



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF R. AND H. v. THE UNITED KINGDOM

(Application no. 35348/06)

JUDGMENT

STRASBOURG

31 May 2011

FINAL

15/09/2011

*This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.*

In the case of R. and H. v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

Nicolas Bratza,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 10 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35348/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two British nationals, R and H, on 21 August 2006.

2. The applicants were represented by McEvoy Sheridan, a firm of solicitors practising in Downpatrick, Northern Ireland. The United Kingdom Government (“the Government”) were represented by their Agents, Ms E. Willmott and Ms H. Moynihan of the Foreign and Commonwealth Office.

3. The applicants alleged the domestic courts’ decision to free their daughter N was unfair and not supported by relevant and sufficient reasons.

4. On 18 September 2008 the Vice-President of the Fourth Section of the Court decided to give notice of the application and to communicate the complaint concerning Article 8 to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Priority was accorded to the application, pursuant to Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, R, was born in 1962. The second applicant, H, was born in 1971. They live in Northern Ireland. The applicants are the biological parents of a child, N, who was born in April 2002. The first applicant, R, is the child's father; the second applicant, H, is her mother. The second applicant has three other children, HH, P and T, who were born in 1989, 1991 and 1996 respectively. Full care orders were made in respect of HH, P and T in 2001. Another child, O, was born to the applicants in November 2006 and has remained in their care.

A. The “freeing order” proceedings in respect of N

6. The second applicant has a long history of alcohol problems and has experienced various periods of stability and sobriety followed by periods of abuse of alcohol, including when she was pregnant with N.

7. When N was born, she was removed at birth and the second applicant was admitted to an addictions centre where she remained for approximately one month. Both applicants attended a parenting centre with N in June 2002 for assessment purposes: they take the view that the assessment reports were positive.

8. In August 2002, the applicants were allowed to take N home. T was returned to the applicants' care in early March 2003. Further reports were also positive until late March 2003 when HH and P came home for contact visits and then refused to leave. The second applicant started drinking again. She asked for help and N was removed by social workers from the Down Lisburn Health and Social Services Trust (“the Trust”) on a voluntary basis and placed with foster carers.

9. HH, T and P were also removed to Trust accommodation. HH was eventually returned to the second applicant in November 2003, by which time she was fourteen years of age, and P insisted on leaving foster care and returning to the second applicant in February 2005, when he was thirteen years of age. T was returned to the applicants in December 2007 (see paragraph 40 below).

10. On or around 29 May 2003, the Trust applied for a care order in respect of N. The care plan, which was submitted by the Trust with its application for the care order, envisaged that N would remain in the care of short-term foster parents pending an application to the High Court to free her for adoption. On 7 July 2003, the Trust was granted an interim care order in respect of N.

11. On 17 July 2003, at a “Looking after children” (LAC) review attended by the applicants, the Trust decided that N’s case should be referred to the Trust’s Permanency Panel. On 20 August 2003, the Trust’s Permanency Panel decided to refer the case to the Trust’s Adoption Panel. The Permanency Panel did not make any recommendations on adoption at this stage but recommended that the care plan should be made more explicit and the second applicant, who had stopped drinking at this time, be monitored to see if she remained sober. It referred the matter of the care plan back to the LAC review. On 4 September 2003, the LAC referred N’s case to the Adoption Panel. However, it also decided that a “kinship assessment” (a social work assessment of whether a specific family member can care for a child) be completed in respect of N’s maternal grandmother, MRH. That assessment was completed in November 2003 and concluded that it would not be appropriate for N to be placed with MRH. This was because, in the late 1980s, MRH’s husband, from whom she was estranged but with whom she continued to live, had been the subject of allegations that he had inappropriately touched one of their daughters. He had also refused to participate in the kinship assessment.

12. On 23 September 2003, MRH applied for a residence order in respect of N and her sister, T.

13. On 11 December 2003, the Trust’s Adoption Panel recommended the adoption of N.

1. Proceedings before the Family Judge

14. The Trust’s application for a care order and MRH’s application for a residence order were heard together by a judge sitting at the Belfast Family Care Centre (“the Family Judge”). In those proceedings a number of reports were filed including one prepared by a consultant forensic psychiatrist on the second applicant, which had been commissioned by the Trust. The report, dated 22 April 2004, identified a series of personality based difficulties, which caused the second applicant’s alcohol abuse but which were also made worse by it. The psychiatrist was not asked to recommend any particular course of treatment in the report.

15. In his judgment of 30 July 2004, the Family Judge first considered whether it was possible to make no order in favour of either the maternal grandmother or the Trust, the effect of which would be to return N to her parents. In concluding that this was not an option, he found that while the second applicant, when sober, provided adequate and appropriate parenting, he did not believe that on the balance of probabilities she would remain abstinent. The first applicant would not provide adequate protection for N in such an event and there was the further prospect of domestic violence by the first applicant towards the second applicant.

16. The Family Judge then dismissed the application by MRH for residence orders in respect of N and her sister. He found that there was

insufficient evidence to make a finding that MRH's husband had committed sexual abuse in the 1980s but it was of great concern that he had refused to be assessed. MRH, from whom the Family Judge had heard evidence, had not grasped the basic implications of a residence order, particularly that it would entrust N to her care for over fourteen years.

17. The Family Judge made a full care order in respect of N in favour of the Trust. On the basis of expert evidence recommending three to four annual face-to-face meetings between N and her parents in the event of her adoption, the judge approved the Trust's plan to reduce contact gradually, from twice a week with the applicants, once a week with the whole family and once a month with her siblings only to one meeting a month. The applicants initially sought to appeal against the Family Judge's order but withdrew their appeal on 16 September 2004 when public funding was withdrawn by the Northern Ireland Legal Services Commission.

2. The High Court proceedings

18. On 14 September 2004, the Trust applied to the High Court for an order freeing N for adoption (a "freeing order") and sought to have the need for the applicants' agreement dispensed with on the ground that they were withholding their agreement unreasonably. The application was heard over seven days between 25 January 2005 and 14 April 2005. It appears from the domestic decisions as submitted by the applicants, in particular the dissenting opinion of Baroness Hale (see paragraphs 30–33 below), that the Trust made no attempts to find prospective adopters in that time since it was not its policy to do so until a freeing order had been made. The Government in their submissions to this Court considered that these findings overlooked the initial steps which had been taken to find suitable carers for N, such as contacting a voluntary adoption agency (see paragraph 60 below).

19. The High Court heard expert evidence from a professor of social work, Professor John Triseliotis, on two separate days. On the first day, Professor Triseliotis stated that he disagreed with the Trust's plans for no contact between the applicants and N after the adoption. There could be no question of post-adoption contact if the applicants did not support the adoption but their opposition to adoption did not mean that they would undermine the placement if an order was made. He further stated that the applicants had to be judged after the court had made its decision.

20. Before Professor Triseliotis could finish his evidence, a senior social worker gave evidence for the Trust stating that the Trust had initially been opposed to direct post-adoption contact because of the parents' hostility but, having heard Professor Triseliotis' evidence, they were prepared to look for prospective adopters who would meet N's need for continued contact with the applicants. However, they could not guarantee finding such adopters or that contact would be workable.

21. When giving evidence for the second time, Professor Triseliotis 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”.

22. In its judgment of 31 May 2005, the High Court concluded that adoption was in N’s best interests and made a freeing order. The trial judge (Mr Justice Gillen) accepted that there was no realistic possibility of the second applicant remaining abstinent from alcohol during N’s childhood. He further found that the second applicant had clearly attempted to minimise domestic violence in the household and regarded it as “another instance where she fails to prioritise the needs of her children over those of herself or her partner”. The trial judge also rejected the applicants’ submission that the Trust should have diagnosed the second applicant’s personality difficulties sooner. He stated:

“[The second applicant] cannot place the burden of her problems on to the Trust. She has her own responsibilities and if she wished to address this problem of drinking she cannot leave it entirely up to the Trust. Failure to ascertain the root of her problem lies partly at least with her own actions. The welfare of this child cannot be sacrificed to the need to address her problems of alcohol. Moreover I am satisfied that the Trust had taken all reasonable steps to afford her professional and expert help and it cannot be blamed if only now yet another alternative remedy is postulated. I believe it is too long a timescale to address all these problems at this stage and I am not prepared to endanger the future of N simply to meet the lateness of the prognosis of H’s problems.”

After considering the relevant case-law of this Court and the domestic courts on adoption and Article 8 of the Convention, the trial judge stated that he was satisfied that adoption was in the best interests of N. He then considered whether the Trust had satisfied him on the balance of probabilities that the applicants were unreasonably withholding their consent. He rejected the applicants’ argument that a reasonable parent would be justified in withholding consent until they could be assured that any prospective adoptive parents would agree to post-adoption contact and also rejected their argument that the Trust should have taken steps to identify such a couple before making the application for a freeing order. He stated:

“I am satisfied that the need for adoption 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....I share the view of Professor Triseliotis 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.”

23. Having reached the conclusion that the applicants' consent could be dispensed with on the ground that it was unreasonably withheld, the trial judge added:

"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....I am satisfied that a freeing order in this case is a proportionate response to the legitimate aim of ensuring the welfare of this child. I have sought to balance the Article 8 rights of both parents, reminded myself that this draconian remedy should only be resorted to where no alternative avenue is open and where the interest of the child clearly requires it."

3. The Court of Appeal's judgment

24. The applicants appealed to the Court of Appeal in Northern Ireland. On 22 November 2005, the Court of Appeal refused the appeal by a majority. All three judges expressed disagreement with certain of the trial judge's findings, in particular his view that there was no hope of the mother remaining abstinent. However, the majority did not consider that he was plainly wrong in finding that freeing N for adoption was in her interest.

25. Lord Justice Nicholson considered first the factual basis for the trial judge's order. He noted that a number of allegations of domestic violence by the first applicant had been withdrawn by the second applicant and HH but found it served no purpose to re-open the Family Judge's findings (see paragraphs 14–17 above). He found:

"Time is not on the side of N and on the best scenario of H's progress, N would be 5½ years old before it would be safe to return her to her parents. By that time N would almost certainly be too old to be adopted successfully and although I consider that the probability is that H will not relapse, I am not prepared to take the risk that she will do so under the stresses and strains of coping with [HH] and P as she did in 1996. I recognise that she is almost 10 years older and much more mature but the risk of serious harm to N is there and the damage caused to [HH] and P is evident. The damage to N if she was returned would be, to quote Professor Tresiliotis: 'catastrophic'.

But as I have indicated I do not take the pessimistic view of the judge about H and R. The birth parents are capable of supporting the bonding of adoptive parents with N. If this proves wrong, H and R would have only themselves to blame. If a Freeing Order is made, they will need counselling not merely from someone who helps H to understand why she resorted to drink ... Moreover, if there is a relapse, this should not

operate as a bar to contact with N, provided that it is supportive. I realise that H and R have been antagonistic to adoption. That is not surprising, especially having regard to their own achievements since 2003. But the Trust must realise that if a Freeing Order is made, their hostility may change, not least as they will otherwise lose all contact with N.

Furthermore, if a Freeing Order is made the Trust must be shown to the judge dealing with the adoption as having made every effort to find prospective adoptive parents who will be prepared to permit supportive contact by the birth parents in the interests of N, as Professor Tresiliotis has urged.

In order to ensure that the Trust fulfils its obligations it has been agreed with Gillen J, who is the Family Judge, that if a Freeing Order is made, Campbell LJ should be the judge who deals with the adoption. Hopefully, it will put pressure on the Trust to meet their obligations. The judge himself indicated his concern that direct contact should be available to H and R if they prove supportive to adopting parents.”

Lord Justice Nicholson further found that the Trust should have been required to provide evidence as to the availability of prospective adopting parents who would permit direct contact with supportive birth parents. Nevertheless, he upheld the view of the trial judge that reasonable parents would accept that if prospective adopters could not be found who would permit contact, N should still be adopted. On Article 8 of the Convention, he concluded:

“ I am satisfied that the judge gave careful consideration to the Article 8 rights of H and R and N’s siblings. I bear in mind the steps taken by the Trust to rehabilitate H and R after the birth of N and the fact that she was placed with them in August 2002 and only taken away in June 2003 when H had a relapse. The decision to make a freeing order is the most drastic step which can be taken in breaking the bond of parent and child. I have read all the relevant authorities which were drawn to our attention. I have disagreed with the judge’s assessment of a number of important matters. But I am satisfied that a freeing order is a proportionate response to the legitimate aim of ensuring the welfare of N, bearing in mind her rights and the rights of H and R and N’s siblings under Article 8.

On a freeing order a court cannot attach conditions. I have made clear my views on the issue of contact post-adoption. It will be a matter for the judge at the adoption hearing to determine whether suitable adoptive parents have been found. Consensual arrangements for contact between adopting and birth parents are much to be preferred.”

26. Lord Justice Campbell, concurring, was not in full agreement with the trial judge either in his assessment of the expert evidence as giving no realistic possibility of the second applicant continuing to remain abstinent during N’s childhood or in his view that the prospects of success of the course of treatment that was proposed were not good. However, he was satisfied that the pressing needs of N could not wait to be met until H had successfully completed the course of treatment. He also found that when the question of contact was a finely balanced judgment, the issue was whether the advantages of adoption to the welfare of N were sufficiently strong as to

justify overriding the views of the applicants. The trial judge had been 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 had to proceed even if this could not be achieved. The reasonable parent, faced with this decision and with the welfare of N in mind, would be driven to this conclusion.

27. Lord Justice Shiel, dissenting, agreed with the other members of this court that it was in the best interests of N that she should be freed for adoption. However, he considered that the trial judge was incorrect in holding that the applicants were withholding their consent unreasonably. The evidence of Professor Triseliotis meant it was a finely balanced judgment as to whether to free N for adoption and there had been a “very marked improvement” in the personal circumstances of the applicants prior to the High Court judgment. The second applicant had managed to stay off alcohol since July 2003 which was a very considerable achievement for one who had had such a severe alcohol problem. N had strong attachments to both of her parents, particularly her mother, both of whom faithfully attended contact meetings with N.

4. The House of Lords’ judgment

28. The applicants appealed to the House of Lords. On 12 July 2006, the House of Lords (by a majority of four to one, Baroness Hale of Richmond dissenting) rejected the applicants’ appeal. Lord Carswell (with whom Lord Nicholls of Birkenhead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe agreed) stated that he agreed with the trial judge that the Trust’s response had been proportionate in the pursuit of the legitimate aim of protecting the welfare and interests of the child. In response to the applicants’ argument that the trial judge could not correctly hold that the withholding of agreement was unreasonable when it was not known whether post-adoption contact could be arranged, Lord Carswell stated:

“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.... [Counsel for H., the second applicant] 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’.”

29. Lord Carswell then reviewed the relevant domestic case-law on reasonableness, including the decision in *Re C* that a reasonable parent pays regard to the welfare of his or her child (see paragraph 46 below). He concluded that the trial judge had appropriately applied this case-law, and observed:

“[The trial judge] 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.”

30. Baroness Hale of Richmond found that any reasonable parent would be entitled to place great weight on the views of Professor Triseliotis and were entitled to see what efforts were made to find the right sort of placement for N before giving their consent. In taking the view that the applicants could frustrate an adoption by behaving so badly that no-one would agree to post-adoption contact, the trial judge had placed undue weight on an irrelevant consideration when deciding that the parents were unreasonably withholding their consent. The evidence was very clear that contact would only be in the best interests of the child if the applicants behaved well and did not use it to undermine the placement. The applicants had not sought to use their contact to undermine N’s placement. Nor, despite the view which he had formed of the desirability of post adoption contact, did the trial judge consider whether the court could, at that stage, promote this, for example by preserving the parents’ position after a freeing order.

31. Baroness Hale also observed:

“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.”

32. She further considered that adoption practice in Northern Ireland laboured under three misconceptions. The first was that the search for prospective adopters should not begin until the child has been freed. The second was that it was not possible to run proceedings, whether for

adoption or for freeing, in such a way that the parents and prospective adopters were able to hear and to challenge one another's evidence. The third was that it was not possible to consider the issue of post adoption contact until the adoption application itself. A judge hearing a freeing application could not make an order about contact after the adoption but that did not mean that the issue of post adoption contact was not relevant to whether or not the child should be freed for adoption.

33. In considering Article 8 of the Convention she stated:

“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.”

B. Subsequent proceedings and the post-adoption contact arrangements

34. The Trust matched N with suitable prospective adopters in March 2006. By letter dated 13 October 2006, the Trust informed the applicants that N's prospective adoptive parents had lodged an application for an adoption order in the High Court. On 26 October 2006, the applicants wrote to the High Court opposing the granting of the order.

35. On 15 January 2007, by direction of the High Court, the applicants were joined as respondents in proceedings but their participation was confined to the issues of post-adoption contact and whether the proceedings should be stayed. On the same date, the High Court also directed that the proceedings should not be stayed pending the outcome of the present application before this Court. In the written reasons for its judgment, given on 25 February 2008, the High Court considered that there were advantages in both biological parents and prospective adopters being involved in further proceedings as to whether there should be post-adoption contact, which the courts in Northern Ireland were to consider “with fresh eyes” after Baroness Hale's dissenting judgment.

36. On 30 March 2007, an agreement was reached between the parties concerning post-adoption contact. The post-adoption contact arrangement provided for N to see her birth family three times per year, accompanied throughout by her adoptive parents.

37. The matter was then adjourned for the hearing of the adoption application. Since the applicants had only been joined to the proceedings for the purposes of their application for a stay and to be heard in connection with their application for post-adoption contact, they were not permitted to participate further in the proceedings. An adoption order was made on 3 April 2007.

C. The current position

38. The second applicant maintains that, with the exception of one relapse in August 2010, she has remained sober since 2003. She has received counselling and regularly attends AA meetings. The Government maintained that she had suffered at least two relapses in summer 2010. Counselling was also provided after T, H's fourteen year daughter, was taken into foster care on 9 October 2010 (see paragraph 40 below) and when the domestic authorities were so concerned about H's mental health that she was offered either inpatient treatment or intensive support from their mental health team.

39. The applicants and O have contact with N three times a year. T, P and HH are permitted to see N once a year, though the Government have indicated that, when N intimated that she was upset as to the lack of frequency of contact with T, arrangements were reviewed in order to increase contact.

40. T was returned to the applicant's care in December 2007, after five years in foster care. The Government maintain that she spoke to social workers about her need to leave the applicants in summer 2010 and, after she attempted suicide, she was removed to foster care on 9 October 2010. After a further suicide attempt, T has been transferred to inpatient psychiatric care. The applicants believe that T's mental health difficulties are attributable to N's adoption. The Government assert that the view of the professionals who are responsible for T's care is that the impact of N's adoption on T has been partly due to the second applicant's continuous promotion of her own views on N's adoption to T and other difficulties in T's upbringing.

41. O remains in the care of the applicants and there have never been any proceedings in respect of him. For approximately two years, the applicants also provided temporary foster care for the second applicant's two nieces and her nephew. This arrangement was approved by a different Trust, the Western Health and Social Care Trust. The applicants maintain that this Trust was very complimentary of the care they provided. The Government

maintain that the Trust responsible for the applicants' own children did not approve of this temporary foster care and that care in fact ended due to problems in the family.

42. HH has had two children. The second child, L, was made the subject of an interim joint residence order by the Family Proceedings Court with care to be shared between the applicants and L's paternal grandmother. The applicants maintain that, in making that order, the court would have had regard to L's welfare and would have had to assess whether L was at risk by placement with the applicants. The Government maintain that L's care was assumed by the paternal grandparents in August 2010 and that the applicants no longer wish to pursue a residence order application for L.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General provisions

43. Article 3(1)(a) of the Children (Northern Ireland) Order 1995 ("the 1995 Order"), which provides that, where a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration. Article 3(2) requires the court to have regard to the general principle that any delay is likely to prejudice the welfare of the child.

The compatibility of these provisions with Article 8 of the Convention was considered in *AR v. Homefirst Community Trust* [2005] NICA 8 where the Court of Appeal in Northern Ireland, found that, in a case where a newborn baby had been removed from his mother's care within a few days of his birth, the need to have the child's situation settled should not be allowed to predominate to the extent that the mother's rights under Article 8 of the Convention were disregarded. The child's welfare was paramount but this did not mean that a court should exclude the parent's Article 8 rights from its consideration. This was applied in *Homefirst Community Health and Social Services Trust v. SN* [2005] NICA 14 to a "freeing order" (see section 2 below). In that case, the mother's child was taken from her care four months after his birth. She underwent therapy for personality and mental health difficulties. The Court of Appeal found that, had the Trust in that case been fully cognisant of the mother's rights under Article 8, it should have given her a further opportunity to prove herself through therapy. Despite the progress she had made, at the time of the court's judgment her son had been settled with prospective adopters for nearly three years and thus it was in the child's best interest that he should be freed for adoption. In those circumstances, SN was withholding her consent unreasonably.

44. Article 18(1)(b) of the 1995 Order provides that it shall be the duty of every authority, so far as it is consistent with its duty to safeguard and promote the welfare of children who are in need, to promote the upbringing of such children by their families. The equivalent provision for England and Wales, section 17 of the Children Act 1989, has been interpreted in England and Wales as creating a strong supposition that it is in the interests of the child to be brought up by his natural parents (*Re W (A Minor) (Residence Order)* [1993] 2 FLR 625). When a child is a baby the assumption is that it should remain with its mother (*Re W (A Minor) (Residence Order)* [1992] 2 FLR 332).

B. Freeing orders

45. Article 9 of the Adoption (Northern Ireland) Order 1987 (“the 1987 Order”) provides:

“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.

46. Article 18 of the 1987 Order provides that 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) of the Order, the court shall make an order declaring the child free for adoption. The grounds in Article 16(2) include when the parent or guardian is withholding his agreement unreasonably.

In determining whether the parent is withholding his agreement unreasonably, the court must apply an objective test. In *Re W (an infant)* [1971] A.C. 682, it was held by the House of Lords that although welfare of the child was the test *per se*, 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.

In *Re C (A Minor) (Adoption: Parental Agreement: Contact)* [1993] FLR 268 it was held by the Court of Appeal in England and Wales that reasonableness could be determined 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.”

In *Re P (Adoption: Freeing Order)* [1994] 2 FLR 1000 it was held that, when deciding whether to make a freeing order when there is no guarantee of post-adoption contact, it was appropriate for a judge to decide: (i) to make no freeing order and decide whether to dispense with consent at the later stage of an application for an adoption order; (ii) to make an order because adoption was more important than contact; or (iii) to decide that contact was so important that, if post-adoption contact was not possible, long-term foster care was appropriate and thus that no freeing order should be made.

Guidance by the Department of Health and Social Services for England and Wales that prospective adopters be identified before the date of the final care hearing was endorsed by the High Court in Northern Ireland in *Re Z and T (freeing order application)* [2005] NIFam 6.

47. Article 18(2) of the 1987 Order provides that no application shall be made unless the child is in the care of an adoption agency and the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption. An adoption agency may be a Health and Social Services Trust. By Article 18(3) read with Article 12(3) of the 1987 Order, such a “freeing order” acts to extinguish the parental responsibility of the parents. Rule 4A.4(2) of the Family Proceedings Rules (Northern Ireland) 1996 (“the 1996 Rules”) requires that the respondents to an application for a freeing order shall include, *inter alia*, each parent or guardian of the child.

C. Adoption orders

48. Article 12 of the 1987 Order provides for an adoption order to be made by an authorised court on the application of the adopters. When such an application is made, Rule 4A.15(1) of the 1996 Rules specifies that the respondents shall include each parent or guardian of the child, unless the child is free for adoption. Rule 4A.16 provides that where the child is not free for adoption and the applicant intends to request the court to dispense with the agreement of a parent or guardian of the child, such a request shall be included in the application. The grounds for dispensing with agreement are those contained in Article 16(2) of the 1987 Order. By Rules 4A.20 and 23(1), of the 1996 Rules, as respondents the parents are served with notice

of any hearing and can attend and be heard on whether the adoption order should be made.

By Article 12(3) of the 1987 Order, the making of an adoption order operates to extinguish the parental responsibility which any person has for the child immediately before the making of the order.

Article 13(1) and (2) require a child to live with his or her prospective adopters before an adoption order is made.

D. Statutory changes in England and Wales

49. The Adoption and Children Act 2002 replaced freeing orders in England and Wales with placement orders. A placement order can only be made with the consent of the parent or guardian, unless the court considers that consent should be dispensed with (section 21). In contrast to Article 18 of the 1987 Order, a placement order can be made without the need to satisfy the court that it is likely the child will be placed for adoption. There is no requirement that prospective adopters be identified before a placement order is made (see *Re T (children: placement order)* [2008] EWCA Civ 248; *Re P (children) (adoption: parental consent)* [2008] EWCA Civ 535).

Placement orders do not terminate parental responsibility until an adoption order is made (section 46(2)) but, if a placement order is made, the biological parents may not oppose the making of an adoption order without the leave of the court. Leave is only given if there has been a change in circumstances since the placement order was made (section 47(7)).

50. Similar provisions apply in Scotland under the Adoption and Children (Scotland) Act 2007.

III. EUROPEAN CONVENTION ON THE ADOPTION OF CHILDREN (REVISED)

51. Article 5 of the European Convention on the Adoption of Children, Strasbourg, 2008, where relevant, provides as follows:

“1 Subject to paragraphs 2 to 5 of this article, an adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:

a the consent of the mother and the father; or if there is neither father nor mother to consent, the consent of any person or body who is entitled to consent in their place;

b the consent of the child considered by law as having sufficient understanding; a child shall be considered as having sufficient understanding on attaining an age which shall be prescribed by law and shall not be more than 14 years;

c the consent of the spouse or registered partner of the adopter.

2 The persons whose consent is required for adoption must have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin. The consent must have been given freely, in the required legal form, and expressed or evidenced in writing.

3 The competent authority shall not dispense with the consent or overrule the refusal to consent of any person or body mentioned in paragraph 1 save on exceptional grounds determined by law. However, the consent of a child who suffers from a disability preventing the expression of a valid consent may be dispensed with.

4 If the father or mother is not a holder of parental responsibility in respect of the child, or at least of the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicants complained that the freeing order was a disproportionate interference with their rights guaranteed by Article 8 of the Convention because the domestic authorities failed to keep their assessment of their family situation under review and because the reasons given by the trial judge were neither relevant nor sufficient. The applicants also argued that, procedurally, it was improper for a freeing order to have been made in advance of an adoption order. If the freeing order had been refused, the applicants would have been able to participate at the adoption order hearing.

53. Article 8 of the Convention provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

54. The Government contested those arguments.

A. Admissibility: the Government's preliminary objection as to victim status

1. The parties' submissions

55. The Government submitted that, in light of the agreement on post-adoption contact of 30 March 2007, the applicants were no longer victims for the purposes of Article 34 of the Convention. They had received contact on the terms recommended by Professor Triseliotis and had not been prejudiced by the approach taken by the Trust, which found suitable adopters who agreed to post-adoption contact. The agreement had worked as intended so the applicants had been afforded all that they could reasonably have wanted or expected.

56. The applicants submitted that they remained victims after the agreement of 30 March 2007. They had felt constrained to accept three contact visits per year because, by this stage, they were former parents with no rights. The agreement was just that, and not an order of the court. No acknowledgment or redress had ever been provided by the United Kingdom. In any event, they remained victims of the violations which had occurred between the making of the freeing order on 31 May 2005 and the date of the agreement.

2. The Court's assessment

57. The Court considers that the Government's preliminary objection has not been made out. A decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI, and *Constantinescu v. Romania*, no. 28871/95, § 40, ECHR 2000-VIII). In the present case, the applicants' complaints have a substantive and a procedural dimension. Substantively, they complain that the Trust failed to review its assessment and the reasons for the freeing order were flawed. Procedurally, they complain that the two-stage procedure of seeking a freeing order then, at a later stage, an adoption order, was not appropriate in their case. The agreement they made with N's prospective adopters did not amount to acknowledgment of or redress for their complaint that the Trust should not have acted in the way it did or that the freeing order should not have been made: the agreement had no effect on the validity of that order. Nor did the agreement provide any redress for their complaint that the two-stage procedure should not have been followed in their case: the agreement had no effect on the procedure followed, which culminated in the making of an adoption order on 3 April 2007.

58. Accordingly, the Court rejects the Government's preliminary objection in respect of the applicants' victim status. The applicants' Article 8 complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The Government

i. The procedural requirements of Article 8

59. The Government submitted that the proceedings were fair. The two-stage procedure of freeing N for adoption and then seeking an adoption order was compatible with Article 8. The aim was to resolve issues of consent at an early stage, thus providing clarity and certainty for all concerned. This often required courts to proceed without knowing which form of adoption was possible but it was recognised that it was easier to find adoptive parents after a child had been freed. It would sometimes be undesirable for a court to consider adoption in the abstract but there were also cases where the need to free the child was so pressing that it should be done even without knowing what form adoption would take. The domestic courts had taken such a view with N. It was open to them on the evidence to do so. The applicants had participated throughout the proceedings, (in contrast with *B. v. the United Kingdom*, 8 July 1987, Series A no. 121) and had been represented throughout (in contrast with *P., C. and S. v. the United Kingdom*, no. 56547/00, ECHR 2002-VI). Even after the freeing order they were joined to proceedings for the adoption order hearing (in contrast with *X v. Croatia*, no. 11223/04, 17 July 2008). The present case was therefore much closer to *Scott v. the United Kingdom* (dec.), no. 34745/97, 8 February 2000, where the Court had upheld a decision to free the child of an alcoholic mother for adoption because the mother had had the opportunity to participate in the proceedings.

60. The Government further relied on the approach taken by the majority of the House of Lords. They made the following five points in respect of Baroness Hale's dissent. First, it was incorrect that Article 18(2) contemplated, or even expected, that prospective adopters would be found before a freeing order was made: it only required that it be likely that the child be placed for adoption. The virtue of a freeing order was that it widened the choice of prospective adopters to those who would only contemplate adoption if it was likely to be endorsed by the court. Second, it

was incorrect to state that, in Northern Ireland, the search for prospective adopters only took place after a freeing order was made; in the present case, this had been done by looking for carers who had been approved as both foster and adoptive carers. Third, there were ways in Northern Ireland in which both birth parents and prospective adopters could participate simultaneously in child care proceedings. Fourth, in Northern Ireland, the courts considered issues of post-adoption contact before an application for an adoption order was made: for example, such an approach had been taken in *Re Z. and T.* (see paragraph 46 above). Fifth, even Baroness Hale had accepted that there were cases in which the need to free a child for adoption was so pressing that a freeing order should be made without knowing what options were available.

ii. The substantive requirements of Article 8

61. The Government submitted that, taken as a whole, the reasons given by the Trust and the domestic courts were relevant and sufficient for the purposes of Article 8 § 2 and thus the approach taken in respect of N was proportionate. They accepted that Article 8 might impose an obligation to take positive rehabilitative steps for applicants (*K.A. v. Finland*, no. 27751/95, 14 January 2003). They also accepted that the second applicant's underlying personality disorder was only diagnosed in 2004. However, in the High Court, the trial judge had concluded that the Trust had taken all reasonable steps to afford her professional and expert help. In any event, by the time of the freeing order hearing, the timescale for treating the second applicant's problems was too long for N, who was in urgent need of permanent care. Nor could the Trust be criticised for failing to reassess the applicants' situation: it had already tried and failed to return N to her parents. There had been recurring difficulties with their family life, including relapses into alcohol abuse and intermittent domestic violence. The Trust had been required to decide whether, in light of those difficulties, the risks to N outweighed the progress made by the applicants.

62. There was no difference between the Trust's approach to N and the other children in the applicants' care. O had stayed in the care of the applicants because of the second applicant's prolonged sobriety and a more supportive relationship between the applicants. This had led to a more favourable assessment by the Trust but did not undermine its conclusions in respect of N. HH and P had returned home aged fourteen and thirteen respectively. They did so of their own volition, contrary to the Trust's plans. In view of their age, the risks to them were more easily monitored than N who, at the material time, was not of school age.

63. In light of the evidence of Professor Triseliotis, the Trust's position changed significantly in the course of the domestic proceedings from opposing post-adoption contact to accepting that contact 3-4 times a year would be optimal. This had been endorsed by the High Court, which had

considered fairly all the expert evidence before it and had the advantage of hearing live evidence from all the witnesses. It had properly considered all relevant domestic and Convention case-law and had been satisfied that the freeing order was a proportionate means of ensuring N's welfare. Although the Court of Appeal expressed some disagreement with the trial judge's findings, all three members concurred that the freeing order was in N's best interests and was proportionate.

64. It was also legitimate for the High Court to find that the applicants had withheld their agreement unreasonably. This was consistent with its duty to prioritise the rights of N. Any alternative conclusion would have delayed matters, forced a contested adoption hearing and reduced the chances of finding adoptive parents. Even if prospective adopters who agreed to post-adoption contact had been found at an early stage, the applicants would still have had no guarantees as to post-adoption contact since the adoption plans could have gone awry.

b. The applicants

i. The procedural requirements of Article 8

65. The applicants underlined that they were not challenging the two-stage procedure *in abstracto* but rather submitted that it was inappropriate in their case. Refusal of the freeing order and an adoption order hearing at which both biological and adoptive parents could have participated would have provided equal protection to N but greater protection of the applicants' rights. Furthermore, by the time of the adoption hearing, the second applicant would have been able to demonstrate the progress she had made in remaining sober for three years and she would have been able to demonstrate more clearly how disproportionate it was to remove N.

66. Alternatively, a freeing order should only have been made once prospective adopters had been found and their views made known. As it was, there had been no protection from the serious harm that would have resulted had there been no post-adoption contact. Overriding their consent would only have been fair and proportionate if it had been shown that the Trust had extensively searched for adopters who would support contact; simply assuming that the Trust had tried and failed to find such adopters was disproportionate and prevented the applicants from arguing either that a proper search had not been carried out or that prospective adopters were acting unreasonably in not consenting to contact. Moreover, the decisions of the domestic courts did not accord with the approach taken by the courts of Northern Ireland to the balance between Article 8 interests of parents and the welfare of the child: there were strong similarities between their case and that of *AR* and *Re Z and T* (see paragraphs 43 and 46 above). The Guidance endorsed in *Re Z and T* should have also applied in their case.

67. It was not for the Government to submit that the two stage freeing and adoption procedure was compatible with Article 8; it was more appropriate for the Court to consider how that procedure had been applied in the present case. The applicants relied on Baroness Hale's conclusion that it was not enough to decide in a vacuum whether adoption was in the best interests of the child and that the need to free a child for adoption was different from the need for the child to be adopted (see paragraph 31 above). It was also wrong to submit, as the Government had done, that the lack of a freeing order would have made it harder to find suitable adoptive parents; in reality, adoptive parents had been found who were amenable to post-adoption contact. The search for adoptive parents had to begin at some stage and there was no justification for the Trust's failure to look in earnest for suitable adoptive parents prior to seeking the freeing order. Baroness Hale had been correct to observe that the Trust had done little or nothing prior to the freeing order to find prospective adopters and certainly done nothing to find adopters who would agree to contact. Her comments as to the misconceptions which prevailed in Northern Ireland were made after hearing full argument on the issues and it was not open to the Government to challenge her conclusions before this Court.

ii. The substantive requirements of Article 8

68. The applicants considered that the Trust had focused rigidly on adoption as the only option for N; it had made this decision even before considering whether she could be placed with family members such as MRH. The Trust had continually failed to reassess its plan for N in light of the progress made by the applicants in caring for their other children. They accepted that the Trust had changed its position in the course of the proceedings but not to the stage of withdrawing its application for a freeing order in preference for a contested adoption order hearing.

69. The applicants further submitted that the freeing order was disproportionate. Although they had been legally represented and able to participate in the proceedings, this was of no value if their views were not considered properly. This had not been done. The reasons given for the freeing order by the trial judge were neither relevant nor sufficient. His reasons were based on his conclusion that there was no prospect of the second applicant remaining free from alcohol; the Court of Appeal had disagreed with this conclusion and had only been constrained by their limited power to interfere only if the trial judge's decision was "plainly wrong". The trial judge's conclusion was also based on the Trust's submission that any treatment of the second applicant's underlying condition would take too long but it was the Trust's delay in identifying her condition and taking steps to treat her that was the source of the problem.

70. The applicants also submitted that Professor Tresiliotis had only stated that adoption would be in the best interests of N, and would only be

more important than post-adoption contact, if all reasonable steps had been taken to find suitable adopters but none had been found within six months. The High Court, in not evaluating the efforts made by the Trust after six months and proceeding directly to the freeing order, had not followed this advice. It had also erred in deciding that the applicants were unreasonably withholding their consent: if parents reasonably saw a prospect of rehabilitation, they could not be criticised for not consenting to an adoption when that adoption might have put an end to any prospect of rehabilitation. Thus, when the freeing order clearly endangered contact between them and N, the applicants were justified in refusing to consent to the order without proper guarantees that contact would be maintained.

71. Their care of O was instructive. He had not been the subject of any care proceedings since birth and no concerns had been raised as to his welfare. He was born at the same time as the final decisions had been taken in respect of N; it was difficult to reconcile the authorities' attitudes towards him and N. This undermined the relevancy and sufficiency of their reasons for making freeing and adoption orders for N. It was also significant that HH and P, who had initially been unsettled when they returned home in 2003 and 2005, were not thereafter removed from the family home.

2. The Court's assessment

72. There does not appear to be any dispute between the parties that the domestic proceeding in the present care amounted to an interference with the applicants' family life within the meaning of Article 8. Nor is it disputed that the interference was in accordance with the law and pursued a legitimate aim, the protection of N's rights and well-being (see *X. v. Croatia*, cited above, § 46). The principal issue the Court must resolve is whether the domestic authorities' actions were necessary in a democratic society. The decisive issue is whether those actions struck a fair balance between the competing interests which were at stake in the domestic proceedings.

73. The Court has observed that the applicants' complaints relate to both the procedural and substantive requirements of Article 8 (see paragraph 57 above) and it will examine each in turn. At the outset, however, the Court wishes to underline that, in all decisions concerning children, their best interests must be paramount. As the Grand Chamber recently observed in *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 136, 6 July 2010:

“The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to ‘rebuild’ the family [*Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX] On the other hand, it is clearly also in the child's

interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006)."

74. Although *Neulinger and Shuruk* concerned the relationship between Article 8 and the Hague Convention on Civil Aspects of International Child Abduction, the Court considers the principles set out above are equally applicable to domestic care and adoption proceedings. On that basis, it will examine first the procedural dimension to the applicants' complaints and then the substantive dimension (see *Scott*, cited above).

a. The procedural requirements of Article 8

75. The Court would recall that, although Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121-A, pp. 28-29, §§ 62 and 64, and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V (extracts)).

76. Those principles apply generally in proceedings involving children but they apply with greater force when those proceedings may culminate in a child being taken from her biological parents and placed for adoption. As the Court stated in *X. v. Croatia* (at paragraph 47 of its judgment):

"[I]t is an interference of a very serious order to split up a family. The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only add to their problems. They must therefore be allowed a measure of discretion in this respect. On the other hand, predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible as in a case where a child has been taken away from his parents and freed for adoption. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences (see *B. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 72 and 73., § 63)."

77. In respect of the procedures followed by the domestic courts in the present case, the Court first observes that the applicants were legally represented through the freeing order proceedings in the High Court and in

the subsequent appeal proceedings before the Court of Appeal and House of Lords. They were able to give evidence and to call witnesses and experts to testify on their behalf. It is clear that, at least as far as the freeing order proceedings were concerned, they were able to participate fully and to make their views known. The Court acknowledges that the applicants' complaint goes further and questions the appropriateness of the two-stage procedure in their case. The Court agrees with the applicants that it is not its task to review *in abstracto* the compatibility of the two-stage procedure with Article 8. It is, however, of some relevance to the Court's assessment that there are sound practical reasons for the two-stage procedure. It is not an easy task to find suitable adoptive parents for a child, particularly when that child has already formed emotional ties to his or her biological parents. Even where suitable adoptive parents can be found, there may be a reluctance on their part to consider adoption when the biological parents are opposed to such and where there is a possibility that a final adoption order will not be made. If freeing a child makes it easier to find adoptive parents and if there is a pressing need to place that child for adoption, then seeking a freeing order may well be the best means of safeguarding his or her best interests. Moreover, it is clear from the relevant Northern Irish legislation that freeing orders are not made lightly or without reference to clear and well-defined criteria. By Article 3(1)(a) of the 1995 Order, a child's welfare should be the domestic court's paramount consideration (see paragraph 43 above). Article 9 of the 1987 Order reiterates that principle and further directs the court to give full consideration to the need to safeguard and promote the welfare of the child; the importance of providing the child with a stable and harmonious home; and the wishes and feelings of the child (see paragraph 45 above). Article 18(2) further requires that the court be satisfied that it is likely that a child will be placed for adoption (or has already been so placed), a more exacting requirement than the current statutory scheme in England and Wales (see paragraphs 47 and 49 above). Although it would clearly be more advantageous to the biological parents if they were to retain the right to participate to the end of adoption proceedings (that is, to have the right to participate in the second, adoption order stage), their interests must be balanced against the interests of the child (see *Sommerfeld v. Germany* [GC], no. 31871/96, §§ 62-64, ECHR 2003-VIII (extracts)). If it is in the child's interests to be adopted, and if the chances of a successful adoption would be maximised by a freeing order, then the interests of the biological parents must inevitably give way to that of the child. The Northern Ireland statutory scheme, as interpreted by the Northern Irish courts, allows for that balance to be struck between those interests in a manner which shows appropriate respect for all those concerned. As such, it is capable of being applied compatibly with Article 8.

78. The Court further considers that the freeing order procedure, as it applied in the present case, was compatible with Article 8. It is not

persuaded by the applicants' submission that refusing the freeing order and thus allowing them to participate in the adoption order hearing would necessarily have provided equal protection to N but greater protection of their rights. The applicants' reasons for resisting the freeing order were first, their wish to rely on the second applicant's prolonged sobriety and second, the uncertainty as to whether there would be post-adoption contact. However, the very reason why the trial judge had made the freeing order was his conclusion that there was a pressing need for N to be adopted. In reaching that conclusion, the trial judge also found that the timescale for addressing the second applicant's alcohol problem was too long to be in N's interests and that the benefits of adoption outweighed the benefits of post-adoption contact. It is unclear, therefore, that the reasons advanced by the applicants to resist the adoption would have had any greater resonance had they been able to rely on them at the adoption order stage of proceedings. However, even assuming that they would, it is clear to the Court that, by the freeing order stage of proceedings, the interests of the applicants in further participating in the proceedings had to give way to N's interests in being placed for adoption.

79. For the same reason, the Court is not convinced that a freeing order should only have been made once prospective adopters had been found and their views made known. This course of action may have provided greater procedural protection to the applicants because it would have enabled them to better resist the adoption by arguing either that the Trust had not carried out a proper search for prospective adopters or that the prospective adopters were being unreasonable in refusing post-adoption contact. However, the trial judge was well aware of this aspect of the applicants' case. He was also aware of the difficulties in proceeding without a clear picture as to the identity or attitude of prospective adopters. Some weight must be attached to his finding that, even if prospective adopters who would agree to post-adoption contact could not be found, the benefits of adoption outweighed those of post-adoption contact. On the basis of the evidence before him (and in particular the evidence of Professor Triseliotis), this was a conclusion he was entitled to draw and there was nothing arbitrary or unfair in his conclusion that N's adoption was best achieved by making a freeing order. Moreover, the Court also considers that due weight must be given to the evolution in the Trust's position in the course of the proceedings before the High Court. They had initially been opposed to post-adoption contact but later indicated that they would look for prospective adopters who would meet N's need for post-adoption contact. In the event, the Trust were able to find adopters who did agree to contact. In the Court's view, the Trust's efforts to accommodate the applicants' concerns goes some way to mitigating the effects of the High Court's decision to make the freeing order without knowing the views of prospective adopters. Finally, the subsequent proceedings in the case indicate that, even after the freeing order had been

made and upheld on appeal, the applicants were able to participate in the proceedings and to make representations as to the issue of post-adoption contact (see paragraphs 34- 37 above). Indeed, they were able to do so because, as the High Court observed in its judgment of 25 February 2008, the Northern Irish courts were to consider the issue of post-adoption contact with “fresh eyes” after Baroness Hale’s dissenting judgment in the House of Lords (see paragraph 35 above).

80. For these reasons, the Court considers that the applicants have not established that the decision-making process was unfair or that the approach taken by the Trust and the domestic courts failed to involve the applicants to a degree sufficient to provide them with the requisite protection of their interests.

b. The substantive requirements of Article 8

81. In assessing whether the freeing order was a disproportionate interference with the applicants’ Article 8 rights, the Court must consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention (see, among other authorities, *K and T. v. Finland* [GC], no. 25702/94, § 154, ECHR 2001-VII).

In carrying out that assessment, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementation. The Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 201, ECHR 2000-VIII; *Johansen v. Norway*, 7 August 1996, § 64, *Reports of Judgments and Decisions* 1996 III). Those considerations also apply to the making of adoption orders and issues of post-adoption contact (*G.H. B. v. the United Kingdom* (dec.), no. 42455/98, 4 May 2000).

The Court would also recall that, while national authorities enjoy a wide margin of appreciation in deciding whether a child should be taken into care, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII, and *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I). For these reasons,

measures which deprive biological parents of the parental responsibilities and authorise adoption should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests (see *Aune v. Norway*, no. 52502/07, § 66, 28 October 2010; *Johansen*, cited above, § 78 and, *mutatis mutandis*, *P., C. and S. v. the United Kingdom*, no. 56547/00, § 118, ECHR 2002-VI). However, mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible with the requirements of Article 8 of the Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children *vis-à-vis* members of their family are proved, retrospectively, to have been misguided (*R.K. and A.K. v. the United Kingdom*, no. 38000/05, § 36, 30 September 2008).

82. Turning to the circumstances of the present case, the Court considers it necessary to examine the applicants' submission in respect of the Trust before considering their submissions in respect of the reasons given by the domestic courts for the freeing order.

83. In respect of the actions of the Trust, the Court does not consider that the applicants' argument that the Trust failed to keep its plans for N under review is supported by the evidence before it. From the chronology set out at paragraphs 10–13 above, the Court is satisfied that the Trust had not decided irrevocably to have N placed for adoption without first considering the possibility of placing her with MRH. The initial care plan submitted by the Trust with its application for a care order contemplated adoption but did not commit it to pursuing only adoption. The Permanency Panel, in referring N to the Adoption Panel on 20 August 2003, declined to make any recommendations on adoption. The LAC review of 4 September 2003 decided simultaneously to refer N to the Adoption Panel and to have a kinship assessment completed on MRH. It may well be that the Trust was prompted to carry out the kinship assessment by the greater interest shown by MRH in looking after N, but the decision to carry out the assessment was taken before MRH had taken the formal step of applying for a residence order on 23 September 2003. The result of that assessment showed that the Trust had good reason to reject the possibility of N being placed with MRH and the applicants have not sought to show that, before the application for the care order was made, any other family member had come forward as an alternative carer. Some weight must be attached to the Family Judge's decision to grant the Trust's care order application, refuse MRH's residence order application and approve the Trust's plan to reduce gradually N's contact with her family. The Court also considers that, in light of the second applicant's previous relapses, the Trust was entitled to maintain its application for a freeing order and to leave it for the court, in deciding on that application, to consider what, if any, progress had been made by the second applicant at that time. The Trust's willingness to change its position

on post-adoption contact in the course of the freeing order proceedings supports the conclusion that it kept its position on adoption under review throughout the proceedings.

84. The Court now turns to the domestic courts' reasons for the freeing order. It observes that the applicants accept that the trial judge's reasons for making the freeing order were based on his conclusion that there was no prospect of the second applicant remaining free from alcohol. However, they place greater emphasis on the Court of Appeal's disagreement with this conclusion, the consequence of which, they submit, is that the trial judge's reasons were neither relevant nor sufficient.

85. The Court considers that this submission is based on an unduly narrow reading of the judgments of the trial judge and the Court of Appeal. The trial judge's judgment was also based on his assessment that the second applicant had attempted to minimise domestic violence in the household and that her problems were not limited to alcohol abuse but included the personality difficulties that had been diagnosed in the psychiatric report of 22 April 2004 (see paragraph 14 above). Having identified these difficulties he went on to consider the appropriateness of further treatment. He concluded that the Trust had taken all reasonable steps to help the applicant and that the timescale for any further help would be too long and would endanger N's welfare. In this context, the trial judge's conclusion that N's welfare could not be sacrificed to the need to address the second applicant's problem with alcohol was both a relevant and sufficient reason for rejecting the applicants' submission that the freeing order should not be made because of the second applicant's sobriety. In addition, while it is true that the Court of Appeal took a more optimistic view of the second applicant's attempts to remain sober, all three members of the court agreed that adoption was in N's best interests. The majority also found that, even if there was a greater probability of the second applicant remaining sober than the trial judge had found, the possibility of a relapse could not be excluded and the evidence was that any such relapse would be "catastrophic" for N. When read in conjunction with Lord Justice Nicholson's further observations as to the critical age of N (quoted at paragraph 25 above), these reasons are also relevant and sufficient for the purposes of Article 8 and complement those given by the trial judge.

86. This conclusion is not affected by the applicants' submission that proper weight should be attached to the care they have been able to provide to O. Although it is instructive that no concerns have been expressed by the domestic authorities about O, it is also the case that the needs and interests of children, even children in the same family, may vary greatly according to their age. The domestic authorities were entitled to make different decisions as to the care of all of the children concerned in this case and to find that that N's age meant that adoption was in her best interests. Nor would it be appropriate to have regard only to the care the applicants have given to O: it

is an unfortunate feature of this case that the subsequent difficulties which the applicants have had in caring for their other children would appear to justify the concerns of the domestic authorities which led them to remove N from the family home and place her for adoption. The domestic authorities, in seeking to protect the welfare of N and her siblings, have been required to respond to a complex and at times uncertain family situation. The Trust in particular, has had the benefit of long and close contact with the family and, for that reason, must enjoy a measure of discretion in its response (*W.*, cited above, § 62). There is nothing to indicate that it has exercised improperly that discretion or that its concerns for N's welfare were not genuine or reasonable.

87. On the issue of post-adoption contact, the Court finds some force in the applicants' submission that the High Court should have followed Professor Triseliotis's advice and given the Trust six months to find suitable adopters before making the freeing order: it is not apparent from the High Court's judgment why this course of action was rejected. However, in the Court's view, any failing on the part of the High Court was remedied by the approach taken by the Court of Appeal, which made clear its views that post-adoption contact was in N's interests and that the Trust should make every effort to find prospective adopters who would agree to such contact. Lord Justice Nicholson's direction that Lord Justice Campbell should preside at the adoption order hearing was made precisely in order to ensure that the Trust made those efforts. It cannot be said, therefore, that the domestic courts allowed N to be freed for adoption without proper regard for the fact that her interests, and those of the applicants, were best served by post-adoption contact.

88. Finally, the efforts of the domestic courts to ensure that the Trust found suitable prospective adopters also means that the Court should attach less weight to the applicants' submissions that first, they could not be criticised for not consenting to an adoption when that adoption might have put an end to any prospect of rehabilitation and second, they were justified in refusing to consent to the order without proper guarantees that contact would be maintained. As to the first submission, it is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that she be placed permanently in a new family. Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents (*Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 155, ECHR 2004-V (extracts)). Equally, the Court has observed that, when a considerable period of time has passed since a child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited

(see, *mutatis mutandis*, *K. and T. v. Finland*, cited above, § 155; *Hofmann v. Germany* (dec.), no. 66516/01, 28 August 2007). Similar considerations must also apply when a child has been taken from his or her parents. As to the second submission, had the position of the Trust not changed in the course of the proceedings, and had the domestic courts not clearly expressed their preference for post-adoption contact, the Court might have seen greater force in the applicants' submission that they were acting reasonably in refusing to agree to adoption. However, the manner in which the freeing proceedings evolved demonstrates to the Court's satisfaction that, once the domestic courts had concluded that adoption was in N's best interests, they were also entitled to conclude that any reasonable parent who paid regard to their child's welfare would have consented to the adoption. That conclusion was well within the margin of appreciation that domestic courts enjoy in such cases.

89. For the foregoing reasons, the Court concludes that the reasons given by the domestic courts for the freeing order were relevant and sufficient. The freeing order was therefore a proportionate interference with the applicants' Article 8 rights.

c. Overall conclusion in respect of Article 8

90. Having found that the making of the freeing order complied with the procedural and substantive requirements of Article 8, the Court finds that there has been no violation of Article 8.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 6 of the Convention

91. The applicants further alleged breaches of Article 6 of the Convention, which provides, as relevant, as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

92. They submitted that the decision of the domestic authorities to conduct freeing order proceedings, which deprived them of the opportunity to participate at the later adoption order proceedings, breached their right to a fair hearing in the determination of their civil rights as parents. They further argued that there were a number of issues relating to the desirability of the adoption of their daughter, such as post-adoption contact, on which they could not be heard at the adoption order hearing because of the freeing order. In order to guarantee a fair hearing on the decision to deprive them of their civil rights, it would have been more appropriate for the domestic authorities and prospective adopters to have applied for an

adoption order and simultaneously request that the applicants' agreement be dispensed with by a freeing order. At such an adoption hearing, by which time the proposed adopters would have been identified, all such issues could be determined by evidence. The applicants could have attended and argued their case on the evidence, with all the rights and protections afforded to them as parents.

93. The Court considers that this complaint should be declared admissible. However, it also considers that the essence of this complaint, that the freeing order procedure was not attended by sufficient procedural safeguards, has been thoroughly examined under Article 8 above and may be regarded, in the present case, as absorbed by the latter provision (see, *mutatis mutandis*, *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 111, 1 December 2009 and *Connors v. the United Kingdom*, no. 66746/01, § 103, 27 May 2004). No separate issue therefore arises for determination.

B. Article 13 of the Convention

94. Finally, the applicants alleged that the appeal courts could only overturn the trial judge's ruling if they considered it to be "plainly wrong". Under Article 13 they argued that such a restriction on their right to appeal deprived them of an effective remedy in respect of the violations of the Convention of which they were victims.

95. Article 13 of the Convention provides as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

96. The Court considers this complaint to be without merit. There is nothing exceptional in appeal courts having limited powers of review of decisions of lower courts (see, *mutatis mutandis*, *Loewenguth v. France* (dec.), no 53183/99, ECHR 2000-VI, *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I). In any event, the Court has found that the Northern Irish statutory scheme, as interpreted in *AR* and *Re Z and T*, is capable of being applied compatibly with Article 8 (see paragraph 77 above). As in *AR* and *Re Z and T*, the applicants were able to rely on Article 8 at all stages of the proceedings; the appeal courts were able to deal with the substance of the applicants' Convention complaints and, had those courts found that a freeing order would have breached their Article 8 rights, they would have been able to grant appropriate relief.

97. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning Articles 6 and 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention;
3. *Holds* unanimously that no separate issue arises under Article 6 of the Convention.

Done in English, and notified in writing on 31 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Kalaydjieva is annexed to this judgment.

L.G.
T.L.E.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

To my regret I am unable to join the conclusions of the majority. In her dissenting opinion in the case before the House of Lords, Baroness Hale of Richmond formulated the major question as “whether it is necessary and proportionate to sever the links with the family of birth if a new (adoptive) family has not yet been identified”.

In my view a reasonable determination of a child’s best interests can only be based on a comparison between the current situation of a child and the extent to which it calls for separation from the biological parents – on the one hand and the extent to which these interests would be better met with the candidate-adoptive family (including the future contacts with the biological parents) – on the other.

Looking at the length of the “freeing order” proceedings and the fact that the initiation of adoption proceedings was possible only after their completion, I fail to see how the consequential examination of the current and the future situation of the child better met her urgent needs.

Moreover, the examination of (what I see as) inseparable aspects of the child’s interests required the national authorities to assess these aspects as they stood at different times – regardless of the positive changes in the applicants’ abilities to take responsible care of their children. By this time the applicants were found eligible for foster care and their ability to take responsible care of their other child was not contested. However at this moment, the national courts were competent to consider these positive changes only for the purposes of determination of the frequency of their contacts with the child N., who was already destined for adoption by virtue of an earlier reached irreversible decision.

While I agree that it is “easier to find adoptive parents after a child had been freed (see § 59)”, in my view a “freeing order” seems to facilitate primarily the authorities’ search for candidate-adoptive parents but not necessarily the proper assessment of the child’s best interests or the applicants’ rights under Article 8 as to the moment of the decision for adoption.