[2019] IEHC 775

THE HIGH COURT

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

AND

IN THE MATTER OF THE COUNCIL REGULATION 2201/2003

[RECORD NO. 2019/19 HLC]

BETWEEN

Z.R.

APPLICANT

AND

D.H.

RESPONDENT

Written note dated 8th October, 2019 of the ex-tempore Judgment of Ms. Justice Ní Raifeartaigh delivered on 30th day of September, 2019

Nature of the Case

1. This is an application for the return of a child from this jurisdiction to Northern Ireland pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") and pursuant to the provisions of Council Regulation (EC) No. 2201/2003.

General Background

2. The subject of this application for the return of a child is a boy to whom I will refer as "L". His date of birth is 6th October, 2006 (I note that a slightly erroneous date of birth is set out in the assessment report which is discussed further below). On 6th October, 2019, L will turn 13 years of age.

3. I propose to set out only a brief background to this application. L's parents had been married. They separated in or about 2008, and divorced in 2018. The boy has lived with his mother (in Northern Ireland) since his parents separated, with access exercised by his father (although the extent of this was put in dispute by the mother). His father was, as I understand it, for some time living in Northern Ireland but more recently has been living in this jurisdiction; he has re-married and set up a home here. Therefore, the situation from a practical point of view is that the boy's mother lives in Northern Ireland with her new partner while the boy's father lives in the Republic of Ireland with his new wife, and a daughter. It also appears that an older brother of L (who is not the subject of this application) had chosen to leave Northern Ireland in 2013 when he was aged 11, and I understand that while that child may have spent time with his father, he is currently living with his grandmother in County Down in Northern Ireland but not with his mother.

4. The immediate cause of this application is that the child, on 24th May, 2019, went to his father for weekend access in this jurisdiction but failed to return to Northern Ireland. The circumstances and the reasons for his failure to return are in dispute. The father said it was because the boy himself did not want to return for the reasons he later described to the assessor (assessment report discussed below). His mother made an application under the Convention for his return in June of 2019 and a special summons initiating these proceedings issued on 1st July, 2019. After the usual exchange of affidavits, the matter came on before me for hearing on 18th September, 2019, during the court vacation. Prior

to the hearing, the child had been interviewed by a child psychologist (the assessor) and a report was prepared for the Court in order to communicate the child's own views to the Court.

5. There are a number of factual matters in dispute in the affidavits. The first relates to the father's (historical) exercise of his access rights; the father asserts that he exercised access regularly while the mother disputes this. Secondly, there are disputed issues in relation to the payment of maintenance by the father. There are also numerous issues in dispute concerning the circumstances leading up to 24th May, 2019, with various allegations and counter-allegations being made on each side about why the boy did not return and how the mother and her relatives reacted to this situation. I do not go into the detail of all of these allegations here as this is a summary proceeding where the Court should not enter into the detail of factual allegations unless it is necessary to do so, and in any event, the Court is very hampered in making decisions on factual allegations in the context of this type of proceeding, in which affidavits are prepared very speedily and the Court has very limited evidence before it.

6. Two matters of importance and which are not in dispute are as follows. First, the child has significant difficulties with school-learning; he has dyslexia, and requires considerable professional support and assistance within the school system for this reason. The applicant mother averred that she had gone to considerable lengths to secure the appropriate supports for him in school in Northern Ireland. Secondly, he has a great love of sports and is actively involved in training and playing rugby matches, a commitment which requires his attendance at sporting activities several times a week.

7. That is the background and I have set it in a general way without going into detail which I consider to be unnecessary for this decision.

Legal issues raised on behalf of respondent

8. There were four legal issues raised on behalf of the respondent at the oral hearing. However, as I indicated at conclusion of the hearing on 18th September, 2019, it seems to me that there is really only one core issue, and that is the issue of the child's objection to return. I will deal briefly with the other issues raised on behalf of the respondent first.

9. *Habitual Residence* - The issue of a change of habitual residence was raised on behalf of the respondent father, but I reject that submission and conclude that the child's habitual residence of Northern Ireland did not change in May 2019 nor has it changed since then. The child had always lived in Northern Ireland, including during the period since his parents had separated (when he lived with his mother in Northern Ireland), and that was clearly his habitual residence for a long time. When in May 2019 he stayed on in this jurisdiction past the permitted access period and subsequently started living here, going to school, and establishing new networks of friends and activities, there was no consent from the mother. While the authorities in relation to the Hague Convention do emphasise that the question of habitual residence is very much a question of fact to be decided on the facts of each case, the authorities also indicate that a factor which militates heavily against a change of habitual residence is the absence of consent from one parent who has

custody rights (see in particular the discussion of Finlay Geoghegan J. in *D.E. v. E.B.* [2015] IECA 104 and paras 33-4 where she states her conclusions on this point). Thus, even if one parent (in this case, the father) had unilaterally decided that he wanted the child's habitual residence to change, and even if the child himself wanted the habitual residence to change, it does not seem to me that as a matter of law it could have changed in the circumstances of this case, given the absence of the mother's consent and the short period of time between the retention of the child in this jurisdiction and the commencement of these proceedings. Accordingly, my conclusion is that Northern Ireland is still the child's habitual residence and that the courts of Northern Ireland alone have jurisdiction under the Regulation to decide issues of custody and welfare in relation to the child.

10. *Acquiescence* - The second issue raised was the question of whether or not the mother had acquiesced to his retention in this jurisdiction. Again, I propose to deal only briefly with this point. I do not accept that the mother has acquiesced in the child's retention in this jurisdiction within the meaning of the term "acquiescence" as explained, for example, in decisions such as that of the Supreme Court such as *K v. K* [2000] 2 IR 416. The main point relied upon in this regard by the respondent was the fact of an application which the mother had made in a District Court in this jurisdiction on 25th June, 2019. She avers that this was to find out where her son was and that it involved an application for a production order; and it is also the case that she moved quickly to bring the application under the Hague Convention. The father's affidavit also indicates that she made plain her disagreement with his retention of the child in this jurisdiction. It seems to me that all the indications in this case are that the applicant mother did not acquiesce in the retention of the child in this jurisdiction and therefore that acquiescence is not established within the meaning of the Convention.

11. *Grave Risk* - A third issue raised was the "grave risk" defence under Article 13 of the Convention. The factual foundation for this submission on behalf of the respondent consisted of the matters raised by the boy himself when he was talking to the assessor and (as reported by the father) what he said to his father in May 2019 which led to his father's retention of him in this jurisdiction. Thus, the evidential foundation before me in respect of these allegations was hearsay, and there was no evidence which had arisen from his previous life in Northern Ireland which corroborated the boy's assertions. In brief, his assertions amounted to allegations that his mother and her partner had mistreated him, both verbally and physically. It is well-established by the authorities on "grave risk" that the threshold for making out this defence is a high one (see for example *A.S. v. P.S.* [1998] IR 244 and *P v. P* [2012] IEHC 31). Even taking the boy's allegations at their height, it does not seem to me that this threshold has been reached. The approach of the Court, as I understand it from the authorities, is that the Court should first consider the facts described and then consider if, even on the assumption that they are true, the risk presented or potentially presented by those facts to the child can be appropriately dealt with by the authorities and system of the requesting jurisdiction. Here, we are dealing with Northern Ireland, a neighbouring jurisdiction which has a high degree of similarity in terms of the practical services and the legal parameters as pertain in this

jurisdiction. I have no reason to believe that, even if the allegations were true, the authorities (including the courts in any custody application) in Northern Ireland would not be able to respond appropriately to the allegations. I also note that the boy told the assessor that he would be happy to visit his mother on weekends by way of access even if he were to re-locate to this jurisdiction, and this willingness to some degree undermines any suggestion of there being a grave risk inherent in his being returned to his mother. Accordingly, I find that the test for establishing "grave risk" pursuant to Article 13 of the Convention has not been met.

The Child's Objection and Article 13 of the Convention

12. Accordingly, it seems to me that the main issue for the Court to consider is the question of the child's objection pursuant to Article 13 of the Convention. This issue arises because of the views expressed by the child to the assessor, namely that he wished to continue living with his father in this jurisdiction and not to return to live with his mother in Northern Ireland.

13. The authorities have made it clear that when the issue of a child's objection arises, the Court should apply a three-pronged test; (1) has the child's objection been "made out"? (2) if so, is the age and maturity of the child such that it is appropriate for the Court to take account of those objections? and (3) if the two previous questions are answered in the affirmative, how should the discretion be exercised? The most recent authority re-stating and discussing this three-pronged test and the various factors affecting the exercise of discretion is the Supreme Court decision in *M.S. v. A.R.* [2019] IESC 10. The usual manner in which the Court hears the voice of the child in such proceedings is by way of an assessor's report, which consists of a report by a child psychologist arising out of an interview conducted with the child. Such a report was prepared in this case in the usual manner.

14. I pause to record here that on the morning of the hearing on 18th September, 2019, I was informed that there would be an application on behalf of the mother to admit certain evidence which had come into being recently. This consisted of a phone recording/transcript of a phone call in which the boy was speaking together with a letter he was said to have written; both had been generated in the previous 24 hours. There was, understandably, strong objection from the respondent's counsel to the admission of these items into evidence at this late stage. In circumstances where the admissibility of these items would be heavily in dispute, and where there appeared to be strong views by each parent that the other parent was seeking to influence the child, it seemed to me that the best way to ascertain the child's current views would be to speak to him in chambers. This is an option to which the Court very rarely has resort, but in the circumstances which had arisen, it seemed necessary and appropriate to do so. Accordingly, the child was brought in on the afternoon of 18th September, 2019, and I spoke to him for approximately 15 or 20 minutes in chambers in the presence of the Court's Registrar. I reported to the parties after this discussion that the views he had expressed were firm, and that they were identical to those which he had expressed to the assessor.

15. I turn now to the first prong of the three-pronged legal test in respect of a child's objection. Has an objection been "made out"? The assessor in the case was Consultant Clinical Psychologist Anne O'Connell and she had interviewed the child on 19th August, 2019, about a month before the hearing. The child told the assessor that for a long time, his mother and her partner had both been "nasty" to him, and he detailed various instances of this. He reported among other things that his mother had smashed a phone and an iPad belonging to him in a temper; that she had shouted at him; and that she had hit him. He said that he often could not go to school on "swimming day" because he was afraid that people would ask about the bruises on his body, and he talked about missing a number of school days in first year. He also said he had no friends in the school in Northern Ireland. He said that his mother's partner often shouted abuse at him and that when he was in Northern Ireland, he called his father and was crying on the phone because his mother was " nasty" to him and would not listen to his worries. He said that he had been thinking about leaving for some time. He said he was "very happy" living in this jurisdiction, that he liked the atmosphere in his father's house, that he was playing rugby for the local team, that he had made friends, and that his father had gone to his new school to make arrangements for support and assistance for his educational challenges. The assessor said that he expressed a "clear preference for living with his father in [this jurisdiction]" and that he was "agreeable to visiting his mother every second weekend but does not wish to live with her". She said he had "clear recall for the rows, verbal abuse, beatings, lack of school support" in Northern Ireland.

16. As I have already noted above, there was clear consistency as between what he said to the assessor and what the child said to me in chambers about where he wanted to live. I should perhaps add that the child did not envisage there being a suitable arrangement living in Northern Ireland other than living with his mother; he mentioned that his grandmother was elderly and that she lived a long way from the school.

17. Does what the boy stated about his wishes amount to a "preference" or an "objection"? Sometimes the difference between the two can be a fine one, but fundamentally it should not be an exercise in semantics; it seems to me that the difference between a preference and an objection is not so much about the type of words the child uses to the assessor but rather about the strength of the child's views. At one end of the spectrum, a child might have a fairly mild view that he or she does not wish to return, which would amount only to a preference, while at the other end of the spectrum, the child might have a very strong view that he or she does not wish to return, which could properly be described as an objection. The Court's focus should be on ascertaining the true will and desire of the child (and the strength or firmness of that desire) and should not become unduly fixated on the actual words used, because this could become an exercise in semantics which might focus too much on the words the child used. A child does not speak with the Hague Convention terminology in mind but rather is using language appropriate to his age, intellectual ability, articulacy and so on. Bearing all of that in mind, it seems to me that what was expressed by the child in this case did amount to an objection, and therefore I am satisfied that the first prong of the legal test has been satisfied; the child does have an objection to returning to Northern Ireland.

18. I hasten to add that I am not thereby making any findings of fact about the alleged treatment of the boy by his mother and her partner. I do not have sufficient information before me to make that decision, but it is the case that the reason the child gave for not wanting to return and the conclusion he had reached in that regard were inextricably linked in the manner he put forward his views. Also, in the child's mind, returning to Northern Ireland was inescapably and inextricably linked with returning to his mother and he did not believe there was any realistic alternative living arrangement in Northern Ireland that would work in practical terms. While I have limited evidence on that matter, I am not satisfied that there is in fact an obvious alternative to living with his mother such that the connection between return to Northern Ireland and returning to his mother's house is displaced.

19. Turning to the second prong of the test, concerning the age and maturity of the child, the first thing to note is his chronological age. On the one hand, he is not a small child, he is actually of secondary school-age now; on the other hand, he is not an older teenage child, he is not a 16 or 17-year-old on the cusp of adulthood. In terms of his development, I note first of all the views of the assessor. She pointed out that a full psychoeducational assessment was not possible within the interview she conducted. She indicated that he related well and cooperated fully, and I pause to add that this was my experience of him also. Overall, having conducted some limited tests, she concluded his *intellectual ability was well within the average range* although she noted that he had a "significant specific learning difficulty", which tallied with what I was told on affidavit, namely that he has dyslexia and that this is a very significant matter in the context of his education.

20. She went to make the following comment, which was of particular interest to the Court: *"L presents as a teen who is younger than his years and who is somewhat detached from his feelings. This stunting of emotional growth and inability to express himself is often seen in children who have been subject to prolonged abuse. He reports a limited capacity to concentrate on schoolwork at home because of rows and fear of getting in trouble and has in my opinion developed a pattern of coping by withdrawing into his inner world."* I note that passage with some concern. However, as I have stated, I am mindful of not drawing inferences about facts on the limited information before the Court, but it is a note in the report of a professional psychologist and it does cause me some concern. I also note the reference in the passage to L being a teen who is "*younger than his years",* which is relevant when considering his maturity for present purposes.

21. As to whether the child had been influenced in his views, the assessor said: "The language L used, the detail of remembered events and the lack of evidence of any coercion or rehearsal of stories leads me to believe that these are his own views." That was also my own impression; I am obviously much less expert then the psychologist, but it is of comfort to me to note that my own impression was consistent with what the assessor said, namely that he seemed to express his views in a way that suggested to me they were genuinely his own and that he used language and descriptions very spontaneously to express these views.

22. The assessor concluded: "L was clear that he would be unhappy living his mother and believes that the treatment given to him was unfair and unwarranted, he believes a better life is possible for him in [a location in this jurisdiction] with his father." She went on to say that if the necessary learning supports were put in place in his new school, she saw no reason why he would not settle into this family grouping, by which she meant the father and his new wife and the child's stepsister.

23. Taking into account the above, including and notwithstanding the fact that the assessor cautioned that L presents as younger than his 13 years, my conclusion on the second prong of the test is that L is of an age and maturity where his views should be given a good deal of weight, and that he has not been influenced in those views by his father (or indeed his brother) and that the views are authentically his own.

24. The third prong of the test deals with the discretion of the Court and this is where matters become extremely difficult for a trial judge in these situations. The authorities are very clear on the matters to be taken into account, and I refer again to to the most recent Supreme Court decision (*M.S. v. A.R.* [2019] IESC 10) in which a framework is very clearly laid out for how the Court should approach the issue of discretion. There is no presumptive approach; the child's objection does not presumptively suggest a non-return, even if the Court has found that he has expressed an objection that is authentically his own. The matter is much more complex than that. There are, for example, the policies underlying the Convention and in particular the policy of deterrence, with respect to the removal or (as in this case) retention of children in jurisdictions other than that of their habitual residence. There is also the very important policy that the court of the habitual residence of the child should make decisions about where the child should live and other matters relating to the child's welfare. These policies must be taken into account. There is also the question of the time-frame within which the matter has arisen, and in this case I note that the retention date was May 2019, and that the case came before the Court by way of special summons dated the 1 July 2019; therefore this is a case of a recent retention of the child (bearing in mind the comment of Finlay Geoghegan J. in *MS v. AR* that "the further one is from a prompt return, the less weighty the general Convention policies will be"). The situation and the proceedings started at the end of one school year, although we have already started into a new school year and to my mind, that is also a significant fact when one is dealing with a 13-year old child in secondary school.

25. There are, in addition to those general policies of the Convention and how they play out in this particular case, features peculiar to the individual case. In this case, an important consideration is the child's educational challenge by reason of his dyslexia. However, there is very limited evidence before the Court in this regard; there is some evidence of what had been recommended for him in the Northern Ireland by way of a report, together with evidence from the affidavit of the mother as to what she had done to get measures put in place for her son in Northern Ireland. There was little evidence as to what was in place in the boy's school in this jurisdiction, other than an email indicating that the two school principals had been in touch with each other. The child also mentioned to me in chambers that he was happy with the current arrangements for him in school in this

jurisdiction. The limited nature of the evidence is not the fault of any of the parties and arises primarily from the summary nature of the proceedings.

26. I was also conscious of the necessarily limited nature of the evidence before the Court concerning any potential living arrangements other than living with his mother, should he be returned to Northern Ireland. I have a general sense that if he were live with his grandmother this might not be ideal because she is elderly and that she does not live close to the school.

27. I am also conscious that L is a child who is very enthusiastic about sports, that he is very skilled at it, that it is an extremely important focus in his life currently and perhaps will be a lifelong passion. He currently seems to have settled into training and making friends through his involvement in this sport in this jurisdiction.

28. I am also taking into account the proximity of Northern Ireland to the location where the child is currently living in this jurisdiction, which would make potential access on either side relatively easy - at least from a geographical point of view (if not from the personal point of view, given the friction between the two sides evident from the affidavits). Of course, there are no language issues either, unlike some cases, where a child is having to adjust to living and schooling in a different language (e.g. Polish or Lithuanian to English).

29. The exercise of the discretion in this case is very difficult and the considerations on both sides are finely balanced. On the one hand, I have a 13-year-old child who in recent times has been expressing very emphatic views about where he wants to live (i.e. with his father in this jurisdiction) and I am conscious that he appears to have now settled contentedly into school and sporting arrangements in this jurisdiction albeit that it is early in the school year; and, quite separately, I am somewhat concerned at the contents of the passage I noted above from the assessment report which suggested that the child's presentation was consistent with his having suffered "prolonged abuse". On the other hand, I have the Convention policy considerations including the deterrence of unlawful removals and retentions, and I am very aware of the fact that a court of habitual residence should be making, and is better placed to make, decisions about the child's future with the benefit of full information about matters relevant to the child's welfare. I am also conscious that despite the child's firmness of views, he is only 13 and cannot have a long-term perspective in relation to his own future.

30. Also, because this is a case involving Northern Ireland, Article 11 (6)-(8) of Council Regulation (EC) No. 2201/2003 comes into play. This means that if I were to decide not to return him to Northern Ireland, the question of his long-term custody and welfare will go back to the courts Northern Ireland in any event under the procedure laid down in those sub-sections. In other words, if I make an order for non-return, the papers are sent to the Northern Ireland authorities and the parties are invited to make application to the Northern Ireland courts to rule on questions of welfare and custody into the future.

31. In the first instance, two options therefore present themselves. Option A is to make an order for non-return; the child would stay here, the papers would go to Northern Ireland

under the Article 11(6) procedure, and then (upon the request of either or both of the parents), the Northern Ireland courts would take seisin of the custody/welfare issues and decide whether the boy stays here or returns there in the longer term, but in the meantime he would continue to live in this jurisdiction until that decision is made. Option B is that I make an order for his return to Northern Ireland, and the Northern Ireland courts would again ultimately decide upon the longer-term custody and access issues (and no doubt his father will make an application for custody and relocation), but the difference would be that the child would have to move to Northern Ireland in the meantime. In the latter case, the move to Northern Ireland for the child pending a decision from the Northern Ireland court would be an unnecessary disruption if a Northern Ireland court were ultimately to decide that the boy should be allowed to live with his father in this jurisdiction.

32. A further option was put forward by counsel on behalf of the applicant mother. She suggested that, if I were inclined to the view that the boy should stay in this jurisdiction in the short-term while proceedings in Northern Ireland were initiated, I could adopt a slightly different approach and that instead of making an order of non-return pursuant to Article 13 of the Convention, I could instead make an order for his return but put a stay on the return order, which would be another mechanism pursuant to which the child could stay in this jurisdiction in the short-term until a Northern Ireland court (the court of his habitual residence) has an opportunity to address his living arrangements for the longer term.

Conclusion

33. The most important decision I have reached on the basis of the evidence and information before me is that, in view of the various matters outlined in the first half of paragraph 29 above, the child should stay in this jurisdiction in the short-term until a Northern Ireland court is seized of the appropriate application which would enable it, the court of the jurisdiction of the child's habitual residence, to determine the issues of custody and his place of residence.

34. Following from that conclusion, the decision to be made then reduced itself into whether I should (a) make an order of non-return under Article 13 of the Convention based on the child's objection, or (b) make an order for return with a stay upon it of a sufficient length to enable proceedings to be initiated in Northern Ireland. I have decided to follow the latter course and propose to make an order that the child be returned with a stay upon the order of 14 days upon the undertaking of the father to initiate proceedings in Northern Ireland within that time. On 14th October, 2019, I will re-visit the issue of the whether the stay should be continued for a further period of time or not.

35. There does not appear to me to be any bar to the Northern Ireland court dealing with issues of custody and welfare relating to the child upon the application of either or both parents during the period of the stay on my order notwithstanding that this Court has before it an application pursuant to the Hague Convention; on the contrary, the Northern Ireland court is the only court with jurisdiction to deal with matters of custody and welfare because it is the court of the child's habitual residence. As I have determined that

the boy's habitual residence did not shift in or since May 2019, the courts in this jurisdiction have no power or entitlement to decide issues of custody and welfare relating to the child and I certainly do not purport to do so now or in the future. The present proceedings were brought under the Hague Convention and the application did not (nor could it) request the Court to conduct a custody/welfare hearing in respect of the child. Rather, I have determined that, having regard to the considerations appropriate to a Hague Convention application, the appropriate order should be a return order so that decisions on custody should be taken by the court of habitual residence (Northern Ireland), but (unusually) I wish to place a stay on that order because of the child's objections, the contents of the assessor's report and the fact that he has settled into educational and sporting arrangements in a new school year, all of which suggest to me that it would be better if the child's living arrangements could be held in a status quo for a very short period while proceedings are initiated in Northern Ireland and the decision-making power in respect of custody starts to be exercised by those courts. This mechanism (a return order coupled with a short stay) is a procedure which has been employed by this Court on previous occasions without difficulty, although it is fair also to say that it is employed only in rare cases; usually where the child has expressed a desire to stay in this jurisdiction *and* it is considered likely that the court of the country of habitual residence may be in a position to take seisin of custody/welfare/relocation issues in early course, and where having regard to all the factors in the case it is felt by the Court that the child's living arrangements should not be unduly disrupted pending a decision on custody/relocation from the court of habitual residence.

36. I can only express the earnest hope that the Northern Ireland courts will facilitate the initiation of proceedings relating to the custody of the child as soon as possible so that this Court can bring the stay on the return order to an end in early course. I hope to dove-tail the length of the stay upon the return order with the timetabling of the Northern Ireland proceedings in such a manner that the stay ends on the same day that a Northern Ireland court makes a decision on the child's living arrangements, even if only on an interim basis pending a full custody and welfare hearing in Northern Ireland. My intention is to ensure that medium-and long-term decisions on the child's living arrangements should be made by the courts of Northern Ireland, being the only courts with jurisdiction in this regard, and that a very short-term *status quo* in terms of the child's living arrangements is preserved by my stay on the return order in order to avoid any (potentially) unnecessary disruption to the child himself, whose best interests must always be the Court's guiding consideration.