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Supreme Court of Ireland Decisions

Judgment

Title:	Child & Family Agency -v- JD
Neutral Citation:	[2017 IESC 56
Supreme Court Record Number:	16/2015
High Court Record Number:	2014 9536 P
Date of Delivery:	19/07/2017
Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J., MacMenamin J., Dunne J., Charleton J.
Judgment by:	MacMenamin J.
Status:	Approved
Result:	Appeal allowed

Judgments by	Link to Judgment	Concurring
MacMenamin J.	Link	Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J., Dunne J., Charleton J.

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THE SUPREME COURT

[Appeal No. 16/15]

Denham C.J.
O'Donnell J.
McKechnie J.
Clarke J.
MacMenamin J.
Dunne J.
Charleton J.

IN THE MATTER OF RPD (A MINOR BORN ON THE 25TH OCTOBER, 2014), AND IN THE MATTER OF THE CHILD CARE ACT, 1991 (AS AMENDED), AND IN THE MATTER OF COUNCIL REGULATION 2201/2003 OF THE 27TH NOVEMBER, 2003 CONCERNING JURISDICTION AND RECOGNITION AND ENFORCEMENT IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY

BETWEEN:

CHILD & FAMILY AGENCY

PLAINTIFF/RESPONDENT

AND

JD

DEFENDANT/APPELLANT

Judgment of Mr. Justice John MacMenamin dated the 19th day of July, 2017

1. On the 1st day of February, 2017, this Court allowed an appeal brought by the defendant/appellant in this matter. There were a number of subsequent hearings. The Court indicated that it would be appropriate that it should furnish its reasons at a later date.

2. JD, "the mother", who is the appellant, a United Kingdom national, was born on the 15th November, 1977. She arrived in Ireland on the 29th September, 2014, when expecting her second child. The child, R, who is at the centre of this appeal, was born on the 25th October, 2014.

3. JD's elder child, S, was placed in institutional care in the United Kingdom during the year 2010. This was as a result of medical findings that the mother then had an anti-social behaviour personality disorder, and had engaged in physical violence towards S. These events involved significant involvement with the health and childcare authorities, social workers, and health professionals, all of whom, obviously, lived and worked in the relevant part of the United Kingdom.

4. When JD was expecting R, and whilst she was still living in the United Kingdom, she was subject to a pre-natal assessment organised by the child protection authorities there. This was done on account of her medical and family history. The assessment showed that JD had shown affection towards S, despite the events described, and that she had a protective outlook towards the birth of her second child. She had made arrangements in preparation for R's birth, and shown a willingness to work with social workers. She proved able to maintain a long-term tenancy. The United Kingdom social work authorities remained concerned, however, and felt that JD's second child should be placed in a foster family. In the United Kingdom, this course might be followed by the initiation of adoption proceedings by a third party.

5. In light of the social work authorities' views, JD terminated her tenancy and sold her belongings in the United Kingdom, intending to settle in Ireland. Her second child, R, was born here a month after her arrival. Both JD and R have been residing in Ireland, albeit living separately, since that time.

6. Shortly after R's birth the respondents herein ("the CFA") applied to the local District Court in Ireland for an order to the effect that R should be placed in foster care. This application was refused, on the grounds that the CFA was intending to rely on hearsay evidence which, the District Court held, would have been inadmissible. No other issue arose at that point as to whether the District Court had jurisdiction to deal with the

case. Following an appeal brought by the CFA, the Circuit Court ordered R's provisional placement in a foster family. That order has been renewed regularly. JD has exercised the right of regular access to R. The U.K. care authorities were not party to the application in the District Court.

7. In parallel with the District Court proceedings, the CFA decided to bring an application to the High Court. The object of this was to have the case transferred to the High Court of Justice in England and Wales under Article 15 of Regulation No. 2201/2003. Notably, this application was supported by R's *guardian ad litem*, who independently represented the best interests of the child throughout these proceedings. But the U.K. care authorities were not a party to these proceedings either. There were no pending child care proceedings in England.

8. By judgment dated the 26th March, 2015, the High Court authorised the CFA, under Brussels II R, to request that the High Court of Justice in England and Wales assume jurisdiction in the case. However, the High Court decided, in the circumstances, that R should not actually be removed from his foster family in the meantime. JD then applied for authorisation under Article 35.4.4 of the Constitution, to directly appeal against that judgment directly to this Court. This Court granted the unusual application to hear the appeal directly, because matters of general public importance arose, and because the matter was urgent, concerning the welfare of a young child. In its written determination, this Court granted leave on the following grounds:

> • Whether, and to what extent, the High Court, when making a decision under Article 15 of Regulation 2201/2003/EC, should consider, as part of that decision, its effect on the exercise by the mother of her E.U. right to move from one member state to another, and
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> • Whether the High Court, in following a previous judgment of this Court, was correct that the assessment of the child's interests, for the purpose of the decision under Article 15, was not a substantial welfare question, but was, instead, a question of forum.

9. Article 15 of the Regulation allows for the transfer of a childcare or parental responsibility case from the courts of one jurisdiction to another, in certain defined circumstances. In this Court's decision on the appeal, delivered on the 31st July, 2015, I expressed the view that the Regulation, as drafted and applied, contemplated a relatively simple and straightforward manner whereby, in repealing the earlier Regulation E.C. 1347/2000, courts in member states could address questions of jurisdiction, recognition and enforcement of judgments in matrimonial matters, and issues of parental responsibility. The Regulation sets out rules whereby the courts of each member state can approach such questions.

10. Article 8 of the Brussels II Regulation provides that the courts of a member state are to have jurisdiction on matters of parental responsibility over a child who is "habitually resident" in that member state at the time the court is seised.

11. However, by way of exception to this rule, under Article 15 of the Regulation, the courts of a member state having jurisdiction as to the substance of the matter may adopt other measures, if they consider that the court of a different member state with which the child has a particular connection would be better placed to hear the case, or a specific part thereof. A court may stay the case, or part thereof, and either invite the parties to introduce a request before the court of that other member state, or request a court of another member state to assume jurisdiction. (Article 15(1), (4), (5)). It is helpful to quote Article 15(3) in full:

"(3) The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; …"

12. The questions raised before this Court in the appeal included; whether the Regulation applied to a case falling within the scope of public law despite the fact that no proceedings concerning R were pending in the United Kingdom; and whether recognition of the jurisdiction of the courts of that member state would, therefore, mean that subsequently the child protection authorities in the United Kingdom would, themselves, agree to take on R's case. There was no evidence to show any such agreement. This Court was addressed on what should be the proper interpretation of the concept of "*best interests of the child*", as set out in Article 15(1) of the Regulation. Applying earlier authorities, I expressed the view that the concept of "best interests" should be understood in the light of the objective of quickly and speedily determining which court, in which jurisdiction, should hear a case falling within the scope of that Regulation. I took the view that the implementation of Article 15 did not require that an Irish court should carry out a comprehensive examination of the substance of the child's best interest where it contemplated transferring that case to the court of another member state which it considered better placed to hear the case.

Questions Referred

13. However, this Court was of the opinion that there were certain matters, regarding the interpretation of the Regulation, which required further clarification in order to determine the appeal. It was decided to refer these to the Court of Justice of the European Union (CJEU), pursuant to Article 267 TFEU. These questions were:

1. Does Article 15 of Regulation 2201/2003 apply to public law care applications by a local authority in a member state when, if the court of another Member State assumes jurisdiction, it will necessitate the commencement of separate proceedings by a ***different body*** *pursuant to a different legal code and possibly, if not probably, relating to different factual circumstances?*

2. If so, to what extent, if any, should a court consider the likely impact of any request under Article 15, if accepted, upon the right of freedom of movement of the individuals affected?

3. If the "best interests of the child" in Article 15(1) of Regulation 2201/2003 ***refers only to the decision as to forum****, what factors may a court consider under this heading which have not already been considered in determining whether another court is "better placed"?*

4. May a court, for the purposes of Article 15 of Regulation 2201/2003 have regard to ***the substantive law****, procedural*

provisions, or practice, of the courts of the relevant member state?

5. To what extent should a national court, in considering Article 15 of Regulation 2201/2003, have regard to the specific circumstances of the case, including the desire of a mother to move beyond the reaches of social services of her home state, and thereafter give birth to her child in another jurisdiction, with a social services system she considers more favourable?

6. Precisely what matters are to be considered by a national court in determining which court is best placed to determine the matter?

14. The Supreme Court requested that the case be dealt with under the "urgent preliminary ruling" procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union, and Article 107 of the Rules of Procedure of that Court. However, as is recited in the judgment of the CJEU herein, Case C-428/15, Child & Family Agency v. JD, 16th June, 2016, that court considered that the facts set out in support of the request did not establish the urgency required in order to justify applying that urgent procedure. The Chamber did, however, decide to give the case priority, under Article 53(3) of its Rules of Procedure.

15. The Court of Justice delivered its judgment on the 27th October, 2016. By that time, the circumstances of the case had evolved further. When the matter was finally considered by this Court on its return from the Court of Justice, counsel were in a position to indicate that R was reasonably well settled with the foster parents, and that, although there had been difficulties, it appeared the mother was enjoying carefully supervised access to the child. Such an outcome was very welcome.

The Judgment of the CJEU

16. In response to the first question (quoted above), the Court of Justice (CJEU) affirmed that Article 15 did apply in public law care proceedings, where separate proceedings might be necessitated in the courts of another member state. The court did not read the Regulation as imposing any additional procedural conditions as to the existence or otherwise of proceedings in the other state.

17. The Court then turned to the second and fifth questions, reformulating them as one question in the following way:

> *"To what extent should the court to which the application is made take account of either the effect on the right of freedom of movement, or the reasons why the mother of the child has exercised that right?"*

18. The Court emphasised that the provisions of Article 15(1) were designed in the best interests of the child. (para. 63). Accordingly, it held that, if it was possible that a transfer of the case was liable to be detrimental to the right of freedom of movement of the child concerned, that would be "*one of the factors to be taken into consideration when applying Article 15(1) of Regulation 2201/2003".* On the other hand, it continued, considerations relating to other persons concerned in the case ought not, as a general rule, be taken into account, unless those considerations also had a relevance to the assessment of that risk with respect to the child. (para. 64 and 65 of the judgment).

19. Thus, as the CJEU observed, a number of rights were at stake, including the concept of freedom of movement within the European Union, and the concept of the best interests of the child. As is obvious, young children, very frequently, do not independently exercise the right to free movement. That right is, in the vast majority, if not all, cases, exercised on behalf of children by their parent or parents. In that context, the Court of Justice held that, "*the court having jurisdiction in a member state must not*

take into account either the effect of a possible transfer of the case on the right of freedom of movement of persons other than the child, or the reason why the mother of that child exercised that right prior to the court being seised, unless those considerations were such that there may be adverse repercussions on the situation of the child". (para. 67).

20. These conclusions were at variance from those I expressed in the judgment of this Court, delivered on the 31st July, 2015.

21. The Court of Justice then addressed the third, fourth and sixth questions which it linked together. These questions concerned how the concepts of the court "*better placed*" and "*the best interests of the child*" could be reconciled. The court concluded that:

> *"In order to determine that a court of another member state with which the child has a particular connection is better placed, the court having jurisdiction in a member state must be satisfied that the transfer of the case to that other court is such as to provide genuine and specific added value to the examination of that case, taking into account, the rules of procedure applicable in that other Member State;*
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> *In order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a member state must be satisfied in particular that the transfer is not liable to be detrimental to the situation of the child."* (para. 61).

22. Here the CJEU relied on four considerations. First, it pointed out the need to consider the child's interests derived from the obligation to ensure respect for his or her fundamental rights. It expressed the view that the Regulation endeavoured to meet this obligation by reference to the criterion of proximity, which results in a rule, in accordance with Article 8(1) of the Regulation, whereby jurisdiction is determined having regard to the child's habitual residence. It held that Article 15(1) operates as an exception to this rule, and therefore should be interpreted strictly. (para. 48). This meant that a member state court dealing with an application under Article 15 must be capable of rebutting "*the strong presumption in favour of maintaining its own jurisdiction".* (para. 49).

23. The CJEU emphasised the requirements in Article 15(1), that the child be shown to have a "*particular connection*" with the other member state. The factors identified in the Regulation, which establish such a connection, are all evidence of a relationship of proximity between the child concerned in the case, and a member state other than that of the court having jurisdiction to hear the case on the basis of Article 8(1). (para. 52)

24. The CJEU held that, when applying Article 15(1) of the Regulation, the member state court having jurisdiction must compare the extent and degree of the relation of what it termed the "*general*" proximity that linked it to the child concerned under Article 8(1) of the Regulation, with the extent and degree of the relationship of "*particular*" proximity demonstrated by one or more of the factors set out in Article 15(3) of the Regulation that exists in the particular case between that child and certain other member states. (para. 54).

25. Finally, however, the court went on to point out that the existence of such a "*particular*" connection did not "*prejudge*" the question of whether that other court is *"better placed",* or whether the transfer is "*in the best interests of the child".* When considering the concept of the "*court better placed*", the Court held that this meant that the other court must be shown to be in a position to "*provide genuine and specific*

added value, with respect to the decision to be taken in relation to the child" (para. 57). With this in mind, the CJEU observed that the court hearing the application may take into account the rules of procedure in the other member state, but should not take into account the substantive law of the other member state. This latter, it opined, is forbidden on account of the principles of mutual trust between member states.

26. The CJEU concluded that the court hearing the application must be satisfied that the transfer is "*not liable to be detrimental to the situation of the child concerned*" (para. 58). Thus, the court having jurisdiction must assess any negative effects that such a transfer might have on what the court considered were the familial, social and emotional attachments of the child concerned in the case, or on that child's material situation.

27. In *HSE v. MW & GL* [2013] 2 ILRM 225, I expressed the view that, in order to protect the effectiveness of the Regulation, and in order to achieve an expeditious hearing in the only court which was best suited to address and hear all the evidence, the paramount consideration, at that stage, should be the appropriate forum to determine the best interests of the child.

28. Applying this dictum, the High Court judge in the instant case expressed the view that the "*best interest*" test, and the "*court better placed*" test, were, in effect, overlapping in this jurisdiction for the purposes of Article 15.

29. From its judgment it is clear that the CJEU distinguishes between the questions of "best interest", and that of "forum". As a consequence of the judgment of the CJEU on this referral, it seems to me that certain of the observations, which were made in *HSE v. MW & GL*, should be seen as being confined to the facts of that case.

30. The CJEU has held, therefore, that the question of potential detriment to a child should be treated as a discrete matter for the court hearing the application to determine. Thus, the effect of the judgment is that a trial judge, in addressing this case, should consider the situation of the child; the situation of the foster parents; whether they were willing to look after the child on a long-term basis; the attachment of the child to the foster parents; whether the mother had a viable plan to remain in Ireland; the attachment of the child to the mother; and the effect of the transfer on those relationships. Consequently, the CJEU concluded, a court hearing the matter should not limit the evaluation of the child's best interests to the question of forum. The duty of the member state court is to assess any negative effects such a transfer might have on the familial, social and emotional attachments of the child concerned. (para. 59).

31. In its judgment, therefore, the CJEU determined that the Regulation was applicable "*where a child protection application brought under public law by the competent authority of a member state concerns the adoption of measures relating to parental responsibility, such as the application at issue in the main proceedings, where it is a necessary consequence of a court of another member state assuming jurisdiction that an authority of that other member state thereafter commence proceedings that are separate from those brought in the first member state, pursuant to its own domestic law, and possibly relating to different factual circumstances*".

32. It is clear that Article 15 issues of jurisdiction are to be determined by the national court in which the application is *first* made.

Guidelines

33. The following practical consequences appear to flow from the ruling of the Court of Justice:

1. It is the duty of the court which *first* deals with a child care matter with

international dimensions, to consider the question of whether it is the court best placed. In the instant case, and in many other cases, this will now be the District Court. It follows, that it would be no longer appropriate that a separate application in that regard should generally be made to the High Court, where there are already District Court proceedings in being.

2. The question of "best interests" is to be dealt with in a manner apart from the consideration of "forum". It follows from this that observations to a different effect, made in the judgment in the *MW* case, are to be confined to the facts of that case.

3. Motivation for parental movement from one jurisdiction to another is to be excluded from the assessment, unless those considerations might have adverse repercussions on the situation of the child. The corollary of this, however, is that, if it is concluded that there may be adverse repercussions on the situation of the child, this is a factor which must be taken into account.

4. A court must assess the issues underlying the question of proximity. In general, it is in the interests of the child that his or her case be dealt with in the court of their habitual residence, because this will be the jurisdiction with which he or she has the greatest proximity. While Article 15 recognises that, in some exceptional cases, the application of this general principle would not protect and ensure the best interests of the child, there is a "*strong presumption*" that this arises under Article 8. However, this presumption can be rebutted if there is evidence of a sufficient degree of proximity between the child and another member state so as to render the exercise of jurisdiction, pursuant to Article 8, inappropriate, and contrary to the best interests of the child.

5. In order to ascertain whether there is a sufficient degree of proximity between a child and another member state to justify a transfer pursuant to Article 15, a court should apply the following factors set out in the Article, as follows:

> (a) Whether there is a particular connection with another member state. If there is no such connection, there cannot be a transfer. The existence of a particular connection is a gateway to the power to seek a transfer.
>
> (b) The court must then consider the degree and extent of the proximity to the other member state arising from the particular connection. If such a particular connection is established, the court must be satisfied that the court of another member state is better placed to determine the case, or some part thereof.
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> (c) To establish that a court is "better placed", it must be proved that the transfer of the case to that court would provide genuine and specific "added value" with respect to the decision to be taken.
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> (d) In considering whether there will be such "added value", the court may not have regard to the nature of the substantive law of the other state, but may have regard to the rules of procedure therin.

> (e) The court must be satisfied that the transfer of the case will not have a detrimental effect on the child. The desirability of the case being determined by the court best able to do so may, therefore, be overridden by some negative effect on the transfer of a case on the circumstances or situation of the child. The court may, in the context of having assessed the negative effects on the situation of the child, decide to request the transfer of part of the case, as opposed to the entire case. This may, in particular, be appropriate where the factor of proximity with another member state relates not to the child directly, but to one of the holders of parental responsibility.

34. It is necessary to add that, with regard to the second and fifth questions, the CJEU held that the right of freedom of movement is not relevant, other than being a factor to be taken into account in the consideration of the best interests of the child in the context of the transfer of the case. The court is only required to have regard to the reasons why a party, such as a mother, exercised her freedom of movement, insofar as her actions may, or may not, have adverse repercussions on the child.

35. For the future, therefore, a court should set out, in its judgment and order, the basis upon which, in accordance with the relevant provisions of Brussels IIR, it is either accepting or rejecting jurisdiction, and also the basis upon which, in accordance with Article 15, it either has, or has not, decided to exercise its power under Article 15. The effect of this will be to determine that the court has actually addressed issues which may not always have been addressed in the past, and may, sometimes, be overlooked by the parties.

Events subsequent to referral to the Court of Justice in July, 2015

36. Since the time the matter was referred to the Court of Justice, the position of all the parties involved has evolved, and to a degree crystallised. There have been a number of applications to the District Court. The interim care order relating to R has been extended from time to time. On the 22nd September, 2015, the mother was permitted access for 2 days per week for 3 hours. On the 26th April, 2016 that access was reduced to 1 day per week for 3 hours. That order was appealed to the Circuit Court, and access was reinstated as previously. On the 12th July, 2016 the matter again came before the District Court, and this Court has been informed, that the respondent was directed not to bring any cameras to access visits. On that occasion, an order under s.47 of the Childcare Act, 1991 was granted providing that the mother might consent to any necessary medical treatment or assessment with respect to the child and, in particular, a medical procedure which was deemed necessary. On the 23rd August, 2016 an application was made on behalf of the mother for an extension of access to allow R to meet her other son, S. On the 27th December, 2016 the District Court made directions for further access. The judgment of the Court of Justice was delivered on the 27th October, 2016.

37. When the matter came before this Court on its return from the Court of Justice, the CFA were directed to furnish particulars as to whether or not, if the matter was remitted to the High Court, it was intended to make an application under Article 15 of Brussels IIR. In particular, the CFA was asked to clarify whether or not the social protection authorities in the United Kingdom intended to initiate proceedings in this jurisdiction relating to any application under Article 15 of the Regulation to transfer the matter to the United Kingdom. Subsequently, this Court was informed that there was no such intention. The matter remains in Ireland.

38. R is currently placed with foster carers. There is no dispute that the carers are willing to care for him on a long-term basis. The mother says that she has bonded with R and that he has an attachment to her. The Court has been informed that the mother has undergone a number of educational courses, and has accepted her failings with regard to past parenting. She says that the allegation that she is unable to put her child's needs first cannot be evaluated in the absence of updated psychiatric reports. She seeks the maximum input into R's parenting, and believes she should not be excluded from his parenting, as would have been the case had the child been adopted in the United Kingdom.

39. Two conclusions may be drawn from this protracted litigation, the first and primary one is to observe a point on which all courts are in full agreement, that at all stages a child's interests are paramount. A second observation might also be made. It is that, on occasions, the elapse of *time in court* proceedings can itself have a significant bearing on the potential outcome of these particularly sensitive cases. For these reasons, the appeal was allowed.