Neutral Citation Number: [2011] IEHC 468

THE HIGH COURT

2011 10127 P

IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION

(EC) 2201/2003 AND

IN THE MATTER OF THE EUROPEAN COMMUNITIES (JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY) REGULATIONS 2005 (S.I.112/2005)

AND

IN THE MATTER OF FOREIGN PROCEEDINGS BEARING REFERENCE NO. 09/011822 AND 02

AND

IN FOREIGN PROCEEDINGS BEARING REFERENCE NO. 11/029074/06 AND

IN THE MATTER OF A S (A CHILD)

BETWEEN

BELFAST HEALTH AND SOCIAL CARE TRUST

PLAINTIFF

AND

D. S. AND O. L.

DEFENDANTS

AND

HEALTH SERVICE EXECUTIVE

NOTICE PARTY

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 16th day of December, 2011

1. On 10th November, 2011, the plaintiff ("the Trust") issued a Plenary Summons seeking, *inter alia,* orders pursuant to Chapter III of Council Regulation (EC) 2201/2003 ("the Regulation") and, in particular, Article 21 thereof for the recognition of two orders made in the High Court of Justice, Northern Ireland Family Division, Office of Care and Protection, ("NI High Court") on 16th September, 2010, and 31st August, 2011, respectively. Each of the orders concern, in part or in whole, the child named in the title of these proceedings to whom I will refer by the pseudonym given to her in the Northern Ireland proceedings, namely, Dona. The order of 16th September, 2010, relates also to a sister of Dona. The application for recognition is insofar as it relates to Dona.

Background to the Application

2. Dona is one of three children of the defendants who are her father and mother. She was born in an Eastern European country and came to reside in Northern Ireland in or about 2005.

3. The family came to the attention of the Trust, and on 11th September, 2009, proceedings were commenced in the NI High Court in relation to the three children. On 16th September, 2010, Stephens J delivered a written judgment and made an order placing Dona and her sister in the care of the Trust.

4. Whilst in the care of the Trust, Dona tried to abscond to this jurisdiction on three occasions. On one occasion, she did so successfully, but was persuaded to return to Northern Ireland by the Trust.

5. On 25th August, 2011, Dona made her way to Dublin. The Trust, having located her, sought the assistance of the Health Service Executive and the Garda Síochána in this jurisdiction. The Health Service Executive has provided Dona with accommodation during her stay in Ireland.

6. On 30th August, 2011, the Trust applied to the NI High Court for a Recovery Order. On 31st August, 2011, the High Court of Justice in Northern Ireland made a Recovery Order as sought by the Trust pursuant to Article 69 of the Children (Northern Ireland) Order 1995, in respect of Dona. The Schedule to that Order sets out the provisions of Article 69(3) of the Children (Northern Ireland) Order 1995, as follows:

> "A recovery order-
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> (a) operates as a direction to any person who is in a position to do so to produce the child on request to any authorised person;
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> (b) authorises the removal of the child by any authorised person;

(c) requires any person who has information as to the child's whereabouts to disclose that information, if asked to do so, to a constable or an officer of the court;

(d) authorises a constable to enter any premises specified in the order and search for the child, using reasonable force if necessary."

7. On 20th October, 2011, the NI High Court issued a Certificate of Enforceability pursuant to Article 39 of the Regulation in relation to the Care Order made on 16th September, 2010, and a Certificate of Enforceability pursuant to Article 39 of the Regulation in relation to the Recovery Order made on 31st August, 2011.

8. Dona has continued to live in accommodation provided by the HSE in this jurisdiction. No other proceedings have been commenced in relation to Dona in this jurisdiction.

Proceedings in this jurisdiction

9. Article 4 of the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 S.I. No. 112 of 2005, provides, *inter alia*, that an application under Section 1 of Chapter III for a decision that a judgment be recognised shall be made to the High Court. Regrettably, O. 42A of the Rules of the Superior Courts which sets out the procedure for applications for declarations of enforceability pursuant to Section 2 of Chapter III of the Regulation does not include any special procedure in relation to applications for recognition. In such circumstances, the Trust commenced proceedings on 10th November by issue of a Plenary Summons. On the same day, an *ex parte* application was made seeking directions, certain interim orders and leave to issue a notice of motion returnable for 23rd November, 2011. On that day, orders were made including:

(i) that the proceedings be heard otherwise in public pursuant to s. 45(1) of the Courts (Supplemental Provisions) Act 1961, as amended;

(j) leave to issue the motion granted;

(ii) that Ms. Carmel Murphy be appointed to act as guardian *ad litem* of Dona and that the proceedings be served on her; and

(iii) certain interim restraining orders pursuant to Article 20 of the Regulation.

10. The proceedings have been served on the father, the mother, the HSE and the guardian *ad litem*. The mother informed the Trust that she did not intend to appear or oppose the application. The father delivered an affidavit sworn on 30th November, 2011, and was represented by counsel and a solicitor at the hearing. He opposes the application. The notice party did not file an affidavit and was represented by solicitor but did not participate. The guardian *ad litem* filed an affidavit sworn on 6th December, 2011, and a report based on interviews with Dona on four separate occasions. She was represented by a solicitor and counsel and supported the application for recognition.

11. The notice of motion issued with leave of the Court on 10th November, 2011, seeks the substantive relief in relation to the recognition of the orders of the High Court of Justice of Northern Ireland of 16th September, 2010, and 31st August, 2011, respectively, and, *inter alia*, an order treating the motion as the trial of the action.

12. On 23rd November, 2011, the return date of the notice of motion, directions were given in relation to the filing of affidavits and a date was fixed for the hearing on 15th December, 2011.

13. It was agreed that the motion be treated as the trial of the action.

Application for Adjournment

14. At the commencement of the hearing yesterday, 15th December, 2011, an application was made by counsel on behalf of the father to adjourn the hearing on the basis that he could not be present in Court and would not be available for cross-examination. No notice to cross-examine the father had been served. Counsel on his behalf stated that her instructions were that he was in Court in Northern Ireland and could not be present in the High Court in Dublin. No notice of the application for an adjournment had been given to the Trust. The application for an adjournment was opposed. I refused the application for an adjournment. I considered it to be in the best interests of the child that the application proceed. The father had been given significant notice of the hearing date, and whilst it was desirable that he be present if he wished, it was not necessary as the hearing was on affidavit evidence. Further, it was unclear why he was required in Court in Northern Ireland. It did not appear to relate to Dona as all relevant people were in Dublin.

15. In Northern Ireland Dona has been represented by a solicitor and she has a guardian *ad litem*. Each of these and the guardian's solicitor had travelled for the hearing and I gave permission that they be present in Court as it appeared to be in the best interests of Dona and there was no objection from any party.

The Regulation

16. Article 21, insofar as relevant, provides:

"1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required. . . .

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter apply for a decision that the judgment be or not be recognised."

17. In Section 2, Article 30 provides that the procedure for making the application shall be governed by the law of the Member State of enforcement and by application that of recognition. Article 31 requires a court to give its decision without delay and then provides, at paras. 2 and 3:

"2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3. Under no circumstances may a judgment be reviewed as to its substance."

18. Article 23 sets out the grounds upon which a judgment relating to parental responsibility shall not be recognised. These are:

> "(a) if such a recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
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> (b) if it was given, except in the case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
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> (c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;
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> (d) on the request of any person claiming that judgment infringes his or her parental responsibility, it if was given without such person having been given an opportunity to be heard;
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> (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
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> (f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought,
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> or
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> (g) if the procedure laid down in Article 56 has not been complied with."

19. It is not in dispute that this Court may only refuse to recognise the orders of the NI High Court on one of the grounds set out in Article 23(a) to (g) inclusive. It is further not in dispute that each of the orders are orders relating to parental responsibility as defined in the Regulation. The prohibition on this Court reviewing a judgment as to its substance is emphasised by a repetition of the prohibition in Article 21 which forms part of Section 1 of Chapter III of the Regulation.

20. In accordance with Article 37, the Trust is required to produce before this Court in relation to each of the orders in respect of which it seeks recognition:

> (a) a copy of the order which satisfies the conditions necessary to establish its authenticity, and
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> (b) the certificate referred to in Article 39.

At the hearing, I was satisfied that there were produced a copy of the order of 31st August, 2011, with the necessary stamp to establish its authenticity, and each of the original Article 39 certificates of the orders of 31st August, 2011, and 16th September, 2010. There was not produced to the Court a copy of the order of 16th September, 2010, with an appropriate stamp to establish its authenticity. Pursuant to Article 38(1) of the Regulation, I permitted the Trust to produce the appropriately authenticated copy of the order by 16th December, 2011 (which has now been done). A plain copy of the order had been produced, and on the basis of that, I was prepared to continue with the hearing and determination of the application.

21. The objections made on behalf of the father to recognition of the orders of 16th September, 2010, and 31st August, 2011, are based upon the facts set out in his affidavit. It was commoncase that none of the matters set out in Article 23(c), (e), (f) or (g) apply to the facts of this case. The father does make complaint in his affidavit of facts which potentially relate to paras. (a), (b) and (d) and I propose, therefore, dealing with each of these.

22. The primary objection made on behalf of the father to recognition of each of the orders of the NI High Court is pursuant to para. (a) of Article 23 on the basis that it would be manifestly contrary to the public policy of this State, taking into account the best interests of Dona, to either recognise the Care Order or the Recovery Order in favour of the Trust by reason of the Trust's alleged failure to protect Dona from degrading treatment including a breach of her constitutionally protected right to bodily integrity whilst in the home from which she absconded.

23. Prior to considering this objection, it is necessary to refer to the proper approach of the Court to determining an objection to recognition, and in particular, on the grounds of public policy. The jurisdiction of this Court in considering an application for recognition and an objection thereto is limited and constrained by the terms of the Regulation. The principle underlying the provisions of the Regulation for recognition and enforcement is explained in Recital (21) to the Regulation "the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required". This Court must, accordingly, consider the issues raised in accordance with the principle of mutual trust between the courts of Member States. Further, it appears to follow from the requirement that the grounds for non-recognition be kept to a minimum; that the courts construe narrowly the grounds set out in Article 23.

24. In relation to Article 23(a), I was referred to the consideration given by Holman J. in the High Court of England and Wales in *Re S. (Brussels II: Recognition: Best Interests of Child) (No. 1)* [2004] 1 F.LR. 571. to the similar provision in Article 15(2)(a) of Council Regulation (EC) No. 1347/2000 (Brussels II) which was the predecessor of the Regulation At para. 32, he stated:

> "It seems to me that, in applying Art 15(2)(a), I have to give proper weight and effect to the language that is used. The Article does not refer simply to recognition being contrary to the best interests of the child. It refers, rather, to recognition being contrary to public policy, taking into account the best interests of the child. Merely to reconsider the best interests of the child would be to review the Belgian judgment (which is clearly welfare based) as to its substance, which is forbidden by Art. 19. I have to take into account the best interests of M, but ultimately to consider whether the recognition is manifestly contrary to English public policy. To say that something is contrary to public policy is a high hurdle, to which the Article adds the word 'manifestly'. This is an international convention and I must apply it purposively, giving appropriate weight to the word manifestly. Indeed, the judgment of the European Court in the case of Krombach v. Bamberski [2001] 3 WLR 488, given on 28 March 2000, although given in a very different context, affords some guidance. At para [21] the court said in relation to a similar provision of a similar convention, although not employing the added qualification of 'manifestly':
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> '. . . the court has held that this provision must be interpreted strictly inasmuch as it constitutes an

> obstacle to the attainment of one of the fundamental objectives of the Convention . . . With regard, more specifically, to recourse to the public policy clause . . . the court has made it clear that such recourse is to be had only in exceptional cases . . .'"

25. I respectfully agree that the above is the proper approach. The hurdle set by Article 23(a) in only permitting the Court to refuse recognition if it is "manifestly contrary to the public policy" of the State is a high hurdle and one which, in my judgment, has not been reached on the facts herein.

26. The factual basis of the objection is the allegation by the father that the staff of the Trust failed to protect Dona in her placement from degrading treatment and an allegation that a member of staff called her an abusive term. This is alleged to have occurred by reason of the fact that Dona, who appears to be an intelligent 14 year old girl, decided to become a member of the Jewish faith. Consequently, she was unable to eat pork. It is alleged that other children in the home threw pork at her and the staff failed to protect her. Dona herself, in conversation with her guardian *at litem* in this jurisdiction, refers to this and other disturbing incidents from other children in the home.

27. I am prepared to accept for the purposes of this application that Dona was unhappy in the home in which she was placed in Northern Ireland prior to absconding and may well have suffered there at the hands of other children. However, on the facts before me, I am not satisfied there is evidence that the Trust, through its staff, acted in breach of what would be constitutionally protected rights of Dona to bodily integrity in this jurisdiction, as was submitted by counsel on behalf of the father or any duty owed to Dona. The allegations must also be considered in the context of the Orders for which recognition is sought.

28. The first order which this Court is asked to recognise is the Order placing Dona in the care of the Trust. It is not an order that she be placed in any particular location in Northern Ireland. The second order for which recognition is sought is a Recovery Order. Similarly, the Recovery Order is not an order which directs or requires the placing of Dona in any specific placement including her prior location in Northern Ireland. Whilst no application for enforcement of either order is made, the expressed belief of the Trust is that an order of recognition by this Court of each of the NI Care and Recovery Orders will facilitate cooperation of the HSE and the Garda Síochána in the Trust's recovery of Dona and her return in its care to Northern Ireland. It is not a matter for this Court to comment on that belief. However, it does appear in considering this application for recognition, that the Court should take into account that a practical consequence of making such an order is that the Trust may recover Dona to their care in Northern Ireland but not necessarily to her prior location in Northern Ireland.

29. The Care Order was made pursuant to the judgment of Stephens J of 16 September 2010, which I have read. It is a welfare based decision in accordance with what is determined to have been in the best interests of Dona. This court is prohibited from reviewing the substance of the judgment. On the facts before me, I am satisfied that it is not contrary to the public policy of this State, taking into account the best interests of Dona, that the Care Order be recognised in this jurisdiction. I have reached a similar conclusion in relation to the Recovery Order. It has not been established that it is contrary to the public policy of this State taking into account the best interests of Dona to make an order for her recovery where she has absconded from the care and control of the person in whose care she has been placed by the NI High Court. I reach these conclusions by reason of the principles already set out, and in particular, having regard to the principle of mutual trust between this Court and the courts of Northern Ireland. The factual basis for the father's objections relate primarily to the nature of the care being provided by the Trust for Dona before she absconded. This is a matter which remains subject ultimately to the supervision of the Courts of Northern Ireland, where Dona has the benefit of a solicitor appointed to represent her in whom, she appears from the guardian's report, to have trust.

30. I am further satisfied that Article 23(b) does not preclude on the facts before me recognition of either of the orders. The judgment of Stevens J. makes clear that Dona was given an opportunity to be heard prior to the making of the Care Order. The Recovery Order was one made "in case of urgency" when Dona had already left the jurisdiction of Northern Ireland. Notwithstanding the order records the fact that counsel and solicitor on her behalf were heard by the Court.

31. I am also satisfied that Article 23(d) does not preclude me recognising each of the orders. The father made no objection in relation to the Care Order on this ground. He did,in his affidavit, make complaint that he was not given what he perceived to be a proper opportunity to be heard on the application for the Recovery Order. It is not clear on the facts whether the father is entitled to maintain that the making of the Recovery Order infringed "his parental responsibility" as Dona was then in the care of the Trust who had parental responsibility for her. Even if he were entitled to make such a claim, on his own affidavit, he was heard by the NI High Court, as the order records, and he did have a right of appeal in Northern Ireland against that order. It appears that the subsequent appeal was dismissed by reason of the father's own unwillingness to furnish certain information sought by the Northern Ireland courts.

32. This Court has had the benefit of the report of Ms. Murphy, the guardian *ad litem* of Dona in this jurisdiction following four interviews with Dona. It is clear from that report that Dona was unhappy and perceived that she had been the subject of abusive behaviour in her prior placement in Northern Ireland. The guardian makes certain recommendations as to the nature of the facility in which she might be placed when she returns to Northern Ireland. The guardian also reports that the only person in authority who Dona currently trusts is her solicitor in the Northern Ireland proceedings, Ms. Ailish McKeown, who was present at the hearing before this Court.

33. Whilst there is no evidence before this Court of the current plans of the Trust for Dona if she returns to its care in Northern Ireland, this Court presumes that the Trust will make decisions in the best interests of Dona in relation to a suitable placement on her return to Northern Ireland, and will take into account the report of Ms. Murphy, the guardian *ad litem* in this jurisdiction and her recommendations.

34. However, as this Court has a well-established, constitutional, inherent jurisdiction in relation to children present in this jurisdiction, as part of that inherent jurisdiction, and not as part of any jurisdiction pursuant to the Regulation, I propose giving a direction that the report of the guardian *ad litem* in this jurisdiction be furnished to Ms. McKeown, the solicitor acting for Dona in Northern Ireland, and to Ms. Fiona Armstrong, the guardian *ad litem* of Dona in Northern Ireland with permission to use same as they consider appropriate in the interests of Dona.

Father's application

35. Counsel for the father applied on his behalf for an order directing the HSE to make an application for asylum on Dona's behalf in this jurisdiction on grounds of inhuman and degrading treatment in the United Kingdom. Even if the Court has jurisdiction pursuant to its inherent jurisdiction already referred to, to consider such an application in these proceedings (which I am not necessarily holding), I refuse same as I am not satisfied that there is any factual basis for it on the evidence before me.

Relief

36. Having heard Counsel following oral delivery of my decision and a summary of reasons therefore, the following orders will be made:

(i) An order pursuant to Chapter III of Council Regulation (EC) 2201/2003 and, in particular, Article 21 thereof for the recognition of the Order made in the High Court of Justice in Northern Ireland, Family Division, Office of Care and Protection made on 16th September, 2010, in proceedings bearing file number 09/011822 and 02 insofar as it relates to [ ], the child named in the title of these proceedings.

(ii) An Order pursuant to Chapter III of the above Regulation and, in particular, Article 21 thereof for the recognition of the recovery order made in the High Court of Justice in Northern Ireland, Family Division, Office of Care and Protection on 31st August, 2011, in proceedings bearing the number bearing file number 11/029074/06.

(iii) Pursuant to the inherent jurisdiction of the Court, a declaration that the report of the guardian ad litem in these proceedings be furnished to Ms. McKeown, the solicitor acting for the child named in the title of these proceedings in the Northern Ireland proceedings, and to Ms. Armstrong, the guardian ad litem of the child in the Northern Ireland proceedings with permission to use same as they consider appropriate in the best interests of the child.

(iv) An Order giving liberty to the plaintiff to disclose this Order to such third parties, including the Garda Síochána, as may be necessary in the interests of the child.

(v) Pursuant to Article 20 of the Regulation, an order that the first named defendant be restrained from contacting or attempting to contact the child named in the title hereof should he learn of her whereabouts for so long as she remains within the jurisdiction of this Court.

(vi) An Order discharging Ms. Murphy as guardian ad litem once the child named in the title leaves the State.

(vii) An Order that Ms. Murphy is entitled to her costs in these proceedings as guardian *ad litem* against the plaintiff.

Application for Stay

37. Counsel for the father applied for a stay on the Orders of Recognition made by this Court pending an appeal to the Supreme Court. I refused such application as it was not in the best interests of the child that such a stay be granted.