THE HIGH COURT

FAMILY LAW

[2020 No.11 H.L.C.]

[2020] IEHC 686

N 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/EC

AND

IN THE MATTER OF S AND M, MINORS

BETWEEN

S.H.

APPLICANT

AND

J.C.

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 16th day of December, 2020

1. Introduction

1.1 This is an application under the Hague Convention for the return of two girls, S and M, to England, their country of habitual residence. There were family law proceedings ongoing in respect of these children in the Liverpool Family Court [the Family Court], when the Respondent moved to Ireland, taking the children with her. The Family Court had already ordered that a care plan be put in place and the issue for this Court is whether or not the children should be returned to England in circumstances where it appears inevitable that, on return, both children will be put into foster care. It is argued that this would amount to a situation of grave risk for these children or would be to place them in an intolerable situation. It is further argued that both children object to being returned to England and are mature enough to have their objections to this outcome taken into consideration. Finally, Article 20 of the Convention is invoked: it is submitted that the protection of the family unit as embodied in the Constitution must inform the Court in its decision and, given that the children will be placed in care and taken away from their family, their return would be contrary to Irish law.

2. Facts

2.1 The eldest child, M, was born in 2009 and is 11 years old. Her sister, S, was born in 2010 and is now 10 years old. Both children were born in England and had lived in England until their removal to Ireland. This is an application for the return of both girls to their habitual residence, following their removal by the Respondent mother in May or June of 2020. The Applicant contends that the said removal was wrongful within the meaning of the Hague Convention in that the removal was without his consent and was in breach of rights of custody held and exercised by him at that time. There is a further argument that the Respondent acted in breach of rights of custody vested in the English Courts in respect of the children but given the concessions in paragraph 2.2, below, this argument was not fully teased out in submissions.

2.2 It is accepted that the Applicant did not consent to the removal of the children, that he had, and was exercising, rights of custody and that the children were habitually resident in England until they were brought to Ireland earlier this year. The children had lived in the Lancashire area for all their lives and have extended family in another part of England.

2.3 The parties' relationship ended in August, 2018 and the girls stayed with their mum, the Respondent. Agreed access arrangements broke down and in April of 2019 the Applicant issued family law proceedings in the Family Court. The Applicant has exhibited a comprehensive note of various stages of these proceedings, prepared by his legal representative in England and exhibited at SH4 in his affidavit dated the 12th of November, 2020. This chronology and the broad description of events therein is in line with the record of the Family Court proceedings exhibited at GB3 of his solicitor's affidavit. There had been local authority contact with the family, according to exhibit SH4, since 2018, due to child welfare issues relating to their mother's new partner and the fact that both girls were being home schooled with few social contacts, amongst other concerns. In August of 2019, the Family Court appointed a guardian for the children due to these concerns. In January of 2020, a psychological report was prepared in respect of both children. This report was critical of both parents and advised, *inter alia*, that the relationship with their father be supported. In May, 2019, access with the Applicant had been ordered by the Court, to be promoted by the Respondent. This kind of order, providing for supervised access with their dad, was repeated at various times, including on the 25th of February, 2020 when the Court refused an application for unsupervised access.

2.4 On the 22nd of May, 2020 there was a scheduled access visit but it was cancelled by the Respondent on the stated basis that the children may have had Covid 19. On the 29th of May, the children did not attend an access visit. On the 3rd of June, the social workers assigned to the case called to the family home where a removal van was outside, containing a washing machine. The maternal grandfather of the children was present but did not assist the social worker as to where the children were or what had happened. On the 4th of June, 2020 the Family Court placed the girls in

interim care on the application of their local Borough Council. On the 5th of June, the Family Court authorised the police to remove the children from the Respondent.

2.5 It clear that between the 29th of May and the 4th of June 2020, the Respondent removed the children from England. The Applicant applied for the return of the children on the 19th of June, the Request for return was received by the Irish Central Authority on the 1st of July and these proceedings issued on the 12th of August, 2020.

2.6 The relevant law in England as regards access to children in such circumstances is set out at exhibit GB2 of the primary affidavit of the solicitor for the Applicant. At Exhibit GB3, the court orders already made by the Family Court are set out. It is clear from these exhibits that the relevant Borough Council and the Family Court had carried out assessments of the children and that the primary focus of that Court, in line with the applicable law in England, was the welfare of these two young girls. The main psychological report of Dr. McIntee has been exhibited at SH2, both parties rely on it for various assertions in their affidavits, and it is referred to in more detail below.

2.7 An Interim Court Order was made in April 2020 to the effect that the Applicant continue to have supervised access with his children twice a week. At para. 16 of the Order, it is made clear that care orders were considered at that time, on the application of the children's guardian, but the Court held that it was not necessary or proportionate. It is equally clear, from para. 17, that a failure to abide by the pre-proceeding arrangements or non-compliance with the expectations of the Court would result in bringing the matter "to legal gateway". The next hearing date was to be on the 5th of June, by telephone, before which date the events described above had overtaken the Court process.

3. Disputes of Fact on Affidavit Evidence

3.1 The affidavits include many assertions of fact by both parties. The Respondent avers to a lack of financial support by the Applicant. Both allege violence on the part of the other, including one allegation of sexual violence. Both deny all such allegations. The Applicant states that the Respondent's partner moved in with her the same night he left the family home. She denies this. He avers that he learned that her new partner had been charged with the assault of his wife and daughter and went to child welfare officers, whereupon the Respondent reacted by stopping his access to his children. From exhibit SH4, it appears that convictions have since been recorded against the then partner of the Respondent. There are further allegations about the circumstances in which the parties' relationship began, about earnings, mortgage payments and gifts given to the children and their value. Most, though not all, of the averments are strongly disputed. There are also general averments to the effect that a failure to deny any allegation on the part of the relevant deponent should not be taken as an acceptance of the matter alleged. In only some limited cases is there evidence to support, or to refute, the allegations made. These matters are set out to give an indication of the kind of disputes of fact raised in this case.

3.2 The application is one made on affidavit and there is no way to test most of the factual allegations made, particularly if they are refuted and there is no supporting evidence exhibited either way. Any of the averments in the case may or may not be true but, as in most such cases, an oral hearing with detailed cross-examination would be required to assess the evidence. It is not only impossible to determine most of the issues on affidavits such as those lodged in this case, it is usually unnecessary in an application such as this. In the context of a Convention case, many such questions of fact are irrelevant to the issues before the Court.

3.3 This Court is concerned with the question of the return or non-return of the children only. The defences of grave risk and Article 20 are raised, and the Respondent argues that the views of the child should persuade the Court to exercise its discretion against returning these children. In those circumstances, and in line with all the relevant authorities, it is inappropriate to conduct a detailed analysis of the evidence set out in these affidavits as to the breakdown of the relationship and the disputes as to how each parent has behaved towards each other or the children. These are the concerns of the family courts in the relevant jurisdiction and not a court considering a case under the Hague Convention. Only those matters which may constitute a grave risk or a breach of Article 20 must be assessed by this Court. In that context, the views of sufficiently mature children may be taken into account, but those views do not determine the question.

3.4 Matters of fact relating to the conduct of the proceedings before the English courts are relevant; this is the process to which the children have been subjected and will be subject if they are returned. Those matters of procedural fact are also supported by exhibits, including copies of court orders and psychological reports. None of these exhibits has been refuted by countervailing evidence and very little of the content of these exhibits has been specifically denied by either party. The Respondent avers that the social workers were hostile towards her, and this claim is one that the Court has born in mind while considering the various exhibits in the case. The main psychological report, Dr. McIntee's report, has been relied upon by both parties to support their respective positions. This Court can rely on the relevant history of the court proceedings and this report, therefore, in a way that it cannot do when considering the parties' direct averments relating to the breakdown of the relationship and alleged ill-treatment of each other and the children.

4. <u>The Proceedings in the Family Court</u>

4.1 The Family Court made an Order on 25th February, 2020 containing this notice;

> *"It is a criminal offence to take a child out of the UK without the consent of everyone with parental rights unless the court has given permission. However, if an order has been made that a child is to live with a person, that person may take the children out of the UK for a period less than one month."*

Paragraph 9 of the same Order sets out the interim arrangements as to the Applicant's rights;

"It is ordered that the local authority shall facilitate visits between the father and the children (it may be separate or together) twice a week for two hours supervised."

As noted above, against a history of concern for these girls, and without making any comment about the conduct of either of the parties in this regard, care orders were considered in April of 2020, but the Court made no such orders. As part of these family law proceedings, a detailed document was drawn up, entitled "Statement of Expectations", and expressed to be an agreement between the parties and the children's services department of the relevant local authority. The plan is exhibited at SH4 in the Applicant's affidavit of October, 2020. Here, the sub-headings are "Contact" (under which detailed access arrangements are listed), "Children's Emotional Wellbeing" and "Children's Education". These headings confirm what is clear from the relevant exhibits: that the proceedings in the Family Court had a strong focus on both children's interests.

4.2 On the third page of exhibit GB3, one can see that on the 22nd of April, 2020, the Family Court, in considering a Child Arrangements Programme for this access case, had been attended by all parties except the Respondent. Counsel for the Applicant, a solicitor representing the Guardian who had been appointed for the children, and Counsel for the Borough Council were all in attendance. Counsel for the Respondent appears to have been present, but without instructions. The presiding Judge rang the Respondent three times on that occasion to facilitate her engagement with the process, to no avail.

4.3 At paragraphs 13 and 14 of her primary affidavit, the Respondent refers to the Applicant seeking care orders and asserts that the Care Orders that have now been made were made at his behest. This does not appear to be correct. The last application he made, in April, was for unsupervised access. This application was refused. It appears to have been the Borough Council in the most recent application in June, and, according to the February Court Order, at para.16, the Guardian that applied for care orders for the girls initially in February, when the Court declined to make such orders. These records also suggest that the conduct of *both* parties has been a significant factor which has led independent professionals to fear for the emotional welfare of the children in this case.

4.4 The children were moved to Ireland at a time when both children were in the sole care of the Respondent and the Family Court had directed that they spend two hours of supervised access with their dad, twice a week. The Family Court asked a psychologist, Dr. McIntee, to prepare a report on the children. This report was completed and dated the 31st of January, 2020. Dr. McIntee concludes, in respect of the Applicant, that he has an insecure style and does not act appropriately in respect of the children, meaning that he will not act quickly to end the distress of his children. Dr. McIntee concludes, in respect of the Respondent, that she has a controlling and dismissive attachment style, which makes it difficult for her to put the children's needs above her own, causing her to fail to regulate the children's distress, instead focusing on her own distress and needs. Both children portray their

relationship with the Respondent as insecure and their relationship with the Applicant as entirely negative. This, Dr. McIntee points out, is consistent with parental alienation.

4.5 Dr. McIntee concludes that parties in this case are emotionally invested in their own negative relationship and that the children are exposed to parental alienation. At paragraph 89 of her report, she concludes that both children have insecure ambivalent attachment styles. Both children have under-regulated emotions in respect of anger and anxiety. She notes that insecure ambivalent attachment styles are associated with mental health issues, with relationship problems, with lack of independence and increased risk of substance abuse. Both children were home-schooled until their removal, which means they were limited in their opportunities to form their own independent views and were not exposed to the views of others. Dr. McIntee advises that parental alienation constitutes emotional abuse. The parental alienation was evident, according to the report at paragraph 95 and preceding paragraphs, in the girls' portrayal of their family relationships, their probable exposure to the family law proceedings, the problematic parenting relationship, and the controlling, dismissing attachment style of their mother and the preoccupied attachment style of their father.

4.6 The same paragraph also contains the view that the "Mother's extreme reaction to the father's presence and oppositional attitude towards professionals are negatively influencing her children. M in particular was seen to replicate the attitude of her mother with eye rolling and sighing in response to questions." She concludes that the children are being emotionally abused. Dr. McIntee recommends that the family engage in a mixture of individual and joint therapy *with the children having continued contact with both parents.* She considered it essential that both parents work in joint sessions to ensure that they addressed conscious and unconscious issues that may be affecting progress and to develop parenting skills. This is a summary of the key findings, in order that the proceedings and Care Orders be seen in context.

4.7 According to the Respondent's solicitor in the English proceedings, the Family Court, having relied on the above psychological report, ordered the immediate removal of the children into foster care, intending to allow them build up a relationship with their father before being released into his care. It should be noted here that care orders were considered, due to the safety concerns expressed by their guardian and the local authority, but were not made by the Court before the Respondent removed her children from the country and from the jurisdiction of the relevant Family Court. As the McIntee report made clear, the ideal outcome was that both parties work on their parenting skills. There appears to have been no indication that the Family Court was going to remove the children from the Respondent's care until she disengaged from the Court's process and removed them from the jurisdiction.

4.8 Dr. McIntee has concluded, at paragraph 100, that the Applicant can gain improved insight into the needs and difficulties of the children, but that the Respondent is likely to be highly resistant to improving her understanding of the children's needs. The Respondent mother has, she reports, a

controlling avoidant attachment style and is therefore likely to be highly resistant to improving her understanding of the children's needs and the impact of emotional abuse caused by parental alienation. She is openly opposed to both the children having access to their father and to the assessment procedure as a whole and has expressed these views in front of the children.

4.9 The McIntee report was created to enable the Court in England to assess risks to the children, remains available to the Court there and is evidence on which this Court relies in assessing the effect of the return of the children to their country of habitual residence. The care order option appears, on the evidence, to be one exercised in the context of a lengthy file of material. The Orders were obtained at the request of the relevant local authority and comprise interim rather than final orders. From the application form itself, also part of Exhibit GB3, one can see that adoption is not being considered in this case and the focus is to address the parenting skills of both parties so as to safeguard the welfare of their two children. It is in this context that the Interim Care Orders were made.

4.10 In April, 2020 the Family Court concluded that the children were at risk of significant harm and the Council implemented a pre-proceedings meeting, arranged for the 11th June, it being made clear that this was an essential meeting to reduce the risk of harm to the children. Their removal in May (or June), in conjunction with the failure of the Respondent to take part in the hearing on the 22nd of April or thereafter, strongly suggests to this Court that the Respondent did not intend to engage with pre-proceedings. Her view as to their welfare is set out in her affidavits and, while the Court has considered this aspect of the case carefully, the Court must conclude that the independent professional upon whose report the Family Court relied, and upon whom both parties in this case have also relied in part, is a reliable source of evidence whose conclusions must carry more weight even that the parties in the case, albeit that they are the parents of the children.

4.11 In particular, the Court is conscious that the Respondent has been the primary carer of the girls and there is no doubt that she loves her children. Nonetheless, there is cogent evidence before the Court that the girls' welfare, and in particular their emotional development, is at the forefront of the minds of those professionals involved in proceedings before the Family Court and that the arrangements made by that Court and the recommendations by Dr. McIntee are aimed solely at the welfare of the two children. The Respondent, for the reasons she sets out in her affidavit, did not make herself or the children available for the Court's Child Arrangements Programme or for the therapy recommended by Dr. McIntee. The Respondent fled the jurisdiction rather than engage with the various independent experts working to assist her and her children. Whatever her motivations for this, it was her conduct, in the context of the girls' family history, that led to the Interim Care Orders being made in the Family Court.

4.12 The Respondent now submits that there has been no investigation leading to this Care Order and that she must have the opportunity to address the Family Court and the Care Order lifted before the children are returned. But this submission ignores the history of the case as set out in exhibits

SH4, GB3 and the McIntee report at SH2, which show a fully documented pattern of engagement by social workers and a guardian, assessment of both children, including interviews with both parents and input from social workers, all being placed before the Family Court for its consideration on various hearing dates and with all parties, including the Respondent, being represented by lawyers throughout that process. Further, the Respondent did not take part in either of the last two hearings before the Care Order was granted, although it was open to her to do so and the relevant Judge had made significant efforts to ensure that her views were canvassed. For the second hearing, in June, it appears to be accepted that she had already removed the children from the country, although that was not known to the Family Court at that time.

5. Convention Provisions

5.1 Article 3 of the Hague Convention on the Civil Aspects of Child Abduction 1980 ('the Hague Convention') provides:

"The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

5.2 Article12 of the Convention provides:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment…."

5.3 Article 13 of the Convention provides;

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

5.4 Article 20 of the Convention provides;

"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

6. Grave Risk or Intolerable Situation?

6.1 The matters alleged by the Respondent to comprise the 'grave risk' or 'intolerable situation' defence arise in the context of the child welfare issues which were being actively considered by the Family Court at the time of the removal of the children. It is difficult to conceive of circumstances where such proceedings, or orders made pursuant to such proceedings, might meet the threshold of 'grave risk' contained in Article 13(b). The main argument in this case is in respect of the Care Order that was made *since* the removal, and as a direct result of the removal, and which followed the Respondent's failure to engage with proceedings which had at their heart the welfare of these children.

6.2 The threshold regarding the grave risk defence is set out by the Supreme Court by Barron J. in the case of *R.K. v J.K. (Child Abduction: Acquiescence)* [2000] 2 IR 416 at 451;

'Prima facie the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state.

In my opinion the following passage from Friedrick v. Friedrick (1996) 78F 3d 1060, sets out the basis upon which the defence of grave risk might succeed. The passage is as follows:-

> *"Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."*

6.3 The threshold regarding grave risk is, therefore, a high one, and the references to war or famine put the facts of this case into context. The risk of serious abuse or neglect is said to constitute the requisite grave risk only when the court in the country of habitual residence is said to be unable or unwilling to protect the child. Again, this highlights the fact that in this case there is ample evidence that the Family Court is engaged in preventing the risk of emotional abuse rather than being unwilling to protect these children.

6.4 The defence must also, to use the words of Barron J., spring from events which, it is alleged, prompted the removal. This is not the case here. The Respondent records some events which pre-dated the proceedings or occurred while the proceedings were ongoing, but now relies on Care Orders made, not as a result of the matters complained of, but, largely, as a result of the removal. The evidence in this case tends to show that the Respondent removed the girls because she was unhappy with the indications of the Court's view apparent in existing orders and proposed arrangements made in April and May of 2020. This case, therefore, cannot be compared with cases in which the risk is said to lie in the danger that the children will be removed from their primary carer due to an adverse psychological reaction to a return order, for instance. There was no reason to remove the children, other than to frustrate the proceedings then in being. There is no reason for the Respondent not to return to England with her children. The thrust of the proceedings there, including professional reports on the welfare of the children, suggest that they were already at risk but that the Court was working to assist them. The evidence before this Court suggests that the children would not have been made subject to care orders, had the Respondent engaged with efforts to support the children.

6.5 The onus lies on the Respondent to establish that grave risk exists. In *P.L. v. E.C.* [2008] IESC 19, [2009] 1 IR 1 (quoting the earlier judgment of *A.S. v P.S. (Child Abduction)* [1998] 2 IR 244), Fennelly J. stated at para. 57 :

> *"The authorities are clear that the burden here is on the mother [the party who relied on the defence in that case] and that the test is a high one. Grave risk is not, of course to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and*

with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future speedily to be decided in that jurisdiction."

6.6 Grave risk cannot be equated with the effect of a care order, made in the interests of a child. The facts of *P.L.* show that even very serious allegations are nevertheless for determination by the courts of the child's habitual residence. The Australian courts in *P.L.* were dealing with child sex abuse allegations. Access to the father was suspended pending investigation of the allegations and a final hearing was conducted where both parties were legally represented. The proceedings were adjourned, at which time the respondent mother removed the child from the jurisdiction.

6.7 When dealing with the grave risk defence, the Supreme Court (Fennelly J, *nem. dis.*) stated;

"54. … [The appellant] believes that the respondent has, when exercising rights of access, sexually abused C and that, C will be at risk of repetition of such behaviour if access takes place. ... Put shortly, her submission amounts to saying that this Court should not trust the Australian courts to protect the interests of C."

55. The correct approach to the treatment of this issue is very well established in the case-law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country."

6.8 This Court is not only bound by the case of *P.L.* but agrees with the reasoning of Mr. Justice Fennelly. In particular, where he concludes that it is difficult to rule on the quality of the evidence before the court of another country, even at a *prima facie* level. There, the Appellant submitted that she had produced evidence that the Australian Court was unable or unwilling to protect the interests of her child. Here, the Respondent does not even attempt to make this argument but relies almost entirely on the fact of interim Care Orders having been made. The detailed evidence as to the representation of the children by guardian and solicitor, the careful plans as to the supervised access with their father, while remaining in the care of their mother, the engagement of a psychologist who had full access to the children and both parents before producing her report, provide ample evidence as to the approach of the Family Court being in the interests of both children. This evidence contradicts any suggestion that the Court will put either child in a situation of grave risk, it tends rather to suggest that they will be protected from risk.

6.9 It is also relevant, in considering the submission on what constitutes a grave risk, that the Respondent submits that the Family Court intends a severance of her relationship with her children. The only reference to the future plans of the Family Court is one in an affidavit sworn by the solicitor for the Respondent in England. This deponent notes that the Court, in a recent hearing, was in agreement with the Local Authority Care Plan of "immediate removal into care with a view to them being placed with their father". This may be the current view of the Family Court, but it ignores the history and the primary objective of these proceedings, which appear to have focused, throughout, solely on the welfare of the children. That Court, until the Respondent's recent actions in removing the children, had considered care orders to be disproportionate to the risk of harm caused by the parenting of both parties to this case.

6.10 Unlike the cases relied upon by the Respondent, in which the primary carer could show an insurmountable obstacle to her moving to a different country, here it appears to be the Respondent's opposition to or failure to engage with the directions of the Family Court has led to these orders being made and has led to the current attitude of the Family Court. Given the contents of the McIntee report, advising therapeutic interventions which the Applicant appeared ready to accept but the Respondent did not, the current view of the Family Court can be seen as one that is dictated by the Respondent and her conduct, to a very large extent. It follows that an acceptance on the part of the Respondent that independent child psychologists may be able to assist her in her parenting skills would be of considerable benefit to her children and may have more impact on the outcome of the Care Plan than any application to this Court could have, given that this Court has no jurisdiction to interfere with the proceedings before the Family Court.

6.11 It is clear that the courts in England are both willing and competent to vindicate the rights of these children and safeguard their welfare. It cannot be argued, tenably, that returning the children to a situation where Interim Care Orders are now in place, made by a court of competent jurisdiction with the sole aim of protecting the children, amounts to placing them in a situation of grave risk or puts them in an intolerable situation within the legal meaning of those terms, in the context of the Convention.

6.12 As is made clear above, this Court is aware of the contribution that the Applicant has made to the diagnoses in respect of both children. It is not the function of the Court to attribute blame or to resolve these issues but to assess whether the Respondent has made out the defences on which she relies, she having accepted that she removed the children from the custody of a parent who was exercising his rights of custody. The Respondent has submitted that there is no evidence of immediate or serious risk to the children's health, safety or welfare while in their mother's care. This is not the test which to be applied when relying on the defence of grave risk. What the Respondent must show is that to return the children will be to put them in a situation of grave risk. The courts of the country of habitual residence are in a far better position to make such an assessment and there is evidence that the relevant Family Court has already done so after numerous hearings and the engagement of social

workers, a psychologist and the legal representatives of all parties, including the court-appointed guardian of the children.

6.13 The views of TUSLA personnel, who visited the Respondent, that the children were receiving appropriate care, are irrelevant to the issue of the grave risk defence. Insofar as it is argued that the views of TUSLA support the proposition that there is no basis for care orders in this case, such initial impressions after visiting the Respondent's home cannot outweigh the evidence of the case history set out at SH4 and GB3 and the views of Dr. McIntee, whose findings were based on detailed interviews and interaction with all the relevant parties. She concluded that the Respondent is emotionally abusing the children, alienating them from their father and modelling oppositional behaviour which will be damaging to their emotional development. There is sufficient evidence before this Court that the conduct of the Respondent subsequent to the McIntee report shows a failure to address the shortcomings identified therein, which conduct, taken together with the report, provides sufficient evidence for a competent court to make interim care orders. There is insufficient evidence of grave risk to the children in the event of their return, even though return will result in them being placed in foster care.

7. Article 13 – The Views of the Children

7.1 It is submitted that the children object to going into care and that this Court should take their views into account. In the case of *C.A. v C.A.* [2010] 2 IR 162, Ms. Justice Finlay-Geoghegan adopted the three-stage approach, at p. 171, citing Potter P. in *Re. M. (Abduction: Child's Objections)* [2007] 2 F.L.R. 72, at p. 87, who 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 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."*

7.2 Mr. Mike Van Aswegen saw the children on the 12th of October, 2020 and on the 1st of December, 2020, after the Interim Care Order had been made. His first report describes the cognitive abilities of the girls. Both were found to have the capacity to make a choice as to who should be her primary carer and where this care should take place. Both expressed the view that they would prefer to stay in Ireland. A second interview took place to assess the children's view in relation to going into care. The second report concludes that both girls object to being put into care.

7.3 This Court has already found that grave risk cannot be equated with a care order, made in the interests of a child. This remains the case where the child objects, as most children would, naturally,

to being separated from a parent who has been her primary carer until the making of such an order. Even if acrimonious or unsuitable, a child's home is her home and a parent or primary care-giver is usually the person to whom she is closest, emotionally. No child wants to live without a parent, save where, for instance, there is severe abuse. The circumstances here fall short of severe abuse but there is, nonetheless, strong evidence of emotional abuse, which this Court cannot ignore.

7.4 Mr. Van Aswegen finishes his report by stating that he agrees with the conclusion of Dr. McIntee to the effect that these children suffer from an insecure attachment style, which he attributes to chronic parental conflict. While the Respondent refers to Mr. Van Aswegen in support of her submission that the children would be in an intolerable situation if returned to England, his report does not suggest this, in the Court's view. More importantly, that was not his objective and (unlike Dr. McIntee) he conducted no tests or interviews of any party in this respect. His focus was on the views of the children, not the situation to which they would return and its suitability or otherwise. His final conclusion, as set out above, is in line with that of Dr. McIntee and both psychologists conclude that parental conflict has caused emotional damage to the children and suggest that the parties to this case must work together to avoid further risk to them.

7.5 Mr. Van Aswegen concludes that adjustment problems are maintained in the medium to long term by poor parental co-operation and on-going chronic parental conflict. He ends his first report by commenting that long-term consequences can include attachment difficulties and poor ability to make and sustain relationships in adulthood. He lists protective factors for children, including good parental communication post separation, consistency in parenting, a supportive friendship network and a supportive extended family network. In the event of their return to the United Kingdom, he concludes, M and S will require therapeutic supports particularly in the context of the re-establishment of a relationship with their father and paternal extended family. Mr. Aswegen confirms that both children will require long term therapeutic intervention into the future.

7.6 As set out in *A.U. v. T.N.U. (Child Abduction)* [2011] IESC 39, [2011] 3 IR 683 by Denham C.J. citing, *Re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, at p. 1308:-

> *'"[46] ... 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.'

7.8 In light of those considerations, the Court has assessed the likely source of the objections. The reports in this case suggest that the objections of both children, while strongly stated, may stem from the parental conflict that they have witnessed. Mr. Van Aswegen concludes that the question of influence as regards M is unclear and that S may be mirroring what she has heard. For this reason, this Court must accord them less weight than they might attract otherwise. In addition, the stated objections are at odds with the important consideration that the welfare of both children in this case depends, according to the evidence of the psychological report, on their having a relationship with both parents. Their emotional wellbeing is being damaged by the acrimony which has been noted by all the social workers and psychologists who have had contact with the family. Both girls will require therapeutic intervention no matter where they live. The strong indications from the reports of the mental health professionals involved and the surrounding facts, as set out in the affidavits and exhibits, are that the children may not get the necessary help for their emotional welfare if they remain under the sole care of their mother.

7.8 Bound, as this Court is, by the precedent of *C.A.*, it is appropriate to record the finding of fact that both girls are capable of forming an objection and that they have done so. It also appears that the children in this case are sufficiently mature for it to be appropriate to take their views into consideration. However, given the factual matrix in this case, it is difficult to determine if these views are, in fact their own but in any event and on the basis of the psychologists' conclusions referred to above, it is not an appropriate case, in this Court's view, in which to refuse to return the children on the basis of their stated objections.

7.9 Considering the overall policy of the Convention and its main objective, to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states, the circumstances of the children in this case, including information relating to the social background of the children, as stated in Article 13 of the Hague Convention, it is an appropriate case in which to order the return of the children. Their home has always been in England, their father and extended family are there, and their mother is likely to return there if they are returned. Notwithstanding immediate plans to place the girls in care, and their objections to this proposal, there is evidence that the Family Court is actively working to safeguard their welfare and is best placed to do so.

8. <u>The Article 20 Defence – Breach of Fundamental Principles?</u>

8.1 The Article 20 defence is said to arise due to the making of the Care Order without notice and the statement of the Family Court that the Order was made with a view to the children being placed with their father. The Respondent submits that this statement means that the Orders will remain in place without hearing the Respondent or the children.

8.2 The defence is rarely invoked. The Applicant cites an example given in the text by Lowe, Everall and Nicholls, "*International Movement of Children*" 2004 (1st Edition) who observe at p. 370;

> *"Article 20 pleas are rarely successful, but this Article was apparently relied upon in a Spanish case in which, after a removal had taken place, the father, who had brought divorce proceedings in a religious court in Israel, obtained a declaration that the mother was a 'rebellious wife' ... The Spanish court understood that to mean that, were the child to be returned to Israel, all contact with the mother would be ended. It therefore held that, since the decision would not be based on the child's best interests but on the desire to punish the mother, a return would be contrary to the fundamental principles of Spanish law."*

8.3 In the Supreme Court decision in *K.B. & K.B. v. Nottinghamshire County Council* [2011] IESC 48, [2013] 4 IR 662, an English local authority intended to arrange for the adoption of the child in question in the event of a return. Mr. Justice Murray held, at p. 684:

> *"[56] In the circumstances I agree fully with the trial judge's conclusion in this case on certain principles which should be applied in relation to a reliance on article 20 of the Convention in this country. These principles were outlined by her … in the following terms:—*
>
> > *"… (i) The onus is on the person opposing the order for return to establish that article 20 applies;*
> >
> > *(ii) article 20, similar to article 13, is a rare exception to the general principle of return and, as such, must be strictly or narrowly construed;*
> >
> > *(iii) a court may only refuse to return a child where the fundamental principles of its law do not permit the return of the child. Where, as in this case, reliance is placed on the Constitution it must be established that the relevant article of the Constitution does not permit the return of the child."*
>
> *[57] It would be a misunderstanding of the provisions of article 20, as brought into force by the Act of 1991, if that was interpreted as meaning that any civil or judicial process which had taken place, or was due to take place after return of the child, in the requesting state should be examined so as to determine whether it conformed to a civil or judicial process as envisaged under the provisions of our Constitution. Such an approach would deny the very essence of the Convention."*

8.4 Mr. Justice O'Donnell gave the majority judgment in that case. He found that the theoretical possibility that our courts might be able to make equally good decisions about the care of a child "comes at a price that is too high to pay", namely the certainty of delay in the case and the chance that a child might put down roots as the case continues through a second set of proceedings. This, he characterised as creating an incentive for child removal and rewarding wrongful conduct, concluding:

> *"[194] ... It is not sufficient to show that some aspect of the law of England and Wales is* different *from that of this jurisdiction or even that some aspect of the law of England and Wales, if enacted in this jurisdiction, would be found to be unconstitutional in some respect. It is necessary to go further and show that the manner in which these children would be dealt with by the courts of the requesting jurisdiction must necessarily offend against the provisions of the Irish Constitution if administered in an Irish court."*

O'Donnell J. then made an order returning the child on the basis that the adoption was neither certain nor so offensive to the Constitution that return could not be permitted.

8.5 Here, the Care Orders are already in place so the placing of the two children into foster care appears certain. However, this Court disagrees with the submission of the Respondent that the Orders were made without notice to her or that it is necessarily the case that the children will be released only to reside with their father, the Applicant. The Respondent created a situation in which she could not be notified of the later orders. Any submission that she was not on notice of these Orders ignores the fact that all previous court dates were notified to the Respondent, where earlier proceedings specifically contemplated care orders and where a detailed plan had been outlined for the care of these children while resident in her home but where, despite this, she left the jurisdiction. This argument must be seen in the context of care proceedings which had been ongoing for over a year and in respect of which the Respondent had failed to engage, to a point of actively opposing the Court and the views of the guardian appointed to represent the children. This submission is also contradicted by the application made by the local authority in exhibit GB3. This is a lengthy exhibit and the relevant part is 28 pages into the exhibit; the covering page of an application form. The application form, for care orders, is said to be one which is not to be made without notice. The fact that the Respondent was not aware of the application was not the fault of the Court or the applicant local authority in these circumstances.

8.6 There is no indication that the Care Orders will remain in place without the Respondent or the children being heard in any future hearing and the submission to this effect seems ill-founded. The processes in the court in England must be trusted, in particular where their system and procedures are so clearly aimed at child welfare and so similar to those in this jurisdiction. The lengthy exhibits at GB3 and SH4, none of which material has been contradicted in any significant respect by the Respondent, suggest that the courts in England will be vigilant to uphold the rights of these children and will act to ensure their best interests but will also abide by the fair procedures that include notification to parties and hearing from all who have an interest in the outcome of the case, as the Family Court has done to date in this case.

8.7 The applicant local authority has specifically stated, again in exhibit GB3, that it does not seek an adoption order and has (along with the guardian) sought to foster better relations between the children and their parents and between the parents *inter se.* Further, and crucially in this context,

this is an order which not only could be made in this jurisdiction, but which is made frequently. It could not be said that the application of the law of England and Wales in relation to these childcare proceedings has been demonstrated to be so at variance with the dictates of the Irish Constitution that a return of a child would be a breach of the constitutional duty of the Irish courts. Finally, the UK is a contracting party to the United Nations Convention of the Rights of the Child, and the European Convention on Human Rights; both conventions can be invoked before the Courts of England and Wales.

8.8 The Respondent also relies on the case of *K.A. v. The Health Service Executive & Ors [2012] IEHC 288, [2012] 1 IR 794* where Ms. Justice O'Malley held that an interim care order was invalid in circumstances where the order was made in the absence of evidence. Having found that there was a constitutional presumption that children's welfare is best served within the family, which can only be dislodged if certain statutory criteria have been satisfied, the order was quashed. The case of K.A. is not analogous with this one: there is evidence justifying the Interim Care Orders in this case, in particular the conclusions of the psychologist, Dr. McIntee, as set out above, in the section of this judgment that addresses the grave risk defence. That evidence is supported by the conclusions of a separate report by another independent psychologist, Mr. Van Aswegen, whose conclusions are set out in the section of this judgment dealing with the stated objections of the children. These reports, coupled with the Respondent's recent conduct in removing the children, provide evidence sufficient to justify such an order. The Respondent's conduct removed the proportional option from the Family Court's consideration, which had been exercised until she left the country, namely, the option that she remain the primary carer with increased access by the Applicant with his children as they both worked on their parenting skills. Any family law proceedings are a dynamic process whereby the future outcomes can be influenced, to a very large extent, by the parties to the case.

8.9 As was done in the case of *K.B.*, this Court notes that the relationship between Irish law and that of other states is itself a constitutional issue and that it would be contrary to Article 29 not to recognise the laws of another jurisdiction. This applies to the laws of England and Wales generally and in particular in this case, insofar as those laws clearly promote the welfare of the child.

8.10 It is insufficient to engage the Article 20 defence to suggest that because a judge has made an indication of agreement with a current care plan that she will not hear any argument to the contrary. That conclusion does not follow logically in any event. The Family Court, as is clear from the evidence in this case, has only one objective and that is to make sure that these children's welfare is safeguarded. Everything done in that Court to date suggests that this will continue to be its chief concern and that it will continue to abide by fair procedures in so doing.

8.11 The submission was also made that to return these children to England where interim care orders were already in existence would be to sever their relationship with their mother. There is no evidence to substantiate this argument. The existence of interim care orders in the context of

proceedings in which a court of competent jurisdiction has been at pains to vindicate the rights of both parents in respect of their access to these children, is far from indicative of any intention to sever the parent/child relationship, still less a permanent severance such as was envisaged in many of the cases relied upon by the Respondent in submissions. The evidence here suggests that the Family Court will seek to rebuild relationships within this family rather than to sever them.

9. <u>Undertakings</u>

9.1 The Court heard submissions as to whether there would be any purpose in one of the parties entering into undertakings, such as occurred in previous return cases, which might obviate the need for the children to go into care. It would be inappropriate for this Court to presume to predict how a court in England might respond to any such undertaking, still less so to dictate to another court; this is not a suitable case in which to attempt some interim resolution between the parties. The Respondent's removal of the children has prompted the Borough Council's application for interim care of the children and there is little that an undertaking to this Court can do to turn back time or address the reasons for that application; only the Respondent can attempt to address those reasons in the context of the ongoing proceedings.

9.2 It appears from the evidence before this Court, that it may be within the Respondent's power to limit the length of any stay in foster care for these children. It seems clear that she loves her children but may have lost sight of their long-term needs. It is manifestly her view that she has been the better parent and she appears to have been most involved in the daily care of the children. But no matter how hard she has worked in this respect, and no matter what her views of the Applicant, he seeks and is entitled to a relationship with his children and they will benefit from a relationship with him. In the interests of the children and their future emotional stability and ability to sustain a relationship, she should consider accepting the assistance of all those involved in the proceedings in the Family Court. In the meantime, this Court will make the orders sought by the Applicant herein.

10. <u>Stay on the Order</u>

10.1 In *C.A. v. C.A. (otherwise CMcC)* , Finlay Geoghegan J. noted that it was not contrary to the Convention to place a stay on an order where there were either proceedings in being or intended, seeking approval for the relocation of the child. That Court also noted that it was in the interests of children that the number of moves between jurisdictions be minimised. This is a different factual matrix in which it is clear that the primary focus of the Family Court's concern is the welfare of these children. Given the function of this Court, having found that the children are not returning to a situation of grave risk, that there is no Article 20 defence and having decided that the objections of the children, while understandable, should not persuade the Court against ordering their return, it is inappropriate to order a lengthy stay in this case. Having heard the parties in this respect, however, the Court will direct that the children be returned on or before the 7th of January 2021.

Conclusion

1) There is insufficient evidence of grave risk to the children in the event of their return, even though return will result in them being placed in foster care.

2) The Court has assessed the objections of the children. The Court has taken these objections into consideration and is nonetheless satisfied that the order to return the children to England is the correct course in this case.

3) In relation to the Article 20 defence, the primary focus of the Family Court's concern is the welfare of these children. The potential for these children to be made the subject of care orders is not only an order which could be made in this jurisdiction but is the kind of order which is made frequently. It could not be said that the application of the law of England and Wales in relation to these childcare proceedings has been demonstrated to be so at variance with the dictates of the Irish Constitution that a return of a child would be a breach of the constitutional duty of the Irish courts.

Having found that the children are not returning to a situation of grave risk, that there is no Article 20 defence and having decided that the objections of the children should not persuade the Court against ordering their return, it is inappropriate to order a lengthy stay on the Order but the Court will facilitate the arrangements of the parties herein and direct that the children be returned on or before the 7th of January, 2021.