



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 19

Record No. 2015/523

**Finlay Geoghegan J.
Irvine J.
Hogan J.**

**IN THE MATTER OF AN APPEAL PURSUANT TO
SECTION 60(8) OF THE CIVIL REGISTRATION ACT 2004**

BETWEEN/

SERGEY CHESNOKOV

APPELLANT/

RESPONDENT

AND

AN tARD-CHLÁRAITHEOIR

RESPONDENT/

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 3rd day of February 2017

1. On 12th September 2014, the appellant ("An tArd-Chláraitheoir"), whose function it is to maintain a system of registration in respect of, *inter alia*, births, marriages, decrees of divorce and nullity, notified the solicitor for the respondent ("Mr. Chesnokov") that his application for the late registration of his birth as having taken place in Ireland on 28th September 1940, under the provision of s. 19(5) of the Civil Registration Act 2004 ("the Act"), had been rejected. From that decision Mr. Chesnokov appealed to the High Court under s. 60(8) of the Act and it is the judgment and order of Hedigan J. (dated 7th August 2015 and 24th July 2015 respectively) reversing that decision that is the subject matter of this appeal.

2. Three issues arose for the Court's consideration on the appeal namely:-

- (a) Whether Mr. Chesnokov's appeal to the High Court had been brought within the time prescribed for so doing;
- (b) whether Hedigan J. was correct when he concluded that the nature and scope of the appeal from the decision of An tArd-Chláraitheoir was what has been described in recent case law as an appeal "on the record", and
- (c) whether the evidence submitted by Mr. Chesnokov in support of his application was adequate for the purposes of s. 19(5) of the Act to establish, on the balance of probabilities, as was held by the trial judge, that he was born in Henrietta Street Dublin on 28th September 1940 such that he was entitled to have his birth registered as having so occurred.

3. I have read carefully the judgment of Hogan J. in relation to this appeal and for the reasons which he has advanced, I too am satisfied that if Mr. Chesnokov's appeal from the decision of An tArd-Chláraitheoir was out of time, as was submitted on the appeal in the High Court, that the circumstances of the case are such as would warrant the making of an order extending the time so as to permit of his appeal.

4. I also agree with the conclusion of Hogan J, for the reasons stated in his judgment, that an appeal to the High Court pursuant to s.60(8) of the Act, is one which permits the High Court judge to reach his/her own conclusion on the decision under appeal, albeit confined to a consideration of the evidence that was before an An tArd-Chláraitheoir and having regard to the relevant underlying statutory provisions. In other words, the High Court is not confined to a review of the lawfulness of the approach of the first instance decision maker, but may also assess the correctness of that decision. That being so, the jurisdiction of this court on this appeal is to consider whether the High Court judge erred in law in the conclusions which he reached. It is this issue only that I intend to address in the course of this judgment.

5. The background facts to Mr. Chesnokov's application to have his birth registered under the Act have also been comprehensively set forth by Hogan J. in his judgment and I gratefully adopt the same for the purposes of reaching my own conclusions in these proceedings.

6. Given the nature and scope of the appeal before Hedigan J. the question for this Court is whether the evidence submitted to An tArd-Chláraitheoir and which was before the High Court judge on appeal, when objectively assessed, was sufficient to warrant the conclusion that Mr. Chesnokov was born in Dublin on 28th September 1940.

Summary of the evidence relied upon by Mr. Chesnokov

7. Mr. Chesnokov maintains that he was born in Henrietta Street, Dublin on 28th September 1940. In support of his application under s. 19(5) of the Act, which was under consideration for a period of approximately three years during which his solicitor had significant interaction with An tArd-Chláraitheoir and his officials, he produced the following evidence:-

- (i) A declaration from his aunt, Ms. Nadezhda Iljinichna Zhirmova ("Ms. Zhirmova") dated 29th April 2010. Her statement is sparse. She states that she delivered the baby, Mr. Chesnokov, on 28th September 1940 at 8 a.m. at No. 5, Henrietta

St., Dublin and that almost immediately thereafter mother and baby left Ireland following which they later arrived in the Soviet Union where she was issued a birth certificate that met all U.S.S.R. requirements. She opined that Mr. Chesnokov's birth had not been registered in Ireland because his parents, as citizens of the Soviet Union, were concerned about the possible repercussions of doing so. It is to be noted that, as someone present at the birth, the Act accords Ms. Zhimova the status of "qualified informant" for the purpose of the application for registration.

(ii) A declaration of a Mr. Vladimir Gribkov. He states that he was friendly with Mr. Chesnokov's mother in the 1950's and that she had told him that her son had been born in Dublin and that she had later travelled to Moscow "experiencing great difficulties".

(iii) A declaration from Alexey Chesnokov, Mr. Chesnokov's son. He states that his grandmother told him that at the time of his father's birth she was afraid to go back to the Soviet Union because of warfare between Great Britain and Germany but was also afraid to stay in Ireland because she risked being pronounced an enemy of the Soviet people and later imprisoned or shot. That is why she had returned to the U.S.S.R. at the first opportunity.

(iv) A birth registration notice/certificate issued on 14th October 1940 from the Registry Office in Moscow and which records Mr. Chesnokov's place and date of birth as Dublin, 28th September 1940.

(v) Copies of Mr. Chesnokov's drivers licence, passport, marriage certificate and trade union membership card all of which record his place and date of birth as Dublin, 28th September 1940.

8. Before moving to consider s. 19(5) of the Act and the import and weight of the evidence in support of Mr. Chesnokov's application to have his birth registered, it is perhaps only fair to acknowledge that a number of documents emanating from the office of An tArd-Chláraitheoir during the period when his application was under consideration are to be criticised as being either factually or legally incorrect.

9. The first of these is a letter dated 11th October 2011 to Mr. Chesnokov's solicitor, advising that he would have to produce some evidence in addition to the documents from the Registry Office in the Russian Federation in support of his contention that his birth had actually taken place in Ireland. That statement would suggest that its author had overlooked the declaration that had been completed by Ms. Zhimova. The second is a letter written by Mr. Pat Canning on 25th July 2012 who stated that there was insufficient documentary evidence to support the assertions made on behalf of Mr. Chesnokov and from which it is to be inferred that he had perhaps overlooked the fact that he had provided copies of his Russian birth certificate, marriage certificate, drivers licence and trade union membership card. Finally, there is Mr. Connolly's letter of 20th September 2012 wherein he incorrectly states as a matter of law that the Registrar General had to be satisfied beyond doubt that a birth had occurred in Ireland before he might authorise registration under the Act. That statement was incorrect as it clearly it is the civil standard of proof that applies.

10. Regardless of these unfortunate references, the fact of the matter remains that the appeal before Hedigan J. was an appeal on the record. That being so, he was free to decide the appeal based on the evidence and materials that had been before An tArd-Chláraitheoir and was he was not confined to a consideration as to whether he had erred in the manner in which he had reached his decision.

Discussion

11. The importance of a having a system which accurately records and registers the births of infants born in this country cannot be understated. Time and time again in the course of their lives people reach for a copy of their own birth certificate or that of a family member because without it some right or entitlement that might otherwise be available to them may be withheld. For example, a birth certificate will routinely be required to facilitate the enrolment of a child in school. It is an essential requirement to support an application for a passport, driver's license or any type of social welfare entitlement. Further, it is not just the location or country specified as the place of birth that is relevant; the date of the birth as it appears on the certificate is of critical and vital importance. That is the date which will determine a whole range of rights and obligations for the holder. It is the date which will determine when they may exercise their right to vote, drive a car or get married. It will regulate much more mundane matters also such as the date upon which they may first purchase alcohol, or watch a particular class of movie. On the other end of the spectrum, it will determine their criminal capacity.

12. This is all by way of emphasising the importance of the challenge faced by An tArd-Chláraitheoir in endeavouring to maintain a register that has real integrity and which can be relied upon as proof positive of the date and the location of any birth therein recorded.

The statutory provisions

13. Given that it is the judgment of the High Court on an appeal from the decision of An tArd-Chláraitheoir which was made by him in the exercise of the Statutory power afforded to him under s. 19(5) of the Act that is under consideration on this appeal, I feel it is necessary to set out the section in its entirety.

19(1) Subject to the provisions of this Part, when a child is born in the State, it is the duty of:-

(a) the parents or the surviving parent of the child, or

(b) if the parents are dead or incapable through ill health of complying with this subsection, each other qualified informant, unless he or she reasonably believes that another qualified informant has complied with it in relation to the birth,

not later than 3 months from the date of the birth:-

(i) to attend before any registrar,

(ii) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the birth, and

(iii) there, to sign the register in the presence of the registrar.

(2) Where a person complies with subsection (1) in relation to a birth, the other persons referred to in that subsection are discharged from the performance in relation to that birth of the duty imposed by that subsection.

(3) Where, owing to non-compliance with subsection (1), a birth is not registered and, having made reasonable efforts to do so, the authority in whose functional area the birth occurred is unable to contact either parent of the child concerned, the authority may give a qualified informant a notice in writing requiring the informant:-

- (a) to attend before a registrar in the functional area of the authority, at the office of the registrar or at such other (if any) convenient place as may be specified by the authority on or before a day so specified (not being less than 7 days from the date of the notice nor more than 12 months from the date of the birth),
- (b) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the birth, and
- (c) there to sign the register in the presence of the registrar,

and, unless the birth is registered before the date of the attendance aforesaid, the informant shall comply with the requirement.

(4) Where paragraphs (i) to (iii) of subsection (1) or, as the case may be, paragraphs (a) to (c) of subsection (3) have been complied with in relation to a birth, the registrar concerned shall register the birth in such manner as an tArd-Chláraitheoir may direct.

(5) Where, in relation to the birth of a child:-

- (a) the parents of the child are dead or incapable through ill health of complying with subsection (1), or
- (b) neither the parents nor another qualified informant can be found after all reasonable efforts to do so have been made,

an tArd-Chláraitheoir may cause the birth to be registered on production to him or her of such evidence as he or she considers adequate for the purpose which, in the case referred to in paragraph (b), shall include, if the place where the birth occurred is known, evidence that the Superintendent Registrar of the authority in whose functional area the birth occurred made all reasonable efforts to find the parents or a qualified informant.

(6) In this section "qualified informant", in relation to the birth of a child, means:-

- (a) the parents or the surviving parent of the child,
- (b) a guardian of the child,
- (c) a person present at the birth,
- (d) if the birth occurred in a building used as a dwelling or a part of a building so used, any person who was in the building or part at the time of the birth,
- (e) if the birth occurred in a hospital or other institution or in a building or a part of a building occupied by any other organisation or enterprise the chief officer of the institution, organisation or enterprise (by whatever name called) or a person authorised by the chief officer to perform his or her functions,
- (f) a person having charge of the child, or
- (g) a man who duly makes a request under paragraph (c) or (d) of section 22 (2).

14. As is clear from the s. 19(5), where the parents of a child who is alleged to have been born in the State are dead, An tArd-Chláraitheoir, may cause the birth of that child to be registered on the production to him of such evidence as he may consider "adequate for the purpose". That being so, it was for the High Court judge, having regard to the provisions of that section, the nature of the Register itself and the purpose of the Act, to which I have already referred in some detail, to consider whether the evidence submitted by Mr. Chesnokov was adequate to warrant the registration of his birth under s. 19(5). Accordingly I now propose to look at some aspects of that evidence.

Decision

15. Mr. Chesnokov's application is based upon events which he contends took place over a sixteen day period between 28th September and 14th October 1940. Crucial to that application are the events which he maintains bookend that period. His evidence of primary fact is confined to what he asserts happened on those two dates. There is no evidence whatsoever as to what actually occurred or what is believed to have occurred shortly prior to or between those dates. The absence of such evidence is a factor, in my view, to which An tArd-Chláraitheoir and any Court on an appeal from his decision, would be entitled to have regard when considering the adequacy of the evidence for the purposes of s. 19 (5). This is particularly so in the present case given that from the outset of the process concern was expressed regarding the sufficiency of the documents and materials supporting the application.

16. As to 28th September 1940, there is the declaration of Ms. Zhimova of 29th April 2010 stating that she delivered Mr. Chesnokov in No. 5, Henrietta Street at 8 a.m. on 28th September 1940. That declaration was made when she was eighty nine years of age, albeit that it was accompanied by a medical certificate certifying her fit to make it. On the later date, namely 14th October 1940, mother and baby were, it is definitively asserted by Mr. Chesnokov, back in Moscow where she successfully then registered his birth at the Civil Registration Office on that date. As there was no challenge to the authenticity of that birth certificate and given that it is an official document prepared by a State body, it must be considered to be at least *prima facie* evidence of the fact that Mr. Chesnokov and his mother were in Moscow on 14th October 1940.

17. It would appear from the letter from the Russian Registry Office dated the 26th January 2011 that any underlying documentation supporting the registration of Mr Chesnokov's birth in Moscow would only have been retained for one year as that was standard practice. Nonetheless, what can be said with relative certainty is that if Mr. Chesnokov was, as is alleged, delivered by his aunt in a private dwelling house rather than in a hospital or by a member of the medical profession, his mother would not have been in a position to present any official documentation from Ireland as proof of the fact that he was born in Dublin of 28th September 1940. For this reason I believe the birth certificate issued in Moscow on 14th October 1940 is principally of evidential value as a document that supports Mr. Chesnokov's contention that his mother was in Moscow on that date. It is not, in my view, of any real value in and of itself as evidence which goes to prove that his birth took place in Dublin on 28th September 1940, certainly in the absence of any other supporting documentation explaining the basis on which the birth was registered by the Soviet authorities.

18. Relevant also to the adequacy of the evidence submitted on behalf of Mr. Chesnokov concerning the registration of his birth in Moscow is the fact that while he placed significant reliance upon that registration, he did not produce any evidence as to what documents would have been required at the time to register his birth in Russia. The nature and extent of that documentation would clearly been material to the evidential weight to be attached to the birth certificate and, indeed, his passport, driver's licence and trade union membership card all of which would appear to have as their origin his Russian birth certificate.

19. The Russian birth certificate does nonetheless support Mr. Chesnokov's own sworn evidence to the effect that he and his mother were in Moscow on 14th October 1940. That being so, the question then is, was there adequate evidence which when objectively assessed could have satisfied the court as a probability that Mr. Chesnokov was born in No.5 Henrietta Street, Dublin sixteen days earlier?

20. I have earlier summarised the evidence relied upon by Mr. Chesnokov in support of his application under s. 19(5). In particular, I have referred to the declaration of Ms. Zhimova which was the principal evidential plinth upon which his application was based. However, when it comes to an objective assessment of that declaration, can any real weight be attached to Ms. Zhimova's statement in 2010 in light of her failure to provide any information that might explain the highly unusual circumstances in which she and her sister allegedly came to be in Ireland in 1940? Even if she did as a matter of fact deliver Mr. Chesnokov in Ireland, could her subsequent declaration at eighty nine years of age and seventy years after the event, be considered - absent any contextualisation of its factual content - adequate proof as to the probability that Mr. Chesnokov was born on the precise date and at the precise location alleged?

21. Having regard to the aforementioned statutory provisions and the importance that An tArd-Chláraitheoir maintain a Register which has the utmost integrity, a special onus must surely rest on an applicant who seeks to register a birth some 70 years after it occurred, particularly where the facts relied upon include the fact that the child concerned was allegedly born to a Russian national in Dublin in 1940 to provide all information and evidence potentially available to support that application. For evidence to be considered "adequate for the purpose", clearly it must be such that when objectively considered it is sufficient to establish as a matter of probability that the birth occurred on the date and at the location alleged.

22. An tArd-Chláraitheoir is not obliged to accept the evidence presented to him blindly and regardless of concerns he may have concerning its reliability. He is, in my view, entitled to analyse and assess the evidence having regard to all of the relevant circumstances and to take into account, in appropriate cases, the absence of evidence that he might reasonably have expected to have been made available but which was not forthcoming. Likewise, for the purpose of determining whether the evidence was "adequate" for the purpose of obtaining registration he must be considered entitled to have regard to what may conveniently be described as "gaps" in the evidence, particularly in applications where he, through his officers, may have expressed concerns as to the sufficiency of the materials and documentation provided prior to the ultimate determination of the application.

23. I am quite satisfied that this court, in deciding whether Mr. Chesnokov adduced adequate evidence sufficient to warrant the registration of his birth by An tArd-Chláraitheoir, is entitled to assess the weight to be attached to the bald assertion made by Ms. Zhimova's as to the time, date and place of his birth in light of the information which was not provided, particularly in face of the reservations expressed by the officers of An tArd-Chláraitheoir concerning the sufficiency of the materials submitted in support of his application.

24. It is perfectly understandable that Mr. Chesnokov, seeking to register his birth more than half a century after it occurred and in circumstances where he maintains he was not born in a hospital, might find it difficult to produce documentation of an official nature to prove his date and place of birth. Likewise, I can readily accept his difficulty in producing documentation to establish that his mother was in Ireland at the time of his birth. However, whilst these are matters to which An tArd-Chláraitheoir or the court on appeal would be obliged to have regard, they did not absolve him of the requirement that he produce evidence adequate to warrant the registration of his birth by An tArd-Chláraitheoir.

25. I reject the submission made on Mr. Chesnokov's behalf that the declaration of Ms. Zhimova, she being a qualified informant under s. 19(3) of the Act, automatically relieved him of the requirement that he provide all such evidence as might reasonably have supported his application in light of the prevailing circumstances.

26. Mr. Chesnokov was aware of the fact that An tArd-Chláraitheoir was concerned that there was no documentation available to prove that his mother was actually in Ireland in 1940, and also no information provided as to why, how and in what circumstances his parents had arrived in Ireland. He could not but have been aware of the fact that An tArd-Chláraitheoir did not consider Ms. Zhimova's declaration sufficient evidence to establish that he had been born in Dublin on the date alleged. Yet, for whatever reason, Mr. Chesnokov refrained from providing any evidence himself concerning the circumstances known to him surrounding his birth in Ireland and neither did he seek to have Ms. Zhimova flesh out what had been stated by her in her declaration. His silence concerning her statement that his mother left Ireland immediately after his birth and was back in Moscow with him to register his birth sixteen days later, left a gaping hole in the evidence which An tArd-Chláraitheoir might reasonably have expected to have been addressed by any late applicant for registration after the expiration of such an interval of time.

27. If the content of Ms. Zhimova's declaration is true, Mr. Chesnokov's mother and father had an extraordinary story to tell concerning his birth and survival. That he and his mother were well enough to start a journey to Moscow, commencing almost at the moment of his birth, would itself be an extraordinary story and one which would be unlikely to have been withheld from the very infant that had survived such an ordeal. But it would have been even more remarkable for the monumental risk involved and the planning it would have required in light of the war that was being waged right across Europe at the time and which would have affected all routes that might reasonably have been deployed to reach Moscow. Surely his parents would have regaled him with tales of the plans they made for their journey, the route they followed, the method of transportation they managed to avail of, how they obtained the necessary financial resources to finance this trip; whether they had travelled alone or together? Would they not have explained to him why it had been necessary for his mother to leave immediately following his birth and why she had not delayed some weeks to

allow them both get stronger? It is, indeed, hard to understand in light of An tArd-Chláraitheoir's concerns as to the sufficiency of the evidence offered to support Ms. Zhimova's declaration that he chose to withhold all he knew concerning this journey in favour of the much more remote and vague evidence concerning the same contained in the statement of his grandson and Mr. Gribkov.

28. It is, of course, correct to state that Ms. Zhimova stated in her declaration that she was present at the birth and, if she was, she must be considered a qualified informant for the purposes of s. 19(3) of the Act. However, the fact that she made such a declaration does not mean that the An tArd-Chláraitheoir had to accept that evidence as sufficient to discharge the onus of proof that was on Mr. Chesnokov for the purpose of entitling him to have his birth registered. If it were otherwise, An tArd-Chláraitheoir would have to register every birth once he was receipt of a statement from a person who professed their attendance at the birth.

29. The fact of the matter remains that Ms. Zhimova's declaration is the only evidence to support Mrs. Chesnokov's presence in Ireland in 1940 and Mr. Chesnokov's birth here on 28th September 1940. At the end of the day her declaration is not much more than a bald assertion as to the date, time and location of his birth which happens to coincide with a date which is recorded in the Russian birth certificate. The fact that Mr. Chesnokov and his mother were probably in Moscow on 14th October 1940 and the lack of information of the type to which I have already referred or any statement as to how his mother and her sister Ms Zhimova came to be in Ireland in September 1940 makes it impossible, in my view, to come to the conclusion that, objectively assessed, the evidence submitted to An tArd-Chláraitheoir and the High Court on appeal was sufficient to establish as a probability that he was born in Henrietta Street, Dublin on 28th September 1940.

30. All of that is not to say that I dismiss as a possibility that Mr. Chesnokov was actually born in Ireland. Indeed, he may have been born in Henrietta Street, but the evidence simply does not support the conclusion that judged by reference to the balance of probabilities his birth took place there on 28th September 1940.

31. Before concluding, I should state that I am troubled by the fact that Mr. Chesnokov's Russian birth certificate states that he was born in Dublin because it is hard to understand why, if this fact is not true, his mother would have so advised the Soviet authorities. It could scarcely have been in Mr. Chesnokov's interests or, indeed, that of his parents to have registered his birth as having taken place in Ireland given the prevailing climate in the Soviet Union at the time. However, as already stated, the appeal before this Court focuses upon the finding of the High Court judge as to whether, as a matter of probability, Mr. Chesnokov was born in Dublin on a particular date, namely 28th September 1940, and, in my view, the evidence simply does not support the same as a matter of probability.

32. I have read the historical analysis of the war in Europe in the later part of 1940 as is described by Hogan J. in his judgment and I agree with his conclusions as to the impact that such a state of affairs would likely have had on the possibility of Mr. Chesnokov's mother successfully travelling between Dublin and Moscow in sixteen days commencing in late September of that year. However, even without resorting to those facts, I am satisfied that the evidence produced to An tArd-Chláraitheoir, when objectively assessed having regard to the purposes of the Act, was not adequate for the purpose of establishing his entitlement to have his birth registered as having occurred in Henrietta Street, Dublin on the 28th September 1940. Accordingly, I am satisfied that the trial judge erred in law when he concluded that the evidence was sufficient for such purpose.

Conclusion

33. For my part, I would allow the appeal against the decision of Hedigan J. and I would uphold the decision of the Registrar, albeit for reasons that are different from those advised by his office.

34. I am satisfied that having regard to the nature of the Register maintained by An tArd Chláraitheoir and the purpose which underlies s. 19(5) of the Act, that for the reasons already stated in this judgment, the evidence submitted by Mr Chesnokov, was not adequate to establish as a matter of probability that he was born on the date and at the location alleged so as to warrant the registration of his birth as having so occurred.