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Judgment: approved by the Court for handing down | *Delivered:* **18/12/2018**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

An appeal relating to MASON (a Pseudonym)(Freeing proceedings under the Adoption (NI) Order 1987)

BETWEEN:

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

Appellant:

-and-

M

Respondent:

Before: Stephens LJ and Sir Richard McLaughlin

Stephens LJ (delivering the judgment of the court)

Introduction

[1] By summons dated 17 December 2012 the South Eastern Health and Social Care Trust ("the appellant") sought an order pursuant to the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") that a child, whom we shall call Mason, be freed for adoption in order that he could be adopted by his long term foster carers. His mother ("M") withheld her consent. That application and also an application for a care order in respect of Mason were in the list of the Rt. Hon. Sir Reg Weir ("the judge") who on 25 June 2013 made a care order and then deliberately delayed delivering judgment in relation to the application for a freeing order to determine whether the foster carers were as good as their word that though they would prefer to adopt Mason if possible they were committed to his long term foster care. In the event having noted that they were and continued to be as good as their word the judge went on to state that "as he had hoped everyone; mother, Trust, Guardian ad litem ("the guardian") and foster carers agreed that Mason should permanently remain living with the foster family." At that stage given that everyone agreed that Mason should reside permanently with his foster family the only issue

before the judge was whether Mason should remain in long term foster care with his foster carers or be freed for adoption by them. In the event the judge in his judgment under citation [2018] NIFam 5 decided not to grant an order freeing Mason for adoption and by this means sought to secure that Mason should remain in long term foster care with his foster family. The appellant now appeals against that order to this court and is supported in that appeal by Mason's guardian. M is the respondent to the appeal.

[2] Mason's identity has been anonymised by the use of a pseudonym and we have also anonymised the names of the other children by the same means. Nothing may be published in relation to the proceedings or this judgment that might directly or indirectly lead to Mason's identification.

[3] On Thursday 13 December 2018 at the conclusion of the hearing we allowed the appeal with reasons to follow remitting the application for a freeing order to a different judge. We also gave directions timetabling the remitted hearing which is to take place in February 2019. We directed a review before the assigned judge during the course of week commencing 17 December 2018 and also directed that the papers should be made available to that judge. We expressed concerns about the need to reconsider the contact arrangements between Mason and M given information with which we were provided during the course of the appeal hearing about an unauthorised and unsupervised contact which had taken place purportedly by chance at Mason's school on 12 December 2018 when M was in the area apparently by virtue of a GP's appointment. This was not the first time that M had approached Mason in this way at school. The directions which we gave included that statements should be submitted by the parties in relation to what had occurred on 12 December 2018 and that M should provide documents confirming that there had in fact been a GP's appointment at that date and time. We also required the Trust to give consideration to offering to provide M with further therapeutic guidance and assistance as to how to deal with contact and as to the potential for disruption to Mason's education and placement by unauthorised or unsupervised contact. In this judgment we also encourage M to avail of any such guidance and assistance that is offered to her.

[4] Moira Smyth QC and Mr Ritchie appeared on behalf of the appellant. Ms McGrenera QC and Ms Lyle appeared on behalf of the guardian. Ms Dinsmore QC and Ms McKee appeared on behalf of M. We commend all for their assistance for which we are grateful.

[5] We now give reasons for allowing the appeal.

Factual background

[6] In setting out the factual background we have drawn heavily on that part of the judgment of the Rt Hon Sir Reg Weir to whom we are grateful.

[7] Mason was made the subject of an interim care order on the day of his birth and discharged from hospital directly to the care of foster carers. Those foster carers have cared for him since his birth. The judge held that it was clear that Mason was very well looked after by them and much loved. The judge stated that they are apparently quite comfortably off and are able to provide Mason with a stable and harmonious upbringing. The judge also found that they have said from the outset that while they would prefer to adopt Mason if possible they are committed to his long term foster care should that be the outcome of these proceedings. There was evidence before the judge as to the occupations of the foster carers, as to their other children and in particular as to one child who was identified in the reports as "J" who was expressly referred to by Mason when expressing his wishes and feelings as to adoption. None of that evidence was contested however we are concerned not to inadvertently publicly identify the foster carers if we set out any further details in relation to them. For that reason we will refrain from doing so.

[8] M has 5 children in relation to whom we set out brief details identifying them by pseudonyms

a) Oliva, her eldest child born in August 1999
b) Evan, born in July 2000.
c) Noah, born in April 2004
d) Lena, born in July 2008 and
e) Mason, born in June 2011.

[9] HB, to whom M is not and has never been married, is believed to be Mason's father but the judge found that he has taken little or no interest in Mason since his birth and has never sought contact direct or indirect nor engaged with social workers despite their best efforts in that regard. HB took no part in the proceedings before the judge or in this court he having informed the appellant that he has no interest in these proceedings. In any event as the judge observed his parentage has not been reliably established because of the refusal by HB to provide a DNA sample.

[10] Since 2000 M has been known to Social Services following the birth of her second child, Evan, in July of that year when concerns were expressed by nursing professionals. M appeared reluctant to follow advice from doctors and health visitors and missed medical appointments while in the community. As a result, in October 2000 and again in April 2001, Evan was admitted to hospital with concerns that his medical needs were being neglected and that advice was not being followed. Evan gained more than 2 kgs in weight during that second hospital stay of about one month but M would not accept that any failure on her part to follow advice had contributed to Evan being significantly underweight. Evan was therefore discharged from hospital to foster carers with whom he continued to make excellent progress.

[11] Also in June 2001 M asked the Trust to take her eldest child, Oliva, then aged 1¾ into care because she said she could not cope. M was then in a highly distressed

state and complained that she was having relationship problems with the father of Oliva and Evan which involved substance misuse and domestic violence which had on occasions occurred in front of the children. Oliva was therefore placed with her father's parents and settled well until, within three months, M had quarrelled with those carers and asked that Oliva be removed from their care.

[12] Following a Child Protection Case Conference in November 2001, when various unsatisfactory aspects of parenting came to light, full care orders for both children were obtained. Attempts at a parental assessment by the Trust failed and Dr Bownes, consultant psychiatrist, assessed M and the father of Oliva and Evan in November 2002 and concluded at that time that M's behaviour reflected a pronounced level of immaturity and that she was driven by her own needs and would use any means open to her to get what she wanted regardless of the harm it might cause to herself or others. He noted that neither M nor the father was willing or able to acknowledge any of the concerns regarding the children and he saw little evidence of capacity on the part of either to effect and sustain positive change. He did not advise the return of either child to the parents' care. In consequence both Oliva and Evan continued in various rather ad hoc foster care arrangements until, because according to the Trust, M had made progress in the interim. Oliva was returned to her parents' care in May 2004 and Evan was returned in June 2005. Meanwhile in January 2004, a third child, Noah, had been born to the couple. During the process of phasing the elder children back home it was recorded by the Trust that the home situation had greatly improved and M was following its advice and guidance. The full care orders remained in place with reviews under the LAC process.

[13] The judge held that the improvements were short lived. Disharmony continued between the parents with allegations of substance misuse until they appeared to separate around the middle of 2006 although on-going conflict between them continued on and off into 2007. Conditions for the three children dis-improved and it was noted that Noah was suffering delayed speech. M did not co-operate with speech therapy and failed to bring Noah regularly to a nursery placement that the Trust had arranged. M moved house repeatedly between 2005 and 2007 and in June 2007, following her having taken an overdose of tablets, social workers found the two older children in bed wearing their school uniforms with the house in an unkempt state. In August 2007 a third party reported that the house was being frequented by strangers and that the children were dirty. There then followed an unsettled period with rows between M and neighbours culminating in a Child Protection Case Conference in December 2007 when a catalogue of concerns about the children's welfare was compiled from various housing, health and educational professionals. The children were however left in M's care while complaints continued to be received from various sources. In July 2008 a fourth child, Lena, was born to M.

[14] By October 2008 M had formed a new relationship with G and declared her intention of moving with him to Derry. The Trust asked Dr Bownes to assess the

new couple to gauge their motivation and long term plans following which they were allowed to move as they wished. However, by February 2009 M was back in the Trust's area having parted from G. She found a new home quickly and throughout 2009 matters appeared to progress tolerably well, although there were repeated complaints that she was engaging underage babysitters and allowing young people to drink in her home. M denied these allegations and would not co-operate with the Trust's endeavours to do some therapeutic work with the children. In December 2009 a Child Protection Case Conference decided that due to the absence of the therapeutic work and M's unwillingness to co-operate with it the children should remain on the Child Protection Register. M at this time commenced a short-lived relationship with another man J but would provide the Trust with no details concerning him.

[15] Throughout 2010 matters continued in a similar pattern of minor and not so minor crises and uncooperative behaviour on the part of M. The second child, Evan, who was by now in his tenth year, began to display emotional and behavioural problems both at school and at home. A referral was made to the community paediatrician who expressed concern about Evan's vulnerability and about attachment issues. M said that Evan was unmanageable but was unable or unwilling to see that therapeutic work might help him and wished him to be medicated. She missed appointments with him at the paediatric clinic.

[16] In May 2010 Noah, by then six, suffered a fall in circumstances that were somewhat unclear, fortunately without lasting effect. After he returned home a social worker called at the house unannounced and found M absent and all four children in the care of the eldest child Oliva who was by then not quite 11. On 15 July 2010 Lena, by then just two, was brought to hospital with a limp. M could not say what had caused it but an x-ray revealed a healing fracture. Investigations revealed that Lena had, from 6 July, been left in the care of a childminder while M had gone to Donegal on a holiday with the other children. The childminder said that on the morning of 7 July she had found Lena to be limping but was unable to contact M because apparently her mobile phone could not receive calls in Donegal. The childminder did not know M very well and had been paid £100 to keep Lena for a week. She had not brought Lena to the Accident and Emergency Department because she knew it would seem strange that she did not know the child's details. She did not hear anything from M until the day of her return from holiday.

[17] The Trust held a meeting at the hospital on 19 July 2010 as a result of which it was decided that the children were to reside with their maternal grandmother. A medical report from the Orthopaedic consultant expressed the view that there had been a fracture of the fibula, probably at least 2 to 3 weeks old when presented, that it would have caused pain from the beginning and a limp probably of more than one week's duration. The unusual location of the injury suggested to the consultant that it had resulted from a direct blow.

[18] On 1 September 2010 interim care orders were granted by Newtownards Family Proceedings Court in respect of Noah and Lena. It will be recalled that care orders had been granted in November 2001 in respect of Oliva and Evan and these had remained in force. All four children were removed from M's care and placed in foster care. A freeing order has been made in relation to Lena. None has since been returned to M except that relatively recently Oliva and Evan have decided to leave their foster placement and reside with M.

The proceedings before the judge

[19] These family issues initially came before the judge at somewhat different dates but by 2012 there were four sets of proceedings being:

(i) An application by the father of the two older children, Oliva and Evan, to have their care orders discharged. This application was ultimately not pursued.

(ii) An application by the Trust for full care orders in relation to the three younger children, Noah, Lena and Mason in circumstances where successive interim care orders were made beginning on 27 June 2011 in respect of Mason.

(iii) An application by the Trust to free Lena for adoption.

(iv) An application by the Trust to free Mason for adoption.

[20] The judge in accordance with his conscientious practice directed that a great deal of work was to be done with a view to encouraging contact between the siblings and their mother, grandparents and father or fathers. In addition efforts were made to assess M's potential, firstly to understand the historic concerns of the appellant and secondly to alter her behaviour so as to demonstrate her ability to provide adequate parenting for the three younger children whom she wished to have in her care.

[21] The judge addressed the issue of placing Mason with M by directing a two-strand approach to her treatment and assessment which involved a Trust Family Centre on the one hand working in partnership with Dr Michael Paterson, consultant clinical psychologist, providing intensive therapeutic input on the other. Reports on the work that each was carrying out were shared between the Family Centre and Dr Paterson as it progressed so that each was aware of how the other's strand was going. Dr Paterson provided treatment on no fewer than 35 occasions between August 2011 and May 2013 and reported on a total of six occasions as his work progressed. He provided a final report dated 12 June 2013. The judge set out how that report illustrated the "before and after" positions in relation to M in that for instance it stated that she had made excellent progress in a number of areas and that by and large she could meet Mason's needs as they currently stand but that she

would need continuous updating of information and on-going instruction. The conclusion of the report in essence was that after the therapeutic work M was motivated to parent Mason but would require input from someone of at least the level of a child support worker at each stage of Mason's development to ensure that she understood Mason's needs emotionally and psychologically. At each stage of Mason's development M would require a four week intensive course and she would need guidance. There was no guarantee of success.

[22] On 25 June 2013 there was a hearing before the judge at which Dr Paterson gave evidence and was cross-examined by counsel for the appellant and the guardian. The judge states that there was no challenge to the substance of Dr Paterson's evidence. At the conclusion of that hearing the judge made the full care orders applied for, a course to which the judge stated that there was no objection of any substance. The only care plan in respect of Mason before the court was one for "Permanence via Adoption." Ordinarily after a care order is made that would conclude the care proceedings but there appears to have been some confusion as to whether the judge did approve the care plan as he indicated that at that point the evidence had not satisfied him that M was unreasonably withholding her consent. The judge stated that on that basis and following discussion with counsel he would adjourn the matter (which matter we assume to have been the application to free Mason for adoption) to enable a residential assessment at Thorndale to be arranged and, if that were successful, to see whether M could manage Mason at home. We consider that at this stage the judge had in mind a care plan of rehabilitation of Mason to M, failing which long term foster care or adoption. No order was made directing an assessment at Thorndale but the appellant who was not willing to arrange such an assessment appealed to this court. However given that no order had been made this court remitted the matter to the judge. In the event no order was made directing a Thorndale assessment. We do not consider it necessary for the purposes of this appeal to resolve the issue as to whether the judge did approve the care plan of permanence via adoption and if not what care plan was approved.

[23] A hearing took place before the judge in October 2013 in relation to the freeing application. Prior to that hearing the minutes of a meeting of the Trust's Adoption Panel held on 18 June 2013 were disclosed. This meeting was some two weeks before the 25 June 2013 hearing. The minutes of that meeting were not disclosed prior to the hearing on 25 June 2013 but as we have indicated were available prior to the October 2013 hearing. The minutes reveal that at the meeting Mason's case had been discussed and the following is the judge's summary of parts of the minutes:

> "The chairperson asked why the child had come back to the Panel again and a social worker explained that it was due to the fact that Dr Paterson had carried out further work with M at the request of the judge *who had felt that she had made some kind of progress.* The chairperson

> referred to Dr Paterson's report noting that it was made quite clear that M had demonstrated progress but that it would not develop any further so there was no more work to be completed."
>
> "A Trust member observed that M had been through a lot of assessments throughout her dealings with the Trust. The principal practitioner responded saying that *Dr Paterson's last piece of work had been required by the judge otherwise it would not have been carried out*."
>
> "The chairperson questioned did the Trust hold a freeing order for the child as yet? *The senior social worker remarked that it was a formality that had to be completed.*" (emphases supplied)

That summary is relevant to M's sense of grievance, particularly those parts to which we had added emphasis. A point of detail in relation to that summary is that there were 2 senior social workers and 2 social workers present and it might be more appropriate to have stated that "a senior social worker remarked …" rather than "the senior social worker remarked …."

[24] Judgment was not delivered after the October 2013 hearing but rather there was a period of delay by the judge to determine whether the foster carers were as good as their word. The judge delivered his judgment on 1 June 2018.

[25] Between October 2013 and June 2018 there was no further oral evidence but further reports were submitted to the judge from the guardian and the appellant together with an affidavit from M sworn on 13 April 2017. We summarise only one of the reports which was from the guardian dated 29 March 2017. The guardian stated that the passage of time has allowed for the opportunity to see in actual terms how long term foster care was working for Mason, whether or not it was adequately meeting his needs and how M had behaved in her interactions with Mason. The guardian stated that Mason had become more aware of the fact that his care arrangements were constantly under scrutiny by professionals and that his placement status was different from child J another member of the foster carer's family. She considered that confusion was being caused to Mason and that on meeting him initially he had become more guarded. The guardian recounted how she had been told by his foster carers that he was often more unsettled and anxious by his social worker visits.

[26] The guardian also reported that Mason spontaneously said that he wanted to be adopted and that he wanted to use the surname of his foster carers. The guardian stated that this is how he wishes to be known, that he believes that this will give him the security and certainty of belonging in a permanent way within the foster carer's family and will confirm him as a fully integrated member of their family. The

guardian referred to Mason's present emotional insecurity and that this had also been observed by the social workers. She reported on her conversation with Mason's teacher who had observed negative emotional impact on Mason in and around the days of contact with M. The guardian reported that she had been told by one of the foster carers about an incident at the end of October 2016 when M in the presence of Mason had said it was her intention to "get all of her children back." The guardian had met M on 14 March 2017 and she reported that M had informed her that she wanted Mason to remain in long term foster care so that eventually she can seek a discharge of the Care Order and that he can be returned to her care. The guardian recounted how she had also been told by M that if the appellant was concerned about Mason's best interests then he would already be in her care and added that it remained her intention to secure the return of all of her children to her care. We would observe that those statements in March 2017, if accurately reported, occurred one month prior to M's affidavit of 13 April 2017 in which she stated that she was content for Mason to reside permanently with his foster carers. The guardian in her report also stated that M's engagement with professionals was once again reported at times to be "hostile and aggressive." The guardian concluded that "on the basis of all of the information available that the disadvantages of adoption have decreased and the advantages of foster care have also decreased." Consequently the guardian was of the professional opinion that adoption is not only the "right" option for Mason, it is the "only" option to secure and protect Mason's needs and welfare now and throughout his life." She stated that such an outcome would be in accordance with Mason's wishes and feelings though it was a matter for the court to determine what weight should be attached to them.

[27] As can be seen from that report the guardian identified and addressed the issue as to whether adoption or long term foster care was in the best interests of Mason. We do not consider it necessary to set out all the other reports which were submitted in evidence both before and after October 2013 which addressed the same issue. All of them from the appellant and from the guardian were to the effect that adoption rather than long term foster care was in Mason's best interests. Furthermore, in her report dated 29 March 2017 the guardian stated that adoption was not only the right option but was the only option.

The judgment of the Rt Hon Sir Reg Weir

[28] In relation to welfare the judge held that "the welfare of the child has been admirably secured, practically since birth, by the consistent love and care afforded to him in his long term foster placement." He held that it is clear that Mason is very well looked after by them and much loved. The judge also stated that "there is no remaining consideration pertaining to the child's welfare – everyone agrees he could not be looked after better than he presently is and will continue to be."

[29] The judge having stated that "everyone; mother, appellant, guardian and foster carers, agrees that the child can and should permanently remain living with

the foster family," identified the only question outstanding as being the legal status within that family; long-term fostering or adoption?

[30] Consideration was then given by the judge as to whether M was unreasonably withholding her consent to adoption. The judge's reasons for deciding that the mother was not unreasonably withholding her agreement essentially related to a justifiable sense of grievance held by M and in summary were:

a) M was never afforded the opportunity to parent Mason notwithstanding all the difficult and protracted work that she undertook with Dr Paterson over a considerable period and very many sessions.

b) M was denied the opportunity to undertake a Thorndale assessment and, if it had succeeded, to parent Mason in the community with a modest level of professional support as Dr Paterson recommended.

c) The minute of the adoption panel meeting on 18 June 2013 demonstrated that the social workers misrepresented to the panel the extent of the positive changes M had made in her work with Dr Paterson and plainly regarded the granting of a freeing order as 'a formality that had to be completed.'

The judge then posed the question "how can it be said that nothing else but freeing for adoption will do?" and the question "how can it be said after all her work and progress, that having been denied any opportunity to demonstrate her ability to parent the child, that the withholding of her consent to the child's adoption was "unreasonable"?" The judge answered these questions by stating that in his view the appellant had entirely failed to discharge the high legal standard required of it before "unreasonableness" could be found. The judge was not satisfied that M was unreasonably withholding her agreement and he refused the application.

Legal principles

[31] We will confine ourselves to the legal principles which are strictly necessary to the determination of this appeal.

[32] Article 9 of the 1987 Order requires that in "deciding on any course of action in relation to the adoption of a child, a court … shall regard the welfare of the child as the most important consideration and shall have regard to all the circumstances full consideration being given," to amongst other matters, "the need to be satisfied that adoption … will be in the best interests of the child." This is the welfare principle under which the court is required to consider whether adoption is in the best interests of the child. In circumstances where, as here, the realistic proposals are long term foster care or adoption then a welfare analysis of both of these proposals in respect of the child must be carried out. That is not an option. It is a requirement that both proposals are validly considered on their own merits as they affect the particular child. It is not sufficient to state that both long term foster care and

adoption are permanent. There are important distinctions between long term foster care and adoption that impact on the welfare of a child. The two proposals cannot be equated in terms of what they offer by way of security for a child.

[33] Article 9(b) requires that in deciding on any course of action in relation to the adoption the court … shall "so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding." There is a fundamental requirement in deciding on whether long term foster care or adoption is in the best interests of the child for the court to ascertain, listen to and give due consideration to the voice of the child. As Mason's representative in this litigation the reports and conclusions of the guardian as to his wishes and feelings required detailed consideration. A determination of welfare as between the options of long term foster care or adoption absent consideration of the voice of the child is deficient.

[34] Articles 16(1)(b)(ii) and 16(2) provide that an adoption order shall not be made unless in the case of a parent the court is satisfied that she is withholding her agreement unreasonably. Again in deciding that issue the court is required first to ascertain whether long term foster care or adoption is in the best interests of the child and also to listen to the voice of the child. An objective parent in deciding whether to consent would take into account, amongst other matters, what was in the best interests of the child and also take into account the wishes and feelings of the child.

[35] An adoption order (and indeed for instance a care order) amount to an interference with family life, a right protected by Article 8 ECHR. An adoption order may be justified if aimed at protecting the "health or morals" and "the rights and freedoms" of the child. But they must also be "necessary in a democratic society". In *R and H v United Kingdom* [2011] 54 EHRR 28 [2011] 2 FLR 1236 at paragraph [81] the ECtHR stated that in "assessing whether the freeing order was a disproportionate interference with the applicants' Article 8 rights, the court must consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention." The court also recalled "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." The ECtHR went on to state that "such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed." The ECtHR then stated that

> "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* …" (emphasis added).

That passage, particularly the part to which we have added emphasis, makes it clear that in determining whether the interference is proportionate there has first to be a welfare assessment which in this case would be a welfare assessment as to whether adoption or long term foster care is in the best interests of Mason. Absent such an assessment a court cannot form a view as to whether there is an overriding requirement pertaining to the child's best interests. An alternative way of emphasising the importance of carrying out the welfare consideration is that if the conclusion is that the child is equally well looked after in long term foster care or by virtue of adoption then there cannot be an overriding requirement pertaining to the child's best interests.

[36] In relation to the role of this court on the hearing of an appeal it is sufficient to refer to paragraph [46] of *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 W.L.R. 1911 so that this court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity. The decision of the lower court may be unjust if a judge fails to give adequate reasons for his determination.

[37] The appellant submits that if this court allows the appeal then we should either determine the freeing application ourselves as there is an evidential basis for doing so or in the alternative we should remit the application for hearing before a different judge. We were referred to In *Re B (A Child) (Evaluation: Appellate Court's Function)* [2014] 1 WLR 4344, in which in relation to the issue as to whether this court should decide the issue or remit Ryder LJ stated, amongst other matters, that "If the question to be decided is a key question upon which the decision ultimately rests and that question has not been answered and in particular if evidence is missing or the credibility and reliability of witnesses already heard by the first court but not the appeal court is in issue, then it is likely that the proceedings will need to be remitted to be reheard.

Discussion

[38] The judge stated that as everyone was agreed that Mason should permanently reside with his foster carers "there (was) no remaining consideration pertaining to Mason's welfare." We do not consider that to be accurate as an agreement as to the permanence of residence did not address or resolve the issue as to whether adoption or long term foster care was in Mason's best interest. There was that remaining issue as to welfare about which there was a considerable volume of evidence. We consider that the judge failed to identify this issue in his judgment and as a consequence of having failed to do so that the issue was not resolved. It is not possible from the judgment to say whether the judge decided that one or other option was better than the other and if so by what degree or as to whether they were equally beneficial. Furthermore as the issue was not identified in the judgment or

resolved no reasons were given. Finally the wishes and feelings of Mason should have been but were not considered in relation to whether adoption or long term foster care was in his best interests. The issue as to Mason's wishes and feelings required analysis and if they were or were not to weigh heavily in relation to welfare then reasons ought to have been but were not given. For all these reasons the welfare issue as to whether adoption or foster care was in Mason's best interest was not addressed or resolved and no reasons were given. This in turn means that there was a serious procedural irregularity.

[39] The notional objective parent in deciding whether to consent to adoption has to consider the welfare of Mason and has also to take into account his wishes and feelings. As the judge did not address or resolve the welfare issue as to adoption as opposed to long term foster care and did not consider the wishes and feelings of Mason as to those options we consider that the issue as to whether M was or was not unreasonably withholding consent was not appropriately addressed and also we consider this to be a serious procedural irregularity.

[40] In order to address proportionality under Article 8 ECHR again consideration has to be given to the welfare of Mason in relation to the options of adoption and long term foster care and as to Mason's wishes and feelings. Those matters should have been but were not considered in the proportionality assessment and we consider this to be a further serious procedural irregularity.

[41] For those reasons we allowed the appeal. We considered that the matter should be remitted to be heard by a different judge rather than determining the application ourselves. The issues are key issues. There will need to be an assessment of the witnesses and in particular M. The judge accepted that M supported long term foster care but did not address the evidence of the guardian that M had stated that she wanted all the children, including Mason, returned to her care. There are also issues about for instance Facebook posts.

[42] The judge deliberately delayed delivering his judgment in relation to the freeing application. He is a highly regarded and most experienced family judge who has demonstrated compassion and enormous insight in family cases with a particular regard for the difficulties faced by individuals battling with for instance addictions or mental health issues. He has rescued many families. We mention the issue of delay only so as to ensure that the first instance judgment is not used as a precedent in the future. We do not consider it to have been purposeful to delay judgment in this case either at all or for the period involved both as a matter of general principle and also by reference to the particular facts of the case. Almost every family case involves a predictive exercise. No case should be delayed apart from in the most exceptional circumstances to determine whether a prediction is accurate and even if it is the delay should be strictly limited. In this case on the evidence which we have seen the prediction as to whether the foster carers would be as good as their word was straightforward. We have seen nothing to suggest that

they would not have been as good as their word and we have seen a considerable volume of unchallenged evidence that they would be.

Conclusion

[43] We allow the appeal and remit for determination to a different judge.