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*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**FAMILY DIVISION**

**IN THE MATTER OF C AND D, CHILDREN**

**IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER 1987**

**O'HARA J**

[1] The identities of the parties have been anonymised in order to protect the interests of the children to whom this judgment relates. Nothing must be published or reported which allows those children or any related or interested adults to be identified in any way.

[2] The relevant appearances at this stage of the hearing were as follows. The birth mother was represented by Ms Noelle McGrenera QC with Ms Grainne Brady. The relevant Trust was represented by Moira Smyth QC with Ms Joanne Hannigan. The Department of Health, Social Services and Public Safety was represented by Mr Steven McQuitty and there was a written submission from the Attorney General for Northern Ireland. I am grateful to all counsel and solicitors for the way in which this initial stage of the proceedings was conducted.

[3] This is an appeal from a decision of the Recorder of Belfast dated 25 June 2015. He had been asked by the mother of two children to exercise his powers under Article 20 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") to revoke freeing orders in respect of those children. Article 20 provides as follows:

> "20.— Revocation of order freeing child for adoption
>
> (1) The former parent, at any time more than 12 months after the making of the order freeing the child for adoption when—
>
> (a) no adoption order has been made in respect of the child, and

(b) the child does not have his home with a person with whom he has been placed for adoption,

may apply to the court which made the order for a further order revoking it on the ground that he wishes to resume [parental responsibility for the child].

(2) While the application is pending the adoption agency having [parental responsibility] shall not place the child for adoption without the leave of the court.

(3) The revocation of an order under Article 17(1) or 18(1) ("a freeing order") operates—

(a) to extinguish the parental responsibility given to the adoption agency under the freeing order;

(b) to give parental responsibility for the child to—

(i) the child's mother; and

(ii) where the child's father and mother were married to each other at the time of his birth, the father; and

(c) to revive—

(i) any parental responsibility agreement,

(ii) any order under Article 7(1) of the Children (Northern Ireland) Order 1995, and

(iii) any appointment of a guardian in respect of the child (whether made by a court or otherwise),

extinguished by the making of the freeing order.

(3A) Subject to paragraph (3)(c), the revocation does not—

(a) operate to revive—

(i) any order under the Children (Northern Ireland) Order 1995, or

(ii) any duty referred to in Article 12(3)(c),

extinguished by the making of the freeing order; or

(b) affect any person's parental responsibility so far as it relates to the period between the making of the freeing order and the date of revocation of that order.

(4) Subject to paragraph (5), if the application is dismissed on the ground that to allow it would contravene the principle embodied in Article 9—

(a) the former parent who made the application shall not be entitled to make any further application under paragraph (1) in respect of the child, and

(b) the adoption agency is released from the duty of complying further with Article 19(3) as respects that parent.

(5) Paragraph (4)(a) shall not apply where the court which dismissed the application gives leave to the former parent to make a further application under paragraph (1), but such leave shall not be given unless it appears to the court that because of a change in circumstances or for any other reason it is proper to allow the application to be made."

[4] In the present case the Recorder dismissed the application on the basis that while more than 12 months had passed since the freeing orders were made the children were placed, and had been placed for some time, with a couple for adoption. Accordingly he held that he did not have jurisdiction to hear the application.

[5] The mother's appeal before me was developed on a broader basis than the case put before the Recorder. Among other submissions she relied on the inherent jurisdiction of the High Court. She further argued that if I was against her on the proper interpretation of the 1987 Order read in conjunction with Article 8(2) of the European Convention on Human Rights, and on inherent jurisdiction I should issue a notice to the Crown under Order 121 Rule 2 of the Rules of the Court of Judicature that this aspect of the 1987 Order is incompatible with the Human Rights Act.

[6] Ultimately the notice was issued and I received arguments from the Crown in the guise of the Department and the Attorney General. The relevant Trust which had applied for and obtained the freeing orders also made submissions. In the end the parties reached a common conclusion though not by the same route. They agreed that I should interpret Article 20 so as to ensure that it does not have the effect of contravening Article 8(2) ECHR and that if I did so I would have jurisdiction to hear the application to revoke the freeing orders on its merits. It was further agreed that I could reach that conclusion without having to consider the issue of incompatibility.

[7] I agree with the general approach of the parties and I accept that I can hear the applications to revoke the freeing orders on their merits notwithstanding the circumstances of this case and the wording of Article 20(1) of the 1987 Order. It is necessary in this judgment to explain why this is so and to consider some limited differences which remained between the parties, especially on the question of inherent jurisdiction.

[8] In order for the case to be set in context the following background should be understood:

(i) The two children most directly involved in this case are 8 years and 7 years old.

(ii) The Trust obtained care orders in December 2011 in respect of both children.

(iii) The father is not involved in this case in any way.

(iv) The mother has a younger child who is 5 years old.

(v) When the care orders were made for the older two children the youngest child stayed with the mother on a supervision order which expired in December 2012. It has not been renewed and that child lives under the mother's care which has improved and remained stable since the events which led to her losing her elder children.

(vi) The two older children were placed with prospective adopters in July 2012.

(vii) In February 2013 freeing orders were made for them to which the mother did not consent but which she did not oppose in substance. It was expected at that point that adoption applications would then follow.

(viii) However issues arose between the prospective adopters and the Trust about the extent of the support which was required by the family in light of the particular needs of the two children. Pending an acceptable outcome on those issues no adoption applications were in fact made.

(ix) In May 2015 the mother applied to revoke the freeing orders. At that time the two children had been in the intended adoption placement for approximately two years and ten months.

(x) On 26 May 2015 the Recorder dismissed the applications for revocation.

(xi) Appeals were lodged in the High Court by the mother on 9 July 2015.

(xii) Adoption applications were lodged by the prospective adopters in September 2015, more than three years after the children were placed with them. Those applications have been stayed pending the outcome of this appeal."

**Statutory Framework**

[9] Article 9 of the Adoption Order provides as follows:

"9. In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall—

(a) have regard to all the circumstances, full consideration being given to:

(i) the need to be satisfied that adoption, or adoption by a particular person or

persons, will be in the best interests of the child; and

(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and

(iii) the importance of providing the child with a stable and harmonious home; and

(b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding."

I accept that this provision applies when an application for revocation of a freeing order is being considered. Accordingly the most important (but not the only) consideration for me is the welfare of these two children.

[10] Article 13 provides that adoption orders cannot be made unless the child has lived with the prospective adopters for at least 13 weeks in some cases and longer in others. (It also sets minimum ages which a child has to reach in order for an adoption to proceed.) It is therefore contemplated that in order to be assured that adoption is the right course, the child and the prospective adopters have to share a home for an extended period.

[11] Article 18 provides that where a child is freed for adoption without parental agreement, parental responsibility for the child is given to the adoption agency (in this case the Trust). In effect the freeing order brings to an end the rights and responsibilities of the birth parents for the child.

[12] It is in that context that the provisions of Article 20 are to be understood. Those provisions include the following details:

- Under paragraph (1) a revocation order can only be applied for more than 12 months after the freeing order and only when there has not been an adoption order **and** the child is not living with a person with whom he has been placed for adoption.

- Under paragraph (2) if a revocation application is pending, the adoption agency shall not place the child for adoption without the leave of the court.

- Under paragraphs (4) and (5), if a revocation application is dismissed the birth parents shall not be entitled to apply again for revocation other than

with the leave of the court. There is therefore a court controlled limitation on applications to revoke freeing orders.

**Submissions**

[13] For the mother Ms McGrenera submitted that the purpose of Article 20 is to allow a reasonable period of time for a child to be settled with prospective adopters before any application to revoke a freeing order can be made. However a strict interpretation of paragraph (1) would mean that so long as the child was placed with prospective adopters no application for revocation could succeed no matter how much time had passed. Ms McGrenera submitted that this would be contrary to the overall scheme of the legislation which is to protect children whilst still recognising that parents retain some level of rights even if those rights are limited. She added that the draconian nature of freeing orders has been repeatedly emphasised so the court should not allow them to go unchallenged when it was appropriate to do so. This point was given additional weight by the recognition in Article 8 ECHR of the right to family life of parents and children.

[14] There are notable examples of how courts have approached issues which have arisen under similar, though not identical, statutory provisions in England & Wales. In Re G [1997] 2 FLR 202 the House of Lords had to decide what to do in circumstances where the revocation of a freeing order, while justified because the placement had broken down, could lead to a child being returned to his mother but outside the ambit of any control such as a care order, the care order having been discharged by the making of the freeing order. It was held that despite the absence of any express statutory power to do so, the appropriate course would be to revoke the freeing order but make this conditional upon any necessary consequential orders under the Children Act "or under its inherent jurisdiction or in some other way" – see Lord Browne-Wilkinson at page 2010.

[15] That route was followed in this jurisdiction by Gillen J in Re K, S and G [2004] NI Fam. 8. The judge revoked the freeing orders because it was clear that no placements for the adoption of three children could be found. However he did so on the basis that he immediately granted orders under the Children (Northern Ireland) Order 1995 to provide an alternative way forward for the children. In doing so he referred to the 1987 Order in the following terms:

> "In cases where it might be unsafe to return the child to the parents' care, a court in dealing with an application to revoke a freeing order, is not confined to dealing with the matter solely upon the provisions within the 1987 Order, because this Order operates alongside and is part of the general legislation concerning children and is not a separate and exclusive code."

[16] In Re C [1999] 1 FLR 348 Wall J revoked a freeing order under the inherent jurisdiction of the court in circumstances where there was no prospect of an adoption but there was no parent or local authority who could apply for revocation.

[17] In Re J [2000] 2 FLR 58 Black J revoked a freeing order on the application of a local authority (not a parent) and after only 6 months (not 12 months) because it was already clear that the boy in question was never going to be adopted but needed a foster placement instead. She stated at page 66:

> "In view of the existence of Section 20 of the Adoption Act 1976, I have approached the exercise of the courts inherent jurisdiction cautiously. However in my judgment in the particular circumstances of this case J's interest would be likely to be harmed if there was no power to revoke the freeing order made in relation to him. This cannot realistically be done without reliance on the inherent jurisdiction. There is presently no applicant entitled to apply under Section 20 (just as was the case in Re C) and the reality is that no application is ever likely to be made, even once M becomes so entitled. The freeing provisions are designed to facilitate the placing and adoption of children so that their welfare can be secured. Parliament cannot, in my view, have intended that the statutory provisions should work so as to cause harm to children when plans have changed and in my judgment it is open to me to exercise the inherent jurisdiction to supplement the statutory powers and thereby protect J."

[18] The common theme in these and other cases is that the two central statutory provisions relating to children, the Children Order and the Adoption Order, are to be read together to ensure that the interests of children are protected. If necessary the court will then resort to the exercise of its inherent jurisdiction. That is of course a jurisdiction enjoyed by the High Court but not by the Recorder in the Family Care Centre where his powers are limited by statute. Against that background the question which arises is how to respond to the circumstances of the present case which on its face falls within the terms of Article 20 because although 12 months have passed since the freeing orders were made the children are still placed for adoption. This case is therefore rather different to the four which are cited above.

[19] Ms McGrenera's submission was that I should limit the interpretation of Article 20(1)(b) so that children cannot be considered to be placed for adoption on an indefinite basis. On this approach, once a period of time has passed (probably but not necessarily more than 12 months) the courts should be willing to entertain on their merits applications to revoke freeing orders. In the alternative she submitted

that the court should exercise its inherent jurisdiction to consider whether, in the best interests of the children, a freeing order should be revoked because the expectations encompassed in Article 20(1) have not come to fruition after some considerable time. Either course would be compatible with the recognition of family life which is found in Article 8 ECHR.

[20] Ms Smyth for the Trust submitted that Article 20(1)(b) pursues the legitimate aim of seeking to protect a child and prospective adopters from stressful litigation where adoption is clearly contemplated. She also submitted that there are strong public policy grounds for this provision, namely the need for the child and the prospective adopters to feel secure in their family life from the potential distress, disturbance and confusion which might be suffered by the child as a result of attempts by the natural family to reassert their connection. However, in a departure from the Trust's position before the Recorder, she then suggested that I should consider whether it would be legitimate to read the 12 months' time limit in Article 20(1)(a) into Article 20(1)(b) thereby allowing a revocation challenge after 12 months even if a child was still in an adoptive placement. This submission moved the Trust closer to the submission made on behalf of the mother.

[21] In a supplementary submission Ms Smyth recognised the significance of the decision of the House of Lords in Re G to the effect that the provisions of the Adoption Order should be considered alongside those of the Children Order so that the best future care arrangements for the two children involved in this case could be determined. While the Trust does not agree on the merits with the application which has been made by the birth mother for revocation of the freeing orders, it did recognise through Ms Smyth's submission that more than 2½ years elapsed before the prospective adopters lodged an adoption application so that the court would now be asked to make adoption orders on the basis of the existing freeing orders and dispensation of parental consent in February 2013.

[22] In his submission on behalf of the Department Mr McQuitty contended that Article 20(1)(b) is not unlawful and is entirely compatible with Article 8 ECHR. He suggested that Article 20(1)(b) does not operate as a "complete bar" to all applications for revocation when a child has been placed for adoption, irrespective of the circumstances of any given case. Instead he suggested that applying the ordinary principles of statutory construction, Article 20(1)(b) is subject to an implied "reasonable time" requirement which means that a child cannot be considered to be "placed for adoption" indefinitely. Mr McQuitty further submitted that irrespective of the interpretation of Article 20, the court retains its ability to entertain an application for revocation under its inherent jurisdiction as is clear from the various authorities including those which I have already cited in this judgment.

[23] Having analysed the statute and the case law, Mr McQuitty continued the Department's submission by making the following points:

- The Department considers that substantial delay in the adoption process (after children have been placed with prospective adopters) **may** impact on the status/quality of a placement for adoption but the extent of any such impact would be dependent upon the specific facts of each case.

- Article 20(1)(b), properly construed, does not operate to create a complete bar to applying for revocation simply because it is contended (in opposition to such an application) that the child continues to be placed for adoption. That would be too narrow and literal an interpretation of the statute.

- The Department considers that Article 20(1)(b) is subject to an "implied reasonable time requirement". It was emphasised that "the Department does not endorse a specific time limit". What is "reasonable" will vary with the circumstances of each case.

- The Department does however contend that it will be relatively rare for the Article 20(1)(b) reasonable time requirement to be breached so as to render a "placement for adoption" NOT a placement for adoption.

[24] In the Attorney General's written submission, he agreed with the other parties that the appeal should be allowed with the result that the application to revoke the freeing orders in the present cases would be heard on their merits. However he reached that result by a different route. His submissions were as follows:

(1) Article 20 can and must be read so as to conform with the requirements of Article 8(2) ECHR.

(2) Simply reading an implied reasonable time requirement into Article 20 "would introduce a lack of legal certainty". Therefore the most straightforward and effective means of making Article 20 compliant with Article 8(2) would be to read 1(a) and 1(b) as disjunctive or to replace the "and" between them with "or". The result would be that an application to revoke a freeing order could be made after 12 months either if there had been no adoption or if the child did not have his home with a person with whom he had been placed for adoption.

[25] On the issue of inherent jurisdiction the Attorney General submitted:

> "This is not a case in which the inherent jurisdiction of the court can be invoked to cure any shortcomings in the 1987 Order. Adoption is unknown to the common law and is entirely a statutory institution. The power of the court over its own procedure cannot be expanded at the expense of statutory provisions.

> Insofar as it may be suggested that some particle of the parens patriae jurisdiction is invoked under the term 'inherent jurisdiction' two principles may be recalled:
>
> (1) The prerogative power yields to statute;
>
> (2) The constitutional allocation of transferred prerogative power by Section 23(2) of the Northern Ireland Act 1998."

This contention is strikingly at odds with the approach taken to inherent jurisdiction in the cases already cited in this judgment which illustrate that other courts, including appellate courts, have resorted to inherent jurisdiction in adoption related cases.

**Conclusions**

[26] As I have already indicated at paragraph [7] above, I agree with the parties that I should hear the application to discharge the two freeing orders on its merits in the circumstances of this case. Specifically I accept that I should do so because no application for adoption orders has been made more than two years after the freeing orders were made and nearly three years after the children had been placed with the prospective adopters. Whether the best interests of the children still lie in adoption will have to be explored at a merits hearing though they may well do so notwithstanding the mother's ability to raise and care for her youngest child.

[27] I accept that the legitimate and reasonable purpose of the 12 month period provided for in Article 20 is to allow a time of stability without a threat or risk of an immediate or early application to revoke a recently made freeing order. This has been recognised in a series of judgments such as those already referred to above. The problem with Article 20(1) as it stands is that in a rare case such as the present it can prevent a revocation application indefinitely, even if the child has not been adopted provided that the child has been placed for adoption. It seems to me that simply cannot be right. If there has been no adoption after a period of time it must be appropriate to allow a birth parent to apply to revoke the freeing order. To do otherwise would be to breach the Article 8(2) rights of the parent.

[28] The rather difficult question is precisely how to read Article 8(2) into Article 20. The Department's suggestion is to keep the 12 month period for Article 20(1)(a) but to read a "reasonable time" requirement into Article 20(1)(b) which may be a period of more or less than 12 months depending on the circumstances. The Attorney General suggested such an approach is too uncertain and proposes that a period of 12 months is read into Article 20(1)(b). I have some sympathy with that latter approach because it is so unlikely that anything less than 12 months would constitute an unreasonable interference with any rights under Article 8(2) ECHR. I

am also influenced by the argument which I accept that there is a good policy reason for not allowing revocation applications to be made in less than 12 months other than in exceptional circumstances which the inherent jurisdiction can be used to cover.

[29] While it is not possible to consider all eventualities which might arise, it is relevant that in none of the cases cited to me was there an application by a parent to revoke a freeing order in less than 12 months. It seems to me that this may reflect the reality that given their seismic repercussions freeing orders are highly unlikely to be made if a birth parent has any real prospect of being able to care for a child within 12 months. Accordingly I believe it to be compatible with Article 8(2) ECHR to read into Article 20(1)(b) a proviso that even if a child has a home with a person with whom he has been placed for adoption a revocation application may be brought at a point 12 months after the freeing order was made. If any such application by a birth parent was unsuccessful, the provisions of Article 20(4) and (5) would limit the opportunity to make any further applications. I emphasise that such applications should continue to be rare and that nothing in this judgment should be interpreted as encouraging them other than in unusual circumstances such as those which mark the present case.

[30] Strictly speaking, in light of this finding, I do not need to deal in this judgment with the issues raised about inherent jurisdiction. It is however appropriate that I should do so since the matter is likely to arise again. I do not accept the Attorney General's submission on this aspect of the case. His approach was premised on the correct assertion that adoption is unknown to the common law. However it simply does not follow from this that the High Court has no inherent jurisdiction to exercise. The Attorney's submission does not deal with the cases which were cited to me which show the inherent jurisdiction being exercised repeatedly. Of course that jurisdiction should not be too freely exercised in the face of the legislation but when the rights and interests of children are not sufficiently or properly protected by statute the High Court can and should intervene to achieve those ends. That is what has happened in cases such as Re J and it should similarly happen in Northern Ireland if necessary.

[31] At the end of the oral submissions on this preliminary issue I indicated that the appeal would now proceed to a hearing on the merits. In the course of that hearing I will consider what is in the best interests of these two children. The prospective adopters and the guardian ad litem will be heard along with the birth mother and the Trust. I will have to consider as part of that hearing what Lord Browne-Wilkinson said in his judgment in Re G. At page 208 he stated as follows:

> "The extinguishment of all parental rights, parental responsibility and the statutory rights under the 1989 Act is a draconian step. It is a necessary corollary to enable an adoption to take place. But if the proposed adoption giving rise to the freeing order fails to

materialise and there is no other proposed adoption pending, it is hard to accept that Parliament can have intended that the parents should continue to be deprived of all these rights leaving the child in an indefinite adoptive limbo.

Moreover the inability to revoke the freeing order when the circumstances have changed may give rise to an injustice to the parent and possible harm to the interests of the child. A decision whether or not to dispense with the agreement of a parent has to be taken on the basis of all the circumstances as they exist at the date of the application. Thereafter circumstances may change. For example, if there has been continuing contact between the parent and the child notwithstanding the freeing order, a bond may have developed between them. The situation may have developed in which some third party is prepared to provide satisfactory day to day care for the child whilst retaining beneficial contact between the child and the parent. If it is impossible, in cases where the parent cannot be trusted with full parental responsibility to revoke the freeing order, then many years later notwithstanding such change of circumstances an adoption could take place without the consent of the parent, reliance being placed on the existing freeing order. But in the changed circumstances, it may not be in anyway unreasonable for the parent at that later date to withhold his agreement to the adoption. In my judgment this would run counter to the whole structure of the Adoption Act which shows that parental agreement is only to be dispensed with, whether on the making of an adoption order or on the making of a freeing order, in the light of the reasonableness of the parent's conduct as at that date. Sections 18 and 19 indicate that a freeing order is to be made only where an adoption is likely to take place within 12 months or shortly thereafter. For these reasons, it would to my mind be very strange if, a freeing order having been correctly made to facilitate a pending adoption, it was incapable of being revoked when adoption ceases to be an immediate prospect save in cases where the parent whose rights have been dispensed with under the freeing order is capable of looking after the child and having unfettered control."

[32] In this jurisdiction the only issue on which birth parents have made any representations at or near the time of adoption hearings is in relation to contact. Even that has been a recent and limited development in the context of the increased frequency of post adoption contact. Whether and how that remains the position in light of the words of Lord Browne-Wilkinson will form part of the arguments at the hearing on the merits.