

**THE HIGH COURT  
FAMILY LAW**

[2023] IEHC 439  
Record No. [See Appendix]<sup>1</sup>

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2)  
OF THE ADOPTION ACT, 2010 (AS AMENDED) AND IN THE MATTER OF  
C, A MINOR**

**BETWEEN**

**CHILD AND FAMILY AGENCY**

**AND**

**D. AND E.**

**APPLICANTS**

**AND**

**THE ADOPTION AUTHORITY OF IRELAND AND B.**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Jordan delivered on the 8<sup>th</sup> day of June 2023**

1. The substantive proceedings in this case were heard by the Court in the Summer of 2020 when the child involved [“C”] had almost attained the age of majority. Having

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<sup>1</sup> The Record Number is not being made public and should not be made public without the express leave (permission) of the Court.

heard the case the Court approved of the making of an Adoption Order by the Adoption Authority of Ireland.

2. In this Judgment the record number of the proceedings is not cited in the title and the single capital letters used throughout are with a view to further protecting the anonymity of the individual parties.

3. Following the decision of the High Court an application was made on behalf of the birth mother [“B”] (the applicant in this application) to lift the *in camera* rule to allow her to take legal advice in relation to potential legal proceedings and/or with a view to making a complaint to a statutory body.

4. The Adoption Authority of Ireland is neither consenting nor objecting to the granting of the reliefs in the notice of motion but does seek to emphasise the importance of protecting the best interests of the child. The Child and Family Agency agrees that the birth mother can identify herself as the person named in the judgment to any solicitor she may seek to instruct (and presumably counsel also).

5. The Child and Family Agency has objected to the application by reason of the applicant’s delay. The applicant (the birth mother) first raised the issue of such an application when the judgment was delivered in the summer of 2020. Arising out of that application the solicitors on behalf of the Agency wrote to the birth mother’s solicitor setting out the Agency’s position and suggesting that any application that engaged the confidentiality and privacy rights of the various parties should be grounded on a notice of motion and affidavit so that the parties could understand the scope and basis in respect of the reliefs sought. In response to this the solicitor for the birth mother replied that the application was made at the earliest possible opportunity and that it was made at that time because the ongoing nature of the proceedings was distressing for the

birth mother and given their duty to a vulnerable client they believed that it was in her best interests to make the application as soon as possible.

6. When the application was made the Court granted liberty to the birth mother to issue the necessary motion seeking to lift the *in camera* rule returnable to later in 2020 – with the motion to be issued and served by 16 October 2020. However, the motion was not issued until 23 June 2022 and that is the application before the Court. By this time C had reached the age of majority.

7. In response to this allegation of delay counsel on behalf of the birth mother points out that the delay is explained in part by the process of applying for legal aid, the retention of counsel other than the counsel who appeared at the original hearing and the furnishing of an opinion of counsel prior to the issuing of the motion. In addition, more recently, the need to ascertain the views of C has contributed to the delay.

8. There is no doubt but that there has been delay on the part of the birth mother in making this application. However, it is a fact that she is a vulnerable person. It is also the position that the application was flagged at an early stage and no real prejudice has been shown to have occurred to C, to the Child and Family Agency, to the Adoption Authority of Ireland or to anyone involved by reason of the delay. In addition to all of this, sight cannot be lost of the delay which occurred in relation to the original adoption application. The Court has already dealt with this in some detail in the original judgment.

9. In all of the circumstances, this Court is satisfied that it would be grossly unfair to attach any real weight or significance to the delay which has occurred in the making of this application. It would be preferable if this application was dealt with more proximate to the original hearing and indeed whilst C was a minor. However, the delay is not a bar to the making of this application.

**10.** At an early stage of this application the Court considered it necessary and appropriate to ascertain the views of C concerning the application.

**11.** The Motion was served on the second and third named applicants – the adoptive parents. They did file an affidavit expressing surprise that they were named in the Motion in circumstances where they did not participate in the substantive adoption hearing and they expressed the view that the matter was primarily between the Child and Family Agency and the Applicant. They did however express concern about the inordinate delay in bringing the Motion and in effect objected on that ground to any orders being made. They expressed huge concern that the personal rights of C would be compromised by lifting the *in camera* rule as that would enable her and their family circumstances to be further scrutinised and investigated. The Court must and does have regard to the views expressed by the second and third named applicants.

**12.** An independent solicitor with experience in this area, Mr. Keith Walsh, on being approached by the legal team for the applicant, agreed to give of his time to meet with C - in order to give advice and to provide representation. The Court appreciates and thanks him for his participation and work in this regard. Mr. Walsh was briefed in relation to the application and did meet with and advise C. Having done so he served and filed an affidavit which clearly sets out the position of C. The statement of C which is exhibited in the affidavit is comprehensive and clear in respect of the total objection to the *in camera* rule being lifted and the reasoning for that position.

**13.** That C is totally opposed to the granting of the Orders sought is a weighty consideration for the Court.

**14.** It is clear that C was and remains adversely impacted by the process and indeed by the Court proceedings. Likewise, the birth mother. These were difficult proceedings in an emotionally charged and mentally draining process.

15. The Court is of the view that it must approach this application with the best interest of C as the paramount consideration. In the context of this application which relates to the substantive proceedings which were heard *in camera* it would, in the view of the Court, do an injustice to s.54 of the Adoption Act 2010 (as amended) if the Court did not so proceed – even though C is now an adult.

16. Section 54(6) of the 2010 Act provides that “proceedings under this section shall be heard in private.”

17. The right to privacy conferred by this section does not disappear when a child at the heart of the adoption proceedings attains the age of majority. It remains as a weighty factor for consideration by the Court.

18. It is also the position that the paramount consideration - the child’s best interests - is not synonymous with the only consideration. There are other issues and other rights at play in the context of the application which is before the Court.

19. The *in camera* rule is a derogation from the overarching constitutional principle set out in Article 34(1) of the Constitution that justice shall be administered in public. Section 45(1) of the Courts (Supplemental Provisions) Act 1961 provides; -

“Justice may be administered otherwise than in public in ... matrimonial causes and matters ... and minor matters”.

20. The *raison d’être* of the *in camera* rule is to protect the privacy of the parties and their children as family law matters will and do involve confidential and intimate details of the personal lives, relationships, and business affairs/financial affairs of the parties. In *DX v Judge Buttimer* [2012] IEHC 175 Hogan J stated; -

“The exception prescribed by s. 34 of the Act of 1989 must be taken as reflecting a desire by the Oireachtas to protect other constitutional values in the context of family law proceedings such as the right to privacy (Article 40.3.1), the

authority of the family (Article 41) and the protection of the constitutional rights of children (Article 42.5). It is in that context that s.34 of the Act of 1989 falls to be interpreted.”

**21.** In addition to protecting the interests referred to above, the privacy of the hearings which occur in family law litigation serves to ensure that a confidential atmosphere is maintained insofar as such hearings are concerned. This should encourage litigants to approach such hearings with a “cards face up” strategy in terms of their financial and other affairs when the risk of public dissemination of such private matters is guarded against.

**22.** In terms of the scope of the *in camera* rule, in *RM v DM* [2000] 3 I.R. 373 it is observed that “Proceedings are what goes on in relation to litigation. It covers all pleadings, evidence, whether oral or on affidavit and all orders and judgments in relation to that litigation.”

**23.** It should however be pointed out that anonymized Judgments in Family Law Cases are now routinely published and circulated thereafter. And such publication does create an ever increasing challenge for the system - with a real risk of jig-saw identification a noticeable and strong undercurrent - in this era of powerful search engines and algorithms.

**24.** The lifting of the *in camera* rule is a matter for the Court.

**25.** The judgment of Barr J. in *Eastern Health Board v Fitness to Practise Committee* [1998] 3 I.R. 399 established the ten “Barr principles”. The principles make clear that while there are good reasons for the operation of the *in camera* rule, this does not mean that there is an absolute embargo on disclosure of evidence in all circumstances, rather the...

*“...Court in proceedings held in camera has a discretion to permit others on such terms as the judge thinks proper to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings where the judge believes that it is in the interests of justice so to do, due and proper consideration having been given to the interest of the person or persons intended to be protected by the conduct of the proceedings in camera.”*

**26.** *Since these judgments, the provisions of Section 40 of the 2004 Act have been enacted. Section 40 (as amended) provides:*

*“(1) ...*

*(2) For the purposes of this section each of the following shall be a “relevant enactment”-*

*...Section 54 of the Adoption Act 2010;*

*(6) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to—*

*(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or*

*(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*

*(7) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the giving of information or evidence given in such proceedings to—*

*(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or*

*(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*

*(8) A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings.*

*(9) A hearing, inquiry or investigation referred to in subsection (6) or (7) shall, in so far as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7), be conducted otherwise than in public and no such document, information or evidence shall be published.*

**27.** In a recent judgment, Barrett J in *X v Y* [2022] IEHC 584 concluded that there is nothing in s.40(6) or (7) of the 2004 Act that varies or removes the traditional rule as regards obtaining the prior leave or permission of the Courts when it comes to disclosure to third parties of documents, information, or evidence generated in or garnered or gleaned from *in camera* proceedings.



**28.** Birmingham J. in *HSE v McAnaspie* [2011] IEHC 477 considered whether an application by a deceased child's next of kin for access to reports prepared by his guardian *ad litem* during his time in the care of the Health Service Executive should be granted. In the case, the District Judge had stated a case to the High Court on, *inter alia*, the jurisdiction of the District Court to lift or modify the *in camera* rule and whether the District Court could impose conditions on the release of protected information. Having addressed both English and Irish case law, in relation to the operation of the *in camera* rule, Birmingham J. concluded that "a judge of the District Court had, in certain circumstances at least, a discretion to lift or modify the rigours of the *in camera* rule." Birmingham J. stated that:

"Insofar as the weight of Irish authorities would suggest that the court has some discretion at least to authorise the disclosure of information relating to proceedings held *in camera*, that jurisprudence is consistent with the approach of the European Court of Human Rights..."

**29.** In that case the High Court granted the application and indicated that the District Court Judge could impose necessary restrictions in respect of the documentation released.

**30.** Finally, as regards provision for the release of the record of the proceedings (DAR), Order 123, Rules 9(4) and (5) Rules of the Superior Courts provide:

"(4) Subject to sub-rule (5), the relevant court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record concerned as is specified in the order made on the application, by such means and at such time or times as may be specified in that order and on such terms and under such conditions (including terms restraining the publication, dissemination or further disclosure

of all or any part of the relevant record by the applicant, and the giving of an undertaking to such effect) as the relevant court may direct.”

(5) Unless the relevant court otherwise directs, access to the relevant record concerned shall, where permitted under sub-rule (4), be afforded solely by the provision to the applicant of a transcript of all or any part of that record, on payment by the applicant to the transcript writer of the transcript writer’s fee for producing the transcript.

**31.** It is submitted on behalf of the applicant; - that the Court is not asked to, and may not, consider whether there is a cause of action, good bad or indifferent, against the CFA. It is not asked to, and may not, speculate as to where a complaint might lie or how it might be received or adjudicated upon. It is not asked to, and may not, speculate or rule on the utility of the documents or any class of them to the Applicant or her advisors in any future action or complaint.

**32.** This assertion on behalf of the applicant is understandable but is not entirely correct. The above matters are amongst the ingredients which the Court must weigh in the balance when considering the application. In that regard, the Court has the advantage of having heard and decided the case. Suffice it to say that the judgment is relevant to the substance of the grievance or grievances of the applicant. In weighing matters in the balance this Court is satisfied that this application is *bona fide* and the Court is not dealing with an application which has the hallmarks or characteristics of a timewasting folly or an abuse of process. If the Court concluded that the latter was the position, then that would impact significantly on its decision in relation to the application before it. Furthermore, the Court is entitled to choose the extent to which the in camera rule is lifted in terms of the documentation and is entitled to decide on

the conditions to impose (if any). It is after all a balancing exercise which requires a balance to be struck.

**33.** Turning then to the interests of C. As already indicated the Court considers it appropriate to approach this application on the basis that C's best interests are the paramount consideration. That said, those best interests in the context of this application turn largely on the right to have C's privacy respected and C's desire to have this litigation over and done with - without further intrusion into C's life.

**34.** Balancing the rights of C against the rights of the applicant it is the position that the applicant has a right to pursue a legal remedy if she has suffered a wrong in relation to the matters canvassed in the course of the hearing before the Court and addressed in the Court's judgment. If the Court declined to lift the *in camera* rule – with conditions attached – the Court would be placing or supporting a considerable obstacle which stands in her way in terms of the pursuit of legal advice and/or any legal remedy.

**35.** The Court believes it is possible to take appropriate steps to protect the interests of C. It does propose to lift the *in camera* rule in certain respects. It will impose strict conditions in this regard.

**36.** C does complain about the Court's judgment – and feels essentially that it allowed identification. Unfortunately, as touched on above the anonymising of judgments is far from an exact or perfect science. It is extremely difficult, if not impossible, to anonymise a judgment whilst leaving it with context and meaning, in such a way that will absolutely prevent jigsaw identification. One would however hope that a fade factor is now at play which in itself will help protect the privacy rights of C when coupled with appropriate conditions concerning the lifting of the *in camera* rule.

**37.** Ultimately, this Court has a discretion to lift the *in camera* rule and it can exercise its discretion when it is in the interests of justice to do so.

**38.** Section 40(8) of the Civil Liability and Courts Act 2004 (as amended) creates an exception to the *in camera* rule, permitting disclosure to protect the “legitimate interests of a party or other person affected by the proceedings”.

**39.** It is also the position that the Court has an implied power at common law to lift the *in camera* rule on such terms as it thinks proper in the interests of justice – having balanced the interests served by the *in camera* rule with the public interest in lifting it.

**40.** It is suggested on behalf of the Child and Family Agency that the applicant has a possible alternative route to secure documentation under the freedom of information legislation. This possibility was not argued before the Court and the Court does wonder the extent to which it would resolve the issues in contest before it concerning the lifting of the *in camera* rule. It is also the position that a protective writ has already been issued on behalf of the applicant against the Child and Family Agency. Seeking discovery in accordance with the rules may or may not provide an alternative route for securing documentation for the applicant. Yet again, it is difficult to see that seeking discovery would deal with the issues in conflict between the parties concerning the lifting of the *in camera* rule – but once more this particular option was not argued before the Court.

**41.** It may well be that a refusal by the Court to lift the *in camera* rule in respect of some of the proceedings would serve to protract the litigation rather than do the opposite. In this regard, the Court is conscious of the fact that much of the affidavit evidence which was before the Court was generated from files of the Child and Family Agency. These files existed before the application concerning the adoption was brought to the Adoption Authority of Ireland and existed before any High Court proceedings were instituted. In these circumstances, it is highly artificial to completely close down access to all of the proceedings by reason of the existence of the *in camera* rule. All the more so when the applicant has the right to pursue a claim and/or a complaint.

42. The Court will make an order in the following terms; -
- (1) An Order pursuant to s.40(8) of the Civil Liability and Courts Act 2004 (as amended) and/or pursuant to common law that the Applicant may identify herself as the birth mother referred to - to any solicitor and/or barrister retained by or on her behalf concerning legal advice arising from the judgment and outcome of the proceedings referred to herein.
  - (2) In the event that the birth mother wishes to pursue proceedings concerning or arising from the judgment and outcome of these proceedings, or the circumstances giving rise to same, an order pursuant to s.40(8) of the Civil Liability and Courts Act 2004 (as amended) and/or pursuant to common law that she may identify herself as the birth mother referred to - to such natural persons or statutory bodies or bodies corporate or office holders with a remit or jurisdiction concerning such proceedings and/or complaints and permitting the disclosure of the documents/information/evidence referred to below subject to the redactions and/or omissions directed below.
  - (3) An Order refusing access to the DAR relating to the hearing between the parties. The Court is refusing access to the DAR as the Court does not consider it to be necessary insofar as the applicant's needs and objectives are concerned. Furthermore, the application was heard on affidavit and the applicant is being given access to the affidavits and exhibits which the Court considers relevant and necessary in terms of her purposes and objectives – and having regard to the competing interests of “C” who objects to the disclosure of anything.
43. The lifting of the *in camera* rule applies only to the documents listed below and with the following conditions; -

(a) Any recipient of proceedings pursuant to this Order is bound by the *in camera* rule in relation to that documentation and cannot disseminate it save to the legal team retained for the purpose of advice and/or prosecuting proceedings and/or any complaint made – or any related defence.

(b) Any material which identifies or serves to identify the child or the adoptive parents is to be redacted.

(c) The material is to be provided in hardcopy format only and no softcopies are to be made.

(d) The material shall be put together in a master folder with an index – and paginated. Only one master folder and one copy of it shall be created in order to reduce the likelihood of leakage or dissemination [ i.e. two folders only of the documents – indexed and paginated]. A record of possession of the master copy and the other copy shall be maintained by the applicant’s solicitors and the folders shall be signed in and out in the register. The holder of either folder is at all times responsible for keeping it safe and confidential. The folders shall be destroyed by the applicants solicitors once the litigation and any complaints processes are complete.

(e) The material in respect of which the *in camera* rule is lifted is as follows:-

- (i) The Judgment.
- (ii) Special summons.
- (iii) Affidavit of ... (with exhibits).
- (iv) Affidavit of ... (with exhibits).
- (v) Affidavit of birth mother ... (with exhibits).
- (vi) Affidavit of ... (with exhibits).
- (vii) Affidavit of ...(with exhibits).

**44.** There may be some ancillary/consequential Orders and/or refining required and the parties will have an opportunity to read and consider this judgment. The Court will hear submissions from the parties in that regard on 9 June 2023 or on such further date as the court shall decide. In addition to the foregoing Orders and any ancillary or consequential orders the Court will grant the parties liberty to apply.