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Judgment: approved by the Court for handing down | *Delivered:* **27/06/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

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

Between

A HEALTH AND SOCIAL CARE TRUST

Applicant

and

K AND M

Respondents

and

R AND R

Notice Parties

O'HARA J

Preliminary Ruling

[1] This case involves twins who were born in Northern Ireland in November 2012. They were admitted to care on a voluntary basis on 25 January 2013. An interim care order was made on 4 March 2013 and threshold criteria were agreed and then approved by the court on 14 February 2014.

[2] The father of the twins is a citizen of the United States of America. The mother is a citizen of South Africa (but she may also hold an Irish passport). The twins are US citizens and applications have been made on their behalf for US passports.

[3] The applicant Trust initially proceeded on a twin track approach, with the possibility of rehabilitation to the mother depending on her satisfactory completion of an agreed schedule of work. On 2 August 2013 the care plan was changed to one

of permanence via adoption with members of the father's family in the United States. Rehabilitation was ruled out by the Trust on the basis of an alleged lack of co-operation, evasion and inconsistent attendance at contact. The prospective adopters are a sister and brother-in-law of the father. That couple ("the Rs") were made parties to the current proceedings on 26 September 2013 and have sought a residence order.

[4] It is important to emphasise the following at this stage:

- The fact that threshold criteria have been conceded does not lead inevitably to a care order being made.
- The Trust's care plan has not been approved by the court.
- The mother may seek to be reassessed and reconsidered as a potential carer to whom the twins may be returned.
- The Rs have not been assessed or approved in any way – beyond spending one week in Northern Ireland in October 2013 they have had no contact with the twins.
- Even if a care order is made the mother may object to the twins being allowed to leave Northern Ireland to live in the United States, partly because of the effect that might have on the possibility of her having contact with them.

[5] It is clear therefore that a number of important decisions have to be made before any question arises of the twins being allowed to leave Northern Ireland. Nonetheless, the Trust has applied to the court for a declaration as to the meaning of Article 13 of the Adoption (NI) Order 1987 ("the Adoption Order"). That application has come about because the Trust envisages the following as its way forward:

(i) A care order being made with a plan of adoption by the R's in the United States.

(ii) The court granting an application under Article 33 of the Children (NI) Order 1995 ("the Children Order") allowing the Trust to arrange for the twins to live in the United States with the Rs and, if needs be, depending on her position at the time, ruling that the mother is withholding her consent to that course unreasonably.

(iii) The Rs applying under Article 57 of the Adoption Order for parental responsibility, an order which would extinguish the parental responsibility of the mother and father.

[6] The Rs cannot adopt in Northern Ireland because they are not domiciled here as required by Article 14(4) of the Adoption Order. If however they make a

successful application under Article 57 of the Adoption Order (after a care order and an Article 33 order) that would enable the twins to be placed with them in the United States. In that event an assessment would follow of whether it was proper for them to adopt the twins in light of their progress after placement.

[7] Article 13 of the Adoption Order is relevant to an Article 57 application. Article 13 provides:

> "(1) Where –
>
> (a) the applicant, or one of the applicants, is a parent, step-parent or relative of the child, or
>
> (b) the child was placed with the applicants by an adoption agency or in pursuance of an Order of the High Court,
>
> an adoption order shall not be made unless the child is at least 32 weeks old and at all times during the preceding 26 weeks had his home with the applicants or one of them.
>
> ….
>
> (3) An adoption order shall not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a married couple, both applicants together in the home environment have been afforded -
>
> (a) where the child was placed with the applicant by an adoption agency, to that agency, or
>
> (b) in any other case, to the Board within whose area the home is."

[8] The Trust's concern which led it to seek a declaration was that it appeared that there may be a conflict between a decision of Higgins J in Re JALB [2003] NIJB 22 and the decision of the Court of Appeal in England and Wales in Re A (A child) (Adoption) [2010] Fam 9 on the interpretation of Article 13. In fact on closer analysis there is no such conflict – properly understood the decisions relate to different parts of Article 13 (or its English equivalent) for the reasons which were developed in a most helpful submission by Ms McBride QC who appeared with Ms M Smyth on behalf of the Trust. That reasoning was accepted as correct by Mrs Keegan QC who appeared with Miss Farrell for the mother and by the other parties. It is necessary however to explain the point.

[9] In Re A the local authority sought a declaration from the court that "there was no legal bar to taking into account the period the child spends in the USA for the purposes of the equivalent of Article 13(1) of the Adoption Order. The circumstances were very similar to those in the present case. The local authority held parental responsibility for the child (jointly with the parents) on foot of a care order. The care plan was adoption by a paternal uncle and aunt in the United States. It envisaged the child travelling to the United States to live with the aunt and uncle and certain assessments being carried out while she was there. Thereafter, the case would be referred to the local authority's adoption and permanency panel for approval and matching. Only at that stage would she be placed for adoption with the uncle and aunt. Thereafter, the uncle and aunt would apply for parental responsibility under the English equivalent of Article 57 of the Adoption Order and then apply to adopt the child in the United States.

[10] The central issues which required determination were whether the "home" and "home environment" referred to in the English equivalent of Article 13(1) and (3)(a) and (b) could be outside the jurisdiction and whether the period of 26 weeks immediately preceding the application for an order under Article 13(1) must follow any placement for adoption.

[11] Wall LJ held that the word "home" in Article 13(1) was not geographically defined and further that the phrase "the child's home with the applicant" fitted far more readily with a home outside the jurisdiction ie where the home of the prospective adopters truly was. Any other interpretation would mean that if the child could not spend time with her uncle and aunt in the United States, she could not be adopted within her wider family with the result that prospective adopters would have to be found within the UK who would be strangers. That would necessarily be contrary to any proper policy considerations. I would add that it would also increase the interference under Article 8 ECHR with the likelihood that such interference could not be justified. Wall LJ further held that the reference to "home" in the equivalent of Article 13(3)(a) was not geographically defined and that the more sensible meaning for home environment in the foreign adoption is the home of the adopters abroad. Accordingly, in cases where a child is placed for adoption by an adoption agency, the child's home can be outside the jurisdiction. By way of contrast the proper meaning of the equivalent of Article 13(3)(b) would be that where a child was not placed with an applicant by an adoption agency, the home in question would have to be within the UK (or Northern Ireland in our case) in order to fit within the words "to the Board within whose area the home is".

[12] The Court of Appeal continued by accepting that under the equivalent of Article 13(3)(a) the "sufficient opportunities to see the child" which the adoption agency had to enjoy could be while the child was placed in the United States prior to placement for adoption.

[13] The decision of Higgins J in Re JALB was made in a factual context which is critically different. In that case the applicants were United States citizens who were

domiciled and resident there. The child in question was an infant girl whose parents were unable to care for her and who was placed on a voluntary basis with her great-aunt. The applicants happened to be visiting and working in Northern Ireland and with the agreement of everyone concerned including the Trust wished to adopt the infant. However, the applicants did not fall within Article 13(1)(a) because they were not related to the child nor did (1)(b) apply because the child had not been placed with them by an adoption agency ie a Trust. Within Article 13(3), (a) did not apply because the child could not be placed with the applicants by an adoption agency (Trust) so that (b) was engaged, meaning that the "sufficient opportunities to see the child" had to be within the geographical area of a Board in Northern Ireland.

[14] Re A and Re JALB are quite different cases as a result of the fact that in one case there was a care order giving parental responsibility to a public authority while in the other one, the Northern Irish case, there was not. The reasoning of the Court of Appeal in Re A, on legislation which is mirrored in Northern Ireland by the Adoption Order, will allow the plan envisaged by the Trust to progress if it turns out to be appropriate to make a care order and an Article 33 order.

[15] Accordingly, I am satisfied at this stage that the interpretation of Article 13 of the Adoption Order advanced on behalf of the Trust is correct. In Re A the Court of Appeal made the declaration sought by the local authority and approved that authority's arrangements to place the child with her parental aunt in the United States for whatever temporary period a visitor's visa could be obtained for her. At this stage of the proceedings I am not prepared to make such a declaration because the present case has not yet advanced to the stage that a care order has been made. Accordingly, I believe that it is premature to make a declaration along the lines of the one suggested by the Trust. The ruling which is contained in this decision can only be a preliminary ruling and it is, as set out above, a ruling as to the proper interpretation of the Adoption Order. This should be sufficient for the Trust to proceed with its application for a care order and with any related application which it makes under Article 33 of the Children Order.