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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Between:

A HEALTH AND SOCIAL CARE TRUST

and

A MOTHER

and

A FATHER

IN THE MATTER OF AN APPLICATION TO FREE A CHILD FOR ADOPTION

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Mr Magee KC with Ms Hughes (instructed by DLS) for the Appellant Trust
Ms McGrenera KC with Ms MacKenzie (instructed by Magennis & Creighton Solicitors) for the Mother
Mr McGuigan KC with Mr McCabe (instructed by Reid Black & Co Solicitors) for the Father
Mr Maguire KC with Ms Ross (instructed by McQueenie Boyle Solicitors) for the Guardian ad Litem

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Before: Keegan LCJ, O'Hara J and McBride J

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KEEGAN LCJ (*delivering the judgment of the court*)

Anonymity

Nothing must be published which would identify the family or the child to whom this case relates. The case has been anonymised as it concerns proceedings in relation to a child. In this judgment the child will be referred to as Joy, which was the name given to her by the judge at first instance. That is not her real name.

Introduction

[1] The appellant in this case is a Health and Social Care Trust ("the Trust"). It appeals against the decision of Temporary High Court Judge Larkin ("the judge") delivered on 15 July 2021 whereby he refused the application made by the Trust for an order freeing the subject child for adoption pursuant to Article 18 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order"). This court has already determined that the appeal should be allowed after a hearing during which the Trust's submissions were ultimately not opposed by the parents. Thereafter, the freeing order was made without active objection and the adoption hearing was remitted to O'Hara J for final determination of the question of post adoption contact which was the only remaining issue in the hearing before us.

[2] We now provide our reasons for reaching the decision that we did and in doing so we reiterate some important points pertaining to good practice and procedure regarding freeing for adoption applications in this jurisdiction.

Background

[3] As the background facts were not substantially in dispute, we will simply summarise them as follows. The parents are married parents and present as in a stable and settled relationship. Joy was born in April 2017. She has three older half siblings who are all placed outside of parental care in a variety of different placements. The eldest child is now a teenager and is placed in a family placement. The next two children are twin girls who are placed with a paternal grandmother. The fourth child, who is a full sibling of Joy, has been adopted.

[4] Joy also has one younger full sibling who was born in December 2019. It is a significant part of the factual matrix that this child remains in the care of her parents at home after a successful residential and community assessment. The care proceedings in relation to her were therefore withdrawn.

[5] Joy was removed from the care of her parents a very short time after her birth. After the removal into care Joy was placed with short-term foster carers, however, since May 2018 she has been living in a long-term fostering arrangement. These foster carers wish to adopt Joy. An interim care order in respect of Joy was made on 1 March 2019 and a full care order was made on 18 June 2019.

[6] The reason for care proceedings in relation to Joy and the other children is found in an extensive Statement of Facts which has been filed by the Trust. From that statement we note that there has been extensive social work with this family from April 2012 due to issues of neglect, domestic violence and the mother's mental health. There have also been many social work and expert assessments of the family over the years.

[7] The Trust convened a pre-birth child protection case conference on 11 April 2017 in relation to Joy. Following from this Joy was registered on the Child Protection Register under the categories of potential neglect and potential emotional abuse. A family group conference was convened shortly thereafter, and contact was arranged between Joy and her parents.

[8] To her credit the mother accepted that she could not look after Joy due to her own circumstances, in particular, poor mental health. Therefore, Joy was voluntarily placed in care. Thereafter, in the course of care proceedings a number of assessments took place to test whether the parents could resume care of Joy. In particular, a detailed "PAMS" Assessment of both parents was undertaken. PAMS stands for Parent Assessment Model which focuses on practical parenting where learning needs are identified. This concluded that the following issues remained within the family dynamic:

(i) significant concerns regarding the parents practical parenting with hygiene needs not being fully met;

(ii) limited insight into safety risks for the child;

(iii) ongoing concerns regarding the mother's mental health and an ongoing failure to seek support in a timely manner;

(iv) issues with household budgeting;

(v) ongoing tension between the couple relating to household tasks; and

(vi) at times a failure to recognise parenting responsibilities in relation to Joy's needs.

[9] The PAMS reports of 8 November 2017 and 15 August 2018 recommended engagement with Relate for the parents, for the mother to engage with her GP regarding her mental health and a psychological assessment of the father. Thereafter, a referral to the Family Centre was made on 14 February 2018. In addition, the parents were each assessed by Dr Philip Moore, Consultant Clinical Psychologist and he filed reports dated 20 July 2018 (having filed a previous report in relation to the mother dated 25 March 2018)

[10] As a result of his assessment Dr Moore identified that the mother felt unsupported by the father and that this led to physical altercations between the two parents. Dr Moore identified a pattern of conflict which had been apparent in previous relationships. He opined that the mother remained "emotionally labile with a perpetual sense of grievance." He thought that she would engage in any therapeutic process, but he was concerned regarding its efficacy. He recommended cognitive behavioural therapy for the mother alongside a further suite of supportive interventions.

[11] In his assessment of the father Dr Moore identified that he had a low average IQ and specific verbal difficulties. He recommended emotional regulation work and a parenting assessment modified to address the father's literacy skills and his lack of confidence and domestic violence education.

[12] The mother sought a referral for cognitive behavioural therapy through her GP and was referred to an organisation called "A safe place to be me." She began some therapeutic work with this service in September/October 2018, however, this was not maintained through no fault on the part of the mother.

[13] A final Family Centre assessment of 22 November 2018 found that both parents demonstrated limited understanding of the impact of domestic violence on Joy and that this was a block in terms of parental capacity. Following from this outcome a care plan of adoption was approved for Joy at A Looked After Child Review on 15 November 2018. Joy was presented to the Trust's adoption panel on 1 May 2019. The panel made a recommendation that adoption was in her best interests.

[14] By the final hearing of the care order, contact was facilitated at a level of three times per week and then reduced to monthly contact at the grant of the full care order.

[15] Joy's sister was born in December 2019 and successfully returned home after a positive residential assessment. Social workers were content to recommend this course for the baby but did not think that rehabilitation was viable for Joy as in the opinion of social services the parents could not undertake care of the two children. Freeing for adoption proceedings were therefore issued by the Trust in relation to Joy on the basis that adoption was in her best interests and that each parent was unreasonably withholding their consent.

[16] In the course of the freeing proceedings, a further expert assessment was conducted by Dr Kerry Sweeney, Clinical Psychologist. Her report is dated 20 February 2021.

[17] Dr Sweeney concluded that Joy presented with an insecure avoidant detachment style towards her parents. Dr Sweeney also considered that the child's presentation required a higher than average level of parenting even within her current placement. She thought that if she was rehabilitated home, there was a high risk of this destabilising the placement for her sister. Dr Sweeney concluded that while the reports identified that the parents were caring for Joy's sister to a good enough level, they were not in a position to provide Joy with the level of parenting that she required. Dr Sweeney's overall opinion was that Joy should be placed for adoption.

[18] The above is but a snapshot of the prolonged history in this case. It is in the light of this history that the parents accepted that rehabilitation of Joy to their care was not realistic. Therefore, the only issue in the case was whether or not the child should remain as a fostered child or be freed for adoption. Either way, Joy would live permanently with her current carers with whom she had been placed since 8 May 2018.

The progress of the freeing proceedings

[19] This case was listed in May 2021 before the judge. At that stage he adjourned the case for consideration of European jurisprudence which he indicated to the parties may necessitate a different approach to how freeing applications are dealt with in this jurisdiction. Counsel filed substantial written submissions dealing with both the domestic statutory tests governing freeing for adoption and the European law. Over five days of hearing the judge then heard evidence from the social workers, Ms McNeice, Ms Graham, and from Dr Kerry Sweeney, the Guardian ad Litem and from the mother. We were provided with the relevant transcripts of this evidence.

The Judge's Ruling

[20] In his judgment the judge refers to the legislative framework of the 1987 Order in particular, articles 9, 18 and 16 and various other statutory tests found in the 1987 Order. The judge does not refer at any point to the Convention or the jurisprudence which he had directed counsel to examine.

[21] The judge summarises the evidence and then in his discussion section he states his conclusion that the freeing order should be refused. The reasoning for this is contained in para [38] as follows:

> "[38] I do not believe that the stability that Joy currently enjoys with J and K would be endangered if the present application were refused, and long-term fostering to continue. There is a mature, mutually respectful relationship between Mr and Mrs T and J and K. It is clear that Mr and Mrs T are grateful to J and K for the care they give to Joy and, having heard from Mrs T, I am satisfied that neither she nor her husband would do anything to undermine the relationship between Joy and J and K. The generosity of spirit evidenced, for example, in Mr and Mrs T's use of 'mummy' and 'daddy' with respect to J and K is not only (as the Guardian accepted) unusual, it is significantly reassuring."

[22] The judge examined contact arrangements at para [40]:

> "[40] The relationship between Joy and P would not, I believe, flourish as it should if Joy were adopted. The Guardian, in his evidence, described the importance of the sibling relationship in general. He was right to do so. The age gap of some two years between Joy and P will diminish in significance with the passing years. Without, I hope, devaluing the importance of relationships between Joy and her other siblings, the relationship between Joy and P ought to be a source of great happiness and strength for both of them. But that relationship cannot be maintained adequately – far less flourish as it should – if Joy is adopted by J and K and contact is reduced, as is planned, to around 4 times each year. The Guardian candidly expressed his fear that this relationship would suffer if Joy were adopted."

[23] The judge's ultimate conclusion is found at para [43] as follows:

> "[43] In the light of the foregoing I cannot conclude that adoption by J and K would be in Joy's best interests. Although the 'big family' described by Mrs T is unorthodox, I consider that the provision of long-term care by J and K with the loving support of Mr and Mrs T, who will continue as Joy's parents, is an arrangement more likely to secure Joy's best interests than adoption by J and K."

[24] At para [41] of his judgment the judge refers to post adoption contact proposals as follows:

> "There is simply no substitute for the time together that would be lost to Joy and P. Children need time together that cannot always be evaluated (at least by adults) as 'quality time.'"

Consideration

[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.

[26] Para [47] of the *H-W* case reiterates the need for a holistic assessment of all options in a case such as this by drawing upon a number of decisions given by experienced family judges starting with *In Re BS (Children) (Adoption Order: Leave to*

oppose) [2013] EWCA Civ 1146 and *Re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965.

[27] In the *Re G* case referred to above McFarlane LJ set out the requirements placed on a trial judge in these terms:

> "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."

[28] The overarching welfare test is found in Article 9 of the 1987 Order which reads:

> "9. In deciding on any course of action in relation to the adoption of a child a court or adoption agency shall regard the welfare of the child as the most important consideration and shall –
>
> (a) Have regard to all the circumstances, full consideration being given to:
>
> (i) The need to be satisfied that adoption or adoption by a particular person or persons will be in the best interest of the child;
>
> (ii) The need to safeguard and promote the welfare of the child throughout his childhood;
>
> (iii) The importance of providing the child with a stable and harmonious home;
>
> (b) So far as is practicable first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them having regard to his age and understanding."

[29] The best interests test found in Article 9 has also been explained *Re B* [2013] UKSC 33 which considered when adoption is an appropriate option for a child. Whilst the phrase "nothing else will do" emerged from *Re B* subsequent cases

warned that this dicta should not be over interpreted. In this vein, McFarlane LJ in *Re W* [2016] EWCA Civ 793 at [68] said that:

> "The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime."

[30] In keeping with the Article 9 obligation the social work report dated 11 June 2021 filed for final hearing amply sets out the advantages and disadvantages of long term fostering versus adoption in a child specific way. At para 4 the report specifically refers to the advantages of adoption for Joy as follows:

> "- Joy will have the confidence she needs to grow up in a forever family that is protected from the instability of a residence order.
>
> - The Trust is very aware of the instability that Joy has been subject to since her move into care and the birth of her younger sibling.
>
> - Joy will emotionally feel part of her adoptive family with a greater sense of belonging which that brings.
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> - Adoption lasts beyond the age of 18 and into adulthood with a wide network of extended family for the rest of her life.
>
> - There is legal certainty for the child which cannot be challenged.
>
> - Adoption can also increase the security and emotional attachment felt by the carers who will in turn benefit the child.
>
> - The journey in respect of Joy's carers was one of adoption that took several years. This was their own personal process and assessment. They made their own choice to become adoptive carers and were

matched with Joy. Their wishes and feelings in respect of being adoptive carers has not abated.

- The role of social services and, in particular, social work involvement in decision making for the child will end.

- There are no six monthly LAC reviews and statutory social work visits are unnecessary.

- Joy as a young child struggles with the intrusion into her private family life by social workers and the couple's link workers also.

- Her behaviour during these visits is often difficult as she becomes much more unregulated and she is uncertain about the rational of professionals in her safe space.

- The decision making for the child is made by her legal parents who are the parents raising her and will know her best.

- The child will be known by the same name as the adoptive family which enhance their sense of belonging and feeling of security; this is something Joy is very aware of within her current nursery placement in that her surname is not the same as the people that care for her and whom she shares her home with.

- Adoptive placements have a very low level of breakdown as compared to other placements."

[31] The social worker provided the following overall assessment:

> "Joy has been a Looked After since a very young age. Social work assessments have clearly demonstrated that rehabilitation is not a viable option. Joy presents as a vulnerable little girl who has experienced trauma. Joy has undoubtedly been emotionally damaged within this process. As she gets older she will require ongoing help to understand and be able to regulate her emotions and memories of her experience. Joy requires a permanent family life which will extend beyond her 18th birthday and will, in effect, be life-long. Foster care is an

impermanent form of care which lacks the security and legal certainty that Joy needs. Joy is only four years old and if placed in long-term foster care she could, in effect, spend the next 14 years of her life as a Looked After child. This is not in her interests. Joy's greatest need at present is permanence, stability, safety and protection from harm and to secure these needs the Trust asserts that adoption is necessary. Joy craves emotional security and to belong. She needs to be placed with adoptive carers who will provide her with a sense of belonging and will give her the opportunity to experience a forever family.

Joy has been in foster care for over three years. There are merits to long-term foster care for particular children. Factors such as the child's age at time of placement, their own histories and adverse experiences prior to coming into care, their attachment relationships with their birth families and the likelihood of future rehabilitation are all key considerations as to the appropriateness of foster care as a substitute placement."

The Trust continues to have the view that adoption is the most appropriate option for Joy. It acknowledges the precarious position that the court has to consider encompassing the needs of family life for all involved. The parents have their youngest daughter in their care and are working well to maintain this. The child remains under child protection and the level of intervention continues to be high. They have been afforded the opportunity to access an attachment assessment and whilst they do not consider exploring reunification at this time, this view may change. This results in such uncertainty for Joy and her foster family. To explore sharing of parental responsibility between carers and birth parents would not be safe and provide security for all involved. The concurrent parent carers have never been prepared for this and have always had the safety of social services for many reasons alongside the placement being within a protected status.

Joy is an endearing four year old child who is very aware of her identity, who she is and who her birth parents are. She is also aware that she does not live with them and is placed in the care of her potential adoptive carers. Joy is happy within their care and is also happy seeing her birth parents and her sister. However, the impact following

> this is sometimes difficult as she struggles to navigate this. The therapeutic team assists the carers to support her with her emotional dysregulation and this is very much required. The adoptive carers are ongoing advocates of Joy and within the court do not have the platform to express their own thoughts and feelings. However, they are of the view, that a residence order is not in the best interests of themselves in this instance and they do not feel it is right for Joy at this time. They are respectful of the court making a decision that is proportionate and meets the needs of Joy."

[32] In our view this is a high quality report. The points raised also chime with the sentiments expressed by Black LJ in the case of *Re V* [2013] EWCA Civ 913 at para [96] as follows:

> "(i) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to 'feel' different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature from that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.
>
> (ii) Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.
>
> (iii) Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has

been made, the natural parents normally need leave before they can apply for contact.

(iv) Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."

[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. In actual fact the judgment is lacking in any proper analysis of the effect on the child of being retained in foster care rather than being adopted by the carers with whom she has lived for now nearly four years and, certainly, for all of her formative life thus far.

[34] We also consider that there is merit in the submission made that the judge did not give full weight to Dr Kerry Sweeney's evidence in this regard. It is correct that the judge only refers to part of this evidence which makes us think that the full impact of what she was saying (which is apparent from the transcript we have read) about the benefits of adoption for this child was overlooked or underestimated. These failings are enough in themselves to undermine the decision as the fact that the judge does not examine the options from Joy's perspective is fatal. However, there are other legal failings which we also highlight as follows.

[35] In this case the Trust applied to dispense with the consent of the parents on grounds that they were unreasonably withholding their consent. This test is definitively explained by the House of Lords in *Down Lisburn Health and Social Care Trust v H and another* [2006] UKHL 36 at paras [67]-[70] by Lord Carswell;

"…making the freeing order, the judge had to decide that the mother was 'withholding her agreement unreasonably.' This question had to be answered according to an objective standard.

The characteristics of the notional reasonable parent have been expounded on many occasions. The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St Marylebone LC said in *In re W (An Infant*) [1971] AC 682, 700:

> 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'
>
> Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. … the same question may be raised in a demythologised form by the judge asking himself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to the question."

[36] Lord Carswell further considered the issue of reasonableness and the inter-relationship between this test and welfare considerations by citing Lord Denning in *Re L* as follows:

> "A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still, it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case."

[37] This test of unreasonable withholding consent is an objective test albeit it has been observed that there is a subjective element. It is a difficult test for parents to understand in freeing cases because many parents come before the court who are not of themselves unreasonable but when their position is weighed against the welfare of the child the test is met. Any court considering a freeing for adoption application in Northern Ireland must consider the test approved by the House of Lords in the *Down Lisburn* case. We are concerned that the judge referred to *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064 which deals with administrative discretion as follows:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred."

[38] The above quotation is not equivalent to the test expounded by Lord Carswell in *Down Lisburn* which should be utilised to decide whether a parent is unreasonably withholding consent. Given the judge's reference to a different area of law we cannot be sure that he applied the correct legal test to the question he had to decide. This is the second reason why we think his decision is wrong.

[39] The third reason why the judgment given by the judge cannot stand relates to an omission of any consideration of the European Convention on Human Rights ("ECHR"). The importance of the ECHR in a case such as this is obvious. It is explained in *XY and a Health and Social Services Trust* [2018] NI Fam 1 as follows from paras [16]-[21]:

> "[16] The other important consideration in any application of this nature is the Human Rights Act 1988. Article 8 of the European Convention on Human Rights provides for respect for family life and an adoption order or an order freeing for adoption is clearly an interference with family life and can only be made if it is justified in accordance with Article 8(2). This issue is core to any freeing application and the Supreme Court in the case of *Re B (A Child Care Proceedings – Threshold Criteria)* [2013] 1 WLR 1911 looked at the issue of necessity and proportionality in cases where there is a care plan of adoption. This is well-trodden legal ground now, and whilst various different articulations of the test were expressed by the different judges, the argument is that adoption should be a last resort where 'nothing else will do.'
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> [17] *Re B* has caused some consternation in legal circles and a suggestion that it has made the test for freeing for adoption or adoption more difficult. However, in my view this case represents an articulation of the Article 8(2) test under the European Convention and is a reminder that any application must be proportionate in pursuance of the legitimate aim which is to secure the best interests of the child throughout his childhood as stated in the Adoption (Northern Ireland) Order 1987.
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> …
>
> [21] Numerous other cases have been referred to me in legal argument. However, it is important to note that each case is fact sensitive and so it is dangerous to directly compare decisions in this area. However, the principles apply."

[40] The *Down Lisburn* case was also considered by the European Court of Human Rights ("ECtHR") in *R and H v UK* [2011] ECHR 844. In that case the ECtHR found that freeing for adoption was a justifiable measure to be taken within a state's margin of appreciation. It also made a number of important observations as follows:

> "81. 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, no. 52502/07, § 66, 28 October 2010; Johansen, cited above, § 78 and, mutatis mutandis, P, C and S v the United Kingdom, no. 56547/00, § 118, ECHR 2002 VI).
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> …
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> 86. This conclusion is not affected by the applicants' submission that proper weight should be attached to the care they have been able to provide to O. Although it is instructive that no concerns have been expressed by the domestic authorities about O, it is also the case that the needs and interests of children, even children in the same family, may vary greatly according to their age. The domestic authorities were entitled to make different decisions as to the care of all of the children concerned in this case and to find that that N's age meant that adoption was in her best interests.
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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."

[41] This decision reminds lawyers and judges of the considerations that are required to be made in any case where an interference with family life is proposed. It also reiterates the fact that each case must be determined on its own facts and that the subject child must be kept front and centre.

[42] Some recent European cases were also examined by counsel in their comprehensive legal submissions. The first we mention is the case of *Strand Lobben and others v Norway Application No.37283/13,* 10 September 2019. This was the first of a series of decisions issued in 2019/2020 regarding alleged breaches of Article 8 of the ECHR by Norway in relation to the procedures adopted by its state's authorities in a process leading to the adoption of young children. The facts of this case are instructive.

[43] In *Strand Lobben* the child was born in 2008, there was assessment of the mother and child and the local authority decided to place the child in an emergency foster placement. Despite the child's young age, the contact between the mother and child that was offered was limited to once per week for one hour and thirty minutes and this was further reduced. It is very clear to us that the thrust of the European court criticism was on the basis of a reduction in contact.

[44] To be clear, this case does nothing to change the way that freeing considerations under Article 8(2) are made. Para [165] highlights what the issue was as follows:

> "[165] Contact rights in Norway were notably restrictive and had been denounced by the court in several cases. Considering that limited contact rights had a particularly detrimental impact in the first weeks, months and years of an infant's life, the facts of the instant case were particularly shocking. The first applicant's contact rights had been drastically limited without objective reasons and over a very short space of time. The imposition of extremely restricted access rights had destroyed any chance of family reunification and had made it impossible for X to forge natural bonds with the first applicant. Since the domestic authorities were directly responsible for the family breakdown, the argument that X had had no psychological bonds with his mother was unacceptable."

[45] Paras [206]-[207] also highlight the prominence given to the interests of the child in any balancing exercise in the following terms:

> "206. In instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents (see, for instance, Sommerfeld v. Germany [GC] no. 31871/96, §64, ECHR 2003-VIII (extracts)), and the references therein).
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> 207. Generally, the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, among many other authorities, Neulinger and Shuruk, cited above, § 136; Elsholz v Germany [GC], no. 25735/94, and Maršálek v the Czech Republic)."

[46] *ML v Norway* 64639/16 is another European case which related to public care in Norway and concerned a stark reduction in contact visits between parents and children in state care. In *ML* case the court confirmed:

> "The general principles applicable to cases involving child welfare measures (including measures such as those at issue in the present case) are well-established in the Court's case law and were extensively set out in the case of *Strand Lobben and Others*, to which reference is made."

[47] The ECtHR concluded that there was a breach of the Article 8 rights in relation to contact arrangements but not actually the decision to place the children in public care. Therefore, it seems plain to us as submitted by counsel for the Trust in a lengthy and helpful skeleton argument for the first instance judge that the important principles espoused in these cases do not alter but reinforce the test to be applied in determining whether a plan of adoption for a child is compliant with the State's duties under Article 8 of the Convention.

[48] This European jurisprudence points to the fact that a judge when looking at whether to free a child for adoption must consider the proportionality of the intervention. He or she can do this when considering the best interests test found in Article 9 of the 1987 Order or as most family judges do when considering compliance with Article 8 of the ECHR. Either way any family judge dealing with a freeing for adoption case must establish that the interference is necessary, in accordance with law and proportionate to the legitimate aim of establishing the permanent living arrangements for a child in care.

[49] Unfortunately, the judgment in this case contains no analysis of the European jurisprudence. This is notwithstanding the fact that the judge specifically alerted counsel to the Norwegian cases and counsel then filed comprehensive legal submissions. If the judge had set out an examination of the submissions made by counsel he would, in fact, have developed his analysis to include consideration of the best interests of the child. If he had taken this course, we think that he would also have understood how in this case the balance indisputably fell in favour of adoption on the basis of Joy's best interests.

[50] Finally, we cannot agree with how the judge dealt with contact issues. True it is that contact reduces on adoption however it also reduces in long-term fostering arrangements. In this jurisdiction we have a strong tradition of supporting open adoption and have seen the benefits it can bring by providing a child with a sense of stability whilst allowing a child to understand his or her origins. It also allows birth parents and siblings to be reassured by keeping a link. Adoption is a different legal arrangement which is best for some children. It should not be prevented on the basis of reduced contact if it is ultimately what is best for a child.

Overall conclusion

[51] We consider that the judge was wrong in refusing to free this child for adoption for the reasons we have given. In our view Joy is a child whose best interests are clearly served by adoption rather than long term foster care. If the correct balancing exercise had been undertaken, we do not think that the judge would have reached the opposite conclusion.

[52] When concluding the freeing order, we were told that there was a large measure of agreement between the Trust, the Guardian and the parents as to the frequency of post adoption contact. We do not expect there will be a major conflict in this case in relation to that, but it will be finalised at the adoption hearing by which stage the post freeing reduction will have taken place and all parties including the Guardian can comment on the most appropriate arrangements going forward.

[53] Accordingly, we formally record that we allow this appeal from the decision of the judge, substituting a freeing order. We remit the case for the adoption hearing to take place before the High Court which we would like to be concluded before the end of the year before O'Hara J.