CA No. 14-99012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

***

ZANE FLOYD, Petitioner/Appellant, vs. TIMOTHY FILSON, et al., Respondents/Appellees.	D.C. No. 3:09-cv-00327-RCJ (District of Nevada, Las Vegas) (Death Penalty Habeas Corpus Case)

Appeal from the United States District Court
for the District of Nevada

Brief of *Amici Curiae* in Support of Petition for Rehearing and Rehearing En Banc

Lisa Rasmussen
Nevada Bar No. 7491
Law Office of Lisa Rasmussen
601 South Tenth Street
Suite 100
Las Vegas, Nevada 89101
(702) 471-1436
Lisa@lrasmussenlaw.com
*Counsel for *Amici Curiae*

CAPITAL CASE

QUESTIONS PRESENTED

The Petitioner has presented the following questions:

1. Whether, the panel decision improperly relied on extra-record and unsupported assumptions about the effects and mitigating value of a diagnosis of Fetal Alcohol Spectrum Disorder (FASD), and the decision further relied on unsupported factual implications to cure what would have been a circuit split;
2. Whether, the panel decision failed to determine whether Nev. Rev. Stat. § 34.726(1)(a) was an adequate procedural bar as applied to Floyd, based on the mistaken assumption that it had addressed and rejected all of Floyd's constitutional claims on the merits; and
3. Whether, the panel decision failed to consider the cumulative impact of pervasive prosecutorial misconduct—misconduct that had been recognized by every court to issue a decision in Floyd's case.

This brief is submitted to inform the court with particular respect to Q1.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that no corporations are involved in this pleading. The individuals who participated in this brief do not have a parent corporation or issue publicly held stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.K. Cases

U.K. Legislative Provisions

Reports

Parliamentary Records

Texts

Websites

STATEMENT OF INTEREST

The three research centers of Birmingham City University's School of Law have research interests in American legal studies, the application of capital punishment and the rights of capital defendants, and the approach of legal institutions and agents to developing science. The Center for American Legal Studies, Center for Human Rights, and Center for Law, Science, and Policy, respectively, undertake research into U.S. legal matters, the promotion and protection of constitutional rights, and the interplay of law with science and technology. The instant case raises issues across these areas, specifically the recognition of a medical condition, Fetal Alcohol Spectrum Disorder, in capital proceedings in the U.S. The Directors of the three centers file this brief collectively, in conjunction with the Counsel of Record.

Amici have the consent of both parties to the filing of this brief. *See* Fed. R. App. P. 29(a); 9th Cir. R. 29-2(a).

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, amici certify that no counsel for either party authored this brief in whole or in part; neither party, nor counsel for either party, contributed financial support intended to fund the preparation or submission of this brief; and no individuals or

organizations contributed financial support intended to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

Amici adopt the opinions below, jurisdiction, constitutional provisions involved, and the Statement of Facts in the Petition for Rehearing and Suggestion for Rehearing En Banc, DktEntry 105, and submit this amicus brief in support.

SUMMARY OF THE ARGUMENT

In the United Kingdom (U.K.), Fetal Alcohol Spectrum Disorder (FASD) is a recognized term used to describe a range of life-long conditions caused by the consumption of alcohol during pregnancy. Politicians recognize that FASD is the commonest non-genetic cause of learning disability in the U.K., raise concerns, and promote public information campaigns. Healthcare providers advise expectant mothers of the dangers of consuming alcohol during pregnancy, and provide a suite of support resources. The U.K.'s most senior judges have recognized that the symptoms of FASD may affect the reliability of confession evidence in criminal proceedings. U.K. Family Court judges have received evidence of FASD symptoms when exercising their

discretion to make adoption and care proceedings orders. Criminal justice scholars consider the implications for courtroom procedures and urge attorneys with clients who have symptoms of FASD to notify courts considering the reliability of evidence given by their client both before and during court proceedings.

ARGUMENT

In the United Kingdom (U.K.), Fetal Alcohol Spectrum Disorder (FASD) is a recognized term used to describe a range of life-long conditions caused by the consumption of alcohol during pregnancy. Amici present this position in three parts. First, the recognition of FASD by scientific and healthcare communities in the U.K. Second, the recognition of FASD by U.K. politicians. Third, the recognition of FASD by the U.K. judiciary in civil and criminal legal proceedings, and in criminal justice-focused scholarship.

The U.K. observes International FASD Awareness Day, which falls on September 9 each year.[1]

Birmingham City University law students, Denisa Bucioaca and Stefanie Groves, provided research assistance.

I. Recognition of FASD by U.K. Scientific and Healthcare Communities

The Lancet first published research associated with FASD in 1973.[2] The researchers claimed "… there is a specific set of pathological symptoms in infants whose mothers had drunk alcohol heavily during pregnancy…" and referred to the topic as fetal alcohol syndrome (FAS).[3] Nearly fifty years later, FAS, which "won quick and broad acceptance"[4] sits within FASD.[5] FASD is of national concern in the U.K., which is

---

[1] *See* http://www.fasday.com/ (International FASD Awareness Day started in 1999).

[2] Kenneth L. Jones, & David W. Smith, *Recognition of the Fetal Alcohol Syndrome in Early Infancy*, 302 (7836) THE LANCET 999 (1973); see also Kenneth L. Jones & David W. Smith, *Pattern of Malformation in Offspring of Chronic Alcoholic Mothers*, 1(7815) THE LANCET. 1267 (1973).

[3] Robin Room, *Fetal Alcohol Syndrome: A Biography of a Diagnosis,* 365(9476) THE LANCET 1999 (2005).

[4] *Id.*

[5] World Health Organization *Global Status Report on Alcohol and Health* 5 (2018): ("FASD is an umbrella term [that] includes fetal alcohol syndrome (FAS), partial fetal alcohol syndrome (pFAS), alcohol-related neuro-developmental disorder (ARND) and, depending on the diagnostic and classification system, alcohol-related birth defects (ARBD).").

estimated to have the world's fourth highest rate of alcohol consumption during pregnancy.[6]

Information provided by U.K. healthcare providers reflects this concern. The British Medical Association (BMA) states that "[a] large number of children are born every year in the U.K. with lifelong physical, behavioral or cognitive disabilities caused by alcohol consumption during pregnancy." [7] The BMA recognizes the vulnerability of affected children to "social and mental health problems such as substance abuse or sexual inappropriateness, educational difficulties, or crime and consequent incarceration."[8] It advises that "…the safest approach is for women who are pregnant, or who are

---

[6] Svetlana Popova et al., *Estimation of National, Regional, and Global Prevalence of Alcohol Use During Pregnancy and Fetal Alcohol Syndrome: A Systematic Review and Meta-Analysis*, 5(3) THE LANCET, E.290 (2017).

[7] British Medical Association, *Alcohol and Pregnancy: Preventing and Managing Fetal Alcohol Spectrum Disorders* (June 2007, updated Feb. 2016).

[8] *Id.*

considering a pregnancy, [is] not to consume any alcohol."[9] The Royal College of Obstetricians and Gynecologists gives similar advice.[10]

The U.K. National Health Service (NHS) includes FASD within its A-Z of health conditions catalogues, which outline symptoms, preventative measures, and support.[11] It also supports a National Clinic on FASD.[12] NHS Scotland provides a dedicated Fetal Alcohol Advisory and Support Team.[13] There are specific quality standards for the

---

[9] *Id.*

[10] ROYAL COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, ALCOHOL AND PREGNANCY, INFORMATION FOR YOU, 3 (Feb. 2015, reviewed Jan. 2018).

[11] *See generally*, https://www.nhsdirect.wales.nhs.uk/encyclopaedia/f/article/foetalalcoholsyndrome; https://www.nhs.uk/conditions/foetal-alcohol-syndrome/; https://www.nidirect.gov.uk/articles/pregnancy-and-alcohol.

[12] *See* https://www.fasdclinic.com/.

[13] *See generally*, https://www.nhsaaa.net/services-a-to-z/fetal-alcohol-spectrum-disorder-fasd/.

delivery of healthcare for individuals affected by FASD,[14] some expressly recognizing their relevance to "judicial services."[15]

Since 1973, over 2000 FASD-related studies have reportedly been undertaken worldwide.[16] The first U.K. screening prevalence study, published in 2018,[17] concluded that further research was urgently needed.[18] Similarly, there have been calls in the U.K. Parliament for action to address the absence of structured surveillance and reporting systems for FASD,[19] and the implications of alcohol misuse.[20] The U.K.

---

[14] For England, Wales, and Northern Island *see generally*, NATIONAL INSTITUTE FOR HEALTH AND CARE EXCELLENCE QUALITY STANDARD TOPIC OVERVIEW for fetal alcohol spectrum disorder, available at https://www.nice.org.uk/guidance/indevelopment/gid-qs10139/documents. For Scotland *see generally*, SIGN, *Children and Young People Exposed Prenatally to Alcohol,* https://www.sign.ac.uk/sign-156-children-and-young-people-exposed-prenatally-to-alcohol.html (accessed Dec. 31,2019.).

[15] *Id.* (Scotland SIGN156).

[16] 13 Fetal Alcohol Forum, 2 (June 2015), available at http://www.nofas-uk.org/PDF/FAF%2013%20%20final.pdf ("research around the world has produced over two thousand FASD studies…").

[17] Cheryl McQuire et al., *Screening Prevalence of Fetal Alcohol Spectrum Disorders in a Region of the United Kingdom: A Population-Based Birth-Cohort Study.* 118 PREVENTATIVE MEDICINE 344, 347 (2018).

[18] *Id.* at 350.

[19] SELECT COMMITTEE ON HEALTH & SOCIAL CARE, ALCOHOL, Written Evidence, 83 (Mar. 19, 2009).

[20] *Id.* at 102.

Parliament endorses and supports the efforts of the scientific and healthcare communities to promote better understanding of FASD.

II. The U.K. Parliament's Consideration of FASD and Healthcare Guidelines

Parliamentary Concern & Chief Medical Officer Guidelines

Since the 1973 identification of FAS, the U.K. Parliament has accepted research concerning the negative consequences of alcohol consumption during pregnancy for fetal development. Parliamentary debates reveal wide levels of concern regarding this issue and recognition of the need for public information.

The U.K. Parliamentary record in Hansard for 19 December 2019 reveals that to date: 99 Written Questions on the need for public information and advice concerning alcohol consumption by expectant mothers have been submitted; 38 Answers have so far been provided; and there have been full Parliamentary debates on this issue.[21]

---

[21] *See, e.g.*, 665 Parl Deb HL (Oct. 18, 2004) col 603-19 (UK); 620 Parl Deb HC (Feb. 2, 2017) col 407-418; 652 Parl Deb HC (Jan. 17, 2019) col 1426 – 33 (U.K.). FASD has also been discussed in numerous associated debates, *e.g.* in debates concerning the labelling of alcoholic drinks.

Parliamentary questions have also raised the continuing healthcare needs for children and adults with FASD. Such questions have been put directly to the Secretary of State for Health and Social Care, who has public health statutory responsibility. [22]

For example, on April 27, 2018 Thelma Walker, M.P. (Colne Valley, LAB) submitted the following question: "To ask the Secretary of State for Health and Social Care, what steps his Department is taking support people diagnosed with fetal alcohol syndrome."[23] Steve Brine, Parliamentary Under-Secretary of State for Health and Social Care, responded:

> The Government recognizes that Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorders (FASD) can have a significant impact on the early years development of children, their behaviors and their life choices. Early intervention services can help reduce some of the effects of FASD and prevent some of the secondary disabilities that result. Responsibility for commissioning these services lies with the clinical commissioning groups.[24]

---

[22] Health and Social Care Act 2012, §1.

[23] Fetal Alcohol Syndrome: Written Question—139045, HC (08 May 2018) (UK).

[24] *Id.*

The House of Commons Select Committee on Science and Technology has also considered FASD. In 2012, this Committee and the U.K.'s Chief Medical Officers (CMOs) requested advice on alcohol and pregnancy with a view to harmonizing the guidance provided across the U.K. The Committee's Report concluded that there was no recognizable safe level of alcohol for consumption in pregnancy.[25] In 2016, the U.K.'s four CMOs issued updated guidelines reaffirming the risk to the fetus of drinking in pregnancy.[26]

There are three cross-party All Party Parliamentary Groups (APPGs) that consider FASD: the APPG on Foetal Alcohol Spectrum

---

[25] *See* Dep't Health & Social Care, *Response to the House of Commons Science and Technology Committee Report of Session 2010-2012: Alcohol Guidelines* (March 26, 2012).

[26] Dep't of Health, UK Chief Medical Officers' Low Risk Drinking Guideline, Aug. 2016 at 8.

See also, Dep't of Health, *New Alcohol Guidelines Launched* (Jan. 8, 2016),https://www.health-ni.gov.uk/news/new-alcohol-guidelines-launched.

Disorders;" the APPG on Alcohol Harm; and the APPG on Children of Alcoholics.[27]

The implications of FASD for the criminal justice system and wider society have been publicized in Parliament. On January 17, 2019, the chair of the APPG on FASD Bill Esterson, M.P. (Sefton Central, LAB) brought to the attention of the House of Commons an article published in The Times newspaper the same day, headlined: "Babies being born brain-damaged by alcohol is a national emergency."[28] The newspaper reported the results of a recent study conducted by Bristol University, which suggested that "some 79% of women say that they drank alcohol while pregnant, and that between 6% and 17% of the 14,000 or so children covered by the study have fetal alcohol spectrum disorders." Scaled up, that would give a figure of between 42,000 and

---

[27] *See* https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/registers-of-interests/register-of-all-party-party-parliamentary-groups/.

[28] Bill Esterson, M.P. HANSARD, HOUSE OF COMMONS, Vol. 652 Col. 1427, (Jan. 17, 2019), https://hansard.parliament.uk/Commons/2019-01-17/debates/19011751000002/FoetalAlcoholSpectrumDisorder?highlight=%22foetal%20alcohol%20syndrome%22#contribution-D6C8ABEC-1928-4BDC-9FB5-2CCD76F9AAFF.

120,000 children a year, thus justifying the use of the term 'national emergency.' Mr. Esterson went on to explain FASD to the House of Commons as "*the commonest non-genetic cause of learning disability in the United Kingdom.*"[29]

Mr. Esterson explained the implications [of FASD] for the criminal responsibility of young persons:

> The impact on the brain, although usually not immediately obvious from the outside, affects language, memory, attention, processing and understanding, and creates emotional, behavioral and learning difficulties. Children often struggle with complex concepts such as time, metaphor or consequences. Rewards and sanctions mean very little to children with this kind of brain damage, and consequences do not mean very much either.

Mr. Esterson noted that population evidence received by the APPG suggested, as a low estimate, that at least a quarter of the children in the care system are affected by FASD. He explained that, because the disorder does not go away when children become adults, there are implications for society, and called for action on prevention

---

[29] *Id.* (emphasis added).

[30] Pora v. Queen [2016] 1 Cr. App. R. 3; [2015] UKPC 9.

and diagnosis plus "much greater prominence to be given to CMO advice and guidance "so that everyone understands it".

III. U.K. Case Law & Scholarship

Pora v. The Queen (2015)[30]

This case concerned an appeal to the U.K. Privy Council from a decision of the Court of Appeal of New Zealand dismissing the appellant's appeal against conviction for rape and murder. The Privy Council agreed to receive a range of new evidence concerning the reliability of the appellant's confession including affidavits from Valerie McGinn, a clinical neuropsychologist and Andrew Immelman, a consultant psychiatrist.

Dr McGinn and Dr Immelman were asked by the appellant's lawyers to "conduct an investigation into whether the appellant has a neurodevelopmental disability and if so the nature of that disability."[31] The Court noted the conclusion of both experts that the appellant

---

[30] Pora v. Queen [2016] 1 Cr. App. R. 3; [2015] UKPC 9.
[31] *Id.* at [35] (official transcript) (Lord Kerr).

"fulfils the diagnostic criteria of an alcohol related neurodevelopmental disorder (ARND) also known as static encephalopathy (alcohol exposed)."[32] The Court also noted the conclusion that the appellant's IQ of 83 was within the normal limits but that this was "not inconsistent with there being significant abnormalities in some areas."[33]

Both experts testified to the connection between FASD and impaired executive functions, including poorly regulated and egocentric behavior, particularly in response to stress. Specific statements included the following:

> Results indicate that [the appellant] has deficits of regulatory control and this is a common feature in those with FASD who struggle to regulate their moods and actions. When placed in a complex situation [the appellant] is likely to show a tendency to act impulsively with reduced capacity to think through to consequences.[34]

> In terms of his FASD diagnosis, [the appellant] has significant impairments of executive function including impaired reasoning, literal and limited

---

[32] *Id.* at [36].

[33] *Id.* at [35].

[34] *Id.* at [37].

> thinking, cognitive rigidity and deficits of regulatory control.[35]

The Court found Dr McGinn's testimony "at least potentially, extremely helpful"[36] and summarized the most significant of her conclusions.[37] The Court found that the expert evidence provided an explanation as to why the appellant's confessions might have been false. The Court concluded that "[t]he combination of Pora's frequently contradictory and often implausible confessions and the recent diagnosis of his FASD leads to only one possible conclusion and that is that reliance on his confessions gives rise to a risk of a miscarriage of justice. On that account, his convictions must be quashed."[38]

Criminal Injuries Compensation Authority v First-Tier Tribunal (Social Entitlement Chamber) (2015)[39]

The issue raised in this appeal concerned the ability of a child ("CP"), born with FASD as a direct consequence of her mother's

---

[35] *Id.*

[36] *Id.* at [64].

[37] *Id.* at [37].

[38] *Id.* at [67].

[39] [2015] 2 W.L.R. 463.

excessive drinking while pregnant, to claim criminal injuries compensation from the Criminal Injuries Compensation Authority ("CICA"). There was no dispute that CP had sustained grievous bodily harm by reason of the mother's excessive drinking during pregnancy. The Court acknowledged that:

> FASD is a recognized disorder resulting from grossly excessive drinking during pregnancy. It causes intrauterine growth retardation and limited growth potential. It can cause central nervous dysfunction; a feature of the disorder is that the brain is smaller and particularly affected. Many children with the disorder have severe learning difficulties.[40]

The Court accepted that a diagnosis of FASD had been made in the case but found that no claim for criminal compensation lay as no criminal offence had been committed.[41]

SMcC v. Southern Health and Social Care Trust (2013)[42]

This was a decision of the High Court of Justice in Northern Ireland Family Division, on appeal from orders pursuant to Article 18 of

---

[40] *Id.*

[41] *Id.* at 464.

[42] [2013] NI Fam 2 (N. Ir.).

the Adoption (Northern Ireland) Order 1987, freeing male and female child siblings for adoption. Both children had been assessed by the Northern Ireland Regional Genetics Centre. The assessment indicated that the female child had significant behavioral and developmental problems but did not fit the criteria for FASD.[43] The assessment of the male child indicated that he did fit the criteria for FASD. The mother was reported as saying that she binge drank when pregnant with him.[44] The High Court, agreed with the conclusion of the judge below that adoption was in the children's best interests and dismissed the mother's appeal.

Re Z & Ors. (2016)[45]

This was a Family Court case brought by a local authority seeking care orders in respect of six children on the grounds that they had suffered significant harm, were suffering significant harm when protective measures were taken, and were likely to suffer significant

---

[43] *Id.* at §§4, 41.
[44] *Id.* at §41.
[45] 2016 WL 06065991.

harm if returned to their mother. Two of the children (S & R) had a diagnosis of FASD. S was assessed with significant functioning and learning disabilities to which FASD had contributed.[46] R did not have learning difficulties but needed additional support in some areas at school and had some behavior issues. The Court approved the requested care orders and specifically identified FASD when discussing the harm caused by the mother to these children.[47]

IV. Implications of a Diagnosis of FASD for the Criminal Justice System

Research indicates that the "cognitive, social and behavioral problems associated with FASD often bring sufferers to the attention of the criminal justice system.[48] Scholarship notes that FASD is a life-long physical disability resulting from compromised brain functioning, and has addressed the implications for miscarriages of justice in criminal

---

[46] *Id.* at 5.

[47] *Id.* at 11: "The harm is perhaps most obviously seen in T and S, foetal alcohol spectrum disorder, and in the challenging behaviour of U and W." (Simon Wood, J.).

[48] *See* Heather Douglas, *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, 34 CRIM. L.J. 221, 222 (2010).

proceedings in cases of FASD, notably regarding culpability and procedural adjustments.[49]

FASD implicates the "fundamental principle of sentencing"[50] that the sentence should be just and should be proportionate to the gravity of the offence and the offender's degree of responsibility."[51] FASD sufferers may have a lower level of culpability because of their cognitive deficiencies.[52]

Where there is a diagnosis of FASD assessments of primary behavior (actions giving rise to potential criminal charges) and secondary behavior (responses to pre-trial and trial questioning by police, lawyers and judges) may need to be adjusted. Individuals with FASD are likely to have poor regulatory control. They are likely to be impulsive and suggestible and fail to consider the consequences of their actions. For these reasons, a diagnosis of FASD may be relevant to

---

[49] The literature is extensively referenced by Douglas, *supra* note 48.
[50] Douglas, *supra* note 48.
[51] *Id.*
[52] *Id.*

decisions of culpability and/ or the severity of sentencing.[53] In terms of secondary behavior, individuals with FASD may have:

- little or reduced ability for sustained concentration and for that reason convey to the court an impression of lack of concern or empathy.[54]

- poor or limited language skills and fail to understand the use of metaphor by police, lawyers, and or judiciary (*e.g.* 'this is the end of the line').

- impaired reasoning skills and difficulty perceiving similarities and differences, generalizing information, and translating information between contexts and from hearing to action.

- Poor memory recall and experience difficulty following evidence or conditions (*e.g.* adjournments, bail, disclosure.[55]

There is a growing body of literature dealing with FASD and criminal justice.[56] This literature demonstrates recognition that FASD

---

[53] *See* Douglas, *supra* note 48, at 231.

[54] *See id.* at 222.

[55] *Id.*

[56] *See, e.g.* Larry Burd et al., *Fetal Alcohol Spectrum Disorder as a Marker for Increased Risk of Involvement with Correction Systems* 38 J. PSYCHIATRY & LAW 559 (2010); Ben Collins & Katherine Fudakowski, *Abuse Claims: Criminal Injuries Compensation: A Review of Some*

is a disability which the justice system should accommodate. The following specific recommendations can be identified:

- Information regarding FASD should be collected as early as possible in the justice process. There is a suggestion that prosecuting lawyers should ask defense lawyers in advance of the trial whether they have considered FASD.[57]

- Where it has already been diagnosed, FASD should be raised by parties appearing before a court.

- FASD should be regarded as a disability that may be relevant to issues of both culpability and sentencing.

- A diagnosis of FASD may require adaptation of interrogation and examination procedures.

- Failure to raise FASD may be a successful appeal point: *see Pora v. The Queen* (2015).[58]

- Sentencing conditions, including probation orders for FASD sufferers should be carefully tailored for the individual and his or her level of capacity.

Relevant Case Law for Practitioners, 3 J. PERS. INJ. 105 (2016). Timothy E. Moore & Melvyn Green, *Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System* 19 CRIMINAL REPORTS 99(2004).

[57] *See* David Boulding, *Fetal Alcohol: The Role of Crown Counsel* (2005) at [2], http://www.davidboulding.com/uploads/2/4/1/4/24146766/fetal_alcohol_the_role_of_crown_counsel.pdf (visited 12/14/2019).

[58] [2015] UKPC 9; [2015] 3 WLUK 1060.

CONCLUSION

For the reasons stated above, *amici* urge this Court to reconsider its decision on Floyd's claim relating to FASD.

Dated this 3rd day of January, 2020.

Respectfully submitted,

LISA A. RASMUSSEN, ESQ.
Nevada Bar No. 7491
Law Office of Lisa Rasmussen
601 South Tenth Street
Suite 100
Las Vegas, Nevada 89101
(702) 471-1436
Lisa@lrasmussenlaw.com

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I am one of the attorneys representing *amici curiae*.

I certify that, pursuant to Circuit Rule 35-4, the attached Brief of *Amici Curiae* in Support of Petition for Rehearing and Rehearing En Banc is prepared in format that complies with Fed. R. App. P. 32(a)(4)-(6) and is 3,457words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Century 14-point font.

Dated this 3rd day of January, 2020.

Respectfully submitted,

Lisa Rasmussen
601 South Tenth Street
Suite 100
Las Vegas, Nevada 89101
702-471-1436

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

In accordance with the Federal Rules of Appellate Procedure, I certify that on this date, January 3, 2020, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that counsel for Appellee are registered and listed participants with CM/ECF system and that service of this pleading will be accomplished via mail.

RENE L. VALLADARES
Federal Public Defender
DAVID ANTHONY
BRAD D. LEVENSON
ELLESSE HENDERSON
Assistant Federal Public Defenders
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
Counsel for Petitioner

Jeffrey M. Conner
Assistant Solicitor General
jconner@ag.nv.gov

/s Lisa Rasmussen

ATTACHMENT

ATTACHMENT: BIOS

Dr Sarah L. Cooper is a Reader in Interdisciplinary Legal Studies in Birmingham City University's School of Law, where she is both Director of Research, and the Centre for Law, Science, and Policy. Dr Cooper's published research on challenges emerging from the interaction of legal institution and agents with scientific expertise and uncertainty has been cited across scholarly and legal practice communities. She is a Senior Fellow of the UK Higher Education Authority, and has held visiting positions at Amicus, Arizona Justice Project, and Law Library of Congress. Her qualifications include a LL.B (Hons), BVC, and PhD.

Dr Anne Richardson-Oakes is an Associate Professor of American Legal Studies in Birmingham City University's School of Law. She is Director of the Centre for American Legal Studies and Editor-in-Chief of peer reviewed law journal, *The British Journal of American Legal Studies*. Dr Oakes has published widely on U.S. constitutional law and judicial decision-making. She is a member of the Society of Legal Scholars. Her qualifications include a B.A (Hons), Solicitor (non-practicing), and PhD.

Professor Jon Yorke is a Professor of Human Rights in Birmingham City University's School of Law and is the Director of the Centre for Human Rights. Professor Yorke is a widely recognised expert in international human rights, particularly as they relate to capital punishment. He is a Member of the Foreign and Commonwealth Office's Death Penalty Expert Group and Pro Bono Lawyer's Panel; a Consultant to the United Nations Commission on Crime Prevention and Criminal Justice, European Union, and the Council of Europe; and a member of the International Academic Network for the Abolition of the Death Penalty, and Amicus training team. His qualifications include LL.B. (Hons), LL.M. and Ph.D.

Jonathan Rudin is the Program Director for the Aboriginal Legal Services and the chair of the FASD Justice Committee. The Committee created a website on FASD and the justice system at www.fasdjustice.ca. The website is designed for justice professionals and advocates who work with FASD affected individuals. Mr. Rudin

also teaches on a part-time basis in the Law and Society Program at York University and in the Graduate Program at Osgoode Hall Law School. His book, Indigenous People and the Criminal Justice System: A Practitioner's Handbook was published by Emond in 2018 and won the Walter Owen Book Prize from the Canadian Foundation for Legal Research in 2019.

CA No. 14-99012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

***

ZANE FLOYD, Petitioner/Appellant, vs. TIMOTHY FILSON, et. al., Respondents/Appellees.	D.C. No. 3:09-cv-00327-RCJ District of Nevada, Las Vegas (Death Penalty Habeas Corpus)

Appeal from the United States District Court
for the District of Nevada

AMICUS CURIAE APPENDIX

Lisa Rasmussen
Nevada Bar No. 7491
Law Office of Lisa Rasmussen
601 South Tenth Street
Suite 100
Las Vegas, Nevada 89101
(702) 471-1436
Lisa@lrasmussenlaw.com
*Counsel for *Amici Curiae*

CASES

1. Re: Z & Ors (Children) Case No: NE15C00734
   Family Court Sitting At Newcastle-Upon-Tyne 15 July 2016
   2016 WL 06065991

2. 463 Criminal Injuries Compensation Authority v. First-tier Tribunal (Social Entitlement Chamber) (British Pregnancy Advisory Service and others intervening) [2015] 2 W.L.R. 463

3. Neutral Citation No. [2013] NIFam 2

4. Pora (Appellant) v The Queen (Respondent) (New Zealand) From the Court of Appeal of New Zealand

Re: Z & Ors (Children)
Case No: NE15C00734
Family Court Sitting At Newcastle-Upon-Tyne
15 July 2016

2016 WL 06065991

Before: His Honour Judge Simon Wood
Friday, 15th July 2016

Analysis

In the Matter of the Children Act 1989

In the Matter of: Z & Ors (Children)

Hearing dates: 11th July 2016, 15th July 2016

Representation

- Counsel for the Local Authority: Miss E Lugg .
- Counsel for the Mother: Miss L McKenzie .
- Solicitor the Children: R & T: Mrs S Melvin .
- Solicitor for the Guardian: Miss Hunter .

Judgment
His Honour Judge Simon Wood:

Introduction

The court is concerned with the welfare of R, S, T, U, V and W. They are all the children of M, who was born in 1979 and so is in her 37th year. In R's case her father is F1. In the case of S and T, it is F2 and in the case of U, V and W, it is F3. The children range in age as follows. R is shortly 17, S is 16, T is 14 years 8 months, U is 8 years 3 months, V 7 years 5 months and W 6 years 5 months.

Gateshead Council issued proceedings on 23rd December 2015 seeking care orders in respect of all six children. As I will explain that no longer includes R and it now confirms that it seeks such orders with plans of long term foster care for all the five younger children, each to remain in their present separate placements. That plan is supported by their children's guardian, Laura Grundy, supported by the mother in respect of S and T but opposed by the mother, the only active respondent parent within this hearing, in respect of U, V and W. She seeks the return of those children to her care supported by her sisters, failing which she invites the court to place them with her sisters in whichever combination it thinks fit.

The only other party to the proceedings has been F2. I released his solicitor on the first day of the hearing. He currently has no relationship with his two children, who do not wish to see him, but simply seeks the opportunity, via the local authority, to demonstrate that he can repair the relationship.

Why has the local authority sought orders?

Why does the local authority say, as it does, that these children have suffered significant harm and were suffering significant harm when protective measures were taken and are likely to suffer significant harm if returned to the care of their mother, the likelihood of the harm being because the children will not receive the care that would be reasonably expected from a parent? The case can be summarised very shortly. It is one of chronic neglect which can be traced back to 2003, albeit it is highly likely that its origins lie in the children's mother's own dysfunctional childhood, making the depth of the concerns very longstanding indeed. The revised threshold responses narrowed very substantially the factual dispute because this has overwhelmingly been a case about welfare, but nevertheless the mother's responses to threshold, both as provided in writing and then in evidence, particularly in cross-examination, were directly relevant to the question of welfare and the issues that I have had to consider in addressing it as I will come to.

Before coming to the threshold, however, I need to set out enough of the history to enable those listening to understand how the present situation has been reached. I cannot do better than paraphrase Miss Lugg, counsel for the local authority, in her very detailed case summary, which by agreement avoided the need for any kind of local authority opening. The executive summary really is that there has been very long involvement with Social Care with ongoing concerns for the duration of the lives of each of these children. Support over the years has come via child protection plans, there were three between 2003 and 2007, child in need plans, at least three between 2008 and 2015,

teams around the family, again at least three between 2011 and 2015, and the work of the family intervention project.

The recurrent history is of a mother who is able to demonstrate improved parenting during the times when support has been in place but, once withdrawn, change has not been sustained. Looking at the local authority chronology I can see nothing in terms of actual events in 2005, albeit the children then were subject to child protection plans, but to a greater or lesser extent concerns, and some really quite significant ones, feature every single year since 2003.

As I say, there has been a great deal of support offered during that time. Matters came to a head with a precipitating event on 7th May 2015 when the mother, having fled her then partner, F2, and left the County Durham area, returned to Gateshead, whence she had come in January 2015, she says, to escape his domestic abuse. Whilst living in a flat in the Gateshead area a man who was suspected to be her partner, albeit she denies this, X, assaulted U. As a consequence of that assault the children were removed under police powers of protection and, with the mother's consent, they were thereafter accommodated where they have remained for the present time, with the exception of R who remained with her mother.

That is the executive summary, but it is important to understand more of the detail. The first child protection plan was in 2003, the categories were neglect and sexual abuse. A schedule one offender, a maternal uncle, was reported to be having contact with the children. That plan was closed but a further one was opened the following year for neglect and ran until 2006. A third plan in 2007 followed but despite ongoing concerns regarding the presence of the maternal uncle, home conditions and domestic abuse the case was in fact closed in 2008, U and V being born towards the end of that period.

In August 2009 a multi-agency risk assessment conference (MARAC) took place because of the reports of significant domestic violence occurring between the mother and F3 in the presence of the children. Mother underwent work at that time with Organisation A. She purported to have ended her relationship with F3 but then went on to give birth to W in February 2010. F3 is a man with a very significant history of offending, including arson where he tied up his girlfriend and father prior to setting their house on fire. Although that relationship ended the mother resumed her relationship with F2 in December 2009, an alcoholic with a history of domestic abuse. Although the local authority intervened and matters improved the local authority recommended that there be no contact between the children and F2.

There was a further referral in April 2011 from a speech and language therapist who raised concerns about lack of food in the house, the lack of specialist drinks available for V who needed them and the younger children all presenting as grubby. The recurring pattern repeated itself with matters improving and a team around the family being put in place, but in July 2012 the children were again in contact with F3 despite the agreement. Supervised contact was agreed after some assessment was carried out. A team around the family was initiated by the family intervention team but the following year an anonymous referral raised concerns that there was no food for the children in the house and the caller was concerned for the children during the forthcoming school holidays. It was known by the local authority that the mother was able to make the house presentable for planned visits, but reports continued to be received that there was simply no food in the house at all. A child in need assessment concluded, which had incorporated unannounced visits, but no concerns were revealed.

The family then moved to County Durham in 2013. There is a dearth of information as to what happened in Durham but this local authority was alerted to the family returning to the Gateshead area by Durham in January 2015 by a referral from the Organisation B, which had come from the school, around punctuality and presentation of the children. T was said to be unkempt, crying all the time. The mother reported that T had given her a black eye. It is said she refused a child in need assessment. That may be a matter of controversy to which I will return. A decision was made that the family could be managed with a team around it. A little later on, however, concerns continued to arise. In early May T was very emotional, cried often when discussing home issues at school. He admitted being angry and having hit his siblings. His presentation was one of neglect.

Matters came to a head on 8th May when a referral was made by U's primary school that he had injured his hand on U's report because his "dad" had pushed a drawer onto it on purpose. A social worker visited the school. The man believed to be the mother's partner, X, was said by U to have been responsible for causing the injury when his mother was present. He and the other children were spoken to. It rapidly emerged they were sharing a single mattress on the floor, that there were

no handles on the bedroom doors and U reported that if they needed to leave the bedroom, for example to go to the lavatory, their mother would slide a knife under the door to enable them to manipulate the door open.

As I have said, police powers were executed, the children were removed. When the house was inspected an additional concern was the complete lack of food available to the children. The state of the house, the poverty of resources, food, material as basic as beds and bedding, is graphically illustrated in a series of police photographs that were taken at the time.

At an early stage the local authority social worker met with the mother's sisters, MA1 and MA2, each of whom reported that they had had concerns about their sister's ability to care for the children and, as subsequently emerged, had been the authors of anonymous reports to the local authority from time to time. S disclosed at school in July 2015 that she had witnessed domestic violence at home with F2 strangling her mother and stabbing her mother between the eyes with a fork. She also said that it was her grandfather who was tied up in the house when the house was set on fire.

Placed together U and W's care was extremely problematic. They informed their foster carer that at home T, S and R all smoked and dropped ash on their heads. W said that he and V had set light to a mattress. U and W said that U had access to his aunt's stash of wine, which he drank. His aunt, MA4, and R drank Fosters together and their mother drank vodka and further disclosures of a similar nature were made. I will come to the children's behaviour, particularly that of U and W in due course, but perhaps the highlights are W threatening his foster carer with a knife and U, aged 7, head butting his foster carer.

By September the placement of T was under significant stress, with the carer not being able to cope either with his or S's behaviour, and it broke down. Contact was noted to be of poor quality. T was in a new placement and there was doubtful stability of that with him absconding and going to his mother's home. Indeed he admitted that he had been there on several occasions and on at least one at a time when his Schedule One offender uncle was present.

In November last year R reported to the social worker that she was pregnant. Her mother failed to attend the initial child protection conference with R for that unborn child, albeit did attend a later physiotherapy appointment. Although the intention had been to issue in October 2015, in fact proceedings did not commence until 23rd December as I have mentioned. So far as R was concerned a plan was progressed for her whereby she moved out of her mother's home and into the home of her boyfriend's grandparents. She gave birth in late April to her daughter. It is pleasing to report that her plan has been adhered to. She and her baby thrive and, accordingly, the local authority seeks no orders in respect of R, albeit it remains involved in respect of her baby, who is not subject to any litigation.

A running issue throughout the history has been M's inability to comply strictly with the plans in place for the children. S's placement was put under stress due to the telephone contact between M and her, albeit the greater concern in the evidence I heard related to T, who has simply been helping himself to direct contact, at will, despite a written agreement in place and a clear plan designed to monitor it.

Threshold

The final composite threshold against that background therefore read as follows: first, at various stages since R's birth the children have been made the subject of child protection plans due to concerns about the mother permitting the children to have contact with their maternal uncle, neglect, home conditions described as filthy, lack of food available for the children, alcohol abuse and domestic violence and despite the high level of involvement she had not been able to sustain change and the children's needs had been neglected, thereby placing them at risk of harm. In her response at the beginning of this week the mother denied longstanding concerns but accepted that as at May 2015 home conditions were "inadequate" in respect of which the threshold response document seeks to blame the lack of local authority funding for that state of affairs.

Secondly, the mother has been involved in abusive relationships, particularly with F2 and F3, and the children have been directly exposed to the abuse perpetrated by those men. The mother accepted that abusive relationships occurred, albeit did not respond until giving oral evidence as to whether they had witnessed domestic violence when she accepted they had.

Thirdly, she has had on/off relationships with each of F2 and F3 in which alcohol abuse was a feature and she is criticised for prioritising those relationships over the welfare of her children, the local authority alleging she lacks insight into her own abuse of alcohol and the impact on the children. Whilst she accepted the abusive

nature of the relationships she denied alcohol abuse.

Fourthly, it is said that the children have suffered neglectful care from the mother and her partners, with the children being inappropriately clothed, unhygienic, inappropriately fed. She relied upon S to attend to the care needs of the other children. V when taken into care was underweight with thin hair. Since being provided with appropriate sustenance, V's weight has increased and her hair thickened. M's response to that is it is only accepted in relation to May 2015.

Fifthly, it is said that she caused or permitted X to injure U by slamming a drawer on his hand. She denied being present when this occurred despite U saying she was a witness, thus putting the interests of her partner ahead of those of U. In her threshold response she accepted the allegation, although as the local authority pointed out, was not categoric in the admission. I will deal with this directly in the evidence.

Sixthly, the children had been required to sleep on mattresses on the floor and had been required to sleep in bedrooms whose door handles had been removed. This exposed them to significant risks, for example, had there been a fire, and additionally it was an emotionally abusive arrangement which would have upset the children. The mother accepts the allegation in relation to bedding, limited to a two month period prior to May. She denied that the children had to use a knife to leave the bedroom at night. In fact the absence of door handles was only accepted on being confronted by the police with their photographs showing that state of affairs and she continues to deny that the children had to use a knife to leave the room.

Seventhly, she had failed to supervise the children and failed to provide structures and routines for them to their detriment. For the first time mother accepted bad behaviour and aggression as well as fighting between the boys which she accepted she was unable to manage.

Eighth, it is said she failed to prioritise the needs of the children above her own needs and those of her partners, thus lacking the insight into the emotional needs of the children as demonstrated by the use of the word "dad" by the children to all men she appears to have introduced to them. Her response to that is that she accepts there were too many men involved with the children.

Not thus far mentioned in the chronology is the fact that T and S have diagnoses of foetal alcohol spectrum disorder. She denies in the threshold response that they have that syndrome because she had not drunk alcohol during pregnancy. She reached a different conclusion in the course of her evidence to which I will come.

I will say more about the law in due course, but the first question that the court will have to determine is whether the threshold criteria in section 31 of the Children Act 1989 are satisfied. It is not disputed that they are in this case. The unchallenged evidence of neglect, exposure to domestic abuse, the diagnoses of foetal alcohol spectrum disorder in respect of S and T and even the qualified acceptance of the concerns by the mother would point inexorably to the conclusion that on the relevant date these children has each suffered significant harm.

In concentrating on the second question that the court has to consider, what order should it make, it has been necessary to explore a number of those factual issues as they are directly relevant to whether this mother, with her sisters, or her sisters without the mother and either way with help from the local authority and other agencies, can safely meet the needs of the five children going forwards.

The children

Before turning to the evidence it is necessary to identify those needs by reference to the children, three of whom I had the pleasure of meeting in April. R, separately represented, is a delightful young woman and now young mother. She attended in court on the first day of this hearing, on Monday of this week. Acknowledging her right to be here I gently suggested that, with her present responsibilities, her time might better be used elsewhere. She did then withdraw from the hearing. It was therefore disappointing to be told that she had nevertheless stayed at court throughout the hearing to support her mother. That is not, I should say, a criticism of R. The local authority says it is a criticism of the mother, a dependency of the mother on her child, the opposite of what one would hope for: a mother who cannot, at a critical time in the lives of R and her baby, insist that R leave and attend to the really important things in her life rather than stay and help her mother sort out a lifetime of problems of her own. R is doing well despite the neglect, despite the loss of much of her education which she is keen to make up, and she appears to have grasped the nurturing help and support of the carers around her and with whom she lives as well as the local authority.

S is a girl with a previous diagnosis of attention deficit hyperactivity disorder, which has now been withdrawn,

but nevertheless has learning difficulties, who functions at a much younger age than her chronological age. Highly dependent on consistent nurturing foster carers she is socially and emotionally immature, has needed assistance with all basic tasks down to prompting regarding personal hygiene. Despite the mother's denials and a referral to Dr Palmer, the paediatrician, there has been a diagnosis of foetal alcohol spectrum disorder, which is said to contribute to S's level of functioning and learning disability. Having also missed much school she is in a specialist educational establishment which she enjoys and wishes to progress to the sixth form. Assessed as vulnerable, particularly where boys are concerned, she has needed and continues to need significant ongoing work with regard to friendships, relationships and sexual boundaries. Having had one change of foster carer she has settled well with her present foster carers, is happy, thriving, relaxed and comfortable in their company. She not only wishes to stay, she has reported her concerns about the younger three siblings returning to their mother.

T, also separately represented by Mrs Melvin, who represented R, has had very similar life experiences to S. Like her, he has a diagnosis of foetal alcohol spectrum disorder, albeit he does not have any learning difficulties despite needing additional support in certain subjects at school, where he is said to be unfocussed, and sometimes disruptive. In his case he has particularly struggled with boundaries with reference to seeing his mother whose wellbeing, much like R, is very much his concern. He is, however, doing very well in placement. He wants to remain there and wants the plan for him to succeed.

If I can just skip U for the moment and go to V, she uniquely has been able to remain in the same placement since accommodated and has benefited greatly from it. Suspected of suffering from foetal alcohol spectrum disorder, that diagnosis has not been confirmed and she has not displayed behavioural difficulties since she was accommodated. Fit and well, having gained weight, she is performing at school just below age related expectations. She has formed positive attachments with her foster carers, seems to accept that she cannot live with her mother and shows no real distress at separation from her. She is happy, relaxed and seemingly content in placement and to her children's guardian she scored her placement as eight out of eight.

In many ways U and W fall to be considered together. Placed together with a single foster carer she simply could not manage their behaviour so, in August 2015, they were moved together to very experienced foster carers. Although sufficiently at ease to make the various disclosures they did about life at home, their aggressive behaviour has been challenging far beyond what might be termed sibling rivalry. Hence the decision to separate them in February 2016 with remarkably beneficial effect.

The descriptions of their behaviour when together are really quite startling. The non-adherence to any rules or boundaries, the looking for trouble, the very demanding need they had for attention, in U's case often with outbursts of aggression and anger that upset W, he being described as going into meltdown with rapid mood changes. U hurt W physically. Each of them fuelled the other's behaviour and antagonised each other. U went to head butt his foster carer, aged 7, and he hit T in the face causing him to suffer an injury that bled. On the move to experienced carers the initial improvement noted was short lived. Regular physical fighting and verbal disagreements characterised their behaviour. Attempts by adults to diffuse such behaviour simply redirected it towards the adult in question. Vocal beyond their years their language was described as coarse and foul. It progressively got worse. At times their bedrooms were trashed, threats were made to smash toys in the face of the foster carers, U threatened to slap his foster carer in the face and to take the handbrake off whilst in the car. W threatened to take a knife to the foster carer. Basic instructions were ignored and these extremely experienced foster carers noted that the competition between the boys led to pushing, shoving, shouting, throwing to an extent that it was completely impossible to leave them unattended at all because of the need for constant supervision at all times when awake.

Despite sterling efforts to keep them together the local authority had to bow to the inevitable and U was moved in February 2016, leaving W where he was. The effect has been transformatory. Remarkable, astonishing, mellowed presentation, emotionally matured, calmer, no aggression, growth in confidence and contentedness with surroundings are some of the descriptions.

U, initially upset to be moved, settled well and is showing enormous promise on all fronts, including at school and he rates his placement at 20 out of ten. W became instantly and visibly relaxed and calmer. There was no emotional upset and he is said by his by then consistent carer to be "a different child". His confidence has grown, he is polite, caring and considerate and said to be much more like the 6 year old boy he is. Overall the social worker commented

that she could not have wished for a better outcome and does not think that better placements could have been found for any of the children.

Having investigated for foetal alcohol spectrum disorder, Dr Palmer has made no diagnosis in respect of the younger children, albeit in W's case as at April and following the separation of the siblings she highlights her concern that his behaviours are consistent with a mild neuro-developmental disorder which may relate to foetal alcohol spectrum disorder. The mother denied alcohol use to her. That she has now accepted some alcohol use at least is obviously a factor for Dr Palmer to consider in the event that problems arise again.

So what does the court take from all of this? All five children in respect of whom orders are sought present with a variety of complex difficulties. The local authority and the children's guardian say that they are born of their experience of neglect. Neglect is physically and emotionally abusive. The physical effects of deprivation of the most basic needs are readily understood and cause significant harm as all the research shows. The emotional effects are more subtle. It is the lack of predictability, of routines, boundaries, confidence that the next meal will come and if it does be sufficient, the isolating effect of being dirty and unkempt, the fear caused by domestic abuse, the lack of reliable accessibility to a consistent care giver damage children as much, if not more, than the physical harm. It affects their ability to form secure attachments, to function in an acceptable way, to rely on their key adults as dependable and so on. In short, it causes significant harm and each of these children has thus been damaged. Where additionally foetal alcohol spectrum disorder, or learning disability, or attention deficit hyperactivity disorder, or any other disorder is superimposed it magnifies still further the problem.

These are children who, in each case, have much catching up to do. Their levels of need are high. They need carers with experience, who have a high degree of emotional intelligence and can commit consistently to the children. That therefore brings me directly to the central issue in this case, what orders should the court make in respect of U, V and W?

The local authority evidence

The local authority carried out a parenting assessment of the mother. It is a lengthy, detailed assessment carried out between June and September 2015. Its conclusion, sadly, was negative. It is not possible to do justice to such a detailed document, but I will take what I consider to be the key points from it.

The local authority social worker identified that regardless of with whom M is in a relationship she has always needed the help of services. She notes the longstanding involvement of the local authority, the many referrals over a wide variety of concerning issues over twelve years. She identified an emerging pattern with M herself experiencing little stability in her own upbringing, which in turn is reflected in her parenting. Her relationship with her own mother, the maternal grandmother, is inconsistent and unpredictable, yet she still views her mother, and relies on her, as a source of support. It was very difficult to obtain detail about how she was parented herself. She appeared to have few and limited positive experiences and very little memory of significant events, leading the assessor to consider that she had almost certainly experienced high levels of stress and trauma due to poor parenting herself.

Then there is the entrenched historical pattern within relationships of domestic abuse, poor parenting and neglect. Having investigated these in some detail she reached a conclusion that M, sadly, was unable to demonstrate the capacity and motivation to achieve the changes necessary in her parenting to meet the needs of each of the children and, whilst change had been evidenced in the past, the children had been known to Children's Services for so long that this pointed to the inability of it to be sustained.

M has three full sisters, MA4, MA1 and MA2. It would appear that MA4 at least had a similar experience of being parented to M as her two sons, each with foetal alcohol spectrum disorder aged 6 and 9, now live with MA1 under a special guardianship order just over the road from M, who in turn lives in a flat above their mother, the maternal grandmother, and stepfather. The issues between MA4 and MA1 and between MA1 and the maternal grandmother are such that MA1 will not even enter the street where they and, of course, M live. MA1 was put forward as a carer primarily, as I understood it, for one of the younger boys because she has two boys. Despite many positive qualities the local authority assessment was negative of her as a carer, not through any shortcomings in her parenting as such but because of the risk of destabilising what is a good placement for her two nephews and, not least, because of the behaviours that either U or W have shown when they are denied the focus of the attention of their care giver.

MA2 was not assessed. Having put herself forward as a carer possibly for T she withdrew in February

seemingly on telling the social worker that the maternal grandmother had said that M would not get the children back if her sisters put themselves forward. Like MA1 she gave evidence and put herself forward as part of a family support team which could include respite care but not primary care.

MA3 is the half-sister of the mother, MA1 and MA2. She put herself forward as a carer for T and was assessed, sadly, negatively. She has a long term partner who suffered a catastrophic head injury at work. She is his carer. They have no children. T blew hot and cold over going to live with MA3 so the focus moved to the younger children. However, the local authority found her plans to be confused and vague. She ruled herself out in the end for T, reporting that he would not buy in to a placement with her, and having considered the younger ones she said that the family had decided that they were doing well in foster care. As the assessment progressed the extent of M's influence on MA3's thinking increased anxiety and the risk of destabilisation. The local authority also questioned her commitment with several changes of position as well as a lack of confidence observed in MA3 herself. I heard from MA3 as well and, for the record, her position remains as a support to M in the first instance, to care for one of the younger children in the alternative, probably V because, as she said, MA1 and MA2 have boys, making it more sense to place the boys with them.

All the social work evidence and key documents were prepared by SW, the social worker. Her industry is remarkable for the sheer volume of work that she has carried out in what is a complex case by any measure. I was impressed with her grasp of what is plainly a difficult case.

Maintaining her position that the care plans are the correct ones but noting a greater acceptance of matters formerly in dispute, for example, the trouble between U and W, she nevertheless remained concerned as to M's ability to instil boundaries and challenge behaviours that was evident throughout contact as well as in her inability to follow through on advice such as was given to her by contact supervisors. She said that placing U and W together again would cause her very considerable concern they having successfully broken two placements to date and it was her clear view that putting them together with M, or with MA3, would be likely to result in a reversion to that formerly described behaviour, quite apart from the need that they each have for a resilient, really experienced carer.

In MA1's case it was not in doubt so much as the risk as to the placement of her nephews. She noted that MA3 was not a person with any parenting experience and the needs of her own husband concerned her as to whether she would be able to prioritise a child over him.

Family dysfunction was another factor against placement with M, observing that MA1, even as a support, will not visit M's street. M living above her own mother was a concern. She did so in the four to five months leading to removal when the children were living in such poor circumstances and they were also assessed, the maternal grandmother and her husband, but ruled out because they simply did not recognise any concern or need for support.

Miss McKenzie, on behalf of M, cross-examined the social worker at some length. Although there remained unresolved issues, such as whether M was, for example, pregnant in January 2015, she accepted that M, with MA1's financial help, seemed to have fled Durham with the children but no material belongings. After a short stay with MA1 she was able to move into the flat above the maternal grandmother. She could not confirm that M had sought assistance from the local authority by going to the Civic Centre as she said, but she said that the offer of a child in need assessment had been refused. I have to say, I found the chronology contradictory in this regard, albeit no such assessment has been seen by the court at any stage and I do not take M's evidence as suggesting that such an assessment was ever completed.

The social worker acknowledged that M appeared to be in a better place. She was certainly clean, well turned out and more confident. There has been no evidence of drink in the month since removal, no evidence of any men in her life since September and on self report she stopped smoking eight weeks ago. The house is said to be clean.

She confirmed that M had accessed on her advice Organisation C, an organisation that has a 26 week programme that is designed to assist mothers with the experience that this mother has had. She is half way through that programme, which is consistent with the improvement she acknowledged. M was more willing to admit things than she had previously been and there was further evidence of progress and she did not for a moment doubt that M loves the children very much, just as they love her. She confirmed that she has never missed any contact.

But she said that although there had been progress it was relatively late and it was against a formidable history. She would not accept that M's shortcomings could be cured by teaching her to manage, for example, the children's behaviour. Whilst it could be capable of being learned, the 13 year history of local authority involvement and the depth of the problem suggested that something more long term was necessary and in this regard timescales are relevant, these children having now been accommodated for 14 months to date. The history showed an ability to make change but then let things slip. So she was interested to find motivation to make life long change to prioritise the needs of the children. In that context she referred to M's own poor experience of being parented, the evidence of her inability to retain information from professionals and apply it and it was not so much the knowledge of what needed to be done but her ability to do so consistently and sustain it that was key.

To Miss Hunter for the guardian with regard to the behaviour of U and W she said this:

> "The behaviour of the boys together is such that they need constant supervision. If they went back to their mother it wouldn't be realistic to think they would get it. As a single parent it would be difficult constantly to supervise the boys. Even preparing basic meals was a difficulty for their foster carer. As soon as they woke up they were fighting."

S had reported carrying out a lot of caring work for the younger children. Noting a lack of any medical explanation for their behaviour she felt it was attributable to the care they had received, constantly fighting, as she put it, for their care giving. She agreed with the guardian's analysis that it was attributable to the lack of routines, guidance and boundaries. She said just last week the contact officer had reported it was difficult for M to instil boundaries, she was not following through on instructions and was having to be prompted. She said this:

> "I do recognise change but I don't think it's enough to meet the needs of the younger three children. All three have made progress in their placement and I don't think it would be sustained if they returned home. The risk is long term harm."

The mother's evidence

That was therefore the local authority evidence. I heard from the M. She gave evidence at length. An attractive witness, well groomed, not displaying any signs of self neglect, she gave evidence with good humour, with appropriate anxiety as well at times of upset and gave me a good opportunity to observe her. She talked through her history in January 2015, fleeing F2 when he was seemingly drunk and insensible, the violence, the pressure, the control, not just of her but of the children, and the harm to which she was physically exposed and the children witnessed. She denied the self report that she was pregnant to anyone and certainly not a 21 year old, which appeared to be the final motivation for fleeing F2. She said having obtained a flat it was unfurnished and she had come with nothing. She said the local authority refused to help when she asked for assistance because it was not involved with the family.

She told me about X. He is F2's cousin. She denied absolutely having a relationship with him, albeit he wanted to have one with her. She said that he helped her move some stuff and he had a van which enabled this to take place: "I thought he would be a decent friend to talk to." She went on to say that sometimes they would have a drink and so: "I thought it would better if he slept over in the back bedroom with the three lads", albeit she then later went on to say the she told him to sleep in the living room. Whilst U did call him dad, as did T, he plainly was not their dad and she said she told them. She said: "They called him my boyfriend, but I told them he wasn't." When X hurt U by jamming a drawer on his hand she said she believed U but she made the wrong decision to deny it, she said because she was scared of X's threats to send people to her door and put her in hospital.

Now that she had done half the Organisation C's course

she had learned so much. It had improved her confidence and self esteem and whilst she was not looking for another relationship she would know now what to look for. She said the history was simply horrible, it should not have occurred, but she urged on the court that it would not be repeated. Accepting that the children have been damaged by the experience she said:

> "It'll take time for them to get back where they were. I'll work with them day by day and give them all the support and attention that they should have had",

accepting at the same time support from the family and the local authority.

She ended her evidence in chief saying this:

> "I am not going to go back down the route I was down. I have changed a lot. I have pulled myself together, sorted the house out and I want them home."

I will come to the cross-examination of her when I assess the evidence.

The mother's witnesses

I heard from each of MA1, MA2 and MA3, who had prepared statements that were almost word for word the same. Each was impressive in their own distinctive way and I have no doubt either of their competence.

MA1 described the limited relationship that she had with M due to her awful partners. She had made several referrals about the children to the local authority because of her concern regarding the children. Although initially in her own name many that followed were anonymous. Her hope had been for them, the sisters, to care for one child each. She disagreed that her having one would destabilise her nephews. In any event she said that she would be able to support M. She would be at school twice daily because her boys go to the same school. She would visit her. She would have the children to stay and take them out. She said any sign of a man or an empty fridge and she would tell the local authority. She commented on the improved appearance and demeanour of M.

Acknowledging an awareness of the history, she said that although the two children in her care have foetal alcohol spectrum disorder, which leads to them needing, as she put it "extra good care" she said she would not say that it was that much harder. She said she had experienced her children fighting and she was able to solve it by separating them, thus suggesting she would be able to manage similar problems in the future if there was an additional child. She said, "I think, however, with our help that [M] will get where she needs to be."

MA2 did not seem in recent years to have had so much contact with M and the children. She too had made referrals via MA1, worried about cleanliness, the children not getting enough to eat, the unsatisfactory men, describing the way they treated M as "horrible". She was offering support, respite and would have a key to M's flat so that she would be able to check up on her unannounced. If she did not respond to something that she saw that she did not like she would call the local authority. She said it would be a team effort.

MA3, who had not been brought up with M, only got to know her in relatively recent years. Their relationship is such that they will go out together, they will talk via social media, but they do not go to each other's homes. She saw her role as extra support, but working with professionals she thought that M would be able to manage. She described her as a lot more confident in herself, not afraid to pick up the phone and ask for help. As she put it: "She doesn't look petrified anymore."

She told me that her injured partner had memory issues but that he did not need as close an eye kept on him as he previously had required, albeit he did need help with certain tasks. He has bilateral shoulder fractures so cannot raise his arms and she told me that she simply will not let him in the kitchen at all. She felt that, even if the boys are as they were described by the local authority, with work she could manage and she would welcome a professional opinion as to the best plan.

The children's guardian

Finally at the hearing I heard from the children's guardian whose concise but thorough analysis concluded that there is a mismatch between the very particular needs of these children and M's limited insight into those needs such that a return to her care would expose them to the risk of neglect and harm. Developing this she noted M's tendency to blame others, which was still apparent. She reported on the very late efforts by M to impose boundaries regarding T which had not been particularly successful against a long history of concealment.

She was concerned about M's inability to affect the behaviour of the children in contact. She said that the fact that she was unable to engage them all in contact, along with the children's apparent tendency not to follow her directions, quite apart from controlling potentially dangerous behaviour, was a concern. Accordingly she supported the local authority case in her oral evidence saying that, although M was trying very hard, the children did not see her as an authority figure. She cited V's difficult behaviour in contact, the treating by M of a written agreement regarding T's contact as simply permission for it to occur when it was designed to regulate what to do when it did happen in an unscheduled way.

The guardian told me that M's being soft had caused issues as to the stability of the placement, but she said this: "I think the main area of concern is emotional needs and I don't think that [M] appreciates it." For example, promises not followed through, not keeping appointments, not understanding S's learning difficulties and the behaviour of the younger three. So far as U was concerned she had told the guardian that the incident where his hand was trapped she had not witnessed. She did not get any sense of responsibility or insight as to what she would need to do differently. The description that M had given of fleeing Durham and then not sorting out the most basis home amenities worried her and her lack of understanding as to how that must have played out for the children.

She said that she did not believe that the younger three children saw M as a stable base which they would need for a positive attachment. They required care from carers emotionally attuned to them who could recognise and support them and this was a mother who had her own needs to address at first. Likewise she anticipated that behaviour would deteriorate markedly, particularly with the boys with the resumption of violence and aggression, making the point that S and T had to be separated from each other for the same reason.

Likewise she would not endorse the family plan. She said of MA1 that she would not put another child into that particular mix, as she put it, because of the high level of need those boys have. She was concerned that there was not a full appreciation of the concerns regarding M, the long periods when they had been out of the lives of their sisters, the individual needs of the children and the impact of moves from good, nurturing placements. She said she would need a high degree of certainty before endorsing such a move.

Cross-examined on behalf of M she acknowledged that W will be in foster care for a long time if the plan is endorsed, but although M has started the process of reform there was a long way to go. She has a deep love for the children. She does her very best. They know she cares, but she has not been able to care for them. Despite clear guidance she is not able to follow it consistently and the guardian felt that M would need to access counselling and possibly work around attachment issues to progress further. Despite it being explained to her clearly, she felt that she did not seem to absorb information. Likewise the support from the family, whilst it might be committed, would not meet the emotional needs, an ever present requirement.

The children's wishes

Although not heard from at this hearing last but not least I should mention the children who I saw in April. R was very clear that she wanted to live with her partner at his grandparents' and she had strong views about contact particularly with her siblings. T said that he wanted to live with his mother, then a family member and then stay where he is in that order. S was anxious for the right decision to be made, which in her terms was to be safe. As we now know she accepts the plan to stay where she is. They were polite, friendly, attractive and respectful children and I enjoyed meeting them. In the event I am not being asked by the local authority to do anything that they now oppose.

The law

So having established the threshold I revert to the second question that the court has to consider, namely, what order should the court make? I apply well established legal principles. I bear in mind the rights of M and the three children under Article 8 of the European Convention to respect for family and private life. The children's welfare is my paramount concern

by virtue of section 1 of the Children Act . Delay is likely to prejudice their welfare. I have to have regard to the checklist of factors to be taken into account when determining where their welfare lies and what order should be made.

The particularly important features in this case are the very particular needs of these children given their background, the effect of a change of circumstances on each of them given the plan otherwise for them to remain where they are if care orders are made, the harm that they have suffered and the risk of them suffering further harm and the capacity of this mother and the extended family to meet those needs. In assessing these factors I acknowledge the need for proper evidence from the local authority and the guardian addressing the realistic options as well as the requirement for an adequately reasoned judgment addressing the issues in a global, holistic evaluation.

I fully accept that children should be brought up by parents, or one of them, if at all possible. Hence the acute focus on M who understandably wants to make amends to care for the children as much as, I have no doubt, they would like to be cared for by her. That said, their wishes and feelings are not in this case high on the list of matters that could be determinative given the complex history and the harm they have suffered.

Analysis

The case turns therefore very significantly on the court's assessment of M. I have described her pleasant and appropriate presentation. I do not doubt her intentions, that she loves the children and will not willingly or knowingly harm them. But she has in fact harmed them significantly throughout their lives which has these four consequences:

- (i) She needs to recognise the extent of the harm and the fact that it is attributable to her neglect and exposure of the children to domestic abuse;
- (ii) She needs to recognise that these children, with their very particular needs, will require levels of care which are greater than those that children of U, V and W's age who have not had their experiences need;
- (iii) In addition to being receptive to help and support critically she needs to be completely open and honest because no one, family or professionals, can work with and help someone who is anything less than that;
- (iv) She has a very long history of making sufficient progress only to slip back again. The removal of the children in May 2015 was the first removal, arguably too late in such a long history, but one of the mischiefs of chronic neglect is the cumulative effect of it and the fact that drastic intervention only comes too late. She therefore needs to be able to demonstrate to a very high degree that she has the capacity this time to sustain the necessary change.

It is these issues that were explored in cross-examination of her. The harm is perhaps most obviously seen in T and S, foetal alcohol spectrum disorder, and in the challenging behaviour of U and W. She steadfastly denied that T and S could have that disorder until very recently on the basis that she had not drunk alcohol whilst pregnant. As recently as her statement of 6th May 2016, a year almost to the day following the children's removal, and her threshold response this week continues to deny it. Only in evidence did she say it was "possible" that she drank. Only in cross-examination did she concede it could be possible with regard to W. This was a worryingly late concession despite, I note, Dr Palmer's letter to her on 26th May in which that doctor urged her not to feel guilty, pointing out that this is an evolving area of medicine and expressing reassurance that, no doubt now misplaced, M had told her that she had not drunk in the pregnancies of U and W.

So far as the boys' behaviour is concerned that too has been conceded very late indeed, her denying that there was anything untoward in it until this week. Questioned about it she said that she had seen it "a few times". Pressed a few times became "quite a lot" and pressed further it became "daily". That was a grudging response, extracted only under pressure and again it is not a recognition of the harm I have referred to. I found her claim of not knowing the extent of the behavioural problems of U and W difficult to accept. She had had first hand experience of it. Quite apart from meetings with the local authority social worker her final statement, as long ago as 31st March, sets it out in graphic detail. Yet she still sought to minimise it saying "they have changed since they went into foster care" thereby implying that the behaviour was primarily due to her but attributable to the actions of the local authority in putting them into foster care. These are responses which offer no confidence of an appreciation of the extent of the harm.

That feeds into the second point, the needs of the children. It goes without saying that if the harm is not fully recognised it is not possible to meet their very

particular needs. There was a simple naivety in her answers to questions about how she would manage it, saying for example, “I would be able to sit down and talk to them.” Indeed in respect of contact she denied having to talk, as she put it, to the younger ones, only the big ones that come “in a bit of a flip”. I remind myself of the guardian’s evidence that V tried to push a cupboard over in what was said to be actually a very good contact, which was an event seemingly beyond her ability to address. When told that even with the younger ones a lot of help is needed she repeated “I don’t have to speak to them, we get through it.” There was in these answers little acknowledgement that these are damaged children who need very particular care, despite her having accepted that they are scared and damaged. Whether it is saying what she thinks the questioner wants her to say, a failure to understand the issue properly, or simply being in denial is perhaps beyond the ability of this court to say but beside the point. Whichever it is it is not recognising the level of care that the children need.

I turn therefore to openness and honesty. Plainly an issue right up to the hearing the local authority was particularly anxious to explore just how far M’s concessions went. There were several areas. The injury to U caused by X was an obvious example. U was seen at school with an injured hand. He said at school that his “dad” had jammed it in a drawer because, he said, “he had a headache and I was crying”, suggesting that X lost his temper with U. M was asked about it at the time by the social worker and was told that U had said that she had been present throughout that incident. Her response was to say that she had not been aware of it, she had not seen any injury and indeed she went so far as to suggest that it had been caused by his fighting with W. In her initial threshold response she accepted that U had been injured but denied that she would have permitted it and implied thereby that she had had no role, even a passive one, within it. Her witness statement is completely silent about it, her threshold response on Monday was to accept the allegation. Asked about it when giving oral evidence in chief she said: “I believe U. U would not lie. I wasn’t in the same room but the next day he had a mark.” Only when cross-examined and pressed did she finally accept that she was indeed in the same room. That was not the conduct one expects from a witness who is seeking to convince a court that they are finally confessing fully to what has gone on and as she, again only when pressed, eventually acknowledged was an event deeply harmful to U, who was disbelieved, thought to be being dishonest and was being blamed for the breakup of the family because it was this event that precipitated their removal.

That leads on to X and again I had considerable doubts as to M’s openness and honesty. No family member is able to say if she was in a relationship with that man. Her sisters did not know, but he plainly was ever present within the family home in those early months of 2015 to the extent that U and T were calling him dad. As the local authority said, he was either acting as such or these children are so confused that any male who comes into the house for any length of time ends up being called dad. M’s evidence that he did not sleep in the small back bedroom with the three boys, an empty room with a single mattress seen in the photographs, was wholly unconvincing in the light of her freely telling me in evidence in chief that she had thought it better that he sleep over in the bedroom with the three boys than drive home after drinking.

The local authority has concerns about X. M told me that he threatened her. MA2, her sister, said that she would not even let him in the house when M turned up at her door with him. I do not know if there was a relationship between the two of them, but I do not find that M has been remotely open about his involvement in their lives in early 2015 in circumstances where she sought to protect him over her own injured son, whom she belatedly told me that she accompanied after this incident into his bedroom to comfort him, only then to go on to deny any knowledge of it. One asks rhetorically, how is any child able to trust an adult who behaves thus?

The other piece of information flowing from this relates to U’s claim that there were no door handles on the bedroom door and that his mother would lock them in, pushing a knife under the door to open it when they needed to be out. M denied to the police that there were no door handles until confronted by the photographs that showed plainly the position. She now says that they were off the door because she was decorating but she denied locking them in and repeatedly denied that a knife was passed through underneath the door to enable them to let themselves out. It is such an extraordinary thing that U said to the police, a 7 year old boy. He said it to the social worker at school as well. I cannot accept that he has made it up. Why would he? M said more than once that U would not lie and she accepts that everything else he said was true. So I find myself disappointed that M is in denial in respect of this and it further undermines the confidence one can have in the extent of her progress thus far. There are other examples from the evidence, but I have made sufficient findings to really establish this concern.

So what confidence can the court have that things will not slip again? In short and without seeking to diminish what she has achieved, not a great deal. There is less than full acceptance of the extent of the harm. There is at best a very superficial understanding of the children's needs and she has some considerable way to go in openness and honesty. So on each of the issues I have raised there are, I am afraid, not positive responses.

That is not an end of the matter because M says with help from her family and the local authority she will manage and that brings me to her sisters. They were in many ways impressive and competent as well as quite sincere in their intention to help. They will not, I accept, have seen the full horror of what has gone before and so I am very reluctant to criticise well intentioned, genuine offers of help. But there are obstacles in the way to their being able to provide what is required. Quite apart from the considerable shortcomings in insight as well as honesty, which means there is a constant need for monitoring and support of M, in MA1's case the dysfunctional nature of the family is a problem. She will not enter the street where M lives because of her difficult relationship with her mother, whom she tells me she has not spoken to four years, and also with MA4 whose children she cares for. This is a grandmother who lived right beneath the terrible squalor that was the family flat in the first four months or so of 2015.

Whilst I have no doubt that MA1 is managing her nephews very well, I know little about their difficulties beyond the disorder that they are suffering from. I do not think, however, that she appreciates the level of difficulties that these children, damaged by chronic neglect quite apart from any superimposed other condition, present. Whilst she has undoubtedly helped M in the past, she has a very partial understanding of her circumstances and has been, at best, an intermittent person in her life. In asserting that "with our help she will get to where she needs to be, no one has helped her" there is either a betrayal of considerable ignorance as to the scale of the problem or a minimisation, neither of which is helpful. The assertion that no one has helped M before could not be further from the truth, as the lamentable history shows.

In MA2's case I was left in doubt as to precisely what it is she is offering beyond support, eyes and ears. Yet despite again some patchy awareness of problems she gave the court no confidence that she has confronted M, impressed on her the need to have total trust or ascertained what the truth really was.

In MA3's case her position was slightly different as a relatively recently involved half sister. But asked about her ability to challenge M, she was asked about this in the context of T, it became clear that she, as she put it, would not be wanting to do it very often, quite apart from the practical difficulty of her not being able to leave her husband at the drop of a hat.

Looking at their involvement and what they can offer and their insight into the scale of the problem I was particularly interested in their evidence regarding their role from January to May 2015. In circumstances where M had fled F2 with nothing save the six children and the clothes they stood in, then moved from MA1's into an unfurnished flat, one would have thought that anyone, not least sisters, would appreciate that the needs of this family were enormous. The responses of MA1 and MA2 were particularly disappointing. MA1 never visited the flat. Although she said she had given her some stuff for it she did not realise she was not going to get any other help. MA2 likewise never went. She told me that as early as the first week she had seen the children at her mother's: "I think me and my mam gave them a shower a couple of times as they were a bit dirty." Explored, it was not dirt from messy play, it was ingrained, greasy dirt on unkempt children. Surprisingly, knowing something of the history and accepting that alarm bells were ringing, she did nothing else to help and could not explain why.

In looking at their capacity to provide intuitive, insightful help to a sister in very considerable distress I found this very concerning evidence indeed. I cannot comprehend how they thought that a single mother with six children and no belongings could possibly have coped, still less this mother in respect of whom there were so many longstanding issues. I am afraid it gave no confidence that they can provide the support that she requires if they could not identify the dire straits that this vulnerable mother and even more vulnerable children were in. It does not bode well for intuitive and really very comprehensive support of not just a practical but an emotional nature.

I am also sorry to say that their proposals to care are equally problematic. Quite apart from the difficulty of placing the boys together again, and I agree with the guardian and social worker, it would be a risky and regressive step, there are not homes for all three. The risk to the stability of MA1's children is self-evident. It would be a tragedy for them if that was destabilised given the circumstances in which they came into her

care and their need for permanence. To put either of the boys with her would risk undermining the stability that they have found in excellent placements with the disastrous consequences of failure and placing with new, different foster cares. MA2 offers no permanent home. MA3, in the court's judgment, is not in a position to take on the challenges that these children present. Having no experience of parenting at all to take on an older child with very particular requirements in the face of her caring obligations would not meet the needs of her partner, her priority, or the needs of a child needing care over and above the care a child of that age would ordinarily require. In each case, at best, it would amount to an experiment with doubtful prospects of success in circumstances where good prospects are needed to meet their needs.

In addressing me Miss McKenzie reminded me that M came very close to accepting the force of the local authority case at the end of her cross-examination. She was right in that, tearfully and bravely, she did. Her case is desperately sad and my assessment is that she is at the early stages of recognising the enormity of what has happened over the last 13 years, no doubt built on the harm that she herself suffered as a child. It is not just the children who have suffered. She is as much a victim of harm as they have been. That is a tragedy for her and her children and is most certainly not her fault. But the court's priority has to be the children and, although late in the day, the court will do what it can to prevent history from repeating itself and to give these children the best prospects available to maximise whatever opportunities they have in the future of succeeding in life.

I cannot accept that the lack of detail in the sisters' proposal, as Miss McKenzie suggests, is a strength either. It simply underlines the difficulties that I have identified from their evidence. As Miss Lugg said, the positive is that although the local authority is seeking permanence it is not a case where adoption is suggested. Circumstances can and do change. Prospects improve, relationships are maintained and promoted. This sincere, well intentioned family, however, cannot make short the profound defects identified or manage the harm caused and I am quite satisfied that the welfare of each of the three children is best met by continuing the work done with excellent foster carers in each case, where each child is settled, benefiting from robust, consistent care which is commensurate with their needs.

The level of support that would be required of M would come close to co-parenting, which the sisters cannot remotely offer and nor do I consider that the local authority could either. M's rehabilitation is, I am afraid, a very long and difficult process. It is to her enormous credit that she has placed her feet firmly on the lower rungs of the ladder and I hope that, for her sake but above all for her children's sake, despite the disappointment that this outcome will be that she perseveres with it.

Conclusion

In all the circumstances I approve the local authority plans and I make care orders in respect of each of the five children, including the three of whom I have just adjudicated.

I need to say a word about contact. After a phased reduction the local authority plan is for family contact with M, all six children, six times a year. It had been for four times a year in the school holidays. In accepting six times a year as suggested by the children's guardian, that was adopted very early on as appropriate by the local authority and rightly so. It is not an ideal plan, albeit the intentions are plainly good. Contact with all the children together is problematic for a variety of reasons, but not least the huge age range and the competing needs of the children as has been demonstrated within contact to date. That much seems to be accepted and so the evidence seemed to gravitate towards there being six contacts a year for each child with their mother but divided into groups on most, but perhaps not all, occasions.

There will in addition be sibling contact in any event. It is extremely important to the children. All whom I saw stressed it to me and I am encouraged to note that the carers are committed to this as well and I very much hope it can take place at a regular interval that meets the children's needs, informally promoted and arranged by carers.

To revert though to contact with M, the guardian's proposal was to make it for longer than the hour and a half that the local authority suggests and to make it activity based. I entirely agree with that proposal, as did the social worker. Whether it might on occasion be possible to have a combined contact with, for example, a meal with the two groups having separate contact before and after the meal so that everyone is together for a time but then they go their separate ways, will be something that can perhaps be considered along with all other considerations.

The limit of what the court can direct though was

explained during evidence and argument. It is important to emphasise that although no child will be moving home as a result of this order their circumstances will change profoundly after today. There will, in a number of cases, be changes of school. Contact with their mother will reduce. They will have a new social worker and M is going to have to come to terms with the permanence of the situation. Accordingly much water is to flow under the bridge and no one can predict the reactions of the children, which could be quite diverse. It is often said, and I believe to be true, that it is always easier to increase contact than reduce it. In my judgment six times a year, community based contact during school holidays, for a reasonable period of time, is the right starting point. It is not just desirable though, it is the law, that contact must be reviewed regularly to ensure that it meets the needs of the children. M has a voice at the looked after child reviews that will take place regularly and ultimately an appeal to the independent reviewing officer even if, and I hope that this is not the case, she cannot forge a relationship with the new social worker, or social workers as it is likely to be given the number of children.

Finally, I am quite clear that T has to be weaned off his need to help himself to more contact. He has a pressing need to put down roots and to buy into his placement. He needs to be reassured about his mother, but not by going to see her and he needs to be supported in reducing his helping himself to contact seemingly at will and in a way that his mother has proved powerless to prevent. That said, the court can only express the principle. It cannot prescribe the answer other than to observe that it is going to involve work directly with T as well as work with and by M and the new social worker for T will need to have this very high on the list of priorities to address on taking over. Unless and until it is resolved the need to keep him safe and for his carers to know where he is will remain absolutely critical.

This is not, I acknowledge, the outcome M sought. I am also sorry that the children cannot be reunited with their mother who loves them as much as they love her. But I am satisfied that the local authority plan is the best that can be devised to give these sadly harmed children the best prospects belatedly of repairing some of the harm that they have suffered and developing whatever potential they may have in safe, secure, consistent and nurturing environments. On that note I wish them all well.

2016 WL 06065991

***463 Criminal Injuries Compensation Authority v. First-tier Tribunal (Social Entitlement Chamber) (British Pregnancy Advisory Service and others intervening)**


Image 1 within document in PDF format.

Court of Appeal
4 December 2014

[2014] EWCA Civ 1554

[2015] 2 W.L.R. 463

Lord Dyson MR , Treacy , King LJJ
2014 Nov 5; Dec 4

Analysis

Crime—Malicious administration of poison—"Any other person"—Mother consuming excessive amounts of alcohol while pregnant—Child born with foetal alcohol spectrum disorder causing permanent injury—Whether child victim of violent crime as result of mother's excessive drinking while in womb—Whether foetus "any other person" to whom poison administered so as to cause grievous bodily harm—Whether child entitled to criminal injuries compensation as innocent victim of violent crime— Offences against the Person Act 1861 (24 & 25 Vict c 100), s 23

While she was pregnant the mother drank excessive amounts of alcohol, which resulted in her child being born with foetal alcohol spectrum disorder, having suffered permanent damage. The full extent of that damage would only become apparent as the child developed. On the child's behalf a claim was made for compensation from the Criminal Injuries Compensation Authority under paragraph 6 of the Criminal Injuries Compensation Scheme 2008 , on the basis that she was a person who had sustained criminal injury. It was accepted that the disorder suffered by the child amounted to injury within the Scheme. It was the child's case that her injury was directly attributable to an act of violence by poisoning within paragraph 8(a) of the Scheme in that her mother's excessive consumption of alcohol while she was in the womb constituted the malicious administering of poison so as to inflict grievous bodily harm within section 23 of the Offences against the Person Act 1861 [1] . It was conceded that the mother had administered a poison or other noxious thing to the child while in the womb by drinking alcohol to excess, and that the child had sustained grievous bodily harm. The authority refused the claim on the ground that a foetus was not "any other person" within section 23 and so, since the child had been in the womb at the time when the alcohol had been ingested, she could not meet an essential requirement of section 23 that the poison or other noxious thing be administered to "any other person"; and that she was therefore not the victim of a violent crime under section 23 of the 1861 Act for the purposes of the Scheme. The First-tier Tribunal allowed the child's appeal and awarded her compensation. The Upper Tribunal granted the authority's application for "judicial review" relief under section 15 of the Tribunals, Courts and Enforcement Act 2007 , holding that a foetus was not "any other person" within the meaning of section 23 of the 1861 Act and accordingly the child was not entitled to compensation.

On the child's appeal—

Held , dismissing the appeal, that a claim for criminal injuries compensation required a criminal offence to have been committed, and for an offence under section 23 of the Offences against the Person Act 1861 a poison or other noxious thing had to have been administered unlawfully to "any other person" so as to inflict grievous bodily harm; that a foetus was an unique organism, neither a distinct person nor an adjunct of the mother and as such was not "any other person" within the ***464** meaning of section 23 ; that for section 23 of the 1861 Act the normal rule, that the actus reus and mens rea of a crime should coincide, applied, so that for the offence to be complete the organism to which the noxious substance had been administered had to have been another person at the time of its administration; that since the foetus had not been another person at that time the offence had therefore not been complete at that point; that the harm had been done to the child by the mother's excessive ingestion of alcohol while the child was in the womb and, although the child had suffered the consequences of the injury after her birth when she was an "other person", she had not sustained additional damage from the excessive alcohol consumption at that stage; and that there was therefore no link between the administration of the alcohol and the born child for the purposes of section 23 and accordingly the child was not entitled to criminal injuries compensation within

the Scheme (post, paras 36–47, 56, 57, 58, 62–64, 70–71).

R v Miller [1982] QB 532, CA , R v Tait [1990] 1 QB 290, CA and R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] 2 AC 48, SC(E) applied .

Attorney General's Reference (No 3 of 1994) [1998] AC 245, HL(E) distinguished .

Per Lord Dyson MR. The distinction between (i) harm or injury caused by an act and (ii) the consequences of the harm or injury is critical. An offence contrary to section 23 of the 1861 Act is complete if the defendant, with the requisite mens rea, inflicts grievous bodily harm on a victim. If the victim suffers further harm as a result of the grievous bodily harm, that does not give rise to a further offence. The further harm is simply a consequence of the grievous bodily harm. It is not part of the actus reus of the offence (post, para 63).

Decision of the Upper Tribunal (Social Entitlement Chamber) [2013] UKUT 638 (AAC) affirmed .

The following cases are referred to in the judgments:

- Attorney General's Reference (No 3 of 1994) [1998] AC 245; [1997] 3 WLR 421; [1997] 3 All ER 936; [1998] 1 Cr App R 91, HL(E)
- R v Criminal Injuries Compensation Board, Ex p Webb [1987] QB 74; [1986] 3 WLR 251; [1986] 2 All ER 478, CA
- R v Miller [1982] QB 532; [1982] 2 WLR 937; [1982] 2 All ER 386; 75 Cr App R 109, CA
- R v Parmenter [1992] 1 AC 699; [1991] 2 WLR 408; [1991] 2 All ER 225; 92 Cr App R 68, CA; [1992] 1 AC 699; [1991] 3 WLR 914; [1991] 4 All ER 698; 94 Cr App R 193, HL(E)
- R v Tait [1990] 1 QB 290; [1989] 3 WLR 891; [1989] 3 All ER 682; 90 Cr App R 44, CA
- R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48; [2013] 2 WLR 1012; [2013] 2 All ER 625, SC(E)
- Vo v France (2004) 40 EHRR 259, GC

The following additional cases were cited in argument:

- C, Petitioner 1999 SC 551; 1999 SCLR 992, Ct of Sess
- Criminal Injuries Compensation Board v First-tier Tribunal (Social Entitlement Chamber) [2014] EWCA Civ 65; [2014] PIQR P195, CA
- Fagan v Metropolitan Police Comr [1969] 1 QB 439; [1968] 3 WLR 1120; [1968] 3 All ER 442; 52 Cr App R 700, DC
- R v Church [1966] 1 QB 59; [1965] 2 WLR 1220; [1965] 2 All ER 72, CCA
- R v Criminal Injuries Compensation Board, Ex p Clowes [1977] 1 WLR 1353; [1977] 3 All ER 854; 65 Cr App R 289, DC
- R v Rimmington [2005] UKHL 63; [2006] 1 AC 459; [2005] 3 WLR 982; [2006] 2 All ER 257; [2006] 1 Cr App R 257, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

- Airedale NHS Trust v Bland [1993] AC 789; [1993] 2 WLR 316; [1993] 1 All ER 821, Sir Stephen Brown P, CA and HL(E)
- Andrews v Director of Public Prosecutions [1937] AC 576; [1937] 2 All ER 552; 26 Cr App R 34, HL(E)
- Duport Steels Ltd v Sirs [1980] 1 WLR 142; [1980] ICR 161; [1980] 1 All ER 529, HL(E)
- Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services) [2000] 1 WLR 377; [2000] 1 All ER 373, CA
- MB (An Adult: Medical treatment), In re [1997] 2 FCR 541
- R v Cunningham [1957] 2 QB 396; [1957] 3 WLR 76; [1957] 2 All ER 412, CCA
- R v Gillard (1988) 87 Cr App R 189, CA
- R v Mowatt [1968] 1 QB 421; [1967] 3 WLR 1192; [1967] 3 All ER 47, CA
- R (August) v Criminal Injuries Compensation Appeals Panel [2001] QB 774; [2001] 2 WLR 1452; [2001] 2 All ER 874, CA
- R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2014] UKSC 38; [2014] 3 WLR 200; [2014] 3 All ER 843, SC(E)
- R (Smeaton) v Secretary of State for Health [2002] EWHC 886 (Admin); [2002] 2 FLR 146
- St George's Healthcare NHS Trust v S [1999] Fam 26; [1998] 3 WLR 936; [1998] 3 All ER 673, CA
- Winnipeg Child and Family Services (Northwest Area) v G [1997] 3 SCR 925; 3 BHRC 611

APPEAL from the Upper Tribunal (Administrative Appeals Chamber)

By a claim form the applicant, the Criminal Injuries Compensation Authority, sought "judicial review" relief under section 15 of the Tribunals, Courts and Enforcement Act 2007 in respect of the decision of the First-tier Tribunal (Social Entitlement Chamber) dated 7 February 2011 to allow an appeal by, and to award compensation to, CP, a child, pursuant to paragraph 6 of the Criminal Injuries Compensation Scheme 2008 . On 18 December 2013 the Upper Tribunal (Administrative Appeals Chamber) [2013] UKUT 638 (AAC) allowed the claim and set aside the award of compensation.

By an appellant's notice filed on 7 March 2014 the child appealed on the following grounds, among others. (1) The Upper Tribunal judge had been wrong to quash the decision of the First-tier Tribunal on the basis that a foetus in utero was not "any other person" within section 23 of the Offences against the Person Act 1861 , and so the child's mother had not committed a crime contrary to the section when, on the admitted facts, she had administered, whilst she was pregnant with the child, a "poison or other destructive or noxious thing", namely alcohol in such excessive and sufficient quantity that it inflicted on the child grievous bodily harm (foetal alcohol spectrum disorder). He ought to have found either that a foetus in utero was capable of being "any other person" within the meaning of section 23 or that the child had become "any other person" when she was born. (2) The judge had misinterpreted Attorney General's Reference (No 3 of 1994) [1998] AC 245 by concluding that there was nothing in the decision to link, for the purposes of criminal liability, the administration of excessive alcohol, admitted to be a "poison or other destructive or noxious thing", to the born child so that the foetus became "any other person" when born. The reasoning of the House of Lords established that injury to a foetus which ***466** caused harm after birth gave rise to criminal responsibility providing there was the requisite mens rea, which the First-tier Tribunal had found that there was in this case. (3) The judge had been wrong to hold that the mens rea and actus reus had to coincide in time and that they did not because the mens rea only existed at the time when the child was unborn and therefore not "any other person". He ought to have found that the actus reus was a continuing one, just as in manslaughter, encompassing the administration of the noxious thing and the consequences of it, which were likely to have occurred both before and after birth or, alternatively, that there was no need for such coincidence for the crime to be committed.

By a respondent's notice dated 11 April 2014 the authority asked the court to uphold the decision of the Upper Tribunal on the additional grounds that (1) the First-tier Tribunal had not found that the child's mother had foreseen harm at the moment when she was consuming excessive quantities of alcohol, so that the mens rea of section 23 of the 1861 Act was not made out; (2) even if an offence under section 23 had been made out, the First-tier Tribunal could not have concluded in the circumstances of the case that it had amounted to a crime of violence for the purposes of the Criminal Injuries Compensation Scheme 2008 ; and (3) the tribunal had failed to give adequate reasons for its findings in relation to grounds (1) and (2).

British Pregnancy Advisory Service, Birthrights and the Pro-Life Research Unit intervened in the appeal by way of written submissions only.

The facts are stated in the judgment of Treacy LJ.

John Foy QC and *Laura Begley* (instructed by *GLP Solicitors, Bury*) for the child.

Ben Collins and *Jamie Sharma* (instructed by *Treasury Solicitor*) for the authority.

The First-tier Tribunal did not appear and was not represented.

The court took time for consideration.

4 December 2014. The following judgments were handed down.

TREACY LJ

Introduction

The issue raised in this appeal concerns the ability of a child ("CP") to claim criminal injuries compensation from the Criminal Injuries Compensation Authority ("CICA") as a result of being born with foetal alcohol spectrum disorder ("FASD") as a direct consequence of her mother's excessive drinking while pregnant in circumstances where it was asserted that the mother was aware of the danger of harm to her baby being caused by

drinking to excess.

FASD is a recognised disorder resulting from grossly excessive drinking during pregnancy. It causes intrauterine growth retardation and limited growth potential. It can cause central nervous dysfunction; a feature of the disorder is that the brain is smaller and particularly affected. Many children with the disorder have severe learning difficulties. Whilst a diagnosis of FASD has been made in this case and is accepted as such, it has not been necessary for this court or the tribunals preceding this hearing to ***467** consider the totality of the effects of FASD in this case. Some of the symptoms will only manifest themselves as the child develops (or fails to do so).

We understand that, whilst in the past applications for criminal injuries compensation for victims for FASD have been accepted under previous schemes, CICA's present policy is to refuse to pay out such claims. We were told that there are about eighty other applications for compensation which may be affected by this appeal.

This appeal is brought by CP against the decision of the Upper Tribunal granting CICA's application for judicial review and quashing a decision of the First-tier Tribunal dated 7 February 2011 that she was eligible for compensation. CP was born in June 2007 to her mother, a young woman with alcohol addiction. In November 2009, an application was made under the CICA scheme on behalf of CP by her local authority. CICA rejected her application on the grounds that CP had not sustained an injury directly attributable to a crime of violence within the terms of paragraph 8(a) of CICA's 2008 scheme.

After an unsuccessful review, CP appealed to the First-tier Tribunal which allowed her appeal. It found that she had sustained injury which was directly attributable to a crime of violence, namely an offence contrary to section 23 of the Offences against the Persons Act 1861 . CICA then sought judicial review from the Upper Tribunal which issued its decision on 18 December 2013. The Upper Tribunal allowed the claim and held that CP was not entitled to criminal injuries compensation. The reason underlying the decision was that CP was not "any other person" within the meaning of section 23 of the Offences against the Persons Act 1861 when she sustained injury whilst a foetus within her mother's womb. Thus the mother could not have committed a criminal offence contrary to section 23 of that Act (administering poison or other destructive or noxious thing) by drinking heavily whilst CP was a foetus. The Upper Tribunal did not rule on two additional grounds advanced by CICA: firstly that the mens rea of section 23 was not made out and/or that the First-tier Tribunal had failed to give adequate reasons for its findings in that respect; secondly, that even if an offence was made out it did not amount to a "crime of violence" within the meaning of the scheme.

The CICA administers a scheme which considers claims for compensation "from people who have been physically or mentally injured because they were the innocent victim of a violent crime …". The scheme in this appeal is the Criminal Injuries Compensation Scheme 2008 made by the Secretary of State pursuant to section 1 of the Criminal Injuries Compensation Act 1995 .

Under paragraph 6, dealing with eligibility, compensation may be paid in accordance with the Scheme to an applicant who has sustained criminal injury on or after 1 August 1964.

Paragraph 8 provides:

> "For the purposes of this Scheme, 'criminal injury' means one or more personal injuries as described in paragraph 9, being an injury sustained in and directly attributable to an act occurring in Great Britain … which is: (a) a crime of violence (including arson, fire-raising or an act of poisoning); …"

***468**

It is undisputed for the purposes of this case that the FASD suffered by CP amounts to injury within the meaning of the Scheme. The CICA reserves its position in other cases as being dependent on the individual nature of the effects and symptoms caused.

Paragraph 10 of the Scheme provides: "It is not necessary for the assailant to have been convicted of a criminal offence in connection with the injury …"

In this case, there has never been a prosecution of CP's mother, nor, as far as we are aware, in any other case.

The offence that the mother is said to have committed is that set out in section 23 of the Offences against the Persons Act 1861 . This provides:

> **"Maliciously administering poison, etc so as to endanger life or inflict grievous bodily harm.**
>
> "Whosoever shall unlawfully administer to … any other person, any poison or destructive or noxious thing, so as thereby … to inflict on such person any grievous bodily harm, shall be guilty of felony, and being convicted there of shall be liable … to be kept in penal servitude for any term not exceeding ten years."

CP's submission is that her mother was in fact guilty of that offence, notwithstanding the absence of prosecution, and that it constituted a crime of violence within the meaning of paragraph 8(a) of the Scheme.

It is conceded for the purposes of this appeal that some of the ingredients of the offence are satisfied. There is no dispute that the mother administered to CP (whilst an embryo in the womb) a poison or other destructive or noxious thing by reason of the excessive quantities of alcohol she consumed at the time. There is no dispute that CP has in fact sustained grievous bodily harm.

The first issue which arises is whether CP is "any other person", given that she was a foetus at the time the alcohol was ingested. It is the Upper Tribunal's finding in favour of the CICA's argument that CP could not in those circumstances be "any other person", that is the primary issue in this appeal. CICA as the interested party, seeks to sustain that finding, but in any event through its respondent's notice seeks to justify the Upper Tribunal's quashing of the First-tier Tribunal's decision on two additional grounds.

The first ground is that the First-tier Tribunal did not find that CP's mother foresaw harm to the child at the moment she was consuming alcohol and that the mens rea of section 23 was not made out. Allied to this is the assertion that the First-tier Tribunal failed to give adequate reasons for its findings. The second ground is that even if an offence contrary to section 23 is made out, the First-tier Tribunal was wrong to conclude that it amounted to a crime of violence for the purposes of the Scheme, and/or it failed to give adequate reasons for its findings in that respect.

In Attorney General's Reference (No 3 of 1994) [1998] AC 245, the House of Lords considered the case of a defendant who stabbed a woman in the stomach, knowing her to be pregnant. Shortly afterwards she went into labour and gave birth to a grossly premature child, which survived for only 121 days. The stabbing set in train events which caused the premature birth, which itself led to the child's death, its chances of survival being very significantly reduced by the fact of the premature birth. Thus, a chain of ***469** causation between the stabbing and the death of the child was established. The issue was whether in those circumstances the crimes of murder or manslaughter could be committed.

Their Lordships held that a foetus was an unique organism and at that stage was neither a distinct person nor an adjunct of the mother. It was held that whilst there could not be a conviction for murder, there was sufficient for a conviction for manslaughter. The defendant in stabbing, had intended to commit an act which was unlawful and which any reasonable person would recognise as creating a risk of harm to some other person. Although a foetus was not a living person, the possibility of a dangerous act directed at a pregnant woman causing harm to a child to whom she subsequently gave birth, made it permissible to regard that child as within the scope of the defendant's mens rea for the purposes of manslaughter when committing the unlawful act. Accordingly the crime of manslaughter could be committed even though the child was neither the intended victim nor could it have been foreseen as likely to suffer harm after being born alive. Thus the trial judge should not have held that there was no case to answer on manslaughter on the basis that at the material time there was no victim capable of dying as a direct and immediate

result of what was done.

At para 15 of its decision, the Upper Tribunal referred to the fact that Lord Mustill had identified a number of established rules relating to criminal liability. It continued;

> "One of these was that in the absence of a specific statutory provision, an embryo or foetus in utero does not have a human personality and cannot be the victim of a crime of violence. Although the foetus is a unique organism it does not have the attributes that make it a person. As Lord Mustill said (at p 262D, my emphasis): 'The defendant intended to commit and did commit an immediate crime of violence to the mother. He committed no relevant violence to the foetus, *which was not a person* …'"

The Upper Tribunal's decision continued, at paras 16, 18 and 23:

> "16. If CP was not a person whilst her mother was engaging in the relevant actions, then she was not 'another person' for the purposes of section 23 and as a matter of law, her mother could not have committed a criminal offence contrary to section 23 in relation to her unborn child …"

> "18. The point here is that the actus reus and the mens rea must coincide in time: R v Jakeman (1982) 76 Cr App R 223 ; R v Miller [1982] 1 QB 532 . If the actus reus is a continuing act this rule is satisfied if the defendant has mens rea during its continuance: Fagan v Metropolitan Police Comr [1969] 1 QB 439 . Applying these basic rules to the present case, even if her mother had the necessary mens rea whilst CP was still a foetus, there was no 'another person' and there was no actus reus at that time."

> "23. I can see nothing in Attorney General's Reference (No 3 of 1994) that entitles the First-tier Tribunal to link for the purposes of criminal liability the essence of the actus reus of the section 23 offence—the administration—to the born child so as to mean that the unborn foetus in effect becomes 'another person' which, as demonstrated above, it could not be."

***470**

Since the Upper Tribunal found in favour of CICA and held that no crime had been committed, it did not go on to decide the other two questions now raised in the respondent's notice. Both those issues had been determined in favour of CP by the First-tier Tribunal.

CP's argument

On behalf of CP Mr Foy QC placed heavy reliance on Attorney General's Reference (No 3 of 1994) [1998] AC 245 . He submitted that an offence contrary to section 23 should be regarded in the same way as manslaughter was in that decision. Had section 23 been before the House of Lords, it would have come to the same conclusion. The fact that CP had suffered injury rather than death because of her mother's drinking should not affect the outcome. There was no material difference between the two situations in circumstances where the mother had knowledge of the harmful effect of excessive drinking during pregnancy, and her drinking which would have otherwise been a lawful act, was to be regarded as an unlawful act akin to that required for manslaughter. The position under section 23 was stronger than in the manslaughter situation because the mens rea involved there was not directed at the victim.

Those general submissions were followed by specific submissions directed at the phrase "any other person" in section 23 . The first submission was that a foetus in utero was capable of being "any other person". The foetus should be regarded as a live being with rights and capable of having an existence separate to its mother long before it is born. That was why Parliament had legislated to protect the foetus by section 58 of Offences against the Person Act 1861 and section 1 of the Infant Life (Preservation) Act 1929 .

Recognising that Attorney General's Reference (No 3 of 1994) itself did not support this argument, Mr Foy relied on an alternative. The foetus becomes a person when it is born. Since the Attorney General's Reference had analysed the actus reus of manslaughter as a continuing act running from the moment of the attack on the mother to the death of the child after birth, there was no good reason why the criminal law should not equally protect a foetus from conduct resulting from deliberate acts causing foreseeable harm and which resulted in grievous bodily harm evident after birth.

In support of this argument Mr Foy drew on passages in Attorney General's Reference (No 3 of 1994) [1998] AC 245 .

Firstly, he referred to Lord Mustill's speech at p 253C, where he said: "The able arguments of counsel were founded on a series of rules which, whatever may be said about their justice or logic, are undeniable features of the criminal law today."

He then set out five rules. Rules 3, 4 and 5 are relevant to this case. They are set out at p 254A–F.

> "3. Except under statute an embryo or foetus in utero can not be the victim of a crime of violence. In particular, violence to the foetus which causes its death in utero is not a murder.
>
> "4. The existence of an interval of time between the doing of an act by a defendant with the necessary wrongful intent and its impact on the victim in a manner which leads to death does not in itself prevent the ***471** intent, the act and the death from together amounting to murder, so long as there is an unbroken causal connection between the act and the death.
>
> "5. Violence towards a foetus which results in harm suffered after the baby has been born alive can give rise to criminal responsibility even if the harm would not have been criminal (apart from statute) if it had been suffered in utero."

At p 261F–G Lord Mustill commented in relation to the third rule that it was established beyond doubt in the criminal law that a child in the womb does not have a distinct human personality, whose extinguishment gives rise to any penalties or liabilities at common law. As to the fourth rule, this was an exception to the generally accepted principle that actus reus and mens rea must coincide. A continuous act or continuous chain of causation leading to death is treated by the law as if it happened when first initiated. The fifth rule links an act and intent before birth with a death happening after a live delivery.

Mr Foy submitted that the Upper Tribunal had overlooked the fact that the House of Lords had accepted criminal responsibility in the case of manslaughter and had failed to mention or consider rules four and five.

Mr Foy also drew attention to Lord Hope's speech. In particular he relied on p 268A–D:

> "I have no difficulty in finding in the facts of this case all the elements that were needed to establish the actus reus both of murder and of manslaughter. The actus reus of a crime is not confined to the initial deliberate and unlawful act which is done by the perpetrator. It includes all

> the consequences of that act, which may not emerge until many hours, days, or even months afterwards. In the case of murder by poisoning, for example, there is likely to be an interval between the introduction of the victim to the poison and the victim's death … What is needed in order to complete the proof of the crime is evidence of an unbroken chain of causation between the defendant's act and the victim's death … It was not disputed that injury to a foetus before death which results in harm to the child when it is born can give rise to criminal responsibility for that injury. So the fact that the child is not yet born when the stabbing took place does not prevent the requirements for the actus reus from being satisfied in this case, both for murder and for manslaughter, in regard to her subsequent death."

Lord Hope continued at p 270F: "It is enough that the original unlawful and dangerous act, to which the required mental state is related, and the eventual death of the victim are both part of the same sequence of events."

Mr Foy submitted that the Upper Tribunal had been wrong in stating at para 18 of its decision that the actus reus and the mens rea must coincide in time. Moreover it was in error at para 23 in holding that there was an absence of link between the administration of alcohol and the child when born. The passages cited above established the necessary link. Thus the Upper Tribunal was incorrect to hold that the actus reus of the section 23 offence stopped at the point when the foetus was not "any other person". The decision and reasoning in Attorney General's Reference (No 3 of 1994) ***472** in relation to manslaughter concerned an analogous situation which should lead to a finding of entitlement to compensation.

CICA's response

Mr Collins for CICA sought to uphold the Upper Tribunal's conclusion that the mother did not administer poison to "any other person", so that the actus reus of the section 23 offence was not made out. He argued that Attorney General's Reference (No 3 of 1994) [1998] AC 245 shows that, except under statute, an embryo or foetus in utero cannot be the victim of a crime of violence. CP did not have legal personality until she was born. Thus a foetus in utero was incapable of being "any other person". Accordingly, the mother did not administer poison to "any other person" because the administration occurred only in utero. The general rule is that actus reus and mens rea must coincide: see R v Miller [1982] QB 532 .

Regard should be had to the fact that in the Attorney General's Reference their Lordships were considering crimes with different ingredients to the section 23 offence. In relation to the actus reus of murder and manslaughter, the killing of another person includes not only the act of violence but its consequences. Under section 23 the administration of a toxic substance to "any other person" is an essential ingredient of the actus reus, so that the position is different. In particular, there is a contrast to unlawful act manslaughter which includes in its ingredients an intention to do an unlawful act likely to cause harm to another person, resulting in death. Accordingly, the Upper Tribunal rightly concluded at para 16 of its decision that:

> "If CP was not a person whilst her mother was engaging in the relevant actions, then she was not another person for the purposes of section 23 and as a matter of law her mother could not have committed a criminal offence contrary to section 23 in relation to her unborn child."

Mr Collins submitted that the flaw in CP's argument was that it failed to address the terms of section 23 in detail and had taken instead a broad approach to the Attorney General's Reference , which was concerned with crimes of homicide where there might be a gap between the initial act causing injury and the resultant death. In those circumstances, there was justification for treating the actus reus as a continuum culminating with death. There was no warrant for taking a similar approach with the

section 23 offence.

Conclusion on the primary issue

In R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] 2 AC 48 Lord Hope DPSC, giving the judgment, said that in a criminal injuries compensation case there were two questions for a tribunal to consider. The first was whether, having regard to the established facts, a criminal offence had been committed. The second was whether, having regard to the nature of the criminal act, the offence committed was a crime of violence. The assessment of the first question, once facts are established, is clearly a question of law involving construction of the statute. It is on this aspect of the case that the answer to the primary question turns. The section requires administration of the noxious substance to "any other person". As ***473** set out above, Mr Foy sought to bring himself within that phrase by reference to two alternative arguments.

As to the first, he acknowledged its apparent weakness, and conceded that he was unable to produce authority in support of it. It is clear to me that the decision in Attorney General's Reference (No 3 of 1994) [1998] AC 245 itself is fatal to this limb of the argument. Both Lord Mustill and Lord Hope were in agreement that a foetus is not to be regarded as another person. It was neither a distinct person nor a adjunct of the mother but was a unique organism. As Lord Hope said at p 267F:

> "an embryo is in reality a separate organism from the mother from the moment of its conception. This individual reality is contained by it throughout its development until it achieves independent existence on being born. So the foetus cannot be regarded as an integral part of the mother … notwithstanding its dependence on the mother for its survival until birth."

Additionally, the first sentence of rule three cited by Lord Mustill—"Except under statute an embryo or foetus in utero cannot be the victim of a crime of violence"—is again inconsistent with Mr Foy's contention.

I refer also to the decision of the Court of Appeal Criminal Division in R v Tait [1990] 1 QB 290 . That was a constitution over which Mustill LJ (as he then was) presided. The case involved making a threat to kill contrary to section 16 of the Offences against the Person Act 1861 . The ingredients of the offence include a threat to kill either the person threatened or "a third person". The court had to consider whether a foetus was capable of being a third person against whom a threat could be made. The court said in terms that a foetus was not "another person" distinct from its mother to whom the threatening words had been uttered. It therefore seems to me that the first part of Mr Foy's argument as to the status of the foetus cannot be sustained.

I turn then to the alternative proposition which relies substantially on the decision in Attorney General's Reference (No 3 of 1994) [1998] AC 245 . In my judgment the attempt to equate the section 23 offence with their Lordships' decision as to manslaughter cannot succeed. It is clear that the decision as to manslaughter is primarily based on an exception to the normal rule that actus reus and mens rea should coincide. The analysis of the actus reus of manslaughter or indeed murder, is such that it is not complete until death takes place. However, there may be a gap in time between the infliction of the fatal injury and the fact of death. In those circumstances it is wholly unsurprising that their Lordships found an exception to the general rule and were prepared to regard the actus reus in those cases as being of a continuing nature as long as a chain of causation existed between the initial act and the death of the victim. Thus in the case of a foetus, it was legitimate to find a chain of causation extending from the initial insult to the foetus which triggered its premature birth through to the point of death some time after birth, by which stage the child had undoubtedly achieved legal personality. A close examination of the language used by Lords Mustill and Hope shows clearly firstly that it has to be seen in the context of homicide, and secondly that it was used in the context of a foetus which suffered injury and which subsequently died after birth. It was common ground that violence done to a foetus resulting in a ***474** still birth could not found criminal liability. In cases where the child is born alive, the actus reus cannot crystallise until the time of death.

I consider that the situation is rather different in relation to the section 23 offence. If the foetus is not another person at the time of the administration of the noxious substance then the offence cannot be complete at that point. The situation is distinct from the crime of manslaughter which requires death in order to complete the crime. This, no doubt, is why Mr Foy albeit with some hesitation, sought to rely on the first limb of his argument as it would avoid this difficulty which arises under the second limb. He sought to meet the objection to the second limb by arguing that where FASD occurs, the foetus is damaged before birth, but that after birth there is continuing damage by reason of retardation. To the observation that what occurred after birth was simply the consequences of damage caused before birth, he submitted that these are continuing and that the court should be slow to distinguish between damage done and subsequent consequences or symptoms.

I cannot accept this analysis. The reality is that the harm has been done to the child whilst it is in utero. The fact that if the child is born alive it will suffer the consequences of the insult to it whilst in the womb does not mean that after birth it has sustained damage by reason of the administration of the noxious substance. One only has to cast one's mind back to the Thalidomide tragedy. The injury was done to the affected children by the administration of the drug whilst they were still in the womb. Those children who were born affected were born with missing or ill-developed limbs. Whilst they suffered the consequences on a lifetime basis after birth, they did not sustain any additional damage after birth by virtue of administration of the drug.

Reference to the expert evidence of Dr Kathryn Ward, an experienced consultant paediatrician, whose very detailed report was before the First-tier Tribunal, (and which was not disputed), shows that the harm which is done by ingestion of excessive alcohol in pregnancy is done whilst the child is in the womb. The child would then, when born, show damage demonstrated by growth deficiency, physical anomalies and dysfunction of the central nervous system. Very often, as in this case, the full extent of retardation and damage will not become evident until the child reaches milestones in its development, at which point matters can be assessed. The fact that such deficits cannot be identified until that stage does not constitute fresh damage. It merely means that the damage was already done but has only then become apparent.

It seems to me that this is fatal to CP's contention. The time at which harm, acknowledged in this case to amount to grievous bodily harm, occurred was whilst CP was in the womb. At that stage the child did not have legal personality so as to constitute "any other person" within the meaning of section 23 . The basis on which the actus reus is extended in a manslaughter case cannot apply here since nothing equivalent to death occurred to CP after her birth.

I therefore consider that the Upper Tribunal was correct to conclude at para 23 of its decision that there was no link between the administration of the alcohol and the born child for the purposes of section 23 . It was no doubt for that reason that at para 18 it referred to the normal rule requiring coincidence in time between actus reus and mens rea. It was no doubt for that reason that it did not refer to rule 4 which was ***475** plainly concerned with a situation where a death occurs as opposed to a still birth. As to rule 5 , the reference to "harm suffered after the baby has been born alive" is referable to the homicide situation, but not to one such as the present.

In my judgment the passages relied on by Mr Foy in Attorney General's Reference (No 3 of 1994) [1998] AC 245 have to be read in the context of homicide rather than the present context. Moreover, it seems to me that Lord Mustill was not encouraging a broad approach when he commented towards the end of his speech about the number of potential permutations arising from the referred point of law. He said, at p 265F:

> "It would, I believe be most imprudent to enter on any of them without resolving to pursue them in depth, and I would wish to proceed with particular care in relation to allegations of murder stemming from an injury to the foetus unaccompanied by any causative injury to the mother."

It seems to me that the legislation in the interests of the unborn child represented by section 58 and section 59 of the 1861 Act and section 1 of the Infant Life (Preservation) Act 1929 tends to assist CICA rather than

CP. These are offences committed where there is an intention to kill the foetus in utero, an act which but for statute would not be criminal. In addition, the focus of section 58 is on the administration of drugs or the use of instruments on the woman rather than the child. The result reached provides a conclusion consistent with the approach of Parliament in the Congenital Disabilities (Civil Liabilities) Act 1976 . At section 1 it restricts the ability of a child born disabled to sue its mother in tort in circumstances such as these. Whilst of course there are different public interests in play as between tort and criminal law, and whilst our primary task is to construe section 23 , the conclusion to which I have come has at least the merit of providing coherence between the civil and criminal law.

Respondent's notice

In the light of my conclusion on the primary issue, the issues raised by the respondent's notice become moot. I shall therefore limit myself to the following observations. If a tribunal finds that a crime has been committed, it has to go on to consider whether that was a crime of violence in accordance with paragraph 8(a) of the Scheme, and the approach set out in Jones's case [2013] 2 AC 48 .

In the present case the Upper Tribunal did not need to deal with the issue. The First-tier Tribunal at para 55 gave its decision that CP's injury was "directly attributable to a crime of violence within the terms of paragraph 8(a) of the Scheme and eligibility is therefore established".

The tribunal's reasoning in support of this was sparse in the extreme. It stated at para 63: "The essentials of an offence under section 23 of the Offences against the Persons Act 1861 have been made out. Such an offence is a specified 'violent' offence within Schedule 15 to the Criminal Justice Act 2003 ."

In Jones's case [2013] 2 AC 48 , para 14 Lord Hope DPSC approved the observations of Lawton LJ in R v Criminal Injuries Compensation Board, Ex p Webb [1987] QB 74 , ***476** 79. Lawton LJ said that what mattered was the nature of the crime, not the likely consequences:

> "It is for the Board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence."

He continued, at pp 79–80:

> "Most crimes of violence will involve the infliction or threat of force, but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the Board, as a fact finding body may have to apply to the case before them. They will recognise a crime of violence when they hear about it, even though as a matter of semantics, it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences …"

In the present case there was insufficient consideration demonstrated by the First-tier Tribunal. In particular the reference to Schedule 15 to the 2003 Act does not seem to me to be sufficient; firstly, because the inclusion of the section 23 offence as a specified violent offence within Schedule 15 was done for a wholly different legislative purpose. Secondly, the mere fact that the section 23 offence was included in a list of offences for the purposes of the Schedule does not amount to a sufficiently close focus on the facts of the offence. For my part, I saw force in Mr Collins' submission that the mere reference to poisoning and arson in paragraph 8(a) of the Scheme would not of itself suffice without further analysis. Both are offences which may be committed intentionally or recklessly. It may well be that those differing states of mind have a bearing on the question of whether the crime committed is a crime of violence. There is, however, in the circumstances no purpose in our seeking to determine the matter for ourselves or to remit the issue for further consideration.

The second matter raised relates to the assertion that the First-tier Tribunal did not properly find the mens rea of the section 23 offence proven and/or failed to give

sufficient reasons for its finding. The mens rea of the offence is contained in the phrase "unlawfully or maliciously". It was common ground that, in a section 23 offence, "unlawfully" merely provides for an absence of lawful excuse, and that on the facts of this case if the other ingredients of the offence were proven, what was done was done unlawfully. As to "maliciously", it would be sufficient if the person accused under section 23 had foreseen that physical harm to another person, albeit of a minor character, might result from his action, and yet had gone on to take the risk of it: see R v Parmenter [1992] 1 AC 699 . I have considered the decision of the First-tier Tribunal and am satisfied that there were sufficient findings made to demonstrate the necessary mens rea and that sufficient reasons were given. Para 52 of the decision states:

> "On the balance of probabilities, [the mother] was through her general knowledge; by engaging with her general practitioner and the maternity services during her two pregnancies; and by attending at the Thomas Project, aware of the dangers to her baby of the excessive consumption of alcohol during pregnancy."

This paragraph follows others in which relevant history and findings of fact had been set out. My view is fortified by the observations in Jones's case [2013] 2 AC 48 ***477** that a benevolent approach should be taken by the appellate court in considering the reasoning of the tribunal below. See Lord Hope DPSC at para 25:

> "It is well established, as an aspect of tribunal law and conduct, that judicial constraint should be exercised when the reasons a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

Accordingly, I would reject this part of the respondent's notice.

Interveners

Before leaving the matter, I should record that the court has received written submissions from the first and second interveners. The former is concerned to promote women's rights in pregnancy and childbirth. The latter seeks to promote human life at all its stages including the foetal stage. Each set of submissions focused strongly on policy matters, adopting a different standpoint according to those whose interests they sought to advance. Whilst of interest and thought-provoking, those submissions have not informed this judgment since the appeal was concerned with the correct construction of the statute and the interpretation of Attorney General's Reference (No 3 of 1994) [1998] AC 245 . In so far as either intervener referred to matters of law, they did not materially add to the submissions received from the principal parties. Whilst the second intervener made reference to the decision of the European Court of Human Rights in Vo v France (2004) 40 EHRR 259 , it is clear from that decision that European learning on article 2 cannot assist in determination of the matter before this court. This is an issue for individual states to determine and one which will be governed by domestic law.

Conclusion

The appeal is dismissed.

KING LJ

I agree.

LORD DYSON MR

I agree that this appeal should be dismissed essentially for the reasons given by Treacy LJ. I add a few words of my own because there has been a difference of view as to the issue raised by this case between the First-tier Tribunal (Social Entitlement Chamber) ("the FTT") and the Upper Tribunal (Administrative Appeals Chamber) ("the UT")

and the issue is one of considerable public interest and importance.

The facts have been sufficiently stated by Treacy LJ. The child CP claimed compensation from the Criminal Injuries Compensation Authority ("the CICA") for the criminal injury that is said to have been caused to her by her mother ("EQ"). The FTT found that (i) she was born with foetal alcohol spectrum disorder ("FASD") as a result of grossly excessive consumption of alcohol by EQ during her pregnancy; (ii) FASD was an "injury" within the meaning of paragraph 9 of the Scheme made pursuant to the Criminal Injuries Compensation Act 1995 ***478** ("the 1995 Act"); (iii) CP was the victim of an offence contrary to section 23 of the Offences against the Person Act 1861 ("the 1861 Act") in that EQ, by consuming excessive quantities of alcohol, had administered poison to her foetus so as to inflict grievous bodily harm for the purposes of section 23 of the 1861 Act; (iv) this was a "crime of violence" within the meaning of the Criminal Injuries Compensation Scheme ; and (v) EQ had the requisite mens rea at the time of the consumption of alcohol.

The CICA sought judicial review of the decision of the FTT that CP was eligible for compensation. The UT granted judicial review. It decided that EQ did not administer poison to "any other person" and that the actus reus of an offence contrary to section 23 of the 1861 Act was therefore not established. That was fatal to the claim for compensation and the UT did not consider any of the other issues that had been raised.

The UT dealt with the central issue with commendable succinctness at para 23:

> "I can see nothing in Attorney-General's Reference (No 3 of 1994) that entitles the First-tier Tribunal to link for the purposes of criminal liability the essence of the actus reus of the section 23 offence—the administration—to the born child so as to mean that the unborn foetus in effect becomes 'another person' which, as demonstrated above, it could not be."

Mr Foy QC makes two points in support of the appeal. First, he says that a foetus is capable of being "any other person" within the meaning of section 23 . Mr Foy was right not to press this submission with much enthusiasm. As Treacy LJ has explained, it is well established that a foetus is not a "person"; rather it is a sui generis organism: see, for example, Rule 3 set out in the opinion of Lord Mustill in Attorney General's Reference (No 3 of 1994) [1998] AC 245 , 254A–E.

Alternatively, Mr Foy submits that a foetus becomes a "person" when it is born and there is no good reason why the criminal law should not protect it before birth or criminalise conduct which results in grievous bodily harm to a child after it is born. He relies by analogy on the decision in the Attorney General's Reference . But the analogy is flawed. The elements of the offence of manslaughter where there is an assault on the foetus which causes the death of the child after it has been born are (i) an unlawful and dangerous act, (ii) a death and (iii) a causal link between the act and the death. All three elements are required to complete the actus reus of the offence. The actus reus of an offence contrary to section 23 requires (i) the administering of a poison to a person, (ii) the infliction on such person of grievous bodily harm and (iii) a causal link between (i) and (ii). An essential ingredient of the offence, therefore, is the infliction of grievous bodily harm *on a person* . Grievous bodily harm to a foetus will not suffice. On the facts of this case, the harm caused to CP by reason of EQ's excessive consumption of alcohol was caused *before* her birth. Tragically, the harm was the brain damage with which CP was born. She was born with limited growth potential as she had symmetrical intrauterine growth retardation. All the suffering that CP has endured and will continue to endure during her life is the consequence of the harm that was inflicted on her when she was in her mother's womb. The distinction between (i) harm or injury caused by an act ***479** and (ii) the consequences of the harm or injury is critical. An offence contrary to section 23 is complete if D, with the requisite mens rea, inflicts grievous bodily harm on V. If V suffers further harm *as a result of* the grievous bodily harm, that does not give rise to a further offence. The further harm is simply a consequence of the grievous bodily harm. It may well be relevant to an assessment of the gravity of the offence that has been committed, but it is not part of the actus reus of the offence itself.

If section 23 had expressly included a foetus as well as "any other person", EQ would have committed the actus reus of the offence during her pregnancy. But that is not what Parliament has provided. Accordingly, it is because a foetus does not come within the ambit of section 23 that Mr Foy's argument breaks down.

I am fortified in the conclusion that I have reached by a number of other considerations. First, the approach to section 23 that I have adopted is consistent with the established structure of the criminal law as it relates to the foetus. Parliament has identified certain circumstances where criminal liability arises if a mother causes injury to her foetus. Thus the offence of a pregnant woman using poison, with intent to procure her own miscarriage (section 58 of the Offences against the Person Act 1861) specifically provides for circumstances in which a woman administers poison or a noxious thing to herself. This offence does not apply to the circumstances of the present case because it requires intent. Section 1 of the Infant Life (Preservation) Act 1929 provides that it is an offence to destroy the life of a child capable of being born alive before it is born. Parliament could have legislated to criminalise the excessive drinking of a pregnant woman, but it has not done so outside these offences. Since the relationship between a pregnant woman and her foetus is an area in which Parliament has made a (limited) intervention, I consider that the court should be slow to interpret general criminal legislation as applying to it.

Secondly, in English law women do not owe a duty of care in tort to their unborn child. A competent woman cannot be forced to have a caesarean section or other medical treatment to prevent potential risk to the foetus during childbirth. The negligent acts of a third party tortfeasor, which inflict harm on an unborn child, are actionable by the child on birth if the child is born with disabilities under section 1(1) of the Congenital Disabilities (Civil Liability) Act 1976 . But claims cannot be brought under this Act against the child's mother unless (by section 2) the harm is caused by her when she is driving a motor vehicle. The law would be incoherent if a child were unable to claim compensation from her mother for breach of a duty of care owed during pregnancy, but the mother was criminally liable for causing the harm which gave rise to damage and a right to compensation under the 1995 Act.

It is true that tort and crime are conceptually distinct. But the policy reasons underlying the state's view that a child should not be able to claim compensation from her mother for what is done (or not done) during pregnancy should rationally also lead to the conclusion that, save in the exceptional circumstances expressly recognised by Parliament, there should be no criminal liability for what a mother does (or does not do) during pregnancy. It would be all the more incoherent if the sole or even principal reason for treating what a mother does (or fails to do) during her pregnancy as attracting criminal liability is to enable the child to claim compensation ***480** from the CICA. It makes no sense to say that a child who has been harmed by her mother's conduct during pregnancy can claim compensation from the CICA, but cannot claim compensation from the person who caused the harm. In my view, the role of the state in these circumstances should be to provide care and support for the child who has suffered harm to the extent that this is necessary. It should not be to pay compensation on the basis that the child is the victim of a crime by her mother.

This case has attracted much public interest. We have been assisted by detailed submissions on behalf of CP and CICA as well as by the British Pregnancy Advisory Service and Birthrights ("the first interveners") and the Pro-Life Research Unit ("the second interveners"). The first interveners are committed to supporting women's reproductive autonomy and advocates for women's choices across their reproductive lifetime. They contend that the legal question raised by this appeal is of profound social significance. They say that, if the appeal were to be allowed, this would be a radical development in the criminal law. In short, they say that there is a compelling public interest in safeguarding pregnant women and their foetuses from the detrimental effects of criminalisation.

The second interveners seek to promote respect for human life at all its stages. They say that children affected by FASD need a remedy and that to provide a remedy under the CICA Scheme is just, does not interfere inappropriately with maternal autonomy interests and would not open the floodgates to a large number of claims or to inappropriate prosecutions.

I respect the strength of the convictions which underpin the submissions of the interveners. But ultimately, the question we have to answer involves interpreting section 23 of the 1861 Act. For the reasons I have given, I conclude that EQ did not commit an offence contrary to section 23 of the 1861 Act. I am fortified in this conclusion by the wider considerations to which I have referred.

I would dismiss this appeal. Susan Denny, Barrister ***481**

Appeal dismissed with costs.

Footnotes

[1] Offences against the Person Act 1861, s 23\ : see post, para 12.

Neutral Citation No. [2013] NIFam 2

Ref: **MAG8722**

Judgment: approved by the Court for handing down

Delivered: **08/02/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER 1987

BETWEEN:

SMcC

Appellant

-and-

SOUTHERN HEALTH AND SOCIAL CARE TRUST

Respondent

-and-

HJM

Respondent

MAGUIRE J

Introduction

[1] On 9 March 2012 Her Honour Judge Loughran ("the Judge") made an order pursuant to Article 18 of the Adoption (Northern Ireland) Order 1987 freeing a female child EM, date of birth 27 February 2007, for adoption.

[2] On 7 September 2012 the same judge made the same order freeing a male child SM, date of birth 6 February 2009, for adoption.

[3] EM and SM are siblings. Their mother is SMcC ("the mother") and their father is HJM ("the father"). In each set of proceedings the mother and father opposed the making of a freeing order. In each set of the proceedings the party applying for the freeing order was the Southern Health and Social Care Trust ("the Trust"). In each set of proceedings a guardian ad litem had been appointed to represent the interests of the child. In each set of proceedings the guardian ad litem had supported the Trust's application.

[4] The reason why there were two separate sets of proceedings was that there had been an issue about the paternity of SM. The issue had not been resolved at the date of the hearing of the first set of proceedings. Because of this, the proceedings in respect of SM were adjourned in March 2012. By the time those proceedings came back before the court in September 2012 the paternity issue had been resolved and it had been established that HJM was the father of SM.

[5] In respect of both sets of proceedings, the mother lodged an appeal to this court.

The background to the proceedings

[6] This section is based on the statement of facts filed in the court below and on the helpful chronology provided by the Trust to this court. Neither was the subject of dispute before this court. The mother was born on 15 November 1971 and is now aged 41. The father was born on 28 February 1974 and is now aged 38. They began co-habiting in or about 2006.

[7] The Trust as long ago as 1994 had involvement with the mother. At that time she was looking after her child, C, aged nearly two. C's father was not HJM and HJM was not living with her at the time. There were concerns about the child's welfare due to alleged alcohol misuse on the part of the mother. Later in August 1995 C's father secured an interim residence order in respect of C. This was made permanent in November 1995. Subsequently C spent the remainder of her childhood in her father's care without contact with the mother.

[8] EM was born on 27 February 2007. But even before she was born the Trust had noted concerns during the mother's pregnancy. At this time the mother's relationship with the father had begun. In November 2006 the Trust records reveal that the mother was failing to engage with services in respect of an on-going problem with her mental health. In addition, it appears that incidents of domestic violence were occurring. In one incident in January 2007, when the mother was seven months pregnant, the father allegedly committed a serious assault on the mother.

[9] Similar incidents of domestic violence, it appears, occurred in the first three months of EM's life. In one such incident the mother was assaulted by the father

when she was holding the baby. As a result of such incidents the mother twice sought refuge in a Women's Aid hostel.

[10] In June 2007 the Trust sought and was granted an emergency protection order in respect of EM who was removed from her parents' care as she was viewed as having been placed at risk of physical and emotional harm by the parents.

[11] Around this time incidents of domestic violence appear to have been commonplace. In one incident it was alleged that the father sought to strangle the mother. In a later incident, EM was injured. In respect of this incident, alcohol was involved. Unsurprisingly these incidents led the Trust to commence proceedings for a care order. Initially a number of interim care orders were made.

[12] On 8 September 2007 EM was returned to the care of the mother but within the protective environment of Thorndale Assessment Centre where staff were available on a 24 hour basis. The object of the mother and baby being there was to enable an assessment to be made of the mother's capacity to care for EM.

[13] The mother successfully completed the assessment at the end of November 2007. At this time she was viewed as being capable of meeting the physical and emotional needs of EM but there were continued concerns in respect of the mother's past relationships and with the issue of domestic violence. The mother and baby, on leaving the Assessment Centre, entered Thorndale Resettlement Unit. During the next three month period there was one confirmed incident of alcohol use on the part of the mother, though there were also reports of the mother using alcohol and drugs while looking after EM.

[14] On 16 April 2008 mother and baby began living again in the community. While the mother denied the allegation, the Trust had reason to believe that within a short time the mother had recommenced her relationship with the father.

[15] As a result of an incident in which the mother had placed EM (by now aged 15 months) unsecured on a quad bike on 8 May 2008, EM was removed from her care. In due course an interim care order was made by the Family Proceedings Court. EM was again placed in foster care.

[16] In the period May-December 2008 the mother refused to engage in motivational interviewing despite Dr Bownes, a consultant psychiatrist, recommending that she should do so to assist her in the context of deliberations by the Trust concerning the future of EM.

[17] On 4 December 2008 the Trust ruled out the return of EM to the mother.

[18] On 6 February 2009 SM was born. It is now known that the father of SM, as with EM, was HJM.

[19] The Trust was granted an emergency protection order to remove SM from his mother's care on 6 February 2009.

[20] In the next period of months the mother had positive contacts with SM and EM. The mother agreed to engage in intensive work with a consultant clinical psychologist, Dr McDonald. In the course of this, she demonstrated insight in respect of past issues and presented as willing to learn. The Trust agreed, in light of these developments, to a care plan of the mother caring for the two children.

[21] On 8 June 2009 EM was returned to her mother's care and the same occurred in respect of SM on 20 July 2009. The delay between the return of the two resulted from the challenging behaviour exhibited by EM at the time of her return. As a result of this and on the recommendation of professionals it was decided that EM should be given time to settle before the return of SM.

[22] In succeeding months there emerged a series of incidents which created issues around the mother's ability to cope, particularly in relation to EM with whom, to the eyes of social work professionals, she appeared to interact poorly. The first of these related to the father attending the home and acting in a verbally abusive and aggressive manner, carrying a hammer and causing damage to a neighbour's car. Other incidents involved missed appointments in respect of EM's speech therapy; a failure by EM to attend the Community Paediatric Department; and temper tantrums on the part of EM, then 2½ years, which the mother attributed to her wilfulness. In respect of this last matter it was noted that the mother's management of EM involved the use of foul language. At this time the Trust observed that the mother was finding it difficult to cope with the competing demands of the two children. In the mother's opinion she viewed herself as coping.

[23] The Family Proceedings Court granted care orders in respect of EM and SM on 5 October 2009. The care plan was to maintain the children in the care of the mother with support from the Trust.

[24] On 13 December 2009 a serious incident occurred. At this time the mother had the protection of a non-molestation order but the father breached this. While at the mother's home he broke a window with a bottle of Buckfast. The police at 5.00 am were contacted by the mother and the mother and the two children had to flee to refuge accommodation.

[25] This led to a turbulent period involving multiple moves in accommodation and concern on the part of social work staff. For example, on 14 December 2009 the out of hours social worker dealing with the mother noted that she was not responding to the children crying; was self-absorbed; and appeared unable to control the children. Over the next seven days there were daily visits to the mother but reports indicate that she seemed unable to focus on the needs of the children and could not cope. Further repeated changes to the family's accommodation ensued. Eventually, the family moved to a different town.

[26] By April 2010 the Trust was receiving information from the Northern Ireland Housing Executive, which was housing the family, that the father had been living in the family home for some weeks. When the mother denied that this was true she refused to allow Trust staff to check the upstairs of her house.

[27] On 15 April 2010 the Trust removed the children from the mother's care. Afterwards the mother caused criminal damage to the property and was arrested for arson.

[28] Thereafter, initially the mother was permitted to have contact with the children for two hours twice a week.

[29] On 5 May 2010 the children were placed with Mr and Mrs C, foster carers. It now appears that they wish to provide a permanent home for the children.

[30] In the aftermath of these events the mother reported to one of the Trust's social workers that she had been consuming alcohol on a daily basis to excess over a period of three months while she had the children in her care.

[31] Proceedings were issued by the mother on 7 May 2010 to discharge the care orders in respect of the children as well as to increase her contact with them.

[32] On 22 May 2010 the father was charged with an armed robbery and remanded in custody. He later was convicted of this offence and sentenced to a substantial custodial sentence.

[33] On 26 May 2010 the mother is recorded by social services as having consumed two bottles of Buckfast and 12 cans of beer.

[34] Internal deliberations within the Trust in succeeding months pointed towards the children being permanently removed from the care of the mother. In August 2010 a specialist practitioner on mental health following three observed contacts between the children and the mother concluded that there were evident difficulties in the children's relationship with the mother. On 16 August 2010 a LAC review decided to change the care plan for each child in order to promote permanence and stability in their care arrangements. It was considered that these values would best be secured by adoption.

[35] A further LAC review in November 2010 recommended reduction in the mother's contact to fortnightly given the alleged poor quality of the contact.

[36] The father on 11 November 2010 denied that he was SM's father and declined DNA testing.

[37] On 8 December 2010 Her Honour Judge McReynolds at the Family Care Centre, Craigavon, dismissed the mother's application to discharge the care orders and reduced the mother's contact to once a week for 1 hour 45 minutes.

[38] The mother on 13 January 2011 reported to the Trust that she had been abusing "sleepers". On 26 January it is recorded in the Trust's records that the mother accepted that at that time she could not care for the children but she hoped that within a short period that she would be able to do so once the medications she was on settled down.

[39] On 10 March 2011 the Southern Area Adoption Panel recommended that adoption would be in the children's best interests. At a LAC review on 28 March 2011 a care plan for adoption was confirmed. On 5 April 2011 the Trust's Agency Decision Maker decided that adoption was in the best interests of each child.

[40] EM was assessed by the Northern Ireland Regional Genetics Centre in July 2011. The assessment indicated that she had significant behavioural and developmental problems against the history of maternal misuse of prescribed drugs and a chaotic background. Dr Magee, who carried out the assessment, stated that EM did not fit the criteria for Foetal Alcohol Spectrum Disorder ("FASD").

[41] A similar assessment was carried out at the same time in respect of SM. He was assessed as fitting the criteria for FASD. Later the mother when this assessment was explained to her (by the guardian ad litem) responded by saying that she binge drank when pregnant with SM.

[42] On 31 August 2011 the Trust initiated the freeing applications in respect of EM and SM.

The children

[43] It can be seen from the above narrative that each of the children has in fact only lived with the mother for limited periods of time. In the case of EM she was aged 5 at the date of the hearing before the Judge but she had lived with the mother for only approximately 21.5 months. When the same calculation is done in the case of SM the period is 9 months out of a life to the date of the hearing spanning some 43 months.

[44] Both children on 5 May 2010 moved into the care of Mr and Mrs C and together have lived with them since.

[45] The evidence before the Judge from the Trust was that the children had become well settled with Mr and Mrs C and the foster parents were providing well for their needs. Indeed genuine bonds were developing between them.

[46] The above, importantly, represented a measure of progress, especially in the case of EM, as there is a volume of evidence which suggests that EM was (and to a degree still is) a child who evinced or evinces significant behavioural problems which in the past have manifested themselves in disruptive behaviour; poor social interaction; developmental delays and poor concentration and understanding. In the case of SM the papers before the Judge reveal the existence of concerns in some areas but these were not as pronounced as those existing in relation to EM.

Contact

[47] There are extensive records within the papers which were before the Judge about contact sessions between the mother and the children in the latter half of 2010 and 2011. While these show that the mother availed of contact and came to the sessions prepared with gifts and treats for the children, those observing the contacts over time have developed substantial concerns about a number of aspects of the contact which occurred.

[48] The above concerns may be summarised as follows:

(i) There was concern about the quality of the contact especially in relation to EM. It is suggested that the mother failed to pick up cues as to how she should deal with EM with the result that often the child resorted to temper tantrums and other forms of misbehaviour.
(ii) There were altercations between the mother and EM which resulted in the mother handling her roughly.
(iii) The mother at times seemed unable to cope with the demands of the two children.
(iv) At times the sessions were chaotic.
(v) The mother from time to time resorted to the use of inappropriate or bad language.
(vi) At times the mother in the presence of the children undermined the childrens' carers and was responsible for seeding confusion especially in the mind of EM about the course of future events. As a result the child was placed into a state of uncertainty as to where her allegiances should lie.

The Mother's statement of evidence

[49] The Judge also had before her a statement of the mother's evidence. This document proclaims the mother's love for her children and her wish to have them restored to her care. It notes the mother's record in attending and completing courses designed to assist her and indicates that she has been able to learn from these and to apply them to the future care of the children.

[50] In the mother's view she was not responsible for the many moves which she and the children had made. While she blamed the father for these in part she was

critical of the Trust claiming that the Trust was content for her and the children to live in substandard accommodation; for failing to provide appropriate help for her; and for failing to give her due assistance towards her being able to rent suitable private accommodation.

[51] The mother, in her statement, is adamant in rejecting allegations that the father had in recent times been cohabiting with her or that she was having voluntary contact with him. As to the future, she said that she had no intention of contacting him.

[52] In her statement the mother recognised that alcohol and stress played a substantial role in her being unable to cope and implicitly she recognised that her state of mental health was also a factor. As regards these matters, however, she claimed (in March 2012 the date of the statement) that she had been sober since May 2010; that she had joined AA; and that she was engaging with a community psychiatric nurse and was regularly seeing her GP.

[53] Finally she notes that she had moved into a well furnished home in the estate the children were born into with bedrooms for each of the children. She expressed the view that she could listen to the advice of professionals and put the advice into action.

Dr Rodden's report

[54] A report from a Consultant Psychiatrist, Dr Rodden, was before the Judge at the September hearing in respect of the mother. She had been under his care since 2010 but he also had access to records going back to March 2004. He notes that the mother had had diagnoses of Emotionally Unstable Personality Disorder and Alcohol Dependence Syndrome but at the date when he had last seen her as a treating psychiatrist – 2 April 2012 – she was, in his view, not suffering from depressive illness or other severe mental disorder. He notes that she admitted to misusing prescribed medication and alcohol and had recently overdosed. In his view the mother was responsible and accountable for her actions and lifestyle choices.

The emerging themes

[55] In the context of above materials the court considers there is value in seeking to identify by way of overview what may be viewed as the emerging themes.

[56] The first theme which emerges relates to the duration of the Trust involvement with the mother in this case. It seems clear that this involvement is a reasonably constant feature since 2006.

[57] The second theme is one of apparent recurring difficulties in respect of the family. The relationship between the mother and father is plainly a considerable source of difficulty. There exists a well-documented domestic violence problem

between them and it seems obvious that that problem affects not just the parents but the children who are at risk when domestic violence comes to the surface. While it might have been thought that the mother would have identified and understood the damaging influence which the father brings into the home and ended her relationship with him, the history tends to show otherwise. At keys points in the last few years the father has appeared or re-appeared and been responsible for incidents which have had highly detrimental impacts on family life, including causing the family to flee from their home resulting in numerous re-housings, resulting stress and probably resort by the mother in these circumstances to alcohol and/or drugs.

[58] A further obvious difficulty emerging from the background relates to the mother's weakness for alcohol and/or drugs. There is little doubt that when faced with problems and stress the mother will be likely to find refuge particularly in alcohol. This is not a minor matter because the consumption of alcohol and/or drugs is very likely to be destructive of her ability to properly look after her young children. Yet there appears, aspirational assertions apart, to be no resolution of this issue in sight.

[59] Related to these other matters it seems clear that the mother suffers from being unable to cope with stress. A factor contributing to this would seem to be her fragile state of mental health.

[60] A further theme which emerges from the background is one of the mother having been afforded at various times opportunities to prove herself but then her failing to take these opportunities. This is evident on the key issue of her care for the children. Twice she has had the children returned to her by the Trust for periods but twice the Trust has felt constrained to take the children away again. A similar pattern can be identified in respect of other issues such as her on/off relationship with the father and her apparent attempts to give up alcohol.

[61] It appears clear that over time the Trust has been instrumental in the provision of various services to the mother – designed to assist her overcome the difficulties she faced or faces. The records show that the mother was provided with counselling in respect of domestic violence; support to seek to enable her to overcome her difficulties with alcohol and drugs; packages of measures to help her with the needs of the children; and so on. Disappointingly, however, the mother does not appear to have been able, other than temporarily, to reap the benefits of such provision.

[62] Finally there is a particularly unfortunate theme which as time has gone on has become more prominent and that is a tendency on the part of the mother to blame others, particularly the Trust, for setbacks and difficulties while seeing herself as blameless or a victim of circumstance. Increasingly she regards the Trust as the problem and this approach places barriers in the way of the mother being able constructively to work with the Trust.

[63] The court will return to these matters in due course.

The law relating to the appeal

[64] As noted above the High Court's involvement arises from its appellate function in respect of the decisions of the Judge impugned in these proceedings. The court's role, however, according to the developed jurisprudence on this topic, is not that of providing a *de novo* hearing but rather is one which savours more of that of a supervisor or reviewer, but on a broader footing than the role performed by a judge in judicial review. This role of the High Court in the context of appeals in family law cases is dealt with in some detail by Gillen J in the unreported judgment of McC v McC [2002] NI Fam. 10. In this judgment, having considered the operation of the appellate system in family courts in England and Wales and having noted the material similarity of the statutory words used in conferring rights of appeal as between Northern Ireland and England and Wales, Gillen J was of the clear view that the principles which the appellate court should follow in the conduct of appeals are those found in the case of G v G [1985] FLR 894 and related authorities to which he makes reference. In essence, these principles are as follows:

(i) The High Court will not interfere with the lower court's decision unless the decision was plainly wrong or the court erred in law or principle.

(ii) In appeals the High Court will be reluctant to take oral evidence or receive additional evidence but can do so in exceptional circumstances. Decisions to take oral evidence or to receive additional evidence will be likely to be case sensitive.

(iii) Accordingly a High Court appeal will usually not be conducted by way of full re-hearing.

(iv) The High Court on an appeal will consider any transcript of what occurred in the court below, if available, and in particular will consider the reasons given by the lower court in support of its decision.

(v) In hearing the appeal the High Court will pay due regard to the fact that judges work under enormous time and other pressures. Accordingly it would be quite wrong for the High Court to interfere simply because an *ex tempore* judgment given at the end of a long day is not as polished or thorough as it might otherwise be.

(vi) In considering an appeal the High Court will bear in mind that in family cases there is often no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong and the best that can be done is to find an answer that is reasonably satisfactory.

[65] In these appeals none of the parties has challenged the approach summarised or has sought to argue that McC v McC or G v G should not be followed. In these circumstances the court will approach its task in these appeals in accordance with these authorities.

The law relating to freeing applications

[66] Before considering the relevant provisions of the adoption legislation in Northern Ireland, it is both convenient and appropriate for the court to advert to the nature of a freeing order. Any judge dealing with such an order should bear in mind that its object is to extinguish parental responsibility of the natural parents in respect of their child or children as a prelude to adoption. The effect of making an order is to terminate virtually all of the rights of the natural parents in respect of the child or children and their upbringing. Consequently, freeing orders have rightly been described as "draconian in nature" per Lord Carswell in Down and Lisburn Trust and Another [2006] UKHL 36 at paragraph [45].

[67] Freeing orders, self-evidently, also are interferences with the Article 8 rights of a parent to have his or her right to family life respected. This has been recognised by the Strasbourg court, for example, in the Northern Ireland freeing order case of R and H v United Kingdom (2012) 54 EHRR 2. In that case the court held that such orders call for strict scrutiny. As the court put it at paragraph [81]:

> "…measures which deprive biological parents of [their] 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".

[68] Usually there will be no difficulty in establishing that freeing orders are in accordance with law and serve a legitimate aim (usually the protection of the child) but such orders will also have to be necessary in a democratic society and proportionate. This means that an individual order must strike a fair balance between the competing interests. In short, there must be relevant and sufficient reasons of the making of the order: *ibid* at [72] and [89].

[69] The relevant provisions of the Adoption (Northern Ireland) Order 1987 are as follows:

> "**Welfare of children**
>
> Duty to promote welfare of child

9. In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall—

(a) have regard to all the circumstances, full consideration being given to—

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

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

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

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

Parental agreement

16.—(1) An adoption order shall not be made unless—

(a) the child is free for adoption by virtue of an order made in Northern Ireland under Article 17(1) or 18(1), made in England and Wales under section 18 of the Adoption Act 1976 (freeing children for adoption in England and Wales) or made in Scotland under section 18 of the Adoption (Scotland) Act 1978 (freeing children for adoption in Scotland); or

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

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

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

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

to the making of an adoption order; or

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

(2) The grounds mentioned in paragraph (1)(b)(ii) are that the parent or guardian—

(a) cannot be found or is incapable of giving agreement;

(b) is withholding his agreement unreasonably;

(c) has persistently failed without reasonable cause to discharge his parental duties in relation to the child;

(d) has abandoned or neglected the child;

(e) has persistently ill-treated the child;

(f) has seriously ill-treated the child (subject to paragraph (4) below overall).

Freeing child for adoption without parental agreement

18.—(1) Where, on an application by an adoption agency, an authorised court is satisfied in the case of each parent or guardian of a child that his agreement to the making of an adoption order should be dispensed with on a ground specified in Article 16(2) the court shall make an order declaring the child free for adoption.

> (2) No application shall be made under paragraph (1) unless—
>
> (a) the child is in the care of the adoption agency; and
>
> (b) the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption."

[70] Of particular importance to this appeal are two issues which arise from the above provisions *viz*:

(i) Is the court satisfied that adoption will be in the interests of the children?

(ii) Are the parents withholding their agreement to adoption unreasonably?

In respect of these issues, as regards the appellant, the Judge answered each question affirmatively.

[71] A substantial volume of jurisprudence has grown up in respect of issue (ii) above. In Re W (An Infant) [1971] 2 AER 49 Lord Hailsham when considering the test of unreasonableness said:

> "The test is reasonableness and nothing else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent must take it into account. It is decisive in those cases where a reasonable parent must so regard it."

[72] In Northern Ireland Gillen J in the case of In Re C (Freeing for Adoption Contact) [2002] NI Fam. 1 has expanded on the appropriate test in this context. He states:

> "In Re C (A Minor) (Adoption: Parental Agreement: Contact) [1993] 2 FLR 260 the court suggested that the test may be approached by the judge asking himself whether, having regard to the evidence in 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".

[73] Finally in this jurisdiction Morgan LCJ has recently considered the matter In the Matter of TM and RM (Freeing Order) [2010] NI Fam. 23. He notes at paragraph [6] that the leading authorities on the test the court should apply are Re W (An Infant), Re C (A Minor) and Down and Lisburn Trust v H & R which expressly approved the test proposed at Lord Steyn and Hoffmann in Re C which he then set out as follows (citations omitted):

> "… making the freeing order, the judge had to decide that the mother was withholding her agreement unreasonably. This question had to be answered according to an objective standard. In other words, it required the judge to assume that the mother was not, as she in fact was, a person of limited intelligence and inadequate grasp of the emotional and other needs of a lively little girl of four. Instead she had to be assumed to be a woman with a full perception of her own deficiencies and an ability to evaluate dispassionately the evidence and opinions of the experts. She was also to be endowed with the intelligence and altruism needed to appreciate, if such were the case, that her child's welfare would be so much better served by adoption that her own maternal feelings should take second place. Such a paragon does not of course exist: she shares with the 'reasonable man' the quality of being, as Lord Radcliffe once said, an 'anthropomorphic conception of justice'. The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the judge on the one hand and the legitimate views and interests of the natural parents on the other. The characteristics of the notional reasonable parent have been expounded on many occasions: see for example Lord Wilberforce in Re D (Adoption: Parents Consent) ('endowed with a mind and temperament capable of making reasonable decisions'). The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St Marylebone LC said in Re W (An Infant) …

> 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'
>
> Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are interests of herself and her family which she may legitimately take into account. All this is well settled by authority. Nevertheless, for those who feel some embarrassment at having to consult the views of so improbable a legal fiction, we venture to observe that precisely the same question may be raised in a demythologised form by the judge asking himself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question."

The proceedings before Judge Loughran

[74] The proceedings in respect of the Trust's freeing application relating to EM were heard by the Judge on 9 March 2012. Those in respect of the freeing application relating to SM were heard on 3 and 7 September 2012.

[75] Each hearing involved the Judge considering voluminous materials and hearing orally from those witnesses the parties called. The mother gave evidence orally in the course of both hearings as did the father. Both parents were legally represented by solicitor and counsel. In the grounds of appeal of the appellant as formulated at the hearing before this court there was no challenge to either of the hearings before the Judge on procedural grounds.

[76] It is clear that in respect of each hearing there was ample opportunity for each party to present evidence and argue his or her case.

[77] Substantial oral rulings were given by the Judge. Both hearings and the rulings in each case were on the record and this court has been able to read a complete transcript of what occurred.

[78] The transcript of the Judge's rulings demonstrates that the Judge was conversant with all of the legal principles and was well aware of the case law in relation to such applications which I have cited above. It cannot be said (and has not been said) that she erred in law or in respect of any relevant legal principle.

[79] The issue before the court has been whether the Judge made an overall assessment which was plainly wrong. This chimed with the way the grounds of appeal were pruned before this court and the way in which the case was presented by Mr McGuigan QC in his submissions to the court on behalf of the appellant. While initially there were some 11 grounds of appeal in the principal Notice of Appeal relating to the case of EM, three of these were abandoned during the hearing of the appeal. These were grounds (viii), (x) and (xi). The remaining grounds are grounds which relate to factors or elements within the Judge's overall assessment of the various factors in the case.

[80] In the court's ruling in respect of EM the Judge set out in short form the submissions of the parties before offering her views. The Judge acknowledged that the mother loved the child and accepted there were very many positives in her attitude. But it is clear that it was the Judge's view that these factors alone were not enough. The Judge clearly was influenced by the fact that two attempts to rehabilitate EM to her mother's care had been unsuccessful and that among the reasons for this was the influence of the father and the appellant's alcoholism. In the judge's eyes the recent pattern of contacts between the mother and EM demonstrated the difficulties facing the mother. The judge described the contact as "on very many occasions" chaotic. The mother, the judge notes, used bad language to EM during contacts and importantly appeared not to manage EM consistently. On one occasion, the judge recalled from the evidence that during a contact session a supervising social worker had to intervene to prevent SM from injuring EM. The judge, at one point, remarked that the mother lacked "insight into EM's emotional needs". The judge also considered that the mother sent out to EM conflicting messages, for example, about where EM might be placed or who she may be placed with. The judge also noted that the mother criticised the foster carers before EM which inevitably placed EM in a confused state as to where her loyalty should lie. In the judge's view, the contact record showed that SMcC could not cope with the children during contacts. Hence she posed the question how could the appellant cope 7 days a week 24 hours a day?

[81] Overall the judge's conclusion in respect of EM's case was that "she [the mother] does not have the capacity to meet [EM's] needs. [EM] needs to have security and stability" and neither parent could provide these. As the Judge puts it, in a later passage in her ruling:

> "Everyone agrees that [EM] is confused and she needs to know her future … [EM] needs certainty now. And the only certainty that can be given to [EM] is through a permanent placement. And neither of her parents is able now or in the foreseeable future to meet all her needs in a permanent placement".

[82] In these circumstances the Judge's conclusion was that "adoption is the only route to providing her with stability and security". Therefore, the Judge expressed herself as satisfied that adoption was in EM's best interests.

[83] At this point in the ruling the Judge went on to consider the question of whether the parents were unreasonably withholding consent to adoption. On this issue the Judge noted the position of the father in prison. While there, the Judge was of the view he could not parent his daughter. But, in any event, the Judge was unimpressed by the father's expressed view that there were no problems in EM being looked after by the mother. This view, in the Judge's estimation, showed "a singular lack of insight into the needs of the child". This led the Judge to conclude that the father was, when the hypothetical parent test was applied, unreasonably refusing his consent to adoption.

[84] The same conclusion was arrived at by the Judge in respect of the mother in view of the need on the part of the child for stability, security and certainty.

[85] A ruling essentially to similar effect, was provided by the Judge on 7 September in respect of SM. The transcript of this ruling plainly shows that the Judge directed herself properly in law and had considered the material before her.

[86] In this ruling the Judge's emphasis is on the mother's abuse of alcohol. While the mother had given evidence before the Judge that she had stopped drinking the Judge drew attention to various materials before the court especially the report from a Consultant Psychiatrist Dr Rodden, to which reference has been made above, which tended to show that she had been drinking as lately as 2 April 2012. In view of this the Judge plainly felt that the evidence of the mother could not be relied on. In the Judge's view the mother could not meet the needs of her children when she was abusing alcohol.

[87] On the question of whether adoption would be in SM's best interest the Judge concluded as follows:

> "My view is that the evidence before this court from her treating psychiatrist is that within the last 6 months she has been abusing alcohol and prescribed medication to the extent that she was in fact hospitalised and this leaves me in no doubt whatsoever that she hasn't even begun to make the change in her alcohol consumption which would be a pre-condition of [SM] being returned to her care. And she has been given enough time to address the issue, she failed to address it and therefore, in my view, the welfare of [SM], given his age, given the number of moves he has had, given the length of time that he has been in care, … dictates that he now needs the

> certainty … stability and security and his welfare demands that he be adopted".

[88] As regards the parents unreasonably withholding their consent to adoption the Judge reached conclusions in respect of each parent similar to that she had reached in respect of the case of EM.

The receipt of additional evidence

[89] Since September 2012 some items of new evidence have been assembled by the parties. The Trust at the appeal hearing sought to introduce that material into evidence. The application was not resisted by any party. In these circumstances the court was prepared, where the circumstances of the mother was central to the issues in the appeal, to agree to admit the evidence.

[90] The additional evidence consisted of the following:

(a) A further and more up-to-date report on the mother by a Consultant Psychologist, Dr McDonald.

(b) An up-to-date report on the mother by a Consultant Psychiatrist, Dr Bunn.

(c) Further contact reports in respect of contact between the mother and the children).

(d) Certain reports in respect of, in particular, EM's educational progress.

[91] The report of Dr McDonald is dated 13 January 2013. In its section entitled "Relationship History" it is recorded that the mother had stated that the father was an alcoholic and drug addict. The mother referred to their relationship as chaotic and violent. Nonetheless, Dr McDonald records that the mother was visiting the father fortnightly in prison. She is quoted as saying that "the two of us [are] building a case to get the kids back". She later denied to Dr McDonald that she was in a relationship with him.

[92] The mother acknowledged to Dr McDonald that alcohol consumption had a significant impact on her ability to cope, though she said that she had disengaged with alcohol consumption over the previous 3 year period. This statement was questioned by Dr McDonald who records that the medical reports in respect of the mother had contained the information that during 2012 she had misused drugs and alcohol and had taken an overdose of paracetamol, diazepam and alcohol.

[93] Dr McDonald's report goes on to record that the mother placed primary blame on the Trust in respect of her parenting of the children in that the Trust had

failed to provide support. At a later point in the report the mother is also recorded as attributing blame for EM's poor behaviour on the foster parents. In particular the mother alleged that the foster mother was "pumping [EM] to make her insecure". At another point the mother indicated that EM's behaviour arose because the child wished to return to her mother. In respect of the current placement the mother is noted as saying that the carers "had the calculated intent to influence the children to ensure that the minors remain with them".

[94] In respect of the above Dr McDonald offered the view that the mother's "embitterment towards the statutory agency is entrenched and close minded in respect of any validity to the children's placement beyond her direct care". He identified this state of mind as indicating a poor prognosis in terms of her ability to prioritise the childrens' interests over her own.

[95] As to the mother's mental well being Dr McDonald was of the view that the frailty of her emotional health was well documented and that historically she was prone to damaging episodes of behaviour, such as overdoses, as impulsive responses to stress. In short, pervasive instability has been a dominant feature within her life domain for a chronic time period.

[96] Overall Dr McDonald concluded that if the mother was to be involved in the primary caring role in respect of the children she would require extensive support, education and direction and a positive response from her in respect of these. However, in his view, the mother's current mindset provided a poor prognosis for learning.

[97] Dr Bunn is a Consultant Psychiatrist and his report is based on an examination of the mother which was carried out on 9 January 2013. It notes that at the date of examination the mother was on anti-depressant medication and that she struggled, in her own view, to cope with stress. The report notes that the mother had little family support but that, according to the mother, when she has asked for support from welfare services it had not been provided. In respect of her past psychiatric history Dr Bunn indicates that she admitted to a history of overdosing but that currently there were no thoughts of self-harm, harming others or suicide. In Dr Bunn's review of the mother's medical records he drew attention to an incident on 16 March 2012 when the mother had consumed some 100 Temasezapan and Diazepam tablets in the context of alcohol use. On this occasion the mother attended the Emergency Department of Craigavon Area Hospital. Dr Bunn also noted that in the previous week to this at an outpatient's review the mother on 11 April 2012 had reported having taken an overdose. There is also a reference to her having been drinking for the last month.

[98] Dr Bunn describes the mother as evidencing deficits in her personality and to her being of an emotionally unstable borderline type. He remarks:

> "This may manifest itself with difficulties coping resulting in deliberate self-harm in the form of overdosing, turning to alcohol or chaotic lifestyle, therefore presenting to services in crisis".

In his view there was a history of alcohol dependence and poly substance misuse. At paragraph 8.2 of his report the matter is put baldly with the doctor opining that "her mental health symptoms will adversely impact her ability to care for her children".

[99] A further view offered by Dr Bunn as regards the mother was that in view of her traumatic life experiences and her poor coping with stress in the future it was highly unlikely that she would revert back to past coping behaviours. On top of this Dr Bunn's view was that the mother minimises the seriousness of her current circumstances and blames others rather than herself for her own actions. The past did not demonstrate any ability to cope with adverse pressure and he indicates that he is fearful that in the future "she would quickly revert to crisis management including overdose and alcohol misuse".

[100] In summary, Dr Bunn offers the opinion that the mother "will cope poorly with stress and the demands of parenting. She will quickly be overwhelmed and present to services in crisis". She also, in Dr Bunn's view, was insightless stating that she saw no problem in coping with both children when this clearly was not the case. In his view she had failed to provide a safe environment for the children and at times cannot prioritise the needs of the children. Any support network, while beneficial, would not be sufficient to assist her in crisis management.

[101] The further contact reports provided to the court have been considered by the court but do not require summarisation here.

[102] Finally, the court was provided with a report in relation to EM's progress at school written by her class teacher. It covers the period from September to late November 2012. In many ways the report is disturbing in that it depicts a young child who one day is lethargic while the next day is in a heightened state of arousal. The report describes various incidents: of disruptiveness on the part of EM; of the use by her of bad language; of her acting in a sexually inappropriate manner; of her being aggressive towards class mates and of her attempting violence on herself (attempted to cut her tongue with scissors). The picture painted is of a troubled and insecure child.

The submissions of the parties

[103] The Court has already referred above to the broad stance of the parties before it.

[104] For the mother, Mr McGuigan QC, advanced the argument that the mother was capable of looking after the children and had to an extent been the victim of events beyond her control. In particular, the father had in December 2009 been responsible for the family having to leave their home and the large number of relocations thereafter could not be laid at the door of the mother. What the mother had been able to show was her capacity to care for the children at least to the point where not once but twice the children had been returned to her. The mother, in his submission, was able to learn from past mistakes and in recent times this had been demonstrated by her abstaining from alcohol and her enthusiasm for contact with the children. She had, he said, adjusted her lifestyle and realistically could parent the children in future if given a chance.

[105] The Judge below had failed, in counsel's submissions, to take properly into account the fact that it was factors largely beyond her control which in the past had led to breakdown of placements. The reality was that the Trust had not taken the steps it should have particularly in the context of procuring help for the mother in looking after the children. It was argued, moreover, that the Judge had failed to give the mother the credit she deserved for the high standard of care she had been able to provide for the children and which had induced the return of the children to her care in the past. In this regard it was suggested that the mother would be able to work in harmony with the Trust in providing to the children a high standard of physical and emotional care if she was given the chance to do so. There was no good reason for believing that the mother would repeat the mistakes of the past and to the extent that the Judge below took that view, her assessment was wrong.

[106] In reviewing the reasons for the Judge's decisions in the court below it was suggested that the Judge had placed far too much significance upon contact reports, especially a small number of recent negative reports about the mother.

[107] In view of the above, and other points which I have not here summarised, Mr McGuigan did not shirk from the submission that the Judge below was plainly wrong in her overall assessments, both as to adoption being in the childrens' interests and as to her having withheld her consent to adoption unreasonably.

[108] As noted earlier, the father's posture in the appeal was as a supporter of the mother's position. He accepted that his behaviour had in part led to the difficulties which faced the mother and submitted that this should be taken into account by the court. In his view the court below had made the wrong decision.

[109] For the Trust, Ms Murphy argued that the mother's evidence was unreliable and that her assertions of not engaging in alcohol consumption and in drugs in recent times were unsustainable in view of the medical evidence in the case. The Judge below was clearly dissatisfied in terms of the veracity of the mother's claims in this regard and she had not erred in her view on this aspect of the case.

[110] The Judge moreover, it was submitted, clearly had carefully taken into account the history of the case and the many incidents in which the mother had been involved. The children had been only for a relatively small proportion of their lives in the care of the mother and that care had fallen below acceptable standards so requiring the Trust to intervene. In so far as it was suggested that that mother had not been provided with suitable assistance Ms Murphy argued that the provision of assistance had been fully documented with the consequence that the mother's claim in this regard was unsustainable. The Judge was well aware of the degree of assistance and support provided by the Trust and plainly did not view the mother's criticisms of the Trust with any favour.

[111] On the contrary it was submitted that the Judge had rightly identified a series of factors relating to the mother as being responsible for her inability to parent in a satisfactory way. Chief among these was the mother's problem with alcohol and drugs; her inability to cope with stress; and her fragile mental state. The mother's housing problems, counsel indicated, was not a predominant factor in the Judge's thinking and the truth was that the Judge, for various reasons, had failed to accept the argument placed before her that the mother had been able to make sufficient positive changes to her lifestyle to enable the court to conclude that adoption was not the course which best served the children's welfare. A return to the mother of the children was more than demonstrated by the apparent fragility of the mother's adherence to her new regime.

[112] In the Trust's view the Judge reached obvious and wholly sustainable conclusions that the way forward for the children was adoption and that the mother (and father) had unreasonably withheld their consent to this course. In others words, far from the Judge being plainly wrong, she was plainly right.

[113] As has already been noted above the Guardian ad Litem's view as provided to this court and to the court below has firmly been in support of the Trust's position. In the Guardian's view the mother was not and had not been open and honest with the court, for example, as to her relationship with the father. The Guardian considered that there was clear evidence that the mother could not cope with stress but brought stress on herself in a variety of ways through her drinking and her relationship with the father and her failure fully to co-operate with the Trust. In the Guardian's view the Judge was fully entitled to make the decision she did.

Was the judge plainly wrong?

[114] It seems to the court that the starting point in reaching a conclusion on the question above is to have regard to the position of the children. As already noted, both are of tender years and neither to date is at an age where he or she is able effectively to speak for himself or herself in proceedings of this nature. But it can hardly be doubted that both have suffered from a disruptive childhood to date and both have had to adjust, not just to a large number of relocations but also to life with

a succession of carers including their own natural parents, particularly their mother, and their current carers, Mr and Mrs C. It is difficult to accept that such chopping and changing which has occurred in the past can be productive of anything other than instability, uncertainty and insecurity and it is beyond argument that the effects of such cannot be other than detrimental to their welfare. This is a bad enough state of affairs in itself but it has undoubtedly been added to by the extensive period of time which has been consumed to date in determining what should occur in relation to the children. In these circumstances, as the Judge below recognised, there was and is an urgent need for the children to be provided with a loving environment and living conditions which are likely to be enduring and sustainable. There is already evidence of behavioural problems in EM's case, and in the court's estimation, these are unlikely to disappear in the absence of there being some certainty as to the way forward. While it is inevitable that the working out of care plans and the consideration of the possible ways forward will be bound to use up time in a purposive way, there will inevitably, in the court's view, be a point at which a longer term course has to be charted. In the case of these children, as the Judge below accepted, this time has now arrived.

[115] The long term needs of the children require a stable, secure and loving long term environment with the result that the enquiry for the Judge and now for this court necessarily must focus principally on the question of how what is needed can be achieved. The options in this regard are not limitless and must be realistically assessed before decisions are made.

[116] The Trust's preferred option, as is clear from the above, is adoption. It has for some time now been of the view that this course is in the best interests of the children. This conclusion, moreover, has not been arrived at lightly. Other ways forward have been considered. This is well evidenced in the papers. The Trust has explored the possibility of other family members than the mother and father looking after the children but the search for suitable carers of this type has been in vain. The option of the children being returned to their mother has also been considered. Indeed the Trust has tried and tested this option twice before without success. Unfortunately, on both occasions, for a variety of reasons, it has not proved successful. There have been difficulties, not all of which have been of the mother's making. Many of the mother's housing difficulties, as it seems to the court, arose from factors beyond the mother's control but, notwithstanding this, there are other indisputable factors for which the mother is primarily responsible which have been instrumental in creating unacceptable conditions in which to bring up young children.

[117] Firstly, there is the mother's alcohol consumption and her taking of drugs. While the court accepts that the mother has made efforts to overcome her difficulties in these regards on the evidence (as the judge below found) there could be no confidence that the mother has been able in fact to do so. Indeed, events in 2012 falsify the mother's claims that she has been able to stay off alcohol and drugs.

Instead, the evidence is that she continues to resort to these not infrequently and sometimes in an almost self-destructive way.

[118] Secondly, there is what appears to be an enduring relationship between the father and mother which has been responsible for much heartache for the family. The element of domestic violence has already been referred to in this judgment. The problems of the parents' relationship appear intractable and the court is unable to place any credence in the notion that the mother's relationship with the father is over. There is clear evidence that the mother still continues to this day to visit the father while he is in prison, notwithstanding all that has passed between them. The keeping alive of this relationship, in this court's view, endorsing in this regard the view of the Judge below, is likely often to be to the dis-benefit of the children. The reality in this context appears to the court to be harsh. The mother should long ago have put an end to the influence of the father, both in relation to her and her children. While that relationship subsists, it seems to the court unlikely that any form of stable family life for the children with the mother will be possible. The father brings into the unit, as his past behaviour clearly demonstrates, a malign influence which can give rise to a family crisis almost at any time.

[119] Thirdly, there is the factor of the mother's own susceptibility to stress and her fragile mental health. It very much appears that the mother is in something of a vicious circle. When she feels stressed she is unable to cope well but she is unable to avoid stress by reason of a chaotic lifestyle, poor relationship with the father, and her limited parenting skills. Of course when there is stress this promotes self-destructive behaviour. There is clear evidence that the mother in such circumstances turns to alcohol and/or drugs and is prone to binge drinking and on some occasions overdosing. A pattern of conducting herself in these ways is highly destructive of her capability to look after her children.

[120] All of these factors have caused the Trusts to discard the option of placing the children with their mother and therefore to look to other solutions.

[121] The Trust's preferred option has developed over time. It has, as noted above, now settled on adoption as a permanent solution and as the way to build in stability and certainty into the life of the children.

[122] The advantages of this option in the circumstances of this appeal appear to be substantial. Fortunately, the children are already settled with Mr and Mrs C. The environment in which they have been living has been reported on by social work staff positively. The court is satisfied that Mr and Mrs C provide a high quality and loving environment for the children. In so far as the mother has made some allegations against Mr and Mrs C, the court finds no substance in these. The children are still at an age where adoption can constitute a fresh start with limited heartache. But above all, freeing for adoption would appear, having regard to the issue of the welfare of the children, to be very much in their interests and would be likely to secure the benefits referred to at paragraph [113] above.

[123] The option argued for by the mother is that she should be restored to the position of the carer of the children. This option is supported by the father also. Both are firmly of the view that the children should not be freed for adoption. It seems to this court that the court below was correct to accept that the mother loved and was committed to her children, but the issue arises as to whether such love and commitment without more can provide what is required in this case. Can the mother provide the sort of stable, safe, enduring environment for the upbringing of the children which has been discussed above?

[124] In respect of this question the Trust answer negatively and the Judge in the court below was in agreement with that response. The reasons for these stances have already been identified and set out in the discussion at paragraphs [116]-[119] above. In short, the mother is unable at this time to care for the children because of the difficulties which beset her and which are still there and are unlikely to change within any sort of practical timescale. While credit should be given for the mother's attempts to reform unfortunately it has not proved possible for her not to slip back into old ways and habits which have been and are likely to be destructive of her ability properly and to an acceptable standard to look after the children.

[125] The court is satisfied that the Judge below essentially was acting on the basis of the analysis above even though the *ex tempore* judgments are not laid out precisely in the same way as this court has dealt with them.

[126] Reverting to the questions formulated at paragraph [70] above, this court, having regard to the materials before the Judge below, agrees with the Judge's conclusion that adoption was the way forward for each child and is the option which was in each child's best interests. In this court's view, the train of reasoning of the Judge was balanced and disclosed relevant and sufficient reasons for her conclusion. The issue, moreover, in this court's view, was not borderline. Given the background, the train of events, and the factors already referred to, this court considers that by some margin the adoption option was that which best met and meets the requirements of the situation and of each child.

[127] The second issue – that of whether the mother was unreasonably withholding consent to adoption – was also answered by the Judge below in the affirmative. But it seems to this court that once one accepts that in relation to these children that adoption is in their interests, especially if adoption is to be viewed as being clearly in their interests (as this court thinks), it will be likely to follow that an objective parent considering the issue would be likely to conclude that any course other than that of consent to adoption would not be reasonable. For this reason, when read in the context which has been described at length above, this court reaches the conclusion that it agrees with the decision on the second issue of the court below.

[128] It follows from the above that this court is of the view that the Judge below was not wrong (never mind plainly wrong which is the relevant threshold for intervention) in making the orders she did and in freeing each child for adoption.

[129] The court makes it clear that its analysis above is based on an anxious scrutiny of the Judge's decision having regard to the material before her. The court has reached its conclusions leaving out of account the additional evidence which was admitted for the purpose of this appeal. Unfortunately for the mother when that new material is placed in the balance the effect, in the court's view, is to copper fasten the judgment in the court below as the picture which emerges from the recent reports of the psychologist and the psychiatrist tends to give strong support to the Trust's arguments. This court is satisfied that the mother has in the past received extensive support from the Trust. This is substantially evidenced in the papers before the court. It therefore rejects arguments made by the mother that it is the failures of the Trust which are responsible for the present situation. But what is of greater importance for present purposes is the evidence contained in the reports which depicts the mother as at loggerheads with the Trust and as effectively being unable to work with it. Such a situation can only have a negative effect on the mother's case in that it makes it more unlikely that the mother will be able to discard the range of negative factors which militate against her as a potential carer of the children. It therefore also militates against her being able to provide the pattern and standard of care which is necessary in the circumstances.

[130] Finally, and for the avoidance of doubt, this court makes it clear that in reaching its conclusions on the issues in this appeal it has considered the interference which the decisions below (and now this court's judgment) represents to the mother's Article 8 rights. However the conclusion of the court is that such interference, unwelcome as it is to the mother, is justified by the exceptional circumstances of this case and the need to protect the interests of each child. The reality of this case, it seems to this court, is that there is no viable alternative option to that of adoption. It is therefore of the view that in dismissing the mother's appeal it is acting, as the Judge below was acting, proportionately having balanced carefully the competing interests which arise in this context.

Conclusion

[131] For the reasons given above, this Court dismisses the mother's appeal in respect of each order made by the Judge below.

Hilary Term
[2015] UKPC 9
Privy Council Appeal No 0081 of 2013

JUDGMENT

Pora (Appellant) *v* The Queen (Respondent) (New Zealand)

From the Court of Appeal of New Zealand

before

Lord Kerr
Dame Sian Elias
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT DELIVERED BY LORD KERR ON

3 March 2015

Heard on 4 and 5 November 2014

Appellant
Jonathan Krebs
Ingrid Squire
Malcolm Birdling
Kim McCoy
(Instructed by Alan Taylor and Co)

Respondent
Michael Heron QC
Mathew Downs
Zoe Hamill

(Instructed by Crown Law Office (New Zealand)

LORD KERR:

1. Susan Burdett was raped and murdered in her home in March 1992. In May 1994 the appellant was convicted of both crimes (and of aggravated burglary of Ms Burdett's home) following a jury trial. In 1999 the New Zealand Court of Appeal quashed the convictions and ordered a re-trial. On his re-trial before Williams J and a jury in March 2000 he was again found guilty. The appellant again appealed to the Court of Appeal. That court dismissed the conviction appeal in October 2000. This appeal lies from that decision.

2. Two principal grounds of appeal are advanced on behalf of the appellant. The first is that the confessions which he made concerning his complicity in the crimes (and which the appellant asserts constituted the main evidence against him) have been shown to be unreliable. The second ground is that evidence concerning another man who was convicted of the rape of Ms Burdett should have been admitted at the appellant's trial. This evidence, it is submitted, would have cast considerable doubt on the Crown case that the appellant had been present when Ms Burdett was raped and killed.

The confessions

3. Martha McLoughlin is Teina Pora's cousin. She has claimed that in the week after Ms Burdett's murder the appellant told her that he had discarded a softball bat in a drain near a sports venue called the Manukau Velodrome. According to Ms McLoughlin, Pora told her that the bat was blood-stained. Richard Marcus Bennett, the brother of Pora's girlfriend, gave evidence on the appellant's re-trial. He testified that some days after the murder, he and others, including Teina Pora, had been in the vicinity of the velodrome and that Pora had looked into a culvert and then had pointed out that a bat was visible. Bennett and the others looked into the culvert and saw part of a baseball bat. According to Bennett, Pora said that this could have been the bat which "wasted the lady in Pah Road". Ms Burdett had lived and was murdered in a house in Pah Road.

4. It is at least distinctly possible that the murder weapon was a baseball or softball bat but it has never been possible to identify conclusively a particular bat as the one which was used to inflict the fatal injuries. The only two bats which featured in the evidence as possible candidates for the murder weapon were the bat found in the pipe or drain near the velodrome and a baseball bat which the deceased had kept beside her bed. This baseball bat was found on the deceased's bed after the discovery of her body. Although neither bat could be directly linked to the

murder, the jury on the second trial heard evidence that an implement such as a baseball bat was, as the trial judge directed them, the "kind of thing … consistent with" the injuries that she had suffered.

5. The appellant was interviewed by police twice in 1992. On 7 April 1992 he made a statement to a detective constable that he had seen a baseball bat in a concrete pipe. Nothing further of significance emerged at that interview. Pora was interviewed again on 28 May 1992. He denied having made the remarks to his cousin or to Bennett which they had recounted to police.

6. On 18 March 1993 the appellant, then aged 17, was arrested in relation to a vehicle which had been stolen. After having been questioned about this, he told one of the interviewing detectives that "mobsters" had been looking for him and that he was scared of them. He then asked whether the police had apprehended anyone for the murder of Ms Burdett. When he was told that they had not, he said that he knew who had committed the crime. He was then told about a reward for information leading to the conviction of the offenders. He replied that this was "no good" to him as the mobsters would "find out". One of the interviewing officers then told him that, at the discretion of the Solicitor General, an indemnity against prosecution could be available for anyone who was not a principal offender. A form was produced which purported to clarify the circumstances in which such an indemnity might be available and this was explained to the appellant. After an initial failure to comprehend, Pora claimed to have understood it.

7. There then followed a series of interviews which continued over four days during which Pora gave various accounts of his knowledge of and later his involvement in the invasion of Ms Burdett's home, the attack on her, the rape that was perpetrated on her and, eventually, the circumstances in which she was murdered. It is unnecessary to rehearse the content of those interviews at length. Pora's accounts are strewn with inconsistencies, contradictions, implausibility and vagueness. At various times his replies to questions are halting, hesitant, incoherent and bizarre. A few examples will be sufficient to illustrate the nature of his responses.

8. Initially, Pora claimed that he had taken two men whom he identified only as "Dog" and "Hound" to Ms Burdett's home to carry out a burglary. At first he claimed that he did not know their true names. After the burglary, they had returned to his car carrying a baseball bat with blood on it. Soon after he gave this account, Pora accompanied police to a house where he said that Dog and Hound lived. On his return to the police station he said that he had lied about his involvement in the murder. He said that he had gone to Ms Burdett's home but only as a lookout. He did not enter the house. Within a short time of giving this

version, however, he said that he did indeed go into the house and there observed Dog and Hound raping Ms Burdett.

9. During an interview at 2.24pm on the 18 March he said that on the day of the murder he had gone to Superstrike (a ten pin bowling alley where Ms Burdett played regularly). Dog and Hound had come up to him and told him that they were going to follow Ms Burdett's car, with Pora driving the following vehicle. He agreed to do this and drove behind Ms Burdett's car to her home, he said. Despite this and despite the fact that he was an experienced car thief, he was quite unable to describe the car, to identify its make or model or to say whether it was small or large. When he was taken by police on a drive designed to show his route to Ms Burdett's house, he appeared disorientated, unable without assistance to indicate the way to her house and had great difficulty in identifying the house even when he was standing directly outside it.

10. It was on the issue of how entry to the house was obtained, however, that Pora was at his most vague and inconsistent, not only when he accompanied police to the property but also in the accounts given during interview. At first he claimed that he had climbed through a window; then he said that he had waited outside the back door and was admitted to the house by Dog. This complete volte-face occurred within the space of three transcribed lines and two successive questions on the interview record. Later during interview on 18 March he said that all three had climbed through a window. But within moments he said that Hound had gone in through the door. Then he reverted almost immediately to the account that all three had climbed through the window. At 6.18 pm on the same day, when he was at Ms Burdett's home with police officers he suggested that all three of them had climbed through a window by the back door.

11. Pora was also wildly inconsistent about the part that he had played in the events of the evening that Ms Burdett was killed, claiming at times that he did not witness the killing, having been out of the room when it had occurred and at others admitting to having struck Ms Burdett and held her down while she was attacked. These variations are not, in themselves, unduly surprising. Criminals who admit their crimes frequently seek in the first instance to play down their role. But this does not explain why radically different accounts of the parts played by Dog and Hound were given. One consistent feature was that Dog had raped Ms Burdett but, as to Hound's actions, Pora's account differed dramatically and often within a few consecutive sentences of a particular version having been given. He said at various times that Hound had raped Ms Burdett as well as Dog and then at others he insisted that Hound had not done so at all. No discernible reason for these remarkably different versions can be gleaned from the transcript of the interviews.

12. Of course, all these circumstances have to be viewed against the background that there was no evidence whatever (apart from Pora's word) that the two men, whom he referred to for most of the interviews as Dog and Hound, had anything whatever to do with Ms Burdett's rape and murder. Although at first he refused to, or claimed to be unable to, give the true names of the men, Pora later admitted that he knew them as Roy Wong Tung and Gert. In the event, DNA recovered from the body of Ms Burdett was linked to Malcolm Rewa who was subsequently convicted of having raped her; Roy Wong Tung and Gert gave blood samples in order to establish their DNA and, on the basis of the results obtained, were eliminated from the inquiry. Rewa has been found guilty of no fewer than 24 sexual offences against women, many of these bearing strikingly similar characteristics and in most, if not all, he acted alone.

13. At the invitation of the interviewing police officers, Pora drew an outline of the body of Ms Burdett as she lay on the bed during the attack on her. Significantly, this was in a different position from that in which Ms Burdett's body was discovered. Pora had drawn the figure representing Ms Burdett as lying fully on the bed whereas her body was discovered with the lower legs draped over the side of the bed. This is a position in which many of Rewa's victims were placed by him in order to carry out his attack on them.

14. Although the confessions made by Pora contained many internal inconsistencies and cannot in all respects be reconciled with the known facts and although they implicated individuals who, so far as the available evidence can show, had nothing to do with the crimes, the statements that he made constituted a graphic account of the rape and murder of Ms Burdett. It is an account, moreover, which can be shown in some of its material elements to be consistent with the circumstances surrounding the murder. These include the fact that a bat may have been used to inflict the fatal injuries; and that, in search of money, Pora had looked through a "suitcase type bag" which contained "paper". Police had discovered Ms Burdett's briefcase on the bed with its locks disengaged and papers spread across the floor.

15. It was therefore unsurprising that the appellant's confessions were of critical importance in the case presented against him on both his trials and that they played a pivotal part in the dismissal of the appeal against his convictions.

Treatment of the confessions in the earlier proceedings

16. Before his trial in 1994, counsel then acting for Pora challenged the admissibility of his confessions on the grounds that these were obtained in breach of the New Zealand Bill of Rights Act 1990 and that they were the product of unfairness

both because of a promise of immunity and because his relations had been used to extract the statements – his aunt and uncle had been present during later interviews. The challenge under the Bill of Rights Act was abandoned in advance of a hearing before Henry J as to whether the confessions should be admitted. Nothing was raised about any mental impairment that the appellant might have suffered. On 8 March 1994 Henry J ruled that the confessions were admissible. An appeal against this decision was dismissed by the Court of Appeal on 3 June 1994. Again no issue about the mental capacity of the appellant was raised, beyond a suggestion that he had not understood the distinction between the roles of a principal and a secondary party in the commission of an offence as part of a joint enterprise.

17. On his first trial the appellant gave evidence. He denied involvement in the crimes. He was unable to explain satisfactorily why he had confessed to involvement, however. He was duly convicted and sentenced to life imprisonment.

18. After Rewa was convicted of the rape of Ms Burdett (on 17 December 1998, following a second trial), Pora appealed his conviction for the offences of which he had been found guilty. The Court of Appeal (Elias CJ, Keith J and Panckhurst J) allowed the appeal, quashed the convictions and ordered a re-trial. As Panckhurst J (delivering the judgment of the court) observed, the appeal was based on the single ground that, had the evidence of the DNA match to Rewa and his distinctive mode of offending been before the jury, they might not have convicted him on the basis of his confessions. The judge commented that Pora had been "bereft of an explanation" as to why he had confessed. He also referred to the competing arguments on the reliability of the confessions. In short summary, these were, on behalf of Pora, that the confessions were deficient in compelling detail and that such detail as they did contain was in the public domain, while on behalf of the Crown it was contended that certain details could only have been given by someone who had been involved in the crimes. The Court of Appeal considered that it was better not to express a view on these competing arguments in light of the fact that it had decided to quash the convictions because it could not be assumed that the appellant's confessions would be accepted by a jury "with knowledge of the Rewa dimension".

19. Significantly, the Court of Appeal considered that the Crown case had been based solely on the appellant's confessions. Noting the fact that the possibility of falsely confessing to serious criminal offending was now well recognised, it considered that the convictions should be quashed. In so holding the court referred to the appellant's immaturity at the time that he confessed to the crimes and his marked lack of literacy skills. There was no reference to any other form of mental impairment of the appellant.

20. Pora's second trial began on 20 March 2000. Again, the Crown case relied heavily on the confessions which he had made. Evidence was also given of an association between Rewa and Pora. In particular Martha McLoughlin said that she had seen them together on three occasions, including a few days before the murder. Another witness, Mark Shepherd, also claimed to have seen Pora and Rewa together on three occasions. The appellant did not give evidence on the second trial and no evidence was adduced, therefore, as to how or why he came to make the confession statements. He was again convicted.

21. The second appeal against conviction was based on two principal grounds. First that the trial judge was wrong to have prevented counsel from cross examining about erectile dysfunction that Rewa suffered from, which, it was suggested, would have thrown into doubt the Crown's theory that Pora and Rewa had acted in concert. Secondly, it was claimed that the trial judge had erred in permitting the Crown to recall a witness. The Court of Appeal rejected both arguments. The question of the reliability of the appellant's confessions does not appear to have featured to any significant extent on the appeal. Certainly, no question was raised about any mental impairment on the part of Pora that might have explained how he had come to make the confessions.

The new evidence

22. The appellant applied to introduce ten items of new evidence. These consisted of (i) a number of affidavits from medical and clinical witnesses, Professor Gisli Gudjonsson, a clinical and forensic psychologist, Valerie McGinn, a clinical neuropsychologist and Andrew Immelman, a consultant psychiatrist; (ii) affidavits from the appellant; (iii) affidavits from police officers who had been involved in the investigation of Ms Burdett's murder; (iv) an affidavit from a private investigator; (v) an affidavit from Pora's former counsel; and (vi) an affidavit from Professor Glynn Owens on the subject of whether Rewa was likely to have acted alone in the rape of Ms Burdett. The Board considered these materials in the course of the hearing of the appeal *de bene esse* without deciding whether they should be admitted.

Professor Gudjonsson

23. Professor Gudjonsson was asked by the appellant's solicitors to consider the reliability of confessions made by Pora to police and to some of his relatives; and to evaluate any other matters that he thought relevant, including the appellant's performance in the witness box and any possible disadvantage that he might have had at trial. This was a wide-ranging brief and Professor Gudjonsson undertook a commensurately all-embracing review of all aspects of

the case which included interviews and psychometric testing of the appellant, review of video recordings of the crime scene, crime scene reconstruction, police interrogation, witness statements, and the results of intellectual and neuropsychological tests, which he had asked to be undertaken. He also prepared an extensive appendix consisting of "extracts from time line, questions and answers in police interviews during Mr Pora's period in police custody, and observations (comments)".

24. Professor Gudjonsson can certainly not be faulted for any lack of thoroughness in his approach to the preparation of his evidence. But the Board would wish to make three general observations about that approach before commenting on some particular aspects of his reports and appendix. It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. Professor Gudjonsson trenchantly asserts that Pora's confessions *are* unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity. It would be open to Professor Gudjonsson to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession but, in the Board's view, it is not open to him to assert that the confession is in fact unreliable.

25. The Board has reached this conclusion notwithstanding the provisions of section 25 of the Evidence Act 2006 and the submission that the common law of New Zealand before the passing of the Act broadly mirrored those provisions. Section 25 provides:

> "(1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
>
> (2) An opinion by an expert is not inadmissible simply because it is about—

> (a) an ultimate issue to be determined in a proceeding; or
>
> (b) a matter of common knowledge."

26. It was submitted that section 25(2)(a) had abolished the common law rule that forbade evidence being given as to the ultimate issue. The Board does not accept that proposition. The rule may have been modified by the 2006 Act but it still has a part to play in the decision as to whether particular species of expert evidence is admissible. As Andrews J observed in *R v Phillips HC* Rotorua CRI-2007-070-1765 at para 30:

> "[W]hile section 25(2) of the Evidence Act does not make evidence as to the 'ultimate issue' (that is, one that is to be determined by the jury) inadmissible on those grounds alone, it does not make such evidence admissible. Admissibility must still be determined."

27. The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter which is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to give an opinion on such a matter but this is not one of them. It appears to the Board that, in general, an expert should only be called on to express an opinion on the "ultimate issue" where that is necessary in order that his evidence provide substantial help to the trier of fact. As observed above, Professor Gudjonsson could have expressed an opinion as to how the difficulties that Pora faced might have led him to make false confessions. This would have allowed the fact finder to make its own determination as to whether the admissions could be relied upon as a basis for a finding of guilt, unencumbered by a forthright assertion from the expert that the confessions were unreliable. In this way it would be possible to keep faith with and preserve the essential independence of the jury's role, which is to evaluate all the relevant evidence, including both expert evidence and other evidence which the expert may have no special qualification to evaluate.

28. The second preliminary observation relates to the professor's comments in the appendix which summarised the interviews of the appellant. At various points these partake of a forensic annotation with the apparent purpose of giving credence to the thesis which Professor Gudjonsson had advanced that the confessions were unreliable. For instance, observations are made about Pora's difficulties in describing the route that he is supposed to have taken when following Ms Burdett's car and his having to be shown a road map of the area

and about one detective officer's apparent scepticism of the appellant's account. Likewise, in his first report of 25 June 2012, Professor Gudjonsson conducts an extensive forensic review of the evidence assembled by police in the course of their investigations and refers to a number of matters which have no direct relevance to the question which it was legitimate for him to address, *viz* whether Pora was someone who might make a false confession because of some personality or psychological disorder. To take but two examples, he refers to Martha McLaughlin's mother contacting the police about Mr Pora's possible involvement in the murder and her later having admitted that she had falsely implicated him. He also refers to a detective having "dismissed Mr Pora as a suspect, citing false information and conspiracy by Mr Pora's aunties to implicate him." The Board considers that it is inappropriate for an expert witness to engage in this type of exercise.

29. The third and final preliminary observation relates to Professor Gudjonsson's reliance on the affidavits of Pora. As the Board will explain, these are not admissible as items of fresh evidence. In so far as his evidence and opinions rely on these affidavits they may not be admitted.

30. Professor Gudjonsson provided three reports in all. The second dealt with the Crown's submissions about the relevance and admissibility of his evidence. This is, at least, an unusual report, dealing as it does with legal issues and citing his experience in earlier appeals. Whatever may be the propriety of obtaining such a report, the Board is entirely satisfied that it could not begin to satisfy the test for admissibility of fresh evidence and it is therefore unnecessary to say anything further about it. The third report commented on Dr McGinn's and Dr Immelman's reports. It is not necessary to refer to it and the Board will concentrate, therefore, on the report of 25 June 2012.

31. Professor Gudjonsson's first report ranged over a great many fields and subjects. He reviewed the evidence in painstaking detail; he considered at length various psychiatric and psychological reports prepared for the purpose of the proceedings and for consideration of Pora's eligibility for parole; he analysed in great detail the reports of Professor Glyn Owens (who had administered tests to evaluate Pora's current intellectual functioning) and Dr Anthony Morrison (who had carried out a full neuropsychological assessment); and he discussed at length the interview that he had had with Pora and the results of the psychological tests which he had conducted. For reasons that will appear, it is not necessary to rehearse his findings on these many subjects at length.

32. The professor stated his overall conclusions in a series of paragraphs at the end of his report. The Board need only refer to two of these. They were:

> "1. I am in no doubt that Mr Pora's self-incriminating admissions to police in March 1993 … are, beyond reasonable doubt, unreliable due to Mr Pora's psychological vulnerabilities at the time he was interviewed and taken to the crime scene. His admissions whilst in prison in 1995 are similarly inherently unreliable. In fact, having evaluated Mr Pora and studied his interviews and self-incriminating admissions very carefully, I have no confidence in the self-incriminating admissions he made about his alleged witnessing and participation in the rape and murder of Ms Burdett. These confessions are fundamentally flawed and unsafe."

and

> "7. In order to attempt to achieve his objective of receiving the reward money, combined with his apparently impaired personal and social decision making and insensitivity to future consequences of his behaviour, Mr Pora became entangled in a web of lies, which clearly was of major concern to the investigating officers who in the video recorded interviews kept emphasising the need to give a truthful account. He was repeatedly caught lying, which he could not get out of by telling the real truth if he was to maintain his story about having witnessed the murder and rape and hoping to receive the reward money. The longer he went on lying to police, the more difficult it would have been for him to own up to his having no useful knowledge about the crime whatsoever and having completely wasted the time of the officers who had been kind to him and whom he was trying to please and impress. …"

33. For the reasons given at paras 25-27 above, the Board considers that Professor Gudjonsson's expression of certitude as to the unreliability of Pora's confession was inappropriate. A report containing such a statement cannot be admitted as an item of fresh evidence. So too the professor's forensic analysis of the various materials referred to earlier. That evidence would not be admissible on trial. Inevitably, therefore, it could not be right to admit it in evidence on appeal.

34. It might be suggested that the professor's report could be "filleted" in order to isolate those parts of it which comprise objective accounts of the results of tests or which could be regarded as properly falling within the legitimate expression of opinion. The Board has concluded that such an exercise is not feasible in relation to the evidence of Professor Gudjonsson. His conclusions depend on his overall consideration of the various aspects of the case that he has examined and

the contribution which each of those has made to his decision cannot be safely identified. It is not possible to segregate those parts which are unobjectionable from passages which are not. The Board has concluded, therefore, that Professor Gudjonsson's evidence cannot be admitted.

Dr McGinn

35. Dr Valerie McGinn is a clinical neuropsychologist based in Auckland. She and Dr Immelman were asked by the appellant's lawyers to "conduct an investigation into whether Mr Pora has a neurodevelopmental disability and if so the nature of that disability". Dr McGinn's role was to carry out a neuropsychological examination while Dr Immelman was to undertake a psychiatric evaluation.

36. Having taken a history from Pora's father, Cedric Rangi, and his aunt, Matekino Matengi, about the appellant's mother's drinking habits during her pregnancy with Pora and having conducted an interview with him and administered tests to establish whether he suffered from foetal alcohol spectrum disorder (FASD) Dr McGinn concluded that he Mr Pora fulfils the diagnostic criteria of an alcohol related neurodevelopmental disorder (ARNO) also known as static encephalopathy (alcohol exposed).

37. On the basis of this diagnosis, Dr McGinn reached a number of highly important conclusions. In the Board's estimation the most significant of these were:

> (i) "The higher thought processes of judgment, reasoning, planning and organising, as well as adjusting to changing situational demands are important in regulating behaviour and behaving appropriately. These executive functions are required to plan and think through to the consequences of one's actions and realise the effects of these on others. These are the last cognitions to fully develop in the teenage brain and are known to be significantly affected by serious neurological insult including prenatal alcohol exposure. Deficits can be reflected in poorly regulated and egocentric behaviour. As a teenager Mr Pora certainly seemed to display these characteristics from the information available. On testing he showed significant deficits in most aspects of executive brain function."

> (ii) "Despite not presenting as impulsive during the assessment, Mr Pora made a high number of impulsive errors on a task sensitive to this tendency, the D-KEFS Colour Word Interference task. He was required to firstly name coloured squares (red blue

and green) and then read the words of these colours and he did this efficiently and without error. On the Inhibition condition Mr Pora was required to name the colour ink a word was written in, suppressing the more dominant urge to read the word. He did this quickly but with a high rate of errors (seven errors, more errors than 99% of his same age group). When the demands of the task were increased on the more difficult switching condition that required Mr Pora to respond according to two different rules depending on whether the word was presented in a box or not, he slowed down and worked more carefully making fewer impulsive errors. However, he attained a lowest possible score for his efficiency to complete the task, indicating that this was a challenging demand for him to switch attention and inhibit responses. In everyday life these results indicate that Mr Pora has deficits of regulatory control and this is a common feature in those with FASD who struggle to regulate their moods and actions. When placed in a complex situation Mr Pora is likely to show a tendency to act impulsively with reduced capacity to think through to consequences.

In terms of his FASD diagnosis, Mr Pora has significant impairments of executive function including impaired reasoning, literal and limited thinking, cognitive rigidity and deficits of regulatory control."

(iii) "Mr Pora's developmental history was, in my opinion, entirely consistent with a child with an undiagnosed FASD. He was clearly alcohol exposed with a low birth weight. He was described consistently as being slow and having difficulty with communicating from a very young age. There was mention made of his immaturity, being easily led and engaging in impulsive behaviours without considering the consequences, all primary neuro-behavioural features of FASD. Children with FASD are known to be vulnerable to being victimised and it seems that Mr Pora was scapegoated and more severely mistreated in his upbringing than other children in the family. With an unrecognised disability, he would inevitably have been set up for school failure and could not have functioned successfully within a mainstream educational programme. Sadly the life course experienced by Mr Pora in his teenage years is all too common in New Zealand where young people with FASD tend to be gullible and readily targeted by gangs and attracted to antisocial activities unless they are closely protected, supervised and provided with pro-social influences. Without his disability diagnosed and recognised, even had there been responsible family members to raise him, they

would not have known how to cater optimally to his special needs."

(iv) "FASD is often described as 'Swiss cheese brain damage', with some processes remaining intact while others are in deficit. It is the variability of function that is typical but can be deceptive with those affected often seeming more capable on the surface than they actually are. Intellect is lowered but not always in the retarded range, even with full FASD. Many adults with FASD function in the Borderline to Low Average range intellectually as Mr Pora does. However, adaptive function is known to be more affected and they are functionally disabled in their everyday life and tend to lack common sense. Mr Pora shows impairment of his daily living skills in the areas of functional academics, community use, self-care, leisure and social function. Conceptual and social domains were impaired while practical skills were strong when living in a well-structured and supported environment."

(v) "Most notable on testing was Mr Pora's impairments of executive functioning. He showed no capacity for abstract thought, interpreted sayings entirely literally and could not appreciate deeper or implied meaning. He was cognitively rigid, sticking to one way of responding and was unable to appreciate a range of differing options. This indicates that he will get something in his mind and stick to it even when the evidence is contrary to it. He will not be well able to match his thinking to the circumstances and adapt with changes of situational demands. Mr Pora also showed deficits of regulatory control suggesting that he will tend to respond without due consideration especially in complex situations. As well as behavioural dysregulation those with FASD tend to be emotionally dysregulated and cannot tolerate or manage stress well. They require others to provide a high level of direct assistance to be productive and remain emotionally settled. These types of higher thought process deficits seriously affect a person with FASD's capacity to self-monitor, realise the thoughts and feelings of others, and appreciate how their actions may be perceived. Due to brain limitation Mr Pora will tend to say and do what seems to his advantage at the time, without a realisation that he is doing this. This tendency can be perceived as manipulative and self-serving until the underlying brain damage is considered and it is appreciated that this is not wilful or intentional. A lack of insight into one's own limitations is a universal feature of FASD and in my opinion Mr Pora was not well able to understand that he has a disability when this was simply explained to him. This is because individuals with FASD can only view situations from their

own perspective and lack the capacity to step out of their own shoes to appreciate the perspectives of others and compare themselves to others. …"

(vi) "Having diagnosed and treated more than 200 children and young people with FASD, many of whom were youth offenders I am able to provide my opinion about the FASD limitations that Mr Pora would have shown at the age of 17 years when interviewed by the police and charged. I have viewed the evidence including transcripts and DVD footage. In my opinion at the age of 17 years Mr Pora was thinking and acting like a much younger child of about eight to ten years of age. He was not able to comprehend the meaning of complex words or sentences, grasping parts but missing much of the meaning. He lacked insight into his limitations and tended to respond as if he understood. When asked directly if he understood he would often say no, but he did not volunteer this information. What was most evident when reviewing police interviews was the paucity and simplicity of speech displayed by Mr Pora, and the long delays in his responding where he seemed confused and did not know how what to say. …"

(vii) "Mr Pora showed significant verbal memory deficits although with repetition he has some learning capacity. When listening to two simple stories at an eight and ten year old level of complexity, very little was apprehended and retained. The general gist of each story was not grasped and Mr Pora confused one with the other. Even when asked questions about the stories and required to pick the correct answer out of three options, one being correct, Mr Pora's responding was no better than by chance guessing. This result indicates that when in a situation that requires listening to, comprehending, retaining and recalling verbal information, Mr Pora will be severely limited. His span of apprehension is four simple pieces of information, when compared to about seven being usual for an adult. Adding to this limitation is the before mentioned extremely limited understanding of the meaning of words and the inability to compare one thing to another. Results of this assessment show that Mr Pora is markedly impaired in his capacity to engage in conversation or comprehend and respond to even quite simple questioning. This is a brain based problem and part of his FASD disability."

(viii) "People with FASD, most especially when they have memory and executive deficits are prone to confabulate; that is make up stories to fill in the gaps that are not in keeping with the

> truth. This is different to lying as it is not intentional and is a feature of executive brain impairment. Mr Pora did confabulate on Professor Gudjonsson's testing and also showed this tendency on my memory testing, although it failed to reach significance. At the age of 17 years Mr Pora's brain, although damaged, was still in a phase of rapid development. I would expect that his executive functioning was even more impaired at the time of police interview and when charges were laid. When working with families of young people with FASD who confabulate, we advise that things they may say should be taken 'with a grain of salt' and suggest that they double check with a reliable source. The persons with FASD cannot be considered a reliable informant and this is in my opinion the case for Mr Pora."

38. On behalf of the respondent, the Solicitor General either accepted or raised no issue with the statements recorded at (i), (iii), (iv) and (v) above. He said that he had "some reservations" about the contents of the other passages.

39. In the Board's view, Dr McGinn's evidence should be admitted. The process by which admission of new evidence should be determined was stated in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273, at para 120:

> "… the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh."

40. Dr McGinn's evidence cannot be described as "fresh" in the sense in which that term has been used in this context. With reasonable diligence on the part of Pora's defence team at his two trials, her evidence, or that of a suitably qualified expert, could have been obtained. But no submission has been made that her evidence is other than entirely credible. And, although it was faintly suggested that the jury was already alive to certain shortcomings in the appellant's intellectual functioning, it really cannot be plausibly argued that the crucial

evidence that he suffered from a form of FASD does not have a potentially significant impact on the safety of the conviction. The simple truth is that at the first trial the appellant was quite bereft of an explanation for having admitted guilt of crimes which he sought to have the jury believe he did not commit. At the second trial he did not even give evidence, much less try to explain why he had confessed to these offences. Dr McGinn's evidence would, at the least, provide a possible explanation for his having admitted to something that he did not do. The possibility of such evidence securing a different outcome to the trial cannot be gainsaid.

41. This conclusion is in accord with New Zealand judicial authority on the question of the admissibility of expert evidence. In *R v Cooper* [2007] NZCA 481 at para 21 the Court of Appeal accepted that the statement in *Cross on Evidence* that "the overriding question [was] whether the witness could give evidence which is helpful to the court, *ie* which is relevant and reliable", correctly stated the law in New Zealand both before and after the passing of the Evidence Act. And in *Mahomed v R* [2010] NZCA the Court of Appeal accepted that the concept of "substantial help" required consideration of the relevance, reliability and probative value of the proffered evidence.

42. Before the enactment of the Evidence Act, Tipping J had occasion to consider the question of the admissibility of expert evidence in the case of *R v Calder* (HC Christchurch T 154/94, 12 April 1995). He said that this was to be determined on the following basis:

> "Before expert evidence … can be put before the jury by a suitably qualified person it must be shown to be both relevant and helpful. To be relevant the evidence must logically tend to show that a fact in issue is more or less likely. To be helpful the evidence must pass a threshold test which can conveniently be called the minimum threshold of reliability. This means the proponent of the evidence must show that it has a sufficient claim to reliability to be admitted."

43. Dr McGinn's evidence satisfies these requirements. She is undoubtedly suitably qualified; her evidence is relevant and it is, at least potentially, extremely helpful in determining whether Pora's confessions can properly be relied on.

Dr Immelman

44. Dr Andrew Craig Immelman is a consultant psychiatrist, also based in Auckland. He received identical instructions to those given to Dr McGinn. He also

interviewed Matekino Matengi, the appellant's maternal aunt. He examined Pora on 14 March 2014.

45. Although Pora was found to have an IQ of 83 (which is within normal limits), Dr Immelman pointed out that this was not inconsistent with there being significant abnormalities in some areas. Pora performed badly on verbal memory testing and this indicated great difficulty in understanding questions that were put to him and in remembering the content of the question when composing his reply. He had very significant impairments in frontal executive function, with no demonstrable capacity for abstract thought and a strong tendency to maintain a position even when it was shown to be entirely untenable.

46. Dr Immelman confirmed Dr McGinn's diagnosis of Pora's FASD. He stated that a feature of this condition is that responses given during interview, even in the non-coercive setting of the taking of a medical history, can be unreliable. By way of illustration, he referred to an explanatory model described by Novick-Brown in 2011. This discusses the three components associated with the condition: uncertainty about what the "correct" answers might be; interpersonal trust that the interviewer's intentions are constructive and benign; and reluctance to admit uncertainty or lack of knowledge when the interviewees believe they should know, or are expected to know, the answers to the questions.

47. Translating this to Pora's case, Dr Immelman considered that, firstly he might be uncertain about what the correct answer to the question should be, because he does not remember and may therefore provide an incorrect answer in order to satisfy the interviewer. Secondly, he might also place trust in the person questioning him, and be eager to please. Thirdly, he might be reluctant to admit uncertainty about his lack of knowledge and continue to maintain a position which is different from the true facts.

48. The Board has concluded that Dr Immelman's evidence must be admitted, essentially for the same reasons that Dr McGinn's evidence should be received. While it is not "fresh" since it could clearly have been obtained with due diligence before the trial, it is plainly credible and could be critical in the assessment of whether Pora's confessions could be relied upon.

The other evidence

49. The affidavits from the appellant do not satisfy the test for admissibility of fresh evidence. They are plainly not fresh and their credibility must be questionable at least, given that they are proffered in order to advance his appeal. Moreover, the

Board does not consider that there is a risk of miscarriage of justice if these affidavits are excluded. They cannot be accepted as fresh evidence, therefore.

50. The affidavit of Timothy Smith, a police officer who had been involved in the investigation of the murder of Ms Burdett, consisted of his impression of the consistency of Pora's statements and 'body language' and facial expressions when taken by police to show them the victim's home. This evidence would not be admissible at trial and it is clearly not admissible on the appeal. The affidavit from the private investigator, Timothy McKinnel, comprises, for the most part, commentary on the evidence of other witnesses and the result of his investigations. It is plainly not admissible as an item of fresh evidence.

51. The affidavits from Pora's former counsel, the police officer, David Bruce Henwood and Professor Owens touch on the second principal issue on the appeal *viz* the significance of the evidence about Rewa's alleged erectile dysfunction. For reasons that will be given in the next section of this judgment, the Board considers that this is not something which is relevant to the safety of Pora's conviction and that the evidence of these witnesses, in so far as it relates to that issue, is not admissible. Counsel's affidavit also deals with a number of what she considers to be errors on her part in the conduct of Pora's defence. She deposed that she ought to have engaged experts to advise on the reliability of Pora's confessions; that she should have called evidence to refute the suggestion which featured in the Crown case that Pora had given his sister earrings that resembled those which had been owned by Ms Burdett; and that she should have consulted and called witnesses who would have challenged evidence of an association between Pora and Rewa. The Board considers that the last two of these matters are peripheral to the issue of the safety of Pora's conviction and the question of whether she should have engaged experts to advise on the reliability of Pora's confession is subsumed into the consideration of Dr McGinn's and Dr Immelman's evidence. Counsel's affidavit is therefore not admitted. It should be said, in passing, that the Board considers that the error which counsel so commendably accepted is not as grievous as she suggests. Many decisions taken in the course of a trial may appear unfortunate in hindsight. It is by no means clear that the failure to investigate these matters and call the witnesses concerned was an egregious error.

Rewa

52. The man who raped Ms Burdett was undoubtedly Malcolm Rewa. That she was killed at the time that she was raped is not open to doubt. Unless Pora was present at the time of the rape he could not be implicated in Ms Burdett's murder. It is now known that Rewa suffered from erectile dysfunction. It is also known that he belonged to or was an associate of a gang which was a rival to that of which

Pora was either a member or an associate. The theory is therefore promoted that it is unlikely in the extreme that Rewa would have carried out the attack in the presence of another since he would not wish to have his condition disclosed. In particular, it is said that he would certainly not have had a young member or associate of a rival gang with him. The appellant suggests therefore that there is a real risk that a miscarriage of justice has occurred because the jury at his re-trial did not receive evidence that during eight of the nine rape offences committed by Rewa before his rape of Ms Burdett he suffered from erectile dysfunction, nor did they hear evidence of the steps that he took to overcome those difficulties. These were such, it is suggested, that the inevitable embarrassment that he would suffer if others were present meant that it was far more likely that he operated as a lone predator.

53. Some consideration of Rewa's condition took place at the appellant's re-trial. It appears that counsel for Pora attempted to introduce evidence of Rewa's erectile dysfunction in his offending both before and after his rape of Ms Burdett, through her cross-examination of Detective Inspector Rutherford. Apparently, the trial judge ruled that evidence of Rewa's other offending could only be elicited from the detective inspector if a direct link between it and the crimes committed on Ms Burdett was established. Unfortunately there is no transcript of the exchange between the trial judge and defence counsel but it is suggested by the appellant that they may have been at cross purposes because she curtailed her cross examination and did not pursue the theory that she had intended to advance, namely, that Rewa's method of attack made it highly likely that he would have acted alone. The respondent has suggested that the detective inspector was in fact cross-examined extensively at the retrial in relation to Rewa's modus operandi in his extensive sexual offending. Cross-examination included reference to the position of the victims *vis-a-vis* Rewa during intercourse, how he gained entry into their homes, the level of violence inflicted during the offending and patterns discernible from the commission of those offences. This evidence was relied on by the appellant in an attempt to demonstrate that the attack on Ms Burdett was perpetrated by Rewa alone. It is accepted, however, that it was not put directly to Detective Inspector Rutherford that Rewa suffered erectile dysfunction or that the description of his offending by a number of the complainants implied this. One of the positive reasons that Rewa would not have offended with others was therefore not put to the jury; rather the mere fact of his habitual lone offending was raised. On one view, this is enough to displace the suggestion that Pora was a joint offender with Rewa. He was undoubtedly a very confident sexual predator in the company of lone women. But this does not necessarily mean that he would have been willing to have others with him as primary offenders in his sexual offending. The theory that his confidence would have been contingent on the absence of other men is not implausible.

54. Having given this matter careful thought, however, and whatever may be the true situation about the ruling of the trial judge and counsel's reaction to it, the Board is not satisfied that the failure to adduce evidence of Rewa's erectile dysfunction gives rise to a risk of miscarriage of justice. The thesis that Rewa acted alone was before the jury on Rewa's re-trial. (In fact there is some dispute as to whether this is accurate on all occasions but that does not signify in the present discussion). The jury was aware that Rewa had been convicted of the rape of Ms Burdett. In the Board's estimation, the suggestion that it would have been more disposed to find that Pora was not present because of Rewa's erectile dysfunction is speculative. As Dr Downs, on behalf of the respondent, put it, this requires a leap of faith or, at least, a measure of conjecture. Moreover, the offences committed on Ms Burdett had features which distinguished them from Rewa's other attacks, not least in relation to the level of violence used. This was a savage attack obviously carried out with murderous intent. It was markedly different from the other instances of Rewa's offending. Of course it is suggested by the appellant that Ms Burdett was likely to present more robust defence than many of Rewa's other victims and that it would be necessary to perpetrate greater violence on her in order to overcome her resistance but this discussion emphasises the essentially conjectural nature of the reflection on the various possibilities. It is simply not possible to say that evidence of Rewa's erectile dysfunction, if given to the jury, would have made the difference which the appellant claims.

Disposal

55. The evidence of Dr McGinn and Dr Immelman unquestionably establishes the risk of a miscarriage of justice. It provides an explanation as to why Pora's confessions may have been false. This is of central and critical importance to one's approach to the question whether his convictions can be regarded as safe.

56. The impact that evidence of a confession will have, especially a confession to heinous crime, is difficult to overstate. The natural reaction to such an admission is that it is bound to be true. Why would someone confess to a dreadful crime if they were not guilty of it? But experience has shown that false confessions, even to the most serious of offences, are often made. The intuitive response to the fact of confession to crime is, inevitably, that it must be right but that intuitive reaction may be very dangerous. In *R v Oickle* [2000] SCR 3 the Supreme Court of Canada confronted the phenomenon of false confessions. Iacobucci J at paras 34 and 35 said:

> "… it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone

> would confess falsely. See *S M Kassin and L S Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts"* (1981), 11 J Applied Soc Psychol 489. However, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence. See, eg, *R A Leo and R J Ofshe, 'The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation'* (1998), 88 J Crim L & Criminology Justice …"

57. As Elias CJ observed in *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277, [2007] NZSC 7, para 14 "apparently reliable confessional evidence has led to significant miscarriages of justice". Any court must therefore be astute to examine the reliability of seemingly straightforward confession of guilt where that comes under later challenge. In the present case it is clear that none of the police officers exerted pressure on Pora. Indeed, they were, if anything, fastidiously correct in their treatment of him. The natural inclination therefore is to assume that his confession (which was certainly not the product of any form of coercion) must be true. But it is precisely because of the experience that people confess to crimes that they did not commit that one should be vigilant to examine possible reasons that confessions may be false. As the senior Canadian prosecutor, Bruce MacFarlane, has said, "judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime". In light of that entirely natural and to-be-expected reaction, careful attention should be paid after the confession has been made to reasons given that it was in fact untrue. Indeed, such is the potential potency of confession evidence that particular care is required in examining whether it reflects the true state of affairs.

58. The combination of Pora's frequently contradictory and often implausible confessions and the recent diagnosis of his FASD leads to only one possible conclusion and that is that reliance on his confessions gives rise to a risk of a miscarriage of justice. On that account, his convictions must be quashed.

59. It has been contended that no jury, faced with the evidence of Dr McGinn and Dr Immelman, could possibly be convinced that Pora's confessions were reliable. For this reason, it is claimed, it would not be appropriate to order a new trial. The respondent has argued, however, that the question of the reliability of the appellant's confessions should be subject to the type of close scrutiny that only a further trial can provide. The Solicitor General made it clear that it would be the Crown's intention, in the event of a re-trial, to obtain evidence that might well counter that given by Dr McGinn and Dr Immelman. As against this,

however, must be weighed the respondent's acceptance of much of Dr McGinn's evidence. On one view this would admit of only one conclusion, namely, that that affirmation of the appellant's convictions could not be contemplated.

60. The question of whether a re-trial should be ordered was not the subject of extended argument. The Board has therefore decided that the parties should have the opportunity to make written submissions within four weeks as to whether the appellant should be ordered to stand trial again.

CERTIFICATE OF SERVICE

In accordance with the Federal Rules of Appellate Procedure, I certify that on this date, January 3, 2020, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that counsel for Appellee are registered and listed participants with CM/ECF system and that service of this pleading will be accomplished via mail.

Jeffrey M. Conner
Assistant Solicitor General
jconner@ag.nv.gov

/s/ Lisa Rasmussen