THE COURT OF APPEAL
Civil

Appeal Number: 2022/35

Birmingham P.
Whelan J.
Binchy J.

Neutral Citation Number [2022] IECA 297

IN THE MATTER OF THE PROTECTION OF CHILDREN (HAGUE CONVENTION) ACT 2000

AND IN THE MATTER OF THE MINORS X. and Y.

BETWEEN/

A Q

APPELLANT

- AND –

K J

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 20th day of December 2022

Introduction

1. This is an appeal against the judgment and orders of Mr. Justice Jordan made in the High Court on the 17th December, 2021 and perfected on the 21st January, 2022 in respect of High Court proceedings record no. 2021/19HLC wherein the appellant (hereinafter "the Father") sought an order pursuant to Art. 11 of the Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (the 1996 Hague

Convention) or otherwise directing the immediate return of the two named children of the parties to the jurisdiction of the Court of Pakistan and/or putting in place immediate measures to ensure the said children's safe return to Pakistan. Judge Jordan in his judgment of 17th December, 2021 refused the said application for recognition and enforcement of the Pakistan Order. He otherwise made an order in a separate application 2021/127M, that all issues of custody and access (having due regard to an order made by O'Hanlon J. in the High Court on the 26th May, 2017) be remitted to the Circuit Court to be further prosecuted before a judge assigned to the relevant circuit for the determination as part of or alongside the respondent-mother's divorce proceedings bearing record no. F284/2019 pending before the said Circuit Court. A stay on the said order was refused.

Relevant background

2. The father and mother were married to one another in Pakistan in 2001. They lived in Ireland between 2001 and 2014. Three children were born of the marriage. The oldest child is now of full age, the younger children are aged 17½ and 14½ approximately.

3. The family moved to Pakistan in the summer of 2014 and the wife and children continued to reside there for a period of approximately 15 months. Difference arose between the parties during that time and the father obtained an order restraining the mother from removing the children from the jurisdiction of the Courts of Pakistan pending further hearing of proceedings in that country. The mother separately invoked the jurisdiction of the Guardian Court in [city] Pakistan and obtained an order on the 4th May, 2015 restraining the father from removing the children from her custody pending further order.

4. Without the knowledge or consent of the father, the mother removed the three children from the jurisdiction of the Courts of Pakistan and returned to Ireland in early November 2015. They have continued to reside in this jurisdiction ever since.

5. The father instituted proceedings Record No. 2015/61M in November 2015 seeking the summary return of the children to Pakistan and invoking the provisions of the 1996 Hague Convention together with the Guardianship of Infants Act, 1964. In pursuing the said proceedings under the Hague Convention, 1996 and the inherent jurisdiction of the High Court for the purposes of seeking the summary return of the children to the jurisdiction of the Courts of Pakistan, the husband relied in particular on an order he had obtained from the Guardian Court in his home city in Pakistan on the 2nd May, 2015 which had restrained the wife from removing the children from Pakistan.

6. The said proceedings were ultimately disposed of by an Order of the High Court made on the 26th May, 2017 (O'Hanlon J.) wherein the court refused to make an order returning the three minors to Pakistan. The father appealed to this court. On the 12th March, 2018 this court dismissed the said appeal. The said order was perfected on the 13th March, 2018. The father thereafter sought leave to appeal to the Supreme Court pursuant to Art. 34.5.3 of the Constitution. The said application was refused by the Supreme Court by a Determination date 15th May, 2018.

Events between the 15th May, 2018 and the 7th September, 2021

7. Following the said refusal of the Supreme Court to grant leave to appeal, all three children continued to reside with the mother within the jurisdiction of the Irish courts. The father resided abroad, including in Pakistan. On the 7th September, 2021 approximately three years and four months after the 2015 Child Abduction proceedings had concluded, the father commenced the within proceedings Record No. 2021/19HLC in the High Court, again invoking the 1996 Hague Convention and the Protection of Children (Hague Convention) Act of 2000. Same appears to have been served on the wife in or about the 28th September, 2021. Paragraphs 1 – 8 of the Indorsement of Claim in the Special Summons rehearses the

history of the relationship between the parties and the 2015 Child Abduction proceedings. At para. 9 of the Indorsement of Claim it is stated: -

> "*The Custody granted to the mother in the Pakistani Court has been cancelled since 14.1.19. The custody has been granted to the father since 8.7.19 with schedule of access to non-custodian parent. It was Pakistani court who had the jurisdiction as accepted in the Court of Appeal to decide custody and jurisdiction of Ireland was for emergency reasons only. ... There is a pending case of Guardianship lodged by father in the same court since 30.6.2015. The respondent's lawyer in Pakistan did not give any reasonable statement there and kept lingering the case and eventually disappeared from the case. Eventually custody was granted to the father. ... There has been no mention in Pakistani court by the respondent that she was not aware of the restraining order or her lawyer did not inform or she has initiated any inquiry against the lawyer for not informing her about restraining order. ... In Pakistani courts, comity of courts is followed strictly and abduction cases are decided on urgent basis. In principal (sic) any court seized (sic) first, has right to make the decision."*

8. It appears therefore that the father invokes the 1996 Hague Convention in light of two distinct litigation events. Firstly, that he has obtained an order varying the orders previously obtained by the mother on the 4th May, 2015 from the Guardian Court in [city], Pakistan. Secondly, it is separately asserted that the father obtained an order on 8th July, 2019 granting him sole custody of the children from the courts in Pakistan, apparently within proceedings instituted by him in 2015 in Pakistan. In respect of recognition and enforcement of either order, the following observations can be made:

9. Chapter II of the 1996 Hague Convention governs jurisdiction. The said Convention can only be invoked by the father for the recognition and enforcement of these Orders by

the Irish courts provided it is established that at the date of institution of the proceedings in September 2021 seeking the enforcement the children were habitually resident in Pakistan.

> "CHAPTER II — JURISDICTION
>
> *Article 5*
>
> *1. The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.*
>
> *2. Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."*

The trial judge found that the minor children were habitually and ordinarily resident in Ireland. That crucial finding has not been specifically appealed against by the father. If that finding is correct then it is the courts and authorities in Ireland, the "new habitual residence", that have jurisdiction to make orders in relation to welfare, custody, guardianship and access.

10. Article 7 of the 1996 Hague Convention provides:

> *"1. In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and*
>
> *a each person, institution or other body having rights of custody has acquiesced in the removal or retention; or*
>
> *b the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had*

knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

2. The removal or the retention of a child is to be considered wrongful where—

…

3. So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child."

11. The Order sought to be enforced by the father was obtained in Pakistan on 8th July, 2019. The proceedings requesting the High Court to order the return of the children to Pakistan were only instituted by him in September 2021 – about 2 years and 2 months after the orders were made. No explanation for this significant delay has been forthcoming. There is no suggestion that the father was not aware of the presence of the children in Ireland as of 8th July, 2019. No application for recognition and enforcement was brought within the year following the making of the Order. If the children are now habitually resident in Ireland, as the High Court judgment under appeal held, then Pakistan no longer keeps its jurisdiction to make orders pertaining to their welfare, in light of Article 7(1).

12. Given the delay of over one year from 8th July, 2019 before an application by the father to enforce the Pakistan Order was brought and that the children have resided in Ireland for a period of at least one year after 8th July, 2019, if it is shown that the children are settled in their new environment in Ireland there is a valid jurisdictional basis to refuse to recognise and enforce the said orders.

13. Apart from the jurisdictional impediments to recognition and enforcement of orders arising under the 1996 Hague Convention, Chapter II Articles 5 or 7 above, Chapter IV, Article 23 provides discretionary bases for non-recognition, several of which are engaged in light of the facts in the instant case;

CHAPTER IV — RECOGNITION AND ENFORCEMENT

Article 23

> *"1. The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.*
>
> *2. Recognition may however be refused—*
>
> *a if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;*
>
> *b if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;*
>
> *c on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;*
>
> *d if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;*
>
> *e if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;*
>
> *f if the procedure provided in Article 33 has not been complied with."*

Some General Observations

11. Where the 1996 Hague Convention is invoked, the burden rests with the applicant to prove jurisdiction under Chapter II and the applicability of the said Convention, as well as compliance with the necessary procedural steps which are a prerequisite to recognition and enforcement pursuant to Chapter IV. There is no evidence that Pakistan has ever ratified the 1996 Hague Convention. There can be no question of "*urgency*" arising under the 1996 Hague Convention or otherwise given that the orders sought to be enforced were obtained by the father over two years prior to institution of these proceedings. There is no clarity as to the precise manner in which the father procured the 8th July, 2019 order. In particular, it is not clear whether any relevant application or proceedings were served on the mother in Ireland in sufficient time to enable her to retain representation and engage with the litigation. The exhibits do not identify what specific and current evidence was before the court in Pakistan concerning the welfare and circumstances of the children as of July 2019. The views of the children were not sought, considered or taken into account.

12. It is further unclear as to precisely when after 8th July, 2019 the father first served certified copies of either the said orders on the mother apprising her either of the alleged variation or "*cancellation*" of orders she had previously obtained in Pakistan in 2015 or of orders of 8th July, 2019 said to have conferred custody on the father. It's not clear whether same were served in sufficient time to enable the mother to bring any appeal in Pakistan she might have wished to have brought pertaining to same.

13. It appears that although the father obtained orders on the 8th July, 2019 in relation to custody, no step was taken by him to effect service expeditiously on the wife in Ireland nor was any further step taken to enforce the said orders within a year of their making or until the institution of the within proceedings as aforesaid on the 7th September, 2021. No cogent

explanation has been forthcoming as to why the father chose not to seek to enforce the orders he had procured in Pakistan on the 8th July, 2019 for two years and two months.

14. It appears that the wife's Family Law Civil Bill seeking a divorce was served on the father in or about September 2020. This appears to be the precipitating event that led to institution of the within proceedings seeking to enforce the Pakistan Order of 8 July 2019. The father in the Special Indorsement of Claim asserts that the courts in Pakistan have jurisdiction and that this was not contested by the mother. He also makes the extraordinary assertion that; "*at this stage legally nobody has custody of the children*."

15. At para. 11 of the Indorsement of Claim in the father's summons 2021/19HLC he states:

> "*Now during contesting for jurisdiction on the 15.6. 21 in Circuit Court …, it has been accepted by mother that they have no dispute that Only Pakistani Court has Jurisdiction for matters related to parental responsibility in High Court Dublin has only retained Jurisdiction for access of the children*."

However, that substantially misrepresents the import of the evidence that was put before the High Court, including the application brought by the mother in proceedings 2021/127M wherein the Special Summons issued on the 26th November, 2021. The procedural approach of the mother stemmed from the repeated assertions of the father that issues of custody and access had been retained by way of exclusive seisin in the High Court since May 2017 as her written submissions to this court make clear.

The decision of Jordan J. with regard to 1996 Hague Convention application

16. The application for recognition and enforcement of the Pakistan order of 8th July, 2019 is dealt with primarily at paras. 4-13 (inclusive) of the judgment of 17th December, 2021. The trial judge determined at para. 6, *inter alia*, that the children are habitually resident and ordinarily resident in this jurisdiction:

> *"In that regard, there can be no ambiguity about their habitual residence nor can there be any ambiguity about their ordinary residence… Apart from the fourteen months which they spent in Pakistan their life has been in Ireland and that is where their life is at present – along with their mother in … ."*

The trial judge continued –

> *"On the affidavit evidence which is before the court and having regard to the documentation exhibited, there cannot be any ambiguity in relation to their ordinary residence or their habitual residence. There cannot be any contest in that regard."*

The father does not appear to have explicitly appealed against the finding that the children are habitually and ordinarily resident in Ireland.

Does the 1996 Hague Convention apply?

17. The trial judge rejected arguments advanced by the father that the children should be regarded as being present in Ireland on foot of some form of "*temporary*" residence by reason of the findings of the High Court, the Court of Appeal and the determination of the Supreme Court in the 2015 Hague Abduction prodeedings.

18. It appears clear that over the years from the 8th July, 2019 to the 7th September, 2021, years during which the oldest child attained the age of majority, the father took no step to seek the return of the children to Pakistan. It has never been open to the father to invoke the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Child Abduction Convention) in circumstances where albeit Pakistan has acceded to the said Convention on the 1st March, 2017, that accession has not yet been accepted by the EU and accordingly, pursuant to the principles of International law, the Hague Convention on Child Abduction 1980 has not entered into force between Pakistan and Ireland/the EU as of the date of institution of the within proceedings by the father in September 2021. Furthermore, Pakistan is not a signatory to the 1996 Hague Convention.

That being so, the 1996 Convention does not have the force of law in Pakistan and cannot be invoked by the appellant for the purposes of the recognition or enforcement of orders which appear to have been obtained on the 8th July, 2019 in Pakistan pertaining to the children.

Habitual residence and delay

19. It is clear from his judgment that Jordan J. had concerns about the passage of time and delays since the conclusion of the 2015 Child Abduction in May 2018.

20. With regard to the trial judge's determination that the two younger children are habitually resident within the jurisdiction of the courts of Ireland and in particular were so when the within proceedings were instituted, it is clear that neither child has been present in Pakistan since in or about November of 2015.

21. Habitual residence and/or ordinary residence is a question of the application of legal principles to a set of facts rather than a purely legal concept *per se* such as domicile. Generally, at EU level the ECJ has characterised habitual residence as according with *"…the place which reflects some degree of integration by the child in a social and family environment*" in the country concerned. Habitual residence must be decided in accordance with the laws of the requested state.

Integration

22. The children have lived their entire lives in this jurisdiction save the period of 15 months in 2014/2015 where they resided in Pakistan at a time when the marriage between the parents was breaking down. The older daughter will reach full age in March 2023. She is a full-time student at a third level institution and the younger child is also in full-time education in this State. The children have continued to reside with their mother in the family home and their residence and the habitual pattern of their lives is not consistent with mere temporary presence within this State but rather has achieved a substantial degree of

permanence, integration and stability where they live in the society and under the care of their mother with Skype and other access from time to time to their father, which arrangement has obtained since the conclusion of the 2015 proceedings on the 15th May, 2018.

23. I am satisfied in light of the jurisprudence in this jurisdiction and at EU level, including Case C-497/10 PPU *Mercredi v Chaffe* ECLI:EU:C:2010:829, that the trial judge was correct in his determination that the children are habitually resident and ordinarily resident in this jurisdiction and the father has not advanced any evidence as would undermine that determination.

24. The trial judge was correct in concluding that the arguments of the father outlined at para. 8 of the judgment to the effect that the children were to be considered temporarily resident in this jurisdiction by reason of the findings and determinations of the High Court, this Court and the Supreme Court in the 2015 abduction proceedings was "incorrect".

> "*It is incorrect because there cannot be any ambiguity in terms of the ordinary residence of these two girls or their habitual residence*."

Matters did not stand still from May 2018. The evidence shows that the children's habitual residence had changed within the meaning of Article 5 of the 1996 Hague Convention and within the norms of private international law such that they were not habitually resident in Pakistan when the father instituted these proceedings in 2021 but had acquired a new habitual residence in Ireland which fact in and of itself deprives the court of jurisdiction to make the orders sought under the doctrine of the comity of courts.

Delay

25. Further, the degree of the delay on the part of the father from July 2019 to September 2021 is significant and is indicative of the father having acquiesced in the children's continued presence within this jurisdiction. The sustained failure of the father for over two

years from the 8th July, 2019 to take steps to enforce the orders he had secured in Pakistan is consistent with him having acquiesced in the continuing presence of the children in this jurisdiction for such a duration that assuming that their habitual residence was not in Ireland at the conclusion of the Child Abduction proceedings in May 2018, it thereafter changed over the ensuing years and they were demonstrably habitually resident in Ireland by the time the father instituted the within enforcement proceedings in September 2021.

26. This is particularly so in light of the facts in the instant case where the children had resided from birth to mid-2014 in this jurisdiction and were merely absent from the State for an overall period of approximately 15 months. Thus, the children's integration in Ireland was quite deep and well-established at the time the family originally departed to Pakistan. They continued to be in full-time education, resident in the family home and situate within this jurisdiction throughout the period of time from May 2018 to date. From May 2018 onward the process of reintegration of the children into Irish society continued. The exceptional length of the delays on the part of the father in taking any formal steps in Ireland by way of enforcement of the Order obtained in Pakistan in 2018 contributed to the comprehensive reintegration of the children and the clear re-establishment of their habitual residence in Ireland.

Consequence of children being habitually resident in Ireland

27. Once the children were found to be habitually resident/ordinarily resident in this jurisdiction then the laws of this State govern all issues of welfare including custody and access. The trial judge was correct in his analysis that the orders concerning welfare of the children procured by the appellant in Pakistan may be tendered in evidence by the father in the event that there is a dispute to be determined concerning access and/or custody of the children when the remitted High Court proceedings 2021/127M come to be heard alongside proceedings F284/2019.

Urgency

28. The contention that the father is entitled to invoke Art. 11 of the 1996 Hague Convention is not maintainable in circumstances where no urgency has been demonstrated. Indeed, very substantial delays have been occurred in seeking to enforce the said order since the date same was obtained in July 2019. Further, the father has not demonstrated that Art. 11 of the 1996 Hague Convention is engaged in circumstances of this case as outlined above.

Comity of Courts- inherent jurisdiction

29. The approach of the Irish courts to foreign orders concerning children made in non-convention countries is illustrated by the jurisprudence such as Costello J. in *Oxfordshire County Council v J.H. and V.H.* (High Court, Unreported, May 1988) where, following the making of an interim care order and prior to final orders being made, parents removed their children from England to this jurisdiction. In the course of his judgment Costello J. observed that he was concerned "*primarily with the welfare"* of the children in question. Costello J. observed:

> "*I also approached the case bearing in mind that the English Court has made an order taking these children into wardship and giving custody to the Local Authority. The fact that such an order has been made does not necessarily determine the matter, but the comity of courts is a powerful doctrine in a situation such as this. The courts in Ireland cannot ignore the fact that responsible courts in England have taken a certain course."*

30. The importance of the courts of the jurisdiction where children ordinarily reside making decisions concerning their welfare was emphasised by the Supreme Court in *Sanders v Mid-Western Health Board* (Supreme Court, Unreported, June 1987) where Finlay C.J. observed:

> *"As a general principle, subject to exceptions in the interests of justice, the comity of the court and the question of the welfare of the children requires or demands that disputes and matters affecting their custody should be determined by the court of the jurisdiction in which they ordinarily reside and in which they were intended to be brought up."* (Page 3 of Judgment)

31. Where the doctrine of the comity of courts has been invoked, the Superior Courts attach significance to delays on the part of a parent seeking to enforce an order procured abroad concerning custody. In the instant case, I reiterate that the key period of operative delay ultimately is between the 8th July, 2019 and the 7th September, 2021 - although questions might well be asked as to the reasons for the father's delays in applying for Orders in Pakistan between 15th May, 2018 and 8th July, 2019 in the first instance. Whatever the reasons, delays of the magnitude and duration disclosed in this case on the part of the father in taking any step to invoke the jurisdiction of the Irish courts to enforce a foreign order has contributed to the creation of circumstances and conditions that ultimately preclude the enforcement of the judgment or order in question under the comity of courts doctrine.

32. The Irish courts discourage delay in seeking to enforce orders concerning welfare of a child. An example is the case of *D.A.D. v P.J.D.* (High Court, Unreported, 1986) where Blayney J. declined to return a child to the jurisdiction of the courts of England and Wales in circumstances where the child had been brought to Ireland by a parent in breach of an English Court Order. There had been a delay in excess of one year by the mother in taking steps to enforce orders she had obtained from the English Courts directing the return of the child by the father. Blayney J. stated:

> *"The circumstances in which the infant happened to come within this jurisdiction do not alter the duty placed on the Court by Section 3 [of the 1964 Act], though*

obviously they may affect the view which the Court will take of what course of action will be most conducive to the welfare of the infant."

The court refused to direct the summary return of the child to England ordering instead that a welfare hearing be conducted in this jurisdiction and that there be "*a full investigation of every aspect of the case before a final Order can be made*" (page 12 of judgment).

Res judicata

33. It is not open to the father to now seek to reopen the 2015 Hague Child abduction proceedings which he unsuccessfully litigated to a Supreme Court determination concluding in May 2018. Such an approach amounts to an impermissible collateral attack on the orders made in the 2015 proceedings. Rather, the approach of the trial judge at para. 10 commends itself. He acknowledges that:

"…The order made in Pakistan may be tendered in evidence … in the event there is a dispute … but that is something that should be done in the proceedings in the Circuit Court. In those proceedings the Circuit Court will have the opportunity to consider the circumstances in which the court order in Pakistan was made in addition to considering the actual order made. It will have the opportunity to have regard for the fact that the order was made without a contesting in that the mother did not appear and defend the proceedings whether that was because she chose not to do so or for some other reason. It may also be part of the considerations of the judge dealing with the effect of and importance of the order made in Pakistan."

34. The approach of the trial judge was entirely correct. It will be open to the trial judge within the Circuit Court proceedings record No. F284/2019 and/or remitted proceedings 2021/127M to ascertain all the material facts and circumstances concerning this family and the welfare of the children. Further, the said court will have an opportunity to consider the totality of the family dynamic, including the older child of the family who is of full age but

a dependant being in full time education so that a comprehensive approach can be taken to the issues of welfare arising in this case. The courts here are validly seised of an application for divorce having due regard to s. 39 of the 1996 Family Law Divorce Act, as the trial judge conclusively determined.

Approach of Circuit Court

35. Since the children are habitually resident in Ireland, the Circuit Court is entitled to have regard to the Guardianship of Infants Act, 1964. section 3 as amended and further sections 31 and 32 thereof. In particular in assessing what weight is to be accorded to the Orders made in Pakistan 8th July 2019, the court can have regard as to whether the children were provided with an opportunity to be heard before the courts in Pakistan when orders were made concerning their welfare and in the event that they were not, whether same constitutes a violation of fundamental principles and procedure in this jurisdiction having due regard to Art. 42A of the Constitution. Further, the court can have regard to whether the mother was afforded a reasonable opportunity to be heard within the said proceedings and in the event that she was not, whether same infringed her rights in this jurisdiction. In its evaluation of the orders obtained by the father before the courts of Pakistan, it is open to the Circuit Court to evaluate same with due regard to the best interests of the children and to ascertain whether same were obtained in a manner consistent with or contrary to the public policy and laws in this State with regard to the determination of issues of welfare of children in the context of Art. 42A of the Constitution.

Objections of children

36. The trial judge, prior to reaching his conclusions and refusing the orders for return of the children as sought, consulted with and spoke to both minors who are adolescents. His approach accorded not alone with domestic law but with international norms including Article 12 of the U.N. Convention on the Rights of the Child, particularly in light of their

ages and maturity. It is evident that the views of the two children were strongly expressed and opposed the application. The trial judge's approach respected the procedural rights of both parents and children in accordance with Article 8 of the European Convention on Human Rights children and vindicated the children's rights pursuant to Art. 42A of the Constitution. He observed of the minors that they were *"... entitled to their views and the court is obliged to have regard and to give due weight to their views having regard to their age and their maturity."* (Para. 11)

37. The trial judge dismissed proceedings 2021/19HLC:

> *"They appear to me to be misconceived. They appear to me to be a collateral attack on the decision already made in the High Court and the Court of Appeal and I am entirely satisfied that forcing these children to return to live in Pakistan will be contrary to their best interests and inimical to their welfare. They want to stay in ..., they want to study in Ireland and that is understandable."*

38. The husband's application for the summary return of the three children to Pakistan was brought pursuant to Art. 11 of the Hague Convention of 1996 or in the alternative, pursuant to the inherent jurisdiction of the court. The husband further relied on s.12 of the Protection of Children Act (Hague Convention), 2000.

39. Article 38(4) of the 1980 Child Abduction Hague Convention provides that that Convention applies between an acceding country and such contracting States as will have declared their acceptance of the said accession.

40. Under the processes operated by the Hague Conference on Private International Law (HCCH), the EU must first accept Pakistan's accession to the 1980 Convention in order for it to enter into force between Pakistan and the EU Member States, including Ireland. EU Member States as such lack sovereign competence to otherwise individually accept Pakistan's accession.

41. The existence of the EU's exclusive competence in the matter of the acceptance of the accession of a third country to the 1980 Hague Convention on Child Abduction was confirmed by the Court of Justice of the European Union after having been consulted at the initiative of the European Commission on the issue. On the 14th October, 2014 in *Opinion 1/2013* the Court of Justice of the EU held that the exclusive competence of the European Union encompasses the acceptance of the accession of a third State to the 1980 Hague Convention on Child Abduction. By *Council Decision of the 6th July, 2021* the Member States of the EU were authorised to accept in the interest of the European Union the accession of Pakistan to the 1980 Hague Convention on Child Abduction. Accession is an ongoing process and the process of recognition of Pakistan's accession has not yet been concluded to by the EU.

Observations on Notice of Appeal

42. The Notice of Appeal purports to identify 33 distinct grounds of appeal. With regard to the "Introduction", in large measure it is backward looking and makes detailed reference to events that occurred from the date of institution of the proceedings by the appellant in 2015 up to the time of their conclusion before the Supreme Court in May 2018. This approach is replicated throughout the Notice of Appeal. Grounds which seek now to canvass a review of events, including the judicial review proceedings and the abduction proceedings, are not maintainable and do not amount to specific grounds identifying errors of law or legal principle or the mis-application of the relevant law to the facts by the trial judge in respect of the judgment and order of the 17th December, 2021.

43. The grounds of appeal are replete with allegations and assertions, including of "corruption" and other wrong-doing, directed towards a variety of individuals including lawyers and professionals, together with allegations of "misleading conduct" and "threats"

by lawyers and allegations of "gross corruption". It is not open to the appellant in the within appeal to seek to pursue issues, complaints or grievances which fall outside the ambit of these proceedings and in substance amount to an attempt to reopen the High Court abduction proceedings 2015/61M or seek to revisit the substance of same, the events pertaining to the trial of that action or the appeal therefrom to the Court of Appeal.

Ground 1 – Jurisdiction

44. I am satisfied for the reasons stated above that the appellant is mistaken in his assertion that the trial judge erred as alleged or that there had been a "*previously decided issue of jurisdiction in Ireland*" whereby "*Ireland has jurisdiction only for access of children only…".* The selective excerpt from the High Court Transcript of the 26th May, 2017 referred to at, *inter alia,* Ground 1 derived from a misunderstanding by the appellant of the law and of the facts and of the significance of the events that took place, including that "*liberty to apply*" was granted in relation to access in the context of the 2015 child abduction proceedings for the purposes of convenience. Further, the order of 26 May 2017 did not preclude the mother from either instituting the divorce proceedings F284/2019 or custody proceedings, record no. High Court 2021/127M, which is the subject of a separate judgment herein. Insofar as the appellant seeks to invoke the 1996 Hague Convention, he has failed to establish that same is either applicable or that he is entitled to invoke same on any basis. No evidence was put before the High Court that Pakistan has ratified the 1996 Hague Convention. The appellant did not at any time demonstrate that he was entitled to invoke the provisions of the 1996 Hague Convention in connection with the recognition and enforcement of the orders procured on the 8th July, 2019 in Pakistan. In the context of the doctrine of the comity of courts, the clear finding that the two adolescent children were at all material times habitually resident and ordinarily resident within the jurisdiction of the courts of Ireland accords with the facts and the evidence. This is a finding of the High Court

not appealed against by the appellant. These were valid jurisdictional bases which entitled the trial judge to refuse to make the orders for return sought.

Ground 2

45. The appellant contends that the High Court had:

> *"…erred in ignoring the role of mother and lawyer and deteriorated welfare of the children, and not informing the father."*

He states, *inter alia*:

> *"The result of the original case could have been different if I had the information about child welfare in time. By the lawyer or mother. When I asked the lawyer while giving consent for a mental health assessment, solicitor lied, misled and threatened."*

In large measure the appellant is seeking to re-open the original 2015/61M Child Abduction proceedings once more. The said proceedings concluded in May 2018 and all appeals are now at an end. The assertions of "*irregularities*", "*corrupt lawyers*" and "*soft feeling of children welfare*" are addressed to historic events and do not engage with any specific statement or determination within the judgment of 17th December, 2021 under appeal. A Notice of Appeal is not to be treated as an instrument for the ventilation of invective or personal grievances without restraint or the making of serious allegations against a variety of named individuals. Whilst the appellant quite correctly asserts his rights as a guardian to decide about "*habitual residence, religion, culture and school of children …*", it must be borne in mind that the mother is also a guardian of the children. The parents are joint guardians of the children pursuant to Irish law. Having due regard to the determination of the High Court on 17th December, 2021, all issues pertaining to guardianship and welfare of the children fall to be determined now by the Circuit Court in proceedings F284/2019 and remitted 2021/127M, within the circuit where the wife has instituted proceedings and where she resides with the children of the marriage.

Ground 3. "The judge erred in obtaining and using impressible evidence from the children on the phone against the consent of father."

46. This appears to take issue with the approach of the trial judge in canvassing of the views of the children. The appellant is correct that "*views are one out of many factors to be considered for the welfare as section 32*". However, the trial judge was entitled - and in light of his finding that they were habitually resident in this state – obliged, having due regard to the ages and degree of maturity of the children at the date of the hearing before the High Court, namely the older child was 16 years and 9 months, the younger child 13 years and 10 months, to ascertain and give due weight to their views. I am satisfied that the trial judge correctly discharged his obligations and vindicated the children's rights both under domestic and international law in the approach he adopted to ascertain and according appropriate weight to the views of the children.

47. The various assertions with regard to welfare and concerns pertaining to "*aspects of deteriorated welfare*" articulated throughout the Notice of Appeal are matters which fall to be determined by the trial judge in the Circuit Court in the remitted pending proceedings 2021/127M. It is open to the appellant to adduce relevant and necessary evidence including expert evidence regarding his concerns pertaining to welfare. However, the issues of welfare can only be determined in relation to two younger children since it is noteworthy that the older child is aged 20 years and 8 months approximately and is not subject to the provisions of the Guardianship of Infants Act,1964 as amended.

Ground 4

48. This ground contends that the trial judge erred "*in ignoring the evidence by the mother in the Circuit Court that Ireland only has jurisdiction for Access*." I am satisfied that the matter was amply and correctly analysed by the trial judge at, *inter alia*, para. 14 of his judgment. He correctly clarified the position regarding the order made by O'Hanlon J. on

the 26th May, 2017 in proceedings 2015/No. 61M insofar as it pertained to access and the practical implications arising from the subsequent conclusion of the child abduction proceedings in May 2018, the retirement of the High Court judge. and the institution by the mother of proceedings by way of special summons in November 2021. The determination of the trial judge was clear and unambiguous and issues of custody and welfare of the minor children remains to be determined before the relevant Circuit Court. This ground of appeal is not made out.

Ground 5 – "The Judge erred … in changing or not clearly stating the reasons given by the mother about Court case in Pakistan and not recognising the order."

49. It was incumbent on the appellant, as the moving party seeking the recognition and enforcement of an order obtained in Pakistan on the 8th July, 2019 pertaining to the children, to demonstrate that the said order is valid and enforceable either pursuant to the 1996 Hague Convention and/or the doctrine of comity of courts, as the case may be. Factors of relevance in that regard that might prudently have been addressed by the appellant before the High Court but were not include the following:

(a) The delays between the conclusion of the proceedings before the Supreme Court in May 2018 and the obtaining of the order sought to be enforced 14 months later on the 8th July, 2019. That delay represents an appreciable period of time in the lives of adolescents.

(b) The said delay was further compounded and exacerbated by the additional unexplained delays for a further two years between the date of obtaining the said order on 8th July 2019 and submitting the matter to the High Court in Ireland seeking recognition and enforcement which appears to have occurred on or about the 1st July, 2021.

(c) This amounted to an aggregate of delay of over three years from the conclusion of the abduction proceedings before the Supreme Court and approximately two years from the obtaining of the orders in [city] Pakistan. In the course of that time, the son of the parties attained full age in March 2020 and resides and studies in Ireland.

50. Throughout all this time the children continued to reside in Ireland with the mother in the family home and such residence does involve a significant degree of permanence. Apart from the period of 15 months spent in Pakistan between the summer of 2014 and beginning of November 2015, the children were ordinarily resident in Ireland throughout their entire lives but more particularly from the date of delivery of the Supreme Court determination on the 15th May, 2018 to date. The facts demonstrate a significant element of continuity and settled purpose attendant upon their presence in this jurisdiction throughout the relevant time up to the date of institution by the father of the within proceedings on the 7th September, 2021. This powerfully supports the fundamental determination of the High Court judge that the children were at the relevant date, habitually resident and also ordinarily resident within the jurisdiction of this State. No basis is identified in the Notice of Appeal or submissions to cast doubt on that finding.

51. Additional factors identified in the judgment and disclosed by the evidence entitled the judge to refuse to recognise or enforce the Pakistan order, notwithstanding the doctrine of the comity of courts, including that the children were neither heard nor afforded an opportunity to have their views taken into account by the courts in Pakistan before the making of the orders on the 8th July, 2019.

52. Such a right is enshrined in Art. 42A of the Constitution and domestic legislation. At the level of international law, the children had such entitlements derived from Art. 12(2) of the UN Convention on the Rights of the Child and Art. 24 of the Charter of Fundamental

Rights of the European Union. It further will be recalled that the father attempts to invoke the 1996 Hague Convention. It will be recalled that Chapter IV of the said Convention addresses the recognition and enforcement, and in particular Art. 23(2)(b) provides *"recognition may however be refused – if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State*".

53. As a matter of international law, it is for the courts in Ireland, as the requested State where recognition and enforcement of the order of the 8th July, 2019 is sought, to determine whether the failure to give the children the subject matter of the application an opportunity to be heard constitutes a violation of this State's "*fundamental principles of procedure*". I am satisfied that the trial judge correctly found on the evidence that the children had not been afforded an opportunity to be heard within the said Pakistan proceedings prior to the making of the Order of 8th July, 2019. I am satisfied that the trial judge was correct in affording the minor adolescent children an opportunity to be heard, in accordance with the national law of this State and international norms in the within application.

54. Where, as here, there is a complete absence of evidence of compliance with this fundamental procedural requirement by the courts in Pakistan in making the orders sought to be recognised and enforced in this jurisdiction, the High Court judge was not bound to recognise the Pakistani Court's decision. In light of the state of the evidence and where it appeared that the procedural process adopted in Pakistan excluded hearing the views of the children or having regard to their views, the trial judge's approach was correct.

Evidential deficits in regard to service

55. Despite voluminous material put before the High Court, there is a deficit of information as to the manner whereby service of same and of the order obtained by the father

on the 8th July, 2019 were served upon the mother. It would appear that she was neither in court nor represented at the said hearing. In substance it was a hearing *prima facie* conducted in default of appearance. It is essential that the specific application put before the court which secured the orders of 8th July, 2019 are served on concerned parties such as the other parent in sufficient time and to enable that parent to arrange her defence -unless there is evidence that the mother had indicated unequivocally to the courts in Pakistan in advance that she was consenting to the proposed orders and there is no suggestion to that effect.

56. Proof of service of all underlying proceedings and proper notice of any substantive hearings is necessary where a foreign order is sought to be recognised and enforced. The parties to a welfare dispute concerning children are entitled to a fair hearing and both parents were entitled to have their respective views considered and taken into account. A respondent is entitled to exercise a right to defend proceedings and to advance arguments with regard to jurisdiction as well as substantive grounds why orders sought might not be made in the context of a welfare analysis. Despite the voluminous material there's no evidence to satisfy that minimum requirement put before the High Court by the applicant father. Insofar as the father invokes the 1996 Hague Convention, it is demonstrable that the failure identified falls foul of Art. 23(2)(c) of the said Convention which states:

> "2. *Recognition may however be refused –*
>
> *c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;*

That provision merely reflects one of the established norms of private international law. It is clear from the judgment that the trial judge took into account the deficits in evidence regarding the events surrounding the making of the order, including regarding service. There is no evidence tendered that the mother had been afforded an opportunity to lodge any formal

document defending the proceedings or challenging jurisdiction. It cannot be contended by the father that there was "*urgency"* attendant upon the application culminating in the order made in Pakistan on the 8th July, 2019 when thereafter he delayed for over two years before submitting the said order to the High Court in July 2021 to seek enforcement of same. The father's conduct is wholly incompatible with urgency.

57. The cumulative impact of the above factors including that the children were not heard by the court in Pakistan, that there was no formal evidence before the High Court proving effective service of the proceedings to make the mother aware of the application which was heard on 8th July, 2019 in Pakistan, the indications that the mother was deprived of an opportunity to be heard in the said application, the ostensible failure by the courts in Pakistan to make a formal finding as to the habitual residence of the children as of the date of the said hearing, the fact that as of the date of the hearing before the High Court the children had become habitually resident in this jurisdiction, coupled with the clear evidence of the children given to the trial judge as to their strong views and having due regard to their respective ages and degree of maturity, there were ample and multiple grounds which warranted the trial judge pursuant to the inherent jurisdiction refusing to recognise or enforce the order made by the courts in [city] Pakistan on the 8th July, 2019 pertaining to the said children.

58. Further, it is noteworthy that such grounds to refuse recognition and enforcement arise separately pursuant to the provisions of the 1996 Hague Convention Art. 23, albeit Pakistan is not a party to the said Convention and in my view, same was not validly invoked by the appellant. Noting the totality of factors considered by the trial judge, recognition of the said Pakistan order would have been manifestly contrary to the public policy of this State having due regard to the best interests of the said children, and their clear views expressed to the trial judge. Recognition of the order in this State would in all the circumstances be at

variance to an unacceptable degree with the legal order of this State in that it would infringe the fundamental principles of Art. 42A of the Constitution. I reach this conclusion having due regard, *inter alia*, to the decision in C-455/15 PPU *P. v Q.* ECLI: EU: C:2015:763.

Ground 6

59. This alleges that the High Court was "*unfair in related case to refuse the liberty to appeal jurisdiction of divorce in Court of appeal or to stay the proceedings until determination of appeal of related case i.e. custody of children*." This seeks to pursue a further appeal impermissibly from the orders of Groarke J. made in the Circuit Court on the 15th June, 2021. That appeal was determined by Jordan J. on 17th December, 2021. No leave to further appeal was granted to the appellant. It is further pursued in Grounds 26, 27, 28 and 29 of this Notice of Appeal. Since the appellant ultimately did not formally withdraw these grounds of appeal, same are dealt with in a short separate judgment.

Ground 7 – "The court erred taking into consideration that High Court was decided on assessment report which is neither abduction report nor welfare report and cross examination of the assessor was cancelled due to lawyers from her employer who came without court permission or notice."

60. This ground, *inter alia*, expounds on *"proven misconduct in the Court and corruption by the lawyers."* This ground of appeal seeks to impermissibly reopen the proceedings brought by the appellant in High Court Record No. 2015/ 61M. As such, it amounts to a collateral attack on the concluded Child Abduction proceedings which culminated in the Determination of the Supreme Court on the 15th May, 2018. Accordingly, this ground of appeal is not maintainable.

Grounds 8 to 19 inclusive

61. These grounds amount to a collateral attack on the proceedings, judgments and orders in the concluded litigation High Court Record No. 2015/61M which culminated in the

Determination of the Supreme Court of the 15th May, 2018. Same amount to an impermissible attempt to pursue a collateral attack on the said judgment and orders and are not maintainable.

Grounds 20 to 24 inclusive

62. These grounds are directed exclusively or substantially towards the eldest child of the parties who was born in March 2002 and attained full age in March 2020. At the date of the hearing of this appeal he was aged 20 years and 7 months. Given that he is now of full age, no issue pertaining to the welfare or custody of the said child can be pursued within the ambit of the proceedings. At the date when the father obtained the orders in [city] Pakistan, Pakistan on the 8th July, 2019 the son was aged 17 years and 4 months. No step was subsequently taken by the father to enforce the said order in respect of the eldest child during his minority. No issue pertaining to same was maintainable within the ambit of the within proceedings. Grounds of Appeal 20 to 24 inclusive are not maintainable.

Ground 25 - "The Custody granted to the mother in the Pakistani Court has been cancelled since 14.1.19. The custody has been granted to the father since 8.7.19 with schedule of access to non-custodian parent."

63. This ground of appeal is prolix and contends, *inter alia*, "*as in all cases with international dimension, in principal (sic) any court seized (sic) first, has right to make the decision. The respondent has got the interim custody by invoking the jurisdiction of Pakistani Court and also requested relocation of children to Ireland*." Insofar as the appellant contends for some form of first mover's advantage in the context of child welfare that is not the governing principle where the doctrine of the comity of courts is invoked to enforce a foreign custody order. It is asserted that: "*The Pakistani court provided her and children full opportunity to be heard*." There is no clarity before the High Court as to how precisely it is said the Pakistani Courts afforded the mother and the children such a "*full*

opportunity". It was incumbent on the appellant to demonstrate any evidence underpinning this bare assertion which was not supported by any evidence clear amongst the voluminous affidavits, submissions and documentation put before the High Court. That omission was significant and went to jurisdiction. Further, given the extensive delays on the part of the father in seeking to enforce the Pakistan Orders, a major consequence was that by the time the matter came before the High Court in December 2021 on foot of the proceedings instituted by him on the 7th September, 2021, the two younger children of the marriage had come to be habitually resident within the jurisdiction of the courts of Ireland and the oldest child was of full age and no longer a minor. In all the circumstances for the reasons stated above and having taken account of the views of the two adolescent daughters of the parties as of the said date, the trial judge correctly exercised his discretion and validly noted (para.10) that the Circuit Court could take into account the Pakistan Orders.

Grounds 30 to 32 inclusive

64. These grounds raise a wide variety of allegations including the circumstances surrounding the conduct of a Circuit Court hearing F284/2019 which proceeded remotely during the Covid-19 pandemic. A variety of allegations are made such as "*my video link connection was switched off. during my case. Only then I thought these corrupt people have no limit, and I have to confront them*." These generalised allegations are not directed towards any specific finding made by the trial judge in his judgment and represent generalised attacks on the practitioners and the process which operated during the Covid- 19 pandemic in connection with the hearing of cases. Ground 32 appears to be directed towards the fact that the appellant's application for recognition of the Pakistani Court Order made on the 8th July, 2019 was initially sought to be pursued within the ambit of the concluded child abduction proceedings Record No. 2015/61M. These complaints are directed towards procedural

issues and do not identify any valid or coherent basis whereby the orders made by the trial judge the subject matter of this particular appeal might be varied or set aside.

Ground 33

65. This ground is directed towards a range of allegations concerning professionals who acted for the wife in the concluded Child Abduction proceedings Record No. 2015/61M. This seeks impermissibly to agitate grievances of the appellant directed towards professionals involved in the litigation including counsel and solicitor who acted on behalf of the child assessor appointed by the court within the said proceedings. This ground of appeal is not maintainable and falls to be dismissed.

Conclusions

66. The trial judge correctly concluded that the children were habitually resident within the jurisdiction of this State at the date of the hearing of the said application in proceedings Record No. 2021/19 HCL. The trial judge was entirely correct in his application of the relevant principles and in his approach to the exercise of discretion in an application for the recognition and enforcement of a foreign order granting custody where the children in question are ordinarily resident and/or habitually resident in this state by the time an application to enforce is instituted.

67. His approach accords with the doctrine of the comity of courts. Even had the 1996 Hague Convention applied – and it could not because Pakistan has never ratified that specific Convention and because the children are not habitually resident in Pakistan - Art. 23(2) of the 1996 Hague Convention identifies several distinct significant bases which warranted a refusal of the orders sought. In light of the fact that the children are habitually resident in this jurisdiction, the trial judge's approach accords with the provisions of the Constitution Art. 42A, the Guardianship of Infants Act, 1964 including s. 3 and Part V thereof. Further, in approaching the application for recognition of the Pakistan Order of the 8th July, 2019, the

trial judge was entirely correct in engaging with and having regard to the views of the two minor children. For all the reasons stated above, the trial judge was correct in his approach and in his conclusions. The facts and circumstances as outlined above identified an exceptional circumstance where, notwithstanding the doctrine of the comity of courts, the trial judge was entitled, in the exercise of his discretion having carefully considered all relevant circumstances, to refuse to recognise and/or enforce the said order. The trial judge was further correct to indicate that the issue, including the said order, could be dealt with within the ambit of proceedings currently before the relevant Circuit Court and the separate proceedings of the mother Record No. 2021/127M, High Court Family Law which were remitted to the Circuit Court for determination along with the subsisting Circuit family law proceedings F284/2019.

Costs

68. The appellant having failed on all grounds of appeal advanced, my provisional view is that the respondent is entitled to her costs of this appeal, to be ascertained in default of agreement. If the appellant contends for a different outcome with regard to the costs, a written submission, no longer than 2,000 to be provided by him to the respondent and the Court of Appeal office within 21 days of the date of delivery of this judgment setting out all arguments for a different costs order. The respondent to be entitled to furnish a replying submission - no longer than 2,000 words - in response within a further 21 days. The court will consider same thereafter and make such directions or orders as appropriate.

69. Birmingham P. and Binchy J. have indicated their agreement with the within judgment.