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*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

Delivered: 21/12/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A MOTHER

Applicant

v

A HEALTH AND SOCIAL CARE TRUST

and

THE CHILD AND FAMILY AGENCY

Respondents

In the matter of a female child KG aged 14 months

Mrs M-A Dinsmore KC with Ms M Mullally (instructed by Roche McBride solicitors) for  
the mother

Ms L Murphy (instructed by the Directorate of Legal Services) for the Health and Social  
Care Trust

McFARLAND J

*Introduction*

[1] On 9 November 2023 the mother issued an application seeking an order that “the proceedings under the Child Care Act 1991 ongoing in the Republic of Ireland be transferred to Northern Ireland under Article 8 of the Hague Convention ... 1996.”

*Background*

[2] The background is that the child was born in England in October 2022. The mother is a member of the Irish Travelling community. The child has lived with her

mother in various locations, including one in Northern Ireland, one in England and two in the Republic of Ireland. The mother states that she regards her home as being in Northern Ireland and that home is the stated residence of the father, another member of the Irish Travelling community. They are not married but the father is named on the birth certificate so both share parental responsibility.

[3] The welfare of the child had become an issue in July 2023 when the child was residing in Co Roscommon in the Republic of Ireland. The Child and Family Agency (which I will refer to using the acronym in the Gaelic - TUSLA) had alerted the Irish police and a home visit was carried out by the police on 17 July 2023. On that date an *ex parte* emergency protection order was issued by the Irish courts requiring the child to be taken into the care of TUSLA. The parents then left the Republic of Ireland that day travelling to Northern Ireland.

[4] The police in Northern Ireland attended an address which was a short distance away from the stated home of the mother and father on 20 July 2023 and located the child and her father. There were concerns about the child's welfare given the state of the house and the fact that the child was wearing a loose and wet nappy with her genital area raw from nappy rash. The police then took the child into their control under a police protection order before handing the child over to the Gateway Team of the local Health and Social Care Trust ("the Trust").

[5] On 21 July 2023 the Trust then passed the child into the care of TUSLA and she was taken to the Republic of Ireland where she has remained in the care of TUSLA and was placed in foster care. An interim care order was granted in the Republic of Ireland on 25 July 2023.

[6] The mother then applied to the court in the Republic of Ireland challenging the jurisdiction of the court and seeking transfer of the proceedings to Northern Ireland.

[7] In Northern Ireland she issued proceedings on 17 August 2023 seeking a judicial review of the decision of the Trust to remove the child from the jurisdiction of Northern Ireland and place her in the care of TUSLA. Those proceedings were resolved as the Trust conceded that it had acted unlawfully by bypassing the normal procedures when it, lacking parental responsibility, removed the child to another jurisdiction. In a judgment delivered on 25 August 2023, Scofield J dismissed the mother's application for leave given the Trust's concession. The judgment is reported at *JR 282 [2023] NIKB 82*.

[8] In correspondence to the court on 23 August 2023, the Trust's legal department stated that:

"The [mother] and or father of the child can make their own free-standing application to the Northern Ireland High Court Family Division under the Hague Convention for the ongoing proceedings in the Republic of Ireland to

be transferred to this jurisdiction.”

Scofield J refers to this correspondence at para [24] in his judgment.

### *Hague Convention 1996*

[9] The Hague Convention 1996 ("the Hague Convention") relates to child welfare issues such as those raised by this case. Article 5 states that the judicial and administrative authorities of the State of the habitual residence of the child shall have jurisdiction to take measures directed to the protection of the child. Article 11 allows a State where a child is present but not habitually resident to take emergency steps to protect the child.

[10] Articles 8 and 9 deal with the potential for changing the jurisdiction. Under Article 8, by way of exception, if the State of the habitual residence considers that another State with which the child has a substantial connection, would be better placed to assess the best interests of the child, it can request that other state to assume jurisdiction or it can suspend consideration of the case and invite the parties to make such a request to that jurisdiction.

[11] Article 9 allows that other state, should it consider that it is better placed to assess the child's best interests, to request the State of the habitual residence that the requesting State be authorised to exercise jurisdiction, or invite the parties to make such a request.

### *The application*

[12] It was conceded by Mrs Dinsmore KC that the application under Article 8 is flawed, and this court cannot consider or grant the order sought by the mother. If the child was habitually resident in the Republic of Ireland, then it was up to the court in that jurisdiction to consider the derogation in Article 8. If the child was habitually resident in Northern Ireland, then this court had primary jurisdiction and it was not necessary to consider another country assuming jurisdiction.

[13] It was agreed that the court would permit the mother to amend her application and to seek the following orders from the court:

1. A declaration that the child is habitually resident in Northern Ireland and an order requesting that the child be returned to its country of habitual residence;
2. In the alternative, and in the event of the court determining that the child is not habitually resident in Northern Ireland, a determination under Article 9 of the Hague Convention that this court is better placed to assess the best interests of the child and a request to the court in the Republic of Ireland to authorise this court to exercise jurisdiction.

[14] I was content to deal with this case on this basis, notwithstanding that the father was not a party to the original application and the lack of notice given to the Trust and TUSLA.

[15] I conducted a hearing on 12 December 2023, and on being advised that Roscommon District Court had listed a full hearing on 14 December 2023 at which it was likely to determine the issue of habitual residence and primary jurisdiction, and, if necessary, any potential derogation under Article 8, I reserved judgment beyond that date.

### *The decision of Roscommon District Court*

[16] I have been advised by the Trust, that after convening the hearing at which the parents participated fully, and on considering the evidence presented to the court, it was decided on 14 December 2023 that KG was habitually resident in the Republic of Ireland with its courts having primary jurisdiction and further, that it was considered that there would be no derogation from the Hague Convention as the courts in Northern Ireland would not be better placed to assess the best interests of the child.

### *Habitual residence*

[17] Although “habitual residence” is not defined in any legislative provision in the United Kingdom (or, as I understand it, in the Republic of Ireland) or in the Hague Convention, both the United Kingdom and the Republic of Ireland approach the determination of a child’s habitual residence as a fact-finding exercise based on the child’s centre of interests.

[18] The underlying purpose of the Hague Convention is the mutual recognition of decisions in the field of child protection. This is reinforced by the provisions of Chapter IV. Article 23(1) provides:

“The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.”

Article 25 provides:

“The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.”

[19] The Explanatory Report published with the Hague Convention states in its section on Article 25 that:

“If, for example, the authority of origin decided as an authority of the State of the child’s habitual residence, the

authority of the requested State will not be able to review the facts on which the authority of origin based its assessment of habitual residence.”

Although Northern Ireland is not being requested to specifically enforce an order of a court in the Republic of Ireland, it is clear that it has an obligation to recognise findings of fact by its courts.

[20] By operation of the provisions of the Hague Convention and the general application of the *res judicata* jurisprudence this court is bound by the fact-finding decision of Roscommon District Court that KG is habitually resident in the Republic of Ireland and that that country’s courts have primary jurisdiction.

*Are the courts in Northern Ireland better placed to assess KG’s best interests?*

[21] Roscommon District Court has already considered this question when considering whether to invoke Article 8 and has answered it in the negative.

[22] That decision would not be a fact finding exercise but rather an evaluation and would not prevent this court considering the question. It may reach a different conclusion, particularly if it has evidence available to it which was not available to Roscommon District Court.

[23] It does so by application of Article 9. The procedure in this article is described in the Explanatory Document as “exactly symmetrical” to that in Article 8. Typically, it will be considered when the State of the child’s habitual residence has not had its jurisdiction invoked or may not even be aware about the need for the protection of the child and the child is physically present in another State.

[24] In this case the Republic of Ireland had invoked its primary jurisdiction by making the emergency protection order on 17 July 2023. When KG was removed from her father’s care by the police in Northern Ireland and was transferred into the care of the Trust, there was no primary jurisdiction as the child has habitually resident in the Republic of Ireland. The urgent measures taken by the police were permitted under Article 11.

[25] The Article 9 procedure is still a valid consideration even at this stage notwithstanding the physical presence of KG in her country of habitual residence but as a decision has already been made on the issue, it would normally be the case that this court should be considering additional information. The mother was represented at the hearing when Article 8 was dealt with in Roscommon District Court and, no doubt, was afforded the opportunity to present evidence and make submissions on this issue.

[26] Exercising jurisdiction relates to the decision making and does not necessarily have any bearing on where the child should live (see the comments of Black LJ in *Re N* [2015] EWCA Civ 1112 at [159]). What is being transferred is the problem of the

decision making.

[27] At present the mother is living in Northern Ireland as is the father and the wider paternal family. The presence of these individuals in Northern Ireland may facilitate assessments but I do not consider that the presence of the parents and wider family members outside the jurisdiction would prevent TUSLA from carrying out its functions directly, or indirectly, by using the services of the Trust.

[28] Bearing in mind that the assuming of jurisdiction by a state in which a child is not habitually resident is a derogation, there has been no compelling evidence presented to suggest that the Trust and the Northern Irish courts would be better placed to assess KG's best interests. The CJEU in *The Child and Family Agency v D* [2017] 2 WLR 949 in considering a similar provision in the Brussels IIA framework stated that a transfer should have a genuine and specific added value with respect to the decision making.

[29] Knowles J in *Re D* [2021] EWHC 1970 carried out an extensive review of the case law concerning these requests at paras [36]–[48]. Her conclusion not to make a request to the Swiss authorities in that case was based on three factors – the application of the principle of mutual trust between the contracting States, the clear evidence that the Swiss legal framework was capable of resolving any of the issues in the case that might arise, and the practical difficulties arising (see paras [72]–[74]). The practical difficulties relating to KG's case are not insurmountable, however the mutual respect and the ability of the Republic of Ireland to deal with the issues clearly are relevant in this case.

[30] It is understood that the mother is pregnant again and that in or about February 2024 a full sibling to KG will be born. The mother's stated intention is that she will remain in Northern Ireland for the birth. Following the birth the Trust may, or may not, consider a public family law intervention. Should that happen then there will be two full siblings with different habitual residences and different states exercising jurisdiction. In those circumstances one could see a potential advantage of assessment and decision-making for both being brought under one roof whether in the Republic of Ireland or in Northern Ireland. In those circumstances this issue may need to be revisited, but there is little point speculating about future events or the outcome at this stage.

### ***Conclusion***

[31] For the reasons given I am not satisfied that the child is habitually resident in Northern Ireland. I also consider that this court is not better placed than the courts in the Republic of Ireland to assess her best interests and decline to make any request under Article 9 of the Hague Convention.

[32] The application, in its amended form, is therefore dismissed. The mother is in receipt of legal aid, so I make no order as to costs save for a taxation order in respect of her costs.