HOUSE OF LORDS SESSION 2005–06

[2006] UKHL 36

on appeal from [2005] NICA 47

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Down Lisburn Health and Social Services Trust and another (AP) (Respondents)

v.

H (AP) and another (AP) (Appellants) (Northern Ireland)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have had the advantage of considering in draft the speech which is to be delivered by my noble and learned friend, Lord Carswell. I agree with it and, for the reasons which he gives, I too would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Carswell. I agree with it, and for the reasons which he gives I would dismiss this appeal. I add a few words of my own out of respect for the dissenting opinion of my noble and learned friend Baroness Hale of Richmond.

4. Baroness Hale's opinion contains, if I may respectfully say so, some valuable insights as to the advantages and disadvantages of the procedure of freeing a child for adoption. These considerations, and Baroness Hale's comments on the practicalities of the procedure, may well be taken into account in the review of adoption law in Northern Ireland which is to take place soon. But I am not persuaded that the trial judge, approaching the matter in the context of society in Northern Ireland, made such an error as would entitle an appellate court, applying the principles in *G v G* [1985] 1 WLR 647, to reverse his decision.

5. In any case concerning children an appellate court must (as Lord Fraser of Tullybelton recognised in *G v G* at p 652A) bear in mind the potentially unsettling effect of prolonged litigation. I fear that reversal of the judge's decision in this case would be bound to be seen as a victory by the birth parents. It would be surprising if, after what they regarded as a victory, they were able to put aside the strong feelings which have actuated them up to now. I do not of course base my conclusion on that point, but it confirms my view that the appeal should be dismissed.

BARONESS HALE OF RICHMOND

My Lords,

6. The issue before us is the use of the procedure to free a child for adoption and to dispense with parental consent in a case where some continued contact may well be in the child's best interests. Freeing for adoption was introduced in England and Wales under the Adoption Act 1976, following the Report of the Departmental Committee on the Adoption of Children chaired by Sir William Houghton in 1972 (Cmnd 5107). At that time, the conventional picture of adoption was still prevalent: it was the consensual if reluctant placement of a baby, usually born to an unmarried mother, with strangers who would step into the shoes of the birth family, making a clean break with the past. Yet even then times were changing. Fewer and fewer babies were being surrendered for adoption. The use of adoption for older children who might otherwise spend their childhoods in the care of local authorities was increasing. Concern that children should not be left without a permanent home led social workers to strive to achieve 'permanency' – either by reuniting them with their own families or by finding them a new 'family for life'. These adoptions could bring great benefits for the

child but they also brought a new set of challenges for social work and for the law. The children were older. They had a history. This might well include damaging experiences from their past. But it might also include significant relationships with members of their birth family. The use of compulsory adoption, dispensing with the need for parental agreement, was increasing. But the fact that these children had a history also meant that their best interests might require that any significant links with the birth family be preserved in a more 'open' form of adoption. It was increasingly recognised that there could be more ways than one of achieving the desired permanency for the child. (The recent introduction of special guardianship in England and Wales is a further step in the same direction.) Research (see, for example, J Triseliotis, *In Search of Origins*, Routledge and Kegan Paul, 1973) had also shown how adopted people often felt the need to discover more about their origins when they grew up.

7. Interest began to develop in preserving some limited contact between an adopted child and her birth family. This might serve two rather different functions. One, which can often be accomplished by life story books and occasional letters and cards, is to help the adopted child develop her sense of identity and self as she grows up. Another, which may indicate the occasional face to face meeting, is to preserve significant attachments, prevent the feelings of loss and rejection which the child who remembers her birth family may feel if she is completely cut off from her past and help her not to worry about the family she has left behind, including siblings (see Department of Health, *Adoption Now. Messages from Research,* 1999). This form of contact requires the birth parents to be able to put their own feelings of grief and anger aside so that they do not use their contact to undermine the adoptive placement. But if they can do this it can be a great help to the child in making the transition to her new 'family for life'.

8. Hence the case for some form of post adoption contact may be strongest when the adoption itself is particularly contentious. The parents may rightly feel that they have something to offer the child even if she can no longer live with them. The problem for the court is to enable all the competing issues to be properly tried and resolved. This is not easily done within the framework of freeing for adoption because the parents' attitude to adoption may be judged without prospective adopters having been identified. Since the implementation of the Adoption and Children Act 2002 in December last year, freeing for adoption is no longer available in England and Wales. But it remains a possibility in Northern Ireland. This case provides a good illustration both of its advantages and of its disadvantages.

9. There were of course many matters in dispute between the Trust and the parents, who remain deeply opposed to adoption and would like their child to be returned to them eventually. But the issue of principle for us is put this way in the respondent's case:

> "In circumstances where there is a significant attachment between a child and her birth parents, where post adoption contact is in the best interests of the child, but it cannot be established that there will be post adoption contact, is the court required to take those issues into account when deciding, for the purposes of making an order under article 18 of the Adoption (Northern Ireland) Order 1987:
>
> (a) whether adoption is in the best interests of the child; and
>
> (b) whether the parents are unreasonably withholding their consent to their child being adopted?"

The factual history

10. We are concerned with a little girl whom I shall call Nina. She was born on 19 April 2002, the fourth child of her mother, whom I shall call Maureen. The mother has three older children, Helen aged 16, Peter aged 14, and Tanya aged 10. Nina is, however, her first child with the father, whom I shall call Bernard. He is registered as Nina's father and thus shares parental responsibility for her under the terms of the Children (Northern Ireland) Order 1995, article 7(1)(a) (in this respect Northern Irish law was ahead of English law, for the equivalent provision in England and Wales only applies to fathers registered on or after 1 December 2003).

11. The mother has a long history of problems with alcohol, although she has also had periods of stability and sobriety. When not abusing alcohol she is able to look after her children properly and to establish good relationships with them. Unfortunately, because of her problems, they have all suffered periods of separation from her, including periods in care. The older three were all the subject of care orders when Nina was born. According to Professor Triseliotis, the renowned emeritus Professor of Social Work in the University of Edinburgh, "the two eldest [children] present complex problems and their future well-being is very much in doubt. [Tanya] has been somewhat spared by the simple

explanation that she is younger and has not had so many moves, but her long term welfare is also far from certain."

12. Because of the mother's history and abuse of alcohol during the pregnancy, Nina was placed in foster care when she left hospital soon after the birth. However, she was reunited with her parents when they were all admitted to a residential assessment centre in June 2002. The assessment went so well that all three returned home to live together in August 2002 and the Trust did not pursue its application for a care order. Later, the three older children also returned home. Unfortunately, the mother relapsed into alcohol abuse in early 2003 and the father was unable to take responsibility for the children while she was unfit to do so. A crisis arose in June 2003, and the children were once again removed from home. During the latter part of 2003, the Trust determined that the care plan for Nina should be adoption. Not surprisingly, they did not wish to see the pattern established for the older children repeating itself with Nina.

13. The hearing of the application for a care order began in March 2004 and the order was granted in July. His Honour Judge Rodgers held that Nina was likely to suffer significant harm because of her mother's abuse of alcohol and the father's violence towards the mother. He approved the Trust's care plan for adoption. Professor Triseliotis produced two reports for those proceedings. In the first, he said this, based on his observations of Nina with her parents:

> "It is my overall view that [Nina] has attachments of some significance to her parents and that she greatly enjoys and benefits from contact. In spite of her interrupted parenting, and the fact that she is being parented for 24 hours a day by foster parents, she has retained and/or developed significant attachments to her parents. This could be attributed to some positive parenting when mother was not drunk and to the frequency of contact sessions. She also has a heightened awareness of who they are and in spite of her very young age, they could not be easily excised from her life without leaving psychological scars."

In the second, he concluded in the light of the risk of the mother's again relapsing into alcohol abuse and the fate of the older children that he could not recommend returning Nina to her mother. But:

> "At the same time I should stress that [Nina's] attachments to her parents are significantly stronger than estimated by the Trust's staff and I do not recommend excising them from her life. In the event of her being adopted she should have 3-4 annual face-to-face contact meetings with her parents."

The judge specifically noted this evidence, when approving the Trust's plan to reduce contact gradually, from twice a week with parents, once a week with the whole family and once a month with her siblings only, eventually to once a month.

14. Nevertheless, the Trust did not make any attempt at that stage to find prospective adopters, still less to find adopters who were willing to accommodate Nina's need for contact with her parents. This is despite the clear guidance from the DHSS that, if the care plan is for adoption, prospective adopters should have been identified and the match between child and prospective adopters approved by the adoption panel, *before* the final hearing of the care proceedings (see DHSS, Permanency Planning for Children: Adoption – Achieving the Right Balance, May 1999, para 6.9). No doubt their reason was the two fold assumption: first, that where the parents were opposed to adoption, it was necessary to apply to free the child for adoption and second, that the child should not be placed before she was freed. The DHSS Guidance acknowledges that it may be necessary to free the child for adoption, but points out that the care and adoption proceedings should be co-ordinated, so that the parents do not have to face a contested care application followed months later by a contested freeing application (para 6.11). It also stresses the need to avoid delay in the placement of children (para 5.1).

15. Yet that is what happened in this case. The freeing application was made in September 2004, heard by Gillen J over seven days from 24 January to 14 April 2005 and decided on 31 May 2005, 10 months after the care order was made. Yet it appears that little attempt was made to find prospective adopters during that time, apparently because it was the Trust's policy not to do so until there was a freeing order. Furthermore, there was no attempt to explore the issue of contact with prospective adopters, because despite the evidence of Professor Triseliotis the Trust remained opposed to an open adoption.

16. Professor Triseliotis gave evidence on two separate days in the freeing hearing. His evidence on the first day was that he disagreed with

the Trust's plans for no contact after the adoption. There could be no question of post adoption contact if the parents did not support the adoption. But their opposition to adoption did not mean that they would undermine the placement if an order was made. They had to be judged after the court had made its decision. They had not undermined the foster placement during the frequent contact they had had before the care order. It was in the child's interests to have direct contact and adoptive parents should be found who could accommodate that. If no such family could be found the Trust might instead have to look for a long term foster placement which could lead to adoption. He pointed out that the advice given by The British Association for Adoption and Fostering was that all prospective adopters should be prepared for the possibility of post adoption contact. If every effort was made to find such adopters, he was hopeful of success.

17. Before he returned for cross examination to be completed, a senior social worker had given evidence for the Trust. They had initially been opposed to direct contact because of the parents' hostility, but having heard Professor Triseliotis' evidence, they were prepared to look for prospective adopters who would meet all Nina's needs, including her need for continued contact with her parents. However, they could not guarantee to find such adopters or that contact would be workable. When the Trust's modified stance was put to Professor Triseliotis, he eventually accepted that if every effort was made over a period of six months to find suitable adopters who would agree to direct contact, but none could be found, he would 'go for adoption but with some regret that an adoptive parent would be so exclusive'. He had changed his mind on the understanding that the Trust would make such efforts and that the court would have to be satisfied that they had done so. It is fair to say, on reading the transcript, that the judge played a considerable part in the modification of the stance of both the Trust and the Professor. The guardian also modified his views on post adoption contact 'slightly'.

18. Mr Justice Gillen concluded that adoption was in Nina's best interests (para 18). He referred to the 'chilling' evidence given by Professor Triseliotis of the emotional damage suffered by the older children; he was convinced that there was no realistic possibility of the mother remaining abstinent during Nina's childhood; a further breakdown would be catastrophic for her; adoption was the only way to safeguard and promote her welfare throughout her childhood. At that stage he did not refer to the question of contact.

19. He went on to conclude that both parents were withholding their consent unreasonably. He rejected an argument that a reasonable parent in this case would be justified in withholding consent until they could be assured that any prospective adoptive parents would agree to post adoption contact. He was (para 21(x)):

> "satisfied that the need for adoption for this child is so pressing that whilst it would be preferable that some limited measure of post adoption contact should be established if possible nonetheless adoption must proceed even if this cannot be achieved. Otherwise both parents could operate a veto on adoption by behaving so badly that no one would agree to post adoption contact."

Having reached the conclusion that parental consent could be dispensed with on the ground that it was unreasonably withheld, he added this comment (para 23):

> "Whilst it is inappropriate for me to look at the question of contact post adoption until this child comes before the court for adoption, I feel it is appropriate that I should say that I accept entirely the view expressed by Professor Triseliotis that it is important that if at all possible this child should have the benefit of continued contact with both parents at the frequency suggested by Professor Triseliotis. . . . If these birth parents can accept the new position and help this child to settle down without undermining the placement, I believe this can be of great assistance to this child now and in the future. . . . I also sincerely hope that the prospective adoptive parents when they are chosen will be carefully counselled as to the views of Professor Triseliotis concerning the benefits of post adoption contact but obviously if after all reasonable efforts have been made by the Trust for a period of six months or so, and no such couple can be found, then I am of the opinion that the benefits of adoption will outweigh the benefits of post adoption contact."

Accordingly he freed the child for adoption. He made no provision for the contact which was to take place between the freeing order and the determination of any adoption application which might eventually be made.

20. On 22 November 2005, the Court of Appeal dismissed the parents' appeal. They disagreed with the judge on some factual issues, but the majority nevertheless agreed that the parents' consent could be dispensed with. Sheil LJ dissented. It was on the evidence a finely balanced judgment whether Nina should be freed for adoption even if prospective adopters had not been found who would allow contact with her parents. He also took a less pessimistic view of the risk of the mother relapsing into alcohol abuse. It could not be said that the parents were withholding their consent unreasonably.

21. The parents petitioned this House. By this time prospective adopters had been found who were willing in principle to allow contact between Nina and her parents. Leave to appeal was granted on the understanding that the placement could proceed before the determination of the appeal. Nina was placed with the prospective adopters on 12 April 2006.

The legislation

22. Article 18(1) of the Adoption (Northern Ireland) Order 1987 is in apparently mandatory terms:

> "Where, on an application by an adoption agency, an authorised court is satisfied in the 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."

23. Article 16(2) lists six grounds for dispensing with parental agreement, but much the most commonly employed is that in article 16(2)(b), that the parent 'is withholding his agreement unreasonably'. This is because, since the landmark decision of this House in *In re W (An Infant)* [1971] AC 682, it does not require any blameworthy conduct on the part of the parent. It merely asks whether the parent's objection is one which a hypothetical reasonable parent, placed in the position in which she finds herself, could have, bearing in mind that a reasonable parent considers her own feelings but also places great weight on what will be best for her child. I do not understand that Steyn and Hoffmann LJJ (as they then were), in their elegant exegesis of the underlying rationale for this provision, in *In re C (A Minor) (Adoption: Parental*

Agreement: Contact) [1993] 2 FLR 260, were intending to change the law as previously laid down by this House in *In re W (An Infant)* [1971] AC 682 and *In re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602. Provided that the parent's decision is within the band of decisions which a reasonable parent might make at the time and in all the circumstances of the case, it is not for the court to substitute its own view.

24. Article 18(2) provides two additional criteria:

> "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."

The effect of a freeing order is to remove all parental responsibility from the parents, leaving the child in a state of legal limbo, with no individual having parental responsibility for her. It is clearly wrong to sever a child's links with her birth family unless a replacement family has already been identified or it is clear that one will in fact be found for her. Article 18(2) contemplates, even expects, that prospective adopters will have been found, the match approved and the placement made, before the freeing order is made. It certainly gives the lie to any suggestion that the search should not even begin until after the inconvenience of the parents' objections has been cleared away.

25. The effect of the order is drastic for the child, but it is even more drastic for the parents. They no longer qualify as parents for the purpose of taking part in future proceedings about the child. Their consent having been dispensed with, they have no right to be told about, let alone to participate in, any eventual adoption application. They can only apply for contact with the leave of the court. Furthermore, a freeing order can only be revoked, on the application of a former parent, if more than 12 months after the freeing order, the child has not been adopted or is not currently placed for adoption (article 20(1)). The court has no power to revoke the order of its own motion, or even on the application of the adoption agency, should it later turn out that adoption will not be in the best interests of the child, for example because the child needs

contact with the birth family and no prospective adopters can be found who will tolerate this.

26. However, the stark terms of article 18 have to be read subject to the general duty of courts and adoption agencies in article 9:

> "In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall –
>
> (a) have regard to all the circumstances, full consideration being given to –
>
> (i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and
>
> (ii) the need to safeguard and promote the welfare of the child throughout his childhood; and
>
> (iii) the importance of providing the child with a stable and harmonious home; and
>
> (b) 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."

Although this article emphasises the question in relation to the eventual adoption of the child, it clearly requires the court to regard the welfare of the child as the most important consideration when deciding whether or not to free a child for adoption. Even if an eventual adoption will be in the best interests of the child, the welfare of the child might indicate that it would not be right to make an order freeing her for adoption.

The issue of principle

27. The answer to the issue as posed in paragraph 9 earlier is obvious: yes, of course, the court has to take into account the child's need for contact with the birth parents in deciding whether adoption is in

the best interests of the child. These days, as already indicated, adoption can take many different forms. In many cases, particularly those where the child has a significant history, it is not enough for the court to decide in a vacuum whether 'adoption' is in the best interests of the child. It must decide what sort of adoption will best serve her interests. If the court takes the view that some form of open adoption will be best, then it will have to take that into account in deciding whether it will accord with its most important consideration, the welfare of the child, to make an order freeing the child for adoption before there is any evidence available of the efforts made to secure the right sort of adoptive placement and to prepare both families for it. The court may, of course, take the view that the need to free the child for adoption is so pressing that this should be done even if it is not yet known whether an open adoption will be possible. But the need to free the child for adoption is different from the need for the child to be adopted. It may be premature to free a child for adoption even though it would not be premature to make an adoption order.

28. The court also has to take into account the child's need for contact with the birth family in deciding whether the parents are unreasonably withholding their agreement to adoption. The question is not whether the parents will in the future be unreasonable in withholding their agreement to adoption. The question is whether, in the light of the evidence available to them at the hearing, they are *at present* unreasonable in withholding their agreement to adoption. The matter must be judged on the basis of the evidence available to them then. They cannot at that stage know what the judge's findings will be. They cannot know how strong will be the judge's endorsement of any particular view expressed by the professionals or experts.

Its application in this case

29. In this case, a large part of the parents' objections were directed against adoption in principle. The mother had remained abstinent since 2003, the underlying personality disorder which had led to her drinking problems had been identified and could now be addressed in therapy, and there had been no domestic violence over the same period. The parents were still together and committed to their child. The judge rejected these objections on the basis that the risk of history repeating itself was overwhelming. Although the Court of Appeal was not quite so pessimistic, it reached the same conclusion as he did on this aspect of the parents' objections. This is not a matter for us.

30. But the parents raised a discrete objection based upon the uncertainties surrounding their future contact with the child. The judge rejected this because he took the view that the parents could frustrate an adoption by behaving so badly that no-one would agree to post adoption contact. As was pointed out in the Court of Appeal, however, the evidence was very clear that contact would only be in the best interests of the child if the parents behaved well and did not use it to undermine the placement. This would be true both of contact between freeing and adoption and after an adoption. Contact which is not in the best interests of the child can readily be stopped. It is, moreover, important to recall that despite their adamant objections to the Trust's plans, the parents had not sought to use their contact to undermine their daughter's current placement. Nor, despite the view which he had formed of the desirability of post adoption contact, did the judge consider whether the court could, at that stage, promote this, for example by preserving the parents' position after a freeing order. In my view, therefore, the judge placed emphasis upon an irrelevant consideration and did not consider a relevant factor, when reaching his conclusion that the parents were unreasonable in withholding their consent while the contact position was so unclear. This enables us to look again at his decision.

31. The question is whether, by the end of the hearing but before the judge had delivered judgment, a reasonable parent could have maintained his or her objection to adoption on the basis that steps had not yet been taken to find prospective adopters who might agree to post adoption contact. These parents had heard the evidence of Professor Triseliotis. He was very clear that post adoption contact would be in Nina's best interests. He thought that the parents' capacity to support such contact in a way which would promote rather than undermine the placement should be judged once the placement proceeded rather than in advance. Although in the end he was prepared to support adoption even if prospective adopters who could accept contact could not be found, he wanted the court to be assured that all the right steps had been taken to find them. He was somewhat sceptical because of the Trust's lack of experience in this area, open adoption still being much less common in Northern Ireland than it has become in Britain. The parents had also heard the evidence of Mrs McComish for the Trust and of the guardian ad litem. Both had moved towards accepting that post adoption contact might be best, but remained very sceptical of the parents' ability to support it, in the light of past suspicions and hostilities. Their conversion was by no means enthusiastic and had come very late in the day.

32. In my view, any reasonable parent would be entitled to place great weight upon the views of Professor Triseliotis. He is an

acknowledged expert in this field, thoroughly familiar with the up to date research literature, but also experienced in making assessments in individual cases. He had seen Nina with her parents, whereas the social workers making the decisions about contact had not. They had simply relied upon reports by supervisors which Professor Triseliotis had thought superficial. A reasonable parent would be entitled to say, let us wait and see what efforts are made to find the right sort of placement for our child before we give our consent.

The European Convention on Human Rights

33. There is no doubt that Nina and her parents had established a family life together. That family life continued even after they were separated. Article 8 of the Convention guarantees all of them the right to respect for their family life. A public authority must not interfere with that right unless three conditions are fulfilled: first that it is in accordance with the law; second that it is for a legitimate aim, in this case safeguarding the best interests of the child; and finally, that it is 'necessary in a democratic society' – that is, that the interference is for relevant and sufficient reasons and proportionate to the legitimate aim pursued. The European Court of Human Rights has only rarely held that the initial taking of a child into care violates article 8, although it has done so in the case of new born babies: see *K and T v Finland* [2001] 2 FLR 707 and *P, C and S v United Kingdom* [2002] 2 FLR 631. But it has consistently held that the object of the authorities must be to seek to restore the child to her family as soon as practicable; measures which will hinder this, such as prohibiting contact or placing the child a long way away, may well violate article 8: see, for example *KA v Finland* [2003] 1 FLR 696. It was in that context that both the Children Act 1989 and the Children (Northern Ireland) Order 1995 gave the court wide powers to control contact between children in care and their families despite the fact that the local authority or Trust had parental responsibility for their upbringing and care: hence the observations of Simon Brown LJ, as he then was, in *In re E (A Minor) (Care Order: Contract)* [1994] 1 FLR 146, 154-155, on the benefits of contact between children in care and their families. These are not in doubt. Contact once a child becomes a member of a new family, while it may still be very desirable, is a more complex issue because of the need to respect the privacy and autonomy of the new family.

34. There is, so far as the parties to this case are aware, no European jurisprudence questioning the principle of freeing for adoption, or indeed compulsory adoption generally. The United Kingdom is unusual

amongst members of the Council of Europe in permitting the total severance of family ties without parental consent. (Professor Triseliotis thought that only Portugal and perhaps one other European country allowed this.) It is, of course, the most draconian interference with family life possible. That is not to say that it can never be justified in the interests of the child. The European Court has said that where the interests of the child and the interests of the adults conflict, the interests of the child must prevail: eg *Yousef v The Netherlands* [2003] 1 FLR 210, para 73. But it can be expected that the European Court would scrutinise the relevance and sufficiency of the reasons given for such a drastic interference with the same intensity with which it has scrutinised severance decisions in other care cases: see, in particular, *P, C and S v United Kingdom* [2002] 2 FLR 631, para. 118. The margin of appreciation accorded to the national authorities is correspondingly reduced. In a freeing application, the question must be whether it is necessary and proportionate to sever the links with the family of birth if a new family has not yet been identified.

The Implications for Freeing for Adoption

35. We understand that a review of adoption law in Northern Ireland is currently under way and that a consultation paper is expected shortly. It is not for us to make recommendations to that review. What is appropriate for the larger and more diverse area and population of England and Wales may not be so appropriate for a small society like Northern Ireland. Freeing for adoption has the great benefit that the burden of the proceedings is carried by the adoption agency and not by the prospective adopters. If it is difficult to find prospective adopters for a particular child, because of the parents' attitudes and behaviour, freeing the child for adoption may aid the search. Nevertheless, it does have serious disadvantages, in delay, in disabling the court from addressing the real issues and in placing the child in legal limbo: see Review of Adoption Law, Report to Ministers of an Interdepartmental Working Group, Department of Health and Welsh Office, October 1992, para. 14.4. These were the considerations leading to its abolition in England and Wales. Even before then, some local authorities in England and Wales never used the freeing procedure and others used it only sparingly.

36. It does appear from this case that adoption practice in Northern Ireland may labour under certain misconceptions. The first and most important is that the search for prospective adopters, still less the actual placement of the child, should not begin until the child has been freed.

Yet it is clear from the terms of article 18(2) itself that there is no objection in principle to this. It may be argued that this is to present the parents with a fait accompli which they will find hard to resist. But the reality is that it can be even harder for them to resist the hypothetical ideal prospective adopters who are imagined when a freeing application is heard.

37. A second misconception is that it is not possible to run proceedings, whether for adoption or for freeing, in such a way that the parents and prospective adopters are able to hear and to challenge one another's evidence. There are many different ways of conducting contested adoption proceedings and the procedures can be adapted to the particular needs of each case. But it is common practice in the Family Division of the High Court in England and Wales for the prospective adopters to listen to the proceedings in another room while the parents give evidence and for the positions to be reversed when or if the prospective adopters give their evidence. This enables issues such as contact to be properly explored between the very people who will have to make it work if it is to happen at all. It also enables each to understand the other's point of view much more clearly than they can from the papers. Each becomes a person rather than the ogre or the threat they may previously have been.

38. A third misconception is that it is not possible to consider the issue of post adoption contact until the adoption application itself (the source of this appears to be some observations of Ward LJ in *In re G* [2002] EWCA Civ 761. But this was a case where freeing had been refused and the question was whether contact with the child should have been ended *before* the adoption hearing.) Of course, it is not possible for the judge hearing a freeing application to make an order about contact after the adoption. He can only make orders, if at all, about contact between the freeing and the adoption order. But that does not mean that the issue of post adoption contact is not relevant to whether or not the child should now be freed for adoption. For all the reasons given earlier, in some cases, it may be highly relevant.

Conclusion

39. I recognise, of course, that just as there is a band of reasonable parental decisions each of which may be reasonable in any given case, there is a band of reasonable judicial decisions, each of which may be reasonable in any given case. Just as a judge should be careful not to

substitute his own view for another view which a reasonable parent could take, an appellate judge must be careful not to substitute her own view for one which a reasonable judge could take. I pay tribute to the care with which the judge approached his anxious and difficult task and to the very important shift in attitudes which his interventions produced. But in my view he placed considerable weight upon an irrelevant consideration when deciding that the parents were unreasonably withholding their agreement at that stage. Perhaps because of the beneficial movement he had secured, he did not take into account the other legal options available in seeking to achieve the best possible outcome for this little girl. I do not, of course, suggest that post-freeing and post-adoption contact are appropriate in every case or that uncertainty about whether contact will be possible is always a good reason for withholding consent. But they are often important factors both for the parents and for the judge to consider.

40. I myself would allow the appeal and set aside the freeing order. As Nina has now been placed, the issue of post adoption contact would be better explored on a substantive adoption application. The Trust will, of course, make the running on behalf of the prospective adopters. The prospective adopters are aware of these proceedings and can be supported both financially and emotionally through the process. The parents too should try to put aside their own feelings in the interests of all the children. They should be offered no encouragement at all to maintain their objections to adoption in principle. Two trial judges and two appellate judges have now reached the view that the risks of history repeating itself are too great. The parents have enough on their plates in maintaining a stable home for the older children who need them so much. If they can come to terms with this, they and the older children could play an important part in helping Nina to establish herself securely in her new family.

LORD CARSWELL

My Lords,

41. The subject of this appeal, N, was born on 19 April 2002 and is now four years of age. Her young life has been far from settled and in order to provide her with a favourable permanent environment the respondent, the Down Lisburn Health & Social Services Trust ("the Trust"), proposes to make arrangements for her adoption by a suitable

family. Her parents H and R have not given their agreement to adoption and the Trust accordingly brought the present application under article 18 of the Adoption (Northern Ireland) Order 1987 (SI 1987/2203) (NI 22) ("the 1987 Order"), seeking an order from the court declaring the child free for adoption. The Family Judge, Gillen J, made a freeing order, being satisfied that the agreement of the parents should be dispensed with on the ground that they were withholding their agreement unreasonably. The Court of Appeal (Nicholson, Campbell and Sheil LJJ) by a majority dismissed the parents' appeal. At the time when the judge made his order prospective adopters had not been identified and the question whether and to what extent post-adoption contact between the child and her parents could be arranged was unresolved. The issue in the appeal before the House is whether the judge could properly make a freeing order on the basis that the parents' agreement was unreasonably being withheld, when they did not yet know if post-adoption contact would be available.

42. Adoption in the United Kingdom has undergone a considerable change since the early 1970s. The number of children adopted has suffered a sharp decline and the proportion of older children, as distinct from infants, adopted has increased markedly. In many cases adopted children now have an attachment to their birth parents and it is generally recognised that there is a much stronger case for post-adoption contact than was thought when the permanency theory held sway. When the 1987 Order and its English analogue the Adoption Act 1976 were passed it was generally thought desirable that adoption should be a clean break and that there should be no contact between adopted children and their natural parents, which was reckoned to be potentially disruptive of the settled state of the children and their new families. Judicial acceptance of this view may be seen in the speech of Lord Ackner in *In re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1, 17-18:

> "The cases rightly stress that in normal circumstances it is desirable that there should be a complete break, but that each case has to be considered on its own particular facts. No doubt the court will not, except in the most exceptional case, impose terms or conditions as to access to members of the child's natural family to which the adopting parents do not agree. To do so would be to create a potentially frictional situation which would be hardly likely to safeguard or promote the welfare of the child. Where no agreement is forthcoming the court will, with very rare exceptions, have to choose between making an adoption order without terms or conditions as to access, or to refuse

> to make such an order and seek to safeguard access through some other machinery, such as wardship. To do otherwise would be merely inviting future and almost immediate litigation."

43. A subsequent shift in opinion occurred towards what is termed "openness", favouring the continuation of contact between the natural parents and the child following adoption. The reasoning was articulated in the White Paper, Adoption: the Future (1993) (Cm 2288) paras 4.14 - 4.16:

> "4.14. There has been an increasing tendency in recent years to favour maintaining some contact between an adopted child and his birth family where possible. This may in part reflect the increased average age of children being adopted, and in suitable cases a degree of such contact may well be desirable. However, the Government considers that once an adoption order is made, the most important objective is to support the new family relationship.
>
> 4.15. Where the birth parents wish to maintain direct contact, provided there is free consent by the child and the new family, this should generally be allowed. If the adoptive parents oppose the prospect, their views should have the greater weight though where older children are adopted out of families with whom they have formed a bond the issues need particularly careful judgment and the child's view will be correspondingly significant.
>
> 4.16. Each case must be considered on its merits and there can be no central blueprint. By regulation, the Government intends to ensure that the courts and adoption agencies will assess the most suitable arrangements for contact between the birth family and the child after his adoption."

This approach was strongly espoused by Professor Triseliotis in his reports and oral evidence in the present case.

44. There have been some differences of opinion in the published literature about the desirability of contact, which is propounded by some as universally beneficial, while others are more cautious and urge a

degree of flexibility of approach and avoidance of doctrinaire policies. They point out that in the wrong case contact can lead to disturbance of the children and impose a significant burden on the adopting parents. There is, however, general agreement that in appropriate cases contact can contribute to reassurance and security and a feeling of identity for adopted children and help to dispel feelings of rejection. The courts have accepted the validity of this proposition: see, for example, the judgment of Simon Brown LJ in *In re E (A Minor) (Care Order: Contact)* [1994] 1 FLR 146, 154-155:

> "I recognise of course that the threshold criteria for a care order under section 31 of the 1989 Act require the court to be satisfied that a child is suffering or is likely to suffer significant harm attributable to inadequate parenting and that that inadequacy would normally be attributable to the quality of the parent/child relationship. Nevertheless, although the value of contact may be limited by the parents' inadequacy, it may still be of fundamental importance to the long-term welfare of the child, unless of course it can be seen that in a given case it will inevitably disturb the child's care. In short, even when the section 31 criteria are satisfied, contact may well be of singular importance to the long-term welfare of the child: first, in giving the child the security of knowing that his parents love him and are interested in his welfare; secondly, by avoiding any damaging sense of loss to the child in seeing himself abandoned by his parents; thirdly, by enabling the child to commit himself to the substitute family with the seal of approval of the natural parents; and, fourthly, by giving the child the necessary sense of family and personal identity. Contact, if maintained, is capable of reinforcing and increasing the chances of success of a permanent placement, whether on a long-term fostering basis or by adoption."

It can be beneficial in many respects where the conditions are right, and a level of common agreement among the parties is strongly conducive to this. It does appear clear that the attitude of the birth parents, as well as that of the adopting parents, is of critical importance, and I would endorse the qualification expressed by Simon Brown LJ in the passage which I have just quoted. When considering post-adoption contact courts must exercise care in assessing the effect which contact is likely to have on the particular child in the particular circumstances of the case, bearing in mind the paramountcy of the welfare of the child, given

statutory recognition in article 9 of the 1987 Order and article 3 of the Children (Northern Ireland) Order 1995 (SI 1995/755) (NI 2).

45. Freeing orders, as both the judge and the Court of Appeal stated, are draconian in nature, in that they extinguish at that stage of the proceedings the parental responsibility of the natural parents for the children and declare that they can be adopted, so in effect terminating virtually all the rights of the natural parents in respect of the children and their upbringing. It may be observed, however, that adoption orders themselves have the same ultimate effect and that freeing orders have the effect of moving forward a stage the extinction of the parental responsibility of the natural parents and the consideration of whether the court should order that their agreement should be dispensed with. Under previous legislation that issue had to be decided by the court when determining whether to make an adoption order in the absence of parental agreement (see the Adoption Act (Northern Ireland) 1967, section 5), and it has to be decided at that stage under article 16 of the 1987 Order if no freeing order has been made. Freeing orders were a new concept, first introduced in England and Wales by the Children Act 1975 (though not in operation until 1984) and in Northern Ireland under the 1987 Order. Their effect in England and Wales, which was the same as in Northern Ireland, was described by Butler-Sloss LJ in *In re A (A minor) (Adoption: Contact Order)* [1993] 2 FLR 645, 648 in the following terms:

> "The effect of an order freeing a child for adoption is to extinguish parental responsibility of those previously endowed with it and thus to bring to an end the relationship between the child and his natural family (see Adoption Act 1976, section 12(3)). The child is in a sort of adoptive limbo and parental responsibility is assumed by the adoption agency, in this case, the local authority (section 18(5)). The parents become former parents, sections 18(5), 19 and have no right to make an application under section 8 of the Children Act 1989."

46. It appears that freeing orders were originally designed primarily as a means of allowing consenting parents to make a child available for adoption: The Prime Minister's Review *Adoption* (2000), para 3.66. They were welcomed in Parliament as a means of reducing uncertainty and concomitant anxiety for the birth parents, adoptive parents and children. But they came to be used to a greater extent to free children for adoption where parental consent was not forthcoming. Their

purpose was described by Sir John MacDermott in *In re KLA (An Infant)* [2000] NI 234, 242 as being:

> "to find out if a child would be available for adoption before prospective adopters were found and their hopes frustrated if the adoption court ruled that consent was not being unreasonably withheld."

Although Nicholson LJ wished to qualify this statement in paragraph 21 of his judgment in the Court of Appeal, it does in my view remain as a correct expression of the underlying reason for making freeing orders in the majority of cases in which they are now sought. It was considered that there was a strong imperative to reduce the prospect of a contest between the prospective adopters and the parents at the adoption stage, which would tend to discourage adopting parents from accepting the children. It was found, however, that there was a risk that such applications could be brought prematurely – for an example see *In re E (Minors) (Adoption: Parental Agreement)* [1990] 2 FLR 397 – and strong criticism was voiced of the delays occasioned by the obtaining of freeing orders and of the "adoptive limbo" to which Butler-Sloss LJ referred in *In re A (a minor).* Since the coming into effect in December 2005 of the Adoption and Children Act 2002 freeing for adoption has no longer been available in England and Wales. It remains part of the law of Northern Ireland, however, and resort to freeing applications by health and social services trusts in that jurisdiction has been quite widespread, though not universal.

47. Before I turn to the facts it is convenient to set out the material provisions of the governing legislation. Article 9 of the 1987 Order provides that a court or an adoption agency shall regard the welfare of the child as the most important consideration and that they:

> "shall regard the welfare of the child as the most important consideration and shall –
>
> (a) have regard to all the circumstances, full consideration being given to –
>
> (i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and

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

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

(b) 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."

Article 12 provides for the making of adoption orders, paragraphs (1) to (3) providing as follows:

"(1) An adoption order is an order giving parental responsibility for a child to the adopters, and such an order may be made by an authorised court on the application of the adopters.

(2) The order does not affect parental responsibility so far as it relates to any period before the making of the order.

(3) The making of an adoption order operates to extinguish –

(a) the parental responsibility which any person has for the child immediately before the making of the order;

(b) any order of a court under the Children (Northern Ireland) Order 1995;

(c) any duty arising by virtue of an agreement or the order of a court to make payments, so far as the payments are in respect of the child's maintenance or upbringing for any period after the making of the order."

Article 16 deals with parental agreement. Paragraph (1) reads, as amended:

"(1) An adoption order shall not be made unless –

(a) the child is free for adoption by virtue of an order made in Northern Ireland under article

17(1) or 18(1), made in England and Wales under section 18 of the Adoption Act 1976 (freeing children for adoption in England and Wales) or made in Scotland under section 18 of the Adoption (Scotland) Act 1978 (freeing children for adoption in Scotland); or

(b) in the case of each parent or guardian of the child the court is satisfied that –

(i) he freely, and with full understanding of what is involved, agrees –

(aa) either generally in respect of the adoption of the child or only in respect of the adoption of the child by a specified person, and

(ab) either unconditionally or subject only to a condition with respect to the religious persuasion in which the child is to be brought up,

to the making of an adoption order; or

(ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2)."

The ground specified in paragraph (2) which is relevant to this appeal is that the parent or guardian "is withholding his agreement unreasonably." Article 18 then makes provision for freeing a child for adoption without parental agreement. The material parts for present purposes are paragraphs (1), (2) and (2A):

"(1) Where, on an application by an adoption agency, an authorised court is satisfied in the 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.

(2A) For the purposes of paragraph (2) a child is in the care of an adoption agency if the adoption agency is a Board or HSS trust and he is in its care."

48. The facts relating to the freeing application have been set out in full detail in the judgments of Gillen J and Nicholson LJ and it is only necessary for me to set out a summary of the material facts. N is the fourth child to be born to her mother H, who is now aged 35 years. H has three older children, a daughter H1 born in 1989, a son P born in 1991 and another daughter T born in 1996. All four children have different fathers. H has led a difficult and disturbed life, following a chaotic upbringing, and its story was justly described by Nicholson LJ as sad. She began drinking at the age of 13 or 14 and for periods since then has abused alcohol, with the consequence that she has for some time been an alcoholic. All of the children have been in care for varying periods, the history of which is fully recorded in the judgment of Nicholson LJ, and the two eldest are extremely disturbed and damaged young people. One of the factors upon which the judge placed some reliance in reaching his conclusions was that when H1 and P live with their mother their conduct is the cause of considerable conflict, with resultant stress upon H.

49. H and R commenced cohabitation in 1999 and apart from a period of separation before N was born have lived together since. In earlier days the relationship was violent at times, particularly when both had been drinking, and despite denials in H's evidence it appears clear that she had suffered serious assaults by R. Throughout her pregnancy H continued to abuse alcohol, in spite of warnings, and as soon as N was born she was made the subject of an interim care order and admitted to foster care. In August 2002 she was returned to her parents, with whom she spent the next 10 months, the only period in her life during which she has lived with them. During this period H was attending courses with Alcoholics Anonymous and R went to anger management courses. Unhappily H relapsed again and concerns arose in 2003 about her drinking and her ability to care for N. On 10 June 2003 a social worker found H and her three daughters, together with other persons, in a house which was described as a drinking den. N was in such a physical state that the social worker took her to a general practitioner. His Honour Judge Rodgers, who made a care order in 2004, described her condition in his judgment in the following terms:

> "It was thought at first that her legs were bruised but it transpired that they were simply covered with dirt. When they were washed they discovered she had eczema on her legs and bottom. She also had what [a social worker] described as the worst case of head lice infestation she had ever seen in a young child."

50. N and the other children were at once taken into care. An interim care order was made on 7 July 2003 and it was subsequently decided to refer her to the permanency panel and then the adoption panel. In November 2004 the adoption panel recommended adoption. The Trust applied for a full care order, which was made on 30 July 2004 by Judge Rodgers. In his judgment he expressed the opinion that N required permanence, which should be outside the birth family, and approved the care plan and the Trust's proposals for contact.

51. The Trust then in September 2004 brought an application for a freeing order, which was heard before Gillen J over a period of seven court days between January and April 2005. He gave a very full and thorough written judgment on 31 May 2005, in which he made a freeing order, but declined to consider the question of post-adoption contact, which he considered should appropriately be left for the judge who heard the application for an adoption order. He did state, however, that he accepted entirely the view of Professor Triseliotis that if at all possible N should have the benefit of continued contact with both parents at the frequency which he suggested.

52. The parents appealed to the Court of Appeal, which heard the appeal on 14 October 2005 and gave judgment on 22 November 2005, dismissing it by a majority. The parents brought a petition to the House for leave to appeal. By the time it came before the Appeal Committee on 8 March 2006 the Trust had found prospective adopters who were willing in principle to allow post-adoption contact. The Committee granted leave to appeal, on the understanding that N's placement with them under article 13 of the 1987 Order could proceed in advance of the determination of the appeal. N was accordingly placed with them on 12 April 2006.

53. The judge received evidence, both written and oral, from a battery of expert witnesses. Two consultant psychiatrists, Dr Allen and Dr Bownes, gave evidence of their findings after examination of H and consideration of reports. There was a large measure of agreement

between them about the aetiology of her alcoholism and the prospects of her remaining abstinent in the foreseeable future. They both were of opinion that she suffers from alcohol dependence syndrome, though on her account and that of R she had not been drinking for some time, apparently from mid-2003, when N was removed from her care. She has good insight into her alcohol addiction. Dr Allen expressed the opinion that she suffered from a border-line personality disorder resulting from abuse in childhood, which had left her with an absence of understanding of good parenting. He considered that in addition to her abstaining from alcohol it was necessary to address this problem, which would take some time. Dr Bownes agreed with this diagnosis to the extent that he considered that alcohol was the self-medication to deal with her intrinsic deficiencies and extraneous stressors. Both psychiatrists accordingly were ad idem in considering that one of the important factors that will influence H's abstinence from alcohol is her ability to cope with the stresses and demands of family life, requiring unequivocal support from her partner and family. Dr Bownes expressed it in these terms at pages 12-13 of his report of 22 April 2004:

> "'Clearly the likelihood of H not experiencing a de-stabilisation of her support networks or the onset of insurmountable pressures from the present day to the time N achieves independence is extremely unlikely. If one examines closely the periods in the past that H relapsed to a state of alcohol dependence it is probable that there was a critical shift in the dynamics of her life and hence the periods of abstinence were not dependent solely upon her level of determination or commitment to avoid alcohol but rather her ability to cope with aversive external and internal negative influences.'"

It appears clearly that Dr Allen was in agreement with Dr Bownes' expression of opinion, notwithstanding the efforts of H's counsel in the Court of Appeal to escape this conclusion by parsing the oral testimony. Dr Bownes also stated his view, with which the judge agreed from his own observation of H when giving evidence, that she demonstrated "pseudo insight" with regard to the destructive nature of her own behaviour and the effects that this had had on her children. She does not demonstrate a high level of understanding at the emotional level: although she says what she considers should be said, this does not reflect her genuine beliefs at an emotional level.

54. Professor Triseliotis, a well-known expert in the field of adoption, was engaged jointly by the Trust and the guardian ad litem to give evidence at the freeing hearing, based on his examination of a variety of reports. The salient features were that N is a very needy, insecure and troubled child, lacking in core attachments, who required fairly soon to receive optimum parenting to develop the kind of attachment that she was missing. From his observation of a contact session he thought that she was demonstrating attachment to her parents which he described as significant, meaning by that a level less than strong. If H remained free from stress N could be returned to her, but the problem was that she was likely to give way under stress and the time span for her to repair herself fully and satisfactorily was too long. If a period of two years were to pass before she could return, the chances of her being rehabilitated were remote. He concluded, with regret, that he could not recommend N's return to her mother.

55. Professor Triseliotis expressed a strong view when giving evidence on 25 January 2005 that there should be continuing contact with the parents, perhaps three or four times a year, in order to reduce the possibility of the child's developing feelings of rejection and loss. If the Trust could not find prospective adopters who would facilitate direct contact he favoured long-term fostering instead. He had to defer completion of his evidence until 15 February 2005, by which time the Trust, which hitherto had been opposed to the idea of post-adoption contact, had modified its view on consideration of the evidence earlier given by Professor Triseliotis and was willing to make efforts to find prospective adopters who would accept the possibility of contact. When he resumed he indicated that he had changed, or at least modified, his own view. He still considered that continuing contact was important and should be achieved if possible. But he bore in mind his own conclusion that if N were returned to her parents and H resorted to drink again, even after a number of years, the results would be catastrophic for the child. Taking into account the altered stance of the Trust, he would now favour adoption, even if it proved impossible to find adopters who would agree to contact. He considered that every effort should be made to find such adopters, but concluded that if it could not be achieved he would, with some regret, "go for adoption". He did state, however, in his earlier evidence that if the adoption were to go through it was essential that the birth parents support the adoption plan. They had to let the child settle down and grow up more securely without undermining the adoption. It was in N's interest to have post-adoption contact, but it was an essential requirement that the parents must totally accept the adoption plan.

56. In his judgment the judge observed with regret that N's parents had constantly evinced hostility to public authorities and deep-seated refusal to co-operate with advice about change. In reaching his conclusions he correctly focused first on the issue whether adoption was in the best interests of the child. He expressed his finding on this issue at paragraph 18 in the following terms:

> "I have come to the conclusion that in this instance the medical evidence, and in particular that of Dr Bownes, has convinced me that there is no realistic possibility of H continuing to remain abstinent during N's childhood. Given the troubled background of this child and the damage that she has sustained to date, I am of the view that a further breakdown in this child's attachment would be catastrophic and that no court could reasonably expose her to that catastrophic risk given the history of this case. I have concluded that the only way to safeguard and promote the welfare of this child throughout her childhood and provide her with a stable and harmonious home is through the avenue of adoption."

57. The judge then turned to the issue whether, in terms of article 18 of the 1987 Order, he was satisfied that the parents' agreement should be dispensed with on the ground that they were withholding their agreement unreasonably. He set out his reasons in paragraph 21 of his judgment in a series of propositions, which I shall attempt to summarise. The child required desperately to move on and re-establish permanent attachments in a final move. He considered that she could not wait indefinitely for her parents to change. The results of a lapse by the mother would be so catastrophic, her history was so replete with failure to repair herself sufficiently and the prospects of future success were so fragile that he could not risk permanent damage to the child. The danger of history repeating itself was overwhelming. He thought that the return of H1 and P in 2003 contributed strongly to her return to drinking and that their challenging behaviour, added to the return of N, would be a recipe for disaster. The mother's attempt to place the blame on the Trust for failure to support her was not a legitimate grievance, as the Trust had taken all reasonable steps to afford her professional and expert help, only to be met with hostility from H and R.

58. Gillen J expressed his conclusions on the issue of post-adoption contact in paragraph 21(x):

> "It was argued that the reasonable hypothetical parents in this instance would be justified in withholding consent until they could be assured that any prospective adoptive parents chosen would agree to post adoption contact and that the Trust should have taken steps to identify such a couple before proceeding with this application. I reject that proposition. I am satisfied that the need for adoption for this child is so pressing that whilst it would be preferable that some limited measure of post adoption contact should be established if possible nonetheless adoption must proceed even if this cannot be achieved. Otherwise both parents could operate a veto on adoption by behaving so badly that no one would agree to post adoption contact. The crucial difference between the present case and the fact specific authorities to which Mr Hutton drew my attention eg. *In re P (Adoption: Freeing Order)* [1994] 2 FLR 1000 and *In re C (Minors) (Adoption)* [1992] 1 FLR 115, is that I share the view of Professor Tresliotis that if all reasonable efforts to find a couple who will embrace post adoption contact fail then the circumstances of the historical events of the past still make it imperative that the adoption should proceed. Any reasonable parent in my view would readily understand that. This is not inconsistent with article 8 of the ECHR but rather a careful consideration of the rights of this child as well as the rights of the adults."

It appears from the transcript of evidence (page C54) that in his reference to parents operating a veto on adoption by behaving badly the judge had in mind the period between freeing and the hearing of an application for an adoption order. The discussion in that part of the evidence was related to the possibility that misbehaviour on their part at that time might deter prospective adopters from going ahead with the adoption if post-adoption contact was going to be a necessary consequence.

59. The judge ended by concluding that the response of the Trust to the parents was a proportionate one to a legitimate aim, namely to protect the welfare and interests of the child, and that there was accordingly no breach of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He therefore made a freeing order, leaving the question of contact for the adoption application, while expressing a firm view in support of continuing contact after adoption.

60. The leading judgment in the Court of Appeal was given by Nicholson LJ, with whom Campbell LJ agreed in a shorter judgment. After extensive consideration of the facts of the case, the statutory provisions, the relevant authorities and the arguments presented, Nicholson LJ concluded that the judge's decision should be upheld on both grounds, the question whether adoption was in the best interests of the child and the question whether the parents' agreement should be dispensed with. He expressed a measure of disagreement with the judge on the prospects of H's successful rehabilitation, since he considered the judge's pessimistic assessment unjustified by the evidence. He concluded that the issue of making a freeing order in the absence of an assurance that post-adoption contact would be afforded was a finely balanced judgment, but upheld the judge's decision on the basis that it did not exceed "the generous ambit within which reasonable disagreement is possible."

61. Campbell LJ reached the same conclusion, which he expressed in paragraph 21 of his judgment:

> "If it is a question of such a finely balanced judgment over contact are the advantages of adoption to the welfare of N sufficiently strong to justify overriding the views of her parents? The judge was satisfied that the need for adoption was so pressing that whilst it would be preferable to have some limited measure of post adoption contact, nonetheless adoption must proceed even if this cannot be achieved. The reasonable parent, faced with this decision and with the welfare of N in mind, would in my view be driven to this conclusion. Accordingly I would affirm the judge's decision and dismiss the appeal."

He reached that conclusion, however, while finding himself in less than full agreement with the judge on the prospects of H's remaining abstinent or the prospects of success of the course of treatment proposed for her.

62. Sheil LJ agreed that it was in the best interests of the child that she should be freed for adoption, but dissented on the question whether the parents' agreement should be dispensed with. He did not discuss in his judgment the limits within which an appellate court should reverse the judgment of a trial judge on such an issue. He expressed his own

view of the facts and his conclusions in paragraphs 11 to 13 of his judgment:

> "[11] In the instant case H has managed to stay off alcohol since July 2003 without the benefit of any counselling and has also been regularly attending Alcoholics Anonymous with favourable reports therefrom. There has been no domestic violence since July 2003 and she has been reconciled with her mother. N has strong attachments to both of her parents, particularly her mother, both of whom faithfully attend contact with N limited though that is at present to once a month.
>
> [12] In the present case if the court does not free N for adoption, the care order will remain in place for the time being.
>
> [13] In my opinion it cannot be said that N's parents are withholding their consent unreasonably to her being freed for adoption."

63. The arguments before your Lordships' House centred round the question of post-adoption contact. The appellants' counsel did not place much emphasis on the issues of article 8 of the Convention or legitimate grievance, though both featured in their written case. I do not consider that there is any substance in the latter argument, save in so far as the appellants' discontent with the support afforded by the Trust may, if well grounded, constitute a factor in determining whether they unreasonably withheld agreement to adoption. For the reasons given by the judge, however, I do not think that it is well grounded and it is not a factor to be given any real weight in assessing unreasonableness.

64. Nor do I consider that the argument based on article 8 of the Convention can succeed. I entirely agree with the judge that the Trust's response was proportionate in the pursuit of the legitimate aim of protecting the welfare and interests of the child. That is sufficient to dispose of this point, but I should add one grace note in the interests of clarity. The appellants' argument may on one reading encompass the suggestion that if the Trust failed to recognise the existence of the appellants' rights under article 8, that failure ipso facto invalidated its decision to seek to place the child for adoption. If that suggestion were advanced, in reliance on paragraph 90 of the judgment of Kerr LCJ in *AR v Homefirst Community Trust* [2005] NI 435, then it would in my opinion be misplaced. I do not understand Kerr LCJ to be saying in that paragraph that failure to recognise the article 8 rights invalidated the

decision, an approach which would be appropriate in a challenge to a decision by way of judicial review, but not in a contest on the merits of making a freeing order. What he said was that if the rights have not been explicitly recognised at all, it may be difficult to establish that there was not an infringement of those rights. In some cases that may well be so, but where the court is properly satisfied that the acts and decisions of the body concerned have been proportionate, then it may correctly conclude that no breach of article 8 has occurred, even if that body did not realise that article 8 was engaged and explicitly address the question of compliance.

65. The essence of the main argument advanced on behalf of the appellants was twofold, first, that the judge could not correctly hold that the withholding of agreement was unreasonable when it was not known whether post-adoption contact could be arranged, and, secondly, that the judge had strayed outside his proper function in determining whether the withholding of agreement was unreasonable, in that he had substituted his own view about the attitude which it was reasonable for them to take, rather than seeking to ascertain whether the parental veto came within the band of possible reasonable decisions.

66. The first argument may be put in several ways. The most extreme form, which was espoused by Mr McMahon QC on behalf of R, was that without evidence relating to the prospect of the provision of post-adoption contact, the judge was not entitled to proceed to dispense with the parents' agreement and make a freeing order. If counsel intended by this submission to put forward the need for such evidence as a requirement imposed by law, this cannot in my opinion be sustained. The availability of post-adoption contact is, of course, a relevant factor to be taken into account in deciding whether to dispense with the parents' agreement and make a freeing order, and the necessity to ascertain what and how much contact can be arranged will vary from case to case. But evidence on that topic cannot be regarded as a condition which is in law a sine qua non, requiring to be satisfied before the judge can proceed.

67. Mr O'Hara QC for H put the argument, as I understand his submissions, in a modified form, that the availability of post-adoption contact is a factor which ranks so high in importance that unless there is sufficient evidence about it before him the judge cannot be said to have had regard to all the necessary factors in reaching a decision on dispensing with agreement and freeing for adoption. This again appears to me to be elevating a matter of evidence into a matter of law. It is for

the judge to have regard to the availability of contact in coming to his decision, but so long as he has evidence on which he can properly make his decision and he has not misdirected himself or been in error in respect of other factors to which he should have regard, his decision will be sustainable unless he is "plainly wrong".

68. It is, however, legitimate to argue, as the appellants also did, that the facts of the case pointed so clearly to the need for ascertaining the availability of post-adoption contact that the judge's decision was plainly wrong. They also submitted, as I have said, that the judge substituted his own view and failed to ascertain whether the appellants' veto came within the band of possible reasonable decisions. In order to assess these arguments it is necessary to examine the authorities on withholding agreement.

69. Both the judge and the Court of Appeal cited the relevant statements giving guidance to courts in deciding the very difficult and anxious question whether a parent is unreasonably withholding agreement to the adoption of a child. The starting point is the speech of Lord Hailsham of St Marylebone LC in *In re W (An Infant)* [1971] AC 682, in which he dispelled the then prevalent idea that there had necessarily to be an element in unreasonableness. He stated categorically, at p 699:

> "… the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness, and reasonableness in the context of the totality of the circumstances. But, although welfare *per se* is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."

The mere fact that the proposed adoption would conduce to the welfare of the child is not of itself sufficient to establish unreasonableness on the part of the parent. Nevertheless, as Lord Denning MR said in *In re L (An Infant)* (1962) 106 SJ 611:

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

There may be an amalgam of factors, possibly conflicting, which will vary from case to case and cannot profitably be placed in prescribed categories. In *In re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602, 625 Lord Wilberforce said, in the context of a father's withholding agreement to his child's adoption by the mother and stepfather:

> "What, in my understanding, is required is for the court to ask whether the decision, actually made by the father in his individual circumstances, is, by an objective standard, reasonable or unreasonable. This involves considering how a father in the circumstances of the actual father, but (hypothetically) endowed with a mind and temperament capable of making reasonable decisions, would approach a complex question involving a judgment as to the present and as to the future and the probable impact of these upon a child."

70. The difficulty facing a court 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 moved Steyn and Hoffmann LJJ to say, in their joint judgment in *In re C (A Minor) (Adoption: Parental Agreement: Contact)* [1993] 2 FLR 260, 272:

> "…making the freeing order, the judge had to decide that the mother was 'withholding her agreement unreasonably'. This question had to be answered according to an objective standard. In other words, it required the judge to assume that the mother was not, as she in fact was, a person of limited intelligence and inadequate grasp of the emotional and other needs of a lively little girl of 4.

Instead she had to be assumed to be a woman with a 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 judge on the one hand and the legitimate views and interests of the natural parents on the other. The characteristics of the notional reasonable parent have been expounded on many occasions: see for example Lord Wilberforce in *In re D (Adoption: Parent's Consent)* [1977] AC 602, 625 ('endowed with a mind and temperament capable of making reasonable decisions'). The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St Marylebone LC said in *In re W (An Infant)* [1971] AC 682, 700:

> 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'

Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. All this is well settled by authority. Nevertheless, for those who feel some embarrassment at having to consult the views of so improbable a legal fiction, 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 appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question."

71. The judge addressed these issues, having referred to Lord Hailsham's speech in *In re W (An Infant)* and the judgment of Steyn and Hoffmann LJJ in *In re C (A Minor)*, and articulated his approach to them in the opening passage of paragraph 21 of his judgment:

> "I recognise that the reasonableness of the parents' refusal to consent must be judged at the time of the hearing and I am doing that. I have taken into account all the circumstances of the case. I have recognised that whilst the welfare of the child must be taken into account it is not the sole or necessary paramount criterion. I have applied an objective test in the case of each parent. I have recognised that the test is reasonableness and nothing else. I have been wary not to substitute my own view for that of the reasonable parent. I recognise that there is a band of reasonable decisions each of which may be reasonable in any given case."

He then went on to set out at length his reasons for reaching the conclusion that the parents' agreement should be dispensed with, even if no adopters could be found who were willing to accept post-adoption contact.

72. Nicholson LJ in the Court of Appeal adverted in paragraph 10 of his judgment to the "generous ambit within which judicial disagreement was reasonably possible" in this type of case. He cited the approval given by the House of Lords in the custody case of *G v G* [1985] 1 WLR 647, 650 to the statement of Sir John Arnold P in the Court of Appeal (1984) 6 FLR 70, 73:

> "I believe that if the court comes to the conclusion, when examining the decision at first instance, that there is so blatant an error in the conclusion that it could only have been reached if the judge below had erred in his method of decision – sometimes called the balancing exercise – then the court is at liberty to interfere; but that, if the observation of the appellate court extends no further than that the decision in terms of the result of the balancing exercise was one with which, they might, or do, disagree as a matter of result, then that by itself is not enough, and that falls short of the conclusion, which is essential, that the judge has erred in his method."

The judge's decision has to be "plainly wrong" or to have taken into account incorrect factors, before an appellate tribunal should interfere. The majority in the Court of Appeal, applying these principles, concluded that the judge was entitled to decide the case as he did and that there was no ground on which his decision should be upset. In my opinion they were correct in their conclusion. The judge outlined for himself in the passages which I have quoted the considerations which he should follow and gave himself a reminder that he should not substitute his own view for that of the parents. On a fair reading of his very careful judgment I do not consider that he failed to observe his own cautionary reminder. He took quite a strong line in coming to and expressing his conclusions, but in my view these were properly inside the bounds within which his determination must be allowed to prevail. There was considerable evidence before him of the risks that H might relapse and of the unhappy consequences which that would have for N if she were living with her. It was a matter of judgment whether these circumstances were such that the hypothetical reasonable parents would give their agreement to adoption. The majority of the Court of Appeal were of the opinion that it was a finely balanced judgment, but that the judge's decision should nevertheless stand, and in that I think that they were right.

73. I accordingly consider that the appellants' arguments, in their several forms, cannot be sustained and that the judge's decision should be upheld. I would only add a word of caution on the way in which the question of contact should be handled both before and after adoption. The hope expressed by the judge in paragraph 23 of his judgment that N should have the benefit of continued contact with her parents now appears likely to be fulfilled. I would, however, underline the warning which he gave that the birth parents' attitude and behaviour will require to be carefully monitored for some time. They have so far been adamantly opposed to adoption, and if an adoption order is in due course made they will have to make what will undoubtedly be a painful and unwelcome adjustment. It is in my view essential for the future well-being of their child N that they should then do nothing to undermine the success of the adoption or reduce the prospects of the child's settling successfully into a new and stable life. It will require a degree of generosity of spirit, in the interests of N's welfare, which will ask a great deal of them as parents, and I earnestly hope that they will be able to play a constructive part in her future. That will clearly require support and effective counselling from the Trust, which must necessarily keep a careful and thorough watch on the progress of contact, to ensure that it fulfils the purpose which it should and that it does not detract from the stability and success of the adoption. In that respect I wholly

agree with the observations of my noble and learned friend Baroness Hale of Richmond in the concluding sentences of her opinion.

74. I would dismiss the appeals.