Neutral Citation Number: [2018] EWHC 3054 (Fam)

IN THE FAMILY COURT

IN THE MATTER OF ARTICLE 15 COUNCIL REGULATION (EC) No. 2201/2003

Date: 29 October 2018

Before :

Mr. D. R. L. Garrido, QC,
sitting as a Deputy High Court Judge

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Re. S (Care proceedings: Article 15 second transfer)

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Mr. Dorian Day of counsel (instructed by Hecht Montgomery Solicitors) for M
Mr. Mark Calway of counsel (instructed by Morrison Spowart Solicitors) for F
Mr. Alex Taylor of counsel (instructed by the legal department) for the local authority
Ms. Sally Beaumont of counsel (instructed by Zermansky Solicitors) for S

Hearing dates:
10 & 11 October 2018

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JUDGMENT APPROVED

Mr. D. R. L. Garrido, QC

Introduction

1. Within care proceedings concerning a child "S" (a girl aged 13 months), I am dealing with an application by her mother "M" for the transfer of jurisdiction from England and Wales "E&W" to the Republic of Ireland "RoI" pursuant to Article 15 of Council Regulation (EC) No. 2201/2003, commonly known as Brussels II revised "BIIa". The application is supported by S's father "F" but opposed by the local authority "LA", S's children's guardian "CG" and the Irish Child and Family Agency "CFA".

Background

2. The following chronology, which is not controversial, provides the essential background to this application.

3. M (31) and F (44) were both born in England and until recently had lived their whole lives here. On 7 July 2013, M was delivered of their daughter who was subsequently removed from their care and finally made subject to care and placement orders on 23 September 2014. She was adopted in 2016.

4. In May 2017 when pregnant with S, M relocated to RoI ostensibly to avoid the inevitable interest of children's services here. However, she attracted the attention of the relevant social work department there, so that when S was born on 11 September 2017 in RoI, the CFA

commenced proceedings under the Child Care Act 1991 removing S into foster care. On 8 January 2018, the District Court granted an application for the transfer of jurisdiction from RoI to E&W, a decision that was upheld in the Circuit Court by HH Judge Donnabhain on appeal on 6 February.

5. On 27 February, the transfer request came before Mr Justice MacDonald sitting in the Family Division of the High Court of Justice in E&W and an order nisi was made accepting the transfer of jurisdiction. Thereafter Mr Justice Francis, having heard the parents' representations, made a final order on 12 April accepting jurisdiction. Subsequently, LA issued an application pursuant to part IV Children Act 1989 that was transferred to the Family Court sitting in the area where the orders were made for S's sister, but not before Francis J made an interim care order approving the plan for S to remain in the care of her foster carers in RoI pending final determination. Furthermore, Francis J declared that "the transfer of jurisdiction to this court under Article 15 is emphatically conclusive and this court now exercises jurisdiction as if by Art 8 of Council Regulation (EC) No. 2201/2003".

6. At a case management hearing in the Family Court before Mrs Justice Parker on 19 June, directions were given for a psychological assessment and social work assessment of the parents together with a declaration that the parents could not go behind the opinion of a psychiatrist whose evidence was accepted by the court in the sibling's proceedings in 2014. At the same time, a final hearing was fixed to commence on 14 January 2019 preceded by an issues resolution/early final hearing on 14 December 2018, both allocated to the same Circuit Judge. Although there has been some slippage in the timetable, the proceedings remain on course for resolution in January, if not before.

7. Meantime, M disclosed that she is pregnant with her third child "X" and I am told that the expected date of delivery is 21 November. It is common ground that in respect of X, if proceedings are issued in RoI as seems likely, the CFA does not intend to request transfer of jurisdiction to E&W, although clearly that does not prevent the Irish court making a request of its own motion.

8. Both parents are now settled in RoI and together wish to care there for S and X.

Law

9. If I am to accede to the application "by way of exception" as a court "of a Member State having jurisdiction as to the substance of the matter" and request a transfer of jurisdiction to RoI, Article 15 BIIa requires me to come to the judgment that:
   (i) S has a "particular connection" with RoI, as defined by Art. 15(3); and
   (ii) The courts of RoI are "better placed" to hear the case; and
   (iii) Transfer to the RoI is in the "best interests" of S.

10. Before I can go on to consider those conditions for transfer, I am asked to consider whether BIIa permits a transfer of jurisdiction for a second time. This issue arose during the course of argument and although counsel are to be commended for their research overnight and subsequent oral submissions, clearly I have not heard full legal argument on what I am told is a novel point of law.

11. The determination of the issue relies, at least in part, upon an interpretation of recital 13 to BIIa which reads:

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

12. Within the meaning of that recital, I have no doubt that "the second court" is this court, i.e. the court receiving and accepting the transfer from the court first seised, namely RoI. But what is meant by "a third court"? Is it the court of a third Member State (e.g. France) or is it simply placing the courts in numerical order thereby including within its meaning the court requesting the first transfer (in this case, RoI)?

13. Article 2 defines "court" in this way:

1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1

14. This definition does not provide an answer to the question because the focus of the definition is simply to clarify that "court" is shorthand for all authorities (e.g. tribunals, etc.) exercising the relevant Article 1 jurisdictions within a Member State.

15. Given what I am told is the complete absence of authority on the point, I have been referred to the commentary contained in a number of leading text books:

(i) Clarke Hall & Morrison on Children: *"Only one transfer is permitted under this scheme, although there is nothing to prevent fresh applications being made to ask the court with jurisdiction to reconsider a refusal to transfer (See* AB v JLB *[2009] 1 FLR 517). As the Guide says, proceedings cannot be transferred to a third court (See* Recital 13*)."*

(ii) International Movement of Children (Lowe et al): *"Only one transfer is permitted; a court to which a case is transferred cannot transfer it to a third court (*Recital 13*)"*

(iii) International Family Law Practice (Hodson et al): *"Under Recital 13 of Brussels II Revised, the second court should not be allowed to transfer the case to a third court. In the absence of any provision to the contrary, it is presumably open to the second court to transfer the case back to the first court, for instance where the reason for the transfer has become obviated in the meantime."*

16. There is precious little analysis in any of those texts to give great assistance. *Clarke Hall & Morrison* and *Lowe* appear to have read Recital 13 as imposing a prohibition on more than one transfer in all circumstances whereas *Hodson* clearly draws a distinction between an onward transfer to a third court and a return to the court first seised, the latter "presumably" allowed.

17. In my judgment, the meaning of "a third court" in recital 13 can only sensibly be "a court of a third Member State" and does not therefore preclude transfer back to the court first seised. If Recital 13 is intended to prevent more than one transfers in all circumstances, it is expressed in a rather clumsy and ambiguous choice of words to give effect to that intention. Whereas, if it is intended only to prevent the onward transfer to a third Member State, then the turn of phrase makes much more sense to my mind.

18. Once Recital 13 is set aside in this way, there is, as *Hodson* notes and the parties agree, no other provision preventing transfer back to the court first seised. I have therefore come to the conclusion that it is open to me to request a transfer back to the RoI if the tripartite conditions in Art 15 (summarised at paragraph 9 above) are satisfied. It is to the analysis of those requirements, therefore, that I now turn.

Particular connection

19. All parties are agreed that this condition is satisfied and S has a particular connection with RoI as defined in Art 15(3) that requires one of the following circumstances to be met:

> *3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:*
> *(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or*
> *(b) is the former habitual residence of the child; or*
> *(c) is the place of the child's nationality; or*
> *(d) is the habitual residence of a holder of parental responsibility; or*
> *(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.*

20. In my judgment, the requirement for a particular connection is at least satisfied on the basis that RoI is "*(d) the habitual residence of a holder of parental responsibility"* being S's mother, and I so find.

Better placed

21. Central to the argument presented on behalf of M and F that RoI is the better placed jurisdiction is the impending birth of X. The CFA do not intend to apply to transfer jurisdiction for X to E&W. In these circumstances, a transfer of jurisdiction for S back to RoI would enable one court to consider the futures of the S and X together. This is an obvious advantage that could lead to both children being assessed together with both parents either in a residential setting as M would desire, or otherwise. This process would be made easier because S is still living in RoI and local agencies are managing the parents and S's placement in foster care on a day to day basis. It is not disputed that the parents are also positively cooperating with agencies in RoI.

22. Secondly, it is obviously more convenient for M and F to attend court in RoI. They both live there and F works there. M is pregnant and unable to travel at present. After X's delivery towards the end of November, travel to England, even if no longer medically discouraged, is likely to be very inconvenient in December and January when the next hearings here are scheduled to take place.

23. Thirdly, it is argued that this court cannot be said to be better placed in the absence of there having been any substantive hearing or continuity of judiciary. Professional witnesses in England could easily travel to RoI and/or give evidence by video-link.

24. Three further arguments, however, suggest that the court in RoI is not better placed than the court here. Firstly, the Family Court in this jurisdiction has already received considerable evidence about this family, including expert psychiatric evidence regarding M, and come to judgment in respect of S's older sibling. In common with the judgments of the District and Circuit courts in RoI earlier this year, I find that all that evidence and the factual findings are more easily admitted in these proceedings here than before the court in RoI.

25. Secondly, this court has already given directions in these proceedings regarding S for further expert evidence and assessments that are in hand. The social workers have already travelled to RoI, met with the parents and completed their parenting assessment. The court appointed psychologist has made arrangements to see the parents in RoI. I am told and I accept that both reports are on course to be filed in advance of the IRH in December. M and F have been unable to provide any reassurance to me that the RoI court would accept the admission of this evidence after transfer and it may be the case that they would have to start again with the appointment of experts acceptable there.

26. Thirdly, this court is ready for a final hearing in January where each parent will be represented by counsel and their full participation at that hearing can be facilitated, if necessary by video link if they can establish with evidence that they are unable to travel. No other witnesses who are likely to be at the heart of the final decision about S are based in RoI. It is also properly conceded on behalf of the parents that any final hearing in RoI would most likely take place a number of months after the proceedings here will be completed.

Best interests

27. M and F rely on their "better placed" arguments in arguing that transfer to RoI is also in S's best interests. It is obviously in S's best interests, it is said, if her future can be considered and decided alongside X, in a country where she has always lived and where her parents are settled. Assessments can be undertaken by agencies and professionals already involved with the family in RoI thereby minimising any adverse effect on S. Furthermore, S is settled in her foster placement in RoI with the same carers for virtually her entire life, carers who can continue to care for her until final decisions are made. Any delay that there may be would not be significant given S's settled placement and, in any event, it is three months until the final hearing in this jurisdiction.

28. Two other arguments, however, point to it not being in S's best interests to transfer to RoI. Firstly, only this court has the power to make either a placement order or a special guardianship order, either of which could secure S's placement with her older sibling and her adoptive parents. Having regard to this statement of fact does not offend against comity: it is the very position that was acknowledged by the Circuit Court in RoI when it considered transfer here to be in S's best interests so as to keep all options open. In this, I respectfully agree with Judge

Donnabhain. In my judgment, transfer would in all likelihood deprive S of the possibility of being placed with her older sibling, a welfare outcome that may be in her best interests. It is plainly in S's best interests that all realistic options for her future are able to be considered. I note that transfer is not necessary to enable S to be placed in RoI (see Para 19(3) Sch II Children Act 1989) if that proves in due course to be in her best interests.

29. Secondly, as discussed at paragraph 26 above, transfer is likely to delay the resolution of these proceedings for S. S has already been subject to proceedings for her entire 13 months, more than twice as long as Parliament has determined appropriate. It is axiomatic that delay in deciding a child's future is contrary to her best interests. In particular, in S's children's guardian's opinion, S is now of an age where a move soon to her permanent future placement is crucial. The realistic prospect of a decision not being made in RoI until next summer is well beyond what can be described as S's timescale for permanence.

Discussion

30. Although there is some force in the arguments made on behalf of the parents that RoI is the better placed jurisdiction and that transfer is in S's best interests, in my judgment having considered the arguments rehearsed above and all the other circumstances of the case, they are outweighed by the clear advantages of retaining jurisdiction here.

31. Central to the parents' case under both heads of "better placed" and "best interests" is the ability of the RoI court to make decisions for S alongside X. I accept that this is a clear advantage of transfer, although its benefit to S is less persuasive once it is acknowledged that it is open to this court to give consideration at the IRH and final hearing to the option of uniting both siblings in RoI.

32. Set against this are the two arguments that this court is better placed, given the evidence and findings available from the previous proceedings together with the evidence already ordered in these proceedings that are well underway. In my judgment, this evidential disadvantage of transfer, first identified by the RoI courts themselves, is unable to be mitigated.

33. In addition, I am satisfied that the parents will be able to fully participate in proceedings in this jurisdiction, even if unable to travel, so as to make transfer on this ground unnecessary.

34. It is an unacceptable consequence of transfer that there would inevitably be a delay that places a final decision for S beyond January 2019 and therefore outside the preferred timescale for her permanent placement. In my judgment, that cannot be in S's best interests and is likely to be detrimental to her welfare. Although I accept that the detriment may be mitigated to some extent because she is settled in her placement and will continue to be so until a decision about her future is made, S has already been waiting for a permanent placement for far too long and I accept the Children's Guardian's opinion that time is of the essence, especially given S's age.

35. Finally and uncontroversially, only this jurisdiction has the power to make orders giving effect to the full range of options for S's future placement, whether that be placement in RoI or here. In particular, only this court is able to dispense with parental consent and make a Placement Order placing S with her adopted sibling in England, should that be the only option that meets her welfare needs. In my judgment, a transfer of jurisdiction that would limit the available future outcomes for S (i.e. a transfer to RoI) cannot be in her best interests and is likely to be detrimental to her welfare, a situation readily acknowledged by the RoI courts when requesting transfer here.

Conclusion

36. For these reasons, I have come to the clear conclusion that not only is RoI not better placed to assume jurisdiction but it is also not in S's best interests to transfer jurisdiction. I therefore refuse M's application and decline to request the transfer of jurisdiction to RoI.