

Neutral Citation No: [2024] NIFam 8

Ref: McF12581

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

ICOS: 24/026784

Delivered: 22/07/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A MOTHER

Applicant

and

A HEALTH AND SOCIAL CARE TRUST

and

A FATHER

Respondents

with

THE CHILD AND FAMILY AGENCY

Notice Party

In the matter of a male child KH aged 5 months

Mrs M-A Dinsmore KC with Ms M Mullally BL (instructed by Roche McBride Solicitors)
for the Mother

Ms M Connolly KC with Mr O'Brien BL (instructed by John Fahy & Co Solicitors) for the
Father

Ms L Murphy KC with Ms C McCloskey BL (instructed by the Directorate of Legal
Services) for the Health and Social Care Trust

Ms G Murphy KC with Ms C McCullagh BL (instructed by Thomas T Montaque
Solicitors) for the Children's Court Guardian

McFARLAND J

Introduction

[1] On 28 June 2024 this case came before me and after considering written and oral submissions I indicated that this court would assume jurisdiction for a five-month

old male child habitually resident in the Republic of Ireland. I will refer to the child as 'KH', a randomly selected cypher. The assumption of jurisdiction was on the basis that the child's current foster-placement in the Republic of Ireland remains available for the duration of the proceedings or until such time as this court authorises a different placement. The Irish court was to retain jurisdiction until at least 24 September 2024 when this court would review the matter again. I stated that I would give my full reasons later, and these are those reasons.

[2] The mother had issued a summons 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." I will refer to this convention as "the 1996 Convention." Any transfer of proceedings is strictly a matter for the court with jurisdiction, *i.e.* the Irish court and this court could not, in any event, seek to operate under the Republic of Ireland's Child Care Act 1991. The 1996 Convention provides for an assumption of jurisdiction to measures of protection of a child and therefore should the United Kingdom assume jurisdiction it will do so under its own legislation, and in particular the Children (NI) Order 1995 ("the 1995 Order"). The Trust and the father are respondents to the application and the Child and Family Agency (or 'TUSLA' as it is frequently known by using its acronym in the Gaelic language) was given Notice Party status to the application. TUSLA has not appeared.

[3] Articles 8 and 9 of the 1996 Convention provide as follows:

"Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either - request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or - suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are:

- a) a State of which the child is a national,
- b) a State in which property of the child is located,
- c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either - request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or - invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

(2) The authorities concerned may proceed to an exchange of views.

(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request."

Background

[4] I have set out the background of this family's circumstances in an earlier judgment relating to an older sibling in *Re KG* [2023] NIFam 25. That child was born in England in October 2022 to the mother who was a member of the Irish Travelling community. After living in various locations in Northern Ireland, England and the Republic of Ireland, KG was taken into care in the Republic of Ireland. The mother failed in her attempt to get the United Kingdom to assume jurisdiction for the child and the child now lives in a foster placement in the Republic of Ireland although proceedings are still ongoing.

[5] In para [30] of the judgment I stated:

“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.”

[6] KH was born in January 2024 in a hospital in the Republic of Ireland. In the latter part of the pregnancy the mother was residing in Northern Ireland and the Trust had undertaken some pre-birth assessment. The assessment could not be completed as the mother is understood to have crossed the border to live in the Republic of Ireland. Her motive for doing so is unclear and in her grounding affidavit the mother has declined to explain why. She states that she “engaged positively” with the Trust. At a meeting with the Trust on 20 December 2023 she agreed to remain living in her supported accommodation for at least three months after the child’s birth. In reality, her engagement was far from positive.

[7] Notwithstanding this agreement she left that accommodation a day later to return to live with the father and to resume what was considered to be an abusive relationship. Although the mother stated that the father continued to reside in Northern Ireland, they both appear to have remained outside communication with the Trust and the mother’s next confirmed appearance was about a month later at the hospital in the Republic of Ireland where the child was born.

[8] After KH’s birth TUSLA obtained an interim care order in the local District Court in the Republic of Ireland. It is unclear if that court had assumed direct jurisdiction under Article 5 of the 1996 Convention based on a finding that KH was habitually resident in the Republic of Ireland or was taking urgent “necessary measures of protection” under Article 11 of the 1996 Convention based on the physical presence of the child in the Republic of Ireland. It must be inferred from a later order of 14 February 2024 that it is the former, as the District Court sought to invoke the Article 8 provisions of the 1996 Convention by making a request to the United Kingdom that it assumes jurisdiction for the child. This is a process that could only take place if it had assumed jurisdiction under Article 5 of the 1996 Convention and based on a finding that the child’s habitual residence was in the Republic of Ireland.

[9] Following the order of 14 February 2024, the Trust commenced care order proceedings in Northern Ireland. This application must be seen not as a request by the Trust for this court to exercise jurisdiction by way of KH’s habitual residence, but

rather to respond positively to the request from the Republic of Ireland to assume jurisdiction under Article 8(1) of the 1996 Convention.

[10] KH remains in foster care in the Republic of Ireland under the interim care order. His health is an ongoing concern. At the time of his birth he was required to spend some time in a neo-natal unit with signs of neo-natal abstinence syndrome. He was reported as being “jittery” with issues concerning his breathing. There were also issues with regard to a failure to gain weight. On 7 March 2023 he was admitted to a specialist children’s hospital in the Dublin area following a check-up for assessment relating to irregular airflow (stridor) likely to have been caused by laryngomalacia. Surgery followed and that was reported to have been successful.

[11] The Trust have recently been advised that KH was again admitted to the hospital for further surgery relating to that condition. KH is back living with the foster-carers but the current advice is that the child has not recovered sufficiently for any placement move.

The application

[12] The mother’s application is premised on an assumption that KH is habitually resident in Northern Ireland. On that basis she seeks that “the care proceedings under the Child Care Act 1991 ... be transferred from the Republic of Ireland to Northern Ireland.” As previously stated, certain technical aspects of this application are misconceived. However, to avoid further delay, this court is prepared to amend the application on the following basis:

- A District Court in the Republic of Ireland has determined that it has jurisdiction by virtue of *KH* being habitually resident in that country. This court considers itself to be bound by that decision (see paras [17]–[20] of *Re KG*). It was not appealed by either parent.
- The District Court has made a determination that, by way of exception, Northern Ireland would be better placed to assess the best interests of *KH*, and pursuant to that determination it has considered that Northern Ireland should assume jurisdiction (pursuant to Article 8 of the 1996 Convention).
- Although there has been no formal request passed directly, or through the Central Authorities, I am treating the mother’s application as her responding to this decision as a request to this court to assume jurisdiction.

[13] It is agreed that Article 8(2) of the 1996 Convention applies as *KH* is a citizen of the United Kingdom and through his parents’ current residence he has a substantial connection to the United Kingdom.

Legal basis for Northern Ireland assuming jurisdiction

[14] Article 8(4) of the 1996 Convention provides that Northern Ireland may assume jurisdiction if courts in this jurisdiction consider that it is in the child's best interests.

[15] The principles concerning cross-border jurisdiction within the European Union had been well-established under the Brussels II (Revised) provisions. Brussels II (Revised) emerged from the provisions of the 1996 Convention insofar as they covered EU cross-border issues. When the United Kingdom left the EU, cross-border issues reverted back to the regime of the 1996 Convention.

[16] Keehan J in *Child and Family Agency v Mother and others* [2021] EWHC 1774 said that there were no differences or distinctions of material significance between the provisions in Brussels II (Revised) and the 1996 Convention, and that the courts in the United Kingdom should adopt the comprehensive guidance on the procedure to be followed under Brussels II (Revised).

[17] On that basis the judgment of Cobb J in *Re M* [2013] EWHC 646 is instructive as it directs that the request for transfer should be dealt with judicially rather than administratively, and that the court's function is limited to a consideration of whether the transfer is in the best interests of the child.

[18] The court is also mindful of the observations of Black LJ in *Re N* [2015] EWCA Civ 1112 at [159] when she observed that "what is transferred is, putting it bluntly, the problem, for which the other jurisdiction will, if the transfer is made, take responsibility." It does not necessarily result in the physical transfer of a child.

[19] Lady Hale in *Re N* [2016] UKSC 15 was dealing with an application to request a transfer of jurisdiction under the Brussels II (Revised) regime. (Today, this would have been an application under Article 9 of the 1996 Convention, a symmetrical provision to that in Article 8.) Lady Hale at para [44] said that the question is whether the transfer will be in the child's best interests and not necessarily whether the eventual outcome following a transfer will be in its best interests. The impact on the child's welfare in the short or the longer term cannot be excluded from the consideration. In essence the question is - whether it is in the child's best interests for the court currently seised of the case to retain it or whether it is in the child's best interests for the case to be transferred? Recently this has been expressed to mean that any transfer should provide "genuine and specific added value with respect to the decision to be taken in relation to the child" (see *AM v KL* [2023] EWFC 15 and *Re A* [2024] EWFC 178).

[20] An example of the outworking of this type of case was dealt with by Williams J in *Child and Family Agency v M* [2018] EWHC 1582. A child had been removed from the care of its parents arising from suspected injuries sustained by the child. The mother later travelled to the Republic of Ireland where she gave birth to another child which in turn was made the subject of an interim care order. The Irish court, acting under Article 15 of Brussels II (Revised) invited the United Kingdom to assume jurisdiction.

[21] Williams J set out the guiding principles at para [26] in the following terms:

- (a) He reminded himself that transfer of jurisdiction was an exception to the general rule of jurisdiction grounded on habitual residence.
- (b) It is envisaged that the court with substantive jurisdiction will be responsible for whether the criteria for transfer are met.
- (c) The function of the receiving court is far more limited and involves a determination of whether it is in the best interests of the child.

[22] Notwithstanding any decision by the Irish courts about the best interests of the child, it is still incumbent on the United Kingdom court to carry out its own evaluation. At para [37] Williams J discusses the circumstances in which differing decisions of the requesting state and the requested state could arise and could be resolved. Ultimately, the requested state may bring its own perspective to the evaluation, but in doing so should not carry out a review of the requesting state's determination.

[23] In coming to his conclusion at paras [48]–[54], Williams J took into account several factors:

- (a) The child had been resident in Ireland for nearly three years and all the evidence suggested that save for the implementation of a final care plan, moving the child out of his current placement would be harmful.
- (b) Courts in the United Kingdom are well accustomed to dealing with children residing out of the jurisdiction relying on assessments made by social workers and other professionals from other countries or obtaining its own assessments in relation to family members abroad.
- (c) The case revolved around the maintaining of the current foster-placement. Whilst acknowledging difficulties created by maintaining a foreign placement managed by a United Kingdom local authority, there was not a complete statutory or regulatory bar to that occurring.
- (d) His reservations concerning whether the current foster-carers can maintain the placement could be assuaged by assurances relating to the arrangements to be put in place between the local authority, TUSLA and the foster-carers.

Consideration

[24] I consider that the relevant factors relating to my evaluation of whether it is in KH's best interests that this court assume jurisdiction are as follows:

- (a) The Trust is familiar with both parents and has carried out a pre-birth assessment, albeit one truncated by the mother's disappearance.
- (b) KH has three siblings, all of whom are in foster placements in the Republic of Ireland. Two are permanent and the other under interim arrangements still being considered by the Irish court.
- (c) Although some papers have been shared in respect of KH, the Trust has yet to have had access to the relevant papers relating to the older siblings.
- (d) The parents have had in the past a transient lifestyle (moving between the various jurisdictions in the British Isles). Their current expressed intention is to remain in Northern Ireland, although the court could not have a lot of confidence concerning this.
- (e) KH appears to have potentially significant medical needs. He is six months old and has already had two operations relating to his stridor condition. He has required hospitalisation and it is understood that the current foster-carers are considered to have sufficient knowledge and experience to deal with KH in his current medical condition.

[25] I consider that there are no significant geographical issues concerning KH's welfare. His parents reside in a county in Northern Ireland bordering on the county in the Republic of Ireland where he lives with his foster-carers.

[26] KH can remain in the Republic of Ireland should this court accept jurisdiction and make an interim care order. This may present difficulties at an administrative and practical level, including the sharing of social-work information between jurisdictions and the lack of recognition in the Republic of Ireland of United Kingdom social work professional qualifications. The provisions of Article 33 of the 1995 Order and Article 33 of the 1996 Convention dealing with placement of a child in care outside the jurisdiction will provide further challenges. This may hinder the Trust in its management of any interim care plan with KH continuing to live in the Republic of Ireland. Should that not be a feasible option, then there will need to be a full and complete analysis of KH's medical condition to ensure that both his medical needs and care needs can be met within Northern Ireland. Although this can cause delay and frustration, ultimately it is not an unsurmountable problem.

[27] The court has benefited from a note filed by the guardian following her discussions with a social work manager with TUSLA. The second operation in June 2024 widened KH's airways and although the stridor was considered to be gone, it was uncertain as to whether it would return. Concerns relating to a failure to gain weight resulted in him remaining in hospital with the insertion of a feeding tube. KH was eventually discharged from hospital on 24 June, with the foster-carers attending hospital to be trained in the use of the tube. A review is planned in late August. KH is also under the care of a dietician, with additional weekly visits from a public health

nurse. A speech and language therapist may also be required. (Although I set out the difficulties that arise at an 'official' level in the sharing of information on a cross-border basis, this is an example to what can actually happen 'on the ground' with professionals working together to promote welfare considerations.)

[28] Without a fully reasoned judgment from the Irish court as to its reasons for suggesting that this court assume jurisdiction, it is difficult to take into account the factors which must have influenced that decision. However, it must be acknowledged that there must have been information available to the court to enable it to come to the decision which, presumably, was based on an understanding that transfer would provide genuine and specific added value to the decision-making.

[29] Both parents seek an order that this court assume jurisdiction. They do so on the primary basis that KH is habitually resident in Northern Ireland. The mother's position is somewhat compromised as her application under Article 9 of the 1996 Convention (albeit a flawed one) must, by definition, accept habitual residence is in the Republic of Ireland. For the reasons that I have set out above, that proposition has been rejected. However, the parents' desire is more to achieve the outcome which is that this court assumes jurisdiction by whatever route.

[30] The Trust has expressed a willingness to assume jurisdiction but recognises some of the issues that I have outlined. The Guardian has outlined concerns about the actual physical transfer of KH to a different placement, given KH's specific needs and the care that needs to be provided. Both the Trust and Guardian have suggested that the court may wish to consider adjourning in an attempt to seek further information concerning the social work and medical position. The obvious difficulty with this suggestion is the delay that is likely to arise.

[31] The Guardian, as an alternative, has suggested that this court does assume jurisdiction, but that this should not involve the physical removal of KH into this jurisdiction. The father, in his written submission, has acknowledged that this position would be acceptable to him.

[32] KH's situation is different from that of KG. KG had been living a transient lifestyle with her parents and first became the subject of social work intervention when living in the Republic of Ireland. The parents then removed her to Northern Ireland where she was recovered by police and then returned by the Trust to TULSA. She was clearly habitually resident in the Republic of Ireland, and that the Irish court did not consider Article 8 was appropriate and this court did not consider that Article 9 was appropriate.

[33] The parents would now appear to assert that Northern Ireland is likely to be their permanent, or semi-permanent, residence. Clearly that would assist in proper assessments of their parenting abilities in Northern Ireland. These assessments would be general in nature and also specific to their ability to cater for KH's special needs. The Irish court is also clearly of the view that it considers that this jurisdiction is better placed.

[34] In all the circumstances, I am of the view that this court should assume jurisdiction and reply to the request of our Irish colleagues in the affirmative. I do so on the basis that it is in KH's best interests that we assume jurisdiction.

[35] I share the concerns expressed on behalf of the Guardian and the Trust that a full picture concerning KH's medical and general requirements needs to be acquired by the Trust before any decision is made concerning KH's change of placement. Whilst it would be desirable that he reside in the country which exercises jurisdiction over him, it is not a requirement and his best interests at this stage are clearly that he continues to reside with his current foster-carers. It was on that basis that I made the order on 28 June 2024 that in principle this court would assume jurisdiction for KH but that it was necessary that the child's current foster-placement in the Republic of Ireland remains available for the duration of the proceedings or until such time as this court authorises a different placement.

[36] This court will review the matter on 24 September 2024. I directed that the Trust file an updating report with an interim care plan by 10 September 2024.