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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Between:

X HEALTH AND SOCIAL CARE TRUST

Applicant/Respondent;

and

W

First Respondent;

and

E

Second Respondent.

Before Girvan LJ, Coghlin LJ and Gillen LJ

GILLEN LJ (delivering judgment of the court)

Anonymity

[1] This case relates to care proceedings under the Children (Northern Ireland) Order 1995 and freeing for adoption under the Adoption (Northern Ireland) Order 1987. Accordingly, the names of the parties have been anonymised and nothing should be reported that would serve to identify the child who is the subject of these proceedings or the parents of the subject child.

Introduction

[2] This is an appeal from the decision of Maguire J who granted the application of the Health and Social Care Trust ("the Trust") for a Care Order in respect of the child of W and E (hereinafter called "M") pursuant to Article 50 of the Children

(Northern Ireland) Order 1995 ("the 1995 Order") and that the child further be freed for adoption pursuant to Article 18 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order").

[3] Ms Smyth QC appeared on behalf of the Trust, Mr McGuigan QC appeared as a pro-bono counsel on behalf of the appellant with Mr Jones and Ms Ross appearing on behalf of the Guardian ad Litem. We are grateful to all counsel for the care and thoroughness in which the respective arguments both written and oral were presented to this court. In particular we pay tribute to the efficient working of the pro-bono system in this case on behalf of the appellant.

Statutory Background

[4] Where relevant the provisions of the 1995 Order provide as follows in Article 50:

> "(2) A court may only make a Care … Order if it is satisfied –
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
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> (b) that the harm, or likelihood of harm, is attributable to –
>
> (i) the care given to the child or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

[5] The well-known "Welfare Checklist" is found in Article 3 which provides as follows:

> "(1) where a court determines any question with respect to -
>
> (a) the upbringing of a child …
>
> the child's welfare shall be the court's paramount consideration
>
> ……
>
> (3) In the circumstances mentioned in paragraph (4), a court shall have regard in particular to –

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

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

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

(4) The circumstances are that –

(a) the court is considering whether to make, vary or discharge an Article 8 Order and the making variation or discharge of the Order is opposed by any party to the proceedings; or

(aa) the court is considering whether to make an order under Article 7; or

(b) the court is considering whether to make, vary or discharge an order under Part B.

(5) Where a court is considering whether or not to make one or more orders under this Order with respect to a child, it shall not make the Order or any of the Orders unless it considers that doing so would be better for the child than making no order at all."

[6] Where relevant the provisions of the 1987 Order for freeing a child for adoption without the parents' consent is found in Article 18 as follows:

"(1) Where, on an application by an adoption agency, an authorised court is satisfied in a case of each parent or

guardian of a child that his agreement to the making of an Adoption Order should be dispensed with on a ground specified in Article 16(2) the court shall make an Order declaring the child free for adoption.

(2) No application shall be made under paragraph (1) unless –

(a) the child is in the care of the adoption agency; and

(b) the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption."

[7] Article 9 provides, where relevant, as follows:

"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) a need to be satisfied that adoption or adoption by a particular person or persons will be in the best interests of the child;

(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and

(iii) the importance of providing the child with a stable and harmonious home; and

(b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to that, having regard to his age and understanding."

Background Facts

[8] The background facts in this case were carefully set out by Maguire J in the course of his judgment. The salient issues can be summarised as follows;

[9] W is a member of the travelling community in Northern Ireland. When she was 17 she entered an arranged marriage and had five children. Domestic violence punctuated this relationship and eventually she parted from her husband. She has suffered from mental health problems and suicidal ideations. Her IQ places her in the fifth percentile with a verbal comprehension in the second percentile. We pause to observe that she has played no part in this appeal.

[10] E is of Palestinian nationality and was born in 1981. He left Palestine at the age of 14 or 15 thereafter travelling through Egypt, Jordan, Syria and Turkey where he paid to be smuggled into the UK. He arrived in Belfast in 2007 and his asylum application is still ongoing. He has had no employment since coming to Belfast, speaks only very basic English (an interpreter was required during the hearing in Arabic) and his non-verbal intelligence falls on the borderline of the fourth percentile.

[11] The relationship between W and E has been volatile and permeated with physical violence. An indication of the nature of their relationship can be seen in E's claim that their son M, the subject of the present proceedings, was conceived by virtue of W drugging and then raping E. The child was born in 2010. At this time E was living with another woman, R, with whom he was in a relationship and who also was pregnant with his child.

[12] At the end of April 2010, shortly before M was due to be born W informed the community midwife that she was unable to care for the baby as her family would not accept E's racial and cultural background. Upon her asserting that she wished E to look after him, social services investigated E and, particularly Ms O'Neill, voiced concerns about his ability, capacity and suitability to do so including an alleged assault on a female which was being investigated by the police. In any event W took M home following the birth. Notwithstanding that E informed social services that M was at risk from W's other children and that W's brother had exhibited physical violence in the house. It emerged that E was continuing to live in the house with W.

[13] On 20 May 2010 W advised social workers that she was taking her other children away on holiday and leaving M in the care of E. When social services refused to allow this to happen, W threatened to stab the social worker.

[14] Notwithstanding that W and E informed social services on 30 June 2010 that they had been married in a Mosque, on 22 July 2010 police were summoned to W's house upon W's request for E to be removed. Later in July social service witnesses observed W and E acting in a volatile and abusive manner to each other in front of W's other children in the street.

[15] On 10 August 2010 social workers found M lying on W's bed unattended.

[16] The volatility of W and E's relationship came to a head on 14/15 August 2010 as described by the learned trial judge at paragraphs 39 and 40 of his judgment. [17]

He recorded, inter alia, that on 14 August 2010 police were again summoned by when he informed W that he was taking M and leaving the house. Social workers were concerned that discussions between the two of them might deteriorate and lead to violence.

[18] On 15 August 2010 it emerged that there was an angry quarrel between E and W which spilt out into an episode of violence, the cause and content of which resulted in W and E blaming each other. It was clear that the argument had gone on for some time in open view in the street and throughout the main part of the argument E was holding M while at the same time conducting a physical response to W. W at one point had tried to strike E with a brush notwithstanding that E was holding the child M at the time. The court accepted that W summoned the police. When the police officer arrived she described how M was tucked up under one of E's arms. His head was pointing forward and the officer saw E push W several times. At one point she described E hitting her on the neck. M throughout was crying and was very distressed. When the police officer attempted to take M from E's arms he resisted and ultimately the police had to prise M away from him. E resisted the police officers and had to be restrained leading to his arrest and removal to a police station. He was charged with the assault of W and resisting police. That night M had to be looked after by a neighbour. E was convicted of resisting the police but not of assault on W.

[19] In the aftermath of this incident on the following day M was placed with his maternal aunt J. W, through her solicitor, indicated that she wanted to obtain a non-molestation order against E.

[20] After these events W's mental health deteriorated. As indicated, M was initially taken by the maternal aunt but this placement broke down following E making threats to the maternal aunt.

[21] On 14 September 2010 the Trust applied for, and was granted, an Emergency Protection Order ("EPO") in respect of M. Two days later on 16 September 2010, the Trust was granted an Interim Care Order ("ICO"). The Trust placed M in foster care with the G family where he has remained by virtue of the periodical renewal of the ICO. It is to be observed that Care Proceedings were also instituted in relation to W's five other children.

[22] W and E were both enabled by the Trust to engage in a parenting assessment carried out by the Whiterock Family Resource Centre ("Whiterock"). The outcome of this assessment was not positive for W. E's result, under the guidance of Mr Rossatto, however was more positive and albeit with some reservation, it was recommended that he be offered a residential assessment with his son at Thorndale. Nevertheless, on 5 September 2012 the Trust presented a care plan to the High Court seeking permanent removal of M from his parents and for him to be freed for adoption. The court however, per Weir J, directed E should be given the opportunity of the residential assessment with his son. The residential assessment

began in December 2012 but unfortunately was suspended in March 2013 because of the failure on the part of E to progress and M was returned to the care of the G family.

[23] The Trust's initial care plan sought the permanent removal of M from both parents. The proceedings however were delayed, firstly, by E's arrest and conviction for serious offences in January 2014 which occurred during a contact session with M (see paragraphs 38 et seq below) and, secondly, due to E's detention in England by the Immigration Service following his release from custody. In March 2014 the Trust amended its application to the court seeking an order that M be freed for adoption by his foster carers, the G family.

The judgment of Maguire J

[24] Maguire J handed down his judgment on 12 March 2015 granting the Trust's application for a care order in respect of M and ordering that M be freed for adoption. E, but not W, lodged a Notice of Appeal on 26 March 2015.

The content of the experts' reports before Maguire J

[25] Maguire J had the benefit of a number of reports from experts and from their evidence before him. These included the following:

Dr Denise McCartan, Clinical Psychologist

[26] She examined E on 9 March 2011 and recorded the following views:

- Whilst E appears sociable, mature and self-assured, he fears autonomy and may feel generally antagonistic towards others.
- He attempts to gain social approval and tends to be deferential to those he perceives as superior.
- He attempts to impress them and if he feels he has failed this is likely to cause him to feel anxious and may cause him to become resentful of them.
- He is pre-occupied with public recognitions.
- He exhibits many features of narcissistic personality disorder characterised by pervasive pattern of grandiosity, need for admiration and lack of empathy. This disorder, coupled with his limited problem solving skills, was likely to compromise his parenting and would require a high level of support.
- He has some passive aggressive personality features.
- He denied allegations of domestic violence and said he only behaved towards W as a result of fear.
- He had limited understanding of the Trust's concerns albeit he said he was willing to work with the Trust and engage with any recommended intervention.

Dr Fred Brown, Consultant Forensic Psychiatrist

[27] Dr Brown examined E on 23 June 2011 and 16 September 2011 and made the following points.

- E exhibited no evidence of psychotic illness and did not appear to be suffering from an anxiety or depressive illness.
- His intelligence appeared within normal limits and he did not suffer from a learning disability.
- E was keen to present himself in a favourable light and as the victim of the actions of others.
- He became very angry when asked about the concerns of social services and claimed that he saw no need for their involvement.
- There was no evidence he has been capable of forming and sustaining a mature and mutually respectful relationship with a partner.
- No therapeutic intervention was recommended.
- The discrepancies in accounts given by E during the two interviews called into question the reliability and veracity of his accounts.
- If E were to parent his children it would be important to assess his parenting capacity in practical settings but E's attitude towards the Trust's intervention posed substantial difficulties in working towards achieving a safe environment for the child.

The Family Resource team at Whiterock Family Centre

[28] E attended two referral meetings in March 2012 and 5 of the 6 sessions offered to him in April and May 2012. The centre's conclusions were:

- There continued to be a three way cultural clash between E's culture, W's culture and the social services highly developed child care and child protection system.
- E had the capacity to be protective in the parenting of his son and has for a short period carried out some of the parenting tasks.
- E was very aware of the importance of attachment to his son and the driving motivation for his ignoring social service demands not to reside with W and M was out of concern over W's ability to care for M.
- E was recommended to be provided with an opportunity to undertake a fuller parenting assessment that should be underpinned with a cultural sensitivity.

[29] This fuller parenting assessment took place over a period of 6 sessions during the summer of 2012. The conclusions of the centre arising out of this period were:

- E demonstrated a good understanding of his son's developmental needs.
- E was able to identify in a detailed and practical way the day to day routines associated with the care of his son.

- There were ongoing concerns about E's sense of entitlement regarding the care of M which is so strong that it clouds his judgment and his ability to be empathetic in relation to the attachment of M with his foster carers and the possible distress associated with separation.
- E should be given the opportunity of a residential assessment with M being introduced in a phased basis.

Thorndale Family Centre Residential Parenting Assessment

[30] E's residential parenting assessment course at Thorndale commenced on 22 October 2012. The results of this assessment included the following:

- E demonstrated appropriate ability to receive and implement advice albeit his ability to sustain such required to be monitored.
- M commenced overnight contact with the view of working towards M moving in with E full-time in or around the start of December 2012.
- An incident occurred in January 2013 when E engaged in a heated exchange with his neighbour concerning loud recordings of the Koran. When Thorndale staff investigated E refused them access to his flat and became very agitated.
- At a review in mid-January 2013, 12 weeks into the assessment, it was noted that M was in the full-time care of E and E was continuing to engage appropriately with Thorndale staff to demonstrate his ability and willingness to adopt their advice and guidance.
- Shortly after this review however Thorndale staff noted a decline in E's mental health including low mood, being withdrawn and being tired. This impacted on the standard of care he was giving M. The interim report from Thorndale dated 18 March 2013 concluded that there were still concerns primarily relating to E's ability to be entirely open and honest with all professionals involved with M, especially the suspected concealment of continued contact with W and the increased risk this causes to M.
- As the assessment continued, E spent more time out of the centre and was seemingly disengaged from Thorndale and the ongoing assessment process. Staff found it gravely concerning that he was becoming less open and honest with staff and professionals and increasingly evasive and secretive about certain issues including his whereabouts and movements outside of the centre. This made it impossible for the staff to safely manage the risks around M.

[31] At the professional meeting on 27 March 2013 Thorndale could not recommend the family move out of the Centre together as a family unit.

[32] Concerns by professionals about E being a possible "flight risk" with led M to the High Court on 28 March 2013 making an interim order that M be returned to the foster care of the G family until a scheduled hearing on 8 April 2013.

[33] Following M being placed back with the foster carers, E's contact took place twice per week under supervised conditions at Beech Hall. In April and May 2013 E missed a substantial number of these contact sessions and there was also evidence that M was distressed before going to contact.

Dr Juliet Butler, Consultant Child and Adolescent Psychologist

[34] Prior to the conclusion of E's assessment at Thorndale a specialist attachment assessment was carried out on E by Dr Juliet Butler. Her report was dated 20 March 2013. Her analysis included the following points:

- Dr Butler was deeply concerned at M's presentation and referred to M as "struggling". His life was described as characterised by upheaval and violence and appeared to be working at a high level of "physiological arousal".
- M was displaying his distress and anxiety around all the changes in his life. He was constantly demanding of all the adults around him, screamed rather than spoke and his voice sounded like he was going to cry. He often had an open mouth and a tight face. His body was at times completely tense with his fingers splayed wide apart in a posture of absolute anxiety. His respiratory rate increased, he was sweating and he was very unsteady on his feet. His attention span was short and he behaved in a hyper-vigilant way.
- E struggled to know how to manage the situation.
- M was displaying maladaptive attachment strategies.
- E suffered his own attachment difficulties and was prone to be overcome with his own anger, holding strong views about his own victimisation. He tended to put himself first with M's needs second.
- E appeared to function by always looking at things from his own perspective, blaming other people if things went wrong. E was likely to be a highly traumatised individual. This could be linked to a maladaptive attachment strategy based on past unresolved trauma which brought with it hyper vigilance to danger.

[35] Dr Butler concluded:

> "(M) is not going to be able to have the capacity to deal with his father's trauma alongside his own and there is a risk that it will overwhelm him."

Report of Ms Melanie Gill, Psychologist

[36] Ms Gill was instructed by E's legal representative to prepare a report dated 9 August 2013. Her opinion in this report included the following points:

- E's entire psychological and neurological system is "primed" to react to danger, but the extent of the self-protection can actually create and even elicit

danger to him through angry and aggressive conflict in both personal and professional relations.

- E displaces his distress by projecting all of his childhood pain on to his own children which causes E to sometimes behave impulsively and recklessly.
- E loved his son, wanted to be a good father but believed he was the only person who could look after M. His own knowledge of parenting and what children need emotionally is impoverished due to his own childhood. His reactive lying derived from his "fight" mechanism. He does not see the level of unconscious distress that affects M.
- The attachment between E and M is insecure.
- A further residential assessment would "re-traumatise" both E and M and would increase M's likelihood of developing complex post-traumatic stress and psychological ill health in the future.

[37] Dr Butler produced an addendum report dated 22 September 2013 after a follow up visit to see M in the foster care placement and in response to the report of Ms Gill. By this stage E's contact with M appears to have ceased. Dr Butler considered:

- M was at a much lower level of arousal.
- E still considered he was a good father and that there was no basis for the Trust's interference.
- E denigrated the foster carers and the level of care they were giving M.
- Should M be returned to E's care M would develop a significantly distorted attachment development, suffer emotional abuse and be at risk of physical abuse with a significant potential for developing mental health problems and violent behaviour himself.
- Any further assessment or work with M and E at that time would be abusive.

The meeting of Dr McCarten, Dr Butler and Ms Gill on 15 October 2013

[38] The guardian ad litem convened a meeting of these three experts on 15 October 2013. At this meeting Dr Butler opined that adoption by his current foster carers best met the needs of M. Ms Gill agreed with this. All the experts agreed that M should not be placed with E.

The incident of 3 January 2014

[39] The hearing of the Trust's substantive application to the High Court commenced on 21 October 2013. Following several days of evidence the case was adjourned to January 2014. Before the resumed hearing took place the following incident occurred on 3 January 2014 as recorded by the learned trial judge:

- By Christmas 2013 contact between E and M was taking place at Beech Hall Wellbeing Centre.

- Over the Christmas period problems arose. E failed to appear on 24 December 2013 without explanation.
- On the next due date of contact 27 December 2013 contact was cancelled when E did not arrive by the agreed time ie after 1½ hours. When E did arrive he demanded M be brought to him and a stand-off occurred.
- On the next date of contact on 31 December 2013 E again did not arrive on time and, upon doing so, then left for a further 20 minutes and as a result contact did not occur.

[40] On 3 January 2014 E again did not arrive at the prescribed time being 20 minutes late. Following a discussion between one of the social workers and E it was agreed that staff would collect M for contact. Staff proceeded to do this at approximately 10 am. At 10.15am E arrived in an agitated state. In the course of an argument between himself and a social worker at the reception he called her "a bastard and a devil" and snatched documents out of her hands throwing the documents away. At this point a call to the police was made by other staff. E ran off towards the underground car park. Shortly afterwards he was seen carrying M in the hallway attempting to leave the building with the child in a distressed and tearful state.

[41] The social worker who had brought M to the building appealed to E to put M down and was trying to calm him but he pushed her against a wall calling her "a bastard, devil woman".

[42] M then took the child across a main road away from the centre. M was crying and protesting that he needed to go to the toilet. E ran out into the road with M in his arms and into a nearby shopping centre. Social workers in pursuit were able at this stage to obtain the assistance of security officers at the shopping centre and the police were summoned. There then commenced an attack by E aimed at the security guards with him kicking and punching out. The security guards were forced to restrain E. At this stage a social worker was able to lift M from him.

[43] In the course of the struggle between the officers and E, two 8/9" knives were found concealed down his trouser band. Once police arrived they handcuffed and arrested E.

[44] E was then charged with a range of offences and remanded in custody, being later refused High Court bail.

[45] Arising out of this incident E was convicted in June 2014 over the removal of a child in care, two offences of assault, possession of two knives, threats to kill and disorderly behaviour in addition to threatening to kill M's foster father in a separate incident. He was sentenced to 16 months' imprisonment and released in early September 2014. As a result of all this by order of the court E has not had contact with M since 3 January 2014.

The report of Dr Maria O'Kane, Consultant Psychiatrist dated 19 February 2014

[46] A further report from Dr O'Kane was obtained dated 19 February 2014 in which she made the following points:

- E suffered from a number of personality disorders including paranoia, emotional instability and dissocial personality disorders. These result in him being sensitive to criticism and constantly feel being attacked by others. He is liable to become involved in intense and unstable relationships, to be impulsive, have outbursts of violence or threatening behaviour, has the lack of sense of responsibility for social norms, rules or obligations, a low tolerance for frustration and a low threshold for discharge of aggression including violence.
- E has been effectively orphaned and has been looking after himself in various war zones and tense environments since he was 13 against the background of death, destruction and abandonment. He is naturally fearful of authority that threatens to take his family away.
- He appears to love his children but does not understand their needs. This results from a very rudimentary and naïve expectation of family life based on his own impoverished experiences from early life.

The Trust's Care Plan

[47] The contentions of the Trust were as follows:

(i) M is well settled with the G family and strong attachment bonds have been formed. His developmental needs are being appropriately promoted and maintained.

(ii) The foster carer's call M by his Christian name at the request of M albeit they observe a Muslim diet for him.

(iii) Neither W nor E are able to fulfil the role of being a good enough parent.

(iv) M's stability and security need to the paramount considerations and can only be achieved by permanence in a placement outside the family.

(v) In light the incident of January 2014 supervised contact could no longer be facilitated due to the risk to Trust staff and the possible threat to the foster carers. Accordingly, future contact under a care order should be indirect for both E and W.

The report of Guardian ad Litem

[48] The Guardian came to the following conclusions:

(i) M would be at risk of significant harm if returned to either W or E given the ongoing nature of their lifestyles, emotional/psychological difficulties and parenting deficits.

(ii) The Trust had established that no kinship options existed for M.

(iii) Permanency outside the birth family was required.

(iv) Adoption would ensure M's future needs and interests and also security given his young age and attachment to his foster carers.

(v) Long term fostering would leave M too vulnerable to parental challenge and disruption.

(vi) W and E should be restricted to indirect contact and only after both have undertaken work with social services to address the issues set out.

(vii) Indirect contact was appropriate for sibling contact given that none had occurred in over 18 months.

The decision of Maguire J

[49] In the course of a thoroughly comprehensive and legally impeccable judgment on 12 March 2015, Maguire J came to the following conclusions:

(i) The threshold criteria were satisfied in that M had suffered significant harm prior to the Trust's intervention, he had suffered significant harm at the time of the Trust's intervention and he would have suffered further significant harm if the Trust had not intervened as it did.

(ii) In so concluding he relied, inter alia, on the following factors:

(a) the fraught circumstances surrounding M's birth with W's constant changing stance on whether she wished to care for M, the unstable relationship between W and E and the disregard by W and E of the Trust's child protection concerns.

(b) After his birth M was placed in the middle of a volatile relationship characterised by domestic disagreements, tensions, arguments and ultimately physical violence. There were tensions and arguments between W and her other children and E and W's other children. This all occurred in the context of what the judge found to be E's controlling character and his belief that he had an absolute right to do what he wished in respect of M.

(c) There was an inability of the part of W and E to accept help and direction from the Trust which inured to a greater risk of harm to the child.

(iii) M had sustained emotional harm between May 2010 and September 2010 by virtue of the volatility of the relationship of W and E living together. The incidents of domestic violence during this period were likely to have scarred M emotionally.

(iv) Relying on the opinion of Dr Butler in relation to her visit to M in Thorndale, M was being emotionally traumatised during his time in Thorndale.

(v) He accepted the assertion of Ms Gill that any return to Thorndale by M and E would be likely to cause M significant damage and stress together with the risk to M's psychological health.

(vi) M's physical and emotional needs are probably best met by the current foster carers, the G family, and not with either parent as a return to W or E would likely have a negative effect on M. He accepted the wealth of the expert evidence in the case that neither W nor E is able to provide good enough parenting and that there are no therapeutic or other interventions which would increase their parenting skills within a reasonable time.

(vii) This is one of the rare cases where the detrimental effect of contact is simply too great.

(viii) M's welfare will best be served by him not being returned to the care of either parent and by permanence away from them. He should continue to be placed with his current foster carers.

[50] In relation to the freeing for adoption, Maguire J reminded himself that that test was whether, having regard to all the circumstances, M's welfare would be best served by adoption. In considering same regard had to be given to M's best interests throughout his childhood and the importance of providing him with a stable and harmonious home.

[51] The learned trial judge affirmed that M's parents and each of them could not be considered potential carers for M. No suitable kinship carer had been identified and therefore the only options were either long term fostering or adoption.

[52] The learned trial judge opined that the single most important factor was a need to create stability and permanence for M. Long term fostering, even with the G family, was unlikely to secure the long term confidence that is required and therefore would be unlikely to best serve M's interest. Accordingly, the learned trial judge agreed with the expert evidence, the opinion of the guardian ad litem and the

Trust that M's best interests and welfare throughout his childhood lay with adoption as the way to take his care forward and to advance his upbringing.

[53] Considering whether to dispense with the consent of W and E on the grounds that it was being held unreasonably, the learned trial judge accurately set out the law guided by the Supreme Court decision in Re B (A Child) [2013] UKSC 33 in relation to the application of Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The learned trial judge observed that the advantage of adoption for the welfare of M clearly outweighed the disadvantages to such an extent that no reasonable parent concerned about their child and facing up to the objective evidence could reasonably conclude that a course other than adoption should be taken. Accordingly, he concluded that the consent of W and E was being unreasonably withheld.

Legal Principles

[54] The governing legal principles were not in dispute during this appeal. Mr McGuigan acknowledged from the outset that Maguire J had not been guilty of any misdirection in law and the legal tests to be applied had all been properly set out in his judgment. Accordingly, we need only make brief reference to some of the salient legal principles.

[55] The threshold issue in Care proceedings was addressed by Lady Hale in the seminal case of Re B (A Child) [2013] UKSC 33 where she said at paragraph [193]:

> "Nevertheless, where the threshold is in dispute, courts will find it helpful to bear the following in mind.
>
> (i) The court's task is not to improve on nature or even to secure that every child has a happy and fulfilled life, but to be satisfied that the statutory threshold has been crossed.
>
> (ii) When deciding whether the threshold is crossed the court should identify, as precisely as possible, the nature of the harm which the child is suffering or is likely to suffer. This is particularly important where the child has not yet suffered any, or any significant, harm and where the harm which is feared is the impairment of intellectual, emotional, social or behavioural development.
>
> (iii) Significant harm is harm which is "considerable, noteworthy or important" and the court should identify why and in what respects the

> harm is significant. Again, this may be particularly important where the harm in question is the impairment of intellectual, emotional, social or behavioural development which has not yet happened.
>
> (iv) The harm has to be attributable to a lack, or likely lack, of reasonable parental care, not simply to the characters and personalities of both the child and her parents. So once again, the court should identify the respects in which parental care is failing, or is likely to fall short of what it would be reasonable to expect.
>
> (v) Finally, where harm has not yet been suffered, the court must consider the degree of likelihood that it will be suffered in the future. This will entail considering the degree of likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. It will also entail considering the relationship between the significance of the harm feared and the likelihood that it will occur. Simply to state that there is "risk" is not enough. The court has to be satisfied, by relevant and sufficient evidence, that the harm is likely."

[56] We have no doubt that Maguire J followed these criteria. Once the threshold has passed, the 1995 Order requires that the welfare of the child be the court's paramount consideration. In deciding what will best promote the welfare, the court is required to have regard to the "welfare checklist". The court must not make any order unless it considers that doing so would be better for the child than making no order at all. Once again it is clear that Maguire J expressly followed this approach.

[57] The Order itself makes no mention of proportionality, but it was framed with a developing jurisprudence under Article 8 of the European Convention on Human Rights and Fundamental Freedoms very much in mind. Once the Human Rights Act 1998 came into force, not only the Trust but also the courts as public authorities, came under a duty to act compatibly with convention rights.

[58] Lady Hale considered the Strasbourg case law in this area and concluded at paragraph [198]:

> "… It is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to

> the child's welfare, in short, where nothing else will do. In many cases, and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore and attempt alternative solutions. As was said in Re C and B [2001] 1 FLR 611 at para 34:
>
> > 'Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child'."

[59] The court in Re B held that Article 8 has no application when considering the significant harm test but it is applicable at subsequent stages – for example in relation to the decision as to what form of intervention and family life is appropriate/proportionate.

[60] Maguire J fully recognised this concept. He pointed out at paragraph [155] of his judgment that in Re B Lord Wilson at paragraph [34] indicated that a high degree of justification was required before an adoption order could be made. Lord Neuberger at paragraphs [76]-[78] said that adoption must be necessary and that nothing else would do.

[61] Maguire J correctly summarised the law at paragraph [157] in relation to the consent of the parents when he said:

> "Nonetheless the court must ask itself would a parent be acting unreasonably in the way in which that term has been described in the authorities referred to above if he or she refused to consent to adoption in this case?"

[62] Finally, Re B also addressed the role of the appellate courts. In the course of the majority view, Lord Neuberger at paragraphs [80]-[96] analyses the role of appellate courts where there is a challenge to a care order. He held that the test to be applied by the appellate court is whether a decision of the lower court was "wrong". The appellate court exercises a review role rather than undertaking the entire decision making process for itself.

[63] Dealing with the function of the trial judge in family cases, Lord Wilson said at paragraph [42] that it:

> "transcends the need to decide issues of fact; and so his (or her) advantage of the appellate court transcends the conventional advantage of the fact finder who has seen and heard the witnesses of fact. In a child case the judge develops a face to face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer the question negatively, to ask "are the local authorities concerns about the future parenting of the child by this witness justified?". The function demands a high degree of wisdom on the part of the family judge: focussed training: and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision."

Grounds of Appeal

[64] As indicated above Mr McGuigan did not challenge the principles of law set out by the learned trial judge. In essence the basis of his appeal was that no reasonable judge, having applied these principles to the facts, could have arrived at the conclusion reached by Maguire J.

[65] In particular Mr McGuigan contended:

(i) The evidence of all the Trust social workers, particularly namely Ms O'Neill from the outset, the management of Thorndale and in particular Mr Richardson, the police witnesses and the expert witnesses including Dr Butler, Ms Gill, Dr McCartney, Dr Brown and Dr O'Kane and the guardian ad litem were all flawed with and motivated by a strong element of racial and sexist prejudice against E. In short the learned trial judge ought to have recognised this and preferred the evidence of E.

(ii) In particular from the outset Ms O'Neill on behalf of the Trust had acted in a racist and sexist manner in concluding that E, as a male, lacked the experience and resources to look after this child and was influenced by an allegation that E had assaulted a woman, a charge which was eventually dismissed.

(iii) A clear illustration of the racist thread was the fact that the child had been given a Muslim name M but the Trust had attempted to delete his Muslim culture and assert the use of a Christian name namely D.

(iv) The evidence of Mr Rossato in the Whiterock Centre, who was not racially prejudiced, had been ignored.

(v) The foster carers have lied about the appellant in order to keep the child and the court ignored this factor.

Conclusions

[66] We are satisfied that the learned trial judge adopted a comprehensive and flawless approach to this case and that the conclusions at which he arrived, based on a correct approach to the legal principles, were not "wrong". Accordingly, we dismiss this appeal. Our reasons are as follows.

[67] First, this experienced trial judge heard this case over several days, observed and heard a large number of witnesses including E and W, considered and analysed the many statements of evidence filed by the appellant together with the records provided by the social workers and other professionals. Thereafter he gave a careful, comprehensive and considered judgment 48 pages in length.

[68] In many respects this is a locus classicus of the circumstances postulated by Lord Wilson in re B where he spoke of child cases in which the judge develops a face to face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer the question negatively, to ask "are the local authorities concerns about the future parenting of the child by this witness justified?".

[69] We find no reason to conclude that the learned trial judge was wrong in his conclusions set out at paragraph 15 in relation to the appellant when he said:

> "The court therefore had ample time to consider his demeanour and to observe him. Unfortunately, the court has formed a clear view that E was apt to tell lies if he thought it would advance his case. Some of these lies, in the court's view, were blatant. He made allegations of the most implausible nature against social workers so as to explain away his actions and he often resorted to explanations for events which can only be said to bear little relationship to the weight of the evidence."

[70] The learned trial judge's conclusions about the dangers to this child if in the care of E were well highlighted by him in the judgment at paragraph [92] where he described the report of Dr Juliet Butler, a Consultant Child and Adolescent Psychiatrist who carried out a specialist attachment assessment in respect of M and E. We were profoundly concerned to note that in her opinion M was "starting to … display his distress and anxiety around all the changes in his life". He was constantly demanding of all the adults around him, he screamed rather than spoke and his voice often sounded like he was going to cry. He often had an open mouth and tight face. His body was at times completely tense with his fingers splayed wide in a posture of absolute anxiety. He was sweating and was unsteady on his feet. His attention span was short and he behaved in a hyper-vigilant way. Like the learned trial judge we have no reason to doubt her conclusion that if M continued to function at this level of arousal, he would be likely to be caused significant distress.

[71] We found not the slightest evidence that Dr Butler, the other experts or social workers were motivated by racism or sexism. This was an allegation made by E without any foundation and sadly illustrated only too well, even at this stage in the proceedings, E's propensity to resort to any implausible allegation to support his own self-conception and so as to explain away his indefensible actions.

[72] Some illustrations will suffice to underline the dismissal of these allegations by the learned trial judge. First, even a cursory reading of the reports of these experts – two of whom were from England – reveals the detailed care and attention which they gave to these issues. It is not without significance that E accuses even his own expert, Ms Gill, of racism. Such allegations are easily made but require some basis and factual foundation before they can be sustained. The learned trial judge carefully considered this allegation, as did we, and found no basis for it.

[73] On the contrary, we consider that throughout this case care has been given to address the cultural background of this child. The Trust employed a cultural adviser who attended all meetings of the Trust at the start of the Thorndale assessment. Moreover, Mr Rossato, who was not the subject of a racist claim, from Whiterock Centre also attended at the Thorndale assessment.

[74] In Thorndale itself, we noted the cultural sensitivity in the course of the records of that stay. An illustration is that the records specifically acknowledge that within the Muslim culture families tend to prepare larger dishes for all to share and eat from and accordingly E and M ate the same dishes in this manner.

[75] Even at the stage of foster care, it is noted that the Trust looked at the possibility of Muslim foster carers but none was available.

[76] We are also satisfied that the question of the child's name was sensitively handled. It was a bone of contention between W and E as to whether the child was called M or D. In Thorndale the child was called M and the Trust regularly invoked both names. Once in foster care in March 2013 did the child revert finally to the

name D because the child needed security and was in a family where it was found easier to refer to him as D. We find no reason to believe that the name of this child was dealt with in anything other than a culturally sensitive manner.

[77] We have no doubt that on the facts outlined in the case the learned trial judge correctly concluded that W and E were unreasonably withholding their consent to the child being freed for adoption

[78] Finally, at paragraph [143] of the judgment, the learned trial judge carefully considered the current foster carers and, having considered the reports, noted that they were uniformly good and that the court had no reason to doubt them notwithstanding E's regularly made criticisms of them. The court did not find any of the criticism of the foster carers made by E to be accurate and we agree with this conclusion. On the contrary, one has only to compare the behaviour of E in the incident of 3 January 2014 with the annotated exemplary behaviour of these foster carers to see where the best interests of M lie.

[79] Finally, we find no justification for the attack upon the guardian ad litem. We consider that the guardian ad litem has acted in an exemplary manner in this case.

[80] Obviously the final decision about the nature of future contact with M will be made by the judge dealing with any application for adoption. In the interim we agree with the comments made by the learned trial judge on this issue.

[81] In all the circumstances therefore we dismiss this appeal and affirm the orders of Maguire J.