



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 157

Record No. 2018/68

**Peart J.
Hogan J.
Mahon J.**

**IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION (EC) 2201/2003 AND IN THE MATTER OF FOREIGN PROCEEDINGS
BEARING REFERENCE NO. P017PO0941 AND IN THE MATTER OF E. W. A MINOR BORN ON THE 23RD DAY OF AUGUST 2014 AND
IN THE MATTER OF M.D. A MINOR BORN ON THE 26TH DAY OF MAY 2012 AND IN THE MATTER OF R.E. A MINOR BORN ON THE
3RD DAY OF SEPTEMBER 2017**

BETWEEN/

HAMPSHIRE COUNTY COUNCIL

APPLICANT /

FIRST RESPONDENT

- AND -

C.E. AND N.E. (OTHERWISE N.C.)

RESPONDENTS/

APPELLANTS

- AND -

CHILD AND FAMILY AGENCY

(BY ORDER) SECOND RESPONDENT

-AND-

THE ATTORNEY GENERAL (NO.2)

AMICUS CURIAE

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 7th day of June 2018

1. Following the delivery of the first judgment of this Court in this matter on 17th May 2018 (*Hampshire County Council v. C.E.* [2018] IECA 154) and the subsequent reference which we made to the Court of Justice of the European Union pursuant to Article 267 TFEU, counsel for the Mr. and Ms. E. have now applied to this Court by motion on notice for an order directed at Hampshire County Council ("Hampshire") restraining it from proceeding with the adoption of three young children. Beyond filing what is described as a statement of position with the Court, Hampshire has elected once again not to participate in this appeal or to file an affidavit in response to this motion. Hampshire has, however, more recently insisted in this statement of position that it is proposed only to proceed with the adoption of the new-born, R.

The background to the present application

2. While the detailed facts of this complex matter are set out in the first judgment, it is necessary again to narrate the basic facts. The two defendants are U.K. nationals who arrived in this State by ferry on 5th September 2017 with three young children, one of whom had been born in the U.K. just two days previously. Ms. E. is the mother of all three children whereas Mr. E. is the father of the newborn child, R., only. The two oldest children were the subject of interim care orders which had been made in the United Kingdom prior to the arrival of the children in this State. Purely for reasons of convenience I shall describe them in this judgment as "the parents", even though Mr. E. is not actually the father of the two older children.

3. On 8th September 2017 the English High Court made an order making all three children wards of court. Other orders had previously been made by the English courts in respect of the children. The order further directed that the children be returned to the custody of Hampshire County Council. Meanwhile Hampshire had made contact with its counterparts in the Child and Family Agency ("CFA") regarding the family. Their location at a particular (named) address in the State was quickly established by local Gardaí.

4. Concerns had previously been expressed by Hampshire social services regarding this family, including the standards of hygiene within the home, the parental capacity to manage their children's behaviour, domestic violence in previous relationships and parental substance abuse. It also appeared that one of the children had suffered a non-accidental injury and the possibility that Mr. E. was the perpetrator could not be excluded. It was essentially for these reasons that the children had been taken into care.

5. On the 8th September 2017 Hampshire indicated to the CFA that it intended to seek an order from the English High Court providing for the return of the children. For its part the CFA indicated that any such orders would need first to be enforced under the Brussels

II bis Regulation. Later that day Hampshire informed the CFA that the requisite orders had indeed been made by the English High Court.

6. On 11th September 2017 the CFA made an unannounced home visit to the address in the State at which the E. family were now residing. It is important to state that nothing of concern was found by the CFA during the course of either that visit or on subsequent visits. The parents informed the CFA that they had been advised to travel to Ireland to avoid the UK social services and to stop Hampshire taking the children into care. They were advised in turn that the CFA would be applying for an interim care order based on the concerns and information which had been received from Hampshire's Children's Services. A social worker representative of the CFA advised the parents that Hampshire might apply to have the return order recognised in Ireland by means of an application to the High Court and that if Hampshire were successful the children would then be returned to the United Kingdom.

7. On 21st September 2017 an order was made by the High Court (Creedon J.) pursuant to Chapter III of the Brussels Regulation II bis recognising the English High Court order, and ordering that the said order "be enforced in this jurisdiction." A copy of that order was forwarded shortly before 3pm that afternoon to the CFA's solicitors. Those solicitors then immediately forwarded a copy of that order to the CFA social workers who were dealing with the case.

8. The three children were handed over by representatives of the CFA to social workers attached to Hampshire County Council later that afternoon at Rosslare Ferry Port and the children were then returned to the United Kingdom in the company of social workers from Hampshire Social Services. The parents were notified of this development only *after* the children had left the State and it is agreed that the Hampshire social workers had expressly requested their CFA counterparts not to contact them because they were considered to be a flight risk. The parents were then formally served with the *ex parte* order of the High Court on the following day, 22nd September 2017.

9. The parents then endeavoured to appeal the order of the English High Court which had been made on 8th September 2017 (and which was the subject of the enforcement order made by Creedon J. in the High Court) but permission to appeal was refused by the Court of Appeal of England and Wales on 9th October 2017.

10. On 24th November 2017 the parents filed a notice of motion in the High Court seeking to appeal the order of Creedon J. as provided for by Ord.42A, r.13 of the Rules of the Superior Courts. On 18th January 2018 Reynolds J. held that the parents were out of time (by two days) to lodge an appeal and that in view of the provisions of Article 33(5) of Brussels II bis Regulation there was no jurisdiction to extend time for the purposes of appeal of this kind. The parents then appealed that decision to this Court.

11. The questions of whether the return order made by the English High Court was actually within the scope of the Brussels II bis Regulation and, if so, whether the High Court enjoyed a jurisdiction to extend the time for such an appeal for the purposes of Article 33(5) of the Regulation formed the basis of the specific issues referred to the CJEU by this Court. Following the delivery of the first judgment, counsel for the parents applied for an interlocutory injunction directed to Hampshire preventing them from proceedings with the adoption of the children. While the Court was obviously exercised by the attitude of Hampshire to the entire proceedings and (especially) the manner in which the children had been removed from the jurisdiction of this Court, we considered it appropriate that far-reaching relief of this kind should not be granted *ex parte*. The Court instead granted the parents liberty to seek such an order on notice to Hampshire.

12. In the affidavit which has been filed by the parents' solicitor it is clear that Hampshire are intent on proceeding with the adoption of the three children. There has been no formal response from Hampshire to this application for protective measures of this kind, although, to repeat, in the statement of position which it filed on the morning of the hearing, 29th May 2018, it stressed that it was proposed to proceed only with the adoption of one child, namely, R. The Council explained that the two elder children, E. and M., are currently in the custody of Mr. W., E.'s father, subject to care orders which were made in favour of Hampshire by the English courts. Hampshire further states that it has no plans to remove the two older children from the care of a parent/ parent-figure with a view to placing them for adoption:

"Given the ages of these children (E. is 3.9 and M. 6.0), their placement with a parent and their strong, sibling relationship, there would be no statutory or more importantly, welfare ground which would result in a care plan for adoption. Should the placement with Mr. [W.] break down for any reason, at this time and based on the children's welfare needs at this time, the care plan would be that the girls were placed in long-term foster care."

13. Hampshire County Council remains a party to the proceedings, but while it was legally represented in the High Court, it has nonetheless elected not to take part in either the main appeal or in this application for an interlocutory injunction. The solicitor attached to the Council who is handling this matter has assured the Court that no discourtesy is intended by this absence, but that the decision not to participate in the appeal was taken for financial reasons given certain budgetary constraints. The Council's failure to participate in this appeal is nonetheless regrettable, not least given that once again this present application raises complex questions of private international law, public international law and EU law.

14. At this point it is appropriate that this Court would extend its thanks to the Attorney General who, at this Court's invitation, appeared through counsel as both *legitimus contradictor* and *amicus curiae*.

Whether this Court has a jurisdiction to grant an interlocutory injunction against Hampshire County Council

15. Article 29.8 of the Constitution provides that the State may only exercise extra-territorial jurisdiction in accordance with the "generally recognised principles of international law." An Irish court could not, therefore, ordinarily grant an injunction directed at either a British local authority or an English court restraining them from proceeding with the adoption of a child, since this would represent an interference with the internal administrative, executive and judicial sovereignty of the United Kingdom in a manner which was not warranted or permitted by the generally accepted principles of international law.

16. That, however, is not quite what has happened here. This is rather a case where Hampshire elected to seek the protection of the Irish courts under the Brussels II bis Regulation, but where the children the subject matter of the application were wrongfully removed from that jurisdiction prior to the enforcement proceedings having been served on the parents. If this Court were to grant an injunction restraining the adoption of either R. or, if necessary, the two older children it would simply be to maintain the status quo pending a determination as to whether the order of the English High Court providing for the return of the children was entitled to recognition and enforcement in this State.

17. In any event, it would not normally be necessary for a court to grant interlocutory relief of this far-reaching kind against a public body – be it Irish or foreign – because that body would invariably take part in the appeal and agree to abide the order of the Court. This, however, has not been this Court's experience of Hampshire County Council to date. It has not participated in the appeal and,

moreover, it has given every indication that it is quite indifferent to any order that this Court might make now that the three children are back safely within its own custody and control.

18. In a case such as this the Court's jurisdiction is essentially to act *in personam* designed to ensure that the mutual rights and interests of the parties to the proceedings are appropriately protected. As Browne-Wilkinson V.C. said in *Attorney General v. Newspaper Publishing plc* [1987] 3 W.L.R. 842 in the context of the grant of a *Mareva* injunction with extra territorial effects:

"It is neither accurate nor helpful to consider a [Mareva injunction] as being extra-territorial in character. If it matters, as the order is made against a defendant who is subject to the *in personam* jurisdiction of the court, it may be seen as intra-territorial."

19. Subject only to the issue of EU law raised by the Attorney General, I consider that it would be appropriate that this Court should grant an interlocutory injunction directed *in personam* to Hampshire County Council *qua* party to the present proceedings restraining it from proceeding with the adoption of R. (and, in the event it should prove necessary, the two elder children, E. and M.) pending the outcome of the present appeal. I think it would be appropriate to grant this relief given that, firstly, the Council has not participated in the appeal or seen fit to explain its conduct in the course of the litigation or to indicate that it will abide the order of the Court; secondly the parents have raised weighty issues of law which are already the subject of an Article 267 reference; and, thirdly, the irreversibility of any adoption order which might be made, whether in respect of R. or, as the case be, the other two older children.

The EU law arguments

20. Counsel for the Attorney General, Mr. Durcan S.C., has submitted that this Court has no jurisdiction to make an order of this kind under the Brussels/Lugano system, because it would amount in substance to a form of anti-suit injunction of the kind prohibited by the Court of Justice in Case C-159/02 *Turner v. Grovit* [2004] E.C.R. I- 3565 and Case C-185/07 *Allianz SA v. West Tankers Inc.* [2009] All E.R. (EC) 491. Although the matter is not fully clear, it is understood that adoption in England is a court-led or, at least, court-supervised process such that it is submitted that the making of such an order by this Court would in substance restrain Hampshire from commencing court proceedings in England in relation to the children.

21. For my part, however, I am not convinced that the present case falls within the ambit of *Turner v. Govit*. The rationale in that case was, of course, that the anti-suit injunction was inconsistent with the full faith and credit principles which underpin the Brussels/Lugano system of jurisdiction. These principles presuppose that the court which is about to be seised of the proposed proceedings which is the subject of the anti-suit injunction will itself apply both the jurisdictional rules and the rules as to *lis alibi pendens*. As the Court of Justice itself stated:

"...it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments....

It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of themSimilarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State ...However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention."

22. This rationale does not, I think, apply to the present case. Insofar as any English court will be applying any jurisdictional rules, it will be in the context of a future *lis* on the question of whether R. (or, for that matter, should it arise, the two older children) should be adopted. Unlike the circumstances disclosed in cases such as *Turner v. Grovit* and *West Tankers* – where the foreign court could only proceed to assume jurisdiction if it were satisfied that the jurisdictional rules and the rules as to *lis alibi pendens* provided for under the Brussels/Lugano system were fully complied with, that court will have no reason to concern itself with the quite separate question of whether Hampshire had previously frustrated the operation of the enforcement provisions of the Brussels Regulation II bis in Ireland by arranging for the children to be removed from the State prior to the service of the proceedings on the parents.

23. To that extent, therefore, I do not think that the scheme of the Brussels/Lugano system precludes the grant of *in personam* protective measure of this kind. I recognise, however, that the matter is not clear-cut and, yet again, as counsel for the Attorney General has pointed out, this case has thrown up even further weighty issues concerning the operation of the enforcement provisions of the Chapter III of the Brussels II bis Regulation and, indeed, the entire Brussels/Lugano system. Indeed, it is not even clear that any adoption proceedings in the UK courts would come within the scope of Brussels II bis given that Article 1(3)(b) of the Regulation excludes "decisions on adoption" and "measures preparatory to adoption."

Conclusions

24. In these circumstances and despite the manifest urgency of this application for protective measures, I consider it is necessary that this court should refer the following further question to the CJEU pursuant to Article 267 TFEU, namely:-

"Whether it is compatible with EU law and, specifically, the provisions of Council Regulation (EC) 2201/2003, for the courts of one Member State to grant an interlocutory injunction (protective measures) directed *in personam* at the public body of another Member State preventing that body arranging for the adoption of children in the courts of that other Member State where the *in personam* injunction arises from the necessity to protect the rights of the parties in enforcement proceedings arising under Chapter III of the 2003 Regulation?"

25. I would accordingly propose that the outcome of this application for an interlocutory injunction should stand adjourned pending the response to the Court of Justice to the further question referred. In view of the fact that Hampshire County Council is currently proceeding with a process which will or, at least, may lead to the adoption of at least one of the three children in question, I would further propose that the Court of Justice should also be requested to treat this further Article 267 TFEU reference as a PPU reference in accordance with Rule 107 of its Rules of Procedure if it should consider it appropriate to do so.

