

## THE HIGH COURT

## FAMILY LAW

[2016 No. 374 M.C.A.]

## IN THE MATTER OF AN APPLICATION UNDER THE ADOPTION ACT, 2010

BETWEEN

J. M.

APPLICANT

AND

THE ADOPTION AUTHORITY OF IRELAND

RESPONDENT

**JUDGMENT of Ms. Justice Reynolds delivered on the 17th day of July, 2017**

1. This judgment concerns an application by the applicant, brought on his own behalf and on behalf of his wife, to have a child adopted by them registered in the Register of Intercountry Adoptions (the "Register") pursuant to Section 90(2) of the Adoption Act 2010 (the "2010 Act").

**Background**

2. The proceedings arise from the domestic adoption by the applicant and his wife of a child, A.M., in the Philippines by way of a Decision of the Philippine Court issued on the 28th March 2011. The adoption was subsequently finalised by way of a Certificate of Finality issued by the Philippine Court on the 1st July 2011.

3. The applicants endeavoured to have the adoption entered in the "Register" maintained by the respondent pursuant to Section 90(2) of the 2010 Act.

4. The application was declined by the Authority in circumstances where the Authority contended that it did not satisfy the relevant provisions of Section 57 of the 2010 Act. In particular, it was noted that the adoption could not be registered under:

(a) Section 57(2)(a) of the 2010 Act as it was effected after the 1st November 2010, the date of commencement of the 2010 Act which incorporates the Hague Convention into Irish law.

(b) Section 57(2)(b)(i) because the applicants were not habitually resident in the Philippines at the time the adoption was effected.

(c) Section 57(2)(b)(ii) as the adoption was not certified by the competent authority of the State in which the adoption took place as having been effected in accordance with the requirements of the Hague Convention.

Further, it was noted that the adoption was not registered in the United Kingdom where the applicants are habitually resident.

5. In the circumstances, the applicant now seeks the directions of the Court pursuant to Section 92(1)(a) of the Act to:-

"direct the Authority to procure the making of a specified entry in the register of intercountry adoptions."

**Facts of the Case**

6. A.M. was born on the 4th April 1995 and is now twenty-two years of age. A.M. is the niece of the adoptive mother in this case in circumstances where she and the birth mother were sisters. It is clear that A.M. and her adoptive mother formed a very close and loving relationship during A.M.'s tender years. In later years, after the applicants had married, they proceeded to lawfully adopt A.M. in the Philippines. Whilst it is clear that the application was properly processed through the Family Courts in the Philippines, the applicants appear to have been unaware of the necessity to liaise with the relevant Hague Convention Office with responsibility for intercountry adoption. In the circumstances, the respondent contends that the adoption is not one which is compliant with the procedures required for intercountry adoption in accordance with the Hague Convention.

7. The application form completed by the applicant for an entry of the adoption into the "Register" refers to the date of the adoption order as being the 9th November 2009. On that basis, the applicant contends that the adoption should be registered pursuant to Section 90(2) of the Adoption Act, as it had been completed prior to the 1st November 2010, (the establishment day for the purposes of the 2010 Act which incorporates the Hague Convention into Irish law). The relevance of that date is that an adoption which was effected prior to the said date is eligible to be registered on the Register under Section 57(2)(a) of the Act, even if it had not been effected in compliance with the Hague Convention.

8. However, it is clear from the documents submitted by the applicants that the initial decision of the Philippine Court issued on the 28th March 2011 was followed by a Certificate of Finality dated the 1st July 2011.

9. It was contended by the applicant that the adoption was effective from the 9th November 2009, in circumstances where the decision of the Philippine Court referred to the Decree of Adoption "effective as of the date of the filing of this petition on the 9th November 2009".

10. The applicants have at all times accepted that they were not habitually resident in the Philippines at the time of the adoption.

11. In refusing the application, the respondent determined the date of the adoption to be "28th of March, 2011, finalised on the 1st of July, 2011" and further had regard to the fact that "the child continued to reside with the birth mother until the 1st of July, 2011", a fact which is not disputed by the applicants herein.

**Intercountry Adoptions**

12. The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (the Hague Convention) provides at Article 2 as follows:-

"(1) The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of Origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin".

(2) The Convention covers only adoptions which create a permanent parent – child relationship."

13. The relevant statutory provisions governing the registration of intercountry adoptions are as follows:-

(a) Section 9 of the 2010 Act states unequivocally that the Hague Convention has the force of law in the State and the text of the Hague Convention is annexed at schedule 2 to the 2010 Act.

(b) Section 96 of the 2010 Act provides that the Adoption Authority is the designated Central Authority for Ireland under the Hague Convention and is charged with maintaining the Register.

(c) Section 90(7) provides that if the Adoption Authority is satisfied that an intercountry adoption complies with the requirements of the 2010 Act, the Authority will enter the particulars of the adoption in the Register.

(d) Section 57 of the 2010 Act provides for the recognition of intercountry adoptions effected outside the State. Different principles apply depending on whether the foreign adoption was effected prior to or after the establishment day, which is 1 November, 2010.

(e) Section 57(2)(a) provides for the recognition of a foreign adoption that was effected prior to 1 November 2010 that has been certified by the competent authority of the State of the adoption as having been effected in accordance with the law of that State. There is no requirement that such a pre-1 November 2010 adoption must comply with the provisions of the Hague Convention. However, it must conform to the definition of a "foreign adoption" as defined in Section 1 of the Adoption Act 1991.

(f) Section 57(2)(b) applies to two categories of adoptions effected on or after 1 November 2010. Section 57(2)(b)(i) applies to adoptions where a certificate has been issued by the competent authority certifying that the adopter or adopters were habitually resident in the State of the adoption at the time of the adoption, and the adoption was effected under and in accordance with the law of that State.

(g) Section 57(2)(b)(ii) applies in any other case and reflects the mandatory provisions of the Hague Convention. It provides that an intercountry adoption effected on or after 1 November 2010 must be certified by the competent authority of the State of the adoption as having been effected in accordance with the Hague Convention.

(h) Section 90(6) requires that all applications for entry in the Register of Intercountry Adoptions must be accompanied by the relevant certificate referred to in Section 57.

(i) Section 90(3) provides such applications may be brought by either the adopted person, a person to whom the adopted person was adopted or any other person having an interest in the matter.

14. On application to the Authority by one of the aforementioned persons, the duty of the Authority to enter intercountry adoptions into the Register is mandatory. However, this duty is only mandatory if the Authority is satisfied that the adoption is an intercountry adoption, certified as being compliant with the 1993 Hague Convention or a bi-lateral agreement.

15. Furthermore, Section 90(4) of the 2010 Act also provides that:-

"Not later than 3 months after the date when a child first enters the State after his or her intercountry adoption in another state by parents habitually resident in the State, the adopters shall ensure that an application to the Authority is made under subsection (3) to enter particulars of the adoption in the register of intercountry adoptions."

16. It is clear that until an adoption is registered in the Register of Intercountry Adoptions pursuant to Section 90 of the Adoption Act 2010, a child adopted in another Member State by parents habitually resident in the State is not the subject of a valid adoption order as defined by Section 20 of the 2010 Act.

#### **The Applicant's Submissions**

17. The applicant has identified two main issues in support of his application herein as follows:-

(a) The applicant contends that the Court should consider the relevant date for the purposes of the adoption as being the 9th November 2009, that being the date of the petition. In support of this contention, the applicant submits that the transfer of parental rights and duties occurred at that time.

(b) The applicant contends that the adoption is compliant or at least substantially compliant with the requirements of the Hague Convention and therefore ought to be registered as an intercountry adoption.

#### **The Respondent's Submissions**

18. The respondent submits that the applicant's position is untenable in circumstances where the adoption was not completed prior to the 1st November 2010 and further where the said adoption was purely a domestic adoption and was not effected in accordance with the requirements of the Hague Convention.

#### **Issues to be Determined by the Court**

19. The first issue that requires to be determined by the Court is the effective date of the adoption. In this regard, the Decision of the Regional Trial Court in the Philippines of the Regional Trial Court dated the 28th March 2011 and the Certificate of Finality dated the 1st July 2011 need to be scrutinised.

20. The applicants rely on the following passage of the Decision dated the 28th March 2011 as follows:-

"Furnish a copy of this Decision, which for the purposes of this Petition, shall already be a DECREE OF ADOPTION, effective as of the date of the filing of this Petition on November 9, 2009 ..."

21. In order to qualify under Section 57(2)(a)(i) as a foreign adoption effected before the 1st November 2010, such adoption at that time must conform to the definition of "foreign adoption" set out in Section 1 of the Adoption Act 1991.

22. Section 1(b) of that Act provides that:-

"The adoption has essentially the same legal effects as respects the termination and creation of parental rights and duties with respect to the child in the place where it was effected as an adoption effected by an adoption order (in Ireland)."

23. However, in scrutinising the later Decision dated 28th March 2011 it provides that:-

"Accordingly, the minor, A.M., shall hence forth by virtue hereof be freed from all legal obligations of obedience and maintenance with respect to her natural parent and to all legal intense and purposes, be the legitimate child of herein the petitioners, acquiring reciprocal rights and obligations arising from the relationship of parents and child/daughter and that her name shall now be A.M."

24. In circumstances where it is evident that no de facto transfer of parental rights and duties occurred in November 2009, the adoption does not fulfil the criteria to be a valid foreign adoption within the meaning of Section 1 of the 1991 Act.

25. In addition, it is accepted by the applicants that the adoption could have been revoked, even after the decision of the court in March 2011 and indeed up until matters were finalised on the 1st July 2011.

26. Having regard to the forgoing, the Court can only conclude that the effective date of the adoption is the 1st July 2011.

27. The second issue to be determined by the Court is whether or not the adoption was in accordance with the requirements of the Hague Convention. In this regard, it appears that the applicants were unfortunately unaware of the Hague Convention requirements at the relevant time. It is common case that the adoption was not certified by the Philippines Intercountry Adoption Board which is the competent authority for the Philippines designated to issue certificates pursuant to Article 23 of the Hague Convention.

28. Furthermore, Article 17 of the Hague Convention has not been complied with in circumstances where the competent authority of the receiving State must determine that the prospective adoptive parents are eligible and suitable to adopt before the adoption is effected and that the child is or will be authorised to enter and reside permanently in the receiving State.

29. The applicants have conceded that they did not engage with the appropriate authorities in Northern Ireland prior to effecting the adoption in circumstances where they were unaware of such requirements.

30. In the circumstances, the Court can only conclude that the mandatory requirements of Section 90 and Section 57 of the Act have not been met.

31. The final issue for the Court to determine is whether or not the adoption is substantially compliant with the Hague Convention such that would afford the Court some degree of flexibility or discretion to direct the registration pursuant to Section 92 of the Act. The wording of the 2010 Act is unclear as to whether the powers of the Court under Section 92 are broader than the powers of the Authority under Section 90. The respondent contends that Section 92 could not be interpreted so as to confer a power to dispense with the Hague Convention requirements unless such power was stated in very clear terms.

32. In the case of *MO'C and BO'C v. Udaras Uchtala na hEireann* ([2014] IEHC 580, also known as the Mexico case, Unreported 30 May 2014), Abbott J. made an order under Section 92 in relation to an adoption that did not comply with all the necessary of the Hague Convention. This decision related to an adoption in Mexico where the adopters had engaged with the Authority and had received the appropriate declaration of eligibility and suitability before travelling to Mexico to adopt a child. The child was placed with the adopters prior to 1st November 2010 but the adoption was not legalised until some months later when the law had changed and the Hague Convention had been adopted into Irish law.

33. In determining the issue, Abbott J. concluded that some flexibility could be adopted with a view to addressing technical issues but only if the adoption sought to be recognised fulfilled the broad objectives and fundamental principles of the Convention. Abbott J. stated at para. 33(3):

*"From the Convention itself (which is a Convention of cooperation rather than of technical and inflexible jurisdiction rules) and from the explanatory memorandum it is clear that in relation to ensuring the broad objectives and fundamental principles of the Convention that cooperation and flexibility may be required. Technical problems may arise within the broad parameters of these activities, and I consider that the more open wording of the provision relating to the power of the High Court to enter a name on the Register is more fitting to allow of these possibilities so as to allow the High Court to be a second guarantor of the interests of the child and the proper administration of the Act in relation to inter country adoptions, which the general, standard, automatic registrations effected by the authority would not encompass ..."*

34. Abbott J. directed the registration of the adoption under Section 92 on the basis of vested rights under the law as it was before adoption of the Hague Convention and in circumstances where the applicants had complied in all respects with the requirements of a foreign adoption and had secured a declaration of eligibility and suitability before travelling to Mexico to adopt the child.

35. The approach adopted by Abbott J. recognised that some flexibility could be adopted by the Court in situations where the requirements of the Hague Convention are broadly met.

36. However, clearly the facts of that case must be distinguished from the facts in the instant case in circumstances where the applicants had no prior engagement with the Authority and where no declaration of eligibility and suitability had been obtained. In the circumstances, it is simple untenable to suggest that the broad requirements of the Hague Convention have been met or indeed that the Court could properly direct the registration pursuant to Section 90(2) of the Act.

37. The applicant's tenacity in pursuing this application is to be commended but for the forgoing reasons, the Court must refuse the application.