathe him. He sustained scalding burns to his lower limbs and forearms. He was treated immediately with cold water and conveyed to hospital. He was initially admitted to intensive care and remained in hospital until 12 April 2024 until his wounds were sufficiently well healed. Doctors reported that the injuries received were consistent with the mechanism described and that all treatment afforded by foster carers had been appropriate. The parents were advised promptly. They visited the child in hospital and continuously throughout his in-patient stay. They expressed understandable concern about these very serious injuries. They expressed the view that their child had been abused. In the course of submissions during the hearing of this case, the parents contrasted the child's treatment by the foster carers which had resulted in the scalding with contact records describing their own very positive bathtime experiences with the child in

October 2023 and December 2023. Those records revealed that Trust staff had been very complimentary of parental conduct.

[73] At a LAC review on 16 May 2024, the Trust formally changed care planning for the child. It decided that rehabilitation to the parents was not in the child's best interest and care planning therefore changed to adoption. The parents were present during this meeting and were therefore aware of the change from that time. On 3 June 2024, the child's foster carers asked to be considered as potential adoptive parents.

[74] For a period of time during June 2024, the parents observed the terms of a contract agreement between themselves and the Trust which governed matters such as conduct, behaviours and contact. Tensions within the parental relationship continue to be noted by Trust staff during contact sessions and on 24 June 2024, confrontational exchanges took place between the parents and social workers involving the use by the parents of personal insults and expletive language. These exchanges took place in front of the child. Similar confrontational exchanges took place several days later during a community contact session when staff asked the mother to keep open the door of a changing area.. The mother considered the request to be unreasonable and expressed that view forcefully to Trust staff.

[75] In late June 2024 two further anonymous reports were received by the Trust of parental cannabis use. An unannounced home visit took place the same day during which staff noted a smell of cannabis. Trust staff did not observe any direct evidence of drug use within the premises or by the parents, however, the presentation of both parents was such as to cause concern that they were under the influence of substances. A meeting was arranged several days later with the parents which was reported by the Trust to have been "very unproductive." The Trust recorded that the parents minimised breaches of the contract arrangement and of the need for moderated behaviours, particularly in the child's presence. A Specific Issue Child in Care Review meeting was arranged for the following week to consider contact. At the meeting, the Trust decided that it should decrease contact to 2.5 hours per session, with community based visits ceasing for a six-week period to monitor changes in parental behaviour. However, the reduction was not ultimately implemented.

[76] On 9 August 2024, the child was presented to the Adoption Panel and a Best Interests Recommendation was made for his adoption.

[77] In mid-August 2024, when meeting the parents at their home to bring them to a contact session, staff noted a "waft of cannabis" from the garden shed, which was denied by the father.

[78] In September 2024, the Adoption Panel's Best Interests recommendation was endorsed by the decision-maker and later ratified by the Adoption Panel. The child's care plan therefore remained permanence via adoption. In the interim period

the behaviour of the parents towards staff had improved and been sustained for a sufficient period of time that the proposal for reduction in contact was not implemented.

Comprehensive Parenting Assessment

[79] As set out above, a comprehensive parenting assessment was conducted by the Trust to assess the parenting capacity of both parents. A final report was produced in February 2024. It noted clear improvements in the engagement of both parents with Trust staff, when compared with their engagement in relation to their older children. The Trust considered that the parents had demonstrated a commitment to their son by attending contact and had made efforts to engage in the identified support services and other work. It considered that both parents had demonstrated an ability to "meet the very basic needs of their son." However, the Trust held continuing concerns about their ability to continue to do so as his needs changed over time. The Trust noted that the assessments undertaken had revealed continuing deficits in the parents' protective capacity and their ability to fulfil the child's needs. While changes in behaviour had been noted, the Trust considered they had struggled to sustain those changes, even during the assessment period.

[80] The inability to sustain change raised concerns about the sincerity of the parents when engaging with services in the future. If the child was rehabilitated to their care, the Trust considered that the parents would require ongoing support and assistance from family and friends, possibly requiring a continual presence within the house. Instability in the couple's support network, left concerns for the Trust, given that the parents had repeatedly severed or damaged relations with members of the support network. Those who had previously provided support did not always communicate concerns with the Trust in a timely fashion, leaving fears that if challenges arose in the future, the support network would withdraw and conceal information, thus exposing the child to the risk of significant harm in the care of his parents. The result of the parenting assessment was therefore that the risk factors which were present at the outset of the assessment period remained in place. The Trust had hoped that, in light of the mother's longstanding mental health difficulties, the father may be able to serve as a protective parent in the household. However, the assessment had revealed very substantial ongoing concerns about the father's capacity to do so, resulting in its conclusion that the father was "unable to offer the safe, protective, predictable home environment necessary for [the child]."

[81] The overall conclusion of the Trust was expressed as follows:

> "Currently, neither parent has the capacity to protectively care for a young baby; [the child] has been in care for over a year and there is no evidence that positive change could be sufficiently affected within a timeframe that will meet his needs. It is the assessor's recommendation that rehabilitation of [the child] to the care of [the parents] is

> not in his best interests as he would be at significant risk of emotional harm and/or neglect. Given [the child's] age and crucial stage in the development of his attachment, it is his need for security and stability which needs to be given priority."

Independent social worker reports

[82] The Trust commissioned independent social workers to carry out two pieces of work. First, it commissioned Kerry Malone to conduct an independent evaluation of the parents. The purpose of the report was described as building up an "understanding of the individual person/s concerned including their history, culture, psychological development, attitudes, beliefs, coping strategies, behaviour patterns, relationships, goals and their environment." It was anticipated that the independent report may then have been used by the Trust to inform future engagement with the parents and to understand their problems. It would also identify parental strengths, risks and management options.

[83] The independent recommendations included a range of work for the mother and highlighted the unwillingness of the father to engage in further safety planning work, together with the need for him to engage in self-development work focused on healthy relationships. The need for assessment of the parents' family support network was emphasised, including the suitability, quality and frequency of the support, which was likely to be available, along with the ability of the parents to engage in an open and constructive fashion with statutory agencies. Further attention was drawn to the need to continue to assess the mental health of the parents, the strength of their ongoing relationship, emotional strength and the risk of relapse to substance misuse and criminality.

[84] Overall, the views of the independent social worker were consistent with and certainly not contrary to the approach of the Trust. The report was completed in February 2024 and was therefore available to the Trust prior to the May 2024 decision to change care planning.

[85] The Trust also instructed a second independent social worker to complete a healthy relationships intervention with the father, along with an intimate partner violence risk assessment. Difficulties were encountered commencing the programme and he was unable to attend the first three planned sessions, with explanations provided. He then attended the first three sessions in January 2024. In February 2024 he informed the Trust that he no longer wished to participate in the intervention as he did not believe he needed to complete it, in light of positive feedback he received in the first part of the programme. He advised the independent social worker that he did not consider that his behaviour in the past or at present was problematic. He confirmed that his sole motivation for undertaking the intervention was to assist in the return of the child to his and his partner's care. The social worker was unable to determine what was truly inhibiting the father from

completing the intervention. In light of the father's approach, the healthy relationships intervention was not concluded and the intimate partner violence risk assessment did not take place.

Proceedings in the Family Care Centre

[86] It is not proposed to rehearse the entire procedural history below. Key aspects of the proceedings are the following:

(i) The Trust's plans for the assessment and educative work by the parents was summarised in a court report dated 9 June 2023. This was before the court on 22 June 2023 when it granted the Trust permission to release papers to the various independent experts and social workers in order to progress the assessments.

(ii) At a case management hearing on 31 May 2024, the court provisionally listed the case for hearing on 4 November 2024. It directed that any C2 application should be lodged by 14 June 2024. This hearing took place shortly after the LAC review of 16 May 2024, at which the Trust's care planning proposals changed to adoption.

[87] No application was made by either parent for any additional or alternative form of assessment. In particular, no application was made for a residential parenting assessment at the Thorndale facility, as an alternative to the proposed comprehensive parenting assessment.

[88] The Trust's final court report and care plan were filed in court on 26 September 2024. The report set out in detail the history of the assessment process and engagement with the parents. The Trust maintained its position that rehabilitation of the child to his parents' care was not in his best interests and would place him at risk of significant harm. Its view was that permanence should be achieved by way of adoption.

[89] On 25 October 2024, the Guardian filed its final report. It supported the Trust's option analysis and a care plan for adoption. The report included the following relevant entries:

> "8.5 The first consideration in relation to the Trust's application is whether there is any potential for [the child] to be returned to the care of his parents. It is my view that both [the mother] and [the father] have been given every opportunity to work with the Trust since the beginning of court proceedings and they have engaged in/been offered a high number of assessments and services. Although engagement was positive at the

> beginning of court proceedings, this was not sustained over time and the initial concern that led to the Trust's application to the court, have remained."

[90] In relation to the position of the mother, the Guardian noted the improvements and changes which she had made since previous care proceedings in relation to other children and concluded:

> "… there still remain gaps in what [the child] needs for a secure and safe level of care and what [the mother] is able to provide. Although she loves her son very much, she is, unfortunately, not in a position to care for him."

[91] In relation to the father, the Guardian noted the reluctance of the father to engage in and/or complete some of the educative work on violence and child development. The report concluded:

> "… at the conclusion of proceedings there remained gaps in what [the child] needs for a secure and safe level of care and what [the father] is able to provide. Although he loves his son very much, he is, unfortunately, not in a position to care for him."

[92] Following an options analysis which included the options of rehabilitation to parental care, long term foster care and adoption, the Guardian concluded:

> "8.19 As Children's Court Guardian, it is my view that there has been a fair and detailed process of assessment of [the child's] overall circumstances. There is no viable alternative option for him. His need is for protective and safe parenting with secure emotional ties. On that basis I am, therefore, respectfully suggesting that [the mother] and [the father] are unreasonably withholding their consent to the freeing application before the court and that it is ultimately in the best interests of the [the child] that he is freed to be adopted and remain with his current carers until the outcome of their assessment as his adoptive parents is known.
>
> 8.20 I would respectfully recommend the Trust's permanency care plan of adoption in respect of [the child] as I believe that nothing less will do in this child's best interests."

[93] At the hearing on 4 November 2024, each parent was separately represented. Both informed the court that they did not propose to challenge the facts supporting the Trust's applications and that it was not necessary for the Trust to call its witnesses. The case therefore proceeded on submissions only.

[94] Both parents accepted that, at the date of intervention, the statutory threshold for making a care order under Article 50 of the Children (NI) Order 1989 was satisfied. A threshold document was signed by both parties and submitted to the court. It set out the history of prior care proceedings in relation to all previous children for both parents. In relation to the mother, it set out her history of emotional instability, drug use and aggression towards professionals and the absence of any meaningful family support network. It also contained the following key areas of agreement:

> "…
> 7. The mother had a history of engagement in unstable and volatile relationships.
>
> 8. The father has a history of violence and aggression, including domestic incidents with family members.
>
> 9. The father has a history of mental health difficulties, including active suicidal intent in late 2014.
>
> 10. The father has a history of drug and alcohol misuse. While he attended an initial assessment with the Community Addiction Team on 27 June 2022, and one telephone appointment in July 2022, he disengaged and failed to attend two further face to face appointments.
>
> 11. The father has a history of relevant criminal offences indicative of violence/aggression with 31 convictions between 2011 and 2021. These include: assault on police (4); common assault (2); criminal damage (10); riotous/disorderly behaviour (2); robbery (1); threats to kill (1). A number of these convictions flowed from a domestic incident with his brother on 7 March 2021.
>
> 12. The father had adverse childhood experiences when he himself was a child and that trauma negatively impacted upon his stability in adulthood.

13. The father lacked insight into the depth of the mother's difficulties and was unable to be the primary protective parent.

14. The parents have been unable to manage their own finances to ensure that their own needs were met. They prioritised the purchase of cannabis over ensuring they had sufficient food and electricity.

15. While the couple wished to improve their parenting knowledge and had self-referred to Sure Start for a five-week parenting programme, they only attended one session and had not had the motivation to sustain engagement with that service.

16. The parents had not been able to consistently engage with services to address their underlying difficulties, which negatively affected their ability to offer safe and secure care to a new born baby."

[95] While the threshold document did not record expressly the risks of harm to which the child might be exposed if returned to parental care, it is plainly implicit that they include the risk of exposure to violence, unregulated aggressive behaviour, drug use, criminality, an unstable and insecure home environment and neglect.

[96] The parents filed a joint statement of evidence which explained their dedication to their son and desire for him to be returned to their care. They explained their version of many of the incidents during the assessment period which they believed had resulted in the Trust forming an unjustifiably negative view about their parenting capacity. The parents' statement explained their belief that the assessment process had been progressing well but that the neighbour incident in November 2023 had brought about a change in the social workers' attitude to them and what they perceived to be an unfair reduction in contact. They also stated that the scalding incident in March 2024 had been the catalyst to a further deterioration in relationships with the Trust. The statement contained the following comment on behalf of both parents:

"21. I ask the court to look at all the positives we have achieved and see this as the foundations in which we can have [the child] rehabilitated to our care. It has been established we can provide him with a warm, safe home and meet all his basic needs. We have moved … to be closer to him and our home is warm, clean and can be inspected at any time. We consistently meet his needs during contact and

have recently completed the Incredible Year project to try and meet his emotional needs.

22. I ask that before making any decision, the court considers an attempt for us to prove ourselves by caring for [the child] full-time. I think this should be tried for [the child]. He has a right to grow up with his parents who love him very much.

23. In terms of the freeing application, I believe this is premature and I entirely oppose it. I am making the case that we can provide the care he needs until he is an adult. In doing so, I will work with the Trust and complete any other work it deems necessary. [signed, the mother]"

The decision below

[97] The learned judge heard detailed submissions on behalf of each parent and the Trust. He was provided with all of the reports, assessments and witness statements which he had read in advance of the hearing. He was referred to multiple entries and extracts from the reports and the discovery material by all parties. He adjourned the proceedings and delivered his judgment the following day which included a detailed summary and analysis of all of the materials and submissions.

[98] The judge found on the facts that the Article 50 threshold had been met. He took account of all of the factors in the welfare checklist. He considered the no order principle and the article 8 rights of both the parents and the child. He conducted an options analysis of all of the options available to the Trust, including parental rehabilitation. He ultimately agreed with the Trust's analysis and accepted the Guardian's recommendation by deciding to make a care order and to approve the care plan for adoption. He found that the parents had unreasonably withheld consent to a freeing order. He dispensed with parental consent and made a freeing order. He approved the care plan for phased reduction in contact between the freeing order and any adoption order. The issue of post adoption contact was reserved to be decided in the future. He considered that it would require assessment of the views and attitude of the parents and adoptive parents before considering the child's best interests. The key conclusions and findings of the judge are contained in the following passages:

"… I have given very careful consideration to the analysis of the options before the court as detailed in the Trust's reports and those of the Guardian ad Litem. The Trust and the Guardian are of the opinion that the court should approve the Trust care plan, which seeks that [the child]

would find permanency by way of adoption. I have also taken into account the position adopted by the parents. Both the Guardian and the Trust have considered the options extensively, I have taken into account all matters identified in their reports and, in particular, the analysis of the advantages and also the disadvantages of each option. [The child] as we know, is at an age where he has no real understanding of his complex family background or circumstances. A rehabilitation to the parents has been ruled out by the Trust in May of this year… The couple have been known, individually and collectively to social services for quite a considerable period of time. They have, without doubt, at times showed some improvements in their abilities to parent, but it is evident from the evidence that same has been short-lived. Both have undergone extensive assessments. All the assessments that I have considered have raised concerns of some nature. The parents and in particular, the father, have at times believed that these assessments were unnecessary and so he thought better of not completing same. In addition, concerns remain around drugs, lack of support network, the inability to work with professionals in an open and honest way. They continue to minimise the concerns of professionals, as highlighted by Dr Pollock's report. The mother accepts that she cannot parent on her own and the comments made by the father regarding the reasoning behind attending some assessments call into question his insight and genuine motivation.

The Guardian notes that the overall worry is that [the child] would not be offered protection from risk to his emotional and physical well-being. A number of issues that caused concern at the beginning of court proceedings have continued to cause concern, such as the couple's drug misuse with positive drugs tests for both [the mother] and [the father] in April, and impulsive and aggressive behaviour. This court does not accept the characterisation of the Trust's concerns as nitpicking, as asserted by [counsel for the father].

Taking account of all of the concerns in this case, which have persisted for over two years and beyond, I am satisfied that rehabilitation to these parents is not possible now nor, indeed, within any timeframe commensurate

> with [the child's] needs. Unfortunately, there are no viable kinship options available."

[99] The judge then set out an analysis of the advantages and disadvantages of adoption verses long-term foster care in the circumstances of this case and these parents. He concluded:

> "Having balanced all of the factors, including [the child's] age and his circumstances, I find a care order with a care plan of adoption is, indeed, in [the child's] best interests. Now, I recognise the interference with Convention rights that a care plan of adoption entails. [The child's] best interests it safeguards, promotes his welfare during his childhood and it provides him with a stable and harmonious home…
>
> I am satisfied that, on the basis of the evidence before me, that a reasonable parent, taking into account all of the factors in this case, and, looking at [the child's] welfare, would recognise the overwhelming benefits of adoption for him, and would recognise the unreasonableness of refusing consent. In those circumstances, I dispense the need for parental consent. Taking into account the article 8 rights of all concerned, I am satisfied that freeing [the child] has been in his best interests. I am also satisfied that he has been in placement since birth, that his carers are being assessed as potential prospective adopters and I am satisfied it is likely that [the child] will be placed for adoption within one year of a freeing order being granted.
>
> … I have to say, without a shadow of a doubt, this case has been assessed much more than almost any other case that I have had to deal with. And not only that, the reports that have been provided to this court have been exceptionally detailed and of exceptional high quality. I am very grateful to all those who have gone to the trouble of preparing same for this court…"

Regional Operational Permanence Policy

[100] In the course of the hearing, the court enquired about the existence of policy guidance on timescales for making permanency decisions in the formulation of care plans for looked after children. I was provided with a copy of the HSC Regional Operational Permanence Policy 2017-2021 and was informed that it remains the operative guidance.

[101] The policy explains that the central aim of permanency planning for looked after children is to ensure that they move quickly from an uncertain care placement to the security of a safe and stable permanent family either with their birth parents, in a kinship placement or with other carers. The guidelines state that a permanence plan should be confirmed "at the latest by the third Looked After Children Review" [para 13.1].

[102] The policy provides in relevant part as follows:

> "13.5 Attempts at rehabilitation should be based on clear objectives and contracts with parents and must be carefully monitored and recorded if sufficient changes are to occur to facilitate the child's return home. Comprehensive assessments and interventions should be completed so that a firm plan for permanence is confirmed by the time the child is in placement for 9.5 months (ie. time of the third Looked After Child Review).
>
> 13.6 Of equal importance is that rehabilitation work should not continue past the stage where there is no realistic possibility of success. Getting the balance right is sometimes difficult, but it is important for the well-being of children that situations are not allowed to drift, perhaps more in hope than expectation."

[103] The Regional Permanence Policy is therefore consistent with the ECtHR case law summarised above and applied by the Court of Appeal in *HSC Trust v A Mother and A Father* [2022] NICA 63. Namely that upon taking a child into public care, the authorities have a positive duty to facilitate the possibility of rehabilitation to parental care, but it is not necessary to make endless attempts at family reunification if this is not in the child's best interests. The obligation upon a Trust is to take all necessary steps that can reasonably be demanded to facilitate reunification of the child with its parents. However, with the passage of time since the child was taken into care, the interests of the child not to have a stable and secure placement disrupted, can sometimes override the child's interest in facilitating family reunification.

[104] In this case, the Trust's decision to seek permanence by way of adoption occurred at the fourth LAC review on 16 May 2024. Previous LAC reviews took place on 21 December 2022, 14 March 2023 and 1 September 2023. The decision was taken approximately 17 months after the child was taken into care, which was substantially longer than the guideline period of 9.5 months. Two further LAC reviews took place prior to the hearing below (11 July 2024 and 24 September 2024).

Grounds of appeal

[105] The parents have raised multiple criticisms of the judge's decision which have been grouped into four broad areas for the purpose of the notice of appeal. Each area of appeal is addressed separately below. Many of the issues overlap and many amount, in substance, to criticisms of the weight which the judge did, or did not, attribute to specific features of the evidence or assessment process. In addressing each ground of appeal, I remind myself of the legal principles summarised above and that the standard of review is whether the judge was wrong and not whether I consider a different assessment of the evidence or outcome was appropriate. In doing so, I must also ensure that the decisions to make a care order and freeing order were necessary and proportionate in the circumstances of this case. The analysis below is therefore not a fresh or free-standing assessment of the evidence, but a review of the judge's conclusions.

Parenting

[106] The parents' first point within this area of appeal was that the judge failed to attach appropriate weight to the high standard of care provided by them during contact.

[107] As appears clearly from the detailed summary of evidence above, both the Trust and the Guardian recognised expressly the positive lifestyle changes which had been made by the parents both before and after the child's birth. Both acknowledged clearly that the parents were devoted to the child and loved him. The Trust also made repeated references to the positive nature of contact, albeit that some contact sessions were less constructive than others, particularly after May 2024. Nevertheless, the unequivocal view of the Trust, supported by the Guardian was that the improvements which had been made had not been sustained during the assessment period and that clear gaps remained between the capacity of the parents to provide for the child's basic needs and to do so on a long term basis, as the child developed and his needs changed. The Trust did not have the requisite degree of confidence that the parents could provide a safe home for the child and ensure his welfare throughout his childhood. Pursuant to Article 9 Adoption (NI) Order 1987, the welfare duty upon the Trust requires consideration of the child's welfare "throughout his childhood", not simply during the period of assessment.

[108] It is clear from the decision of the learned judge that he was fully aware of the basis of the Trust's concerns and the fact that they were supported by the Guardian. As set out from the summary above, there was ample evidence before the judge which justified his conclusion that concerns remained about their parenting ability, notwithstanding earlier progress during the assessment period. Like the Trust and the Guardian, he accepted that the parents had made positive changes and that contact sessions had been positive, but he ultimately considered that the positive changes had not been sustained and that the Trust had a proper basis for its continuing concerns about the child's welfare into the future. I do not consider

there was anything wrong with the judge's assessment of the entirety of the available evidence on this issue and I cannot condemn his failure to give greater or decisive weight to the positive contact sessions which had taken place. The judge was not only entitled but was obliged to take a longer term view of the future prospects for both the child and parents, when considering the child's welfare for the remainder of his childhood. There was ample evidence to support his view that past positive contact was not sufficient to eliminate or reduce the risks of harm which the parents themselves accepted had existed at the time of the intervention. The judge expressly acknowledged positive parental improvements but was not wrong in the weight which he gave to this issue when conducting an overall assessment of all of the evidence.

[109] The parents also contend that the contact arrangements should have been allowed to continue for a longer period of time which might have enabled the parents to demonstrate their parenting ability more clearly. In essence, the parents contended that the assessment process should have continued for longer. As set out above, the Trust's Permanence Policy provides that a decision on permanence should be taken by the third LAC review and by 9.5 months following the child being taken into care. This is a guideline figure only and is not prescriptive of the duration of the assessment process in every case. None of the parties sought to challenge these Guidelines, nor contended that they were inappropriate. Rather it was contended that the facts of this case justified a longer assessment period. As set out above, the parental assessment concluded in February 2024 (14 months after birth) and a decision on permanence was not taken until the fourth LAC review in May 2024 (17 months after birth). Contact arrangements continued until November 2024 (22 months after birth). The Trust considered that this period had been sufficient to gather enough information to make a decision on permanence. The Guardian agreed that it was sufficient and that the assessment process had been a fair one.

[110] The Strasbourg and domestic caselaw is also clear that the Trust was not under a positive obligation to continue "endless" assessments or attempts at rehabilitation. I interpret this to mean that the Trust's article 8 obligation did not require assessments or decision making to continue for longer than was reasonably necessary to be able to reach a fair, well informed and reasoned conclusion on rehabilitation. This assessment period continued for significantly longer than recommended in the Trust's permanence guidelines and was viewed by the Guardian as affording the parents a fair opportunity to demonstrate their parenting skills and commitment. Once again, I consider that there was ample material available to the judge to justify his conclusion that a fair opportunity had been given. His comments regarding the duration and quality of the assessment process are notable. In my view, they were clearly not wrong and appear to me to be justified on the available materials.

[111] The parents also criticised the judge for failing to require additional assessments to be carried out, including a residential parenting assessment at the

Thorndale facility and an attachment assessment to determine the impact upon the child of a reduction in contact with the parents. Both of these contentions were raised for the first time on appeal and were not argued below. As set out above, on 31 May 2024, the judge gave directions for any C2 application to be filed by 14 June 2024. This direction was given after the Trust changed its care planning to adoption. Both parents were legally represented at that time and made no application either for a residential assessment in the Thorndale facility or an attachment assessment. In relation to the Thorndale assessment, it is clear that Dr Pollock did not recommend that such an assessment must take place. Rather, he recommended that it should be considered but that a comprehensive parenting assessment may be an appropriate alternative. The possibility of a Thorndale assessment was discussed with the parents early in the assessment period but not pursued. The reasons for this approach are difficult to assess at this stage and without the benefit of findings of fact by the judge. However, it would appear from the available Trust records (which were not disputed below) that the decision not to carry out a residential capacity assessment, was made partly on account of a reluctance by the father, but also for the practical reason that it would have required residence by the parents away from their home for a substantial period of time. The records suggest that this may have caused a difficulty with the continuation of their existing NI Housing Executive accommodation and the possible need for the parents to move into hostel accommodation at the conclusion of the assessment. These issues are recorded as having been discussed with the mother during a meeting with Trust officials on 18 December 2023. The parents therefore appear to have been aware of both the possibility of a residential assessment and the Trust's reasons for preferring an alternative form of parenting assessment. The parents did have the benefit of separate legal advice during all of this period and therefore did have the opportunity to apply to the court for an alternative or even additional form of parenting capacity assessment. This could have been done at the time of the initial decision, or, at the very latest once the decision on permanence had been taken and the judge gave directions for any C2 applications to be filed. It is of note that in submissions to the judge, counsel on behalf of the father expressly acknowledged that a Thorndale assessment would not have been appropriate. He is recorded as having submitted:

> "This is not the case where … if I can put it this way, it is not a Thorndale type case. It is not a case where there are fundamental concerns about the ability to parent on a day-to-day basis. Rather, the essence of the concerns seems to emanate from maybe some unpredictability of behaviour, some volatility. But what I would respectfully submit is that the proof has been in the pudding, in the sense that whilst it is not the Thorndale case, these parents have been tested. There have been bumps in the road along the way…"

[112] In determining this ground of appeal, it is essential to look at the entire history. The assessment process devised by the Trust was informed by the professional recommendations of independent experts. In particular, Dr Pollock did not make an unqualified recommendation that a Thorndale assessment must be completed. His recommendation was framed in the alternative and he recognised the potential for conducting a comprehensive parenting assessment instead. The parents were aware of both the decision not to conduct a residential assessment and that a parenting capacity assessment was to be undertaken. They did not challenge the process either at the time, or following the Trust's permanence decision, despite having the opportunity to do so. In the absence of any request for an additional or alternative assessment and since the assessment process was in accordance with the independent professional recommendations, it is difficult to see what more the judge could have done. The key issues for him were to ensure that the assessment had been fair and comprehensive and that sufficient information was available to be able to assess critically the Trust's permanence plan. In the absence of parental challenge, the independent views of the Guardian were therefore important. The Guardian's report stated that the process had been both fair and comprehensive, insofar as the parents had been afforded "every opportunity" to demonstrate their parenting capacity. In the course of the appeal, while it was asserted that a Thorndale assessment should have been undertaken, no evidence was adduced to undermine the adequacy of the assessment process which had been undertaken, nor was any reasoned basis advanced as to why the assessment should now be undertaken. Taking account of all of these factors, it is clear that the judge was not wrong in how he proceeded below and there is no proper basis upon which I could now conclude either that the assessment process had been deficient or that a residential assessment was now necessary in order to ensure proportionality in the permanence decision. By waiting until such a late stage in the process to make this challenge, the courts below and on appeal were deprived of the benefit of any assessment (whether from the Trust, the Guardian or other independent source) of the impact upon the child of the further delay which would inevitably have occurred. In the circumstances, I cannot fault the judge for proceeding to make a final decision when he did.

[113] The contention that the judge should also have required an attachment assessment to be carried out is also rejected for essentially the same reasons. This was never requested below. If the parents had concerns about the impact of any reduction in contact during the assessment period and the implications for their ability to demonstrate parenting capacity, they were at liberty to make an application to the court at any time during the prolonged parenting assessment process for alternative or increased contact. It is also clear from the chronology that during the entire duration of the proceedings, total weekly contact hours were not in fact reduced. Community contact was ceased following the incident of aggression by the mother on the bus and home contact was ceased following the father's episode of aggression involving the neighbour in November 2023. Full supervision of contact was also introduced in February 2024, following allegations of drug misuse. The duration of contact sessions was also reconfigured to four weekly contact sessions of 3.5 hours, rather than one session of five hours and three sessions

of three hours. This chronology was set out clearly in the Trust's report of September 2024 (internal P55-56) and was available to the judge. It also reveals the multiple opportunities which were available to the parents during the process to seek court intervention to reinstate previous arrangements. It also reveals that the total number of hours for weekly contact was never actually reduced and therefore contradicts the underlying premise of the ground of appeal. In the absence of either parent ever raising the issue or of any of the independent experts recommending that an attachment assessment should be considered, it is again difficult to criticise the judge for proceeding to make a final decision. In the further absence of any fresh evidence on appeal which might have explained the importance of this assessment or how its absence could have had a material impact upon the thoroughness of the assessment, it is not possible for this court to conclude that the judge was wrong for not directing this assessment of his own motion.

[114] The final issue raised under this area of appeal is that the Trust "lulled the parents into a false sense of security" regarding the likelihood of rehabilitation and that this was not identified or considered by the judge. Once again, this point was not argued below.

[115] In the course of submissions on appeal, it was clarified that the parents were not contending that the Trust had acted in bad faith, rather the effect of their conduct and communications led the parents to believe that rehabilitation remained feasible. In my view, this ground of appeal overlaps with the preceding grounds and, in substance, is directed towards the duration and thoroughness of the assessment process, rather than identifying any error of law on the part of the judge. The parents have not identified any specific act or course of conduct on the part of the Trust which improperly conveyed any reassurance to the parents as to the final outcome of the assessment process. Clearly, there was early positive progress and there is no dispute that this was conveyed to the parents who were aware that the possibility of rehabilitation remained the Trust objective. However, all of the Trust's evidence indicates that when issues or events arose which gave rise to concerns on the part of the Trust, these were promptly conveyed to the parents and explained. The parents knew and understood perfectly well that some or all of these issues may result in the Trust ultimately forming an adverse view about their parenting capacity. It is also clear that during the later phases of the assessment, the parents were alive to the possibility that the Trust's views about their parenting capacity may be changing. There were multiple incidents of unfortunate (and at times, insulting) comments being directed towards Trust officials when concerns were expressed about the parents' conduct.

[116] Since this issue was not argued before the judge, he did not make any express findings upon it. It is therefore necessary to consider the issue for myself. My own assessment of the evidence is that, rather than lulling the parents into a false sense of security about the outcome of the assessment and attainment of rehabilitation, the Trust did precisely the opposite by conveying its concerns in a prompt and objective manner, which were not always well received by the parents. The formal statutory

process of LAC reviews also ensured that the parents were aware of the Trust's position. Its ultimate views on permanence were made expressly clear to the parents in the May 2024 LAC review when the Trust formally decided to change its recommendations for permanence to adoption. All of this information was available to the judge and was not challenged by the parents in the course of the hearing. The judge was, therefore, clearly not wrong by acting in accordance with the Trust's recommendations which were supported by the Guardian. For the reasons set out above, if this point had been argued before the judge, my own assessment is that he could not have reached any alternative conclusion.

[117] The same core point was made through a further and slightly differently formulated ground of appeal, namely that the Trust had taken a less favourable view of the parents' capacity at later stages of the assessment process, following the positive drug test and receipt of expert reports. This is not materially different to the alternative formulation in the other grounds of appeal. As set out above, the Trust's initial views of parenting capacity were positive and supported its decision to proceed with the full parenting capacity assessment before making a recommendation on permanence. The Trust's views on capacity do appear to have changed insofar as the original optimism about possibility rehabilitation was not sustained. The change appears to have been brought about as a result of the Trust's objective observations of the parents' conduct, together with growing concerns such as the parental relationship, the weaknesses in the support network, positive drug tests and the outcome of assessment reports. The ultimate view reached by the Trust was therefore not a product of underhand conduct on the part of the Trust, but simply a view about parenting capacity based upon objective evidence. It was supported by the Guardian and clearly was a conclusion which the judge was entitled to endorse on the available evidence.

History repeating itself

[118] The parents identify five separate points under this heading, all of which are directed to the same substantive challenge, namely that the judge should not have accepted the Trust's view about parenting capacity and should have afforded more weight to concerns expressed by the parents about the level of care being given to the child by his foster carers.

[119] All of these grounds of appeal overlap substantially with the prior grounds about the parenting capacity assessment. Any objective reading of the evidence makes clear that the Trust did initially support a plan for rehabilitation to parental care based upon positive progress made by the parents. However, concerns developed when this progress was not sustained. The Trust had every reason to hold continuing concerns about parenting capacity in light of the lack of involvement of either parent in the care of any of their previous children together the behaviours of the parents which emerged in the later stages of the assessment process. In the course of the process, I consider that the parents were perfectly entitled to raise concerns with the Trust about the presentation and treatment of the

child by foster carers, especially after the scalding incident. Indeed, the occasions on which they did so appear to have been based upon well founded concerns. It is difficult to conceive of a more traumatic event for the parents than to learn of the scalding injuries sustained by the child. Their concern about his care was entirely natural and wholly justified. Nevertheless, the mere fact that the parents held justified concerns about the foster carers or about the presentation of the child during contact, does not mean that the parents should be viewed as having demonstrated their own parenting capacity or that the Trust were not entitled to maintain concerns about that capacity. The assessment process under consideration by the judge was directed towards the parents, not the foster carers. However, it is important to record that on each occasion that the parents did raise concerns about the foster carers, the Trust responded in an appropriate manner. In particular, following the scalding incident, the Trust made appropriate inquiries with the medical staff to investigate the likely cause of the child's injuries, whether they were consistent with the carers' explanation and whether there had been any deficiency in the actions of the carers in the aftermath of the incident. On each of these issues, the Trust was advised that there was no evidence that the incident had been anything other than an accident and that the carers' post-accidents conduct had been appropriate.

[120] Both the Trust and Guardian ultimately recommended to the court that the parents had demonstrated improvement in parenting capacity and attitude but that gaps remained. The Trust's view was that it had not been sufficiently demonstrated that the parents could look after this child without the risk of significant harm throughout his childhood. This was accepted by the judge and for all of the reasons set out above, I consider that he had ample material upon which to accept those recommendations and he was not wrong to do so.

[121] It should be noted that the judge expressly referred to the scalding incident and the impact which it had on the parents. He plainly accepted that they were entitled to be both distressed and concerned about this incident. However, I consider he was perfectly entitled to conclude that this had not been the catalyst to a deterioration in relationships between the parents and the Trust. As set out in the chronology above, relationships had begun to deteriorate during the autumn of 2023 when the Trust made changes to the contact arrangements following the incident of maternal aggression on the bus; the incident of paternal aggression towards the neighbour; and reports of continuing drug use. All of these matters were recognised by the judge and he cannot be faulted for his conclusion that the scalding incident was not the catalyst to a deterioration in relations between the parents and the Trust. At the heart of the Trust's concerns, were continuing manifestations of the types of behaviours by both parents which had precipitated its original intervention and its decision to take the child into care following its birth. Those original concerns included drug use, violence, aggression, unregulated emotional presentation and inability to work co-operatively with staff. At the hearing, the parents signed the threshold statement, thereby acknowledging that these behaviours supported the conclusion that they gave rise to a risk of significant harm to the child in parental

care. Similarly, the parents did not challenge any of the Trust's evidence about the extent to which they considered the behaviours (and hence the risk of harm) to have continued through the assessment period. All of this clearly supported the ultimate conclusion by the Trust that there remained a gap between parental capacity which had been demonstrated and that which would be required to support the child throughout its childhood. The judge agreed with the Trust and Guardian's view. I consider that there was ample evidence to support this conclusion and that he was clearly not wrong in accepting the Trust's conclusions.

Drug use

[122] The parents also maintain a number of related grounds of appeal relating to the influence of parental drug use on the judge's conclusion. Many of these grounds overlap and all relate to the fact that the judge gave weight to the negative drug test, as opposed to overlooking it in favour of other mitigating factors such as the drug use being limited to cannabis; that it was much reduced to previous misuse; that the parents had been abstinent from alcohol; that the hair follicle test results may have been influenced by passive exposure; that explanations were provided by the parents which may have countered any inference of drug use. One example which was relied upon by the parents was the presentation of the father on 31 January 2024 while asleep on the sofa during an unannounced home visit and a smell of cannabis which was noted emerging from the garden shed. The Trust was concerned that his presentation and the smell was consistent with drug use. The parents on the other hand pointed to the fact that he had been asleep on the sofa during a visit in November 2023; that daytime sleeping was not unusual for him; that he was suffering from dental pain and had been prescribed medication. This was one example of the challenge which the parents made to the judge's reliance upon parental drug use when concluding that a risk of significant harm existed which justified the making of the care order and freeing order.

[123] In addressing all of these grounds of appeal, it is essential to bear in mind both the evidence available to the Trust and the conclusions actually reached by the judge.

[124] In his psychological assessments, Dr Pollock expressly recognised that there would be a significantly inflated risk of harm to the child "if [the father] returns to any form of substance misuse as a means of coping." He did not distinguish between the forms of illegal substance or identify a hierarchy of substances, some of which might be acceptable. He clearly considered that evidence of any drug misuse during the period of assessment was indicative of a longer term risk to the child, if returned to parental care. In relation to the mother, his assessment proceeded on the understanding that she was abstinent from drug use, as this appeared to be her instructions and was supported by the negative April 2023 test result.

[125] It was not disputed that in April 2024, <u>both</u> parents returned positive hair follicle test results for cannabis use. An explanation of passive exposure was

provided by the parents in 2024. This was investigated with Randox who confirmed that the level of cannabis detected was not consistent with passive exposure but was indicative of regular use by both parents during a three-month period. It is clear that the Trust also received continuing and regular anonymous reports of drug use by the parents. These were followed up by appropriate unannounced home visits in which the Trust made clear to the parents, both the fact of the report and the ongoing concerns. The Trust had two separate occasions on which they had grounds to suspect cannabis use by the father during these visits. However, the Court report provided by the Trust in September 2024 reached no definitive conclusion on whether the father or mother had been using cannabis on any of those occasions. On the contrary, the Trust responded to these suspicions by seeking definitive and objective evidence, by means of a second hair follicle test, which was carried out with the agreement of the parents. Accordingly, the concerns of the Trust about drug use were not founded upon unsupported or inappropriate inferences of drug use derived from observations, but were founded upon objective, independent scientific evidence obtained following a court ordered examination.

[126] In his careful judgment, the judge below correctly identified that drug misuse had been a concern of the Trust throughout the assessment period. He referenced the various incidents which had caused concern and grounds for suspicion. However, like the Trust, he reached no conclusion on whether there had been drug use on those occasions. His concerns about ongoing drug use were based upon the 2024 hair follicle test result. Furthermore, it is clear from the judge's carefully expressed conclusions that concerns about drug use was only one of several areas in which he considered the Trust to be justified in holding concerns about continuing parental capacity. He stated:

> "… in addition, concerns remain around drugs, lack of a support network, the inability to work with professionals in an open and honest way. They continue to minimise the concerns of professionals … the mother accepts she cannot parent on her own and the comments made by the father … calls into question his insight and genuine motivation."

[127] It is clear that the judge did not, therefore, reach a definitive conclusion upon drug use during any of the occasions referenced by the judge, nor did he single out drug use as an exclusive reason for a lack of parenting capacity. On the contrary, it simply formed one of several areas of ongoing concern. His inclusion of this issue was wholly justified by the undisputed April 2024 evidence of continuing drug use, which was precisely the risk factor identified by Dr Pollock.

[128] Accordingly, all of the grounds of challenge under this head must be dismissed.

Emotional regulation

[129] The appellants make a series of overlapping contentions about the failure of the judge to either acknowledge or give weight to potential innocent explanations for incidents of aggressive behaviour or emotional dysregulation by either the mother or the father. The explanations included the fact that the mother's outburst on the bus and her threats to the minor passengers had taken place after she was provoked. Another explanation was the fact that the neighbour whose report of drug use had resulted in the father's outburst of aggression towards her boyfriend, had been motivated by malicious intent. Another explanation was that the paternal aunt who withdrew from the support network and who informed the Trust about parental drug use was also not well disposed to the parents as she had fallen out with the mother over photographs at the child's birthday event and had previously had a difficult relationship with the father. The mother pointed to the work which she had undertaken to address her inability to regulate emotions. The father pointed to the fact that a baseball bat and iron bar stored by the front door had been given to him by others and were not stored there permanently.

[130] Once again, it is essential to understand the evidence available to the judge and the importance attached to this issue as part of his ultimate decision.

[131] In his assessment of both parents, Dr Pollock highlighted the possibility of violence and aggressive behaviour as constituting a risk factor for the child. In the case of the father, he considered that "any form of violence towards property or people" would significantly inflate the risks to the child. In the case of the mother, he expressly identified the need for her to work with the Personality Disorder Service to address her emotional regulation deficiencies. In the case of both parents, the concerns identified by Dr Pollock materialised on more than one occasion during the assessment process. All of this was set out in the detailed findings of the judge. The risks which could be inferred from the displays of aggression by the father when confronted with a stressful and challenging situation from the neighbour were self-evident. Similarly, there were repeated displays of emotional dysregulation by the mother, whether to members of the public, family members such as the paternal aunt, the father or to Trust staff. Some of these occurred in the presence of the child. While the most serious incidents of unregulated behaviour towards Trust occurred after the scalding incident and after the change in care planning, they did provide the Trust with a clear basis for concluding that the improvements previously demonstrated by the parents were unlikely to be sustained if the mother was faced with challenging and stressful situations. This is precisely the risk which had been identified from the very outset of the Trust's intervention in this case and for previous children of the mother. Similarly, the mere fact that these incidents occurred illustrated that the mother had been unable to put into practice the work which she had undertaken to help control her emotions.

[132] In his final conclusions, the judge described this area of concern as being "impulsive and aggressive behaviour" on the part of the parents. When coupled

with the other evidence, I consider that the judge was entirely justified in relying upon this factor to support the overall conclusion that risks of significant harm to the child remained and that a gap existed in their parenting capacity when compared with that which could reasonably be expected. Like his conclusions regarding drug use, this was not the sole reason for his ultimate decision. Rather, it was one of a series of contributing factors which led him to accept the Trust's case and the advice of the Guardian. I do not consider the judge to have been wrong in reaching this conclusion and I dismiss this ground of appeal.

Conclusions

[133] For all of the reasons set out above, I conclude that none of the grounds of appeal are made out and that it cannot be said that the judge was wrong on any of the issues raised. I take this opportunity to acknowledge that this outcome will come as a significant disappointment to the parents, whose desire to secure the rehabilitation of their child to their care cannot be doubted. However, the duty of the Trust is not based upon its assessment of parental commitment, but its assessment of the risk of significant harm to the child and the long-term ability of the parents to ensure that their child will be safe and that his welfare will be protected throughout his childhood. While the legal test for appeal is a narrow one, I consider it appropriate to express my own view that, even if I had been required to consider this case fresh and entirely on the merits, I would have reached precisely the same conclusion as the judge.

[134] I also consider that a reasonable parent, viewing the facts of this case objectively, would also come to the view that the best interests of the child in securing permanence was through an adoptive placement with alternative carers, rather than by rehabilitation to parental care. The concerns of the Trust relating to the risks of significant harm were well-founded on the evidence and also attracted the independent support of the Guardian. I therefore consider that the judge was right to make a care order based upon a care plan for adoption, with parental contact extending until the point of any future adoption order. The judge was also right to dispense with the need for parental consent and to make a freeing order.

[135] The appeal will therefore be dismissed on all grounds. I will hear counsel on the terms of any final order and on costs.