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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A HEALTH AND SOCIAL CARE TRUST

Plaintiff

-v-

A MOTHER AND A FATHER

Defendants

IN THE MATTER OF OM (A MALE CHILD AGED 10½ YEARS)

_____

Mr A Magee QC and Ms J Lindsay BL (instructed by the Directorate of Legal Services) for the Trust
Ms N McGrenera QC with Ms M McHugh BL (instructed by Quigley, Grant & Kyle solicitors) for the Guardian ad Litem on behalf of the child

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McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the child. I have used the cipher OM for the name of the child. These are not his initials. Nothing can be published that will identify OM.

[2] OM is now 10½ years of age. He, and other siblings, were made the subject of a care order on 8 May 2018. His parents have largely disengaged with the Trust and the court in relation to his care. It is clear that they are opposed to the care planning. They have not participated in these proceedings. They are currently residing in the Republic of Ireland, but they had been made aware of the hearing which took place on 19 May 2021 and had been given the various links that would have enabled them to attend the hearing remotely. There was no appearance at the hearing from either.

[3] It would be fair description to say that the care planning for OM has been fraught with difficulty and it has been a significant struggle for the Trust to manage OM given his extreme behaviour.

[4] There is general agreement between the Trust and the Guardian ad Litem ("the GAL") that by any application of the welfare checklist (see Article 3(3) of the Children (NI) Order 1995 ("the 1995 Order")) his needs are best served in his current placement. The journey to that placement has been very difficult. Essentially all options in Northern Ireland were considered and on some occasions had been put into place, but had failed. This culminated in a spectacular failure in one specialist home in March 2020. At that stage an option was considered involving another specialist institution in the Republic of Ireland and OM has been placed there since March 2020. He has achieved an element of stability and progress. All the professional opinion confirms that this is the institution which will best promote OM's welfare, and applying the welfare test, which is paramount in the court's approach, I consider that the evidence is overwhelming.

[5] I do not propose to give more detail concerning the evidence or this placement in case it provides an opportunity for the parents to identify the institution and attempt to interfere with, or even abduct, OM. They have a track record for such conduct in relation to older children. Such an eventuality could have a devastating impact on OM.

[6] Before moving on to deal with the law, I would like to take this opportunity to place on record an appreciation for all the work undertaken by social work staff and others who have struggled with the care planning of this case, particularly the social work staff who have been on the 'front-line' and have had to deal with the day to day care of OM. It has been a most difficult task.

Article 33 of the 1995 Order.

[7] The relevant parts of Article 33 of the 1995 Order are as follows;

> "*(1) An authority may only arrange for, or assist in arranging for, any child in its care to live outside Northern Ireland with the approval of the court.*
>
> *(2) An authority may, with the approval of every person who has parental responsibility for the child, arrange for, or assist in arranging for, any other child looked after by the authority to live outside Northern Ireland.*
>
> *(3) The court shall not give its approval under paragraph (1) unless it is satisfied that –*
>
> *(a) living outside Northern Ireland would be in the child's*

best interests;

(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;

(c) the child has consented to living in that country; and

(d) every person who has parental responsibility for the child has consented to his living in that country.

(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, or other suitable person.

(5) Where a person whose consent is required by paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person –

(a) cannot be found;

(b) is incapable of consenting; or

(c) is withholding his consent unreasonably.

[8] The Trust is applying under Article 33 of the 1995 Order for approval from the court so that OM, being a child in its care, can live outside Northern Ireland in the Republic of Ireland.

[9] For approval to be given, the court must be satisfied in accordance with the provisions of sub-paragraph (3).

The child's best interests

[10] I am satisfied, for the reasons referred to above, that it is in the child's best interests to live outside Northern Ireland.

Suitability of the arrangements in the Republic of Ireland

[11] I am also satisfied that suitable arrangements have been made for his reception and welfare in the Republic of Ireland.

[12] By a letter dated 13 March 2020, TULSA, the competent authority in the Republic of Ireland, has consented to the placement of OM in the institution, thus complying with Article 56 of the Council Regulation (EC) No. 2201/2003 ("Brussels

II"). This provides –

> *"1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.*
>
> *2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.*
>
> *3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.*
>
> *4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State."*

Consent provisions

[13] We are then left with the provisions in relation to consent, namely the consent of OM and consent of the parents.

Consent of the parents

[14] Dealing first with the consent of the parents, when considering whether a parent is withholding consent unreasonably, the court should follow the same approach as in cases involving freeing a child for adoption (see *Re G (Minors)* [1994] 2 FLR 301 and *Re M* [2014] NICA 73). Even though a move to the Republic of Ireland is considered to be in the child's best interests, parental consent is still required, or it must be dispensed with.

[15] The question for the court to consider is whether the refusal of each of the parents is unreasonable. It is an objective test and requires the court to consider the circumstances of the parents but endowed with a mind and temperament capable of making reasonable decisions (adopting the description of Lord Wilberforce in *Re: D* [1977] AC 602 at 625).

[16] In the words of the Court of Appeal of England and Wales in *Re: C* [1993] 2

FLR 260 at 272:

> *"The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the judge on the one hand and the legitimate views and interests of the natural parents on the other."*

[17] Lord Hailsham LC in *Re W (an infant)* [1971] AC 682 at 699C, stressed that the overriding consideration is reasonableness:

> *"It is clear that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."*

but the court must guard against substituting its own view for that of a reasonable parent (see *Re E & M* [2001] NI Fam 2).

[18] The attitude of the parents has not been formally stated to the court. From the very limited contact between the parents and the Trust it is perceived that the parents wish OM to reside with them. They do live in the Republic of Ireland so it would appear that they have no objection as such to OM living in that country, but it is clear that they do object to him living there as a looked after child outside their care.

[19] Having considered all the evidence I am satisfied that a reasonable parent would consent to OM living in the proposed institution in the Republic of Ireland. As such, applying Article 33(5) of the 1995 Order, I consider that both parents are withholding their consent unreasonably and I therefore disregard sub-paragraph (3)(d).

Consent of the child

[20] I turn finally to the consent of the child. Specific consent is required under Article 33(3)(c) of the 1995 Order, but if the court considers that the child does not have sufficient understanding to give or withhold consent, the court can disregard Article 33(3)(c) *"if the child is to live … with a parent, guardian or other suitable person."*

[21] OM is 10½ years of age. I accept the professional opinion of the GAL that OM

does not have sufficient understanding as a result of his immaturity.

[22] This brings me to the major difficulty in this case. What did the legislature mean when it stated: "*the child is to live with a parent, guardian or other suitable person"*? and in the context of this case - Is the institution another person? If the answer to that question is yes, then the court can approve the arrangement of OM living in the Republic of Ireland, if it is not then the legislation would prevent such an approval.

[23] Courts in Northern Ireland have been approving similar placements outside the jurisdiction. Given its modest size the Province is often faced with such problems in the provision of health and social services. There may well be a need to access specialist services elsewhere which often will result in receiving assistance from the Republic of Ireland or from Great Britain.

[24] In the only recorded written judgments in this jurisdiction relating to this matter – *Re: M* – O'Hara J at [2014] NIFam 7 at first instance and Gillen LJ at [2014] NICA 73 on appeal - there is no direct mention of the point being argued or considered. Article 33(4) was dealt with, but only in the context of whether or not the child had capacity to consent. In that case the child was aged 13 years and was not consenting. The Court of Appeal dismissed the appeal from the order of O'Hara J which approved the placement in the Republic of Ireland, so by implication it considered that all the provisions of Article 33 were satisfied.

[25] There are, however, several recent authorities from England & Wales relating to near equivalent legislation which hold that 'person' means natural person and does not include a body corporate or other institution or other artificial person. Before considering this trilogy of English cases, I will make some brief observations concerning statutory interpretation of the phrase – "*the child is to live in the country concerned with a parent, guardian or other suitable person."*

Statutory interpretation of 'person'

[26] The interpretative part of the 1995 Order is silent on the definition of the word 'person.'

[27] Bennion, Bailey and Norbury on Statutory Interpretation (8th edition) at 19.8 states that

> *"Acts are normally drafted on the basis that 'person' covers companies and other bodies of persons as well as natural persons" and the provision of the Interpretation Acts makes it unnecessary to mention corporations of other bodies. However this would not apply if the contrary intention appears, whether expressly or by implication."*

[28] The provision referred to is section 37(1) of the Interpretation Act (NI) 1954

which provides that:

> *"Words in an enactment importing … persons or male persons shall include male and female persons, corporations (whether aggregate or sole) and incorporated bodies of persons."*

[29] It is often said that context is everything. Stirling LJ in *Hirst v West Riding Union Banking Company* [1901] 2 KB 560 at 563 was of the view that

> *"whether the word 'person' … includes a corporation must be judged of by considering the context and the object of the legislation."*

There may well be a rebuttable presumption that when a statute refers to a 'person' it includes both a natural person and an artificial person. Lord Blackburn in *Pharmaceutical Society v London and Provincial Supply Association* (1880) 5 App Cas 857 said as much, although with some hesitation:

> *"I think that in an Act of Parliament unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include [a natural person, a human being, and an artificial person, a corporation]."*

[30] This is confirmed in the approach of the Judicial Committee of the Privy Council in *Royal Mail Steam Packet Company v Braham* (1877) 2 App Cas 381, which at 386 stated –

> *"Person" when used in a legal sense, is an apt word to describe a corporation as well as a natural person. Nothing in the context nor in the object of the enactment in question indicates an intention to limit its application to the latter.*

[31] *Ejusdem generis* is a canon of construction which could be utilised in this case, as it emphasises the importance of context. Wide words, in this case "other suitable person", when associated with more limited words, in this case "parent, or guardian", are taken to be restricted by implication to matters of the same limited character, but the court is mindful of Lord Scarman's warning in *Quazi v Quazi* [1980] AC 744 at 824:

> *"If the legislative purpose of a statute is such that a statutory series should be read ejusdem generis so be it; the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule, like many other rules of statutory interpretation is a useful servant but a bad master."*

[32] Apart from the specific consideration of the meaning of 'person', it is also important to consider what the legislature intended to mean by the inclusion of the

words 'living with.' This would also put some context to the overall interpretation of what is 'a person.' Vaisey J in *re Paskins' Will Trusts* [1948] 2 All ER 156 when interpreting a provision in a will which required a person to be "living with my sister at the time of her death" said that it implied a personal association with the sister and not merely residing in proximity with someone without personal contact. In effect, 'living with' implies a relationship between two or more natural persons.

[33] Therefore, if the wider definition of 'person' is preferred, that will in turn pose the question – can a child live with an artificial person, as opposed to living in an institution or living under the care of an institution? The use of the term 'live with' does provide a strong contextual tool with which to interpret the phrase.

The English authorities

[34] The English cases were dealing with the provisions of the Children Act 1989 ("the 1989 Act") which has near identical provisions. The only difference is that the English provision refers to "*live with … a parent, guardian, special guardian or other person*" (see paragraph 19 of Schedule 2 to the 1989 Act).

[35] In each of the three cases there is a common theme in that the English local authorities were attempting to place a looked after child in an institution in Scotland as there was no suitable institution in England. The cases had therefore parallels with both *Re M* and this case.

[36] The first case was a decision of Munby LJ in *Re X (A child)* [2016] EWHC 2271. The primary issue was whether an English court could make a secure accommodation order in respect of a child if the child was to be placed in Scotland, but there was a subsidiary issue relating to the interpretation of 'person.'

[37] Munby LJ stated his conclusion on the issue at [29]:

> *"It is difficult to see how the requirements of paragraph 19 of Schedule 2 to the 1989 Act will ever be satisfied where the child is to be sent out of the jurisdiction for the purpose of being placed in secure accommodation; and in the present cases they certainly are not. In the first place, unless dispensed with in accordance with paragraph 19(5), the consent of every person with parental responsibility is required. Secondly, unless dispensed with in accordance with paragraph 19(4), the consent of the child is required, and the child's consent cannot be dispensed with unless "the court is satisfied that the child does not have sufficient understanding to give or withhold his consent," and even then only if the child is to live "with a parent, guardian, special guardian, or other suitable person" – wording which, in my judgment, and … cannot include being placed in an institution such as a secure accommodation unit. "Person" here does not, in my judgment, extend to a corporate*

or other organisation or body. It means a natural person."

[38] The next case was a decision of the Court of Appeal in *re C (A child)* [2019] EWCA Civ 1714, which involved a placement in a residential unit in Scotland. The court, comprising of Floyd, King and Moylan LJJ applied *re X (A child)*, stating at [40]:

> *"Paragraph 19(4) applies only if the child is "to live … with a parent, guardian, special guardian or other suitable person." As Floyd LJ observed during the hearing it is not easy to see how a child could live with a company or an unincorporated "body of persons." For example, while a child can live in a residential home which might be owned by a company it would be difficult to argue that, as a result, the child was living with a person. Further, when this is added to the fact that the words "other suitable person" follow a list comprising natural persons, I do not consider it is possible to interpret this provision as meaning other than that it is confined, as decided by Sir James Munby P, to natural persons. Whilst I recognise that there might well be a practical need, as submitted by Mr Howling, this cannot counter the factors referred to above and such a need alone would not provide a legitimate basis for the proposed statutory interpretation."*

[39] Finally, Cobb J dealt with another proposed transfer to a residential home in Scotland in *re H* [2020] EWHC 2780. It was regarded as an intended short-term or temporary placement and Cobb J was able to avoid grappling with this problem, although made some pertinent observations at [43] about the matter after reviewing both *Re X* and *Re C:*

> *"The result of this is that when a child does not consent "to living in that country", and regardless of whether the child does or does not have sufficient understanding, the court is not permitted to approve their placement outside England and Wales other than with a natural person."*

Consideration

[40] The primary submission of Mr Magee QC for the Trust is that there are two lines of parallel authority, the expressed opinion of the English courts and the implied opinion of the Northern Irish courts, and therefore I am bound by the Northern Ireland authority. Although this argument is superficially attractive, I do not consider that there are two lines of authority. The decision of the Northern Ireland Court of Appeal does not mention the issue and it has not presented a reasoned opinion. The reality is that there is only one line of authority and it flows from the English courts.

[41] As an alternative Mr Magee QC suggests that I am not bound by that authority and am free to interpret Article 33(4) of the 1995 Order in such a manner as I consider appropriate.

[42] English precedent has always been regarded as highly persuasive in this jurisdiction, although there is no obligation to follow it (see for example *Re Connelly's application* [2011] NIQB 62). However, when the precedent has been established by what is a formidable quintet of judges of the standing of Munby, King, Floyd and Moylan LLJ and Cobb J, and when they have interpreted identical, or near-identical, legislation, this court should be slow to depart from it, unless there are compelling reasons.

[43] I have been urged to approach the task of interpretation in a purposive or teleological manner.

[44] The purpose of the Article is to permit a looked after child to live on a permanent or semi-permanent basis outside the jurisdiction. The legislature considered the child's consent to be an over-riding factor. Not only will the approval require an assessment by the court that it was in the best interests of the child (which must include a consideration of the child's ascertainable wishes and feelings – see Article 3(3)(a)) but it will also require a consent from the parents and a consent from the child. The parents' consent can be over-ridden on an objective basis, but the child's cannot, as this is a purely subjective decision for the child to make. Should the child be incapable of giving a consent, then the approval can only be given should he be living with a suitable person.

[45] The English authorities rely primarily on the *ejusdem generis* rule and the interpretation of the phrase 'living with.'

[46] As for *ejusdem generis,* the stated types of persons are parents and guardians (with special guardians in England). Moylan LJ in *Re C* considered that this created a *genus* of natural persons. It is however equally persuasive to view the *genus* as people who are capable of exercising parental responsibility. When the legislature in England & Wales created the role of the special guardian by the Adoption and Children Act 2002 ("the 2002 Act"), it did so primarily to permit long-term foster parents to exercise parental responsibility as special guardians. The 2002 Act inserted the special guardian into the *genus*, although as a natural person, following the argument in *Re C,*that would not have been necessary as 'other person' would have been sufficient to include a special guardian.

[47] Should the *genus* include people who are capable of exercising parental responsibility then that could include an artificial person, such as a Trust or similar body in another jurisdiction. The *genus* therefore could extend to include both natural and artificial persons. The one difficulty with that interpretation is that the *genus* would then not include a foster parent as a foster parent does not exercise parental responsibility. One of the primary reasons for Article 33 of the 1995 Order

was to cater for foster parents re-locating out of the jurisdiction and taking a looked after child with them.

[48] With this in mind, a further extension of the *genus* could then be considered to include those persons, natural and artificial, who have a direct responsibility for the care of a child, either by exercising his, her, or its parental responsibility or exercising delegated responsibility (in a practical as opposed to a legal sense) from such a person. That may allow for an inclusion of the residential unit in the Republic of Ireland as it is, in a practical sense, exercising responsibility for the care of OM, being responsibilities delegated to them by the Trust. That however only takes the argument so far as it ignores the use of the term 'lives with.' As explained above it is very difficult to envisage an interpretation of a child living with an institution. That is the real context of this provision. It grants to the court an ability to deal with a situation when a child is unable to consent, provided the child is living with a person who has care responsibilities for the child.

[49] The *ejusdem generis* rule may not be as conclusive as has been suggested in *Re C* however the use of the term 'lives with' puts a context on Article 33(4) of the 1995 Order, and in all the circumstances, despite the eloquence of counsel, I am unpersuaded that the quintet of learned judges from England and Wales have been incorrect in their overall interpretation of this legislation. The court is therefore not in a position to approve OM living in the Republic of Ireland under the provisions of Article 33 of the 1995 Order

Inherent jurisdiction

[50] Mr Magee QC has also asked me to consider exercising the inherent *parens patriae* jurisdiction of the court, following the approach taken by Munby P in *re X*, and Cobb J in *re H*.

[51] I dealt with the retention of the inherent jurisdiction of the court after the 1995 Order in *Father v Mother* [2018] NIFam 10. In summary, I referred to the judgment of Waite LJ *re T (a minor)* [1993] 4 All ER 518 and the retention of the inherent jurisdiction when the 1989 Act/1995 Order provisions were unable to secure the best interests of the child.

[52] The inherent jurisdiction has been severely restricted in the context of public law proceedings by Article 173 of the 1995 Order. This provides as follows:

> "*(1) The court shall not exercise its inherent jurisdiction with respect to children –*
>
> *(a) so as to require a child to be placed in the care, or put under the supervision, of a Board or Health and Social Services trust;*
>
> *(b) so as to require a child to be accommodated by or on behalf*

of a Board or Health and Social Services trust;

(c) so as to make a child who is the subject of a care order a ward of court; or

(d) for the purpose of conferring on any Board or Health and Social Services trust power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(2) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by an authority unless the authority has obtained the leave of the court.

(3) The court may only grant leave if it is satisfied that –

(a) the result which the authority wishes to achieve could not be achieved through the making of any order of a kind to which paragraph (4) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(4) This paragraph applies to any order –

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

(b) which the authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

(5) In this Article "the court" means the High Court."

[53] But the courts had always recognised that the jurisdiction had to be considered by taking into account any statutory regime that was available. Lord Wilberforce in *A v Liverpool City Council* [1982] AC 363 at 373(c) summarised the position in the following terms:

> *"… the inherent jurisdiction of the High Court is not taken away. Any child, whether under care or not, may be made a ward of court… But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend…. **The***

> ***court's general inherent power is always available to fill gaps or to supplement the powers of the local authority.***" (my emphasis)

[54] Munby LJ in *Re X* referred to his earlier judgment in *Re PS* [2007] EWHC 623 where he stated at [16]:

> *"It is in my judgment quite clear that a judge exercising the inherent jurisdiction of the court (whether the inherent jurisdiction of the court with respect to children or the inherent jurisdiction with respect to incapacitated or vulnerable adults) has power to direct that the child or adult in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit."*

[55] In *Re X* the problem was the secure accommodation placement, but whether the accommodation was secure or otherwise did not impact on the use by the court of its inherent power.

[56] At [34] - [37] Munby LJ set out what he considered to be were jurisdictional obstacles:

> *"[34]. It is clear that there are two jurisdictional obstacles that have to be overcome if the inherent jurisdiction of the High Court is to be used in the way proposed here.*
>
> *[35] First, the local authority requires permission from the court – that is, the High Court; the family court cannot exercise the inherent jurisdiction – in accordance with section 100 of the 1989 Act.*
>
> *[36] Neither of the requirements for leave referred to in sub-section (4) will present any obstacle in this kind of case. The application for an order under the inherent jurisdiction is made precisely because section 25 (or section 119, as the case may be) does not apply…*
>
> *[37] The other potential jurisdictional obstacle arises from the well-known and long-established principle that the exercise of the prerogative – and the inherent jurisdiction is an exercise of the prerogative, albeit the prerogative vested in the judges rather in Ministers – is pro tanto ousted by any relevant statutory scheme."*

[57] In the subsequent paragraphs, Munby LJ examined in much detail the existing lines of authority concerning the tension between the exercise of the inherent power and any statutory scheme in place, concluding at [45] – [47] that the

availability of the inherent jurisdiction in the matter he was dealing with fell comfortably within a proper application of the principle expounded by Lord Dunedin in *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 at 526 that:

> "*if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules.*"

In *Re X* the legislation did not 'cover the whole ground', as it was not a comprehensive statutory scheme intended to be exhaustive.

[58] This analysis enabled Munby LJ to conclude at [47] that not only could a judge in exercise of the inherent jurisdiction make an order directing the placement of a child in secure accommodation in Scotland but also a judge in exercise of the inherent jurisdiction could make an order directing the placement of a child in non-secure accommodation in Scotland.

[59] Cobb J was able to approve a transfer to Scotland without the need to engage paragraph 19 of Schedule 2 to the 1989 Act. However, he expressed the opinion in *Re H* at [52] that:

> *"If I am wrong in the analysis set out above, and if there is in fact no statutory route to achieve the result which the Local Authority wishes to achieve, I can confirm that I would have had no hesitation in giving leave to the Local Authority to invoke the inherent jurisdiction to achieve the result contended for."*

[60] I am therefore satisfied that this court is able to exercise its inherent jurisdiction. This case is identical to the second category of case identified by Munby LJ (see [58] above). It would not be incompatible with the 1995 Order. In fact, applying Article 3(1)(a) of the 1995 Order the court when considering OM's upbringing is required to treat his welfare as its paramount consideration. Lord Dyson in *R v Secretary of State for Work and Pensions ex p The Child Poverty Action Group* [2010] UKSC 54, at [34] stated that:

> "*The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by co-exist with it.*"

The suggested inherent remedy lies in perfect co-existence with the 1995 Order as the placement of OM in the institution in the Republic of Ireland is clearly in his best interests and if not approved he will be placed in a situation where he may well suffer significant harm because of the non-availability of a suitable placement in Northern Ireland.

Order

[61] I therefore intend to exercise the inherent jurisdiction of the court. I will treat the Trust's application under Article 33 as an application for leave to invoke that jurisdiction.

[62] I grant leave as I am satisfied that the provisions of Article 173(3) apply, and I grant permission to the Trust to remove OM from the jurisdiction of Northern Ireland to permit him to reside in the institution in the Republic of Ireland.

Concluding comments

[63] I appreciate that this decision will impact on existing practice. If a child has sufficient understanding and is consenting, then Article 33 of the 1995 Order can continue to be used. Gillen LJ dealt with the issue of how the sufficiency of a child's understanding should be approached at [30] – [45] in *Re M* concluding that it has parallels with the concept of *Gillick* competence (see *Gillick v West Norfolk and Wisbech Authority* [1986] AC 112).

[64] In the event of a child not consenting, or not having sufficient understanding to give or withhold consent, applications will need be to be made to the High Court as the only family court capable of exercising the inherent jurisdiction. Such applications would not be 'specified proceedings 'as defined by the Article 60 of the 1995 Order. As this will prevent the appointment of a GAL it may be necessary to involve the Official Solicitor to represent the interests of the child.

[65] One further complication is that the test for Article 33 of the 1995 Order applications is the 'best interests of the child' test. The test for exercising the inherent jurisdiction, as circumscribed by Article 173 of the 1995 Order, is that the child would be likely to suffer significant harm without the making of the order. As the child would already be a looked after child in the care of a Trust that may present a difficulty for a Trust.

[66] Article 52(7)(b) of the 1995 Order does not however prevent a Trust from removing a child outside the United Kingdom for a period of up to one month. This does not require court approval, or consent from either the child or the parents. Cobb J in *Re H* summarised the position at [46]:

> *"In my judgment, this statutory provision is engaged only when an English local authority is making arrangements, as the statute specifically provides, for the child to 'live' abroad; that is to say, for a proposed long-term or permanent arrangement for a child's future outside of the jurisdiction. It is not engaged in my judgment where the proposal of the English local authority is to place a child temporarily, or in the interim or short term, outside of England and Wales."*

[67] Ultimately, legislative change may be considered to be the preferred option,

but that will be a matter for the Health and Social Care Trusts and the Department of Health to consider.

[68] Whatever approach is taken it is highly desirable that Trusts do not retrospectively apply for leave to approve a placement that is already in operation. On this point I will leave the final word with Moylan LJ (*Re C* at [39]):

> *"I would first record that, as the Local Authority recognised, C should not have been placed in Scotland without the Local Authority having first sought and obtained the court's approval to the proposed placement. This was not merely a technical failing; it was a substantive failing. I would expect this Local Authority and, indeed, all Local Authorities to be aware of this obligation."*