

**THE HIGH COURT**

**FAMILY LAW**

**[2014 No. 5 HLC]**

**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 COUNCIL REGULATION 2201/2003 AND IN THE MATTER OF E. G. H. (A MINOR)**

**BETWEEN**

**C.M.H.**

**APPLICANT**

**AND**

**J.P.D.**

**RESPONDENT**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 16th day of May 2014**

1. The applicant seeks an order pursuant to The Hague Convention on Child Abduction (as implemented in this jurisdiction by the Child Abduction and Enforcement of Custody Orders Act 1991) and Article 11 of Council Regulation 2201/2003 for the return of Edward (not his real name), the boy named in the title to the proceedings to the jurisdiction of the courts of England and Wales.

**Factual Background**

2. Edward was born in Ireland on 7th February, 2001. The applicant is his mother ("the Mother") and the respondent is his father ("the Father"). The Mother and the Father are not and were not ever married to each other. Edward, the Mother and the Father are Irish nationals and lived together until December 2013. From 2001 until 2010, they lived in Ireland. In 2010, all three moved to Spain and lived there together until December 2012. The Father moved to live in England in December 2012, and the Mother and Edward joined him in February 2013.

3. Whilst in Ireland, the Mother and the Father had purchased a house in a town in the Midlands of Ireland which was rented out when they left Ireland. Edward attended primary school in Ireland until 2010.

4. In England, the Father had a letting of a pub in Gloucestershire, in which the family lived. Edward went to school and also played rugby and soccer with local clubs there.

5. Regrettably, the relationship between the Father and the Mother deteriorated in 2013. The Father had suffers from a chronic medical condition. There is a significant dispute on the affidavits, which I do not need to resolve, as to whether the Father informed the Mother and others between October and December 2013, that he was also suffering from cancer.

6. On 28th December, 2013, the Mother left the family home and went to live with her sister in Birmingham. Again, there is significant dispute on the affidavits as to the circumstance in which the Mother left the family home and that is not for resolution in these proceedings. The Mother since leaving has had unlimited access to Edward and Edward has stayed overnight with the Mother in England and in Ireland.

7. There is dispute between the Mother and the Father as to the extent of discussion, plans or agreement that the Father to move to live in Birmingham. However, it is agreed that he took Edward to visit a school in Birmingham before leaving England. At that point in time, it appears that Edward's preference was to remain living in Gloucestershire and at school there. The Father was notified that his tenancy of the pub would terminate on 6th February, 2014. It appears that he then sought to move to a local authority house in an area approximately one mile from the pub.

8. On 5th February, 2014, the Father and Edward travelled to Ireland to attend a rugby match. They travelled in a van of a friend into which they had packed all their possessions. The Father decided to remain living in Ireland with Edward. They stayed, initially, with a sister of the Father and are now living with friends. Edward has gone to school in Ireland since 28th April, 2014. He is in first year of the secondary school. Prior to that, the Mother had not given consent to his commencing school in Ireland.

9. Both of Edward's grandmothers are living in Ireland with whom he has contact. He also has cousins in Ireland. The Mother has come to Ireland on visits during which she has had unrestricted access to Edward, including overnight stays.

10. The Mother continues to live with her sister in Birmingham and wishes to continue residing there. The Mother has deposed that there is a home available in Birmingham with her sister for herself and Edward. The Mother is doing voluntary work at present.

11. The Father has indicated that he presently intends continuing to live in Ireland and believes that the prior family home in Ireland will be available to him from 19th May, 2014, into which he and Edward could move. The Mother disputes the availability of the family home by 19th May, and has stated that the current lease does not expire until July 2014.

**English Proceedings**

12. The Mother, with the assistance of a solicitor in England, commenced proceedings which issued on 3rd February, 2014, before the Gloucester and Cheltenham County Court, seeking, primarily, a residence order under the Children Act 1989. On 3rd February, 2014, an order was made *ex-parte* abridging the time for service to two days and fixing the first hearing for 12th February, 2014. Before this Court, there is a dispute as to whether or not those proceedings were served on the Father before he left England on 5th February,

2014. It is also in dispute as to whether or not he was aware of the proceedings and the hearing on 12th February, 2014. It is again not necessary, and probably not appropriate, for this Court to resolve those issues.

13. On 12th February, 2014, in the Gloucester and Cheltenham County Court, an order was made on the application of the Mother, the Father recorded as not attending, for an interim residence order in favour of the Mother; that upon service of the order, the Father return Edward to the Mother and, thereafter prohibiting the Father from removing Edward from the care of the Mother except for agreed contact until further order. It also transferred the proceedings to the Birmingham County Court.

14. The proceedings have subsequently been before the Birmingham County Court and the Family Court at Birmingham. It appears that the latter was informed on 31st March, 2014, from the copy of the order produced of High Court proceedings in Ireland, albeit that the proceedings in Ireland are misdescribed as being proceedings regarding the enforcement of the order made in England on 12th February, 2014. Nothing turns, for the present application, on that misdescription. The only proceedings in Ireland of which this Court is aware are the return proceedings.

15. This Court was informed that on 6th May, 2014, the matter was further adjourned until after the decision of the High Court in Ireland. Initially, the proceedings were to be heard before this Court on 28th April, 2014, but had to be put back by reason of the timing of the interview of Edward by Ms. O'Connell, the child psychologist, and the availability of her report for the Court.

### Issues

16. It is not in dispute that the removal by the Father of Edward to Ireland on 5th February, 2014, was a wrongful removal of Edward from England to Ireland within the meaning of the Hague Convention. It is not disputed on behalf of the Father that in February 2014, Edward was habitually resident in England. Further, the Mother holds rights of custody in relation to Edward, which she was exercising, and did not give her consent to Edward coming to live in Ireland.

17. The Father now accepts, having been legally advised, that he is not currently a guardian of Edward under Irish law and is not the holder of parental authority under English law.

18. The only defence advanced to the Mother's application for the order for return is a defence pursuant to Article 13 of the Hague Convention by reason of Edward's alleged objections to now returning to England. The response to the defence is two-fold. Firstly, it is contended on behalf of the Mother that as a matter of fact, the Court should not find, on the interview conducted with Edward and Ms. O'Connell's evidence that Edward objects to returning to England. It is contended that the views which he expressed in interview with Ms. O'Connell are such that as a matter of probability he has been manipulated by the Father to form or express such a view. Secondly, it is submitted that even if the Court finds that Edward does object to returning to England, that the Court should, nevertheless in accordance with the Case law referred to in the exercise of its discretion under Article 13, make an order for the return of Edward.

### Applicable Law

19. Article 13 of the Hague Convention, insofar as relevant, provides:

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

20. In *C.A. v. C.A.* (otherwise *C. McC*) [2009] IEHC 460, [2010] 2 I.R. 162, this Court adopted and followed the three-stage approach to consideration of a child's objections set out by Potter P. in *Re M.* (Abduction: Child's Objections) [2007] EWCA Civ. 260, [2007] 2 FLR 72 at p. 87, where he stated:

"[60] Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that it is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return."

21. In this application, it is only necessary to consider two of the three questions. It is agreed that if the Court finds that if Edward does object to now returning to England, he is of an age and maturity that it is appropriate for the Court to take account of those objections.

22. The Supreme Court in *A.U. v. T.N.U. (Child Abduction)* [2011] IESC 39, [2011] 3 I.R. 683, considered the proper approach, both to determining whether a child objects and to the exercise by the Court of its discretion. Denham C.J., in giving the sole judgment with which the other members of the Court agreed, stated at paras. 27 and 28:

"[27] A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence.

[28] The range of considerations may be wide. As was stated in *In re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, at p. 1308:-

'[46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are: 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances'.

I agree with this analysis."

23. It is relevant to note that the 'general Convention considerations' referred in the above extract from the speech of Baroness Hale of Richmond in *Re M* are stated at para. 42 of the speech as follows:

"[42] In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states."

24. Denham C.J. further amplified the approach to be taken by a Court in exercising discretion under Article 13 at para. 36 of her judgment in *A.U. v. T.N.U.*:

"[36] It is also the case that in interpreting and applying article 13 of the Convention, courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance. However, as already pointed out, the court has discretion pursuant to article 13(b) in having regard to objections of a child to being returned to his or her country of habitual residence, as outlined above. The circumstances in which children would not be returned are exceptional. As article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed out in *In re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, the extent to which the child's objections "coincide or are at odds with other considerations" which are relevant to his or her welfare are also relevant.

It is clear that in exercising his discretion the High Court Judge took all these factors into account (as indeed this court has in this appeal), including the fundamental policy objectives of the Convention."

25. In *A.U. v. T.N.U.* the application was for the return of children to the State of New York, and in *Re M.* to Zimbabwe. Hence, in neither case, Article 11 of Council Regulation (EC) No. 2201/2003 applied. In those cases, once an order of non-return was made, the courts of prior habitual residence of the child had no further jurisdiction under the Convention to make a different order. In *C.A. v. C.A.* (otherwise *CMcC*), the Regulation did apply and it was submitted that the provisions of Articles 11(6) to (8) should be taken into account in addition to the policy of the Convention. On that issue, I stated in the judgment delivered (which predated *A.U. v. T.N.U.*) at para. 37:

"[37] I accept the submission of counsel for the mother that the court should take into account the provisions of art. 11(6) to (8) in addition to the policy of the Convention, as referred to in the decisions of the Supreme Court in *B. v. B. (Child Abduction)* [1998] 1 I.R. 299 and by Baroness Hale of Richmond in *In re M. (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, when deciding how it should exercise its discretion in a case such as this where the child's objections are made out. Nevertheless, it does not appear that the potential for the court of habitual residence to make an enforceable order for return pursuant to art. 11(8) takes away from the requirement that this court take into account the policy of the Convention, not only to secure the prompt return of abducted children, but also to deter abduction in the first place, and to respect the judicial process of other contracting states. Nevertheless, it is a factor to be taken into account and the weight to be attached would depend upon the facts of the particular application. Care must be taken that the policy of the Convention to deter abduction is not undermined by giving an advantage in any subsequent hearing to a parent who wrongfully removed children. If the court of the jurisdiction of habitual residence is required to consider custody issues, including an issue of return in the context of the court of another member state having made an order for non-return, there may be such an advantage or a perceived advantage."

### Edward's Views

26. In accordance with the current practice in return applications to which article 11(2) of the Regulation applies, Edward was given an opportunity to express his views to the Court by an interview by Ms. Anne O'Connell, a consultant clinical psychologist, pursuant to an order of the Court. Ms. O'Connell has prepared a report for the Court following the interview, and also appeared and gave oral evidence in response to questioning for counsel for the Mother and counsel for the Father. Ms. O'Connell's written report of Edward's wishes expressed to her in relation to his future care and living arrangements, including where he would like to live, is in the following terms:

"Edward would like to go to school in Ireland and continue to live with his Father. He is not attending school at present and believes that his Mother blocked his enrolment in local schools as she is his legal guardian. He states that he does some schoolwork with his Father, and hopes to start after Easter. He has met up with old friends from his primary school."

In relation to an objection to living in England, Ms. O'Connell reported:

"Edward never felt that he fit in (*sic*) in England with his peer group. He enjoys his friends and sees his Grandmothers here."

In relation to his reasons for his objections, Ms. O'Connell reported "he would like to be close to his relatives". Also, "Edward would like to stay in Ireland with his Father. He is happy to retain contact with his Mother through visits, calls, etc. but does not wish to live in England".

27. On the question as to whether Edward appeared capable of forming his own views, Ms. O'Connell, in her report, stated:

"He is, in my opinion, capable of forming his own views as to where he would like to live. He has sampled life in various countries and feels comfortable in Ireland. He worries about his Dad's health and is happy to be with him, whereas he feels that his Mother has her sisters for company and support. Sporting involvement features large in his pastimes and he does not seem to have engaged with any team or specific sport while in the UK."

Later, she stated:

"I believe he has come to these conclusions independently. He states that his Father has told him that he 'just wants

what Edward wants'. I found no evidence of undue influence on Edward's views."

28. In giving her oral evidence to the Court, Ms. O'Connell was questioned carefully and determinedly by counsel for the Mother in relation to the conclusion she reached that Edward had formed the views he expressed independently. It was put to Ms. O'Connell that he was, as a matter of probability, manipulated by the Father so as to reach the views he expressed. This was rejected by Ms. O'Connell and, in my judgment, the reasons which Ms. O'Connell gave for rejecting the contention of counsel have a sound basis.

29. Ms. O'Connell made clear that Edward loves each of his parents. In relation to the suggestion that the Father was using his own health situation to influence Edward to express a view that he wished to live with him, Ms. O'Connell said that it was inevitable that a young person of Edward's age would worry about the health of their parents. Further, that he was of an age where he would be familiar with and would take into account, in his own thinking, his parents' plans as to where they would live. He was aware that his Mother had her sisters, and he perceived the fact that she had been able to go and live with her sister in Birmingham when she left the family home as the availability of support for his Mother. It was therefore a natural reaction of Edward at his age that he might wish to live with his Father and give him support, in particular by reason of his illness and did not result from manipulation by the Father. I accept that view.

30. I find as a fact on the totality of the evidence that Edward does now object to being returned to England. Further that this is his own view. Edward's reasons for objecting to now returning to England, from Ms. O'Connell's report as amplified in her oral evidence, I find to be the following:

(i) Edward wants to remain in Ireland and go to secondary school in Ireland;

(ii) he feels settled in Ireland and has friends here, having been at primary school in Ireland and has, since his return, linked up again with boys with whom he was at primary school;

(iii) he has extended family in Ireland, including both his grandmothers and cousins;

(iv) Edward probably associates England with a difficult period in his life which he wants to put behind him. Whilst Edward indicated to Ms. O'Connell that he had not settled in England, the Court has seen a note written by him to his Mother between 28th December, 2013, and 5th February, 2014, which indicates that at that stage, he felt he had settled in Gloucestershire, had made friends there and did not then wish to move to Birmingham. Hence, it appears to me that his memories of England may not be all negative. Also, he was involved in sport in England with teams in Gloucestershire which he does not appear to have disclosed to Ms. O'Connell;

(v) Edward's perception that his Father may now need him more than his Mother is, in my judgment, probably a secondary reason to his present view that he wishes to remain in Ireland to go to school here. The fact that his Father is now living in Ireland is relevant to this view.

31. Overall, his reasons for objecting to a return to England relate to his wish to have his principal place of residence in Ireland such that he can do his schooling in Ireland and play his main team sports in Ireland rather than by reason of negative views about England. He has no objection to visiting England and, it does not appear to me, objects *per se* to living with his Mother. The objection is rather to living with his Mother in England because that prevents him continuing to live and go to school in Ireland.

32. There are two further factual matters I have taken into account in reaching my decision. Firstly, the school term in his present school in Ireland ends on 30th May, 2014. The Mother has confirmed to the Court that Edward currently has a place in the school he visited in Birmingham which he can take up on his return and that the school term there does not end until 21st July, 2014. Second Edward has recently had a period of principally living with his father by reason of his move to Ireland.

## Conclusion

33. Applying the principles set out above to the facts of this application, I have decided that I should exercise the discretion now given the Court under Article 13 of the Hague Convention in favour of making an order for the return of Edward to England. However in order to permit Edward complete the Irish school year on the 30th May as he wishes I am directing that the return take place on or before Wednesday 4th June, 2014. I will also immediately request the Hague liaison judge for England and Wales to assist in enabling the proceedings in Birmingham between the parents in relation to Edward to be heard and determined as a matter of priority, and if feasible such that a decision, if necessary, may be taken as to where Edward should live and go to school by August 2014. This should help Edward's wish to be settled for his secondary schooling.

34. My reasons for this conclusion are the following. As is clear from the judgments referred to, Edward's views are not determinative of the order that the Court should make. I have taken them fully into account. As stated Edward's objections to returning to England appear to be primarily based upon his wish and preference to go to secondary school in Ireland and this involves living in Ireland during the school terms. Irrespective of whether this Court makes an order for the return of Edward or refuses to make such an order, by reason of Articles 11(6) to (8) of Regulation 2201/2003, the ultimate decision as to with which parent and in which country Edward may now live will be taken by the English courts. It is a decision which will be taken following a full welfare assessment as to what is in the best interests of Edward.

35. Ms. O'Connell's report of her interview with Edward, both written and oral, makes clear that Edward wishes to be settled for the remainder of his secondary schooling. It is desirable, if at all possible, that in the absence of agreement being reached between his parents as to where this should take place, that a decision is taken by the English courts by August 2014 on this issue. The order for return should facilitate an early informed welfare assessment and resolution of the proceedings.

36. Also I must have regard to the fact that Edward was taken from England to Ireland by his Father, wrongly, within the meaning of the Hague Convention amounting to what is commonly referred to as abduction. If I were now to refuse to make an order for the return of Edward, it appears that the Father might obtain a significant advantage to the further decision to be taken by the English courts, as Edward would probably have spent a longer time in Ireland and would not have attended secondary school in Birmingham which is his Mother's plan for his continued living in England prior to the taking of any decision pursuant to Articles 11(6) – (8) of the Regulation. It is clearly contrary to the policy of the Convention to permit an abducting parent obtain such an advantage. In addition, Edward has lived with his Father in Ireland since February 2014, and has spent the greater part of time with his Father, albeit has had access with his Mother.

37. The Mother has indicated her intention that if an order is made for the return of Edward, she will send him immediately to the school in Birmingham and that he will continue there until term ends on 21st July, 2014. I will seek an undertaking from the Mother

that she will do so. By reason of the interim residence order to the English courts in favour of the Mother, Edward, on his return to England, will be required to live with the Mother, except insofar as she may permit him to stay with the Father, or the English courts so permit. It appears desirable that Edward have a further period at school this year, given his earlier absence from school, and that he have an opportunity to experience school in Birmingham and a period where his primary residence is with his Mother prior to the full welfare assessment of what is in his best interests for the remainder of his secondary schooling. It will also give Edward an opportunity of expressing views in the course of the English proceedings which are based upon the double experiences of living with his Father in Ireland and going to school here, and living with his Mother in Birmingham and going to school there. It appears to be in the best interests of Edward that the final decision to be taken by the English courts should be informed by the double experience.

38. It is clear to me from the evidence given by Ms. O'Connell that Edward loves both parents. He is, unfortunately, compromised by the breakdown in their relationship and inability to continue living together. Both parents clearly love him and want what is best for him, though their respective views may be coloured by a desire to have him living with each of them as much as possible. Whilst I am conscious that Edward's present preference is to remain living in Ireland, it is hoped that he will understand the Court's decision that he should, after the end of the Irish school year, return to England to live with his Mother so that the English courts may take the decision, which it is agreed by his parents it is theirs to take (if his parents cannot reach agreement), as soon as possible and on a fully informed basis as to what is objectively in his best interests. Edward will have the opportunity of expressing his views to the English Courts as part of a much fuller welfare assessment than is permissible in this summary application for return.

39. Ms. O'Connell has made clear in her evidence that she believes that Edward understands and expects either the adults in his life or a Court to take the decision as to where he should live and that he will comply with that decision. It is important that the limited nature of this decision is explained to him and that each of his parents facilitate him in complying with the decision and that each parent facilitates and fosters Edward's relationship with the other parent.

## **Relief**

(i) An order for the return of Edward to England on or before Wednesday 4th June, 2014;

(ii) an order that this judgment and the affidavits, exhibits and report of Ms. O'Connell be released for use in proceedings before the courts of England.

40. The Court will seek, as a condition of the above orders, undertakings from the Mother:

(i) To arrange for Edward to attend the school in Birmingham as soon as practicable after his return to England;

(ii) to permit unlimited phone and Skype access between Edward and his Father, and in the event that his Father travels to England, reasonable face-to-face contact pending further orders of the English courts;

(iii) to pursue immediately the present proceedings before the English courts, such that if at all possible, a final decision is taken in relation to Edward's living and schooling arrangements by August 2014.

41. The Court is not seeking any undertakings from the Father as it is obviously in his interests to actively participate in the English proceedings so as to permit, if feasible, a decision to be taken by August 2014.