THE HIGH COURT

FAMILY LAW

APPROVED **REDACTED**

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF CC AND SC, MINORS

[2021 No.8 HLC]

[2021] IEHC 411

BETWEEN:

E.C.

APPLICANT

AND

J.F.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 10th of June, 2021.

1. Introduction

1.1 This is a case in which the Applicant father seeks the return of two children (named S and C for the purposes of this judgment) to the jurisdiction of Northern Ireland. C is a 12 years old and S is 8 years old. The Respondent mother is a litigant in person and the parties separated when S was two years of age. She asks the Court to refuse the application to return her children primarily because they are happier here in Ireland. This is not a family law case

in which the Court can hear evidence and make decisions based on welfare grounds alone. While the best interests of the children are always of paramount importance, in the context of child abduction cases, the Court must be vigilant to ensure that both parents have a meaningful relationship with their children, save in the most unusual circumstances. The parental relationship is seen as being a very significant factor in the emotional wellbeing of every child and this is why the courts place such an emphasis on maintaining contact between children and their parents in all but the most exceptional circumstances.

1.2 The application is made under the Hague Convention of the Civil Aspects of International Child Abduction [the Convention]. The Convention ensures international cooperation in respect of legal issues concerning child custody and welfare. The Convention requires that signatory states trust other signatories in terms of their social services and the operation of the rule of law in their respective nations. The Convention was created to combat the problem of the wrongful removal of children from the country in which they usually reside, usually by a parent, to the detriment of the child's relationship with the other parent. This international agreement recognises the normal incidence of relationship breakdown, which leads to the division of families between households and, given the ease of global re-settlement, between countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction.

2. Summary of the Law

2.1 The Convention requires an Applicant for return of a child to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. It is accepted by both parties that the children in this case were habitually resident in Northern Ireland until the time of their removal to Ireland and that the Applicant has rights of custody in respect of both.

2.2 The Applicant must establish that he was exercising these custody rights at the time of removal. If he succeeds in proving and establishing these matters, the burden then shifts to the Respondent who must satisfy the Court that the Applicant was not exercising those rights,

that the defence of grave risk arises or that the children are well settled in the requested state; in this case, Ireland. If either defence of grave risk or being well settled is established, the Court has a discretion as to whether or not the child must be returned. As a matter of law, the Court has no discretion in respect of return, if there is no proven defence, once the Applicant proves the matters set out and his application has been brought within a year of the wrongful removal or retention; in that event, the child must be returned.

3. Background Facts

3.1 The parties were never married to one another, but the Applicant was present at the registration of each birth and named as the father in each case. The Respondent mother does not contest the fact that he is a parent with rights of custody. She raises the defence of grave risk and notes the children's objections to returning to Northern Ireland. In support of these defences, she avers that the Applicant was physically violent. The Respondent did aver to efforts she made to contact the Applicant before she removed the children but accepts that she did not contact him directly and he has sworn that he did not consent to removal. The Court finds on these facts that the children were habitually resident in Northern Ireland and that the Applicant has custody rights in respect of both children.

4. Custody Rights

4.1 The next issue is whether or not the Applicant was exercising his custody rights. The law sets a relatively low bar for parents in the Applicant's shoes. Ms. Justice Ní Raifeartaigh in *N.J. v E. O'D* [2018] IEHC 662 reviewed the authorities and summarised the situation saying that the courts must take a liberal view on the question of the exercise of custody rights and that the focus of the inquiry should be on whether the parent sought to have a relationship with the child, not merely on issues of financial assistance.

4.2 In a recent decision of this Court, *W.B v S. McC & Anor* [2021] IEHC 380, overnight access alone, some months before the application was brought for the return of the child, provided sufficient proof that the applicant in that case had exercised his custody rights.

4.3 In her affidavit this Respondent states: "*The Applicant previously had contact with both children at [READACTED] Child Contact Centre, [REDACTED] United Kingdom. This lasted for*

only 3 weeks." Taking this evidence alone, while not indicating extensive contact, the Applicant was exercising his custody rights.

4.4 There is further evidence on this issue in that the Contact Centre has provided a letter confirming the access visits and the view of the author, which is undisputed in respect of the visits, was that the relationship between the children and their father appeared to be warm. In those circumstances, there is evidence that the Applicant had sought to have a relationship with the children, albeit he was obliged to see them in the controlled context of a contact centre and at fixed times. Access was stopped on several occasions but at the request of the Respondent, it appears, not the Applicant, due to illness. This evidence of efforts to maintain regular visits meets the evidential standard required of the Applicant and he has established that he was exercising his custody rights under the convention.

5. <u>Consent</u>

5.1 The burden of proving consent on the balance of probabilities is on the Respondent as she seeks to raise the defence.

5.2 In her affidavit the Respondent states that "*I had asked Ms. Anderson if it was okay to leave Derry to which she replied 'There is no Court Order keeping you here. You have all rights to leave'. To which I replied, 'Will you notify* [The Applicants] *Solicitor as soon as possible?', to which she did*." She accepts that she did not contact the Applicant directly in relation to the removal of the child. She further summits that she had spoken to family relations of the Applicant about the removal of the child. At most, this suggests that the Applicant may have been notified or warned of her plans.

5.3 The Applicant avers that Respondent prevented his access with the children in August 2020, and for several weeks thereafter claimed that it could not take place as the children were ill. In October the Applicant avers that he learned from his solicitor that the Respondent had removed the children to Ireland.

5.4 No written or explicit consent to the removal of the children is referred to or exhibited by the Respondent. No conduct which might indicate consent on the part of the Applicant (even if that would be sufficient to justify removal) is referred to by Respondent.

5.5 As set out in *Re K (Abduction: Consent)* [1997] 2 FLR 212, consent to removal must be positive, unequivocal, clear and cogent: the Applicant has offered an undisputed averment that he did not consent to the children's removal and the burden rests on the Respondent to prove consent. She has failed to prove that he consented to removal, on the facts of this case.

6. <u>Grave Risk</u>

6.1 Article 13 provides that a child may refuse to order the return of a child if there is a grave risk that her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

6.2 The Court 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 the child's views. In considering the circumstances referred to in this Article, the Court must 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.

6.3 In *CA v CA* [2010] 2 IR 162, [2009] IEHC 460, Finlay-Geoghegan J. described the Article 13(b) defence as a "*rare exception*" to the requirement to return which "*should be strictly applied in the narrow context in which it arises*." The kind of situation which may constitute a grave risk to a child was considered in *RK v JK (Child Abduction: Acquiescence)* [2000] 2 IR 416, where Barron J. cited with approval the formulation from the United States Sixth Circuit of Appeals in *Friedrich v Friedrich* 983 F.2d 1396 (6th Cir. 1993) (at p.451):

> *… 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.*

6.4 Collins J. in *CT v PS* [2021] IECA 132 outlined the history of the cases relevant to an understanding of the objectives of the Hague Convention and concluded at para. 61, "*there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved*

where the children reside. That is of course a fundamental animating principle of the Hague Convention."

6.5 The Applicant in her affidavit states that she believes "*the Applicant is a threat and danger to both children*". She goes onto to state:

> "*The Applicant in question has been abusive on multiple occasions both physically and sexually, the Applicant has previously violated a restraining order that was in place until November 2020 on multiple occasions during the 8th,10th, 13th, 15th January 2020. The Applicant is going through prosecution for what he has done to me on the dates listed NAMES REDACTED S and C have also been victims of this abuse, Guardian Ad Litem Agency 6, ADDRESS REDACTED, United Kingdom, have information on one of the cases regarding physical abuse toward C*."

6.6 In a case in which the Respondent, who bears the burden of proof, avers that the Applicant was violent, she must do more than assert this without further detail. Here, the Respondent has also pointed to a series of prosecutions of the Applicant. However, the dates of the alleged offences correspond with supervised access visits. These are the only occasions on which the children were with the Applicant in the year or so before they were removed to Ireland. These visits appear to have taken place in a contact centre and a letter from a member of the staff of that centre is referred to above. Further, each one of these prosecutions was withdrawn by the prosecutor.

6.7 The assessor in this case has also made a reference which is relevant to the issue of grave risk. The Court was asked to discard this evidence on the basis that the assessor's role is a limited one and his report is not directed to the issue of risk but to the objections of the children, if any. The issue thus is: what weight, if any, could attach to evidence from the report of the assessor, in circumstances in which it may constitute evidence from a child in support of assertions of abuse. The assessor quotes the elder child referring to the Applicant hitting the mother, "*other family members and me*." While the assessor goes on to reach certain conclusions in this regard, it is argued that the Court is not bound by such conclusions. The Court agrees with this latter argument. This expert's function is to assess whether or not the child objects to return and, if so, whether or not the child is sufficiently mature to have those objections considered. That being the case, the Court is not bound by the assessor's views as

to any risk of violence to the child. This Court takes the view that it may, however, consider evidence of violence offered by a child while being interviewed during the course of such assessment, and it may consider that evidence in determining the issue of whether or not there is a grave risk to the child. That is a different matter to attaching weight to the assessor's views of the risks posed in the event of a return being ordered.

6.8 Where grave risk is properly raised, as it is here, and there is no cross-examination of the parties, the Court must approach the evidence as though it were true. It would be impossible for this court, without detailed cross-examination and more evidence of fact, to decide if the allegations were true. What this Court can decide, however, is that if the allegations were true, whether such conduct would be sufficient to establish that the children, if returned, would be at grave risk of harm. In this case, the answer to that question must be no. Not only are they rarely in the company of their father, their visits are supervised and take place in a contact centre, which arrangement is provided for in a court order set out at p. 28 of Exhibit D. Further, and while there is a reference to concerns having been raised, the Contact Centre has confirmed that in the very few visits which took place, the relationship appeared to the onlooker to be warm. Overall, therefore, and even if there is a history of violence between the parties (which this Court cannot decide) there is no evidence of grave risk to the children which cannot be assessed and addressed by the courts and social services in Northern Ireland.

6.9 In *R v R* [2015] IECA 265 Finlay Geoghegan J, noted the trust which must be placed in the courts of the state of habitual residence to protect the child and in *S.H. v J.C.* [2020] IEHC 686, this Court rejected the argument that the risk of children being placed in foster care in the requesting state constituted a grave risk within the meaning of the Convention. At paragraph 6.11 of that judgment the following conclusion is expressed:

> *It is clear that the courts in England are both willing and competent to vindicate the rights of these children and safeguard their welfare. It cannot be argued, tenably, that returning the children to a situation where Interim Care Orders are now in place, made by a court of competent jurisdiction with the sole aim of protecting the children, amounts to placing them in a situation of grave risk or puts them in an intolerable situation within the legal meaning of those terms, in the context of the Convention.*

7. The Objections of the Children

7.1 Article 13 of the Convention permits a court to refuse to return a child if it finds that the child objects to being returned and has attained an age and degree of maturity such that it is appropriate to take account of the child's views. In *AU v v TNU* [2011] 3 I.R. 683, the Supreme Court upheld a decision to refuse the return of two children to New York, one of whom was 8, as in this case. The facts were quite similar save that the Applicant father in that case had behaved in such a way that his access visits were terminated and the children expressed a fear of him. This was expressed to be an exceptional case in which the children's views were firm and well-articulated.

7.2 It is clear from the reports provided to the Court that both children are happier in Ireland than they were in Northern Ireland for a number of reasons. Both refer negatively to their father and they both object to returning to Northern Ireland. This means the Court has a discretion as to whether or not the children are returned. But it must be exercised in the context of the Convention and bearing its objectives in mind. The main objectives are to prevent and deter child abduction and to ensure that children have the advantage of a relationship with both of their parents.

7.3 A refusal to return a child is a rare exception in Convention cases once wrongful removal has been proven. In these circumstances, while the children object to return, S is 8 years old and the other, C, is 12. C suffers from developmental delay and autism but is said by the assessor to be within the normal range of maturity. Notwithstanding this apparent contradiction, the Court accepts that the evidence of the report is an unequivocal objection to a return to Northern Ireland.

7.4 It appears to this Court that the reasons given by the children relate to the general environs, to their friends and to the social context of their new home and school more so than to the Applicant. Insofar as objections are expressed about the Applicant, they must be seen in context: they have had relatively little contact with him over the years, it is true, but that contact has not been wholly negative, to judge by the independent evidence of the Contact Centre, referred to above. The assessor expresses the view that the children have been

exposed to chronic parental conflict. Somewhat worryingly, the assessor describes S as follows:

> *S describes her experience of living in an environment where she had witnessed conflict between her parents. She appears to have a level of discomfort with exposure to her father. Children that have experienced chronic parental conflict tend to become sensitised to such conflict and begin to distance themselves from such environments. S's views regarding Derry as being "dirty" seem to be linked to her mother's views "Mummy really hates Derry because of Covid".*
>
> *Whilst some of her views are likely to have been influenced by the views of her mother, S does seem to have developed her views regarding the relationship with her father based on her own opinion and experiences.*

7.5 The Court is concerned in this regard as, while the assessor did not know this, the child referred to had last lived with both parents when she was 2 years old, so it is difficult to understand how she had built up a picture of conflict, save from hearing reports from her mother. Further, the assessor and the Respondent herself refer to extended family support – aunts, uncles and cousins of the Applicant, about whom no complaint is made, all of whom appear to reside near her former home in Northern Ireland.

7.6 The Respondent assures the Court that she never stood in the way of access, yet the last months of their lives in Northern Ireland were characterised by missed access appointments which seem to have been cancelled by the Respondent. It is further accepted that she did not seek his consent to removal of the children, although she may have tried to notify him indirectly. This is easy to understand if, as the Respondent says, the Applicant had not played a large part in their lives, but she also accepts that his mother and other family members of his are in Northern Ireland and it appears to this Court that the social and extended family situation is such that this is another factor weighing in the balance against a refusal to return.

7.7 Bearing all of these matters in mind, but in particular the overarching concern of the Convention, namely, to support the relationship of children with both their parents as being overwhelmingly in their best interests save in the most unusual cases, this is not an appropriate case in which to refuse a return, despite the objections of the children. The interest

the Applicant has shown in maintaining a relationship with his children together with the evidence of other family members residing in Northern Ireland persuade the Court that, for their sake more than for his, the children's relationship with their father must be sustained insofar as this is possible. This can only be done, at present, if the children are returned to Northern Ireland.

7.8 It must also be noted that the family law aspects of this case are currently before the courts in Northern Ireland. It may be that, in future and with the support of the courts in that jurisdiction, a formal change of residence can be made which accommodates regular access with their father. The action of removing the children without consent was not an appropriate way to achieve the objective of moving to a new home and may do irreparable harm to the children's long-term psychological health if their relationship with their father is thereby abruptly severed.

8. <u>Financial Difficulty & Grave Risk</u>

8.1 The Respondent has submitted to the Court that she would have nowhere to live if she had to return to Northern Ireland, and that this could be construed as a grave risk to the children. This was not referred to in her affidavit.

Article 13 of the Hague Convention states: -

> *'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-……*
>
> *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*

8.2 A similar argument was made in *C.M.W. v S.J.F.* [2019] IECA 227. There the appellant contended that a summary return would result in grave risk and would also place the two minors in an intolerable situation; firstly, arising from financial hardships that would be encountered by the appellant and secondly by reason of the health of the appellant which she contended would be so adversely impacted as to have a serious negative impact on her mental health which in turn would give rise to an intolerable situation for the minors. There is no such health issue here.

8.3 In *AA v RR* [2019] IEHC 442, Donnelly J stated:

> *The focus must be on the children. Where there is a grave risk however, that the return will place the abducting parent in a specific situation that will result in the child being place in an intolerable situation, the Court is not under an obligation to return the child. The category of circumstances in which this would arise, include violence and abuse towards the abducting parent, physical and psychological harm to the abducting parent and, as will be seen below, financial hardship. The Court must be forward looking and assess the risk of what may happen on return."*

8.4 Donnelly J then refers to two decisions of Ní Raifeartaigh J. relating to financial circumstances. The first decision is *D.H. v L.H.* [2018] IEHC 317 in which the children had been removed from the Czech Republic. In that case Ní Raifeartaigh J. held that:-

> *"notwithstanding the high threshold for establishing "grave risk" within the meaning of article 13 of the Convention, there is, in this case, a grave risk that if the mother were forced to return to the Czech Republic with these children, they would be facing a situation without accommodation and with no guarantee of any source of income. In contrast, they are currently living in Ireland where their mother has a job, accommodation, and the children appear to be well settled and happy at school. In those circumstances it seems to me that there is a grave risk of what could be described as an intolerable situation for these particular children in these particular circumstances if they were returned to the Czech Republic."*

Donnelly J continued at para. 84:

> *"It is necessary to bear in mind the relevant legal principles when making that assessment. In Re M (Abduction: Undertakings) [1995] 1 FLR 1021 Butler-Sloss L.J. dealt with an argument by the mother that financial hardship on return to Israel amounted to grave risk, as follows:*
>
> > *"I have no doubt that if an order requiring the children to return to the country of their habitual residence was demonstrated to result in young children being left actually homeless, on the street and destitute without recourse to State benefits, a court would be likely to find that Art 13(b) had been met. It is, however, important to recognise, to my knowledge at least, no English court has yet found circumstances to meet the*

stringent requirements under Art 13(b), nor do I believe they have been met in the Convention countries with which we are principally concerned, such as the USA, Canada, Australia and New Zealand."

85. It is necessary to analyse carefully whether the respondent has demonstrated on the balance of probabilities that there is a grave risk of being left destitute. The respondent claimed that she is not entitled to employment benefits because she did not pay her social insurance contributions as required by her self-employed status. She has exhibited webpages from a Government of Canada website regarding 'Employment Insurance Regular Benefits'. This website specifically stated that if the person is not entitled to employment insurance benefits they should use the 'Benefits Finder' to find other Government of Canada, provincial or territorial benefits.

8.5 Here, there has been no evidence as to the circumstances of the Respondent either in Ireland or in Northern Ireland thus there has been very little oral argument in this regard. The Respondent does not rely on any medical difficulty, nor does it appear that she left the jurisdiction of Northern Ireland for economic reasons. It is difficult for this Court to accept that there are no social supports in that jurisdiction sufficient to assist the Respondent and this is a matter for her to prove. There has been no evidence adduced in this regard. In those circumstances, and with no evidence on the issue, this Court cannot take it that the Respondent has proven that she will be destitute if she returns to Northern Ireland.

8.6 Finally, the Court notes that the Respondent submitted to the Court during the hearing that if the children were returned to Northern Ireland, *they would not be seeing him,* meaning the Applicant. The Respondent does not appear to understand that a major objective, if not the whole purpose, of the Convention is to ensure that one parent does not sever the contact of children with the other parent. This is entirely in the interests of the children and is not primarily for the benefit of either parent. Her expressed intention to defeat the order of the Court is disturbing but the Court has assessed the weight of her evidence without further reference to this statement.

8.7 I will hear the parties as to how the proposed return is to be achieved, including any application for a stay if that arises, in circumstances where it is not proposed that the

Applicant will become a carer for the children and no undertakings have been offered by him in respect of the security and safe return of the children.