

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

BETWEEN:

BELFAST HEALTH & SOCIAL CARE TRUST

Applicant;

and

JD

and

LR

Respondents.

MAGUIRE J

Introduction

[1] The court has before it an application by the first named Respondent (hereinafter “the mother”) seeking from it an exercise by the court of its discretion effectively to transfer the case in the title above to the courts in the Czech Republic. The application is made under Article 15 of the Brussels II Regulation Council Regulation (EC) No 2201/2003 (hereinafter “the Regulation”). In general terms the court may decide to transfer a case of this type if it is of the opinion that to do so would be appropriate because the child or children concerned have or had a particular connection with the Member State to which the case is proposed to be transferred, here the Czech Republic, and where the court judges that the courts of that Member State are better placed to hear the case and where also the court judges

that it would be in the best interests of the children, with whom the case is concerned, for the case to be heard by that court.

[2] The case before the court is concerned with the welfare of two children and is in the form of an application by the Applicant, the Belfast Health and Social Care Trust (hereinafter “the Trust”), for a Care Order pursuant to the terms of Article 50 the Children (Northern Ireland) Order 1995 (“the 1995 Order”).

[3] To enable the issues in the mother’s application under Article 15 to be understood, it is necessary for the background to the Trust’s application to be outlined. In respect of this Article 15 application, Ms McBride QC and Marie Claire McDermott appeared for the mother, Mrs Keegan QC and Sarah Ramsey appeared for the Trust and Ms McGreenera QC and Joanne Hannigan appeared for the Guardian ad Litem (hereinafter “GAL”). The court is grateful to counsel for the high quality of their skeleton arguments and their oral submissions to the court.

Background

[4] The Trust’s application is concerned with two children born to the mother. The second named Respondent is the father of the children and will be referred to hereinafter as “the father”. The elder of the two children the court will describe as N, who is a female born on 9 April 2007. N is now aged 6. The younger of the children the court will describe as L, who is a male born on 20 December 2008. L is now aged 4. As appears below, N was born in the Czech Republic whereas L was born in Slovakia.

[5] The mother, who is currently 28 years of age, is a national of the Czech Republic. The father, who is currently 33 years of age, is a national of Slovakia. Both belonged in terms of their state of birth to the then existing state of Czechoslovakia, which later in 1993 divided into the two states of the Czech Republic and Slovakia.

[6] The course of the relationship between the mother and father cannot be recorded in this judgement with confidence as the material put before the court about it is sketchy. It seems probable that the relationship began in the early 2000s. The couple lived in Slovakia for a period but later resided in the Czech Republic. N was born to the mother in the Czech Republic in 2007 but thereafter it appears that the family returned to Slovakia where L was born in 2008. At this stage the evidence before the court suggests that the relationship between the parents broke down. The impression the court has is that while the father remained in Slovakia the mother and the two children went to reside in the Czech Republic. The father came thereafter to the United Kingdom, in particular, Northern Ireland, to look for work in 2009 or early 2010. The mother and the two children followed him to Northern Ireland in or about December 2010. All have resided in Northern Ireland since that date.

[7] Since his arrival in Northern Ireland it appears that the father has been employed as a chef. The mother has worked in a part time capacity but in recent times has been unemployed. The family appear to have lived together as a unit until January 2012 but thereafter the mother and children have lived in a hostel. A significant incident of domestic violence occurred on 19 January 2012. This involved a serious attack being made by the father on the mother. For this the father was subsequently convicted in a criminal court in Northern Ireland. The mother and children fled to a Women's Aid hostel. At or about this time the mother sought a number of court orders from the family courts, including a non-molestation order against the father and a residence order in respect of the children. The children and the mother remained in hostel accommodation until the children were removed from it into foster care in the summer of 2012. The mother still resides in the hostel.

[8] The father since the incident referred to above has lived separately from the mother and children. However this is not to say that there has been no contact between them but what contact there has been seems to have been sporadic and there is no suggestion that the father and mother have become or are likely to become reconciled. The father appears to be firmly of the view that his relationship with the mother is over. While he at one point showed some interest in these legal proceedings and filed a statement of evidence, in more recent times his interest in the proceedings appears to have waned and he has chosen not to have any continuing involvement in this litigation. He played no part in the hearing of the application with which this judgement is concerned.

[9] Shortly after the mother arrived at the hostel to live with the children, staff at the hostel began to notice that she was regularly under the influence of alcohol. This created a concern about the parenting which the mother was providing to her children. Incident logs relating to the standard of the mother's parenting were compiled. While the court at this stage is not involved in fact finding and wishes to indicate that in what follows it is not deciding issues of fact, there can be little doubt that what is contained in the reports compiled at the time provides *prima facie* evidence of the mother neglecting her children's needs or otherwise failing to provide an acceptable level of supervision and control for them. While the mother when sober could look after the children well, it appears that this situation radically altered when she was drinking and, unfortunately the evidence suggests that the mother's drinking was uncontrolled and regular. In short, the overwhelming impression is that the mother was suffering from a significant addiction to alcohol which she could not bring under control.

[10] Initially when confronted by hostel staff and later social workers employed by the Trust about her alleged alcohol problem the mother denied that she had a problem or was drinking too much. This position was maintained for some time notwithstanding the numerous occasions when those dealing with her apparently could see that she was failing to cope because of alcohol consumption. Eventually, however, the mother acknowledged that she needed to refrain from the consumption of alcohol and needed help. While she did not accept that her drinking

interfered with her ability to care for her children, in or about June 2012 the mother did agree to receive help. She attended her GP and was referred to the Community Addictions Team. Arrangements were made to screen the mother for alcohol consumption.

[11] By the end of July 2012 it appeared clear that, notwithstanding the assistance which had been provided to the mother, the standard of care she could give to the children remained below an acceptable standard. The children remained at risk because of this. The reason for this appears to be that the mother simply could not stay off alcohol. In these circumstances the Trust decided to seek a Care Order. These proceedings seeking a Care Order began on 27 July 2012. An Interim Care Order was granted by the Family Proceedings Court on 6 August 2012. As a result the children were removed from the mother into foster care. They have remained with foster carers since. N is at primary school and it appears that she is progressing well. L has recently started nursery school.

[12] The care proceedings were transferred to his court in January 2013. This court in due course, if the proceedings are not transferred to the courts of the Czech Republic, will hold the hearings required to deal with threshold and care issues. In this connection it is clear that the witnesses who will be likely to be involved in the hearings will be witnesses resident in this jurisdiction.

[13] Since the children have been taken into foster care it has become increasingly clear that the major barrier to the mother resuming care of them remains her apparent alcohol addiction. While the issue of the effect of domestic violence on the family, and on the children in particular, remains a concern, while the parents live apart its significance has become less central, though the issue has become by no means irrelevant.

[14] The Trust has sought to provide the mother with assistance in respect of her condition and the court can see that she has been assessed by the Community Addictions Team; has completed sessions in respect of basic education; has gone through a period of alcohol detoxification; has been prescribed various drugs to help her deal with her cravings; has been offered a range of therapeutic interventions; and has had access to a wide variety of professionals in this area. She had also, through Barnardos, been offered assistance through its Pharos Service in which a particular emphasis has been on focussing on the impact of her drinking on her children. She also was referred by Pharos to Addiction NI for counselling and an interpreter was arranged but she failed to attend the appointment which had been made despite reminders being given to her.

[15] At this time it appears to be the position that the mother has been unable to take advantage of the various services she has been offered. While she has made some efforts to adhere to the discipline required to receive the benefits of these services, particularly in the context of refraining from the consumption of alcohol, it appears that she had been unable to stop drinking and consequently has lacked the

necessary resolve and purpose required to make significant progress. She has, it appears, missed numerous sessions with social workers and professionals and on occasions she has turned up at sessions smelling of alcohol.

[16] Another aspect of the way in which matters have developed relates to the mother's contact with her children. While initially she was to have daily contact with them there is clear evidence, if the records kept are to be believed, that she often was not attending contact or was attending with alcohol consumed. As a result there has been a scaling down of contact with the children. Even now the mother's record of attendance at contacts, after the level of contact has been scaled down, remains poor.

The Application

[17] The mother would like these proceedings to be transferred to a court in the Czech Republic. Her motivation for doing so seems substantially to be based on her current circumstances. She only has limited English and, as noted earlier, lives in a hostel. Her children are with foster carers. Her relationship with the father of her children has broken down. She has few friends in Northern Ireland and feels isolated. Her attempts to rid herself of her apparent alcohol addiction have foundered to date. She blames this in part on what she sees as failings by the Trust. Her counsel, Ms McBride QC, told the court that the mother felt "imprisoned" in Northern Ireland. She said the mother blamed the Trust for not providing sufficient translation facilities for her – to assist her in taking advantage of the services offered to her. Counsel also complained that the mother had not been provided with group therapy and a residential assessment to help her overcome her problem. It was contended on the mother's behalf that the Trust had failed to comply with its obligations under Article 8 of the ECHR.

[18] Underlying the application, in the court's view, is a belief on the part of the mother that if these proceedings were to be transferred to the Czech courts almost overnight the problems confronting the mother would dissipate or disappear. Once back home the mother's sense of isolation would lift; she would no longer be "imprisoned"; she would be able to tackle her apparent problem with the consumption of alcohol with the help of friends and relatives and overcome it; and she could look after her children again.

[19] How realistic the mother's hopes and expectations are have not been addressed in evidence before the court. While she has asserted that her apparent problem with alcohol can be dated to the aftermath of the incident of domestic violence in January 2012, there is an absence of objective evidence in this regard. The extent of family support if she returned to the Czech Republic is an unknown. The Trust has sought to identify any potential kinship carers who might be willing to look after the children but no-one suitable has to date been identified either in Northern Ireland, where the father has relatives living, or in the Czech Republic. The Court has not been presented with evidence to suggest that anti-addiction

services in the Czech Republic can offer anything more than is available in this jurisdiction. There is also no plan before the court as to what would occur in terms of the treatment and care of the mother and in relation to the welfare of the children if the case was to be transferred to the Czech Republic.

[20] On examination of the documents in the trial bundles, the court can see no basis for any substantial complaint by the mother about the provision of services including interpretation services to her to assist her when working with the Community Addictions Team or others. The same conclusion applies in relation to the sessions of work provided to her through Barnardos. The Trust maintains that the option of working with the mother in a residential facility was not viable because of the mother's lack of adherence to the requirement to stay off alcohol and the court sees no reason not to accept this. The court also has difficulty, in view of the mother's limited English, in regarding group work as a realistic way forward in her particular case. The court can see no case of substance that the Trust have breached the mother's Article 8 rights or otherwise has neglected family reunification as a possible outcome in these proceedings.

[21] While the court has sympathy with the difficult position the mother finds herself in and accepts that the description of her being isolated may well be correct, it does not accept her description of her being "imprisoned" in Northern Ireland. While unfortunately this description may reflect the mother's state of mind, it is important that the mother be disabused of this impression. The mother is free to come and go from Northern Ireland as she pleases. In particular, the mother is at liberty to return to the Czech Republic at any time. Consequently, if it is her view that she would be able to overcome her addiction to alcohol by going back to the Czech Republic, there is nothing to prevent her doing so. If the mother achieved in the Czech Republic the goal of ridding herself of the alcoholism she apparently suffers from and was to return to Northern Ireland having done so there could be little argument that this would assist her greatly in her quest to recover the care of her children. In argument the mother's counsel pointed out to the court that the mother did not want to leave Northern Ireland without her children and that it was this factor which prevented her from returning home to the Czech Republic. If this is so, the mother should take advice as to whether the short term loss of the children while she rehabilitated herself in the Czech Republic would not be worth it if it later opened the door to her recovering to an extent which would enable her children to be returned to her. Given that currently she is not attending contact sessions with the children frequently, the balance of advantage in respect of the matters referred to above does not appear difficult to discern.

[22] A further worry on the mother's part which causes her to wish the case to be transferred to the Czech courts is her belief that in the current circumstances her children will be likely to lose their cultural and linguistic heritage. Both are being exposed more and more to the English language, the mother says, and less and less to the Czech language. The same applies, she says, to exposure to Czech culture. While it appears that there have been steps taken by the Trust to help maintain the

children's Czech linguistic and cultural heritage, through organised contact with a Czech speaker, while in interim care, the Trust accepts that this is an issue which has to be addressed in any care plan. The Trust is clear that the issue will not be neglected while at the same time bearing in mind that given each child's age each has now spent a considerable portion of their young lives in Northern Ireland.

Article 15 and how it should be interpreted

[23] It is not in dispute in these proceedings that this court is properly, in terms of jurisdiction, seized of these proceedings. This is because it is clear that the children currently are "habitually resident" in Northern Ireland and therefore the general rule that the court of the state of habitual residence has jurisdiction, found in Article 8 of the Regulation, is satisfied. However, exceptionally, it is possible for a transfer of the case to a court of another member state to be made where certain conditions are satisfied. The provision which facilitates this is found in Article 15 of the Regulation. Article 15 is given the heading "Transfer to a court better placed to hear the case" and, in its relevant part, for present purposes, reads as follows:

- "1. By way of exception, the courts of a member state having jurisdiction as to the substance of the matter may, if they consider that a court of another member state, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the interests of the child:
 - (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other member state ...; or
 - (b) request a court of another member state to assume jurisdiction ...".

[24] It is clear that a party to the proceedings can apply to the court for an exercise of its discretion under paragraph 1, set out above: see Article 15 paragraph 2(a).

[25] Paragraph 3 of Article 15 deals with what is meant by the reference to the child having a particular connection to another member state.

[26] It reads:

- "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 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."

[27] Article 15, it appears, has not been considered in very many cases. This fact is recorded at paragraph [8] of the recent judgment of Mostyn J in Re T (a child; Article 15 of Brussels II revised) [2013] EWHC 521 Fam. One of the cases in which Article 15 has been considered, however, is that of AB v JLB [2009] 1 FLR 517. In that case, which bears on the facts little resemblance to the present case, Munby J (as he then was) has helpfully distilled the key tests to be deployed by the requested court in the context of the application of Article 15, in a formulation which has later been cited with approval by Mostyn J in re T (supra), as follows:

"[35] ... as Article 15(1) makes clear there are three questions to be considered by the court ... in deciding whether to exercise its powers under Article 15(1):

- (i) First, it must determine whether the child has, within the meaning of Article 15(3), "a particular connection" with the relevant other member state - here, the UK. Given the various matters set out in Article 15(3) as bearing on this question, this is, in essence, a simple question of fact. For example, is the other member state the former habitual residence of the child (see Article 15(3)(b)) or the place of the child's nationality (see Article 15(3)(c))?
- (ii) Secondly, it must determine whether the court of that other member state "would be better placed to hear the case, or a specific part thereof". This involves an exercise in

evaluation, to be undertaken in the light of all the circumstances of the particular case.

- (iii) Thirdly, it must determine if a transfer to the other court “is in the best interests of the child”. This again involves an evaluation undertaken in the light of all of the circumstances of the particular case”.

[28] All counsel before the court have accepted that the tests contained in the above formulation are those which the court should apply in relation to the application before it.

[29] The court accepts the invitation to apply the above tests bearing in mind that:

- (a) the burden is on the applicant to establish that a stay or a request is appropriate;
- (b) the applicant must show that not only is Northern Ireland not the natural or appropriate forum but that the Czech Republic is clearly the more appropriate forum;
- (c) in assessing the appropriateness of each forum the court must discern the forum with which the case has the more real and substantial connection in terms of convenience, expense and availability of witnesses;
- (d) if the court was to conclude that the Czech Republic was clearly more appropriate, it should grant a stay unless more potent factors were to drive the opposite conclusion; and
- (e) in the exercise conducted at (d), the welfare of the children is an important but not a paramount consideration.

[30] These factors, which the court accepts, originate from a judgment of Wilson J (as he then was) in a case called M v M (Stay of Proceedings: Return of Children) [2006] 1 FLR 138 at paragraph [6]. This approach was endorsed in the Article 15 context by Mostyn J in *re T (supra)* (see paragraph [16]) and all counsel have indicated that they represent a useful checklist.

[31] It is to the application of the key tests to the facts of the case to which the court now turns.

The application of the key test to the facts of the case

- (i) The particular connection test

[32] This is not a test which on the facts of this application requires extensive consideration. It seems clear from the evidence before the court that the mother and her children had resided together in the Czech Republic for a period (probably greater than 6 months) before coming to Northern Ireland. It is conceded by the Trust and the GAL that it is probable that at this time the mother and children were “habitually resident” in the Czech Republic. It seems to the court that the Trust and the GAL are correct in making what is, in effect, a joint concession on this point. The court is content to approach the matter on this basis. This means that the first test above has been satisfied by the applicant as the case can properly be viewed as coming within Article 15 paragraph 3 (b) of the Regulation.

(ii) The better placed court test

[33] In considering this issue the court has to decide whether it has been established before it that the courts of the Czech Republic are better placed than this court to hear the case. This involves an exercise in evaluation which will include, *inter alia*, the consideration of the range of factors already referred to above.

[34] In this regard the court takes into account that the events which give rise to the present application by the Trust have arisen in Northern Ireland. The key incident of domestic violence has already been the subject of criminal proceedings in this jurisdiction. That incident has also given rise to the pursuit by the mother of various civil remedies provided by the family courts here, including non-molestation orders and interim residence orders. These different proceedings have been exclusively pursued in domestic courts. They have not involved any foreign element. The concerns which have arisen in respect of the mother’s consumption of alcohol and the effects of this on her children are all matters evidenced by witnesses from here relating events which have occurred here. Likewise the assessment of the mother’s reaction to the unfolding events is based on observed conduct in this jurisdiction and not elsewhere. The same applies to the assessment of the impact of the mother’s plight on the children and to the steps taken to seek to address the problems besetting the mother. In turn, the evaluation of how successful or otherwise these steps have been has also been internal to this jurisdiction.

[35] Inevitably because the locus of events is Northern Ireland the decision makers involved in this case reside in and serve the community here. Already a range of important decisions have been made which will come under due scrutiny in this court if the case proceeds here. Looking to the future, insofar as relevant, those same decision makers will be required to offer the way forward in the context of the compilation of a care plan. The children’s interests in the meantime are being provided for by their residence with foster carers whose care for them appears to be a high standard. The children’s interests in these proceedings are, moreover, clearly being catered for by the GAL. The mother will be, as she already has been, provided with an interpreter to enable her to play a full part in proceedings before this court.

[36] A further important factor is that the current proceedings before the court have already been in existence for some 10 months and have reached a fairly advanced stage. Through no fault of the Trust, it has not to date proved possible to identify kinship carers, whether in the Czech Republic or elsewhere, to care for the children in circumstances where the mother is unable to do so. The effect of this is that it cannot be said that witnesses from the Czech Republic will be likely to be needed in the context of the hearing of this case by this court. Certainly no such witnesses were identified in the course of the hearing of this application by the mother.

[37] Nor, it has to be said, is this a case where this court has the benefit of being able to see any plan to deal with the issues in respect of the mother and the children deriving from any detailed consideration of the matter in the Czech Republic. While the Court has noted the correspondence before it from some of the relevant Czech authorities, what is on offer appears to be no more than a willingness to help if the mother and children were to return to the Czech Republic. There is in reality nothing concrete. If this court were to take the step of transferring the case as suggested by the mother it would not know what would be likely to happen or how the matter would be dealt with in the state of transfer. This court has had no evidence put before it dealing in any detail with this issue. In contrast, it is to be anticipated that the Trust will, very soon, be likely to be in a position to specify the options available and to analyse the strengths and weaknesses of them.

[38] It is accepted by the court that the issue raised by the mother about a perhaps growing loss, as time goes on, of the children's Czech language and culture has force. This is a matter of concern for the court especially if the children have few, if any opportunities, to use the language and be in the company of other Czechs. However it is difficult to avoid the conclusion that this is an unfortunate by product of the situation which has resulted from the factual matrix which the court has described. While the proposition that this situation would be improved by a transfer of the case to the Czech Republic has obvious logical force, in the court's view, this does not compel the conclusion that the second question should be answered in a way favourable to the mother. Such an approach would elevate this one factor to the status of a determining factor which the court feels would not be the correct approach. In the court's eyes, the exercise it is engaged in is concerned with making an evaluation in the light of all of the relevant factors, balancing one against the other before reaching a conclusion. As noted above, the Trust and GAL have shown themselves alive to the need to take steps to do all that is reasonably practical to preserve and foster the children's language and culture. The court welcomes this though it is obviously not a cure all in itself.

[39] Balancing against each other all of the relevant factors (including the mother's complaints against the Trust referred to earlier in this judgement), the court is clear that the mother has not come near satisfying it that the court in the Czech Republic is or would be better placed to hear this case than this court. On the contrary the court is of the view that in terms of the balance of convenience, expense, the availability of

witnesses, speed and efficiency, this court is far better placed to determine the issues which arise. The court would go so far as to suggest that the better view in this case is that this is a Northern Ireland case involving persons (albeit from another part or parts of Europe) who have come to reside here concerning their travails here rather than a case which is, properly analysed, a Czech case which belongs to the courts of that Member State of the community.

[40] The court therefore considers that the mother has been unable to satisfy the second of the key tests set out above.

(iii) The best interests of the child test

[41] Given the court's conclusion in respect of the second test this is not a case in which the court will exercise its discretion to transfer this case under Article 15. Strictly speaking, therefore, it is unnecessary for the court to go on and deal with the third of the key tests referred to earlier in this judgement. But for completeness the court is willing to indicate its conclusion on the third of the three tests without prejudice to its conclusion on the second.

[42] The correct way to approach the third test is not without difficulty. On the face of it the best interests of the child test invites a broad approach which might be viewed as encompassing an evaluation by the court of potential outcomes as between what might occur if the case remained in Northern Ireland as against being transferred to the Czech Republic. However, there appears to be substantial authority to support the proposition that the matter should not be addressed in that way.

[43] The principal authorities to which the court will make reference are the decision of the Supreme Court in the case of *In Re I (A Child) (Contact Application: Jurisdiction)* [2010] 1 AC 319 and *Re T*, the decision of Mostyn J to which reference has already been made.

[44] The strength of the former case lies in the fact that the Supreme Court was interpreting the phrase "best interests of the child" in the context of the Regulation itself, albeit Article 12 rather than Article 15, the difference being that Article 12 deals with prorogation of jurisdiction rather than exceptional transfer. However the contexts are sufficiently close to make it highly likely the approach to the meaning of the same words in one and the other will be the same. In the context of Article 12 Baroness Hale, in short summary, said the following:

- (a) The question raised by the use of these words was quite different from the substantive question in the proceedings themselves *viz* "what outcome to these proceedings will be in the best interests of the child" (see paragraph [12]).

- (b) The meaning of the words will not (in the context in which they are used) depend on a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding on the most appropriate forum (*ibid*).

[45] In *Re T*, Mostyn J, in interpreting the words in the context of Article 15 itself, having recalled and set out Baroness Hale's judgement in *Re I*, in its material part, said:

"In my judgement it is obvious that the scope of any best interests enquiry when deciding whether to make a transfer request under article 15 should be the same as when determining jurisdiction under article 12. It should not involve any profound investigation of the child's situation or upbringing but rather should be an attenuated one which informs the considerations which come into play when deciding upon the most appropriate forum" (paragraph [21]).

[46] In the light of these pronouncements this court will avoid any sort of full blown inquiry into the children's circumstances but will view the concept of the best interests of the child within the context of the consideration of forum.

[47] When this is done the court struggles to find any different outcome to the assessment it has already arrived at in respect of second test. In other words, the court is unable to see how the best interests of the children dictate a course of transfer on the facts of this case given the ambit of the inquiry.

[48] In the court's view the mother has failed to discharge the onus upon her to persuade the court that the third question should be answered in her favour and the court, on the contrary, is of the view that the best interests of the children when viewed within the ambit of the inquiry being undertaken are best served by these proceedings being completed here without transfer.

Conclusion

[49] For the reasons given the Court dismisses the mother's application for an Article 15 transfer.