

Neutral Citation No: [2021] NIFam 44

Ref: McF11657

ICOS: 20/030992

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

Delivered: 02/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant

-v-

A MOTHER

and

A FATHER

Respondents

IN THE MATTER OF TH (A MALE CHILD AGED 1 YEAR AND 9 MONTHS)

**Ms C MacKenzie BL (instructed by the Directorate of Legal Services) for the Trust
Ms S Simpson QC with Ms A McHugh BL (instructed by Logan & Corry solicitors) for the
Mother**

**Ms M Smyth QC with Mr C Gervin BL (instructed by Francis J Madden & Co solicitors)
for the Father**

**Ms L Murphy BL (instructed by Gus Campbell solicitors) for the Guardian ad Litem on
behalf of the child**

McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the child. I have used the cipher TH for the name of the child. These have been randomly chosen and are not his initials. Nothing can be published that will identify TH.

[2] TH was born in England in January 2020. His parents are unmarried and are both citizens of an EU country ("EUC"). Final decisions relating to threshold and care planning have yet to be determined by the court so the background summary is based on the case made by the Trust, although there does not appear to be any major issue concerning this background. The Trust is applying for a care order. The Mother had been a resident in England for some time and had been known to social services and police with issues concerning abuse of alcohol and her mental health. Her two older children aged 14 and 11 (half-siblings of TH) had been the subject of English child protection plans but were removed by the Mother back to EUC (without advising social services). They currently live with their maternal grandmother in EUC.

[3] Before and after TH was born, social services in England were involved with the Mother. TH was a 4 week old baby when brought by the Mother to Northern Ireland. Her motive was to join the Father who she said was working. Social services were not advised of the move. It was unfortunate timing, as the Father was arrested on the day of his son's arrival and was subsequently convicted and imprisoned.

[4] The Mother was unable to cope with the parenting of TH and the police and Trust were required to intervene primarily on the basis of alleged neglect of the child. A police protection order was granted on 27 March 2020 and an emergency protection order followed on 30 March 2020. The family proceedings court, relying on oral assurances from the Mother, declined to extend the emergency protection order, but after the Mother breached those assurances a further order was made on 3 June 2020, followed by an interim care order on 16 June 2020. That order has remained in place and TH has resided with foster carers since that date.

[5] The whereabouts of both parents has been difficult to verify accurately. Independent evidence indicates that the Mother had been arrested in the Republic of Ireland in June 2020, and then returned to Northern Ireland but left in January 2021. She was then arrested in Scotland in April 2021 and detained pending deportation. The Father was in custody in the Republic of Ireland in the summer of 2020 and was deported to EUC in May 2021. It is understood, based on their own self-reporting, that they are now living in another EU country.

[6] The maternal grandmother continues to live in EUC caring for TH's step-siblings. As part of the Trust's care planning, contact was made with the Central Authority of EUC. It carried out a capacity assessment of the grandmother and reported on 6 April 2021. The report stated that she is "*ready to be a carer for her grandson ... [and] is able and has the possibility to take care of the child.*" The Trust carried out its own assessment and that assessment dated 22 June 2021 was less supportive of the grandmother's parenting ability. Current care planning is focussed on keeping TH in Northern Ireland in an adoptive placement which has been identified for him and is pending awaiting a decision from the Best Interests Panel. The case is currently fixed for final hearing before this court on 7 February

2022.

The Parents' Application

[7] The parents have applied for the proceedings to be transferred to EUC.

Brussels IIa

[8] As proceedings were issued prior to 31 December 2020 the transition arrangements relating to the United Kingdom's withdrawal from the European Union apply. As a consequence Council Regulation (EC) No 2201/2003 ("Brussels IIa") applies. References to Articles in this judgment refer to Articles of Brussels IIa.

[9] It is agreed by all parties that TH was habitually resident in Northern Ireland at the time the courts in Northern Ireland became seised of the case. Under Article 8 the courts of Northern Ireland have therefore jurisdiction in matters of parental responsibility in relation to TH.

[10] Article 15 permits a court which has jurisdiction to stay the case and either invite the parties to the proceedings to apply to a court in another EU state, or to invite a court in that state, to assume jurisdiction. To do this the court must be satisfied that:

- a) The child has a particular connection with that country;
- b) The court in that country would be better placed to hear the case; and
- c) It is in the best interests of the child.

[11] It is agreed by the parties that TH, by virtue of his parents' nationality, is a national of EUC and has therefore a particular connection to EUC (see Article 15(3)(c)).

[12] The CJEU in *Child & Family Agency v P* [2017] 1 FLR 223 gave guidance as to the interpretation of the provisions of Article 15. Keegan J in *Re Tom* [2021] NIFam 7 summarised the principles emerging from *Child & Family Agency* as follows:

- a) Article 15(1) must be interpreted strictly as it is a derogation from the general rule that a court should exercise jurisdiction relating to a child who is habitually resident in that country. To this end, transfer should only occur when the case is exceptional;
- b) There is a strong presumption in favour of the court exercising jurisdiction in the country of the child's habitual residence;
- c) When making an assessment of whether to transfer the case, a court should be guided by the need to ensure that a transfer would give genuine and specific

added value with respect to the decision to be made;

- d) When considering whether the other state is “better placed” to hear the case, a court should not take into account the substantive law of the other state;
- e) When considering the best interest of the child the court must be satisfied that the transfer will not be detrimental to the situation of the child.

[13] The two key issues for determination are whether the court in EUC would be better placed to hear TH’s case and whether transfer is in the best interests of TH. In considering both questions the court is carrying out separate exercises in evaluation in light of all the circumstances in the case (see Munby J in *AB v JCB* [2008] EWHC 2965 at [35]). Baroness Hale in *Re N* [2016] UKSC 15 at [43] stressed that although the two questions are inter-related they should be dealt with separately.

[14] Baroness Hale at [46] also stressed that the ‘best interests’ test is applied to the question of the transfer and not the eventual outcome:

“The question is whether the transfer is in the child’s best interests. This is a different question from what eventual outcome to the case will be in the child’s best interests. The focus of the inquiry is different, but it is wrong to call it “attenuated.” The factors relevant to deciding the question will vary according to the circumstances. It is impossible to be definitive. But there is no reason at all to exclude the impact upon the child’s welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? This is not the same as deciding what outcome will be in the child’s best interests. It is deciding 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 to the requested court.”

[15] It is therefore important that argument in relation to which court has jurisdiction is not based on wider issues. As Baker J stated in *Re IB* [2014] EWHC 16 at [24]:

“It must be emphasised that this Court is not at this stage determining whether I’s future lies in Latvia, but rather whether that question should be determined here or in Latvia. Considerations as to merits of the care systems of the two countries, or indeed of the merits of the placements proposed for the child, are irrelevant matters for the purpose of the questions this court has to determine.”

By transferring jurisdiction all this court is doing is transferring the decision making

in respect of TH. The court in EUC may determine that TH should remain in Northern Ireland in the same way as this court could determine that TH should move to live in EUC. Black LJ in her Court of Appeal judgment in *Re N* ([2015] EWCA 1112) at [189] described the decision as relating to transferring the problem and not the case:

“Article 15 is not a provision which facilitates the transfer of particular proceedings, as such, to another jurisdiction. It cannot be, because other jurisdictions do not share our child protection arrangements. What is transferred is, putting it bluntly, the problem, for which the other jurisdiction will, if the transfer is made, take responsibility, leaving our proceedings either stayed or discontinued.”

[16] Ryder LJ in *Re M* [2014] EWCA 152 at [20] suggested a number of questions of fact that a court may wish to consider when conducting its evaluation:

“It is entirely proper to enquire into questions of fact that might inform the court’s evaluation of whether a court is better placed to hear a case. Without wishing to prescribe an exhaustive list, those facts might include the availability of witnesses of fact, whether assessments can be conducted and if so by whom (i.e. not a comparative analysis of welfare perceptions and principles but, for example, whether an assessor will have to travel to another jurisdiction to undertake an assessment and whether that is a lawful and/or professionally appropriate course), and whether one court’s knowledge of the case provides an advantage, for example by judicial continuity between fact finding and evaluation and so on.”

Consideration

[16] The case for the parents is that a court in EUC is better placed to hear the case and would be in the best interests of TH for a number of reasons.

- a) TH’s maternal grandmother and step-siblings live in EUC. The extended family live in EUC and the parents regard their present sojourn in another country as temporary and have expressed a desire to return to EUC. Decision making should therefore be made by the courts of EUC;
- b) A kinship placement with the grandmother exists in EUC which has been approved by the authorities in EUC after completing a viability assessment of the grandmother;
- c) If transferred, the facility to provide further and updated reports in respect of individuals resident in EUC would be enhanced;

- d) EUC is the country of TH's nationality and ethnic origin;
- e) Both parents and the grandmother lack fluent English and would have difficulty participating in court proceedings using English.

[17] The Trust (with the support of the guardian ad litem) counters these arguments by stressing other factors:

- a) TH is habitually resident in Northern Ireland and has lived here since he was 4 weeks old. Care proceedings have been ongoing since June 2020 and are nearing their conclusion;
- b) A transfer could well result in delay in a final determination;
- c) TH has never been to EUC. He has grown up with English speakers and his vocabulary, although limited by his age, is based on English. The language of EUC is foreign to him;
- d) There is an element of continuity in relation to social work staff and the guardian ad litem who have been involved for 18 months. Although this will not be lost it completely it will be restricted due to geographic and language difficulties should jurisdiction pass to EUC;
- e) Although the maternal grandmother resides in EUC, the parents do not and their commitment to that country is uncertain;

[18] The Trust has raised other issues such as the viability of any placement with the maternal grandmother, the lack of other family members and the likely trauma that would flow from any transfer of residence for TH. I do not propose to set these out, as they clearly relate to the wider 'best interests' test which a court, whether in EUC or in Northern Ireland, will have to apply in due course. They have only modest relevance to the 'best interests' test relating to the transfer itself.

[19] Habitual residence is the primary factor when considering forum. Set against this, I do not consider that the courts in EUC would be in a better place to hear the case. I also consider that it would not be in TH's best interests for them to do so. Although I have considered the two questions separately, my conclusions are based on similar evidence.

[20] All the evidence in relation to threshold will be given by witnesses based in Northern Ireland. Assessments of the parents have not been possible as they are no longer in the United Kingdom, but they are also not living in EUC. Any assessments of the parents, should they be required, will present difficulties wherever the case is heard. An assessment of the grandmother, a potential kinship carer, has already been conducted both by the EUC authorities and by the Trust. The one, potentially strongest, point raised by the parents is that any further assessment of the grandmother which would assist whichever court is making the decision, will

benefit from being carried out under the auspices of the EUC courts. There is merit in this point as the Trust will have to show, given its adoption orientated care plan, that, in the words of Lady Hale in *Re B* [2013] UKSC 33, “*nothing else will do.*” As Lord Neuberger at [105] stated, this would normally include any court being satisfied that there was no practical way of the authorities (or others) providing the requisite assistance and support to the grandmother should that be required. However, the parenting assessment from EUC appears to indicate that no assistance or support would be necessary as it is content that the grandmother is capable of looking after TH. As Keegan J in *Re Tom* stated at [15]:

“It is not for the courts of this or any country to question the competence, diligence, resources or efficacy of either the child protection services or the courts of another state.”

That issue is therefore not likely to require any further significant investigation.

[21] The courts in Northern Ireland have been in control of the Trust’s intervention in TH’s life for some time now and with a final hearing due in early 2022, there is a strong case for judicial continuity being maintained. There has been significant judicial comment about the need for these decisions concerning jurisdiction being made at an earlier stage (see, for example, Moylan J in *Leicester City Council v S* [2014] EWHC 1575 at [9] and [10]). For a variety of reasons, primarily Covid-19 pandemic considerations, early determination of this issue has not been possible. Had this matter fallen to be determined at an earlier stage the decision may have been different.

[21] The critical factor is delay. Transferring jurisdiction now will almost certainly necessitate delay in determining TH’s future. There has been limited EUC social services involvement in TH’s life with the assessment of the grandmother so the case will not be starting from the absolute beginning, but the judicial authorities will have had no prior involvement. Article 3(2) of the Children (NI) Order specifically refers to the need for a court to consider delay as being not in any child’s interests:

“In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.”

It is abundantly clear that any decision to transfer jurisdiction will necessitate delay.

[22] The parents, no doubt, are seeking transfer of the proceedings as they perceive that a court in EUC is more likely to exercise its jurisdiction in a manner more favourable to the outcome they desire. Transfer is, however, not necessarily determinative of the outcome of the case. Although TH is habitually resident in Northern Ireland, this court is equipped with the powers to effect a transfer of his care to EUC either under a public law or private law solution.

[22] For these reasons I decline to exercise my discretion to stay the proceedings with a view to transfer under Article 15.