

THE HIGH COURT

[2020 No. 179 MCA]

**IN THE MATTER OF AN APPLICATION BY THE ADOPTION AUTHORITY OF IRELAND  
(THE APPLICANT HEREIN) UNDER SECTION 30(3) OF THE ADOPTION ACT 2010**

**- AND -**

**IN THE MATTER OF A PROPOSED ADOPTION OF X (A MINOR, BORN [STATED DATE])**

**JUDGMENT of Mr Justice Max Barrett delivered on 5th October 2020.**

**I. Some Law**

**i. Údarás Uchtála na hÉireann**

1. Údarás Uchtála na hÉireann (or, in the English language, the 'Adoption Authority of Ireland') stands established under s.94 of the Adoption Act 2010. Under s.96 of the Act, its functions include "(a)...performing the functions in relation to adoptions that...were [historically] performed by An Bord Uchtála...(f) maintaining the register of accredited bodies; [and] (g) maintaining the register of intercountry adoptions".

**ii. Welfare of Child.**

2. Section 19 of the Act of 2010 provides, *inter alia*, as follows:

"(1) *In any matter, application or proceedings under this Act which is, or are, before...*

*(b) any court,*

*...the court...shall regard the best interests of the child as the paramount [i.e. not the sole, but the paramount] consideration in the resolution of such matter, application or proceedings.*

(2) *In determining for the purposes of subsection (1) what is in the best interests of the child...the court...shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including –*

*(a) the child's age and maturity,*

*(b) the physical, psychological and emotional needs of the child,*

*(c) the likely effect of adoption on the child,*

*(d) the child's views on his or her proposed adoption,*

*(e) the child's social, intellectual and educational needs,*

*(f) the child's upbringing and care,*

*(g) the child's relationship with his or her parent, guardian or relative, as the case may be, and*

*(h) any other particular circumstances pertaining to the child concerned.*

(3) *In so far as practicable, in relation to any matter, application or proceedings referred to in subsection (1), in respect of any child who is capable of forming his or her own views, the...court...shall ascertain those views and such views shall be given due weight having regard to the age and maturity of the child."*

**iii. Nature of the Within Application.**

3. By originating notice of motion of 10 August 2020, the Adoption Authority comes to court seeking an order pursuant to s.30(3)(a) of the Act of 2010 "*approving the making of an order for the adoption of...X without consulting the Natural Father in circumstances where the Adoption Authority...is satisfied that it would be inappropriate for it to consult with the Natural Father in respect of the proposed adoption."*

4. It is not necessary to quote the entirety of s.30, which provides, *inter alia*, as follows:

"(1) *In this section 'father', in relation to a child, includes a person who believes himself to be the father of the child.*

(2) *Subject to this section, on the receipt of an application for an adoption order the Authority shall take such steps as are reasonably practicable to ensure that every relevant non-guardian of the child is consulted in relation to the adoption.*

(3) *Where the Authority is satisfied that, having regard to–*

(a) *the nature of the relationship between the relevant non-guardian of a child and the mother or guardian of the child, or*

(b) *other than in the case where the relevant non-guardian of the child is a person referred to in paragraph (b), (c) or (d) of the definition of 'relevant non-guardian', the circumstances of the conception of the child,*

*it would be inappropriate for the Authority to consult the relevant non-guardian in respect of the adoption of that child, the Authority may, after first obtaining the approval of the High Court, make the adoption order without consulting the relevant non-guardian concerned".*

5. The term "relevant non-guardian" is defined in s.3(1) of the Act of 2010 as meaning, "*in relation to a child", inter alia, "(a) a father of the child who is not a guardian of the child pursuant to the Act of 1964"* (with the phrase "*the Act of 1964*" being itself defined in s.3(1) to mean the Guardianship of Infants Act 1964).

## **II. Facts/Evidence**

**i. Overview.**

6. This is a case in which X's stepfather has applied to adopt X. The stepfather has been married to X's natural mother for a period of years. The stepfather is the only person whom X sees as his father. The natural father has met X on five occasions; the two have not met since X, a near-teenager, was little more than a toddler. The Authority has made multiple attempts to seek to consult with the father (in order to hear evidence from him in relation to the proposed adoption and also to give him an opportunity to apply for

custody or guardianship, which he has not done). In light of s.30(2), the Authority had an obligation to do the foregoing and has done so over a period of time. It is the view of the Authority and also Túsla that it is in X's best interests that the adoption order be made; the evidence on the issue of 'inappropriateness' (as referenced in s.30(3)) is considered below.

**ii. Evidence of the Adoption Authority.**

7. The Authority has provided detailed affidavit evidence to the court concerning the background to this matter. In particular, in an affidavit sworn by a member of the Authority's staff, the following is averred to under the heading "*Appropriateness of Consulting with the Natural Father*":

- "18. *In correspondence sent to his last known address and to an email address which was in use as recently as 11 September 2019, the Natural Father has been invited to present evidence to the Authority on several occasions and the Board of the Authority has made reasonable efforts to facilitate his attendance to do so.*
19. *The Natural Father has not responded to correspondence sent by the Authority since [an]...email of 11 September 2019 and failed to attend a hearing of the Board of the Authority which was convened on 14 January 2020. The Natural Father has effectively refused to engage with the Authority and/or [to] set out the reasons for his objection to the proposed adoption. Moreover, I believe and am so advised that the Authority has no other means by which to locate or make contact with the Natural Father.*
20. *The Natural Father has not provided an indication in respect of when he would be in a position to travel from [Named Foreign Jurisdiction]...to Ireland in order to formally consult with the Authority. Any further attempts to consult with the Natural Father would effectively prevent the adoption of X. In circumstances where the Natural Father has refused to engage with and/or communicate with the Authority in respect of the proposed adoption; in light of the limited contact...X and the Natural Father have had throughout...X's life; in light of the age, views and needs of...X; having regard to the detrimental impact of any further delay on X; the requirement that...X's best interests be regarded as the paramount consideration; the circumstances of...X's conception; and also having regard to the relationship between the Birth Parents and the fact that they have not had any contact for several years, it is my own personal view and the view of the Authority that it would not be appropriate for the Authority to consult to any greater extent with the Natural Father in respect of the proposed adoption."*

8. Exhibited to the affidavit of the Authority staff are a number of reports prepared by a social worker within Túsla concerning the proposed adoption. In a report of 15 March 2019, the social worker observes as follows in respect of X's views, and whether the adoption should proceed:

15. *What are the child's wishes on matters such as contact or previous relationship with birth father? Do they wish to have a relationship in the future? X only knows of [Proposed Adoptive Father]...as his father....X became very upset when the applicant and his wife spoke with...X about the adoption application and his birth father....X does not remember any previous contact with [the Natural Father]....His only memory is of [Proposed Adoptive Father]...as his father. He also refused to talk with his social worker on two occasions about the adoption application becoming visibly upset when the topic was raised. The applicant and his wife are open to...X having a relationship with [the Natural Father]...when...X is ready to pursue this contact.*
16. *What are the child's views on the proposed adoption. Is he/she in favour of the adoption proceedings? Are they aware of the guardianship provisions? [The Proposed Adoptive Father]...and X have a very strong attachment and close father/son relationship evident from the family photos displayed around the house, the cards X...wrote to [the Proposed Adoptive Father]...over the years on Father's Day and also on [the Proposed Adoptive Father's]...birthday and in how they both present in each other's company. The applicant and his wife are the only family unit...X knows. While...X is aware of the adoption application he finds it difficult to speak about it....*
19. *Please state whether or not in your view adoption is in the child's best interests. Túsla...supports this adoption application. From its assessment of the family circumstances [we] recommend that it is in...X's best interests to be adopted by the applicant."*
9. In a further Túsla report of 17 June 2019, following a consideration of relevant facts, the same social worker observes as follows under the heading "Recommendation":
- "[The Natural Father] is aware of the adoption application. Túsla...is aware that adoption is not what [the Natural Father] wants for X...however, given the absence of an ongoing reciprocal relationship between...X and his birth father...it is of the view that...X's needs and best interests must take precedence. Túsla...recommend that the proposed adoption proceed."*
10. The various proofs, including but not limited to the mother's affidavit of consent to the adoption, are all in order. In passing, the court would respectfully query whether the standard form affidavit of maternal consent, which makes reference to the applicant's religion (an issue which might conceivably be of relevance in some adoptions) ought perhaps to be reworded so as to allow for the possibility that the applicant has no religion; at the moment it reads as though professing a religion is standard and/or to be expected.

### **III. More Law**

#### **i. Duration of Relationship.**

11. The court has been referred to the *ex tempore* judgment of Jordan J. in *The Adoption Authority of Ireland v. X (a minor)* [2019] IEHC 946. There, like here, the natural father had some contact in the early stages of the child's life, and an application under s.30(3) of the Act of 2010 came before the High Court. In the course of his judgment, in which he granted the approval sought, Jordan J. observed, *inter alia*, as follows, at paras. 17-18:

"17. *In the case of W.S. v. An Bord Uchtála & Ors. [2010] IR 530, Ó'Néill J. while dealing with the case prior to the enactment of the legislation with which I am concerned, had the following to say in circumstances where his consideration of the then legislation involved a consideration of matters similar to what this Court has to consider.*

18. *In dealing with what the court needed to assess in terms of the nature of the relationship between the child and father in determining whether or not he should be notified, Ó'Néill J. provided the following template to the Authority when considering what it had to do in arriving at a decision whether or not to notify – and he said, at 566:-*

*'Under the umbrella of the nature of the relationship, a critical important factor in deciding to notify or not would be the duration of any relationship between the father and the child and hence the degree of any engagement between the father and the child or the depth or lack of it of any commitment by the father to the child. If the duration of the relationship was so short as to be negligible in the sense of demonstrating that no parental filial bond could have been realistically formed between father and child, this would clearly be a factor which would sway the Adoption Authority towards a refusal of notification. If the relationship was one of some longevity, such that the normal parental bond was formed between father and child, unless there was present in that relationship an abusive element of some sort, such as to lead to a conclusion that the relationship should be terminated in the interests of the welfare of the child, then the Adoption Authority should be swayed towards notification.'*

12. The reason Jordan J. points to *W.S.* appears to be because when the court is now deciding whether or not to grant an approval sought under s.30(3) of the Act of 2010, the court must proceed by reference to s.19 of that Act, and, more specifically, by reference to the factors/circumstances identified in s.19(2) which patently would require the court, in an application such as that now presenting, to consider, *inter alia*, the duration and substance of the father/child relationship. Here the duration of the relationship between father and child in this case has been so short as to render the substance of that relationship negligible or even (at this time) non-existent. Just as, under the Act of 1952, "*this would [have been]...a factor which would sway the Adoption Authority towards a refusal of notification*", likewise the court considers that the very brief duration and negligible substantive nature of the father/child relationship in this case points to this being a case where an approval ought to issue from the court under s.30(3), having

regard to this factor in the context of, and along with, the wider array of factors/circumstances identified in s.19(2).

**ii. Format of Application.**

13. In passing, and by way of obiter observation, the court cannot but note that an inherent weakness of the format of the within application, for which weakness the Authority bears no responsibility, is that it involves the Authority making application and presenting its proofs (which will typically be supportive of that application – why else would the Authority be before the court?), with the court essentially being called upon by the statutory system in place to refuse the approval sought in the face of a well-intentioned but typically one-sided presentation, without input from a *legitimus contradictor*. It would be interesting to know just how often the courts have departed from such chiming expert evidence as is placed before them in the context of s.30 applications. Certainly this Court would be slow to depart from the broadly chiming evidence of numerous experts. After all, some degree of judicial humility is required in the face of agreeing experts, just as a degree of judicial courage can be demanded in the face of dissenting experts.

**iii. Absence of Cohabitation/Access.**

14. Jordan J. moves on in X to observe, *inter alia*, as follows, at para. 23:

*"In summary format the following factors fall for consideration by the court:-*

- (1) The limited period of the cohabitation with the child;*
- (2) The lack of adherence by the birth father to Access Orders...*
- (3) The sporadic take up of the access and the limited nature of the access which was required to be supervised; [and]*
- (4) The violent incident which took place on 16th February 2014, which effectively ended the birth father's relationship with the child".*

15. Here, no cohabitation and access rights have never been sought; there were five instances in which the natural father met with his infant child and at this time there has been no interaction between them for the greater part of a decade. Again, however, those are but a part of the factors or circumstances which arise for consideration by the court under s.19 of the Act of 2010.

**IV. Article 42A of the Constitution and**

**Article 8 of the European Convention on Human Rights.**

16. Continuing with the consideration of X, Jordan J. observes, *inter alia*, as follows, at paras. 24-29 of his judgment in that case:

*"24. I am referred also to the written submissions to the requirement that I have regard to Article 8 of the European Convention on Human Rights. The question in that regard is whether family life exists within the meaning of Article 8 of the ECHR as between the natural father and child – because if it does, then the natural father's Article 8 rights are engaged.*

25. *The implications of Article 8 were considered by Ó'Neill J. in W.S. In that case he made the point that family rights under Article 8 apply and any decision to exclude a natural father from participation in adoption proceedings will be in breach of Article 8, unless it is in accordance with the law in pursuit of a legitimate aim, and necessary in a democratic society, and in that vein he stated that it was clear that a child's interests may override that of a natural parent...*
26. *The ECHR has similarly highlighted the primacy of the best interests of the child and the balancing of rights in the case of Eski v. Austria [2007] 1 FLR, at 1650.*
27. *I am satisfied in this case that family life as such does not exist and did not exist in a way in which would engage Article 8 rights in favour of the father. In fact, the evidence proves, in my view, that the natural father unfortunately had very little understanding of what family life meant, or if he did have an understanding he had no commitment to having a family life with this mother and child....*
28. *In addition...I am very satisfied on the evidence...that in circumstances where I have to have regard by virtue of Article 42A of the Constitution and s.9 of the Acts, to the paramount consideration which is in the best interests of the child. I am satisfied that this child, for good reason, does not have a relationship with her father and was traumatised by the physical assault on her and on her mother on the last occasion when she saw him some five years ago.*
29. *I am having regard to the paramount consideration namely the best interests of the child and I am satisfied that the statutory test as set out under s.30, sub.3 of the Acts is met. It seems to me that it would be entirely inappropriate for the Authority to consult with the father in the circumstances and I think it is appropriate to grant the approval referred to in s.30, sub.3...".*
17. Here the application is clearly being made in accordance with law and in pursuit of a legitimate aim, and it is a necessary application in circumstances where the Authority could not make the adoption order without the approval of the High Court. Additionally when it comes, here, to the natural father and X, as with the natural father and child in X, "family life as such does not exist and [has not existed]...in a way in which would engage Article 8 rights in favour of the father".

#### **V. Keegan v. Ireland**

##### **(1994) 18 EHRR 342**

18. Why are the provisions of the Act of 2010 under consideration in this judgment drafted in the way that they are, and – that context in mind – what observations fall to be made in respect of the case at hand? The decision of the European Court of Human Rights in *Keegan* gives a pointer to the answer to this question. There, the mother and natural father were in a relationship for quite some time. They intended to marry and the conception of their child was through a purposeful decision of both the natural father and the mother. The relationship broke down and, thereafter, the natural mother placed the child for adoption without the knowledge of the father (a process which was possible

under the Act of 1952). The father then applied for guardianship of the child in order to have legal standing to object to the adoption. The Circuit Court appointed him as a guardian. On appeal, that judgment was affirmed by the High Court. On appeal by way of case stated to the Supreme Court, that court held that the father's rights should not be taken into account and remitted the matter to the High Court for re-hearing. The father then brought an application before the European Court of Human Rights, which, *inter alia*, found a breach of Article 8 ECHR to present. In its judgment, the European Court of Human Rights observed, *inter alia*, as follows, at paras. 46-55:

- "46. *The applicant maintained that the State failed to respect his family life by facilitating the secret placement of his daughter for adoption without his knowledge or consent and by failing to create a legal nexus between himself and his daughter from the moment of birth. Moreover, the test applied by the Supreme Court to determine the question of custody placed him at a considerable disadvantage vis-à-vis the adoptive parents by requiring him to show that any advantages that they had to offer the child were not important for her welfare. In his submission, to be consistent with Article 8 (art. 8) the law ought to have conferred on him a defeasible right to guardianship and, in any competition for custody with strangers, there ought to have existed a rebuttable legal presumption that the child's welfare was best served by being in his care and custody. He stressed, however, that he was not seeking to overturn the adoption order that had been made in respect of his child.*
47. *For the Government, Contracting States enjoy a wide margin of appreciation in the area of adoption. The right to respect for family life cannot be interpreted so broadly as to embrace a right to impose the wishes of the natural father over the interests of the child in disregard of the findings of fact made by the courts. The applicant, as the Supreme Court had held, had a right to apply to be made a guardian, which right he had exercised. Furthermore, the Supreme Court took into account the blood link between him and his daughter as one of the factors to be weighed in the balance in assessing the child's welfare. In addition, the applicant had every opportunity to present his case and to have his interests considered by the courts. However, in this process the rights and interests of the mother, who had wanted her child to be adopted, had also to be taken into account. In particular, the Government emphasised that to grant a natural father a defeasible right to guardianship could give rise to complications, anguish and hardship in other cases and concerned a matter of social policy on which the European Court should be reluctant to intervene.*
48. *In the Commission's view the obstacles under Irish law to the applicant establishing a relationship with his daughter constituted a lack of respect for his family life in breach of a positive obligation imposed by Article 8 (art. 8).*
49. *The Court recalls that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition*



*be positive obligations inherent in an effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation....*

50. *According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family....In this context reference may be made to the principle laid down in Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989 that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down....*

51. *In the present case the obligations inherent in Article 8 (art. 8) are closely intertwined, bearing in mind the State's involvement in the adoption process. The fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life. Such interference is permissible only if the conditions set out in paragraph 2 of Article 8 (art. 8-2) are satisfied.*

52. *In view of this finding, it is not necessary to examine whether Article 8 (art. 8) imposed a positive obligation on Ireland to confer an automatic but defeasible right to guardianship on natural fathers such as the applicant.*

2. *Paragraph 2 of Article 8 (art. 8-2)*

(a) *'In accordance with the law' and legitimate aim*

53. *It is clear that the decision to place the child for adoption without the father's knowledge or consent was in accordance with Irish law as were the decisions taken by the courts concerning the welfare of the child. That they pursued the legitimate aim of protecting the rights and freedoms of the child is evident from the judgments of the High Court and the Supreme Court in this case (see paragraphs 10-14 above).*

(b) *Necessity in a democratic society*

54. *For the Government, the interference was proportionate to the protection of the child's health as well as of her rights and freedoms. The interpretation of Irish law by the Supreme Court took proper account of the paramount interests of the child. It remained open to the natural father to apply to the courts to be appointed, where appropriate, the guardian and/or custodian of the child. They contended that it was fair and wholly consistent with the Convention that special regulations be enforced to protect the interests of a child born out of wedlock. Indeed it would be impractical and potentially harmful to the interests of such a child to grant the natural father rights that extended beyond a right to apply for guardianship. In any event the Adoption Board may, in its discretion, decide to hear the natural father.*

55. *The Court notes that the applicant was afforded an opportunity under Irish law to claim the guardianship and custody of his daughter and that his interests were fairly weighed in the balance by the High Court in its evaluation of her welfare. However, the essential problem in the present case is not with this assessment but rather with the fact that Irish law permitted the applicant's child to have been placed for adoption shortly after her birth without his knowledge or consent. As has been observed in a similar context, where a child is placed with alternative carers he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care....Such a state of affairs not only jeopardised the proper development of the applicant's ties with the child but also set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child. The Government have advanced no reasons relevant to the welfare of the applicant's daughter to justify such a departure from the principles that govern respect for family ties. That being so, the Court cannot consider that the interference which it has found with the applicant's right to respect for family life, encompassing the full scope of the State's obligations, was necessary in a democratic society. There has thus been a violation of Article 8 (art. 8)."*

19. The conclusion reached by the European Court of Human Rights was that because the making of an adoption order without the natural father being consulted in any way or without any efforts being made by the adoption authority, yielded a situation in which, objectionably from an Art.8 ECHR perspective, an adoption order could be made without the father knowing anything about it. The actions that the Authority have taken in this case can be differentiated from *Keegan* in a number of clear respects. First, the Authority has gone to great lengths to seek to consult with the natural father. Second, once the natural father said that he wanted to apply for custody of X, the Authority set out clearly in correspondence that it would give the natural father a period of eight weeks to issue that application (and, in reality, he was granted a great deal more time). Third, there is a clear welfare issue that presents as regards X and it is in X's best interests that the adoption order be made; that is quite different from the situation that presented in *Keegan*.

## **VI. Conclusion**

20. The various factors to which the court is required to have regard, under s.19 of the Act of 2010, when assessing the best interests of the child, have been comprehensively addressed in the affidavit evidence of the Authority and the reports of Túsla. The court accepts that evidence, and, having considered same and the entirety of the pleadings, is satisfied, in all the circumstances presenting and for the reasons stated herein, to accede to the application made and make the order sought.
  
21. The court respectfully wishes X and his family the best as they embark on the next stage of their journey as a family.