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| **Neutral Citation No: [2021] NIFam 5**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **KEE11422**<br>*ICOS No:* **2020/045188**<br>*Delivered:* **19/02/2021** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

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**IN THE MATTER OF THE HAGUE CONVENTION 1980, THE HAGUE CONVENTION 1996 AND THE INHERENT JURISDICTION OF THE HIGH COURT**

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**Between:**

**A FATHER**

**Plaintiff**

**and**

**A MOTHER**

**Respondent**

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**IN THE MATTER OF LILY AND JANE (MINORS: ARTICLE 21 HAGUE CONVENTION 1980: PRACTICE AND PROCEDURE)**

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**Ms Melanie Rice (instructed by Mc Keown & Co Solicitors) for the Plaintiff**
**Mr Ronan Lavery QC with Mr Colm Fegan (instructed by Campbell & Haughey Solicitors) for the Respondent**

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**KEEGAN J**

**Nothing must be published which would identify the children or their family. The names I have given to the children are not their real names.**

**Factual Background**

[1] The plaintiff in this case is the father of two children who are now aged 9 and 6 coming 7. He is Australian and currently lives there. The mother of the children lives in Northern Ireland with the children. The father has brought a summons under the Hague Conventions seeking contact with the children. This is

accompanied by an affidavit of laws by an Australian lawyer which states that there are no court orders removing his parental responsibility and that "on this basis it would appear that the applicant retains rights of access under Australian law in relation to the subject children for the purposes of the Hague Convention."

[2] The father sets out the history of the case in his affidavit which I summarise as follows. He states that the parties commenced their relationship in August 2009 and they travelled between Australia and Northern Ireland to visit one another before marrying in June 2010 in Northern Ireland. In October 2010 the mother moved to Australia with her daughter from a previous relationship and the parties lived together. The eldest child of the family was born in Northern Ireland. The parties decided to relocate to Northern Ireland permanently on 1 July 2014. The second child was born in Northern Ireland. The father asserts that when living together there was effectively a shared care arrangement. It appears that following the second child's birth the father travelled back and forth between Australia and Northern Ireland in order to organise the sale of his financial planning business in Australia. The father states that on 27 November 2015 when he was in Australia the mother sent him an email asking him to return to Northern Ireland and telling him that she wanted a divorce. Thereafter the father states that he agreed with the mother that the children would remain in Northern Ireland and that he would travel to see them in February 2016 to celebrate their birthdays. He states that he travelled to see the children in February 2016 and he maintains that after that there were problems with contact. It appears that some agreement was reached in relation to finances and the mother agreed that there would be regular contact with the children via Facetime until the father could return to Northern Ireland again. The father states that following the visit in February 2016 the mother did facilitate Facetime calls three times per week but that these gradually reduced.

[3] In his affidavit the father also sets out a series of attempts to keep the contact going including efforts in January 2017 through solicitors in Northern Ireland. It appears that there was a resumption of indirect contact by way of video calls between March 2017 and July 2018. It is also clear from the affidavit that at various stages during 2018 the father contacted the police to ask for welfare checks on the children. This happened in April, May and September 2018. At paragraph 34 of the affidavit the father states that in January 2017 he engaged a law firm in Northern Ireland for assistance in obtaining access to the children "although I have made several phone calls to them, emailed them regularly and paid about $3,000 in fees to my knowledge they have not commenced any access proceedings in Northern Ireland."

[4] The father then explains that he has not had video calls since 27 July 2018. He sets out various indirect contact that he sent throughout the years and he states that he had been paying the mother regular maintenance until about January 2017. The father then refers to the nature of the application and access proposals as follows:

> "I want to resume and maintain contact with the children as soon as possible.
>
> I have considered the needs of the children and the proposed access arrangements contained in my application.
>
> I propose that there be frequent contact with the children to re-establish our close bonds.
>
> I have proposed that the children and I have video call contact on a weekly basis and that we have free exchange of letters, emails, texts, cards and presents.
>
> I want to see the children in Northern Ireland twice a year, at times which are convenient for the mother and the children.
>
> I am hopeful that the mother will recognise the benefit of my involvement in the children's life and start to consult with me about major decisions relation to the children's development and future, including those relating to their education; health care and place of residence.
>
> As I have rights of access which I was exercising over the children and no orders have been made removing my rights of access, I request that this honourable court assist me to make arrangement to secure my rights of access to the children."

[5] In pursuit of his case the father invoked the assistance of the Australian Central Authorities who communicated with the Northern Ireland Central Authorities and an application was then made via allocated solicitors in Northern Ireland.

[6] From the outset I have queried the nature of the application before me which was brought for "A Hague Convention Contact Order." In the alternative the plaintiff asked me to make an order under the inherent jurisdiction for contact with his children. The case has been made comprehensively by both parties in skeleton arguments which have been supplemented by oral submissions. I should say that in parallel to the legal issue which arose, I did endeavour to move on with contact by requiring the parties to enter into negotiations. I am pleased to say that some video contact took place in December 2020, however that progress was short lived. I am told that a joint consultation took place on 21 January 2021 however no resolution could be found. The case is described by Ms Rice on behalf of the father as an implacable hostility case which is very dispiriting. However, I also note that the

father has made contact with the school and got some further information about the children. There is a concern that this case is escalating into something much more than was first anticipated. I say this because Ms Rice was realistic enough to say at the outset that her client was seeking indirect contact and information sharing with the potential to go to direct contact and that this was a fairly modest request. The point to note is that both parties want resolution in this case. The issue is the mechanism by which to do this.

[7] The legal arguments that have been provided by both counsel are of high quality and have been of great assistance to me. The arguments set out various complexities however some matters are uncontroversial. First, the habitual residence of the children in Northern Ireland is not disputed. That gives the Northern Irish court jurisdiction to make orders for the children if necessary. Secondly, there is no dispute about the father having access rights. Thirdly, there is no dispute or difficulty with finding the children which would necessitate a seek or find order or any other order pursuant to the Family Law Act 1986 which is sometimes utilised in these types of cases.

**Legal Context**

[8] The first Hague Convention which is referred to is the 1980 Hague Convention. This is a Convention between signatories of which the United Kingdom and Australia are two which was adopted into our domestic legislation by the Child Abduction and Custody Act 1985. This Convention was designed to accord proper recognition to the principal that a child's interests must be protected in international disputes between estranged parents. In particular, the purpose of the Convention is to protect children "from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence as well as to secure protection for rights of access." The Convention is a foreign treaty and provides for summary return to the courts of the habitual residence of the child.

[9] Rights of access feature in Article 21 Chapter 4 of the 1980 Convention which states as follows:

> "An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
>
> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps

> to remove, as far as possible, all obstacles to the exercise of such rights.
>
> The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

[10] When dealing with this provision in *S v H Abduction Rights* [1997] 3 WLR Hale LJ said:

> "Under Article 21, the only remedy for interference with 'rights of access' is to ask the Central Authority to make arrangements for organising or securing the effective exercise of those rights."

[11] There is limited other case law in this area. In *Re T (Minors: International Child Abduction: Access)* Practice Note Family Division [1993] Bracewell J stated that the application should have been brought under the Children Act 1989. She said:

> "Having considered the submissions before me, I am satisfied that it is not correct procedure for the Central Authority (the Lord Chancellor's Department) to issue an originating summons in the circumstances of the present case. Since Article 21 confers no jurisdiction on a court to determine matters relating to access or to recognise and enforce foreign access orders, the role of the central authority is limited to one of executive co-operation.
>
> Accordingly, the duty of the central authority on receiving an application to make arrangements for organising or securing the effective exercise of access rights under Article 21 is to make appropriate arrangements to provide English solicitors to act on behalf of the applicant for the purpose of instituting an application under s 8 of the Children Act 1989."

[12] A further case in relation to this I have been referred to is *In Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam 216. This is a Court of Appeal decision in which it was found that the obligations imposed by Article 21 were of an administrative, non-mandatory nature directed to central, not judicial authorities and might be discharged by the arrangement of appropriate assistance to an applicant such as the instruction to local legal services; but that since Article 21 did not provide through mutual recognition of enforcement of access orders the court, while according proper weight to a foreign order, would apply domestic law and

exercise its discretion unfettered by the Convention; that in consequence the father should have applied for a contact order under the Children Act 1989, which required the child's welfare to be the court's paramount consideration; and that, accordingly, since the judge had applied the correct test and the exercise of his discretion had been unimpeachable the Appellate Court would not intervene.

[13] The father has placed particular reliance on a more recent decision of Cohen J in *A v C (Hague Convention: Rights of Access)* [2019] 1 FLR 429. This was a case where relatives of a child wanted to invoke Article 21. The question for that court was whether a non-parent who had been granted no right either by a court or by someone with parental rights could avail him or of himself of Article 21. The court ultimately found that such a person could, namely an aunt and a grandmother as they were important people to the child. The court then case managed the matter and also made some comment about whether or not the cases should remain in the High Court determining ultimately "for my part, I can see no reason why this case should stay in the High Court in London, I will hear submissions as to which court should receive it."

[14] The law in England and Wales therefore appears clear. I note that the decisions are from some time ago but they are reflected in the current Practice Direction in England & Wales 12F which governs applications of this nature. Annex 3 relates to Article 21 and it refers to the Court of Appeal decision of *RE G* and states that:

> "If during the course of proceedings under Article 21 of the Convention, the applicant decides to seek access instead of the return of child, a separate application under section 8 will have to be made."

[15] In addition to Article 21 of the 1980 Convention the plaintiff relies on Article 5 of the 1996 Hague Convention and argues that the 1996 Convention strengthens Article 21. Article 5 of the 1996 Convention states that:

> "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
>
> (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

[16] Looking at these two provisions it is my clear view that the court of the children's habitual residence have jurisdiction. The 1980 Convention's provisions have been utilised to put the father in a position to be able to apply for contact with

the help of the Central Authority and solicitors in Northern Ireland. However, in no respect does the 1980 Convention actually provide for the making of a contact order. It is unclear what the shape of that would be or what legal tests would be applied to it. The 1996 Convention confirms that a court of habitual residence has jurisdiction to determine the question of contact and domestic law applies. So these conventions are part of the jurisdictionary framework for the making of orders. I am therefore quite clear that the case having been brought before the court and there being no impediments to the father applying for an order in domestic law the court should be looking at making an Article 8 Order if the court needs to. An Article 8 Order is under the Children (Northern Ireland) Order 1995 ("the Children Order") and it is an order which would settle contact arrangements. The benefit of utilising Article 8 of the Children Order is that there are rules to be applied and tests, namely the welfare tests in Article 3, the welfare checklist and the other principles such as the no delay principle and the no order principle.

[17] Article 11 of the 1996 Convention also allows for a Contracting State where a child is present to take protective measures. This provision may be utilised in abduction cases where there is urgency and necessity but in my view it is subordinate to the general jurisdiction under Articles 5 to 10. In other words if a court has jurisdiction by virtue of the child's habitual residence it should proceed under domestic law. Article 11 is really designed to allow a Contracting State to take measures pending a return of a child to the State of habitual residence. I can utilise domestic measures to deal with any issues and so Article 11 is not applicable.

[18] I have also looked at *Hershman and McFarlane Children Law and Practice Volume* 2 Section G 157 which reiterates the practice by which these applications should be dealt with. I do not see any reason why practice in Northern Ireland should be different. During the course of the proceedings the Central Authority helpfully provided some evidence about how these applications have been dealt with in Northern Ireland. It is clear that there have been very few applications, one in 2014 which was dealt with by way of a contact order, one in 2015 which was withdrawn, one in 2018 which was dealt with by Residence Contact and Parental Responsibility, one in 2019 transferred to England. There is also this case and some other cases that there is no record for. The Central Authority state in the correspondence that:

> "Once the Northern Ireland Central Authority received the Article 21 application for access, we allocate a solicitor to the case and they take it forward and lodge with the court office. I only keep a note of what the final order was."

[19] The main issue seems to be that public funding is not available for an Article 8 application given that it is means tested. I asked the solicitors for the plaintiff to clarify that situation and that does appear to be the case. I am not sure there is much more I can say about legal aid issues however I am obviously keen that the applicant progresses his case in some way. It is just not right to say that I can make any order

under the Hague Convention or anything analogous to that. The case of *A v C* illustrates that a court can be seised by virtue of Article 21 to decide issues in that case whether or not non-parents could invoke the Article 21 provision for assistance. However, it is not an authority for a "Hague Order" being made as I have said. There is provision in Article 10 of the Children Order to make an Article 8 Order even if no application is brought but the definition of family proceedings contained in Article 9(3) does not specifically include these types of proceedings.

[20] Ms Rice has also examined the Family Law Act 1986 to see whether or not this case would come within an application under the Inherent Jurisdiction. The Family Law Act 1986 is an instrument which deals with jurisdiction in Northern Ireland to make orders under the Children Order which are Part 1(1)(c) orders. The court does have an inherent jurisdiction which is exercised where it is appropriate. I will proceed on that basis and decide whether any relief is appropriate at the conclusion of the case when all of the evidence is gathered.

**Conclusion**

[21] In taking the course which I do, I am cognisant of the need for international cooperation to facilitate the return of children and access rights. The practice issues that arise are not of the father's own making and indeed his solicitor and counsel have acted diligently in trying to find a way forward. This issue has arisen mid proceedings. The issues I raise can inform future practice. I do not want to delay this case or cause further costs to be incurred through litigation. I think this is the first time this jurisdictional issue has arisen in Northern Ireland and so I am going to adopt a pragmatic approach to dealing with this particular case. I do this on the basis that both parties want the case decided and Mr Lavery raises no objection. I will not remit the case to another court for hearing of a formal application. In doing so I stress that cases of this nature may well be remitted to the Family Proceedings Court or the Family Care Centre in future where Article 8 applications can be made. I have also considered the child welfare concerns raised by the father. In the first instance I will appoint the Official Solicitor to represent the children. I will direct a report from her within 3 weeks and I will fix a hearing before Easter.