

THE HIGH COURT

FAMILY LAW

[2014 15 FJ]

IN THE MATTER OF THE JURISDICTION OF COURTS AND ENFORCEMENT OF JUDGMENTS ACT 1998 COUNCIL REGULATION (EC) NO. 44/2001 AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985 AND IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2001/2003 (BRUSSELS II REVISED REGULATION 2003)

BETWEEN:

M. McN.

PLAINTIFF

AND

J. R.

DEFENDANT

RESERVED JUDGEMENT of Mr. Justice Henry Abbott delivered on the 2nd day of February 2015

1. This matter has come before the High Court by way of an ex parte application on behalf of the plaintiff who has represented herself throughout the course of proceedings. Her application originates in an order of Keehan J. of the High Court of Justice, Family Division, in the jurisdiction of England and Wales, dated the 23rd January, 2014, as follows:-

1. The children, W. McN. and H. McN. shall be summarily returned to the Republic of Ireland forthwith and by no later than 23.59 on the 25th January 2014, pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The Applicant father shall effect the return of the children, the Respondent mother shall handover the children to the father at East Midlands airport on 25 January 2014 at a time to be specified by the Applicant father and in any event at least two hours ahead of the flight booked by the Applicant father. The Applicant father shall fund the flights in relation to himself and the children so as to effect the return of the children.

2. The Respondent mother shall handover the children to the Applicant father at East Midlands Airport pursuant to paragraph 1 (the exact venue at the said airport to be arranged by solicitors by no later than 4pm on the 24th January 2014).

3. The Tipstaff shall forthwith release all passports and other travel documentation currently in his possession in respect of the children to the Applicant's solicitors []. The Applicant's solicitors or their agents shall thereafter deliver up the children's passports and other travel documentation to the Applicant at East Midlands Airport and thereafter Tipstaff shall hand back the Respondent's passports and other travel documentation to the Respondent upon confirmation that the children have left England and Wales.

4. The Port Alert and all injunctive provisions contained within the Tipstaff Location Order dated 26 November 2013 shall remain in force, save that such provisions as are necessary shall be lifted so as to allow the return of the child to the Republic of Ireland, in accordance with paragraph 1 of this order, and thereafter all such provisions shall be discharged once the Applicant and the child have left the jurisdiction, in accordance with paragraph 1 of this order. The Applicant's solicitors shall inform the Tipstaff once the Applicant and child have left the jurisdiction, in accordance with paragraph 1 of the order.

5. The Respondent shall lodge her USA passport with her solicitors by 9am on 24th January 2014 and the Respondent's solicitors shall then confirm in writing to the Applicant's solicitor that they have the passport and then hold the said passport to the order of the court and shall only release it to the Respondent when there is written confirmation from the Applicant's solicitors that the children have left England and Wales.

6. There shall be permission to the parties to disclose this order, today's judgement and the papers filed in these proceedings to any lawyers that they may instruct in the Republic of Ireland in respect of any current or future proceedings in relation to the parties and/or child and to the relevant court in the Republic of Ireland.

7. A penal notice shall be attached to the Applicant's and Respondent's undertakings set out above and to paragraph 1 of this Order, pursuant to Part 33 of the Family Procedure Rules 2012 and Practice Direction 33A.

8. There shall be liberty to the parties to apply as to the implementation of this order and undertakings set out below on short notice before the Applications Judge sitting in the Family Division, The Royal Courts of Justice, The Strand, London, WC2A 2LL.

9. Permission is given for a copy of this order to be served upon the Tipstaff, airport police, airport security, the airline carrier, the children's current school in England and Wales and Derbyshire social services.

10. For the avoidance of doubt, all previous orders and undertakings in these proceedings shall forthwith be discharged, save for in relation to paragraph 3 of this order.

11. A transcript of today's judgement shall be provided to the parties, the costs of and associated with obtaining the judgement shall be shared between the parties, the said costs being deemed a reasonable and necessary disbursement on

the parties' respective public funding certificates.

12. There shall be no order as to costs, save that there shall be detailed assessment of the publicly funded costs of the Applicant and Respondent and the children.

2. Paragraph 7 of the order of the Court of the United Kingdom makes reference to a penal notice attached to para. 1 of the order and also the undertakings set out as follows:-

"AND UPON THE APPLICANT AND RESPONDENT GIVING THE UNDERTAKINGS RESPECTIVELY SET OUT BELOW, those undertakings having been given freely and voluntarily and following the receipt of legal advice and in support of the obligation and power conferred on this court, pursuant to articles 12 and 18 of the Hague Convention on the Civil Aspects of International Child Abduction 1980, it being intended that the said undertakings should also constitute binding and enforceable obligations in the Republic of Ireland.

AND UPON THE APPLICANT FATHER (THROUGH HIS COUNSEL) UNDERTAKING FREELY AND VOLUNTARILY AND FOLLOWING THE RECEIPT OF LEGAL ADVICE:

(a) To use his best endeavours to stop and extant prosecutions in respect of the Respondent mother in the Republic of Ireland in respect of child abduction, to not instigate any prosecutions of the Respondent mother in the Republic of Ireland in respect of child abduction and to not support any extant prosecutions in respect of the Respondent mother in the Republic of Ireland in respect of child abduction, unless compliance with any or all of these undertakings places him in breach of domestic Irish law;

(b) To not seek to find out the address of the Respondent mother in England and Wales from his current English solicitors [], unless there is a contrary order from the relevant family court in the Republic of Ireland.

AND UPON THE RESPONDENT MOTHER (THROUGH HER COUNSEL) UNDERTAKING FREELY AND VOLUNTARILY AND FOLLOWING THE RECEIPT OF LEGAL ADVICE:

(a) To return the children to the Applicant father at the conclusion of every agreed session of contact with the children;

(b) To not remove the children from the Republic of Ireland.

AND UPON the Respondent mother agreeing to provide the Applicant father (through his solicitors) with an email address at which she can be served in relation to any court proceedings he may instigate in relation to the children in the Republic of Ireland.

AND UPON IT BEING RECORDED THAT the Applicant father can be contacted on the following phone number: [] and at the following email address: []."

3. By order made on the 2nd April, 2014, the Master of the High Court in this jurisdiction enforced the above judgement of Keehan J. of the High Court of Justice, Family Division, and no appeal was lodged in respect of the defendant in these proceedings, J. R.. On the 2nd May, 2014, the plaintiff in this these proceedings, M. McN, came before this Court in Ireland looking for an order to vary the order of the United Kingdom Court dated the 23rd January, 2014, at which time she was informed that the High Court in Ireland does not have jurisdiction to vary orders of the English Court. She was informed that new orders could be made in respect of the children whose habitual residence is now in and was directed by this Court toward the District Court in Donegal in respect of these. On the 4th July, 2014, the plaintiff returned to this Court with a purpose to vary the orders made on the 23rd January, 2014, in the jurisdiction of the United Kingdom as mirrored by order of the Master on the 2nd April, 2014, however; no such application was made in respect of such. The plaintiff then appeared before the Royal Court of Justice in the jurisdiction of England and Wales on the 3rd October, 2014, in order to vary the original order at which time she was informed that the appropriate jurisdiction to make further orders lay in Ireland. On the basis of an *ex parte* application, the President of the High Court, on the 4th December, 2014, made an order granting the plaintiff liberty to serve a notice of motion seeking the attachment and committal of the defendant for failure to comply with the order of the 2nd April, 2014, a mirror of the order of Keehan J. given above. On this basis, on the 12th December, 2014, this Court made an order for the attachment of the defendant, J. R. , and adjourned the matter to such date thereafter on the advice of the plaintiff.

4. On the 7th May, 2014, the plaintiff applied to the District Court at Letterkenny, Donegal to enforce the aforementioned orders originating in the English Court. The matter came before Kelly J. of the District Court again on 11th June, 2014, where the orders were affirmed. Proceedings have been stayed in Letterkenny District Court pending the outcome of these proceedings.

5. This matter has been complicated by a lack of sufficient communication between the High Court of Justice, Family Division, in the jurisdiction of England and Wales and also in large part on the basis of a misunderstanding on the part of the plaintiff regarding the substance of the order of the said English Court. At this present time there is no application before this Court in respect of an order of access nor is there any order of access in place. The children are in the care of the defendant by virtue of an order of Moor J. in High Court of Justice, Family Division, in the jurisdiction of England and Wales dated the 25th January, 2014.

6. The High Court in the jurisdictions of the Republic of Ireland and in the United Kingdom have demonstrated themselves to be amenable towards levels of judicial cooperation in Hague proceedings in the past concerning the return of children to Ireland. In the case of *JPC v. SMW & Anor* [2007] EWHC 1349 (Fam) the learned trial judge, the then President of the Family Division, Sir Mark Potter demonstrated the way through which such cooperation can be facilitated. I quote an extract, at para. 51, of the said judgement relevant for consideration herein:-

"As already indicated, I have no doubt as to the strength of S's objections and I also have concerns about her general welfare. However, not only do I find that the Convention considerations are very strong in the circumstances of this case, it is also clear that the Courts of Ireland, a short journey away, are the forum far and away best suited to deal with these concerns. I also consider that S, whilst not reconciled to any need to return for that purpose, nonetheless appreciates

that an order for her return is on the cards and I do not believe that her welfare will be unduly affected, provided that her case is swiftly dealt with on her return, preferably by Mr Justice Abbott who is already acquainted with her case. I have contacted his office to this end and he has expressed willingness to list the case for expeditious directions with the view to a holding of a welfare hearing before him, upon the appropriate steps being taken by the mother's solicitors."

The learned President of the Family Division made sufficient consideration in his judgement in order to determine issues of access at their appropriate juncture mindful of the fact that orders under the Hague Convention deal specifically with the return of the child to their appropriate jurisdiction. The case at hand would have benefited from judicial cooperation and communication between both jurisdictions in circumstances where the order under the Hague Convention has been drafted in such a way as to give legitimate cause for confusion on the part of the plaintiff. This cooperation would not have followed the strict template of *JPC v. SMW & Anor* [2007] EWHC 1349 (Fam) as it appears that the Plaintiff herein had intended to stay in England. Clear undertakings by the defendant to the English Court were an alternative as the Irish Courts are most assiduous in enforcing such undertakings. The difficulty in this case is that the relevant "undertaking" lacks the clarity required for enforcement – as appears in the next following paragraph.

7. For the avoidance of all doubt, the order of the High Court of Justice, Family Division, in the jurisdiction of the United Kingdom, under the Hague Convention on the Civil Aspects of International Child Abduction 1980, concerned the return of the children to the Republic of Ireland. It does not contain an order pertaining to access. What it does contain is a record indicating that the defendant is *content* to have contact with the plaintiff in the following terms:-

(a) Daily telephone contact for the first week after the children's return at 8pm (Irish time) and thereafter telephone contact every other day at 8pm (Irish time), the Respondent mother to call the children to commence contact but the children also being at liberty to call the Respondent mother whenever they wish;

(b) Half of all school holidays, on the basis that such contact only takes place in the Republic of Ireland and all travel/accommodation costs associated with contact are financed by the Respondent mother;

(c) Weekend contact, specifics to be agreed between the parties on the basis that the Respondent mother has provided the Applicant father with at least 14 days notice of her intention to take up contact, and further on the basis that such contact only takes place in the Republic of Ireland and all travel/accommodation costs associated with contact are financed by the Respondent mother.

In summary terms, the order of the High Court of Justice, Family Division, dated the 23rd January, 2014, contained three items; (i) a record of the views of the parties; (ii) the undertakings of the parties enforced by way of penal notice, and; (iii) the order proper. The indications prescribed in para. 7 of this judgement belong to the first of these three categories; views of the parties, and, as such, are not binding in the form of an order of access.

8. The children of the parties are habitually resident in the Republic of Ireland and are in the care of the defendant father at this present time. Since their return to the jurisdiction, by way of the order under the Hague Convention under *Keehan J.*, the appropriate jurisdiction for the future determination of access is the jurisdiction of the Republic of Ireland. This sentiment was shared by *Moor J.* in the Royal Court of Justice in the jurisdiction of the United Kingdom when the plaintiff in this case came before him on the 3rd October, 2014. As previously mentioned, there is not at this present time any order concerning access in force regarding the children of the parties. These matters must be addressed. I have no doubt that the Courts of Ireland are the best forum for these matters, however; I do not agree with the plaintiff that this must take place in the High Court. Matters may be more appropriately addressed and determined in a cost efficient manner for all parties concerned in the District Court at this time.

9. In light of the foregoing, I vacate the orders of the High Court dated the 12th December, 2014, regarding the attachment of the defendant and strike out the motion on the basis that it is more appropriate for determination in the District Court.

10. This judgement may be forwarded to the District Court in Letterkenny to elucidate for the District Judge the approach of the High Court but without in any way seeking to interfere with the independent jurisdiction of the District Court.