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Judgment: approved by the Court for handing down | *Delivered:* **21/10/14**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

M

Appellant;

and

A HEALTH AND SOCIAL CARE TRUST

Respondent.

IN THE MATTER OF S (A CHILD) (ARRANGING FOR A CHILD IN CARE TO LIVE OUTSIDE NORTHERN IRELAND)

Before: Girvan LJ, Coghlin LJ and Gillen LJ

GILLEN LJ (giving the judgment of the court)

Summary

[1] This judgment has been prepared in anonymised form in order to protect the identity of a child. Nothing must be published which might reveal her identity or that of her family.

[2] This is an appeal from the decision of O'Hara J made pursuant to Article 33 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") approving arrangements for a child to live outside Northern Ireland in a specialist unit in Co Dublin where it is contended she will receive intensive care and support to undo the damage which expert evidence suggests has been caused to her as a result of her relationship with her mother.

[3] In this matter, the mother of the child has been identified as "M", the child as "S" and the applicant Health and Social Care Trust as "The Trust".

[4] Mr O'Donoghue QC appeared on behalf of the mother with Mr Devine, Ms Keegan QC appeared on behalf of the respondent Trust with Ms Sholdis and the Guardian ad Litem was represented by Mr Maguire. Before O'Hara J the father of the child had been represented by Mr Ritchie. In light of the narrow focus of the

appeal counsel understandably felt it unnecessary for the father to be represented by solicitor and counsel in this appeal.

Article 33 of the 1995 Order

[5] Where relevant to this appeal, Article 33 provides as follows:

> "[1] An authority may only arrange for, or assist in arranging for, any child in its care to live outside Northern Ireland with the approval of the court.
>
> [2] An authority may, with the approval of every person who has parental responsibility for the child, arrange for, or assist in arranging for, any other child looked after by the authority to live outside Northern Ireland.
>
> [3] The court shall not give its approval under paragraph [1] unless it is satisfied that:
>
> (a) living outside Northern Ireland would be in the child's best interests;
>
> (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
>
> (c) the child has consented to living in that country; and
>
> (d) every person who has parental authority for the child has consented to his living in that country.
>
> [4] Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian or other suitable person."

[6] In the instant case, the mother, who shares parental responsibility with the Trust, and the child have refused consent. The father, who does not have parental responsibility, and who has not been involved in S's life in any way since she was approximately one year old, has consented to the child living in Dublin.

Grounds of Appeal

[7] Mr O'Donoghue commendably brought sharp focus to this appeal by confining the matter to three issues. These were that the learned judge:

- Erred in finding that S did not have "sufficient understanding" under Article 33(4) of the 1995 Order.

- Wrongly found that the appellant mother was unreasonably withholding her consent pursuant to Article 33(d) of the 1995 Order.

- Made a ruling which was incompatible with the Article 8 rights of the mother and child under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("The Convention").

The Appellate Test

[8] All parties were in agreement that the test for the Court of Appeal in this case is that set out in Re B [2013] UKSC 33 where the Supreme Court held that the guidance in G v G [1985] 1 WLR 647 is to be confined to cases where the Appellate Court is asked to review a purely discretionary decision. Where, as in the instant case, the Appellate Court's task is to review a first instance determination based on an evaluation of the facts, the G v G approach is inapt. The Supreme Court has held unanimously that in such a case the question is simply whether or not the trial judge was "wrong". That is the approach that we have adopted in this case.

Background

[9] In light of the confined nature of the appeal – e.g. the court was not required to consider the decision of O'Hara J that living outside Northern Ireland would be in the child's best interest or that suitable arrangements had been made for her reception and welfare in the Republic of Ireland – it is not necessary for this court to repeat all of the facts or summarise all of the evidence which are so fully set out in the judgment of O'Hara J between paragraphs [7]-[26].

[10] The narrative in this case makes for uncomfortable reading. A sufficient recitation of the facts relevant to this appeal is found in the following extracts from the judge's findings. The purpose in these extracts is to enable the issues which arose in this appeal to be put in context.

1. M, 49 years old, has spent considerable time in USA before the birth of S and, imbued with the free spirit that she encountered in her years there, had developed an unconventional way of life since returning to Northern Ireland.

2. M& S (now aged 13) have lived an isolated life made more so by the fact that at the age of four it was decided that S would not go to school but would be home

tutored by M. M said in her evidence that while she likes the philosophy of the Rudolf Steiner School, she worries that S would be frightened to go there now, that it would be too structured for her and too big an adjustment.

3. The end result was assessed by an educational psychologist Ms Thompson who recorded that:

> "… S has an above average level of cognitive abilities/intelligence and above average levels of receptive vocabulary but presents with some phonological immaturities in her expressive language. There are notable gaps in her learning and social and emotional developments which, in my view, are best described as falling within the category of complex interaction of needs. …".

Ms Thompson concluded that the child should be referred to the Education and Library Board for a statutory special education needs assessment.

4. Mother and daughter live in very limited circumstances with a spartan existence without luxuries or treats. For example, when social workers visited their home in December 2013 they had to borrow a torch from a police officer as there were no overhead lights upstairs. They found that the door to the bedroom of S was off its hinges and that she slept on a small thin foam mattress on the floor approximately the same size as a cot mattress. The limitations on their finances make it difficult for them to travel even a short distance into Belfast and restricts their social activities thus adding to their isolation. The learned judge concluded:

> "From all this evidence in no real sense does S have friends in the way that almost every other child of her age does. I also conclude that M herself is isolated, without meaningful support and with no trusted family or friends to turn to for advice."

5. The judgment relates a number of events from December 2013 which included various incidents illustrating S being completely out of control – e.g. throwing a bottle of water over a social worker in circumstances where M did not control her, both mother and daughter appearing to be unwashed and smelly, reports by neighbours of S screaming and an abject refusal by S to engage in any meaningful way in an assessment by social workers. When the social workers in February 2014 tried to speak to S she shouted and screamed at them in a hysterical way which her mother was unable to control. This led to the GP making an immediate home visit and he described her behaviour as abnormal. When mother and daughter attended a hospital for a medical assessment on 28 February 2014, as a result of their behaviour, contact was made with the Child and Adolescent Mental Health Service to assess S urgently.

6. That assessment led to a mental health admission to hospital of S on 20 February 2014 and subsequent transfer to Beechcroft on 29 February 2014. This was made necessary by S's increasingly disturbed and uncontrolled behaviour over which her mother appeared to have little or no control.

7. On the basis of these events, an Interim Care Order was made (which has been periodically extended thereafter) and M & S were transferred to Thorndale Family Centre on an emergency basis on 3 March 2014.

8. Such was the behaviour of S in Thorndale and the inability of her mother to control her, that it became impossible for Thorndale to complete a report and it brought an end to this process after nine weeks. Since that time mother and daughter have been continuing to live in Thorndale until an alternative placement is found. The placement which is proposed by the Trust is in a specialised unit "Fresh Start" in County Dublin.

Expert evidence

[11] Over the four day hearing, O'Hara J heard expert evidence from:

- Professor Iwaniec a child care and child protection expert,
- Dr Conaghy (child and adolescent psychologist),
- Dr Gracias (child and adolescent psychiatrist),
- Ms Best (social worker),
- Mr Denn (Fresh Start in Dublin),
- Ms Hughes (children's manager in the Child and Adolescent Mental Health Service)

[12] In addition, the court was provided with the written reports of Dr O'Kane (adult psychiatrist), Ms Rogan (child and adolescent psychiatrist), Ms Thompson (educational psychologist), and Thorndale staff.

[13] Once again in light of the confined nature of the appeal, it is unnecessary to dilate at length on the nature of this evidence generally. Suffice to say it provided ample evidence for O'Hara J to conclude at paragraph [44] of his judgment that the proposal by the Trust that this child requires the intensive care and support which only the specialist treatment in Fresh Start in Dublin can provide is in her best interests:

> "44. Turning first to whether living outside Northern Ireland would be in the best interests of S, there can only be one answer. It is simply unrealistic to think that S will not be damaged even more by staying with her mother. All of the experts agree that M and S need to be separated. There is no available specialised foster placement in Northern Ireland and placing her

> in a children's home would not help her. Professor Iwaniec suggested that 'she wouldn't last a day' in such a setting. Unfortunately there is no equivalent in Northern Ireland to the services which are provided by Fresh Start. That being so I see no alternative to Fresh Start. S is a much damaged isolated child whose relationship with her mother has long since gone beyond being unusual."

[14] The learned judge also properly concluded that he was satisfied that suitable arrangements had been made for her reception and welfare by Fresh Start in County Dublin as required by Article 33 (3)(b) of the 1995 Order.

[15] On the matter of the consents of S and M to the child living outside Northern Ireland, the following extracts from the expert evidence are of particular relevance.

Professor Iwaniec in her report of 7 May 2014

[16] Professor Iwaniec recorded the following comments in her assessment of S:

> "I was not able to do a comprehensive assessment of S because she did not make herself available to me on a sustained basis, but did answer some questions when she felt like it. M kept asking her to talk to me, but she did not take the slightest notice of her requests and M did not insist that she follow her instructions.
>
> "S presented as a somewhat shabby looking girl with strange looking hair (medieval style) in total disarray and not clean. She presented as a thin, underweight girl who looked younger than her chronological age. She walked in a strange manner and spoke in a childish way. She looked physically, emotionally and socially immature and found it difficult to discriminate as to what was right and wrong.
>
> S said she would not speak to the social worker, police, guardian or doctors because they treated her badly, saying that they violated her human rights and children's rights. She emphasised she would never go to school because she wanted to be taught by her mother at home. I asked S whether there are things that she wanted to talk to me about – she said that there was nothing apart from leaving her and her mother alone. She said there was no reason for people interfering with their lives.

> S's understanding and awareness of rules, routines and behavioural boundaries is non-existent as she was encouraged to reject structure and discipline and taught to adopt absolute freedom of daily life and thinking. The above brought about missocialisation and belief that she should do what she feels like and any attempt to correct that is seen as a violation of human and children's rights."

Dr Shirley Gracias in her report of 8 July 2014

[17] Dr Gracias at paragraphs 70 et seq of her report dealt with the question of whether the child was capable of giving or withholding her consent to the Trust's application that she reside in a specialist unit outside of the jurisdiction of Northern Ireland. She recorded at paragraphs 72-74:

> "72. S seemed fixated on there being only one possible outcome (namely her going home and the Trust withdrawing) and would not entertain the discussion of any alternatives. She seemed to know what was proposed and was unable to tolerate any suggestion of there being risks and benefits, associated with treatment, that would allow for there to be a choice. This meant there could be no exploration of possible risks (e.g. the potential for her to experience trauma on separation from her mother) or benefits (e.g. the opportunity to develop her individual character and possibly feel better) from their proposed treatment. Furthermore, I could not clarify, because she would not talk about options, whether she was aware of the other proposed placement and the risks it brought with it.
>
> 73. Given the above my judgement was that it was not possible for S to weigh options before coming to a decision about choices. S, who was unwilling to even think about choices, seemed to have limited understanding of the proposed treatment. She saw it, rightly, as creating a separation from her mother but she appeared to have no sense that it could potentially have benefits for her. This added to my sense that there seemed no way for S to weigh the risks and benefits when thinking about consenting to the treatment or refusing it.

> 74. Equally it seemed that S had limited information about alternatives to the proposed intervention and the risks or benefits of them. I could not ascertain if this was because she had not been told or because she had not wished to be given the information."

[18] On the question of whether the child had ever been specifically asked if she consented to living in Dublin together with her reasons for refusing—as contended by Mr O'Donoghue -- paragraphs 22 and 27 of Dr Gracias's report are relevant:

> "22. S said that she did not want to be put in care so needed a solicitor who could fight the plan. She added that she knew the place in Dublin was a 'mental hospital' and she would be sent without mother, who is a very good mother. She said she had not looked at the unit on the internet saying 'why the hell should I look on the internet'. S went on that she wanted to 'get those bastards out of my life … they're threatening me … damaging me … scum of the earth'.
>
> 27. The best outcome for S would be 'social workers to bugger off out of my life … me and my mum can live in peace … no time restrictions … together'. She said she would not talk about other possible outcomes and they were 'hideous little plans' and should not be contemplated."

[19] Dr O'Kane, consultant psychiatrist had proffered an alternative to S being removed from her mother's care. That alternative was for both of them to access psychotherapy contemporaneously for at least 2-3 years with the child requiring schooling throughout. The learned judge recorded that M had seized on what Dr O'Kane had suggested but he concluded that her acceptance of that proposal was not based on any analysis or understanding of that proposal and was merely taken as an alternative to separation. It was clear she had no understanding at all of why both she and her daughter would need to attend therapy for at least 2-3 years. O'Hara J considered that this alternative suggestion by Dr O'Kane was unrealisable and he concluded that the child needed urgent specialised and intensive intervention.

[20] Dr Conaghy, consultant clinical psychologist, had concluded that S was competent to instruct a solicitor in the case and that her views, while rigid, were well informed and articulate so that she was cognitively competent with a good grasp of the legal system. The judge had reservations about that report and in light of those reservations a psychiatric report was obtained from Dr Gracias. For

perfectly logical reasons set out in his judgment, the judge preferred the report of Dr Gracias.

The Submissions of the Parties

The submissions on behalf of M

[21] Mr O'Donoghue made the following points on the issue of S's withholding of consent:

- S had never been asked the reason why she was not consenting. This ignored therefore a number of practical problems that she might have related e.g. the fact there was no family connection in Dublin, she was away from her mother with attendant difficulties of visiting etc.

- Consent of the child to living "in that country" is the sole issue *tout court*. Her subjective consent does not depend on any objective test of rationality and is not necessarily informed by the other tests such as the child's best interests, suitable arrangements etc. In terms Article 33(3)(c) gives the child the ultimate veto.

- The only exception to this veto was found in Article 33(4) relating to sufficient understanding. The only understanding that is necessary for this is the understanding about living in that country. The fact that she does not understand her best interests is irrelevant.

- There was no evidence that she had insufficient understanding of this issue i.e. whether she consented to living in that country or not.

[22] In relation to M, Mr O'Donoghue made the following points:

- Once again M had not been asked the question as to why she was not consenting to the child living in that country.

- The court failed to identify the reason advanced by M on the issue of the proposed transfer to Dublin. The learned trial judge failed to analyse why her consent was being withheld and therefore why it was unreasonable.

- It might well be reasonable for her to withhold consent because the child herself did not wish to go and M did not wish to be separated from her. Those are the kind of reasons that may well be objectively reasonable in the circumstances. These possibilities were never explored.

The submissions on behalf of the Trust

[23] Ms Keegan made the following points on the issue of S's consent:

- When looking at Article 33(3)(c) and 33(4) there must be a context to the child's understanding.

- The extent to which the child's decision on consent is upheld depends on factors such as the child's age and understanding as well as the matter in issue and the severity of the consequences of the decision.

- Whether a child is capable of consenting is a question of fact and depends on the circumstances of the case.

- The Trust is under a duty of care to safeguard and promote the welfare of the child and provide accommodation for her. The presence of a damaged child who needs help cannot be divorced from the context of the consent which she is required to understand.

- The reports from the experts made it absolutely clear that this child did not have sufficient understanding to give or withhold consent.

[24] On the question of Article 33(3)(d) and M's consent, Ms Keegan made the following points:

- This must be interpreted in the same way that the term is interpreted in the Adoption (NI) Order 1987. The court has to ask whether the parent's objection is one which a hypothetical reasonable parent, placed in the position which she finds herself, could have bearing in mind that a reasonable parent considers her own feelings but also places great weight on what is best for the child.

- No reasonable parent in this situation would have refused to consent to the application bearing in mind the impact on her daughter if this therapeutic treatment is not invoked.

The submissions on behalf of the Guardian Ad Litem

[25] Mr Maguire on behalf of the Guardian ad Litem made the following points on the issue of S's consent.

- In assessing whether the child has sufficient understanding to give and withhold consent to live in that country, the court must of necessity assess what the child's understanding of her best interests involve.

- The consent of the child should be considered in all the circumstances of the application to assist getting that removal. The consent to removal cannot be divorced from the circumstances of why the removal is sought or indeed what objectively is in the child's best interests.

- The learned judge specifically undertook an inquiry into the sufficiency of S's understanding and in particular the report of Dr Gracias provided ample evidence that the child did not have sufficient understanding of this issue.

[26] On the issue of M withholding her consent unreasonably, Mr Maguire essentially embraced the arguments put forward by Ms Keegan.

[27] All parties adopted a common approach to the third ground of appeal touching on the question of the Article 8 Convention rights of M and S. Mr O'Donoghue recognised that if the power under Article 33 of the 1995 Order had been lawfully exercised, there was probably a sufficiency of evidence before O'Hara J to have concluded that the exercise of the power to approve the arrangement was proportionate. In essence he recognised that M's argument depended on the proper construction of the lower court's analysis of S's sufficiency of understanding under Article 33(4) and of the reasonableness of M's withholding of consent. That essentially reflected the position maintained by Ms Keegan and Mr Maguire.

The judgment of O'Hara J on these issues

[28] At paragraph [46] of his judgment, O'Hara J dealt with the question of the consent of S to living in Dublin. His conclusion was that while S can be articulate and knowledgeable up to a point, she does not have sufficient understanding of the issues in order to give or withhold consent for the reasons set out by Dr Gracias. He accepted the criteria set out by Dr Gracias in assessing competence/understanding and concluded that S did not meet those criteria. She appeared to have no insight into her problem so that she could not and does not understand that the benefits of the Trust proposal far outweigh the risk of any additional trauma being caused to her by separation from her mother.

[29] On the issue of M withholding her consent to the arrangements being made for S to live outside Northern Ireland, the learned judge concluded in paragraph [47] that she was being entirely unreasonable. In his view any reasonable parent in M's position would have welcomed the Trust's intervention and support and would have co-operated with the Trust.

Consideration

"Living" abroad

[28] We commence with two preliminary, albeit important, issues. First, it is relevant to note that Article 33 of the 1995 Order deals with "arrangements to assist a child to *live* abroad". Article 52, which deals with the effect of a care order, records at Article 52(7)(b) that while a care order is in force with respect to a child, no person may remove him from the United Kingdom without the written consent of every person who has parental responsibility for the child or the leave of the court. Article

52(8) provides that paragraph (7)(b) does not prevent the removal of such a child for a period of less than one month with the written consent of the authority in whose care he is or apply to the arrangements for such a child to live outside Northern Ireland governed by Article 33.

[29] We are satisfied in this instance that the proposed arrangements for the child to be taken to Fresh Start in Dublin do constitute "living" arrangements. The child will reside there for some months and presumably be schooled, nourished and cared for in that establishment. In all respects she is "living" there. However we observe that the Trust in future should be cautious in seeking to invoke Article 33 for arrangements which would merely involve e.g. very short hospital or medical treatment outside Northern Ireland.

The voice of the child

[30] The second preliminary issue concerns the general proposition of how the voice of the child can find expression before the courts.

[31] In a thought provoking and scholarly address "The Developing Voice of the Child at Home and Abroad" given by the Chief Justice of Ireland Mrs Justice Denham in November 2013, she said:

> "Participation in legal proceedings, the outcome of which will impact hugely on the life of the child, is said to offer a sense of enlightenment and empowerment to children in those situations where they otherwise feel helpless and voiceless. …… the views of the child may not always reflect their best interests. This notwithstanding, the views of the child can facilitate Court in making a decision which reflects to an even better extent the best interests of the child."

[32] Domestically and internationally the concept of children's rights and the need for courts to hear the views of the child has been gathering momentum in recent years:

- Article 12 of the United Nations Convention on the Rights of the Child (entered into force in 1990) recognises that the child has the right of participation in legal proceedings, including a right to be heard.

- The Children (Northern Ireland) Order 1995 provides that the court shall have regard in particular to the ascertainable wishes and feelings of the child concerned when determining any question regarding the upbringing of the child.

- Article 24 of the EU Charter of Fundamental Rights and Freedoms provides that children may express their views freely and such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

- The European Convention on the Exercise of Children's Rights 1996, Article 3, provides that children who have sufficient understanding shall have a right of access to information and to participate in judicial proceedings concerning them. This Convention thus emphasises practical rights of participation albeit the United Kingdom has not yet signed this Convention.

- The Hague Convention on the Civil Aspects of International Child Abduction and the European Union's Brussels II *bis* Regulation has helped to develop a pan-European approach to hearing the voice of the child in child abduction cases.

- Recently the Council of Ministers of the Council of Europe has published "Guidelines for the Protection of Children's Rights and the Promotion of Child Friendly Justice" which makes clear that the views of children should be taken into account by judges in accordance with their age, maturity and circumstances of the case. In family cases children should be included in discussion prior to any decision which affects their present and/or future well-being.

[33] Case law is brimming with exhortations to ensure that courts recognise a child's right to self-expression. See Re S, N and C (Non-Hague Convention Child Abduction: Habitual Residence: Child Abuse) (2005) NI Fam. 1, Mabon v Mabon (2005) EWCA Civ. 634, A.S. (otherwise D.B) v R. B. (2001) IESC 106, and O'D v O'D (2008) IEHC 486.

[34] The situation was well summed up by Baroness Hale in Re D (A Child) (Abduction: Rights of Custody) [2007] 1 AC 619 when she said at [57]:

> "… There is now a growing understanding of the importance of listening to the children involved in children cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adult may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

[35] Hence Article 33(3)(c) of the 1995 Order has an important pedigree. Under this provision, not only must the child be listened to, but absent his/her consent the court will not approve the arrangements to live abroad provided the court is satisfied the child does have sufficient understanding to give or withhold consent under Article 33(4). There is no hierarchical order in Article 33(3) and the consent of the child is to be given the same weight as the other provisions of that article.

[36] There is however no algorithmic formula for ascertaining the views of a child or, for that matter, whether the child under the provisions of Article 33(3) has consented to living in that country. Law is often characterised by a dialectic between theory and experience and there is an on-going debate within the family justice system about the manner in which the voice the child is best heard in family proceedings. A number of ways in which the voice of the child can be heard have emerged ranging from the child speaking to the judge, professional reports prepared by child psychologists, interviews by social workers, a guardian ad litem or legal representation.

[37] In the instant case, no suggestion was made to the learned judge (or indeed to this court) that he should speak to the child directly.

[38] However, the child had written a letter to him dated 1 June 2014 in which she stressed the importance of her having a solicitor to express her views in court which she felt the guardian ad litem was not doing. She expressly states that she did not want the guardian to represent her because she felt he was not representing her and had not listened to her. She concluded "It is extremely important for my welfare and well-being for my views to be heard in court so I can live with my mum and live without fear of being separated from her."

[39] There may well be instances, albeit probably rare, where a court will have to determine whether a child should have both a guardian ad litem and a lawyer to represent him/her. The former, although representing the child, has a commitment to his/her best interests and there may be cases which merit a contrary view being argued by a lawyer on behalf of the child. However we are satisfied that in this case the approach adopted by the learned judge, namely to rely on the guardian ad litem and the various reports before him together with the evidence heard, furnished him with a true and accurate picture of the views of the child. We do not consider that this was a case where it was necessary for the judge to have interviewed the child or for her to have had a solicitor representing her beyond the guardian ad litem. Our conclusion is influenced by the following factors:

- This child was fixated on there being only one possible outcome and she would not entertain discussion of any alternatives. A balanced informed view was clearly outside her capacity.

- Time and again she had refused to engage with or speak to experts or social workers once she perceived that they were not adopting her views. She has refused to entertain discussion of any alternative to her own fixed notion.

- Understandably Dr Gracias came to the conclusion at paragraph 79 of her report that S did not present with capacity to instruct a solicitor.

- The learned judge probed with objective thoroughness vehicles that would express the view of this child. Painstakingly he evaluated the reports of the numerous experts already referred to and heard the evidence of a variety of social workers and mental health nurses, as well as M. The views of this child and her objection to living in Dublin clearly emerged before him.

- The child was represented by the guardian ad litem. Whilst this evidence was based on the best interests of the child, nonetheless we are satisfied that the views of the child insofar as she was prepared to discuss the matter at all were clearly set out by the guardian.

[40] Accordingly we are satisfied that the child had a proper opportunity to voice her views, and to indicate that she was not consenting to living in Dublin. The learned judge was thus afforded ample opportunity to make an assessment under Article 33 (4) of the 1995 Order. There has been no procedural unfairness in this matter.

The construction of Article 33(3)(c) of the 1995 Order

[41] We consider that the interpretation of Article 33(3)(c) advanced by Mr O'Donoghue is too narrowly based. Whilst courts should not underestimate the resonance of simple language, nonetheless there is nothing in the design or language of the statute to suggest that the court is confined in the manner suggested by counsel.

[42] A purposive construction must be afforded to this Article in the overall context of the 1995 Order. The consent of the child needs to be contextualised and considered in all the circumstances of the application necessitating the case for removal. It cannot be entirely divorced from the circumstances dictating the removal of the child.

[43] In order to have a sufficient understanding of the nature of her consent which she is being asked to give, the child must have the capacity to understand the context in which she is withholding her consent. She has to be able to recognise and understand the views of experts that her continuing relationship with her mother is damaging her, that at some stage she will have to live in the world at large without her mother and that Fresh Start can help her to do this in circumstances where there is no other place in Northern Ireland which can provide such a solution.

[44] However, the evidence from Dr Gracias, which the judge accepted, is that she is unable to weigh up such options before coming to a decision about choices. Indeed she is unwilling to even think about choices and seems to have a limited understanding of the proposed treatment. She has no sense of the potential benefits for her. This all stems from the fact that she is fixated on there being only one possible outcome namely her going home and the Trust withdrawing and thus she refuses to entertain the discussion of any alternatives. It is relevant to note again Professor Iwaniec's conclusion that this child finds it difficult to discriminate between right and wrong and has no understanding of behavioural boundaries. In such circumstances she cannot have sufficient understanding to give or withhold consent.

[45] The learned judge correctly interpreted Article 33(4) as being essentially the test of competence set out in Gillick v West Norfolk and Wisbech Authority (1986) AC 112. The House of Lords held that a child under the age of 16 was capable of giving consent to medical treatment if he was capable of understanding what was proposed and of expressing his own wishes. The more mature the child, the more care should be taken to consider his wishes and feelings. We have come to the conclusion that the learned judge correctly concluded that this child did not have sufficient understanding to give or withhold her consent in the circumstances of this case. In our view the evidence availed of no other conceivable conclusion.

Dispensing with the consent of M

[47] Where a Trust wishes to place a child in its care abroad and the child's parent with parental responsibility does not consent to the placement the consent must be dispensed with as being withheld unreasonably. In Re G (Minors) (Care: Leave to Place Outside Jurisdiction) (1994) 2 FLR 301, Thorpe J, dealing with comparable English legislation, held that the appropriate test for the court in determining whether consent is being withheld unreasonably is the same test which is applied in adoption cases.

[48] The difficulty facing a court in carrying out such a task is obvious. It has to apply an objective standard of reasonableness, looking at the circumstances of the actual parent, but supposing this person to be endowed with a mind and temperament capable of making reasonable decisions. It was this difficulty which Steyn and Hoffmann LJJ confronted in their joint judgment in Re C (A Minor) (Adoption: Parental Agreement: Contact) (1993) 2 FLR 260 at 272b when they said:

> "….making the freeing order, the judge has to decide that the mother was, "withholding her agreement unreasonably"…….. This question had to be answered according to an objective standard. In other words, it required the judge to assume that the mother was not, as she was in fact was, a person of limited intelligence and inadequate grasp of the

> emotional and other needs of a lively little girl of four. Instead she had to be assumed to be a woman with full perception of her own deficiencies and an ability to evaluate dispassionately the evidence and opinions of the experts. She was also to be endowed with the intelligence and altruism needed to appreciate, if such were the case, that her child's welfare would be so much better served by adoption that her own maternal feelings should take second place. Such a paragon does not of course exist. She shares with the 'reasonable man' the quality of being, as Lord Radcliffe once said, an anthropomorphic conception of justice. The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the child on the one hand and the legitimate views and interests of the natural parents on the other."

[49] The judgment went on to declare at 272g:

> "… We venture to observe that precisely the same question may be raised in a demythologised form by the judge asking himself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appears sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question."

[51] This approach was cited with approval in a case emanating from our own jurisdiction in Down Lisburn Trust v H and R UKHL (2006) p. 36 at [70] per Lord Carswell.

[52] We are satisfied that O'Hara J came to the only plausible conclusion on this matter, namely, that no reasonable parent would have refused to consent to the current application.

[53] As the judge correctly observed, M had admitted to Professor Iwaniec that she had "created a monster", that the child had hit her on more than one occasion and that she was unwilling or unable to control or even influence S's behaviour which is extreme and hysterical. It is inconceivable that any reasonable parent in M's situation would not have welcomed the Trust's intervention and support and have co-operated with the Trust to turn this situation around. The unequivocal

evidence was that Fresh Start facility in County Dublin was the only facility affording the necessary expertise to do this.

[54] There is no doubt that M displayed a sedulous devotion to this child. However the grim truth is that she lives in a world where the boundaries between fact and fiction are blurred and where she is unwilling or unable to understand, control or even influence her child's behaviour. Any sense of being in a hurry to resolve the child's problems is absent. Only separation and expert treatment can secure the welfare of this child in the future and no reasonable parent would withhold consent to that step.

[55] Mr O'Donoghue argued that the reason for her withholding of consent had never been directly sought from her. Even a cursory reading of the various interviews that M had with the experts in this case reveals in unequivocal terms the reason why she is not consenting – namely that she does not want to be separated from S, and she has no understanding at all of why both she and her daughter need expert treatment. It is this total lack of understanding which fuels her withholding of consent. The learned judge was well aware of this issue when coming to the conclusion that M was unreasonably withholding her consent.

Article 8 of the Convention

[56] As Mr O'Donoghue rightly conceded, once we have determined that the powers under Article 33 of the 1995 Order have been lawfully exercised, inevitably the court will conclude that the exercise of this power to approve the arrangement was lawful and proportionate in the circumstances. There has been no breach therefore of the Article 8 Convention rights of S or M.

Conclusion

[57] In all the circumstances therefore we consider that the learned judge was not wrong to come to the conclusions he did, we affirm his decision and dismiss the appeal.