

## THE HIGH COURT

## FAMILY LAW

[2018 No. 12 M.]

## IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT, 2010

AND

IN THE MATTER OF A. M., A MINOR

BETWEEN

CHILD AND FAMILY AGENCY AND T. J. AND D. J.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

**JUDGMENT of Ms. Justice Reynolds delivered on the 27th of April, 2018**

1. This is an application brought by the Child and Family Agency for an Order pursuant to s. 54(2) of the Adoption Act 2010, authorising the first named respondent to make an adoption order in relation to the child A. M. in favour of the second and third named applicants, the child's foster carers and further dispensing with the consent of any person whose consent is required to the making of such order.

2. This is a somewhat unique application in circumstances where it is conceded that many of the essential proofs required for the making of an adoption order are effectively absent.

**Background**

3. At the outset, it is apparent that there is considerable uncertainty surrounding the child's date of birth. It is believed that A. M. was born in 2000 to a Romanian woman in Romania and that they came to Ireland in 2002. She thereafter applied for and was granted refugee status.

4. In 2003, both mother and child presented to a local hospital where concerns were raised with the Child and Family Agency's statutory predecessor regarding possible non-accidental injuries to the child, together with developmental delay in relation to the child's speech and motor functioning. A decision was made that he was likely to be at immediate risk should he be returned to the care of his mother and an application was made for an Emergency Care Order.

5. Following the granting of the Emergency Care Order, the child was placed in foster care. Access was arranged to take place shortly thereafter between the child and his mother. This occurred in August 2003 and was the last contact between the child and his mother. No further steps were taken by her to initiate contact or access, nor was there any application to set aside the Care Order.

6. A. M. has significant physical and developmental issues, a learning difficulty and ADHD. He has lived with his foster carers since he was four years old and their commitment to him over the years has been unwavering in circumstances where he has made exceptional progress which was deemed unlikely in the beginning. His complex medical needs have required significant support services; psychiatric, psychological, speech and language, occupational therapy, neurology, physiotherapy and orthopaedic services. His foster carers have supported him through what have undoubtedly been challenging times over the years and their commitment to him has remained steadfast. Due to his developmental difficulties, he is unaware to date that he is in foster care and has no understanding of his heritage or background.

**Proceedings before this Court**

7. The special summons issued on the 23rd March, 2018. The matter proceeded to hearing on the 10th April but was subsequently adjourned to notify the Attorney General's office of the proceedings in circumstances where by virtue of granting the relief sought, the child would acquire Irish citizenship. The matter subsequently resumed before this Court on the 26th April, 2018.

**The Birth Parents**

8. As already stated, the last contact between the child and his birth mother was in August 2003. During the course of her engagement with social workers at that time, she indicated that her husband had died in Romania and that she had travelled to Ireland seeking asylum status for herself and her son. Her application for asylum had been made in April 2002 and she was granted refugee status on the 28th March, 2003. In her application, she named the child herein as her only family and recorded his date of birth at that time as the 31 May, 2000. In the course of completing the documentation, she was afforded an opportunity to confirm that the information therein was correct, which she subsequently affirmed, together with signing and dating the said document.

9. In 2004, the child's mother had further engagement with social workers and at this stage indicated that the child's date of birth was January 2000. She purported to identify his birth father but advised that he was deceased.

10. During the course of further engagement in 2009, the child's mother indicated that she was unsure of the child's date of birth but thought it was July 2000. Again she indicated that the child's birth father was deceased but gave a different account as to what her relationship with him had been and further that he had died after he came to Ireland albeit that she did not have a death certificate.

11. Subsequent enquiries by the Social Work Department seeking verification of these details from the Romanian Embassy were fruitless. The Embassy advised that they had been informed by the competent authorities from Romania that all Romanian databases had been searched yielding no records in relation to the child, his birth mother or birth father.

12. In contemplation of an adoption application, social workers again engaged with the birth mother in 2009 at which time she indicated she would not support such an application. Shortly thereafter, she left Ireland with no forwarding address or contact details.

13. Upon further enquiries made in late 2016 and early 2017, efforts were made to contact the birth mother at her last known address in both England and Ireland and also to a known address in Romania. In September 2017, members of the birth mother's family engaged with the social services and proffered an address in England to facilitate correspondence with the birth mother. In addition, the birth mother rang the Adoption Services and during the course of discussions surrounding the proposed adoption herein, she indicated that she did not want the application to proceed. Further telephone communication ensued in circumstances where the birth mother was afforded the services of a Romanian interpreter to facilitate ongoing discussions. Again, she reiterated her objection to the within application. Further, she indicated that she was unsure of the child's date of birth and did not have a birth certificate. She also reiterated that she had not been legally married to his birth father and that he was deceased. She provided an address for the forwarding of all documentation in relation to the proposed adoption application and it is clear that none of those documents have been returned.

14. Further attempts thereafter to make contact with the birth mother and her family have failed.

#### **The Proceedings before the Authority**

15. The Authority held a hearing on the 9th January, 2018 at which it identified a number of concerns with the documentation provided as follows:-

- (a) the absence of a birth certificate;
- (b) the absence of proof that the asserted birth mother is, in fact, the natural mother;
- (c) the absence of a death certificate in respect of the birth father;
- (d) the absence of corroborated evidence of the birth mother's account.

16. The Authority was clearly dissatisfied with the extent of the information available to it and advised further steps to be taken as follows:-

- (a) the appointment of a person to act in a role analogous to that of guardian ad litem in order to objectively assess the views of the child;
- (b) that efforts be made to investigate and address the absence of a birth certificate;
- (c) that efforts be made to obtain corroborative evidence concerning the death of the presumed birth father;
- (d) that confirmation be obtained regarding the status that can be given by adoption to a child with refugee status.

17. At a further hearing on the 6th March, 2018 the Authority was furnished with additional information and evidence concerning the extensive efforts made by the Agency to address the outstanding issues concerning the lack of documentation; the lack of documentary or other evidence as to the identity or fate of the birth father; and the lack of documentary or other corroborative evidence regarding the identity of the birth mother.

18. It was apparent from the evidence that the Agency had made significant efforts to address the concerns identified by the Authority in January 2018. This included undertaking the various steps suggested by the Authority to investigate matters in Ireland, the UK and in Romania. However, it was also apparent that these efforts had not produced any documentation or other evidence concerning the birth of the child, the identity of the birth mother or the identity or fate of the birth father.

19. Notwithstanding these concerns, the Authority was of the view that the statutory criteria had been met to permit the within application to be made to this Court.

#### **The Law**

20. Section 54(2) of the Adoption Act 2010 provides as follows:-

"On an application being made under paragraph (a) or (b) of subsection (1), the High Court by order may authorise the Authority to make an adoption order in relation to the child in favour of the applicants, and to dispense with the consent of any person whose consent is necessary to the making of the adoption order, if—

(a) having due regard for the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child), the High Court is satisfied that it would be in the best interests of the child to grant the authorisation, and

(b) it is shown to the satisfaction of the High Court as follows:-

(i) that—

(1) for a continuous period of not less than 12 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53 (1) relates, for physical or moral reasons, have failed in their duty towards the child,

(2) it is likely that the failure will continue without interruption until the child attains the age of 18 years,

(3) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child, and

(4) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents;

(ii) that the child—

(1) at the time of the making of the application, is in the custody of and has a home with the applicants, and

(2) for a continuous period of not less than 12 months immediately preceding that time, has been in the custody of and has had a home with the applicants;

and

(iii) that the adoption of the child by the applicants is an appropriate means by which to supply the place of the parents.”

21. Article 42A of the Constitution has been ratified since the 28th April, 2015. It provides as follows:-

“1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2.1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4.1° Provision shall be made by law that in the resolution of all proceedings—

(i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

(ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.”

22. It is clear therefore, that in determining the within application, the best interests of the child must be the paramount consideration.

23. The UN Convention on the Rights of the Child provides under Article 7 as follows:-

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

24. Article 8 further provides:-

“State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

Where a child is legally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

25. In circumstances where Ireland ratified the Convention in 1992, it is clear that there are obligations on the State to vindicate the rights of the child under the provisions of the Convention and to provide assistance and protection to the child with a view to re-establishing his identity.

26. Section 3 of the Adoption Act provides the definition of a child as “any person who is under the age of eighteen years”.

27. Section 23 of the Act further provides that the Authority shall not make an adoption order in respect of a child unless, inter alia, the child “is, at the date of the making of the adoption order, less than eighteen years of age”.

### **Issues in this Case**

#### *Date of Birth*

28. Clearly the most difficult issue in this case is the lack of evidence surrounding the child’s purported date of birth in circumstances where the court is mindful of the following matters:-

- (a) the absence of a birth certificate;
- (b) the absence of proof that the asserted birth mother is, in fact, the natural mother;
- (c) the absence of a death certificate in respect of the purported birth father;
- (d) the absence of corroborative evidence of the natural mother’s account.

In such circumstances, it is readily apparent that the within application is a wholly unprecedented application.

29. The date of birth relied upon by the applicants herein is that of the 31st May, 2000, and having considered the evidence herein, this Court is satisfied that this is the only written record of the child’s date of birth in circumstances where the birth mother relied upon same in processing her asylum application in April 2002. In the course of completing this documentation, the birth mother had been invited to amend any inaccuracies in the application before signing and dating same in the presence of a department official. This is clearly the first record of the child’s date of birth given by the mother and is the closest record to the child’s date of birth

subsequent to his birth.

30. Thereafter it is clear that over subsequent years, the birth mother indicated that she was unsure of the child's date of birth and gave differing accounts.

31. Despite the best efforts of the Child and Family Agency, it has not been possible to identify any independent record of the child's date of birth nor indeed has it been possible to identify any person who can assist in this regard. The child's birth mother has persistently refused to engage with the social workers in connection with their enquiries and despite exhaustive efforts on their behalf, no further evidence in this regard has been forthcoming.

32. In the context of dealing with evidential difficulties of this nature, the court is mindful of the decision in *R. (A.) v. Croydon LBC* [2009] 1 WLR 2557 where it was noted by Baroness Hale at para. 27 as follows:-

"... The decision-makers have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers."

33. Undoubtedly the question of whether the child herein is less than eighteen years of age is a difficult question which requires to be resolved by this Court on the basis of such imperfect and inconclusive evidence. However, the court must consider the totality of the evidence and determine the issue having regard to the balance of probabilities.

34. It is clear that the most contemporaneous record of the child's date of birth is that which was relied upon by the birth mother in her application for refugee status, a document which was signed and executed in the presence of a department official. This is the date of birth relied upon by the Child and Family Agency and its statutory predecessor over the years as being the most reliable record of the child's birth date.

35. Whilst the birth mother thereafter may have given varying accounts over the years in relation to this matter and indeed other matters, the court has to balance this against what it considers to be the more persuasive evidence in relation to the asylum application, and concludes, on the balance of probabilities, that the likely date of birth is that of the 31st May, 2000.

#### *The Wishes of the Child*

36. In endeavouring to obtain the wishes of the child and having regard to his particular difficulties, the Adoption Authority appointed Ms. McKettrick to act in a role analogous to that of guardian ad litem in order to objectively assess the views of the child. Her evidence to the court was that the child strongly identifies with his perspective adoptive parents particularly in circumstances where he has never known his own birth family. Further, she is satisfied that it is in the best interest of the child that the adoption order be granted. Indeed, it is clear from her evidence that the second and third named applicants are to be highly commended for the level of care they have provided to the child over the years. Whilst A.M. has no current understanding of his heritage and identity, Ms. McKettrick has recommended that these issues be dealt with in the future when he is less emotionally vulnerable and has further matured.

#### *Best Interests of the Child*

37. It is evident in this case that the birth mother of the child herein has failed in her duty to the child to such an extent that his welfare is likely to be prejudicially affected. She has failed in her parental duties to him since he was taken into care in 2003. Further, she has taken no steps to engage any further with him over the years and has failed to assist the applicants herein in their efforts to verify his identity and date of birth. She has played no active role in his life since he was two years old and there is no reasonable prospect that she will be able to care for him in the future in a manner that would not be detrimental to his welfare. The second and third named applicants have provided the child with a caring and loving home environment and have provided for all of his very complex welfare needs. For the foregoing reasons, it is clear that the granting of the orders herein is in the best interests of the child and where the Adoption Authority has complied with all other statutory requirements, the court grants the following reliefs:-

(a) An Order pursuant to s. 54(2) of the Act of 2010 (as amended) authorising the first named respondent to make an adoption order in relation to the child, A.M. in favour of the second and third named applicants herein;

(b) An Order pursuant to s. 54(2) of the Act of 2010 (as amended), dispensing with the consent of A.M.'s parents to the making of an adoption order.