

THE HIGH COURT

[2023] IEHC 721

Record No. H MCA 2023/402

IN THE MATTER OF AN APPLICATION BY THE ADOPTION AUTHORITY OF IRELAND (THE APPLICANT HEREIN) PURSUANT TO SECTION 30(5) OF THE ADOPTION ACT 2010 – 2017 (AS AMENDED)

-AND-

IN THE MATTER OF THE PROPOSED ADOPTION OF ‘A’ (A MINOR, BORN [STATED DATE])

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 14th day of December 2023

1. This matter comes before me pursuant to an Originating Notice of Motion dated the 23rd November 2023, issued by the Adoption Authority of Ireland (‘the AAI’), in which the AAI seeks an order pursuant to section 30(5) of the Adoption Act 2010 – 2017 (‘the Acts’) approving the making of an order for the adoption of a child (‘A’) without consulting the natural father in circumstances which the natural mother is unable to identify the natural father and the AAI has no other practical means of ascertaining the natural father’s identity.
2. When the matter came before me on the 8th December 2023, having heard and received the evidence adduced by the AAI and submissions of Counsel, I granted the Order sought while indicating that a reserved judgment would be delivered in early course.
3. The legislative provisions which are engaged in this matter are, primarily:

Section 30(5) of the Acts:

“(5) If the identity of the father of a child is unknown to the Authority and the mother refuses or is unable to reveal the father’s identity, the Authority shall counsel the mother, indicating to her—

(a) that the adoption may be delayed,

(b) the possibility of the father contesting the adoption at some later date,

(c) that the absence of information about the medical, genetic and social background of the father may be detrimental to the health, development or welfare of the child, and

(d) such other matters as the Authority considers appropriate in the circumstances.”

and Section 19 of the Acts:

“19.— (1) In any matter, application or proceedings before—

(a) the Authority, or

(b) any court,

relating to the question of the arrangements for the adoption of a child, for the making of an adoption order or for the recognition of an intercountry adoption outside the State, the Authority or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration.”

Historical background

4. The issue of notice to a non-guardian birth father prior to the making of an adoption order in respect of a child was comprehensively addressed by O’Neill J. in *WS v The Adoption Board* [2010] 2 IR 530, albeit in the context of the pre-2010 legislative scheme applicable to adoptions. It is clear that the legal position will vary based upon whether or not “family life” rights pursuant to Article 8 of the European Convention of Human Rights are or have been engaged on the facts of a particular case. Referring

to the decision of the European Court of Human Rights in *Keegan v Ireland* (1994) 18 EHRR 342 and in particular to Para. 45 of the Judgment:

“45. In the present case, the relationship between the applicant and the child’s mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married. Their relationship at this time had thus the hallmarked of family life for the purposes of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child’s birth there existed between the applicant and his daughter a bond amounting to family life.”

5. O’Neill J. then went on to address the manner in which ‘family life’ is to be identified in non-marital situations:

“8.10 Family life within the meaning of Article 8 extends beyond families based on marriage, as noted in Keegan to include other de facto families, as when parties live together. A child born within such a relationship would enjoy a relationship amounting to family life with its parents. The existence or non-existence of family life under Article 8 is a question of fact which depends upon the existence of the requisite personal ties. Evidence of personal ties, in the context of a child born into a non-marital relationship, could include the following matters as identified by the Court in Lebbink v. The Netherlands (2004) 2 F.L.R. 463: -

“[36] ... Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth”

8.11 In *Boughanemi v. France* (1996) 22 E.H.R.R. 228 the Court held that family life existed in circumstances where the applicant father had separated from the mother several months before the child's birth and was subsequently deported. The Court, at para.35, indicated that family life, once established, could only be broken thereafter in exceptional circumstances: -

“35. ... The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances. In the present case neither the belated character of the formal recognition nor the applicant's alleged conduct in regard to the child constitutes such a circumstance.”

8.12 The Court in *Ciliz v. The Netherlands* (Judgment of the European Court of Human Rights, 11th July 2000) dealt with the circumstances in which family ties can be severed. In that case the parents of the child had been married and later separated. During the period immediately following the separation the applicant father made no attempt to see his son and when he did express a desire to meet him, he did not keep his appointments. After some time, the applicant began to meet with his son with some frequency and he made a number of applications to court in respect of access. Ultimately the Court found that “exceptional circumstances capable of breaking the ties of ‘family life’” were not demonstrated.

8.13 In *Gul v. Switzerland* (Judgment of the European Court of Human Rights dated the 22nd of January, 1996) the Court found that the separation of a natural father from his son for seven years since the birth of his child was not sufficient to terminate family life between them, though in that case the applicant father was married to the mother.

8.14 In establishing whether family life exists as between a natural father and his child it is apparent that the Court will adopt a pragmatic approach in identifying the necessary personal ties. If this relationship exists, a very high

threshold must be reached to demonstrate that those ties have been extinguished by subsequent events. If a natural father who enjoys family life with his child is deprived of any participation in adoption proceedings this may or may not result in a finding of a breach of Article 8. It will have to be established, in the context of the specific case, whether such a decision to exclude him was “in accordance with the law”, pursued a “legitimate aim” and whether it was “necessary in a democratic society”, in the sense of being a proportionate measure in the circumstances. It is clear that a child's interests may override that of a natural parent.”

6. The Court, in interpreting Section 19A of the Adoption Act, 1952 (inserted by the Adoption Act, 1998) and, in particular, Section 19A(3)¹, found

“10.31 When the matter went to the respondent for a decision on notification on the 18th July, 2006, the only material before the Board, apart from the 4 documents referred to, was, in effect, the notice parties' version of events, conveyed through their application form, the background report on the applicants and the interview with the social worker as set out in his report dated the 12th July, 2006. It is quite clear now that the information given to the respondent which moved or persuaded it to withhold notification was not only wholly inadequate, when compared to the fuller picture which has emerged in these proceedings, but also unjustly damnified the applicant. When one takes the undisputed facts, as revealed in the affidavits in these proceedings, it is quite clear, in my judgement, that the applicant is a person who should have been consulted by the respondent under s.19A(2). His relationship with S. was a relatively normal paternal relationship which was of considerable duration i.e., for the first 3 years of S.'s life. The applicant's relationship with N.L. was also one of lengthy duration i.e., 4 years. Without doubt, because of the youth and immaturity of both and the depressive illness of the applicant, it may have been a fractious inadequate relationship that was always doomed to eventual failure. If there was violent and abusive behaviour

¹ “(3) Where the Board is satisfied that, having regard to the nature of the relationship between the father and the mother or the circumstances of the conception of the child, it would be inappropriate for the Board to consult the father in respect of the adoption of the child, the Board may make the adoption order without consulting the father.”

on the part of the applicant, as alleged by N.L., then that would have made the relationship that much worse. In spite of all that the relationship did last a long time and it would appear that, notwithstanding its difficulties, it must have been viewed by N.L. in a positive light as late as the middle of 2003 when she jointly applied with the applicant to the local authority for a house. The relationship between the applicant and N.L. cannot, in my view, be seen as very unusual because it is not or as having a particular content or nature which would warrant it, or either of the participants in it being categorised as reprehensible.”

Preliminary observations

7. The lack of a legitimus contradictor in applications such as the present have been previously highlighted in judgments of this Court. Barrett J. reflected in ***Adoption Authority of Ireland v Y*** [2020] IEHC 494:

“13. In passing, and by way of obiter observation, the court cannot but note that an inherent weakness of the format of the within application, for which weakness the Authority bears no responsibility, is that it involves the Authority making application and presenting its proofs (which will typically be supportive of that application – why else would the Authority be before the court?), with the court essentially being called upon by the statutory system in place to refuse the approval sought in the face of a well-intentioned but typically one-sided presentation, without input from a legitimus contradictor. It would be interesting to know just how often the courts have departed from such chiming expert evidence as is placed before them in the context of s.30 applications. Certainly, this Court would be slow to depart from the broadly chiming evidence of numerous experts. After all, some degree of judicial humility is required in the face of agreeing experts, just as a degree of judicial courage can be demanded in the face of dissenting experts”.

Factual Background

8. The present application before me was grounded upon the Affidavit of Mark Kirwan, included in which were many useful exhibits. Mindful always of the importance of corroboration (and this is particularly so in the context of the dicta in the **WS** case referenced above), I have determined the following facts to be of particular significance:

(a) Facts pertaining to inability to identify the natural father.

- The child was conceived and born outside of Ireland a considerable time ago.
- There was no ongoing relationship between the parents at the time of conception. It is indicated by the mother that the association between herself and the natural father was of short duration and had ended prior to her discovery that she was pregnant with A. There was no cohabitation.
- The father is not named on the birth certificate.
- A statutory declaration has been made by the mother stating that she is unable to identify the natural father. She knows only his first name (possibly abbreviated), his ethnicity (he was not local to the place where the parties were at the relevant time) and his place of work at the relevant time. She has no contact details for him. She has no specifics as to his age merely an approximation of his age at the time of their involvement. She has no specific address for the natural father at the time in question, merely a broad geographical location.
- It would appear that both were students at the relevant time, but they did not attend the same university.
- She did not contact the natural father either in relation to her pregnancy or the birth of the child as she did not have the information to do so. This is understandable in light of her assertion that in the immediate aftermath of the conception of the child, the mother was texted and informed that the natural father was resuming his relationship with his girlfriend. This was some months prior to her realising she was pregnant.
- Text messages were received by her from the natural father during the short period of the relationship but such contact information as these might have revealed is no longer available.

- The mother has received the received counselling as provided for in Section 30(4) of the Acts.
- The AAI has confirmed that no notice from the non-guardian father of the child pursuant to section 16(1) and section 16(2) of the Acts has been received.

(b) Facts pertaining to there being no other practical means of ascertaining the natural father's identity.

- The only information available is a first name (possibly abbreviated) and the address of a place of work of the natural father some considerable time ago.
- Independent contact was made with this place of work, but this did not yield any information concerning him with the social worker concerned being informed that there was nobody working there at this time who was there at the relevant time and there was no knowledge of a person arising from the information available.

(c) Facts pertaining to the welfare of A

- The child was born a long number of years ago and is of an age and level of maturity where the views of the child are extremely pertinent. A is very much in favour of adoption and desires this not only for the creation of a legal bond but also on an emotional level. The maturity of A's wishes is evident from the evidence presented to me.
- A is a talented and successful child and is achieving considerable academic, social and sporting success. A is bonded with the prospective adopting parent (the Applicant) in this context.
- The child has belonged to a de facto family comprising the mother, her partner (the Applicant) and the child/children of their relationship for a period of a number of years.
- A Declaration of Eligibility and Suitability has been made by the AAI in favour of the Applicant and the Deponent herein on behalf of the AAI has deposed to the AAI being of the view that the proposed adoption is in the best interests of A.

Determination

9. Based upon these factual circumstances, I am satisfied to make an Order pursuant to section 30(5) of the Acts. In so doing, it is important to state that this is not a case in which family life rights are engaged so far as the natural father is concerned. There was, arguably, never a relationship between the parents or, at best, it was of very short duration, was without commitment or loyalty and ended long prior to the birth of the child. There is nothing to suggest that the mother has not accurately reported the circumstances arising. The statutory provision is not in absolute terms. It does not require exhaustive searches to be carried out. It requires that the AAI has no other practical means of ascertaining the natural father's identity. In normal, everyday usage, "practical" has been defined as "relating to experience, real situations or actions rather than ideas or imagination" and "suitable for the situation" (Cambridge Dictionary). In the circumstances which pertain herein, I find that the AAI's effort satisfies this test.