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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 FATHER

Plaintiff

-v-

A MOTHER

Defendant

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985, THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980 ("THE HAGUE CONVENTION") AND EU COUNCIL REGULATION 2201/2003 ("BRUSSELS II REVISED")

AND IN THE MATTER OF RE (A FEMALE CHILD aged 15 years 7 months), VI (A MALE CHILD aged 14 years 4 months) and DH (A FEMALE CHILD aged 11 years)

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Ms M Dinsmore QC and Ms M Mullally BL (instructed by PJ Flanagan & Co solicitors) for the plaintiff
Ms L Brown BL (instructed by Kelly & Corr solicitors) for the defendant
Ms S O'Flaherty BL (instructed by the Official Solicitor) for the Official Solicitor representing the interests of the children

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McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the children. I have used the random ciphers RE, VI, and DH for the names of the children. These are not their initials. Nothing can be published that will identify the children.

[2] The plaintiff has issued a summons seeking the return of the children to a foreign country (which I will call "FC") where they had been habitually resident prior to their removal by the defendant on the 28th July 2017.

[3] The defendant was born in Northern Ireland and then went to live in FC. The parties were married in August 1998 and continued to live there. There are six children of the marriage. The three older children are all over 18 and live independently, two in FC and one in Northern Ireland.

[4] Following the separation of the parties in April 2017, legal proceedings continued in the courts of the FC although they focussed more on protection orders (the equivalent of non-molestation and occupation orders in this jurisdiction) for the adults as opposed to any residence or contact arrangements for the children. The court in FC did endeavour to manage proceedings to enable some progress to be made concerning contact. As is often the case the evidence comprised of allegation and counter-allegation. During the course of this litigation the defendant removed the children from FC without the knowledge or consent of the plaintiff.

[5] At a very early stage, the plaintiff was aware that the children had been removed to this jurisdiction and were resident in Northern Ireland.

[6] Negotiations continued concerning contact arrangements with the court in FC ordering a section 47 report, the equivalent of an Article 4 report, and on 31st October 2017 an agreement was reached whereby the plaintiff would have contact with the children, although this did not result in any contact taking place. The defendant then disengaged with the legal proceedings and they were eventually concluded.

[7] The plaintiff claims that he was given negligent advice concerning his ability to pursue a Hague Convention return order and because of this advice no proceedings were issued at that time. This is disputed by the lawyer in FC who has stated that specific advice was given, but that the lawyer would not act for the plaintiff in relation to such an application.

[8] In June 2019 the plaintiff sought advice from another party and in due course A request was made by the plaintiff to the Central Authority in FC to act on his behalf in pursuing an application. He completed the application form on 27 June 2019, it was received by the Central Authority in Northern Ireland on the 15 July 2019 and the summons was issued on 27 September 2019.

Hague Convention

[9] The Hague Convention is a multilateral treaty which provides for the prompt return of children removed from their country of habitual residence to another country.

[10] Articles 12 and 13 of the Convention provide as follows:

> *"Article 12. Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.*
>
> *The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*
>
> *Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.*
>
> *Article 13 Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:*
>
> *a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*
>
> *b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*
>
> *The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*
>
> *In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."*

[11] Certain core facts are obvious or have been conceded by the parties. The defendant has accepted that the children were wrongfully removed by her from FC. The date of commencement of proceedings was over one year after the children were removed. The plaintiff has accepted that the children were settled in their new environment in Northern Ireland at the time of the commencement of proceedings. As a consequence this court is not obliged to order the return of the children under the first or second paragraphs of Article 12. Both parties were entirely correct in making these concessions.

Judicial discretion

[12] The plaintiff requests the court to exercise its general discretion under Article 18 which states:

> *"The provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."*

However, the defendant argues that the court's discretion is constrained by the provisions of Article 13 in that:

a) After removal the plaintiff has subsequently acquiesced in the retention of the children in Northern Ireland;

b) There is a grave risk that the children's return would expose them to physical or psychological harm;

c) Each of the children object to returning to FC and each has attained an age and degree of maturity at which it is appropriate to take account of their views.

Acquiescence

[13] Gillen J set out what is meant by acquiescence at [22](6) in *Re G and A* [2003] NIFam 16:

> *"The leading case on the meaning of acquiescence is the House of Lords decision in Re H (Minors) (Abduction: Acquiescence) [1997] 1 FLR 872. Acquiescence under Article 13 involves the court looking to the subjective state of mind of the wronged parent and asking "has he in fact consented to the continued presence of the child in the jurisdiction to which he has been abducted." The court must determine whether in all the circumstances the wronged parent has, in fact, gone along with the wrongful abduction. Accordingly acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions. It is a pure*

> *question of fact for the judge in the material before him. Once again the burden of proof is upon the abducting parent to establish that acquiescence has occurred."*

The House of Lords in *Re H* summarised the test faced by the mother in that case (and in this case) that she would have to show that the father's actions were clearly and unequivocally inconsistent with his pursuit of his summary remedy under the Hague Convention (at page 885).

[14] In this case the plaintiff continued to engage with the courts in FC after he became aware that the children were in Northern Ireland. His main task was to achieve a court based solution in relation to his contact with his children. This proved to be impossible although an agreement as regards contact was entered into in October 2017 but it was never implemented by the defendant. Although there is a dispute between the plaintiff and his former lawyers in FC, there is a letter written by the lawyers to their professional body which sets out a chronology of events which includes a statement that the plaintiff had been advised of his rights to make an application for summary return of the children under the Hague Convention sometime between July and September 2017, but that the lawyer could not act for him. I am satisfied, on the balance of probabilities, as to the accuracy of the lawyer's statement.

[15] A further significant fact is that when the plaintiff eventually made the application to the Central Authority in FC, he completed the form and indicated by ticking a box that he wished to submit an application for contact with the children, and not for return of the children. In section 9 of the form the plaintiff completed a long statement. The form states:

> "*This section should only be completed if you wish to make an application for contact/access or to make an application for recognition/enforcement of an existing order."*

The plaintiff also completed section 9 (ii) which is headed – "*Please detail your proposals for contact/access with the minor(s)."*

[16] I am therefore satisfied, on the balance of probabilities that the defendant has proved that the plaintiff was aware of his rights to bring Hague Convention proceedings in the late summer of 2017, about one or two months after the children had been removed. He pursued contact proceedings within the courts of FC until the Spring of 2018, and then in July 2019 he commenced Hague Convention proceedings, primarily on the basis of obtaining contact with the children. In all the circumstances I am satisfied that the defendant has shown that the plaintiff's actions were clearly and unequivocally inconsistent with his pursuit of his summary remedy for the return of the children under the Hague Convention. He has therefore, subsequent to the children's removal, acquiesced in their retention in Northern Ireland.

Exposure to grave risk

[17] Lady Hale in *Re E* [2011] UKSC 27 at [31] – [35] said that the wording of Article 13(b) was quite plain and did not require further elaboration. The burden of proof was on the person opposing the return. The use of the term 'grave' indicates a high level of seriousness, and although it characterises the risk it cannot be wholly separated from the harm. The harm is categorised as physical or psychological but there is also an additional factor which is placing the child in an intolerable situation. This would be something over and above the type of distress and discomfort that a child is expected to put up with as part of growing up. Finally the provision looks to the future and the return of the child to the country, and not necessarily to the person requesting the return. In this context the ability of the institutions within the country to protect the child against risk are a factor.

[18] I have considered the defendant's and the plaintiff's affidavits. There is clearly conflicting evidence, but even taking the mother's evidence at its height, I do not consider that she has satisfied the burden placed on her with regard to proving a grave risk to the children.

The children's objections

[19] Lady Hale gave some guidance concerning how to approach a child's objections in *Re M* [2007] UKHL 55 at [46]:

> *"In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."*

[20] Gillen J in *Re S, N and C* [2005] NIFam 1 considered the voice of the child to be

of particular relevance and courts should not just pay lip service to Article 12 of the UN Convention on the Rights of the Child. At [12] he articulated that it was a fundamental right of the child of sufficient maturity to be heard:

> *"It must be remembered that a child is a person with human dignity and not merely the object of a parental dispute. A child's fundamental rights, including the right to be heard, must be respected in all forums including the confounds of the Hague Convention and non-Convention case. A child therefore possesses the right to self-expression."*

[21] The court has had the benefit of several reports. The first is a report from a psychologist in September 2017. This has been supplemented in more recent times by a report from the Court Children's Service in March 2021 and a report from the Official Solicitor in May 2021. There is nothing to suggest that any of the authors of these reports is inexperienced in interviewing children and ascertaining their wishes and feelings.

[22] The children are now 15, 14 and 11. When they spoke to the court children's officer each was clear that they did not wish to return to live with their father. They identified the level of acrimony between their parents, and what would appear to be their father's intense suspicion and jealousy concerning their mother. For example, they recalled their father waking them up in the middle of the night showing them pictures of men and enquiring if these men were seeing their mother. The children displayed a strong attachment to their elder siblings who continue to live in FC and with whom they have maintained contact. I consider that the children have no real objection to returning to live in FC to see their siblings, but they have no wish to live with their father, or with both their parents as a couple. The court children's officer spoke to the children by Zoom call but all were together and there was no opportunity to speak to them separately, although the mother was not present in the room.

[23] The Official Solicitor had the opportunity to have a face to face meeting with each child separately. She reports similar comments from the children concerning home life in FC, which included a complaint of being forced to say "*I like daddy more than mum"* which the father recorded on his telephone. Each of children were able to express a clear opinion that they were well settled in Northern Ireland enjoying their home life which includes contact with the extended maternal family and one sibling.

[24] The report compiled in September 2017 contains similar themes. The author, a specialist in child adolescent and educational psychology, considered that there had been indications of some coaching from both parents, although he believed that the children at that time were intelligent and mature enough to express their needs and wishes independently.

[25] The plaintiff's main criticism of all of these reports is that he asserts that the

children have been coached and whatever may have been said it is not the true wishes of the children.

[26] I consider that there may well be a degree of influence placed on the children by the mother but the most significant influence on their wishes and feelings is now the environment in which they live. Above all the children have been released from the dysfunctionality of the marriage of their parents and are able to express their own views. Notwithstanding the influence exerted by the mother, I do not believe that the children are making up these stories about their father or somehow misrepresenting what they say happened to them.

[27] The reality of the situation is that all three children are mature enough to express their opinions about their present and future life, and each is of a view that they have no desire to return to live with their father. I also consider that this includes a desire to remain in Northern Ireland because they are very settled within the wider maternal family unit and have established a network within their own social and school environments.

Overall discretion

[28] The structure of the Hague Convention provides for the swift return of children who have been wrongfully removed from a country where they are habitually resident. The rationale of the convention is that the child should be returned unless there are circumstances which would allow a court to exercise its discretion to refuse. These would include if the child was now settled in the new country (see Article 12), if the parent had consented to or acquiesced in the removal or retention, if there was a grave risk of harm to the children, if the child was of sufficient maturity and was objecting (see Article 13), or for human rights grounds (see Article 20).

[29] It also has to be borne in mind that the issue of both delay and settlement are very alive in this case. The children left FC in July 2017 and we are now approaching the fourth year of their residence in Northern Ireland. The plaintiff, for whatever reason, did not commence proceedings until September 2019. This is clearly not a 'hot pursuit' case which undermines the fundamental purpose of the Hague Convention which is the swift return of children wrongfully removed. Lady Hale referred specifically to this matter in *Re M* at [47]:

> *"In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the*

comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community."

Conclusion

[30] In this case the children were wrongfully removed from FC in July 2017. At the time when the plaintiff commenced proceedings they had become settled in Northern Ireland, and now have been living here approaching a period of four years. The father acquiesced in their retention in Northern Ireland by pursuing contact legal proceedings and by his delay. Each of the children have expressed a desire to remain living with their mother in Northern Ireland. Taking all these factors into account I consider that the court should not exercise its discretion in ordering the return of any of the children to FC.

[31] This decision only relates to whether or not the children should be returned under the provisions of the Hague Convention. Although it was not an issue specifically before the court, the children's habitual residence is now likely to be in Northern Ireland, so the courts in Northern Ireland can exercise jurisdiction over all aspects of family life, which could include residence, permitted removal from Northern Ireland and contact. The father is perfectly entitled to ask the court to consider all or any of these matters. It would be important that some sort of contact regime is set up between the children and the father. Given the nature of the proceedings before this court no such order can be made by me concerning contact. Fresh proceedings will need to be issued.

[32] When I heard this case on 21 June 2021 I indicated to the parties that I would dismiss the father's application and that I would give my reasons in written form later. These are those reasons. On the 21 June 2021 I also confirmed the position in relation to costs. There will be no order as to costs between parties, but as the parties are both legally assisted there will be the usual taxation order in respect of costs.