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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 05/06/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Between:

ZS

Applicant

v

A HEALTH AND SOCIAL SERVICES TRUST

Respondent

(Adoption: genetic identity: declaratory relief)

KEEGAN J

This case has been anonymised as it involves a child. Nothing must be published which would identify the child or his family. The name given to the child in this judgment is not his real name.

Introduction

[1] This is an application for declaratory relief brought by a mother of a child who is in foster care and in respect of whom an application to free for adoption is pending. The issue is whether the mother can restrict the information which can be shared with the child should he be adopted. I will call the child Zach for the purposes of this judgment.

[2] The Trust was represented by Ms Smyth QC and Ms Ramsey BL. Ms McGreenera QC and Ms Rice BL represented the mother. Ms Maguire BL represented the Department of Health (“the Department”) and Mr Maguire BL the Guardian ad Litem. I am very grateful to all counsel and representatives for their written and oral submissions. I also received a written submission from the Attorney General which has been of assistance.

[3] The mother's representatives helpfully refined the wording of the proposed declaration during the course of the hearing before me given that issues have narrowed as this case has progressed. Ms Rice confirmed that the declaration being sought was as follows:

"The only information to be made available to the child is his mother's name, date of birth, the photograph on the passport and details on the passport."

[4] I should say that at the initial stages in these proceedings the mother also sought a declaration that the child should not be made aware of the identity of his putative father and that neither he nor his half siblings should be notified. I have dealt with those applications at an earlier stage in proceedings having considered authorities such as *Re TJ (Relinquished baby: sibling contact)* [2017] EWFC 6 in that I made a declaration dispensing with service on the putative father. I also decided that given that the child has no relationship with his half siblings that there was no necessity to contact them for the purposes of assessment as potential carers or to protect Article 8 rights. This case therefore came down to a net issue in relation to what information should be shared with this child as part of the adoption procedure.

[5] There was some debate at the outset about whether or not this declaratory relief should be determined as a preliminary issue or as part and parcel of the freeing application. The Trust wished to proceed with all matters and made the case that this child needed certainty. The mother was opposed to that course. Having considered the arguments I decided to hear the case in stages to afford the mother the opportunity to reflect upon this ruling before the case progresses further.

Factual Background

[6] The child in this case has just turned two years of age. He was born in Northern Ireland. Two days after birth he was placed in short term foster care. This was because his mother did not want to see him or hold him after birth and she left Northern Ireland shortly thereafter. She has had no contact with Zach since then. It is reported that she is now living in Scotland. She has not had contact with the Trust since October 2016 albeit she keeps some contact with her legal advisers. On 28 November 2016 Zach was made the subject of a care order under Article 50 of the Children (Northern Ireland) Order 1995. Since 12 December 2016 Zach has been placed with duly approved carers who wish to adopt him. The reports in respect of Zach show that he is thriving in his placement. He is a child of African origin as are both of his parents. The mother of the child has not been present during these proceedings but she has given instructions to her lawyers. During the course of the hearing efforts were made to find the person identified by the mother as the father of the child. There is no father named on the birth certificate.

[7] In relation to the issue of tracing the putative father affidavits have been filed by the senior social worker, Cliona McBreen, dated 22 January 2018 and the Trust

solicitor, Rory Fitzpatrick, dated 9 February 2018. The affidavits set out the efforts made by the Trust to identify and locate the putative father. These efforts have been unsuccessful and as a result on 19 February 2018 I declared that the Trust had made all reasonable efforts to find the putative father and that service could be dispensed with in relation to him.

[8] The mother has filed an affidavit which is dated 13 June 2017. In that she sets out the following:

- She states that she wishes to make it clear from the outset that she is wholly supportive of Zach being freed for adoption and ultimately adopted by the family he is living with. She says that she understands that Zach has been very well cared for by this family and that they are good people. She says that “this is all I ever wanted for Zach”.
- The mother also says that “I however cannot formally consent to Zach being freed for adoption because to do so would mean that the Trust and the Guardian ad Litem would then take steps to trace and speak to Zach’s half siblings and potentially my family”. She says she is opposed to any of her family and Zach’s half siblings being notified of his existence.
- The mother then sets out some background which involves her history living in Africa, then her move from Africa to London and then her move to the Republic of Ireland prior to coming to Northern Ireland.
- The mother sets out her position that the father of the child was volatile, irrational, that she thought he had mental health problems and that he was taking drugs.
- The mother also points out some difficulties when she announced that she was pregnant to the father, however she decided to have the child.
- The mother refers to the fact that she believes “nothing good will come from Zach knowing information about her, his half siblings or his father.” She says:

“I firmly believe that it is in Zach’s interest to grow up believing his adopted family are his biological family - he will then feel truly part of the family.”

She states that Zach has a right to privacy and a family life and that this should be with his adoptive family.

- The mother says that all she ever wanted for Zach was a good and loving family. She says that if information about her, the father and her older children were given to Zach she believes that this would cause more harm than good for him. She says her family in Africa are not aware of his

existence and she submits to the court that for her benefit and also for the child's benefit this should remain the case.

- Finally the mother submits that if her older children are informed about Zach's existence her relationship with them will end. In relation to the older children she refers to the fact that she has a son who lives in Africa and who is aged 23, also a second son aged 19 who she says is at college in the Republic of Ireland. She states that her other three sons were born in Ireland.

Legislative and Legal Context

[9] In this regard I gratefully utilise the statement filed by the Department which is comprehensive and has been of very great assistance to the court. The statement sets out a summary of the current legislative position as it relates to the sharing of information about adoption. The main message that I draw from this is that the current law requires information about the child's identity to be shared with the child who is subject to proceedings at a relevant juncture in the child's life. There is no provision in current law, which enables the birth mother of the child to override the interests of the child at that time.

[10] The Department points out that the draft provision in the Adoption and Children Bill will not alter that position. The Bill will however include provision to enable the High Court to make an order on application from the adoption agency to withhold this information if it believes that the circumstances are exceptional. An example when the High Court may exercise its power is where it is considered that disclosure would lead to a serious crime being committed. In its submission the Department states that the racial origin of the child is an important factor and that the child's race makes information sharing at an appropriate juncture in his life, particularly in relation to his half siblings, more pertinent. The Department points out that information sharing could be of particular significance in connection with matters like marriage and health, in circumstances where health history would be beneficial or even critical.

[11] The relevant legislation is as follows:

- (i) The Adoption (Northern Ireland) Order 1987 ("the Adoption Order")

Article 16(1)(b)(i)(ab) outlines the only condition a parent can attach to their agreement to their child's adoption which is in respect of religious upbringing it states:

"16 . – (1) An adoption order shall not be made unless –

(a) ...; or

(aa) ...; or

- (b) in the case of each parent or guardian of the child the court is satisfied that—
 - (i) he freely, and with full understanding of what is involved, agrees—
 - (aa) ...; and
 - (ab) either unconditionally or subject only to a condition with respect to the religious persuasion in which the child is to be brought up,

to the making of an adoption order; or
 - (ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2).”

Article 17(1)(b) of the Order reiterates the above condition as it relates to freeing the child for adoption with parental agreement.

Article 18(3) - Freeing for Adoption without Parental Agreement applies Article 17(3), (5)-(7) to an order under Article 18(1) as it would to an order made by the court under Article 17(1).

Article 54(1) - Disclosure of Birth Records of Adopted Children requires (subject to the provisions of this Article) the Registrar General to supply to a person who has attained the age of 18 years such information as is necessary to enable that person to obtain a certified copy of the record of his birth.

Article 54(2) also enables an adopted person under the age of 18 who intends to marry or form a civil partnership, to obtain a declaration from the Registrar General to say that he is not related to his intended spouse or civil partner in such a way as to preclude their marriage.

(ii) The Adoption Agencies Regulations (Northern Ireland) 1989

The Adoption Agencies Regulations, make provision for establishing a case record and obtaining information relating to the child, information to be provided by adoption agencies, confidentiality and preservation of case records, access to these case records and disclosure of information. In particular reference has been made to the following:

Regulation 7 and Parts I, III and IV of the Schedule set out the particulars to be obtained (where practicable) about the child, their natural parents and the health of the natural parents. For the child, this includes any brothers and sisters and extensive access to members of the child's natural family. For the natural parents, this includes their personal circumstances, any brothers or sisters they have and/or may have had and their wishes and feelings in relation to the adoption, including any wishes in respect of the child's religious and cultural upbringing. With regard to the health of the natural parents it includes "a family health history, covering the parents, the brothers and sisters (if any) the other children (if any) of the natural parent with details of any serious physical or mental illness and inherited and congenital disease."

Regulation 12 provides for the prospective adopter to receive "written information about the child, his personal history and background, including his religious and cultural background, his health history and the current state of health, together with details of any conditions as to religious upbringing of the child under Article 16(1)(b)(i)(ab) if applicable and to "send a written report of the child's health history and current state of health to the prospective adopters' medical practitioner".

Regulation 14 provides for adoption agencies to treat information as confidential, place it in the case record and retain it under social security for at least 75 years.

Regulation 15 allows for an adoption agency to "provide such access to its case records and indexes to them and disclose such information in its possession as may be required."

(d) to the persons and authorities referred to in Regulations 11 and 12 to the extent specified in those regulations....

The persons and authorities referred to in Regulations 11 and 12 include the child, the parents of the child, their prospective adopter, the prospective adopter's medical practitioner, the HSC Board and the Education Authority.

(iii) The Family Proceedings Rules (Northern Ireland) 1996

Appendix 4 to these rules (inserted by the Family Proceedings Amendment Rules (Northern Ireland) 2003) in the main replicates the requirements in Parts I and III of the Schedule to the Adoption Agencies Regulations for the child and natural parents with regard to the information to be provided by the adoption agency to the court. With regard to the health of the child it also requests (where possible) the same details and family history as outlined above under Part IV of the Adoption Agencies Regulations (ie a family history which covers any other children of the natural parent, if any).

- (iv) Article 54 of the Adoption Order introduced access to birth records from October 1989. Since then all adoption agencies (including HSC Trusts) have provided counselling, mediation and intermediary services for those going on to trace birth relatives. As required under Article 3 of the Adoption Order, these services are also available to birth parents who wish to know about adopted relatives.

In relation to this provision the Department states;

“These cases have been numerous and varied with adoption agencies building up considerable expertise in these areas, building on the experience gained before the legislation was introduced in 1989. Many challenging dilemmas in respect of information sharing have been mediated and dealt with.”

Article 54A of the Adoption Order introduced the Adoption Contact Register where adoptees (from age 18) and birth relatives can record their wish to have contact with adoptive persons/birth relatives in the future.

- [12] It is recognised that adoption represents an interference with family life. In that context, in any adoption in this jurisdiction, there is a process of life story work undertaken for the benefit of a child by the relevant agencies. In *M v W (Declaration of parentage)* [2006] EWHC 2341, Hogg J summarises the benefits of this as follows:

“It is thought good practice and beneficial to an adopted child to have information relating to his birth family. Life story books are prepared carefully by social workers and others and left in the adoptive home so that an adoptive child can be encouraged and enabled to acquire as much information as is possible as to the natural birth family from which he or she came. It is an important part of enabling an adopted child to be confident as to his or her status and to know as much about his or her background as possible.”

- [13] These sentiments are well established in adoption practice in Northern Ireland. In terms of identity I also look to the international framework and the following instruments. Article 7 of the United Nations Convention on the Rights of the Child (“UNCRC”) reads as follows:

- “1. The child should be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality and, as far as

possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

[14] In the Implementation Handbook for the Convention on the Rights of the Child, (Unicef 2007), the term parents is said to include not only one's social or legal parents but also genetic and birth parents. The information at page 106 of the Handbook illustrates that the UN Committee on the CRC has interpreted Article 7 so as to promote a child's right to knowledge of origins and has criticised legal systems which withhold such information from children born by donor conception and those which allow mothers to give birth anonymously and to keep their identity secret from their offspring.

[15] Further, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR") reads as follows:

- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[16] Helpfully, I have also been referred to an academic article entitled "Tracing down the historical development of the legal concept of the right to know one's origins" has "to know or not to know" ever been the legal question? In this the author Richard J Blauwhoff identifies three phases in the Strasbourg jurisprudence when tracing the emergence of a right to know under Article 8 of the ECHR. These are as follows:

- (i) Phase 1 - Towards the recognition of the right to know one's origin.
- (ii) Phase 2 - Recognition *expressis verbis* of the right to know one's origins as an aspect of private life.

- (iii) Phase 3 - The right to know someone's genetic identity linked to an encompassing right to identity protected under Article 8 of the ECHR.

[17] There were four core authorities relied on by all counsel as follows. Firstly, the case of *Gaskin v United Kingdom* [1990] 12 EHRR was referenced. This was a case where the applicant was taken into the care of an authority during his childhood. Records were kept in relation to him and the applicant alleged that he was ill-treated in foster care so he sought access to his care records upon reaching his majority. The reason for this was to help him overcome his problems and learn about this past. The applicant was refused access to all of his records and he ultimately complained in relation to that arguing that this was a breach of Article 8 of the Convention. The court held by a majority of 11 votes to 6 that there had been a violation. In its approach to Article 8, the court observed that in addition to the protection of the individual against arbitrary interference by public authorities that there was a positive obligation on the State which was in play in this case. The issue of confidentiality of records also received attention. Reference is made to a system which was made to access records dependant on the consent of a contributor to that record which could in principle be considered compatible with Article 8 in view of the State's margin of appreciation. However, it would only comply with the principle of proportionality if there was an independent authority to decide whether access would be granted in cases where a contributor withheld consent or failed to notify whether they consented or not. In that case, at that time, there was no such independent authority and so there was a violation.

[18] The second case relied on was *Odievre v France* [2004] 38 EHRR 43. In that case the applicant, who was adopted, had been abandoned by her biological mother who had requested that her birth be kept secret. This was an option open to mothers under French legislation. However, the applicant in that case subsequently wanted to find out about her personal history but was denied access. She complained to the court about the fact that her birth had been kept secret with the result that it was impossible for her to trace her origins amounted to a breach of her rights under Articles 8 and 14 of the Convention. It was held by 10 votes to 7 that there had been no violation of either Article. This decision was based upon the legislative framework in France which allowed a system of secret or anonymous births. The court ultimately decided that the choice made by the State in that case was within the margin of appreciation.

[19] The third case which was referred to was the case of *Jaggi v Switzerland* [2008] 47 EHRR 30. This was a case in relation to the right to an identity. The applicant wished to determine his parentage having been born outside of marriage in 1939. He sought to ascertain the identity of his biological father. Various tests were denied to him and that ultimately resulted in an application to test using the remains of the putative father. In this case the court held that the right to an identity, which included the right to know about parentage was an integral part of private life and in such cases particularly rigorous scrutiny was called for when weighing competing interests. At paragraph 38 the court said:

“The court considers that persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. At the same time it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing. The court must examine whether a fair balance was struck between the competing interests in this case.”

[20] The final case was *Phinikaridou v Cyprus* [2007] ECHR 23890/02. In this case the applicant was an adult who sought judicial recognition of paternity. The respondent made the case that the request was statute barred. The ECHR held that birth, and in particular the circumstances in which a child was born, form part of a child’s and subsequently the adult’s private life guaranteed by Article 8 of the ECHR. It was decided that a fair balance had to be struck between the competing interests of the individual and the community as a whole and in both contexts the state enjoyed a certain margin of appreciation. The court held that having particular regard to the absolute nature of the limitation period, a fair balance had not been struck between the different interests involved and therefore the interference of the applicant’s right to respect for her private life was not proportionate to the legitimate aims pursued.

Arguments made by the parties

[21] All parties agreed that the legal principles at play are those I have set out above and there was no real dispute about them. Counsel effectively submitted that this case came down to a balancing exercise between the privacy rights asserted by the mother under Article 8 and the rights asserted by the child to have information about genetic identity also encompassed within Article 8 as an aspect of private life.

[22] On behalf of the applicant Ms McGrenera made the following points:

- (i) The mother has consented to the provision of certain information, namely her passport photograph and the child is also aware of her African identity. She argued that this allows the child to obtain a birth certificate so the child would not be in total ignorance. In other words this is not a blanket ban by the mother. Ms McGrenera argued that this was a proportionate balance to protect the rights at issue. She said that the information given was sufficient.
- (ii) Ms McGrenera referred to the mother’s position that the biological father had been violent. She also referred to the mother’s position that the half-siblings and the other family members including her husband would be badly affected if they knew about the existence of this child.

(iii) In summary Ms McGreenera said there was no absolute knockout point for either side in this case and this case came down to a balancing of rights but that the balance tipped in favour of the mother in this case.

[23] Ms Smyth made the following arguments in reply:

(i) She also said that this was a balancing of rights case. Ms Smyth pointed out that the full extent of Zach's profile had been shared as part of the matching process with the duly approved carers. She said this was in keeping with the regulation. She pointed out that the current carers, if there was adoption, would become the legal parents of the child. She pointed out that this declaration sought by the mother would greatly restrict information sharing and have a bearing on the role of the parents.

(ii) Ms Smyth pointed to the fact that life story books were extremely important in the case of an adopted child. She said that this was important to give the child confidence and status and understand his position. She referred to the issue of openness in adoption and she said that this declaration militated against all of these principles and in particular the grain of best interests which is embedded in Article 9 of the Adoption Order.

(iii) Ms Smyth pointed out that the information sharing is not just if the child asks for information which it is inevitable he will do given that he is of a different racial origin to his carers. But his carers also need to be enabled to help him, if they consider it in his best interests, to share some of the information they have. Otherwise, they would effectively be covering up information they know and she said that would not be conducive to a settled home. Ms Smyth also referred to Article 54A of the Adoption Order and the provisions of the Adoption Contact Register which she said Zach would be prevented from accessing or have the benefit of if this declaration were granted.

(iv) Overall, Ms Smyth said the balance fell firmly in favour of Zach having information which could then be sensitively shared by his carers or the adoption agencies as and when the child required it which would be in his best interests.

[24] Ms Maguire BL on behalf of the Department assisted the court by referring to the written statement. She also referred to the Unicef Handbook. She made the point that at an international level there has been a move against anonymous birth and towards openness in this area. Ms Maguire made the case on behalf of the Department that there is no prohibition in the legislative structure open to the mother in relation to placing an imposition on an adoption consent other than religious upbringing and that that is only likely to change in the new legislation in exceptional circumstances which she said would not be applicable on the facts of this case.

[25] Mr Maguire BL, on behalf of the Guardian ad Litem, also supported the application made by the Trust and the Department that I should refuse the declaratory relief. He did not dispute any of the legal principles but in addition he made another point which was that he said that the mother had not vouched the assertions made in her affidavit that providing Zach with information regarding his origins would put her in detriment and her other children. He said there was no corroborative evidence about that and that that was an important proof in the case too. Mr Maguire said that it was absolutely essential that Zach would have an opportunity to have explained to him his culture, origin and identity. He said that the Guardian was extremely clear about this and that it would be contrary to Zach's best interests if the court effectively approved a cover-up in terms of the information in the possession of the carers not being shared with Zach. Mr Maguire argued that it was manifestly in Zach's interests and of benefit to him to know information about his roots. He said the extent to which he should know and how that should be handled would be managed by those caring for him but there should not be a restriction on the information that should be shared. Mr Maguire also pointed out that the Guardian thought that the mother should be encouraged to provide more than the simple single passport photograph to the child to assist him and that she thought that it would be better to have a more appropriate picture.

Conclusion

[26] The context of this case is important as it involves adoption of a child. Article 9 is the core provision of the Adoption Order which embeds the best interests of a child at the heart of any consideration. It is clear that the legislative structure does not allow a parent to give a conditional consent other than as regards religious observance. It is also clear that information sharing is part and parcel of normal adoption procedures. It is a welcome feature of our society that we have moved away from the secrecy that surrounded adoption in days of old. This practice accords with the international direction of travel which has been set out in the various authorities put before me.

[27] The mother invokes Article 8 of the Convention and her rights to privacy to base her claims. She states that this should take precedence over the child's right to knowledge of his genetic identity which is recognised as an aspect of private life under Article 8. There was no dispute about the legal principles at play. I am simply being asked to balance the competing rights. The outcome will depend upon the facts of each case. In this case, having undertaken the exercise, I am firmly of the view that the child's interests prevail. I say this for the following reasons:

- (i) The fact that the child is of a different racial origin to his prospective adopters means that it is inevitable that he will question his genetic origins. The suggestion made by the mother that the child should grow up thinking that his adoptive parents are his natural family is clearly unrealistic.

- (ii) The carers have information about the child's background as part of the matching process and so they would have to withhold that if the declaration were granted. In my view it would be totally impossible for the prospective adopters who have information about the child and his origins to act in Zach's best interests when, as he becomes older, he asks questions and is curious about where he came from and such like.
- (iii) The mother has allowed for some identifying information to be placed on the file. This is not a case involving absolute secrecy. If some information is provided I cannot see that the proposed adopters and agency should be further restricted otherwise the system would become unworkable.
- (iv) The European authorities are clearly in favour of the argument made on behalf of the child. The one case of *Odievre* from which the mother may extract some support involves a different factual circumstance where secrecy was provided for within the French legislative scheme.
- (v) I have considered the mother's position and I recognise that her views carry weight within the overall balance. I appreciate the difficult circumstances surrounding the birth of Zach. I also commend the positive comments made by the mother concerning Zach's care arrangements. However, I am not at all convinced on the evidence that there will be such catastrophic effects as the mother predicts if the declaration is not granted. The putative father cannot be found and so the risks associated with him are low. Also, the mother has not produced particular evidence of relationship breakdown within her family if information was shared. In any event this seems to me to be a rather remote possibility given the geography pertaining to this family and the lack of verifiable information about them.
- (vi) The risks in this case are best described as potential. In my view the potential adverse consequences of information sharing are outweighed by the potential benefits of Zach knowing his genetic identity in terms of his overall health and wellbeing.
- (vii) This issue must be looked at both in the short term but also in the longer term when Zach becomes an adult. In my view Zach should not be deprived of a choice to have information about his genetic identity.
- (viii) Fundamentally, the domestic and international direction of travel is towards openness and against a cover up save in very exceptional circumstances. I do not consider that this case represents exceptional circumstances. In my view that must be confined to a very small and narrow cadre of cases.
- (ix) The fact of the matter is that prospective adopters become a child's parents upon the making of an adoption order. They are entrusted to act in the best interests of the child. They are guided by experienced professionals. I am

confident that any information that is shared with the child will be managed in a sensitive and careful manner.

(x) Overall, I consider that it is in the best interests of this child to have the right to know. I do not consider that this potential should be lost. What actually happens in the future remains to be seen.

[28] Accordingly, this application must be dismissed.