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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

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

AND IN THE MATTER OF ARTICLE 5 BRUSSELS IIa

AND IN THE MATTER OF ARTICLE 37, VIENNA CONVENTION ON CONSULAR RELATIONS 1963

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant

and

A MOTHER

and

A FATHER

Respondents

IN THE MATTER OF J, M, R (MINORS) (FREEING FOR ADOPTION: JURISDICTION: BRUSSELS 11R: VIENNA CONVENTION)

Ms Ramsey QC (instructed by DLS Solicitors) for the Trust
Ms McAllister BL (instructed by Reid Black Solicitors) for the Respondent Mother
Ms Brady BL (instructed by Archer Solicitors) for the children instructed by the Guardian ad Litem

KEEGAN J

Nothing must be published which would identify the children or their families.

Introduction

[1] This is a ruling in relation to preliminary issues of jurisdiction in the context of an application to free the three children for adoption pursuant to the Adoption (Northern Ireland) Order 1987 ("the Order"). The matter came before me by way of submissions in relation to the applicability of Article 15 of Council Regulation EC No 2201/2003 also known as Brussels IIa ("the Regulation"). In essence I was asked to determine whether or not Northern Ireland should retain jurisdiction in relation to this case given that the parents of the children are Slovakian.

The Application

[2] This family has been known to social services in Northern Ireland since 2012. The three subject children are aged 5, 3 and just over 1 year and are full siblings. They have another six full siblings aged between 24 and 8 years old. The parents are of Slovakian/Roma origin. Little is known of the movements of this family until 2012 when they came to Northern Ireland. The five youngest children were all born here. There is history of serious parental deficits which resulted in four of the older children being removed from their parents care by virtue of an Interim Care Order on 9 June 2017. The other children were also removed after they were born with the youngest child having been left by his mother at hospital. Care Orders have been granted for the children with a care plan of adoption. There are no kinship placements. The father has had no engagement with contact or proceedings. The mother has had limited engagement but she has provided some instructions in these proceedings.

[3] Ms Ramsey QC appeared on behalf of the Trust and asked the court to hear the freeing applications as soon as possible in the best interests of the children. Ms McAllister BL appeared on behalf of the mother and helpfully indicated to the court that while she took no issue with the Article 15 submissions she asked for an adjournment of the freeing case because the mother had recently engaged with her solicitor. I did allow an adjournment of the freeing case and an opportunity for the mother to file an affidavit within 4 weeks given her recent engagement. However, I proceeded to hear the submissions made under Article 15. Both Ms Brady and Ms Ramsey initially argued that Article 15 of Brussels 11a applied but that the case should be heard in Northern Ireland as the children were born here and the parents' effective connection was to Northern Ireland notwithstanding the fact that they are Slovakian in origin.

[4] During the course of submissions I raised the question as to whether or not Article 15 of Brussels 11a applies to freeing for adoption proceedings. That led to the parties filing additional legal argument. I am very grateful for the joint addendum position paper filed by Ms Ramsey and Ms Brady which deals with the questions that remain namely:

(i) Does Brussels IIa apply to freeing for adoption proceedings?

(ii) If not on what basis does the court exercise jurisdiction in a freeing case?

(iii) What steps need to be taken under the Vienna Convention on Consular Relations given that the children are Slovakian by origin?

Question 1

[5] Chapter 1 of Brussels IIa outlines the scope and definitions of this Regulation. Specifically, Article 1(1) provides:

> "This regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to …
>
> (b) The attribution, exercise, delegation, restriction or termination of parental responsibility."

[6] Article 1.2 further states that:

> "The matters referred to in paragraph 1(b) may in particular deal with:
>
> (a) Rights of custody and rights of access;
>
> (b) Guardianship, curatorship and similar institutions;
>
> (c) The designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
>
> (d) The placement of the child in a foster family or in institutional care;
>
> (e) Measures for the protection of the child relating to the administration, conservation or disposal of the child's property."

[7] Article 1.3 of the Regulation provides some limitations specifically at Article 1.3(b) where it states that the Regulations shall not apply to, *inter alia*:

> "Decisions of adoption, measures preparatory to adoption, or the annulment or revocation of adoption."

The question is whether or not freeing for adoption comes within the auspices of "measures preparatory to adoption."

[8] This issue was analysed by the Court of Appeal in England and Wales in the case of *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 112. The core question in that case was whether the English court had jurisdiction to make an adoption order in relation to a child who is a foreign national and to dispense with the consent of her parent who is a foreign national and, if so, how it should exercise that jurisdiction. A further question was related to what the scope or ambit of Brussels IIa was. The court specifically asked itself "are care proceedings within the scope of Article 1.1(b) even if the local authority's care plan is for adoption?" A further question was whether proceedings for a placement order under the Adoption and Children Act 2002 were within the scope of Article 1.3(b).

[9] In *RE N* the court determined that the proceedings in relation to a placement order were not within the scope of the Regulation as they were measures in contemplation of adoption. This case was appealed to the Supreme Court and is reported in the matter of *N (Children)* [2016] UKSC 15. The Supreme Court decided that the Court of Appeal had erred in their evaluation of the best interest tests in Article 15(1) which the Supreme Court considered was too attenuated and did not consider the impact of the actual transfer on the short and long term welfare of the subject children. This was a significant step in relation to how courts would deal with Article 15 transfers because the best interest test garnered more substance than previously thought. However, the Supreme Court did not interfere with the remainder of the Court of Appeal decision which remains good law.

[10] Sir James Munby, gave the lead judgment and the unanimous decision in the Court of Appeal. He distinguished between care proceedings with a care plan for adoption and placement order proceedings under the Adoption and Children Act 2002 stating:

> "… care proceedings, even if the plan is for adoption, are not, as such, part of the process of adoption. A care order, even if the court has approved a plan for adoption, does not of itself authorise a placement with a view to adoption. It may be a step along the way of implementing the local authority's plans for the child, but it is not a "measure preparatory" to adoption."

Further, he stated:

> "On the plain language of Article 1(3)(b), which like all other provisions of BIIa must be given an autonomous meaning, and having regard to the *Lagarde Report*, it is clear that an application for a placement order is a "measure preparatory" to adoption within the meaning of Article 1(3)(b). It forms part of the process of adoption as set out in the 2002 Act; it is a precursor to the making in due course of an adoption order, and it has to do, as its

> name indicates, with the "placement" of the child, specifically with a view to adoption."

[11] Of course, placement orders are not part of the structure in Northern Ireland. In this jurisdiction adoption law remains governed by the Adoption (Northern Ireland) Order 1987 which maintains the process of freeing for adoption. A child may be freed for adoption pursuant to Article 16(1)(a). Parental consent must be given or dispensed with in accordance with Article 16(1)(b)(ii) and Article 16(2). There are provisions within the Order that there is parental consent to adoption pursuant to Article 16(1)(b)(i) or under Article 17(1). The child must be likely to be placed for adoption rather than having to be placed for adoption, but in current practice most freeing applications proceed once the child has an identified placement.

[12] In any event the question is whether or not this regime represents a measure preparatory to adoption. The case of *Re N* has found that placement orders are a measure preparatory to adoption and I see no reason why that should not apply to freeing which is the equivalent in Northern Ireland. These are freestanding applications under the legislative structure and a freeing order is a pre-cursor to adoption. I see from the joint paper that both the Trust and the Guardian now accept that Article 15 is not relevant as Brussels IIa does not apply to freeing proceedings and I agree with that approach.

Question 2

[13] The issue arises if Brussels IIa does not apply to freeing proceedings, how is the court to ground jurisdiction in the case? Again, in the case of *N*, Munby LJ analysed the issue, in the adoption context. He highlighted the fact that adoption in England and Wales is a pure creature of statute. That is the same in Northern Ireland. The legislative structure itself also refers to the living and domicile requirements placed upon adoptive carers.

[14] In *Re N* the court held at paragraph 76 that:

> "76. … the fundamental foundation of the *jurisdiction* of the court to entertain the application for an adoption order at all is determined by the circumstances, crucially for present purposes the domicile or habitual residence, of the adoptive parent(s) *and no-one else*. (For the period of not less than one year ending with the date of the application.) Moreover, and assuming that the jurisdictional requirements of section 49 are met, the 2002 Act contains no limitation, whether by reference to nationality, domicile or habitual residence, upon the children who can be adopted or the natural parent(s)

> whose consent can be dispensed with pursuant to the 2002 Act."

[15] The Adoption (Northern Ireland) Order contains similar provisions within Articles 14 and 15 of the Order. Munby LJ confirmed this view in *Re A & another (Children) (Adoption: Scottish Children's Hearing)* [2017] EWHC 1293. This case involved a jurisdictional dispute between Scotland and England. A query had arisen in the case due to the children at issue not being domiciled, or indeed, habitually resident in the jurisdiction where the adoption order was sought. However, in this case the children are clearly domiciled in Northern Ireland, having been born in Northern Ireland, and so that issue does not arise. In any event the issue of domicile, as I have said, from Articles 14 and 15 of the Adoption Order pertains to the domicile of the prospective adoptive parents. An Adoption Order also confers benefits upon a child on the basis of Article 12 which confers parental responsibility and so thereafter the child is treated as a child of the adoptive carer.

Question 3

[16] Under Article 37 of the Vienna Convention on Consular Relations of 24 April 1963 the following requirement is found:

> "If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty: … (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments."

[17] The Consulate of Slovakia based in London was notified of the current freeing proceedings on 16 June 2020.

[18] Also, in England and Wales Section 1(4) of the Adoption and Children Act 2002 sets out the considerations which apply to the exercise of powers. This contains very detailed provisions as to which the court must have regard in considering any decision relating to the adoption of the child. In applying these statutory factors to adoption with a foreign national element Munby LJ stated *Re N*:

> "It cannot be emphasised too much that the court in such a case must give the most careful consideration, as must the children's guardian and all the other professional witnesses, in particular to those parts of the checklist which focus attention, explicitly or implicitly, on the

> child's national, cultural, linguistic, ethnic and religious background. Moreover, it must always be remembered that, in the context of such factors, the checklist demands consideration of the likely effect on the child throughout her life of having ceased to be a member of her original family. Mere lip service to such matters is not enough. The approach, both of the witnesses and of the judge, must be rigorous, analytical and properly reasoned, never forgetting that adoption is permissible only as a "last resort" and only if a comprehensive analysis of the child's circumstances in every aspect – including the child's national, cultural, linguistic, ethnic and religious background – leads the court to the conclusion that the overriding requirements of the child's welfare justify adoption."

[19] In Northern Ireland there is no such checklist in our legislation but the good practice here is to consider the issue of cultural, linguistic, ethnic and religious background when looking at adoption of any child pursuant to the Article 9 requirement in the Order to consider and promote the best interests of the child. The Guardian, in her report of 5 July 2020, has referenced the three subject children's specific and unique cultural heritage and highlighted the role of the prospective adoptive carers in promoting this, and further, the greater importance of sibling contact particularly given the language issues in this case. It is therefore clear to me that issues of cultural, linguistic, ethnic and religious background are already being considered by the professionals involved in this case and the issue has been highlighted to the Slovakian authorities who may wish to make an intervention in the case.

The wider debate

[20] Counsel have also addressed the law in Slovakia in answer to my question whether non-consensual adoption existed in Slovakia. I asked this question because I am aware that freeing for adoption is rare across European States. In the *RE N* case Munby LJ also referenced the issue. In this regard I am grateful to Counsel who have researched the point. I was referred to a document entitled 'Adoption without Consent' updated in 2016 which deals with the situation across Europe including Slovakia. It is noted that within Europe there are different ways in which adoption can be authorised without parental consent. The most common way is stated to be where parental consent is not in fact necessary as the parents have been deprived of parental rights or on the grounds of parental misconduct. The relevant Slovakian provisions are Article 1.8(2)(ii) Act No: 36/2005 on family law noted in Annex 1.5 page 78 which states:

> "The consent of parents to adoption can be dispensed with if they systematically did not manifest proper

> interest in the child for 6 months, by not visiting the child, by not fulfilling their maintenance duties, by not trying to rectify their family and social situation within the limits of their possibilities so that they can personally care for the child. However, the parents of the child to be adopted shall not be parties to the proceedings when they are deprived of their parental rights or when they have no legal capacity and also when their consent is not needed for adoption in spite of the fact that they are representatives at law of the child to be adopted."

[21] I am grateful to counsel for sourcing this material. It reassures me that there is a concept of dispensing with parental rights in Slovakia akin to dispensing with parental consent in this jurisdiction. As counsel state in the joint paper the court is therefore not dealing in legal concepts and constructs that are completely alien to the parents' national Member State.

Conclusion

[22] Accordingly, I have found that the Brussels IIa Regulation does not apply to an application to free a child for adoption as that is an application in preparation for adoption within the meaning of the Regulation and is barred by virtue of Article 1.3. I further conclude that I have jurisdiction to hear the freeing application. Further, I consider that it is appropriate to notify the Slovakian authorities, in accordance with the Vienna Convention. That course has already been undertaken. The case will therefore be listed for hearing at an appropriate time to be agreed by the parties.