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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **25/02/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF AN ADOPTION APPLICATION (STAY PENDING DETERMINATION OF ISSUE BY THE EUROPEAN COURT OF HUMANS RIGHTS)

GILLEN J

[1] This judgment is being handed down on Monday 25th February 2008. It consists of 12 pages and has been signed and dated by the Judge. The Judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that no person may reveal by name or location the identity of the child and the adult members of her family in any report. No person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the child and the adult members of their family must be strictly preserved. I have already given my decision in this case and this judgment now sets out and dilates on the reasons in written form .

Background

[2] In this matter a child ("N") born in April 2002 was made subject to a Care Order in July 2002. Thereafter on 31 May 2005 she was the subject of a Freeing Order before this court. The Court of Appeal in Northern Ireland affirmed this Order by a majority on 22 November 2005 and on 12 July 2006 the House of Lords affirmed the Order by a majority of 4 to 1. The child was placed with her prospective adopters on 12th April 2006 and has now commenced school in September 2006. Prospective adopters have now lodged an application with this court to adopt the child. The application is at an advanced stage with the appropriate statutory reports having been lodged by the relevant Trust and the Guardian ad Litem Agency.

[3] Post freeing contact has taken place between the birth parents and the child .

The Applications

[4] The birth parents ("the applicants") now invite this court to stay the Adoption Order proceedings pending a determination of the issues in the case by the European Court of Human Rights. ("ECHR" or "the European Court"). In addition they apply to be joined as parties in the present proceedings by virtue of Rule 4A.15(3) of the Family Proceedings (Amendment Rules) (Northern Ireland) 2003. That Rule states:

> "The Court may at any time direct that any person or body be made a respondent to the application."

[5] The parties to this application have made enquiries from the ECHR as to a likely timetable for the processing of the present reference. It has now emerged that the ECHR has accorded priority and confidentiality to the case. The question of admissibility was likely to be dealt with in March 2007. Correspondence of 9 January 2007 from the ECHR stated, inter alia:

> "The President will consider this case shortly. If priority is granted (*this has now been done*) it would nonetheless take the court a certain time to examine the issues. If the complaints were communicated to the Government for their comment, with the applicants having the opportunity to reply in turn and if the case was then declared admissible, it could not be expected that a judgment on the merits would issue before the end of 2007. If priority is not granted a case takes on average 2 to 3 years to reach a judgment on the merits (if not rejected as inadmissible). This application must therefore be approached on the basis that the first instance hearing of the matter before the ECHR will not conclude before the end of 2007 and thereafter there remains the possibility of a reference to the Grand Chamber of the court."

The Joinder Application

[6] I have come to the conclusion that these applicants should be joined to this Adoption application but that their participation should be limited to the question of post adoption contact and therefore to the application at this hearing to stay the proceedings. I have come to this conclusion for the following reasons:

[7] It is beyond argument that the applicants, the child's birth parents, do not have any right to be notified of the final hearing of the adoption proceedings in light of the freeing order. The only obligation on the adoption agency is to notify the birth parents that the child has been placed for adoption and is adopted. Nothing that I say in this judgment will alter that unequivocal position.

[8] Natural parents in these circumstances will not be made respondents to adoption applications simply because they have lost parental responsibility by virtue of the Freeing Order. Former parents however can apply to be joined by virtue of Rule 4A.15(3) of the 2003 Amendment Rules. On its face, that Rule appears to give the court an unfettered discretion to direct that any person be made a respondent to the application. The discretion must be exercised judicially on the facts of the individual case and for good reason. Such a power should only be invoked sparingly and only in very rare instances should the natural parents be made respondents to adoption applications. Normally they will not know about the hearing and will not become entitled to know about it until after it has taken place. The rationale behind this is that because apart from making an Adoption Order, there is no future role for the court and no reason for the birth parents either to attend the hearing or to make any further representations to the court. (see Re F (Children) Neutral Citation No. (2006) EWCACIB 1345 at para 21.)

[9] Nonetheless in exercising its discretion the court must take into account the fact that at the time of the 1987 legislation open adoption, whereby birth parents are now not infrequently accorded contact with children post adoption, was scarcely contemplated. The philosophy behind this development is that whilst contact is always expressly to be considered in light of the welfare of the children, post adoption contact between the natural parents and the adopted child can be of assistance to assuage any concerns the child may harbour about the birth parents, assist feelings of self identify and serve to underline the new placement for the benefit of the child. On the other hand prospective adoptive parents often entertain concerns about the birth parents and their motivation in being accorded post adoption contact. They must be involved in the post adoption decision making process. This has undoubtedly introduced a fresh element into the concept of contact post adoption.

[10] I find reassurance in my view that courts have to consider this concept of post adoption contact with fresh eyes in the dissenting judgment of Baroness Hale of Richmond in Down Lisburn Health and Social Services Trust and Another (AP) (Respondents) v H (AP) and Another (AP) (Appellants) (Northern Ireland) (2006) UK HL36 at para. 37 where, dealing with certain misconceptions she felt operated with adoption practice in Northern Ireland, the judge said:

> "A second misconception is that it is not possible to run proceedings, whether *for adoption* (*my italics)* or for freeing, in such a way that the parents and prospective adopters are able to hear and challenge one another's evidence. There are many different ways of conducting contested adoption proceedings and the procedures can be adapted to the particular needs of each case. But it is common practice in the Family Division of the High Court in England and Wales for the prospective adopters to listen to the proceedings in another room while the parents give evidence and for the positions to be reversed when or if the prospective adopters give their evidence. This enables issues such as contact to be properly explored between the very people who will have to make it work if it is to happen at all. It also enables each to understand the other's point of view much more clearly than they can from the papers. Each becomes a person rather than the ogre or the threat they may previously have been".

[11] It should also be borne in mind in this context that in the Royal Courts of Justice in Northern Ireland, there are facilities for birth parents and adopters to view and listen to each other's evidence in different parts of different buildings without ever coming into contact. It is thus possible to split final adoption hearings into two parts whereby in the first part of the hearing (with the applicant's legal representatives present) the natural parents, and perhaps the prospective adopters with their legal representative and the judge can deal with issues of post adoption contact. Once the decision is made, the second part of the hearing, perhaps on a different day, can take place where the judge meets the children with the prospective adopters and the informal finalisation occurs without the natural parents being present or even being aware of the date when the matter is for hearing.

[12] In Re F, at paragraph 30 Wall LJ referred to the system in England as follows:

> "If the birth parents attend the first part of the hearing (with the applicant's legal representative present) and the judge comes to the conclusion that an Adoption Order should be made, this means that the prospective adopters can attend the second limb with the child or children concerned, without any risk that the natural parents will be present. Once the Order is made, an informal ceremony can then take place, in which the Judge meets the children concerned and the

> adopters, photographs are taken, and, in some courts, the children are presented with an informal certificate marking the occasion.
>
> 31. We both speak from our respective first instance experience when we say that these occasions are important, since children who have often had very disturbed unhappy backgrounds are being the opportunity, through adoption, to make a fresh start. Sensitively handled such an occasion is, we believe, of considerable value to both the adopters and the child and marks a rite of passage at a critical moment of the child's life".

[13] I have dilated to some extent upon this matter to highlight the importance of adoption proceedings in the life of a child and to illustrate how that part of the hearing must be kept sacrosanct, free of rancour or contest. The present application however in my opinion does not dilute that principle.

[14] In this particular case at the first instance hearing before me, the prospective adopters had not been identified. Consequently the views of the prospective adopters could not be canvassed. Expert evidence was given by Professor Tresiliotis about the likely benefits of post adoption contact and the suggested frequency. In the event I came to the conclusion that a Freeing Order should be made even though no adopters had been identified. The circumstances of this case are that such prospective adopters have now been identified and that discussions have taken place in general terms about post adoption contact. I have no doubt that post adoption contact is more likely be effective and for the benefit of a child if some measure of agreement can be entered into between the prospective adopters, the Trust and the natural parents provided it has been determined that post adoption contact would be to the benefit of the child. This supposition is predicated on the condition that the birth parents can accommodate themselves to the new adoption position. If that can be established in this case it is believed by Professor Tresiliotis, the Trust and as I understand it, the prospective adopters that post adoption contact can be for the benefit of this child. However discussions about the nature of the contact, both with the birth parents and the siblings, appear to have encountered impediments because of the uncertainty introduced by the proposed referral to the ECHR. I had before me a document headed "Adoptive Parents Position Statement". In it they have asserted that they want an end to the litigation by the birth parents because they feel it is not in N's best interests. They state:

> "We would seek the birth parents to make an open statement confirming their support for the adoption placement of N. We would like them to accept that

> this is permanent as otherwise refusal to accept the adoption will undermine the placement . . .
>
> 4. Post adoptive placement contact has taken place as the birth parents wish. However, their lack of openness towards us as N's adoptive parents about their intentions to embark on further litigation in Europe has left us feeling let down by their actions. What is the purpose of further litigation?"

[15] Against this background I have concluded that this may well be one of the instances postulated by Baroness Hale where by allowing the question of contact to be explored in the calm surroundings of the court between the very people who will have to make it work if it is to happen at all, it would be in the best interests of this child. As I have already indicated to the parties, I intend to fix a directions hearing so that the appropriate procedure and method of carrying out this exercise can be performed to the mutual benefit and confidence of all the parties. I consider that this is one of these very rare instances indeed therefore where allowing the birth parents to attend at least the first stage of the adoption hearing might well amount to the kind of creative and imaginative approach which the courts must in the modern era contemplate if post adoption contact is to be explored realistically and meaningfully. Listening to each other in calm and measured circumstances may lead to a new understanding and fresh initiatives to benefit this child.

[16] I do not consider therefore that my decision to permit these birth parents to be made respondents for this limited purpose in this adoption will operate as a precedent for other cases given the circumstances of this case. I do so in the conviction that similar circumstances are highly unlikely to arise again in the future.

[17] The Order of this court therefore is that:

(1) The natural parents of the child shall be given notice of that part of the adoption proceedings in which post adoption contact is to be discussed ("the first part").

(2) The natural parents of the child shall file and serve a written statement of their proposals for post adoption contact within 7 days of receipt of this judgment.

(3) Representations on behalf of the natural parents shall be confined to the issue of post adoption contact.

(4) The child shall not be present at the first part of the hearing.

(5) Thereafter the court will fix a further hearing, notice of which will not be given to the natural parents, at which the prospective adopters will attend with the child for consideration of the making of the Adoption Order.

[18] **Application to Stay the Adoption Proceedings Pending a Determination from the European Court of Human Rights.**

[19] The Respondent's Case

Mr Hutton, in the course of a well marshalled skeleton argument augmented by oral submissions made the following points:

[20] His application was to the effect that the court should stay the adoption order proceedings until the European Court finally determines the case. Alternatively it should be stayed pending some further clarity in terms of the proposed determination from the European Court and at least until the European Court provides an opinion on admissibility.

[21] He submitted that domestic courts will often stay a case pending a European decision on another case to be decided on similar facts and instanced Wrexham County Borough (Appellants) v Berry (Respondent and Others) [2003] UKHL 26 where at para. 3 of the judgment Lord Bingham expressly referred to the hearing of an application which was stayed to await the outcome of an application pending the European Court of Human Rights. This was a case considered in the context of the use and development of land.

[22] Mr Hutton acknowledged that he could find no authority where an injunction or other similar order had been granted to stay/restrain a domestic law process pending a determination by the European Court, but he did urge that interim injunctions have been granted in domestic courts following referrals to the European Court of Justice. In particular he drew attention to R v Secretary of State for Health and Others ex parte Imperial Tobacco Limited [2000] UKHL 60 (7 December 2000).This case involved consideration of a directive of the European Parliament which provided that all forms of advertising or sponsorship promoting tobacco should be banned in the community. Whilst the immediate issue in the case was whether the domestic court should determine the case according to community law or domestic law (a matter which was left undecided by the court on the basis that the question required a referral to the ECJ), Mr Hutton drew attention to the comments of Lord Hoffman where he stated:

> "justice required national courts to have jurisdiction to suspend the enforcement of a community regulation pending a decision on its validity."

[23] Responsibly, Mr Hutton drew my attention to R v Home Secretary ex parte Kaur [1996] IMM. AR 359("Kaur"). In that case the applicant sought leave to injunct the Secretary of State from proceeding with deportation pending a reference to the European Court of Human Rights. The court refused leave to move for judicial review on the grounds that the court had no power to injunct the Secretary of State from deporting the applicant pending the decision from Europe since he was acting within domestic law and the Secretary of State's decision was not Wednesbury unreasonable given the time it would take to resolve the matter in Europe. Mr Hutton sought to distinguish this case on the basis that Kaur was decided before the incorporation into domestic law of the rights under the Convention and Ms Kaur had no directly applicable Convention rights in domestic law which the court could seek to protect. Secondly he argued that the respondents in the instant case were complaining to the European Court about violations of various Convention rights which he submitted by virtue of Section 6 of the Human Rights Act 1998 would co-extensively have been violations of the rights in domestic law.

[24] It was Mr Hutton's argument that in the absence of direct authority governing the question of how the court should exercise its discretion the court should rely by analogy on the ordinary injunctive principles and in particular on those set out in the well known case of American Cyanamid v Ethicon Limited [1975] 1 AER 504. He argued there was a serious issue to be tried before the European Court given the dissenting judgments of Lord Justice Sheil and Baroness Hale in the earlier hearings in this instance , that damages would be an inadequate remedy to these applicants , that the balance of convenience was in favour of a stay given that the child could remain in her current placement and that the Convention right aspect made this a "special case".

[25] Turning to the remedy that would be open to the European Court, Mr Hutton submitted that the decisions of the Strasbourg Court have both prospective effect and retrospective effect. (See The Queen on the Application of Colin Richards v The Secretary of State for the Home Department [2004] EWHC 93 (ADMIN.)). Moreover Mr Hutton drew my attention to the remedies of the court adverted to in Philip Leach 2nd Edition (Taking a Case to the European Court of Human Rights) were the author at para. 4,51 states:

> "The effect of a judgment to which the court has found a violation of the Convention is to impose a legal obligation on the respondent State to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (restitutio in integrum). Therefore, if restitutio in integrum is possible, then it is for the State to carry it out, as the court has no power to effect restitution. If restitutio in integrum is in practice impossible, the

> respondent State is free to choose the means for complying with the judgment, provided that those means are compatible with the conclusion set out in the court's judgment.

The author refers to Scozzari and Giunta v Italy [2002] 35 EHRR 12 at para. 249:

> "A judgment in which the court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the court and to redress as far as possible the effects."

[26] Mr Hutton went on to submit that the respondent Government will be asked to report to the Committee of Ministers on any measures taken in response to a judgment of the court and that in those circumstances the door preventing the adoption should not be closed .

Conclusions

[27] Insofar as I have determined to accede to the submission of Ms Keegan QC ,who appeared on behalf of the Trust, to refuse to stay the adoption of this child pending resolution of the matter by the ECHR it is unnecessary for me to set out the detailed arguments that she so comprehensively and skilfully advanced. My reasons for rejecting the application for a stay are as follows ;

[28] First, at the time of hearing this application it was very uncertain as to when this application would be determined in the ECHR. Delay could have served to frustrate the best interests of this child which had been determined by all the domestic courts to be adoption. A number of judges at all levels domestically had determined that the risks of history repeating itself with this child were too great if rehabilitation to the birth parents was contemplated. It seems to me that delay cannot be allowed to become an unwitting tool of further uncertainty for her. An interim injunction or stay could therefore have come perilously close to giving the applicant birth parents the remedy that has been denied them in the domestic courts namely the frustration of the adoption of this child .

[29] A second factor in my decision is that I am satisfied I can take into account the strength or weakness of the applicants case albeit ultimately it is a matter for the exercise of my discretion in light of all the circumstances. In *R v Secretary of State for Transport ex parte Factortame Ltd and Others* [1991] 1 AC

603 (“Factortame”) the House of Lords considered how the guidelines for the exercise of the court's jurisdiction to grant interim injunctions laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 should be applied where there was doubt as to the adequacy of any remedy in damages to either party, and where as here a reference to the European Court was being made which involved the effect of European law on a national law. Lord Goff made clear that nothing he said was intended to qualify the guidelines laid down by Lord Diplock in *American Cyanamid*. Those guidelines made clear that where interlocutory relief is being claimed it is enough for a plaintiff or claimant to show there is a serious case to be tried. Once that threshold has been passed, the first stage is then to consider the adequacy of a remedy in damages to the claimant seeking the injunction, and to the defendant if an injunction is granted. So far as the claimant is concerned if there is an adequate remedy in damages that normally precludes the granting of an injunction. If the claimant is not so precluded then the court will consider the position of the defendant. If the defendant can be adequately compensated by the cross undertaking in damages that means there will be no reason not to grant the injunction on that ground. If damages are not an adequate remedy to either party, then when considering the balance of convenience, the court must consider all the circumstances of the case.

[30] What was argued in *Factortame* was that because a challenge was being made to the validity of a United Kingdom national law, the test was no longer "serious case to be tried", but "strong prima facie case". However Lord Goff summarised his view of the position in this way:-

> "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of the law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction

> from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

[31] In the Court of Appeal in *R v Secretary of State for Trade and Industry ex parte Trades Union Congress* (2000) IRLR 565, having referred to the passage in the speech of Lord Goff quoted above, Lord Justice Buxton indicated at para 25 that:

> "I venture to draw from that latter passage that Lord Goff was recognising that there may be an unusual case – I infer in Lord Goff's view it would be a very unusual case - where there was no strong prima facie case that the law was invalid, but where, nevertheless, it would be appropriate because of the weight of other factors to grant interim relief. But that case apart, Lord Goff in my judgment appears to regard the importance of not restraining a public authority by interim injunction except in a case such as that he refers to at the end of the passages I have cited as being, not a paramount factor, but an important threshold principle to which the court that is being asked to consider interim relief must direct its attention in the first instance."

[32] Whilst the instant case can be distinguished in that the applicants are disputing not the law itself but rather the implementation of the Adoption Order by the Trust I regard it of significance in this case that a Trust as a public authority seeks to act in the best interests of a child and in accordance with domestic law. To date the trial judge, two appellate judges and four out of five judges in the House of Lords have determined that the step of adoption is a lawful one if implemented by this Trust. That is an important factor in determining the strength of the applicants case and whether or not the interim relief sought should be denied. Courts should be cautious about granting a stay or an injunction in those circumstances especially where the future of vulnerable children is at large .Whether the test be a serious case to be tried or a strong prima facie, I am not persuaded that the applicants' case has sufficient strength or weight to justify interfering with the intention of the Trust in this instance. In any event if this child were to be deprived of adoption because of delay in the hearing of this matter damages are not likely to be an adequate remedy for her. Even if the court were to introduce the concept of the balance of convenience into this equation-which I consider inappropriate in a child's case where my decision must be guided by article 9

of the Adoption(Northern Ireland) Order 1987 case -- it would not favour the relief now sought as this child's position could be rendered irreparable.

[33] Thirdly no application was made for interim relief at any stage prior to the present application. None of the courts determining this matter considered such a step. The House of Lords expressly allowed the placement to proceed. I consider further delay is potentially prejudicial to this child. Relief of the kind now sought needs to be made expeditiously in the context of family proceedings. Delay in seeking this remedy is a factor against granting it.

[34] Fourthly whilst in the wake of any decision by the ECHR in favour of the applicants the Committee of Ministers may wish to discuss measures to be taken in response to the judgment, in other cases involving a challenge to the implementation of domestic law in the family context the ECHR has not sought to invoke a jurisdiction to overrule the domestic courts decision in favour of a freeing order etc. For example in P, C and S v UK (2002) 2 FLR 631 where the ECHR determined that the removal of a child at birth amounted to a breach of Arts 6 and 8 of the Convention the court made a pecuniary award of damages .

[35] In all the circumstances I therefore have refused the application for a stay.