APPROVED

NO FURTHER REDACTIONS NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/98

Binchy J.
Pilkington J.
Allen J.

Neutral Citation Number [2023] IECA 158

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 E.B. (A MINOR)

BETWEEN

A.B.

APPLICANT/RESPONDENT

AND

C.B.

(ALSO KNOWN AS C.D.)

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Allen delivered on the 19th day of June, 2023

1. This is an appeal against the judgment and order of the High Court (Gearty J.) made on 20th April, 2023 pursuant to Article 12 of the Hague Convention and Regulation (EC) 2201/2003 that [a child] be returned to the jurisdiction of the courts of [the European Union country of her habitual residence] as soon as possible.

2. Ms. [B.] *("the child")* was born in [a European Union country in] 2012 and lived there until [mid] 2022 when she was brought to Ireland by her mother, the appellant *("the mother")*. Following a request by Mr. [A.B.], her father, the respondent to the appeal *("the father")*, to the [relevant] Central Authority for the return of the child to [the country of her habitual residence], High Court proceedings were commenced by special summons issued on 20th December, 2022.

3. The judgment of the High Court identified a factual dispute as to whether the father had consented to the removal of the child, an issue as to the reliability of the child's views as expressed at an assessment, and three issues – described by the High Court judge as preliminary issues – as to the procedures adopted by the High Court and the fairness of the hearing. The focus of the appeal is on the fairness of the High Court hearing. The mother seeks to have the High Court order set aside and the proceedings returned to the High Court for hearing. Alternatively, the mother asks that this court should make a reference to the CJEU for a ruling on a number of questions of law said to be raised, and a decision on which is said to be necessary to allow this court to give judgment on the appeal.

The chronology of the High Court proceedings

4. The chronology of the progress of the High Court proceedings is of some importance.

5. The father's Family Law Special Summons which was issued on 20th December, 2022 and made returnable for 12th January, 2023 was served personally on the mother on 7th

January, 2023. On the first return date the mother was given two weeks within which to file a replying affidavit and the summons was adjourned until 26th January, 2023. On the adjourned date the mother's affidavit had not been filed. The time for the filing of the mother's affidavit was extended by a further two weeks and the summons adjourned until 9th February, 2023.

6. By 9th February, 2023 the mother had provided an unsworn affidavit and was given a further week within which to have it sworn and filed, and the father was given two weeks thereafter within which to file his replying affidavit. The High Court also then fixed the hearing of the summons for 23rd March, 2023 and directed that in the meantime the child be interviewed by an expert assessor, Ms. Ruth More O'Ferrall, on 27th February, 2023 *inter alia* with a view to establishing the child's wishes in relation to her future care and living arrangements and where she would like to live, and if those wishes did not include living in [the country of her habitual residence] whether she had any objection to living in [the country of her habitual residence] and in the event of any objection, the child's reasons for such objections. The court directed that the parties should file their respective written legal submissions by close of business on 20th March, 2023 and that the summons be listed for mention on 9th March, 2023;

7. The mother's affidavit was sworn on 23rd February, 2023 and on 9th March, 2023 the father was allowed a week to file a replying affidavit. The deadline for the exchange of written submissions was extended to 22nd March, 2023 and the hearing date for the following day confirmed.

8. On 16th March, 2023 the father delivered an unsworn but final version of his replying affidavit, which was sworn and filed on 20th March, 2023. By order of the High Court made on 20th March, 2023 Ms. More O'Ferrall's report to the court was released to the parties and on 22nd March, 2023 the legal submissions were exchanged. Also on 22nd March, 2023 the

mother's solicitors served a form of notice to cross-examine the father on his replying affidavit.

The evidence in the High Court

9. The special summons was grounded on an affidavit of Ms. Grainne Brophy, the father's solicitor, which she swore on the instructions and with the authority of the father, conveyed by the Central Authority [of the child's habitual residence] through the Irish Central Authority. Ms. Brophy deposed – and it proved to be common case – that the father was the father and the mother was the mother of the child. The father and the mother were married [in] June, 2012 and divorced [in] August, 2014.

10. The child was born [in] 2012 and the father and the mother were named as such on the child's birth certificate. On 9th July, 2014 a written agreement was made between the father and the mother by which the parents were to continue to have joint custody of the child, who was to primarily live with the mother but with access to the father, including overnight access. That agreement contemplated that either parent might take the child out of [the country of her habitual residence] with the agreement in writing of the other by SMS message one month in advance on the time, place and procedure of departure. The father had custody rights under the law of [the country of the child's habitual residence] and, until the removal of the child from [the country of her habitual residence], was exercising those rights. The child was habitually resident in [the country of her habitual residence] until her removal. The child was removed from [the country of her habitual residence by the mother [in mid] 2022.

11. The premise of the father's application to the Central Authority [of the child's habitual residence] and of the High Court proceedings was that the child had been removed

from [the country of her habitual residence] without his consent and accordingly, that the removal was wrongful within the meaning of Articles 3 and 5 of the Hague Convention.

12. There was no issue that the father did not seek the assistance of the relevant authorities as soon as was possible and when it became clear that the mother would not return the child voluntarily.

13. The mother in her replying affidavit accepted that *"some of the personal details"* set out in Ms. Brophy's affidavit were correct but identified a number of Ms. Brophy's averments as being *"incorrect,"* including the claims that:-

(i) *"The child did not speak English prior to her removal;"*

(ii) the father *"has been deprived of the opportunity to exercise [his] rights [of custody, parental responsibility and access];"*

(iii) *"the claims set out at paragraph 9 of the translated version of the special summons"* – which were that the mother had taken the child without the father's knowledge or consent;

(iv) *"the claim set out at paragraph 14 of the translated version of the special summons that 'The removal of the child to the Republic of Ireland in or about [mid] 2022 was without the knowledge and or consent of the [father] and is wrongful within the meaning of Article 3 of the Hague Convention.'"*

14. The mother *"took issue with the title of herein proceedings which uses the wording 'CHILD ADDUCTION' AND … WITH THE USE OF THE WORDS 'wrongful removal' and 'wrongfully removed'"*. She deposed that she and *"our"* daughter had moved from [the country of the child's habitual residence] to Ireland *"for the purposes of our resettlement as a family unit. I am advised and believe that I and our daughter were exercising European free movement rights ('free movement rights') when we resettled as a family unit in the State, upon moving from [the country of the child's habitual residence] on or about [mid] 2022."*

15. At para. 6.1(i) of her affidavit the mother deposed that she had not acted in breach of the Hague Convention in bringing her daughter to Ireland because *"our movement to the State was in exercise of our free movement rights, for the purposes of family unit resettlement in the State."*

16. At para. 6.1(ii) of her affidavit, the mother deposed that:-

> *"I sought express permission (telling the applicant that myself and our daughter were leaving to live in Ireland; I also told the applicant that I was selling my apartment and business in [the country of the child's habitual residence] and was leaving to live in Ireland; the first time I phoned the applicant to tell him we were leaving to live in Ireland, the applicant was surprised; the second time I called the applicant to tell him we were leaving to live in Ireland, he said 'if you decided to do so, then fine' applicant then talked to our daughter, who told him she wanted to go to live with me in Ireland; to which applicant replied, 'yes, if you decided that then you can go.') from applicant (sic.) that our daughter could move with me to the State for the purpose of our resettlement as a family unit in the State."*

17. While the mother asserted that the father had given his express consent to the child moving to Ireland, there was no suggestion that he had done so in writing as required by the deed of 9th July, 2014. Nor was there any indication of the time or circumstances in which the conversations were said to have taken place.

18. I was struck by the averment, at para. 6.1(iv) of her affidavit sworn on 23rd February, 2023 – three months after the father's request to the Central Authority [of the child's habitual residence] and more or less two months after the commencement of the High Court proceedings – that *"the [father] has not, in the interim since our family unit resettlement in the State, withdrawn his express consent to our daughter resettling in our family unit in the State."*

19. The mother, as I have said, *"took issue"* with the averment in the summons that the child did not speak English prior to her removal. At para. 6.2 she averred that *"... this claim is untrue and is an attempt to mislead the Honourable Court as to the true facts."* She averred that before she and her daughter left [the country of the child's habitual residence], the child not only spoke English but in the evaluation of her [country of habitual residence] school spoke good English. She exhibited what she described as a bundle of documents generated before the removal of the child which included a certificate [for a date shortly before the removal of the child in] 2022, congratulating the child *"for her amazing progress in English"*.

20. Ms. More O'Ferrall duly interviewed the child and reported to the High Court and on 20th March, 2023 the report was released to the parents.

21. Ms. More O'Ferrall reported that she had interviewed the child, who had been brought to her office by the mother and a woman who introduced herself as the mother's niece but who was referred to by the child in interview as her – the child's – sister, [X]. The child was reported to have presented as a shy child who did not have sufficient command of the English language to engage *"fully"* in the assessment process but who was able to answer very basic questions. She was said to have appeared to have been, and to have confirmed that she had been, prepared for the interview and to have provided what appeared to be rehearsed answers to open questions. The report set out verbatim a number of questions and answers. At para. 24 the report recorded that:-

> *"[E.] told me that her mother and sister had helped her to prepare for the interview, I asked if anyone had told her what to say, she said 'my sister and my mum', I asked what they had told her, [E.} said that she did not understand the question."*

22. In Ms. More O'Ferrall's opinion, the child's narrative and responses could not be regarded as reliably reflecting her own felt wishes and feelings and lived experiences.

23. On 20th March, 2023 the father swore his replying affidavit. He confirmed the accuracy of what had been set out in the grounding affidavit of Ms. Brophy. He acknowledged the mother's free movement rights but said that she had no such rights under the Hague Convention or EU Regulation 2019/2011. The father denied that he had consented to the removal of the child to Ireland. The mother, he said, had never told him that she was leaving [the country of the child's habitual residence] to live in Ireland. She had, he said, told him that she wanted to go to Ireland for the summer holidays. The father averred that he had not consented to that but that when it happened, he assumed that the child would be brought home for the commencement of the next school year.

24. Specifically in reply to para. 6.1(ii) of the mother's affidavit, the father denied that he had consented to the mother traveling to Ireland with the child or speaking to the child about any such move.

The hearing before the High Court

25. When the case was called in the High Court, counsel for the mother applied for an adjournment. As he put it, his main application was that the hearing could not go ahead that day. Without saying why it was contended that the hearing should not go ahead, counsel conveyed his instructions to make a leap frog application to the Supreme Court if it did.

26. At the invitation of the High Court judge, counsel set out the grounds of which an adjournment was sought. First, it was said, Ms. More O'Ferrall should have discontinued the interview when she determined that the child – as counsel put it – *"did not have a sufficient command of English to engage with the assessor."* Secondly, it was said, the mother had a right under O. 38, r. 3 of the Rules of the Superior Courts to cross-examine the father. Thirdly, it was said, it was unfair that the written legal submissions had been exchanged. The

mother, it was suggested, had a right to have replied to the father's written submissions. This, it was said, was unfair and breached Article 47 of the Charter of Fundamental Rights of the European Union.

27. Counsel for the father protested that no notice had been given of the adjournment application. She acknowledged that there was reference in the mother's written submissions which had been filed on the previous day to oral evidence and that a notice of intention to cross examine had been served on the previous day. Counsel pointed out that O. 133, r. 5(2) of the Rules provides that proceedings under the Child Abduction and Enforcement of Custody Orders Act, 1991 shall be heard on the basis of affidavit evidence only, with the proviso that the court, in its discretion and in exceptional circumstances, may direct or permit oral evidence to be adduced. Counsel emphasised that the burden of proof on the consent issue was on the mother.

28. The High Court judge carefully teased out the arguments made on behalf of the mother. Counsel confirmed that the mother was proposing that there should be a second interview with the child, the focus of which would include whether the child had been coached for the first interview. He confirmed that his argument was that the mother was entitled as of right to cross examine the father, rather than that she was required to identify any specific issue that could only be resolved by cross-examination, and he did not attempt to identify any such issue. Counsel acknowledged that he would have the right and opportunity to respond by oral argument to anything in the father's legal submissions and characterised what had shortly before been put up as a breach of the appellant's Charter rights as *"... not something you need to worry terribly about, Judge."*

29. The High Court judge gave an *ex tempore* ruling on the adjournment application. Having addressed the three grounds *seriatim*, the judge refused to adjourn the case and moved to the substance, on which judgment was reserved. In her written judgment, the High

Court judge reprised the reasons for which she had refused the adjournment application and I will deal with them when I come to the written judgment.

30. I should say at this point that after the judge had ruled on the adjournment application, she offered counsel for the mother what she referred to as the advantage of opening on the substance of the application on the basis that the burden was on the mother. Counsel for the mother then said that he was seeking permission to file affidavits to be sworn by her – the mother's – sister and her – the sister's – husband which, it was said, would *"prove that they were there and they heard the [father] consenting in the phone call."* That application was opposed by counsel for the father on the grounds that the adjournment had already been refused on all of the grounds on which it had been made and that the issue to which the proposed new evidence was directed had never been pleaded. In reply – or rather in response – to what had been said on behalf of the father, counsel for the mother spoke again of an application to the Supreme Court for leave and inferentially asked for an adjournment to allow a leave application to be brought. The High Court judge declined to adjourn the hearing for that purpose and again invited counsel for the mother to address the court on the substance.

31. Counsel for the mother then took the position that if the mother were to take part in a hearing which she believed to be unfair and unconstitutional and in breach of Article 47 of the Charter, she would be effectively acquiescing in an unfair trial. The judge then suggested that he might address the substance without prejudice to his position that the trial was unfair. Counsel then said that he would rely on everything which had been said in the written submissions filed on behalf of the mother and left it at that.

32. The judge then heard counsel for the father on the issues of consent and the child's view before inviting counsel for the mother to reply.

33. Counsel for the mother did not address the arguments which had been made on the substance of the application but returned to the question of further affidavits.

34. In her affidavit of 23rd February, 2023, the mother had referred to a difficulty in downloading electronic communications *"in the period relevant to herein proceedings"* between her and the father, and between the father and the child, but contemplated that it might later become possible to do so. In her affidavit, the mother asked for liberty to file a further affidavit exhibiting those electronic communications translated if she could later download them.

35. Pointing to the previous averment as to the difficulty in downloading electronic communications, counsel for the mother said that *"she now has them downloaded and she has the evidence of the [father] making a phone call and her sister and her sister's husband were there and who heard it."* The court was asked to allow the mother to file affidavits by each of those persons which, it was said, would prove the fact that they heard the father consenting.

36. This was all very vague. It was not said when the phone call was made or when the mother had downloaded the electronic record or what the electronic record was. The earlier affidavit had referred to a difficulty downloading electronic communications but had referred only to communications between the mother and the father, and between the father and the child. At the invitation of the judge, counsel clarified that the call was a video call which had been made by the father to the mother's sister which, it was said, had been overheard by the mother who, it was said, could see the father's partner. Again in response to the court, counsel confirmed that what had been downloaded was not the call but screenshots which would prove that a call had been made. There was still no clarity as to precisely – or even generally – when the call was made but it was clear that that the call had predated the mother's replying affidavit.

37. Perhaps more to the point, counsel for the mother did not engage with the father's arguments on the issues of consent and the child's views.

The High Court judgment

38. In her written judgment delivered on 20th April, 2023 the High Court judge first reprised the adjournment application and the reasons she had given for refusing it.

39. The judge dealt first with the question of the timing of the exchange of legal submissions. She noted that the direction that the written submissions should be exchanged had been described by counsel in argument as a *"small sin"* and that the submission had gone no further than to note a perceived unfairness. The judge noted that in most cases brought under the Hague Convention the exchange of legal submissions takes place only a few days before the hearing and is intended to give the parties and the court some notice as to what arguments will be made. She noted that counsel for the mother had not identified any argument made in the written submissions which had not been anticipated or which rendered the exchange unfair in any way.

40. The judge then dealt with the question of cross-examination. In her written judgment, the judge recalled that the argument was that the mother was entitled as of right to cross examine the father. The judge held that under O. 133, r 5(2) of the Rules, applications in the Hague Convention list must be heard on affidavit evidence only, save that leave to cross-examine may be granted in exceptional cases. She found that there was no material in the mother's affidavit beyond a mere denial and assertion and that cross-examination was not necessary to resolve the consent dispute where all the available exhibit evidence suggested that the parents had agreed that any agreement in relation to the removal of the child from [the country of the child's habitual residence] would be in writing. While the judge did not

repeat it in her written judgment, the transcript of the hearing shows that the judge then said that if at the end of the hearing she considered that there was some infirmity in the evidence that could only be resolved by cross-examination she would, of course, revisit the issue.

41. The High Court judge next dealt with the question of the adjournment to obtain further affidavit evidence, starting at para. 2.10. The judge recalled the time and circumstances in which the application had been made. There was, she said, no mention of the sister or her husband in the mother's affidavit. The height of the application was that they would support the mother's version of events but with nothing more than a screenshot of a call between the father and the sister. The application was refused on the basis that there was no reason to anticipate compelling evidence on the consent issue, and furthermore due to the timing of the application. The judge found that there was no reason why these two individuals had not been identified previously; no reason why the application had not been made before the case began; and no reason to expect that the court could attach much weight to averments from close family members with no explanation as to why they had not presented their evidence at the earliest possible stage.

42. Starting at para. 2.14, the judge next addressed the application for an adjournment to obtain a second report on the child. She summarised the arguments made on behalf of the mother and the assessor's report and said that she was satisfied that although the child did not have good English, the assessor had nevertheless been able to ascertain enough information from her to assist the court in assessing the child's views. The judge concluded that the child's repetition of stock phrases, such as *"I love this beautiful country"* without being able to say why, would have raised the court's suspicions as to whether the answers represented the child's independent views. She pointed to the inconsistency between the school reference exhibited by the mother which confirmed that the child was happy and popular at school in [the country of her habitual residence], and the child reporting to the assessor that she had no

friends there. She pointed to the fact that the child had confirmed to the assessor that the mother and her sister had told her what to say in interview.

43. At para. 2.28, the judge concluded that:-

> *"2.18 In those circumstances, while the true views of the child have not been ascertained, it is difficult to anticipate how a further report would achieve anything more authentic. If anything, the longer the child spends in Ireland without access to her dad (no access having been achieved since January 2023) the more likely the child is to become entrenched in these views. The application to adjourn the case for a further report was refused on the basis that a second report could not be expected to reveal any more than the first in terms of the child's wishes. A second and equally important reason to refuse to adjourn this case was the urgent nature of the proceedings; it was not appropriate to delay the hearing further. The Hague Convention anticipates a summary return of children who have been wrongfully removed, which aim would be defeated by multiple reports, particularly if a court waits until the child speaks the new language sufficiently well to be able to answer more sophisticated questions."*

44. Starting at para. 4.1 of her judgment, the judge dealt with the issue of consent and concluded that the mother had not discharged the burden of proving that the father had consented to the removal of the child. It is not necessary to engage with the judges reasoning and conclusion on this issue because there is no appeal against this finding.

45. Starting at para. 5.1, the judge dealt with the substantive issue of the views of the child. She found that the strong evidence that the child had been told what to say made any assessment of her views and decisions on whether or not they constitute true objections meaningless. Significantly, the judge found that the submission that the child's views could not be ascertained due to her lack of English was not well founded. She said that:-

"In this case, the obstacle to ascertaining the child's views was not a linguistic one but one of authenticity; what was being said had been directly influenced by others."

46. Again, as I will immediately come to, there is no appeal against this finding.

The appeal

47. By notice of appeal dated 5th May, 2023 the mother appealed to this court against the judgment and order of the High Court. I will come to the grounds of appeal but it is useful to first define the parameters of the appeal. The mother, in the introduction to her written submissions on the appeal at paras. 1.4 and 1.6, sets out that:-

"1.4 Appellant brings herein Appeal on the basis of her right to a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') – the High Court – in error, refused to grant Appellant her sought adjournment; and, in error, continued to hear the proceedings. …

1.6 In short, Appellant believes that, in error, she has not had a fair hearing of these international child abduction proceedings."

48. This is perfectly consistent with the application and arguments made in the High Court. However, the mother goes on to identify the issues for determination in the appeal as being:-

"(i) the legal status of the Charter?

(ii) is the Charter engaged in this case?

(iii) are Appellant's and the Child's European Union free movement rights engaged in this case?

(iv) *did the High Court's decision to continue hearing the proceedings (after refusing Appellant's sought adjournment) breach Appellant's Article 47 rights?*

(v) *if the answers to issue '(ii)' and issue '(iii)' are both yes, is Appellant entitled to the relief sought in the Notice of Appeal?*

(vi) *before a final decision is taken in respect of herein Appeal, is Appellant entitled to the benefit of an Opinion from the CJEU, pursuant to Article 267 of the TFEU, of the following questions of European Union law (reformulated if necessary):*

1. *Whether or not the swiftness of hearing provisions (as applied by the High Court) under the Hague Convention, under Council Regulation 2019/1111, and, under Order 133 of the Rules of the Superior Courts are incompatible with Article 47 of the Charter?*
2. *Whether or not the swiftness of hearing provisions (as applied by the learned High Court judge) are incompatible with Article 24 of the Charter?"*

49. There was no issue in the High Court as to the legal status of the Charter or as to whether the Charter was engaged.

50. The mother, in her replying affidavit, averred that her and the child's movement to the State was in exercise of their free movement rights and in her written submissions in the High Court had asserted that *"The [father's] seeking the return of the child to [the country of her habitual residence] has placed in jeopardy the [mother's] and the child's free movement rights. "* In the mother's written submissions on the appeal, it was asserted that it is beyond argument that the mother's and the child's free movement rights are engaged in this case and that:-

"By reason of the fact that Appellant and Child have exercised their free movement rights; their Charter rights are accentuated."

51. On the oral hearing of the appeal, counsel for the mother sought to argue that the mother's – and, perhaps, the child's – free movement rights might somehow trump the rights of the parents and the child under the Hague Convention and/or that The Hague Convention does not apply to EU citizens exercising their free movement rights. The very height of the argument made in the High Court – as noted by the judge at para. 5.8 – was that a decision to return the child would somehow contravene the right to free movement. As the judge observed, it was not surprising that no authority was cited in support of that proposition. The assertion at the oral hearing of the appeal – and it was no more than an assertion – went much further. In practical terms, the proposition was that EU citizens exercising their free movement rights are at liberty to abduct their children. Counsel for the mother agreed that this was not an argument that was made in the High Court but said that if the case was remitted to the High Court, it would be.

52. The question formulated as issue (iv) is, as I will come to, the only issue properly raised by the notice of appeal.

53. The question formulated as issue (v) is a *non sequitur*. If the Charter and the mother's free movement rights were simply *"engaged"* – without having been breached – this could not possibly justify setting aside the High Court order.

54. As to the suggested questions of European Union law – and ignoring the fact that Article 267 does not confer rights on the parties to litigation or contemplate the CJEU giving opinions – the issue which the mother would now seek to raise is an argument that the Hague Convention, Council Regulation (EU) 2019/1111 and O. 133 of the Rules of the Superior Courts are incompatible with Articles 24 and 47 of the Charter. Not only was this not raised before the High Court but the proposition flies in the face of the acknowledgement in the

mother's written submissions to the High Court of the need for fast redress and of her obligation to cooperate in the expeditious hearing of the proceedings. The mother's argument that the Regulation and the provisions of domestic law must be interpreted in conformity with the Charter is another matter altogether.

55. The first ground of appeal is that:-

> *"In error and in breach of the Charter of Fundamental Rights of the European Union, the High Court judge elevated both the principle of Hague Convention mutual trust between member states and Hague Convention swiftness (expeditious hearings) in disposing of child abduction proceedings above the best interests of [the child] – [the child's] Article 24 and Article 47 of the Charter rights were breached."*

56. The first thing to be said about this is that it invokes the rights of the child – who is not party to the proceedings. Secondly, the proposition that the High Court approached the case otherwise than on the basis that the interests of the child were paramount flies in the face of the express statement in the judgment that the best interests of the child were paramount.

57. The substance of this ground, or at least what appears to be behind it, insofar as I can discern, is the argument that the hearing should have been postponed to allow a second interview with the child.

58. The mother relies on the judgment of the CJEU in Case C-491/10 PPU *Zarraga* in which it was said that the national court:-

> *"... must ensure that, having regard to the child's best interests in all the circumstances of the individual case, the judgment to be certified was made with due regard to the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into*

account the procedural means of national law and the instruments of international cooperation."

59. This passage is relied on by the mother in support of the proposition that Article 24 of the Charter imposed an obligation on the Central Authority or persons acting for the Central Authority, to have made an interpreter available to the child. This sweeping proposition of law is entirely divorced from the facts. The facts are that in making arrangements for the interview, Ms. More O'Ferrall raised the issue as to whether an interpreter would be required. The grounding affidavit of Ms. Brophy had suggested that the child did not speak English prior to her removal from [the country of her habitual residence] but in her replying affidavit the mother had deposed that before she left [the country of her habitual residence] the child spoke good English. The request from the Central Authority [of the child's habitual residence] showed that since September, 2022 the child had been attending a primary school in [Ireland] and the child confirmed in interview with the assessor that she was in class 4B, which is obviously 4th class. Whatever about the child's English when she left [the country of her habitual residence], by the time of the interview she had been living in Ireland for eight months, of which she had been in school for seven.

60. In any event the mother presented the child for interview without an interpreter. This was recognised by Ms. More O'Ferrall and by the judge as less than ideal but the judge was satisfied that even though the child did not have good English, she had sufficient English to allow the assessor to ascertain enough information to assist the court in assessing the child's view. As the judge put it, the obstacle to ascertaining the child's views was not a linguistic one but one of authenticity. While the mother argues that the decision to refuse the adjournment to allow a second assessment to be made violated the child's rights under Article 24 of the Charter, she does not engage with the judge's conclusion that such a second assessment would not have advanced the issue. At the commencement of the oral hearing,

counsel for the mother confirmed that she was *"not seeking to overturn the merits of the High Court decision"*.

61. In her written submissions on the appeal, the mother has declared that she is satisfied that she was afforded the utmost fairness by the High Court, save only in respect of the refusal of the adjournment. This acknowledgement includes specifically the hearing on 9th February, 2023 when the assessor was appointed and when the direction was given for the simultaneous exchange of written legal submissions. Later it is suggested that the High Court's expedition of the proceedings was evident in the decision of 9th February, 2023 to appoint *"... respondent's chosen child assessor, over appellant's preferred child assessor"* but I do not take this as an attempt to resile from the unambiguous acknowledgement of scrupulous fairness.

62. The transcript of the hearing on 9th February, 2023 shows that Ms. More O'Ferrall was proposed by the solicitor for the father. The solicitor for the mother had identified another assessor – well known to the court – but it had been established that his diary was full. The mother's position was that she objected to the appointment of any assessor other than the assessor whom she had identified but no reason was given for this. There was not then and never was any suggestion that Ms. More O'Ferrall was not eminently qualified and competent or that she was not independent. Nor, indeed, was it ever suggested that Ms. More O'Ferrall was not entitled to have formed the opinion which she did and which she reported back to the High Court; that the child's responses to her questions *"could not be regarded as reliably reflecting her own felt wishes and feelings and lived experiences"*. To be sure, the appellant disagreed with the assessment, but that is another matter.

63. In the course of the oral hearing, counsel for the mother pointed to the decision by the High Court to appoint an assessor who was immediately available rather than defer the assessment as evidence of the fact that the High Court judge was expediting the proceedings

but he did not suggest that the process was in any way unfair. Counsel speculated that if the judge had not then decided to appoint the assessor *"we might not be here"* but, with no disrespect, this makes no sense.

64. There was no reference in the mother's written submission to the simultaneous rather than sequential exchange of the written legal submissions and I will take the acknowledgement of the fairness of the hearing on 9th February, 2023 as an abandonment of anything that might have been left of that complaint after the judge was told that it was not something she needed to worry about terribly. In any event, this issue was not relied upon by counsel for the mother at the hearing of the appeal.

65. While the mother was adamant in the High Court and was adamant on the appeal that the case should have been adjourned to obtain a second report on the child, there was no challenge to the conclusion of the judge that the assessor was able to obtain sufficient information to assist the court in assessing the child's views. Nor – although the mother vehemently denied that she coached the child – was there any challenge to the entitlement of the judge to have reached the conclusions she did that the child had been coached. Nor was there any challenge to the judge's conclusion that while the true views of the child had not been assessed, it was difficult to anticipate how a further report would achieve anything more authentic.

66. It will be recalled that in applying for an adjournment to facilitate a second assessment, counsel suggested that the assessor ought to have terminated the interview when she determined that *"the child did not have a sufficient command of English to engage with the assessor."* But that is not what the assessor determined: rather it was that the child did not have sufficient command of English to engage fully in the assessment process.

67. The second ground of appeal is that the judge failed to afford the mother a fair and just opportunity to defend herself against the allegations that she had wrongfully removed the

child from [the country of her habitual residence] and had wrongfully retained the retained the child in Ireland.

68. By O. 133, r. 4(1) of the Rules of the Superior Courts the respondent to child abduction proceedings is expected to deliver his or her replying affidavit setting out all grounds of defence being relied on within seven days of service of the grounding affidavit. In this case the mother was allowed more than five weeks. While she applied on the day of the hearing – nearly three months after service of the proceedings – for leave to file further affidavits, it is clear that the additional evidence she wished to adduce was available to her from the beginning. The unavailability at an earlier stage of a screenshot confirming that a call had been made was no impediment to the filing of affidavits by the mother's sister and her husband and the belatedly downloaded screenshot confirming that a call had been made did not add anything to the credibility or reliability of any evidence they might have given.

69. If what is behind this ground of appeal is the refusal to permit the cross-examination of the father, there was never any cogent reason advanced as to why this was necessary. The argument in the High Court was that the mother was entitled, as of right, under the Rules of the Superior Courts, to cross-examine the father. The High Court judge decided that he was not. There was no appeal against that finding and on the oral hearing of the appeal counsel for the mother acknowledged that she had no such entitlement under the Rules. Instead, counsel sought to argue that the mother had an absolute right to cross-examine under Article 47 of the Charter. Again, the proposition went no further than a bald assertion but if and to the extent that it amounted to an argument, it was not only an argument that was not made in the High Court but was inconsistent with the argument that had been made in the High Court.

70. I am quite satisfied that the mother had every opportunity to answer the case that she had abducted and retained the child and that the mother has failed to show that the judge erred in the exercise of her discretion to refuse to adjourn the case.

71. The third ground of appeal is that the High Court judge, in error and in breach of the Charter, did not afford the mother a fair and just opportunity to defend the allegations that she had wrongfully and improperly influenced the child's objection to returning to live permanently in [the country of her habitual residence].

72. The mother, in her written submissions, focusses on the second reason given by the judge to refuse to adjourn the case, namely the urgent nature of the proceedings. The argument in the written submission is that the acknowledged need for expedition *"... must yield to Appellant's Article 47 rights because Council Regulation (EU) 2019/1111 and M. (T.M.) v. D. (M.) [1999] IESC 8 must be interpreted and or disapplied so as to give proper effect to Appellant's Article 47 rights."*

73. The transcript of the hearing before the High Court shows that counsel for the mother was encouraged – even exhorted – to articulate his arguments in English rather than simply referring to the regulations and the provisions of the Charter.

74. By Article 47 of the Charter, the European Union recognises the right to an effective remedy and a fair trial. The mother asserts that her *"Article 47 rights require to be given unbended effect to permit"* her:-

(i) To effectively confront the assessor's report that she had coached the child;

(ii) To properly defend the allegations that she impeded/frustrated an order of the High Court appointing an assessor to obtain the true views of the child; and

(iii) That the mother be the protector of the child's Article 24 rights.

75. It seems to me that in focussing on her own rights, the mother has lost sight of the nature and object of the proceedings. The assessment was ordered with a view to extending to the child a genuine and effective opportunity to express her own views. The difficulty presented by the answers given by the child in interview and reflected in the report was that the views expressed by the child were not her own and could not be relied on. As the

judgment of the High Court shows, what was important was not so much whether the child had been coached by either or both of her mother and sister but that she had been coached by someone. The adjournment was initially sought for the purpose of cross-examining the father and obtaining a second report. Neither the cross-examination of the father nor a second report could have gone to the issue as to whether the child had been coached or – to whatever, if any, extent to which it might have been relevant – to whether the child had been coached by the mother in particular.

76. The High Court judge delivered her judgment on the morning of 20th April, 2023 and, as had previously been scheduled, the matter was listed for mention and final orders that afternoon. It was then, for the first time – and in the context of an application for a transcript of the DAR – that reference was first made to *"the right to cross-examine the author of that section of the assessor's report"* which reported that the mother and her sister had coached the child. The transcript of the hearing on 20th April, 2023 shows that the judge's previous scepticism as to the necessity for a transcript of the arguments made on 23rd March, 2023 immediately evaporated.

77. The proposition that the mother was entitled to cross-examine the assessor was first raised after the High Court had given judgment. In principle, the judge cannot properly be criticised for failing to permit something which she was not asked to do.

78. As to the arrogation by the mother to herself of the role of protector of the child's rights under Article 24 of the Charter, this is based solely on the text of Article 24(3), in which the mother emphasised the proviso, namely:-

> *"Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless* ***that is contrary to his or her interests.****"*

79. Inferentially, I suppose, the proposition is that it was contrary to the child's interests that she should have the right to maintain on a regular basis a personal relationship and direct contact with her father but I fail utterly to see where the ground for this was laid in the evidence.

80. The fourth, fifth and sixth grounds of appeal are that the swiftness (expeditious hearing) provisions of the Hague Convention, of Council Regulation (EU) 2019/1111, and of O. 133 of the Rules of the Superior Courts are incompatible with Article 47 of the Charter. Notably, there is no suggestion in these grounds of any error on the part of the High Court judge. Nor could there have been, since the alleged incompatibility was no part of the case made in the High Court.

81. The seventh ground of appeal is a bald assertion that the father consented to the child travelling with the mother for the purpose of living permanently in the State with the appellant. The fact of the matter is that the High Court clearly found otherwise and the notice of appeal simply fails to engage with the onus which is on the appellant to first of all identify and then establish an error on the part of the judge in coming to the conclusion which she did. As previously observed, counsel for the mother made it clear at the oral hearing of the appeal that he was not seeking to overturn the merits of the decision on the substance of the case.

82. The eighth ground of appeal is a bald assertion that after the child and the mother had begun living permanently in the State, the father reaffirmed his consent to the child living permanently in the State with the mother. Apart from the mother's failure to identify any alleged error in the judgment of the High Court, there was not so much as a scintilla of evidence of any reaffirmation of consent. The mother's affidavit comprised in the main denials of what had been set out in the grounding affidavit of Ms. Brophy. The assertion that the mother had sought and obtained consent was expressed repeatedly in terms that the

mother and daughter *"were leaving to live in Ireland."* There was no suggestion that the father might have given or reaffirmed his consent after they had left.

83. The ninth ground of appeal is the bald assertion that the child and the mother are possessed of a European Union free movement right to live permanently in the State. Well, so what? If behind this assertion is the proposition that the right of free movement outweighs the objectives of the Hague Convention, that argument was never made and, as the judge observed, it would – if there was anything in it – be an answer to every Hague case. The mother does not propose that the court should invite the CJEU to give a ruling on whether the Hague Convention applies to EU citizens exercising their free movement rights, or their children.

84. The tenth ground of appeal is that the High Court judge failed to mention or give any consideration to the fact that the mother absolutely rejected what the notice of appeal characterised as the assessor's *"allegation"* that the mother had improperly coached the child. That is just not so. At para. 2.14, the judge recalled the submissions on behalf of the mother that the allegations of coaching and comments in the report were unfair and that the assessor should not have made such findings. At para. 2.16, the judge found that the issue of whether the child's views were independent was addressed in detail in the report and that the assessor had set out several reasons – which the judge set out – for her conclusion. At para. 2.17, the judge noted the assessor's conclusion that the child's views were not her own. The assessor's view, said the judge, did not bind the court but was in line with the court's own view of the answers given by the child.

85. The suggestion that the judge did not mention or give any consideration to the fact that the mother rejected the assessor's finding that she, the mother, had coached the child is manifestly without foundation. More to the point, the foundation of the judge's decision was

not the assessor's view but the judge's own view and the notice of appeal does not suggest that there was any error in the judge's assessment and analysis of the assessor's report.

86. The eleventh ground of appeal was shown by the father's respondent's notice to be wrong and was abandoned.

87. The twelfth ground was a general assertion that it is just and fair that the appeal be allowed.

Reference to the CJEU

88. I have already addressed the claim in the mother's written submissions that she is *"entitled"* to the *"opinion"* of the CJEU on the two questions of law formulated. Leaving aside the fact that no question of compatibility was raised in the High Court, the mother's argument is that the facts of the case demonstrate a clear tension between the swiftness of hearing provisions of Article 24 of Council Regulation (EU) 2019/1111 and *"the Article 47 right not to be summarily subjected to an unfair trial"* and a clear tension between *"a child's Article 24 right to be given an effective opportunity to express his/her views in respect of her permanent place of living."*

89. The premise of each of these propositions is factual: of the first, that the mother was summarily subjected to an unfair trial and of the second, that the child was not given an effective opportunity to express her views. The case in the High Court and the appeal turns on the application of clearly established principles of law to the facts. It does not give rise to any question as to the validity or interpretation of any act of the institutions, bodies, offices or agencies of the Union.

Conclusion

90. I would dismiss this appeal on all grounds and affirm the order of the High Court.

91. As this judgment is being delivered electronically, Binchy and Pilkington JJ. have authorised me to say that they agree with it.