Neutral Citation Number: [2014] EWFC 4

Case numbers omitted

IN THE FAMILY COURT
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of J and S (Children)

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Ms Marie-Claire Sparrow (instructed by Pritchard Joyce & Hinds, both acting pro bono) for the parents
Mr Roger Hall (of Kent County Council) for Kent County Council
Ms Cherry Harding (instructed by Kingsfords LLP) for the prospective adopters
Mr Jeremy Hall (instructed by Davis Simmonds and Donaghey) for the children

Hearing dates: 7 and 15 May 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in open court

Sir James Munby, President of the Family Division :

1. I have before me applications by a father and a mother for leave pursuant to section 47(5) of the Adoption and Children Act 2002 to oppose the making of adoption orders in relation to two of their children, J and S, boys born respectively in 2010 and 2012. The parents are Roma from the Slovak Republic. They also apply for the transfer of the proceedings to the Slovak Republic in accordance with Article 15 of the Regulation commonly known as Brussels II revised (BIIR). Those applications are made on their behalf by Ms Marie-Claire Sparrow, acting pro bono. There are communications from the Central Authority of the Slovak Republic, The Center for the International Legal Protection of Children and Youth, dated 10 April 2014, 25 April 2014 and 15 May 2014, recognising the jurisdiction of this court but seeking in accordance with Article 56 of BIIR the placement of the children in what is described as foster care in a named children's home in the Slovak Republic.

2. All of this is resisted by the local authority, Kent County Council, represented by Mr Roger Hall, by the prospective adopters, represented by Ms Cherry Harding, and by the children's guardian, represented by Mr Jeremy Hall.

The background

3. This is a very sad case. The background is set out in a judgment given by Theis J on 3 May 2013: *Kent County Council v IS and Others* [2013] EWHC 2308 (Fam), [2014] 1 FLR 787. In that judgment Theis J explained why, in relation to the two children with whom I am now concerned, she had decided to make care and placement orders. That judgment, which is available freely to all on the BAILII website, requires neither summary nor quotation, save in relation to two matters.

4. The first goes to a point understandably relied on by those who resist the parents' application: Theis J's findings in relation to the parents' non-acceptance of other peoples concerns and their inability to change. Theis J's judgment requires to be read as a whole, and the passages I select need to be read in context, but for present purposes what is important are her findings (para 58) that:

> "The parents have made it clear they do not accept the concerns about their parenting in the past and, in effect, can see no basis to change how they parented the children in the past. Without any insight there is no prospect for any change"

and that:

> "if the children returned to the care of their parents there would be no change in the parenting or care they received prior to being placed with foster carers. The parents can see no basis to change as, in their view, all the evidence has been made up.

> They will, in my judgment, not accept any social work intervention or support that questions their parenting."

5. The other goes to matters equally understandably relied on by Ms Sparrow: Theis J's views about what would be an appropriate adoptive placement. In considering whether the case for placement orders was made out, Theis J recorded (para 58) that "The parents rightly emphasise the Roma origins of the children and their Catholic faith." In considering the children's welfare, she drew attention (para 63) to the fact that:

> "Both children are of Roma Slovakian origin and any placement will need to be sensitive to their needs and identity … Both children are of Roma Slovakian origin and their parents are practising Catholics."

She added:

> "There can be no doubt the parents wish to care for J and S and each strongly object to the plans to place the children for adoption, in particular because of the impact such an order would have on their Roma identity. But the children's welfare needs for long-term security and stability outweigh this consideration."

Subsequent events

6. Both parents sought permission to appeal against the orders Theis J had made in relation to J and S. Their applications were heard by Ryder LJ on 23 July 2013. He refused the applications as being "totally without merit".

7. Both the mother (Application no 75642/13) and the father (Application no 77050/13) applied to the European Court of Human Rights at Strasbourg. Both requested the European Court of Human Rights to make interim measures under Rule 39. The mother's application under Rule 39 was refused by letter dated 4 December 2013. The father's application under Rule 39 was refused by letter dated 10 December 2013 and again, following a request for reconsideration, by letter dated 11 December 2013.

8. In February 2014 the prospective adopters applied to the Canterbury County Court for adoption orders in relation to J and S. The parents were given notice of the directions hearing fixed for 11 April 2014. It came on before His Honour Judge Murdoch QC. In the meantime, the father had made a further request to the European Court of Human Rights for reconsideration of his application under Rule 39. It was again refused, by letter dated 28 March 2014. Judge Murdoch transferred the adoption applications to the High Court and directed that they be listed before me on 7 May 2014 "for determination of the application for leave to oppose the making of adoption orders … or further directions." He directed the local authority to serve copies of his orders on

the Central Authority of the Slovak Republic and gave the Central Authority liberty to attend the hearing on 7 May 2014. He directed that "HMCTS do provide 2 Slovak interpreters for the hearing on 7 May 2014."

The hearing on 7 May 2014

9. The hearing before me on 7 May 2014 was unable to proceed. Despite the order made by Judge Murdoch, and although HMCTS had, as was subsequently conceded by it, gone through the appropriate procedures with Capita Translation and Interpreting Limited (Capita) to book two interpreters, no interpreter was present at court. I had no choice but to adjourn the hearing. How could I do otherwise? It would have been unjust, indeed inhumane, to continue with the final hearing of applications as significant as those before me – this, after all, was their final opportunity to prevent the adoption of their children – if the parents were unable to understand what was being said. Anyone tempted to suggest that an adjournment was not necessary might care to consider what our reaction would be if an English parent before a foreign court in similar circumstances was not provided with an interpreter.

10. I accordingly adjourned the hearing until 15 May 2014. I directed that HMCTS was to provide two interpreters for that hearing. I directed that Capita's Relationship Director, Sonia Facchini, file a written statement (with statement of truth) explaining the circumstances in which and the reasons why no interpreters had been provided by Capita for the hearing on 7 May 2014. I gave Capita permission to apply to vary or discharge this order. It chose not to. I reserved the costs of the hearing on 7 May 2014 to the hearing on 15 May 2014 "for consideration of, inter alia, whether Capita should pay such costs."

Capita

11. Ms Facchini's statement is dated 14 May 2014. I need not go into the full details. That is a matter for a future occasion. For immediate purposes there are three points demanding notice. The first is that, according to Ms Facchini, the contractual arrangements between Capita and the interpreters it provides do not give Capita the ability to require that any particular interpreter accepts any particular assignment, or even to honour any engagement which the interpreter has accepted. The consequence, apparently, was that in this case the two interpreters who had accepted the assignment (one on 14 and the other on 17 April 2014) later cancelled (on 5 and 1 May 2014 respectively). The second is that it is only at 2pm on the day before the hearing that Capita notifies the court that there is no interpreter assigned. The third is the revelation that on 7 May 2014 Capita had only 29 suitably qualified Slovak language interpreters on its books (only 13 within a 100 miles radius of the Royal Courts of Justice) whereas it was requested to provide 39 such interpreters for court hearings that day. This is on any view a concerning state of affairs. If the consequence is that a hearing such as that before me on 7 May 2014 has to be abandoned then that is an unacceptable state of affairs. It might be thought that something needs to be done.

12. Whether the underlying causes are to be found in the nature of the contract between the Ministry of Justice and HMCTS or whoever and Capita, or in the nature of the contract between Capita and the interpreters it retains, or in the sums paid respectively to Capita and its interpreters, or in an inadequate supply of interpreters (unlikely one might have thought in a language such as Slovak), I do not know. We need to find out.

The hearing on 15 May 2014

13. On 12 May 2015 I received a request from Mr Igor Pokojný, Counsellor-Minister and Head of the Consular Section of the Embassy of the Slovak Republic, that he be "invited to monitor the hearing … on 15 May 2014." I had no hesitation in acceding to this request. I repeat and emphasise in this context what I said in *Re E* [2014] EWHC 6 (Fam), para 47:

> "it is highly desirable, and from now on good practice will require, that in any care or other public law case … the court … should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state, for … permission for an accredited consular official to be present at the hearing as an observer in a non-participatory capacity".

14. On the morning of the hearing on 15 May 2014 I received emails and a letter dated 13 May 2014 from Ms Lucie Boddington, Vice Chairman of Deti patria rodičom, a non-profit organisation based in Bratislava which as I understand it assists Slovakian parents involved in English care proceedings, making representations on behalf of the parents and asking that Ms Boddington be permitted to be present in court. None of the parties raised any objection to Ms Boddington being present, so I permitted her to attend the hearing, making clear that the proceedings were in private and that she was not at liberty to disclose to anyone what had gone on in court.

15. I make clear that my permission to Ms Boddington to attend this particular hearing is not to be treated as any general precedent for the future, whether in relation to Deti patria rodičom or any other organisation. The parents, after all, were represented before me, had the use of interpreters and had the benefit of the presence in court of a senior consular official from their Embassy.

16. The parents' case was set out in their statement dated 25 April 2014 and in position statements and skeleton arguments from Ms Sparrow dated 2 May 2014 and 13 May 2014, supplemented by Ms Sparrow's oral submissions. I had various case summaries, position statements and skeleton arguments from Mr Roger Hall, Ms Harding and Mr Jeremy Hall, each of whom also addressed me orally. Capita was neither present nor represented.

17. Both Mr Roger Hall, on behalf of the local authority, and Mr Jeremy Hall, on behalf of the children, indicated that they sought orders that Capita pay them their costs of the abortive hearing on 7 May 2014. Plainly I could not deal with those applications without giving Capita a proper opportunity to consider the case being made against them. I accordingly adjourned these applications.

18. At the end of the hearing I announced that I was dismissing both the parents' application under Article 15 and their application under section 47(5). I now hand down judgment explaining why.

19. As I have mentioned, Judge Murdoch transferred the proceedings to the High Court. In accordance with articles 2 and 3(1) of The Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014, SI 2014 No. 956, the proceedings have continued on and after 22 April 2014 in the Family Court as if they had been issued in that court. It is accordingly in the Family Court that I sat on 7 and 15 May 2014 and that I now sit to give judgment.

The application under Article 15

20. The issue of a possible transfer under Article 15 had been canvassed before Theis J. A position statement and skeleton argument prepared for that hearing by Ms Sparrow on behalf of the mother set out her case that the proceedings should be transferred to Slovakia in accordance with Article 15. The father, separately represented before Theis J, took the same stance at the outset. The local authority and the guardian demurred. Theis J described in her judgment (paras 28-29) what happened:

> "[28] At the start of this hearing the parents confirmed that as their primary case was for the children to be rehabilitated to their care in this jurisdiction they did not pursue a transfer of the proceedings pursuant to Art 15. Their secondary position was that in the event that the court did not return the children to their care they sought placement of the children in the children's home in Slovakia pursuant to Art 56.
>
> [29] They agreed that in the event that the court decided not to return the children to the care of their parents the focus then was on Art 56 …"

21. I understand Ms Sparrow as suggesting that this was not so. As to that I say only this. If there was some ground of complaint about this part of Theis J's judgment, it was incumbent on the parents to raise it in their application to the Court of Appeal. If they did not, they cannot complain now; if they did, it has been dealt with by Ryder LJ.

22. There are, in my judgment, three short and conclusive arguments against any application at this stage under Article 15:

i) It is not open to the parents to renew an application which has already been determined against them.

ii) It is in any event far too late in the day to be contemplating a transfer under Article 15: see *Nottingham City Council v LM and Others* [2014] EWCA Civ 152, paras 32, 58.

iii) In fact the proceedings have now progressed beyond the point at which BIIR applies. Article 1(3)(b) provides that BIIR "shall not apply to… decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption".

23. Accordingly, the parents' application under Article 15 is dismissed.

Article 56

24. The question of whether Article 56 should be invoked in this case was considered in some detail by Theis J: *Kent County Council v IS and Others* [2013] EWHC 2308 (Fam), [2014] 1 FLR 787, paras 24-29, 61. She decided that the children should not be placed in Slovakia. The parents have not renewed that argument before me, but it has been canvassed before me as being the desirable outcome for J and S both by the Central Authority of the Slovak Republic and by Deti patria rodičom.

25. There are two reasons why in my judgment this is simply not appropriate:

i) First, there is no new material which even begins to suggest that Theis J's decision on the point, not disturbed by the Court of Appeal, should be reconsidered.

ii) Second, and for the same reason as in relation to Article 15, the proceedings have now progressed beyond the point at which Article 56 applies.

26. Accordingly, I decline to make any order under Article 56.

Section 47(5)

27. These matters out of the way, I come to the central focus of the parents' case, that they should be given leave to oppose the making of the adoption orders which are being sought.

28. The applicable principles are not in doubt: see *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069, *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, and *Re W, Re H* [2013] EWCA Civ 1177.

29. The court has to ask itself two questions: Has there been a change in circumstances since the placement order was made? If so, should leave to oppose be given? The necessary change in circumstances since the placement order was made does not have to be "significant"; the question is whether it is "of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings": *Re P*, para 30. At the second stage the court must have regard to the parent's ultimate prospects of success if leave to oppose is given. The parents' prospects must be more than just fanciful, they must be solid: *Re B-S*, paras 59, 74, *Re W, Re H* paras 20-22.

30. In my judgment the parents here fall at the first obstacle. Even if they could surmount that they would in my judgment fail at the second. I take the two points in turn.

31. In the present case Ms Sparrow relies upon three matters as constituting a change in circumstances.

32. The first is the pending applications before the European Court of Human Rights. As I have already noted, the parents' applications for Article 39 measures have been rejected on three occasions. The present position is that the substantive applications remain pending before the European Court of Human Rights and, as letters from the Court state, will be considered "as soon as possible" though due to the Court's heavy workload "it is not possible to indicate when this will be." I say nothing as to what the position might be in a case where the Court has made interim measures under Rule 39. This is not that case. I fail to see how the mere fact that there is an application pending before the European Court of Human Rights can possibly amount to a "change in circumstances" for the purpose of section 47(5). I agree with what Moor J said in *The Prospective Adopters v IA and Another* [2014] EWHC 331 (Fam), para 39:

> "The third alleged change of circumstances is the application to the ECHR. I cannot see how this can be a change of circumstances, particularly where the ECHR has not accepted the case."

33. The second alleged change in circumstances arises out of the fact that J and S have been placed with prospective adopters who are a same sex couple. The parents put the point very simply and very eloquently in their witness statement:

> "Our family is a Slovak Roma family and we are practising Catholics and a homosexual couple as potential adopters is very different from what Mrs Justice Theis had in mind in her

> judgment as this will not promote the children's Roma heritage or their Catholic faith … Whilst we have no doubt that the prospective adopters have been properly assessed by the Local Authority, they are a homosexual couple and as such their lifestyle goes against our Roma culture and lifestyle
>
> The children will not be able to be brought up in the Catholic faith because of the conflicts between Catholicism and homosexuality. They would not be able to maintain their Catholic faith if they are adopted by this couple and even if it was promised that they would attend church the children would at some stage be taught or learn of the attitude of the church to same sex couples. This would undoubtedly be upsetting to them and cause them to be in conflict between their religion and home life.
>
> Slovakia still does not recognise same sex couples and so their Slovak roots and values will not be maintained. In 2013 the Catholic Bishops in Slovakia condemned same sex marriage."

They go on to say:

> "If, as expected, our children will try to find us and their siblings and roots, then they will discover the huge differences between our culture and the couple with whom they have been brought up. This is likely to cause them great upset and to suffer a conflict within themselves such as to set them against their adoptive parents. This would therefore cause the children great psychological harm as homosexuality is not recognised in the world wide Roma community. Having Roma children live with homosexuals or being adopted by them would be found to be humiliating … Ethnic, cultural and religious identity is an important part of identity and this aspect of a child's needs in an adoptive placement should be considered very carefully. We do not accept that this has been properly considered by Kent County Council."

They add:

> "By proceeding with the adoption process and supporting adoption by a homosexual couple the Local Authority are continuing to act in such a way that will change our children who are of Slovak Roma heritage into white middle class English children which is contrary to the human rights of us and of the children. This is social engineering and is a conscious and deliberate effort by Kent County Council to transform our children from Slovak Roma children to English middle class children."

34. Put very shortly, what Ms Sparrow says is that J and S have been put in a placement of a kind that was not contemplated by Theis J and which is wholly unsuitable having regard to the children's Slovak Roma origins and Catholic roots.

35. I do not see how this can be described as a change in circumstances. There is nothing in all the material I have seen to suggest that the children's placement with the prospective adopters was inappropriate or wrong, let alone irrational or unlawful, having regard to the principles that the local authority had to apply. Everything I have seen indicates that the process was conscientiously and properly undertaken having regard, as the paramount consideration, and as section 1(2) of the 2002 Act requires, to the children's welfare throughout their lives. Nor, despite Ms Sparrow's characterisation, has it been demonstrated that the placement was of a kind not contemplated by Theis J. On the contrary, Theis J expressly held, as we have seen, that the children's welfare needs "outweigh" the impact that adoption would have on their Roma identity.

36. Of course, any judge should have a decent respect to the opinions of those who come here from a foreign land, particularly if they have come from another country within the European Union. As I said in *Re K; A Local Authority v N and Others* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, para 26, "the court must always be sensitive to the cultural, social and religious circumstances of the particular child and family." But the fact is, the law is, that, at the end of the day, I have to judge matters according to the law of England and by reference to the standards of reasonable men and women in contemporary English society. The parents' views, whether religious, cultural, secular or social, are entitled to respect but cannot be determinative. They have made their life in this country and cannot impose their own views either on the local authority or on the court. Thus far I agree with the local authority. I have to say, however, that it was, in my view, unfortunate that the local authority should have referred at one stage in the proceedings to the parents' views on homosexuality in such a way as to suggest that they are bigoted. The label is unnecessary and hurtful.

37. The third alleged change in circumstances (not canvassed either in the parents' statement or in Ms Sparrow's written submissions) relates to what are said to be improvements in the parents' domestic and family circumstances. I am prepared to assume for the sake of argument that there have indeed been improvements of the kind Ms Sparrow refers to, but it does not, in my judgment, take the parents anywhere. The short fact is that nothing Ms Sparrow has said begins to suggest any change which bears in any way on Theis J's findings in relation to the parents' non-acceptance of other peoples concerns and their inability to change.

38. In my judgment, none of the matters relied upon by Ms Sparrow, whether taken separately or together, amount to a change in circumstances sufficient to take the parents beyond the first stage. They fall at the first hurdle. That being so, there is no need for me to go on to consider the second stage of the inquiry. I make clear, however, that even if the parents had been able to overcome the first hurdle, they would, in my judgment, have fallen at the second. Their ultimate prospects of success

if leave to oppose was given are threadbare. They are entirely lacking in solidity. In truth, I have to say, they are little more than fanciful.

39. Accordingly, I refuse the parents leave to oppose the making of adoption orders in relation to J and S.

Conclusion

40. It was for these reasons that at the end of the hearing on 15 May 2014 I refused the parents' applications. There is no need for the case to remain before what in The Family Court (Composition and Distribution of Business) Rules 2014, SI 2014 No 840 (L 13), is referred to as a "judge of High Court judge level." I shall remit the proceedings to be heard in the Family Court at Canterbury by a "judge of circuit judge level."