High Court of Ireland Decisions

Judgment

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[2018] IEHC 514

THE HIGH COURT
FAMILY LAW

Record No. 2018/20 HLC

Between

LINCOLNSHIRE COUNTY COUNCIL

Applicant

AND
J.MCA. AND A.C.

Respondents

Judgment delivered by Ni Raifeartaigh J. on the 21st September, 2018

Nature of the Case

1. This is a case in which the applicant, Lincolnshire County Council (hereinafter "the Council"), seeks the return of an infant girl to the jurisdiction of England and Wales pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "the Hague Convention"), and Council Regulation EC 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. The child was the subject of an interim care order made by an English court at the time she was removed to Ireland by her parents, who are the respondents in these proceedings.

Relevant Chronology

2. The child, who I will refer to as "E", was born on the 1st November 2017 in England. Both of her parents are British citizens. The parents are not married but the father was

named on the birth certificate and thereby acquired, under the law of England and Wales, rights of parental responsibility.

3. Events occurred subsequent to the child's birth which caused the English authorities to have some concerns about the welfare of the child. The essence of these concerns was that the mother was repeatedly reporting medical symptoms which, in the opinion of the medical authorities, were not borne out upon investigation. Among the reports of the mother were that the child was vomiting blood on an almost daily basis.

4. As a result of the concerns referred to, an application was made to the English courts on behalf of the Council on the 22nd January 2018. The solicitor for the Council averred in the proceedings before me that the child was, at the time of the application, an in-patient at a particular English hospital, and that the applicant relied upon a statement of the treating consultant paediatrician, one Dr. B, a consultant paediatrician, which set out her concerns. This document has been exhibited to me and contains a detailed exposition of the history of events in the hospital together with a description of the steps taken by the medical staff, drawn from the medical records. The solicitor averred that on the 25th January 2018, the English court heard evidence from the doctor, who was cross-examined on behalf of the parents, each of whom had filed statements disputing the doctor's version of the facts. The solicitor avers that the parents ‘chose not to give evidence to the court and be cross-examined', but that the mother read a prepared statement to the court denying the allegations and requesting that the child be returned to their care. I note below that the mother has averred in the present proceedings that she was "prevented" from giving evidence to the English court by her legal advisers. An interim care order was made by the English court on the 25th January 2018. The order, which was exhibited before me, stated, inter alia, that there were ‘reasonable grounds to believe' that certain reports made by the mother of certain medical symptoms were ‘false' and that there was a ‘refusal to accept conclusion of medical staff on these matters after appropriate investigation', and that this gave risk to ‘reasonable grounds to believe' that if the child remained with her parents there would be ‘further instances of false reporting of conditions and symptoms which will inevitably give rise to treatment and investigation' which was likely to cause significant harm to the child.

5. The interim order placed the child in the care of the local authority, being the applicant Council. The Council in turn assessed the child's paternal grandmother and then placed the child with the grandmother in accordance with a Safety Plan. Under English law, a local authority, when such an order is made, has the power to determine the extent to which the parents may meet their parental responsibility for the child. The court does not have power to impose conditions and it is the local authority which has the power to decide where the child shall live pending a final decision. As noted, in the present case, the authority decided to place the child with her paternal grandmother, with supervised access to the parents three times per week. The interim order itself contained a clear and explicit prohibition on the removal of the child from the jurisdiction.

6. The matter came before the English court again on the 9th March 2018, which granted permission to the mother to have contact with the child on Mother's Day; dealt with the filing of papers; and instructed a psychiatrist to assess the respondent mother, in circumstances where the mother had a history of mental illness diagnoses included self-harming behaviours and borderline personality disorder. The respondents were represented by solicitor and counsel at this hearing. The matter was listed for the 20th April for further hearing. It was averred by the solicitor for the Council in the present proceedings that it was made plain that the intention of the local authority was to marshal the primary factual evidence so that a fact-finding hearing could take place before the English court, most likely in September 2018, while also undertaking a

parental assessment of both parents and the paternal grandmother. This fact-finding hearing would involve testimony from the primary medical witnesses/nurses, the parents, the parents' witnesses, and expert evidence.

7. On the 19th April, 2018, one day before the next court date, the report of a consultant paediatrician, a Mr. R, was served on the parties. The conclusions were unfavourable to the parents of the child and it recorded that there was "evidence for illness fabrication", which was described in the detailed report. The parents did not attend court on the 20th April, 2018. It subsequently emerged that the grandmother had woken that morning to find the child gone, and that the respondents had entered her house covertly during the night and taken the child. They had a left a note which said that they had taken E away for two days "before they start adopting her out" and that they needed "some space to say goodbye".

8. The English and Irish police engaged in liaison with each other and it was ascertained that the parents had travelled by ferry and arrived in Ireland on the 20th April 2018. An emergency telephone hearing was convened at 6pm on the same date, at which the English court made an order stating that the court was satisfied that the child was habitually resident in England, was entitled to British citizenship, and that this had not been changed by the unilateral actions of the parents. Orders were made that the child be returned forthwith. The respondents were represented by counsel in their absence.

9. On the 22nd April 2018, the respondents presented themselves at a Garda station in Ireland. They have averred in the present proceedings that they did so, having realised after their arrival in Ireland that they may be in breach of the English court orders. They have averred that they had received advice from a McKenzie friend in England, before their departure, that because the respondent father had ‘parental responsibility' rights, it would not be forbidden for them to leave England and Wales. It was averred that they had received contrary advice from a McKenzie friend after their arrival in Ireland, and decided to present themselves to the Gardai for this reason. They subsequently presented themselves to another Garda station in Ireland on the same date and explained that they had left England with their child who was the subject of a court order. The child was examined by a doctor and noted that the child's conditions was "good and normal" and "appeared well looked after".

10. An application was made to the District Court on the 23rd April 2018, as a result of which an order was made pursuant to s.13 of the Child Care Act, 1991 and article 20 of Regulation 2201/2003 placing the child in the care of the Child and Family Agency (hereinafter the "CFA").

11. On the 25th April, 2018, there was a further sitting of the High Court in England and Wales. The parents were represented by their legal team in their absence. An order was made again providing that the habitual residence had not changed and for the return of the child. A certificate was also executed pursuant to the provisions of Annex II of the Regulation for the return of the child. Both documents were exhibited to me. The parents sought to appeal but this application for leave was refused by order of the Court of Appeal (McFarlane J.) dated the 11th June 2018. Again, these documents were exhibited. The refusal of leave to appeal stated that the central factor in the case was that the child was the subject of an interim care order and that it was unlawful to remove a child from the care arrangements made under an interim care order. It noted that most of the grounds of appeal related not to the return order but rather to issues in the ongoing care proceedings.

12. In this jurisdiction, the local authority obtained an order from the Master of the High Court, dated 17th May 2018, pursuant to the provisions of Chapter III of Regulation 2201/2003, declaring that the return order be recognised and be enforceable in Ireland.

The respondent parents appealed the order, and the order was stayed pending the determination in separate proceedings of a reference by the Court of Appeal to the CJEU of a question relating to the provisions of Chapter III of the Regulation.

13. A further interim care order was made by the District Court on the 9th July 2018.

14. The special summons issued in the present proceedings on the 9th July 2018. The Council brought proceedings by instructing a legal team on its behalf, rather than pursuing matters through the Central Authority of Ireland.

15. On the 23rd July 2018, the Court made an order pursuant to s.12 of the Child Abduction and Enforcement of Custody Orders Act, 1991 that the CFA continue to provide care for the child pending the determination of the proceedings and gave directions as to the swearing of affidavits. A hearing date was fixed for the 27th August 2018, during the court vacation.

16. On the 26th July 2018, an appearance was entered by a solicitor on behalf of the respondent parents.

17. On the 27th August 2018, the first hearing date, there was no appearance by the legal team on behalf of the respondents. The respondent mother also appeared to be in considerable distress and informed the Court that she had very recently suffered a miscarriage. This was subsequently confirmed by medical evidence. The respondents indicated that they had expected the solicitor to be present, although they had experienced difficulties in contacting him and having consultations. Counsel for the applicant handed to the court an email sent to them by the solicitor in the previous 48 hours, indicating that he did not consider himself to be acting in the matter anymore and that he had given certain advices to the respondents to find another solicitor. The court adjourned the hearing and directed the solicitor to attend and explain his non-attendance on the hearing date despite his still being formally on record.

18. On the 5th September, 2018, the solicitor in question was present in court and apologised for his non-attendance on the previous hearing date. He said that it was due to an oversight on his part, as he was continuing to act for the respondents in other related court proceedings but was no longer willing to act in the present proceedings for reasons which he did wish to elaborate upon by reason of legal professional privilege. The respondents were not present on this occasion. The court directed that a formal application to come off record should be filed and the court would rule upon it if necessary, and fixed the 12th September as the next hearing date.

19. An application to come off record was then made, on consent, on the 12th September date and an order was made discharging the solicitor from the case. The respondents indicated that they had sought the assistance of many solicitors, but all had refused. They were not in a position to proceed on this date. The Court fixed a new hearing date of 19th September 2018, upon which date the matter proceeded, with the respondent mother making submissions on behalf of both respondents. Affidavits and legal submissions were filed by them some days in advance of this hearing.

20. In an affidavit sworn on the 13th September 2018, Ms. McA averred, inter alia, that she had been fully discharged from mental health services for over one year before she became pregnant, and that following her discharge, she had undertaken a course in mental health care. She also averred that she was assessed by the mental health team during her pregnancy and after the birth and that there were no concerns. Documentation was exhibited in support of some of the above matters.

21. The mother also averred that the child was currently happily settled and that there

was "no need to emotionally damage her by placing her into a confusing situation, once again placing the child with another set of strangers when she is now familiar with her current carers'. She also averred that she had developed a good working relationship with the Tusla (Irish child-care/social work agency) worker, and that the child was responding positively to both parents during access visits. She averred that the current family caring for the child had now raised medical concerns about "potential hypermobility and tongue tie", matters in respect of which (she said) she herself had been accused of fabrication by the UK authorities.

22. She averred that they wished to stay in Ireland, that there was no danger of her "abducting" the child in the future because she had no desire to return to England, and that the concerns about the child's welfare in England had been due to speculation or suspicion based on her own history of mental illness, which was discriminatory.

23. In a second affidavit sworn on the same date, a number of witness statements were exhibited. These appear to be friends of the respondents and set out the witness' accounts of events in which they sought to corroborate the mother's description of the child vomiting and there being blood present in the vomit, together with photographs. It was averred by the mother that the English police had wrongfully taken and retained her phone, which contained further evidence. It was averred that the respondents had no opportunity to address the court in England because "they were consistently prevented by their legal representatives" from doing so. It was averred that Dr. B was now under investigation by the English hospital for making false allegations against the mother. It was alleged that Dr. R's conclusions were unsubstantiated and that the diagnosis of illness falsification should not have been reached on the evidence before him or within the short time-frame in question. Reference was also made to the matter being drawn to the attention of an English MP who was said to be alarmed about how the respondents had been treated. It was also averred that at the time of leaving England, the respondents were under the impression that they were entitled to leave with the child because Mr. C had "parental responsibility" for the child and that they had been advised of this by a McKenzie friend in England. It was pointed out that when the child was examined at the Garda station by a doctor, she was pronounced fit and well cared for. It was averred that if the child were returned to England, the parents could not go with her because of the threat of arrest and imprisonment. It also suggested by the respondents that the medical treatment of the child in Ireland was and would be better than that in England, and that the parents' concerns were being taken seriously in this jurisdiction.

General matters

24. The respondents were legally unrepresented in the hearing before me, their solicitor having come off record one week before the hearing in the circumstances described above. Accordingly, their submissions were more in the nature of cries from the heart to be allowed a chance to stay in Ireland, work with the child-care authorities, and have access to their baby, rather than legal arguments framed with reference to the provisions of the Hague Convention.

25. There could be no doubt, having heard the submissions of Ms. C, and observed her over the various occasions on which she was present in court, that she deeply loves her child and that she genuinely believes that she has been done an injustice by the English doctors, nurses, social workers, lawyers and courts. At a human level, I could not but feel sympathy with the pain she is clearly suffering by being separated from her baby and because of her fears for the child's future. However, the Court is constrained to operate within the necessary legal parameters of the Hague Convention, which are as follows.

26. The starting point is that Article 12 of the Hague Convention provides that the Court

"shall" return the child where she has been "wrongfully removed or retained in terms of Article 3". Thus, the basic position is that the Court has no discretion; it must return the child if there has been a "wrongful removal". (For completeness, I mention the provisions of article 12 which provide for a different situation if a child has been in the jurisdiction longer than one year before the proceedings are commenced, and the child has settled into her new environment, but that was not the case here). The court sometimes has discretion to refuse to return a child; this arises in a number of strictly defined scenarios: (1) pursuant to article 13(a): where there was consent or acquiescence to the removal or retention; (2) pursuant to article 13(b); where there is a "grave risk" that the child's return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"; or (3) under the penultimate paragraph of article 13; "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"; and (5) under article 20, where "return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" . Further, even where the Court has discretion, it does not follow automatically that it should necessarily exercise that discretion in favour of the child remaining in the country to which she has been taken; a large number of matters have to be taken into account before deciding whether to return or not return, and there is a large body of legal authority dealing with this matter.

27. It is often mistakenly thought by respondents in Hague cases that the Court is conducting some kind of hearing "on the merits", in the sense that the Court is squarely deciding what is best for the child, or where the child should live, or the rights and wrongs of all the allegations made by one party against another. This is not so. The facts and circumstances of the case are considered by the Court only with a view to considering the narrow issues referred to above. Broadly speaking, the key issue is not "where or with whom does the Court think the child should live" but rather "do any of the particular circumstances set out in articles 12 and 13 exist in the case to create an exception to the obligation to return, and if so, how should the Court's discretion be exercised".

28. The underlying policy of the Convention is not to lay down rules as to where children should live, but rather rules as to what court (i.e. the court of what country) should decide that issue. These rules are informed by the general view that it is better that the courts of the child's habitual residence should decide issues relating to her care and welfare; but this general rule is nuanced so that there are some situations where return may not be best for the child, hence the softening of the general obligation to return by creating certain specific exceptions, namely those set out above.

29. It is understandable that litigants, particularly litigants without legal representation, would have difficulty understanding the distinction between a hearing "on the merits" of a custody dispute and a hearing which is primarily about jurisdiction i.e. which country should have jurisdiction over the dispute. This is particularly so in circumstances where there are certain aspects of the Court's analysis which do require an assessment of the child's welfare; these include (a) the fact that the jurisprudence of the CJEU has said that the "best interests of the child" must be factored into the analysis (*Neulinger and Shuruk v Switzerland* , Grand Chamber, 6th July 2010; and X v. Latvia Grand Chamber 26th November 2013), and (b) the nature of certain of the exceptions, such as the "grave risk" exception and the "child's objection" exception. The Court itself has to be vigilant to ensure that the appropriate balance is maintained between a straightforward exercise in which assessing what is best for the child is the central issue, as in a typical "on the merits" child care hearing, and a hearing in which the primary focus is the jurisdictional one, albeit one in which the best interests of the child are factored into the analysis. The exercise for the Court is a nuanced one.

30. In the present case, the respondents were, understandably, unable to appreciate these nuances when making their submissions. Indeed, it was an indication of their lack of legal knowledge that their submissions were based on the UN Convention on the Rights of the Child, without any reference to the provisions Hague Convention under which these proceedings were brought by the applicant. I will deal with each the points made by them by doing my best to re-frame them as legal issues under the Hague Convention and then respond to each of the point in turn.

The custody rights of the applicant and the parents

31. The first issue is that of whether the applicant has custody rights, and whether the removal of E to Ireland was "wrongful", within the meaning of article 3 of the Convention. The respondents argued that because the father had rights of "parental responsibility", a matter which was referred to in affidavits on behalf of the applicant, it followed that he had the right to determine the child's place of residence. This is simply a misunderstanding of the law both in England and under the Hague Convention. Article 3 of the Hague Convention provides that a removal of a child is "wrongful" where it is in breach *of rights of custody attributed to a person, an institution or other body, either jointly or alone* , under the law of the State in which the child was habitually resident immediately before the removal or retention….". It goes on to say that "The rights of custody…may arise in particular by operation of law or by reason of *a judicial or* administrative *decision* …." In the present case, the mother had acquired rights of parental responsibility automatically upon the birth of the child by virtue of being the child's mother; while the father had acquired rights of parental responsibility as a matter of law by virtue of having been included on the child's birth certificate. However, the English court subsequently made orders placing the child in the care of the applicant Council. These were the various interim care orders made by the English court between 22nd January 2018 and 20th April 2018. Part IV of the Children Act 1989 deals with care orders. Section 33(3) of the Act of 1989 provides that the local authority designated by the care order shall have parental responsibility for the child and the power to determine the extent to which a parent may meet his parental responsibility for the child. It is the local authority (not the court) which decides where or with whom the child shall live), as made clear in *Re T (A Minor) (Care Order: Conditions)* [1994] 2 FLR 423. . Further, s.33(7)(a) of the Act of 1989 provides that no person may remove the child from the United Kingdom while a care order is in force. This prohibition from taking the child out of the jurisdiction was stated explicitly on the face of each of the interim orders made by the English court in the present case. There is no doubt at all, as a matter of law, that the applicant Council did on the 20th April 2018, and does now, have custody rights under English law, and within the meaning of Article 3 of the Convention. Both the father and mother continue have rights of "parental responsibility"; the point is the court orders made from the 25th January 2018 onwards gave the applicant Council joint parental responsibility, and more particularly, the right to set certain parameters within which the child's parents could exercise their rights. The applicant Council has rights of 'custody' within the meaning of article 3 of the Hague Convention. Further, the Council was exercising those rights insofar as it had placed the child in the care of the paternal grandmother, from whose care the child was covertly removed during the night by the respondents.

32. The respondents have sworn that they took legal advice from a "McKenzie friend" in England before the left that jurisdiction and mistakenly thought they were entitled to leave. It is true that they presented themselves quickly not merely to one but to two Garda stations in Ireland within 2 days of their arrival here. Also, they have attended in court regularly before me and behaved with courtesy and dignity. However, the English court orders explicitly stated that it was forbidden to take the child out of that jurisdiction, and the respondents have provided no explanation as to why they did not consult their professional legal advisers in England as to their entitlements rather than a McKenzie friend. Also, the taking of the child was covert and in the middle of the night, which is hardly consistent with a belief that they were entitled to take the child. At its

best, their removal of the child to Ireland seems to me to have been with reckless disregard for the English court orders. But it is not necessary, in any event, for there to be culpability in the moral or legal sense for a removal to qualify as "wrongful" for the purpose of the Hague Convention. "Wrongful" in this context simply means "legally wrongful" in an objective sense, with the objective conditions for wrongfulness being set out in article 3 of the Convention.

Habitual Residence
33. The respondents sought to argue that the child's habitual residence had been altered by virtue of their having lived in Ireland for the last number of months. I do not think it is necessary to address the detailed analysis of habitual residence set out in cases such as *DE v EB* [2015] IECA 104 (which itself analysed leading CJEU cases on the concept of habitual residence including *Mercredi v. Chaffe, 22nd December, 2010, Case C-523/07* and *C v M, 9th October 2014, Case C-276/14)*). There can be no question on the facts of this case but that at the time of the E's removal to Ireland, her habitual residence was that of England and Wales. Therefore, the relevant condition of article 3 has been fulfilled: "The removal or the retention of the child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State *in which the child was habitually resident immediately before the removal or retention….* ". (emphasis added)

References to the child being "settled" in Ireland
34. Insofar as there were references to the child being "well settled" in Ireland in the respondents' affidavits, the formal defence of the child being "settled" under the Hague Convention cannot be relied upon in the present case, because it is a matter which the Court is only permitted to consider (under article 12 of the Hague Convention) if the proceedings were commenced more than 1 year after the child's removal to Ireland. Here, the child was removed in April 2018 and proceedings were commenced in July 2018, and this issue manifestly does not arise on the facts.

Complaints about how matters had proceeded in England
35. The core of the respondents' case was that there had been, in their view, many serious breaches of justice and errors in the UK. Their complaints were described both in the affidavits (as noted above) and, in some instances, elaborated upon in oral submissions. For example, they alleged that they had not been permitted to address the English court and that their lawyer had failed to "fight" for them. They alleged that they had not been allowed to present relevant audio recordings to the court at the interim hearings. They made allegations against Dr. B and claimed that she is currently under investigation for misconduct in relation to their case. They said that Dr. R was entirely mistaken and that he had based his conclusion on suspicion and speculation only and that his conclusions were in breach of relevant English guidelines. They said that they had been unfairly denied the opportunity to care for their child in a supervised setting. They said they had recently been told there would be no family contact in the future for fear they might abduct the child again. They said that, since their arrival in Ireland, they had overheard a discussion of a plan to have the child adopted by a Muslim family. There was even an allegation that an English social worker had suggested to the mother that she take her own life, and that the English police had seized the phone on which a recording of this comment was contained, thus depriving the respondent the means of access to this evidence.

36. The complaints of the respondents as described above can be divided into two broad but separate legal submissions; (1) that the English courts 'got it wrong' on the merits and should not have come to the conclusions they did; and (2) that the English courts were/are unwilling to treat the respondents fairly.

37. As regards the first of those submissions, I have already pointed out earlier that it is

not for this Court to decide the issue of where and with whom the child should live. The issues before this Court are circumscribed by the provisions of the Hague Convention, as described above. Further, the decisions on the child's care made by the English court to date have been *interim* orders. No final decision had been made at the time the respondents chose to leave the jurisdiction of England and Wales. The respondents have exhibited witness statements to this Court, suggesting that the English court was mistaken in its factual conclusions, and have made other comments about the medical evidence presented to the English court. However, it is not for this Court to review the English court decision in any way. The English court made certain *interim findings* and was preparing to engage in a full fact-finding exercise, according to the affidavit on behalf of the Council, which says that it was hoped the hearing would have been conducted in September 2018. At this hearing, the respondents would have had the opportunity to call the witnesses whose statements were exhibited to me, and any experts they wished to call concerning the diagnosis of "illness fabrication" or the mother's current mental health. It would be utterly inappropriate and quite contrary to the Hague Convention for this Court to seek to deal with the merits of the medical and factual issues in the case.

38. As regards the second of the submissions, namely, in effect, that the English courts have been or are unwilling to protect the respondents' rights, I must have regard to the decision of the Supreme Court in *PL v. EC* [2009] 1 IR 1. This was a case where, like the present case, matters had not reached finality in the courts of the jurisdiction from which the child was removed. The respondent mother had removed the child from Australia to Ireland at a time when an 8-day hearing had taken place before an Australian court but the court had yet to rule. The mother claimed that certain comments made by the judge indicated that he was preparing to rule unfavourably in respect of her allegations of sexual abuse in respect of the father, and therefore the return of the child to Australia would create a "grave risk" to the child's health and welfare. In the course of his judgment, Fennelly J., confirming that the child should be returned to Australia, said as follows: -

> "[61] The real issue concerns the position that this court should adopt in relation to the fact that the identical allegations are the subject of proceedings before the Australian court. The respondent submits that she has produced evidence to satisfy the test that the Australian court is unable or unwilling to protect the interests of C.
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> [62] In order to meet the test laid down in the cases, the respondent must persuade the court that the Australian court has decided, in advance of argument from counsel, to make orders exposing C. to a risk of sexual abuse and that, for that reason, that court is unable or unwilling to protect the welfare of C.
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> [63] The respondent does not accept that the judge expressed a tentative view in proposing for consideration by counsel an order providing for supervised access for a time and unsupervised access thereafter. The applicant, in his application to support his application to the Australian Central Authority in November, 2005, three times said that the judge had described his views as tentative […] More importantly, the judge, at the hearing of the 9th November, 2005, explained in explicit terms that the views he had expressed were tentative […]
>
> [64] He explained this and reiterated it in clear terms. The respondent nonetheless says, in an affidavit of the 17th July, 2007: -

> "I say that it was only when challenged about making his decision prior to hearing all the evidence that the judge stated his views were tentative."
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> This, of course, amounts to an attack on the integrity of the judge. The respondent does not state when the judge is alleged to have been "challenged". There is no evidence of such a challenge at the hearing on the 9th November. This type of unsupported attack on the Australian court is quite unacceptable. It is made in disregard of the facts. The respondent was represented by solicitor and counsel throughout the lengthy hearing in the Australian Family Court. None of her legal representatives have been asked to swear an affidavit to support her attacks on the judge. I conclude that the respondent has produced no credible evidence to suggest that the Australian courts are unable or unwilling to protect the interests and welfare of C.
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> [65] It is for the Australian court, not this court, to test the strength and veracity of the allegations of sexual abuse. It has heard oral evidence from both parties, tested by cross-examination, over a period of eight days. It has also heard expert witnesses and received their reports. The Australian courts conduct adversarial proceedings in a manner remarkably similar to our own. They are capable of protecting the interests of C. If the respondent is dissatisfied with a decision of the family court, she will have a right of appeal. For these reasons, I am satisfied that the respondent has not made out the case of grave risk."

39. In the present case, it is manifestly clear that the English court has not finalised its decision as to the long-term care of the child, because all the orders made between 22nd January 2018 and 20th April 2018 were interim care orders, and plans were being made for a full fact-finding hearing. What is similar to the PL case in the present case is that the respondents have in substance made an allegation that the English courts are unwilling to protect their rights or those of the child. This allegation has been made without any supporting expert evidence or any affidavit from the lawyers who represented the respondents in the English courts or any evidence other than the opinion of the respondents. I have no hesitation in rejecting the submission. The respondents were afforded legal representation before the English court; appropriate hearings were conducted; a doctor gave evidence and was cross-examined; future hearings were being planned; this was all done in a similar fashion to how adversarial proceedings are carried out in Ireland. Further, the interim arrangement was in my view a humane one, involving the child being placed with her grandmother and the respondents being permitted three access visits per week. There is no evidence at all to suggest that the English courts are unwilling to protect the child's rights or those of the respondents. In reality all that is offered is the respondents' personal view that the doctors and the court were wrong in their diagnosis and that they were being treated unfairly by the courts. They could have advanced their case vigorously if they had stayed for the full hearing; and it can be done on their behalf at any future hearing, with appropriate evidence, including that of experts on behalf of the respondents and any evidence they may wish to marshal from any Irish doctors or child-care personnel they have interacted here with while in Ireland. I am informed by counsel on behalf of the applicant that their legal team can act on their behalf in England if they choose not to travel to that jurisdiction for the hearing.

Emotional Damage to the Child

40. Insofar as the respondents relied upon potential emotional damage to the child by being uprooted and sent back to England, this would fall to be considered within article 13(b) of the Hague Convention, which provides that the Court is not bound to order the return of the child if it is established that "there is a grave risk" that the child's return

"would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

41. It is well established that the burden of proof lies upon the respondents to show that their case falls within the scenario described in article 13(b) and that the burden is a high one. An oft-cited description of the level of gravity necessary to satisfy the "grave risk" test is that of the United States Court of Appeals Sixth Circuit in *Friedrick v. Friedrick* (1996) 78F 3d 1060: -

> "… we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, *e.g* . returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

In *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, Denham J. cited from a judgment of Hale J., in her Supreme Court judgment, saying at p. 261: -

> "The underlying philosophy of the Convention and the heavy burden required to be proved to meet art. 13(b) was set out in *Re HB (Abduction: Children's Objections)* [1997] 1 F.L.R. 392. Hale J. held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned."

42. The respondents' case regarding emotional damage to the child is that not only would she would be uprooted from the family where she has been living for 2 months, but that she would also be deprived into the future of the company of her parents because they cannot return to England for fear of being prosecuted for child abduction. In oral submissions, they stated solemnly to the court that they had, with regret, come to the firm conclusion that if the Court made a return order in respect of E, they themselves would not return to England. In the first instance, it has to be said that any disruption cause to the child by returning to her England, after her having been taken from her grandmother, is the fruit of the respondents' own actions in bringing E to Ireland in clear disregard of an English court order. However, more importantly, I am not convinced that the only possible outcome of the child's return to England would necessarily be the dramatic one that her parents would never be allowed *by the English authorities* to play a role in her life in the future. This Court must place trust in the English system to ensure that the child's best interests will be factored into any decisions concerning whether the parents would be prosecuted if they returned to England (a decision for the police and/or Crown Prosecution Service); what the sentence might be if prosecuted and convicted, taking into account all mitigating factors offered on their behalf (a criminal court); and what their role in the child's life might be into the future (a family court). This is not merely a question of mutual respect for a country which is a signatory to the Hague Convention but also a practical recognition that the jurisdiction of England and Wales is subject to many of the same fundamental principles as Ireland, including those contained in the European Convention on Human Rights, whether or not it remains part of the EU. If the parents choose not to return to England, that is their own decision. But this Court is not at all persuaded that the English system, if they chose to return to England, would take a simplistic black-and-white view of the conduct of the respondents, having regard to factors such as the history of the mother with regard to mental illness, the possible intervention of a McKenzie friend who may have given them erroneous advice, the fact that the respondents presented themselves to the Garda Siochana within two days of their arrival in Ireland, and most

fundamentally of all, the question of the best interests of the child herself. Therefore, I do not think that it has been proved that the circumstances give rise to a grave risk of the type of long-term harm to E that is currently being envisaged by the respondents.

Article 20 of the Hague Convention

43. Insofar as the respondents sought to rely upon the fundamental human rights of the child and the family, the relevant defence would be that under Article 20 of the Hague Convention, which provides that the return of the child may be refused "if this would not be permitted by the fundamental principles of the requested State [in this case Ireland] relating to the protection of human rights and fundamental freedoms".

44. Article 20 was considered by the Supreme Court in *Nottinghamshire County Council v. KB and others* [2013] 4 IR 664. The parents of the child in that case had sought to rely on an important difference between the Irish adoption legal regime and that in England, namely that the latter permitted the adoption of children of married couples in circumstances not permitted in Ireland. Notwithstanding this significant difference between the two legal systems, it was held that article 20 did not apply. The court held that a mere legal difference in regimes was not sufficient to trigger article 20, and that the test was whether what was proposed or contemplated in the requesting state was something that departed so markedly from the scheme and order envisaged by the Constitution and was such a direct consequence of the court's order that return was not permitted by the Constitution.

45. There is nothing in the present case which suggests that child care proceedings are so fundamentally different in England than in Ireland that this argument can be considered to have any substance. There was no affidavit of laws or any other evidence suggesting any fundamental difference as between the two legal systems, and indeed a perusal of the English court orders and reasons given, as exhibited, suggest considerable similarity between the legal systems rather than the opposite. It is also the case that the jurisdiction of England and Wales is subject to the European Convention on Human Rights as well as (at least currently) the European Union Charter of Fundamental Rights. In reality, this seems to me to be a case where the mother is dissatisfied with the particular decision and therefore with the manner in which the principles of law were applied by the English court, not with the English system or the fundamental principles themselves. I reject the article 20 submission.

The United Nations Convention on the Rights of the Child

46. The respondents repeatedly referred to the United Nations Convention on the Rights of the Child without referring to the provisions of the Hague Convention under which the present proceedings were brought. Again, this approach was based on a misunderstanding of how the law in this area operates. The Hague Convention is considered to be part of a harmonious framework of international Conventions designed to protect the best interests of the child, and is not somehow in conflict with the UN Convention on the Rights of the Child. In *G.S. v. Georgia* [2015] ECHR 2361/13, the European Court of Human Rights discussed the relationship between the Hague Convention, the UN Convention on the Rights of the Child, and the European Convention on Human Rights. Having referred to all three Conventions, it said that there was a broad consensus, including in international law, in support of the idea that in all decisions concerning children their best interests must be paramount. The same philosophy was inherent in the Hague Convention, which associated this interest with restoration of the status quo by means of a decision ordering the child's immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child's interests, thus explaining the existence of exceptions, specifically in the event of 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. In the context of an application for return made under the Hague

Convention, which was distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention.

47. Thus, the rights and principles set out in the UN Convention on the Rights of the Child cannot somehow be used as "trump cards" in respect of the matters raised in the present proceedings under the Hague Convention. Rather, the various Conventions are seen as pursuing the same general aim of protecting the child's best interests, and the specific Hague Convention parameters are those within which the rights and best interests of the child are to be considered by a national court in the particular circumstance of a wrongful removal of a child from her place of habitual residence. I have accordingly endeavoured throughout this judgment to consider the various arguments raised on behalf of the respondents in accordance with this approach and through the prism of the appropriate Hague Convention principles and policies.

Conclusion

48. In all of the circumstances and for the reasons set out above, I am of the view that there has been a wrongful removal of the child from the jurisdiction of England and Wales and that none of the doors have been opened to the exercise of the Court's discretion on the facts of the present case. Accordingly, I will make an order for the return of the child to England and Wales.