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Judgment: approved by the Court for handing down | *Delivered:* **27/03/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE

FAMILY DIVISION

_____

Between

J

Plaintiff/Appellant

and

G

Defendant/Respondent

_____

Gillen LJ, Weir J and Stephens J

WEIR J (Delivering the judgment of the court)

The Nature of the Proceedings

[1] The plaintiff ("J") appeals from a decision of O'Hara J dismissing the plaintiff's claim for the return from this jurisdiction to Canada of a child ("Q") who was born on 21 April 2011 in Canada and who is the natural child of the parties. The defendant ("G") cross-appealed on the ground that the learned judge had erred in not finding that she, the mother, had established that J, the father, had acquiesced in the removal (more accurately the retention) of Q in this jurisdiction. However, that cross-appeal was abandoned at the commencement of the hearing in this court. Nothing may be published of or concerning this matter that would lead to the identification of the parties or Q.

The Background

[2] The parties began their relationship in 1999 and lived together between January 2000 and 14 February 2014 when the respondent, who is a native of Northern Ireland, left Canada with Q to return here. At that time J was in hospital in Canada recovering from an operation. It is not clear whether G had decided before her departure that she would not return to Canada or return Q there but she

certainly made J aware that she had so decided around the beginning of April 2014 at which time J promptly placed the matrimonial home upon the market and the proceeds of sale were divided between the parties.

[3] The judge succinctly summarised what were agreed to be the applicable principles of law at paragraph [4] of his judgment which is to be found at [2014] NI Fam 15 where he also reviewed the decision of the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758 which contains the most recent authoritative discussion of the purpose and application of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention") which has the force of law throughout the United Kingdom by virtue of Section 1(2) of the Child Abduction and Custody Act 1985. At first instance counsel for the parties had sensibly reached agreement in relation to a number of relevant matters which the judge recorded thus:

> "(i) The removal of Q was wrongful within the meaning of Article 3 of the Convention because it was in breach of J's custody rights in Canada where Q was habitually resident, J being a father who was exercising those rights.
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> (ii) Since Q was wrongfully removed and retained within the meaning of Article 3, and since proceedings for his return were brought within one year, I must order his return to Canada unless the mother proves one of the exceptions allowed for in Article 13.
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> (iii) The mother has to prove either that the father consented to or subsequently acquiesced in Q's removal or retention within Article 13(a).
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> (iv) In the alternative the mother must establish that there is a degree of risk that Q's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation within Article 13(b).
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> (v) Even if the mother proves either the 13(a) or the 13(b) exception, I retain a discretion as to whether Q's return should be ordered."

[4] For most of their time together the parties lived in Canada of which J is a native and where his parents and other family members live. In 2007 they married in Northern Ireland which is G's place of origin and then returned to Canada where they lived together more or less continuously until the birth of Q and thereafter until

January 2014 when, due to particular domestic disharmony, G went with Q to stay with her sister in the United States for a month before returning to Canada and then almost immediately leaving there for Northern Ireland where she and Q have remained.

[5] The judge found and it was not disputed before us that the central reason for the problems between the parties was that J habitually used alcohol and drugs to excess which resulted in volatile and unpredictable behaviour on his part. As a result the police were quite frequently called and some official records of their visits are available from which the judge abstracted the following:

> "[10] In November 2007 the mother called the police because she was concerned that her husband had stolen her three wedding/engagement rings to pawn in order to pay off a drug debt. As a result of their investigation the police found the husband at a strip club. He returned home to discuss the issues. He had consumed alcohol but was co-operative with police. The three rings were recovered at the family home and were not pawned.
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> - In June 2009 the police were called again. Both parties advised the police that there had been a breakdown in the relationship due to J's dependency on drugs. His father had been supporting J in order to help him with his drug addiction and had been supporting the couple with their bills because J had been spending his wages to support his drug addiction. On 1 June J was upset because his father was siding with his wife and as a result J wanted his father to leave their residence. That report also contains a reference to J having enrolled in a drug programme at a rehabilitation centre in 2008 but not finishing the programme.
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> - Later in June, the police were called again because G found that her wedding rings were missing. According to both parties G refused to give her husband the remaining amount of a pay check which she was saving to pay bills at the home. The police were able to mediate a resolution as a result of which G agreed to give her husband the balance remaining on his pay check in exchange for which

the husband agreed to buy back the rings from the pawn shop.

- On another occasion at about the same time a police entry records that the husband was intoxicated, had two knives and did not care if he was shot.

[11] There seems to have been a period of relative calm after July 2009 but in July 2012 when Q was only about 15 months old G called the police again because J was very drunk. No assaults or threats were reported but social services were informed. Six months later J was in a serious car accident brought about by his own drunk driving. He suffered major injuries and spent much of 2013 in recovery, initially in hospital and then at home.

[12] On 1 December 2013 police were called to the family home. G was noted to have consumed only a small amount of alcohol and was regarded by the police as being fit to care for Q. The police note suggests that J had taken much more drink and that his yelling had led to an argument during which he locked G out of the house. Once again social services were informed. Regrettably they were informed again after an incident late on Christmas Eve when J rang the police to report that G was being "nasty" to him. The police found him drinking in the basement while G who was sober was upstairs sleeping with Q.

[13] G went away to her sister for about one month in January 2014. She contends that she did so because he had started using drugs again. During her absence he promised that he had stopped taking drugs. He asked her to come back to help him with surgery which he was scheduled to have on 14 February. When she did so she discovered that he was still taking drugs. After he came out of his operation she told him that she was leaving with Q. On 15 February she flew to Ireland on a return ticket with Q.

[14] On 13 February J had called the police to the family home. The police record describes him as "an admitted cocaine and alcohol user" who has "numerous arguments with family over his ongoing drug and alcohol use". The reason for his call was to have his parents removed. By

> the time the police arrived they had in fact left. The record refers to J "clearly suffering from mental health issues" and to him stating that he blamed his parents for him being abused as a child. The note also states that he is "not currently seeking counselling".
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> [15] This last police record is argued by the mother to be significant in an additional respect. It was obtained after the oral hearing in this case and only because it was specifically asked for. This raises concerns that the records which have been provided, extensive as they are, do not tell the full story of police involvement with this family. It is further relied on by the mother as supporting her case on grave risk by showing the police impression of J's mental health issues, his erratic behaviour, his resistance to change and his estrangement from his parents who offered him support.
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> [16] There is one important allegation made by G which is not corroborated by police records. She claims that J has been physically violent to her eg by grabbing and bruising her and by dragging her. Her case is that she was ashamed to admit this to the police despite the many call outs. J's case is that this never happened other than on two specific limited occasions which he has sought to explain."

[6] From this material the judge concluded as follows:

> "[17] It has not been proved to my satisfaction that J has physically assaulted G. I would be more inclined to accept her suggestion that she did not report the physical abuse because she was ashamed of it and because she hoped that ringing the police would have a "wake up" effect on her husband but for the fact that those police calls were so frequent. I do however accept that living with a man who the police have described in the terms set out above on 13 February 2014 inevitably brings with it a real and sustained fear of physical harm as a direct result of him losing self-control through drink and drugs. This harm might be caused either to the mother or to Q because on the evidence there must have been times when the father acted recklessly and dangerously as a result of his addictions. He could certainly not be relied on to care for Q or even to help him in an emergency.

> [18] I also accept that living in this environment must have been psychologically damaging for Q. Instead of spending his formative infant years in a stable environment he lived in one in which his father's abuses, his shouting, his arguing and his general behaviour must have been gravely upsetting to G and to Q himself."

[7] The judge then reviewed the contents of email exchanges between the parties after G's return to Northern Ireland. He considered them for the purpose of examining the issue of acquiescence which was live before him but also noted that J claimed that he was attending AA meetings and that on 31 May 2014 he had said "I am going to be 90 days clean and sober tomorrow".

[8] A medical report dated 28 October 2014 was provided in support of J's case by a Dr Sula, who had been the family physician for some years before 10 April 2014 on which date she had last been consulted by J. However, the judge noted that a comparison of the history provided by J to the doctor as recorded in her practice notes was at odds with the police records in several concerning respects:

> "(i) She says that on 13 January 2014 "he again adamantly insisted he had not had any alcohol" when the police reports from Christmas Eve and from 1 December show conclusively that he had.
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> (ii) She records him admitting drinking heavily again in February when his wife left.
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> (iii) She records his apparent isolation and lack of support from family and friends.
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> (iv) She refers to him visiting on 5 occasions in March/April 2014 for counselling and drug testing without disclosing the results of any of the tests which she surely would have done if they were negative.
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> (v) She has not seen him since April 2014 and there is no up to date report from his new physician."

The Judge's Decision

[9] Having rejected G's claim of acquiescence on the part of J, the judge turned to the matters that fall for consideration under Article 13(b) of the Convention, namely whether G had established that:

> "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."

[10] In this connection he noted the potential importance of undertakings and that undertakings had been proffered by J. His conclusions on the Article 13(b) question and the relevance of the proffered undertakings were as follows:

> "[27] I have no doubt on the evidence that since Q's birth his mother has done all that she can to raise him responsibly. I am also in no doubt that J has behaved outrageously and in the most damaging way. He has caused serious injuries to himself by his own drunk driving in December 2012. The available police reports (which are certainly incomplete) are only likely to cover a small proportion of his behaviour. Having the police call out twice in December 2013, including on Christmas Eve, when Q was about 2½ years old must have been enormously distressing and humiliating for G. It is also likely to have adversely affected Q as a result of any awareness he had of his father's state and from the effect that had on his mother who he relied on for protection. The mother's story of J's fresh descent into drugs in December 2013-February 2014 is entirely consistent with J's history, with the December 2013 police reports and with the February 2014 police report which could hardly have been written in more worrying terms – see paragraph [14] above.
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> [28] The family physician's report is unreliable because J lied to her about his use of alcohol in December 2013, inadequate because it does not include the results of his drugs test and limited in value in any event because J has transferred to another doctor from whom he has not obtained a report.
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> [29] In all these circumstances I conclude that Q is at grave risk of physical or psychological harm or of being placed in an intolerable situation if his return to Canada is ordered. His father has been abusing drugs and alcohol for many years. There is no evidence that he has stopped beyond his own assertions which are extremely unreliable. I conclude that the grave risk is a direct one to Q from his father's conduct and an indirect one as a result of the effect which that pattern of conduct would have on his mother.

> [30] The protections which have been offered by way of undertakings are relevant both to the issue of grave risk and to the exercise of my discretion. They are undertakings of a type typically offered in a Hague Convention case. The difficulty here is that they are offered on behalf of a deeply troubled and addicted man who cannot possibly be relied on to keep to them. Given the police records alone, J is not someone whose undertakings are of any value. For these reasons I exercise my discretion against the plaintiff and I dismiss his application."

Submissions on Appeal

[10] Mrs Keegan QC who appeared with Ms Hughes for J submitted that, while the judge had not mis-applied the law and she accepted his identification of the issues, the evidence before him had not been sufficient to enable him to find grave risk of harm to the child or of its being placed in an intolerable situation if returned to Canada. It had not been and was not now proposed by J that G and Q should return to again live in the same household as J but rather that they should live independently in Canada where J had undertaken, inter alia, to assist in securing alternative accommodation for their occupation and to make voluntary monthly payments for Q's support to the extent of 20% of his net monthly income. Further, he had undertaken not to go to their home or to contact them except for such contact with Q as might be agreed. Mrs Keegan accepted that satisfactory undertakings were required but submitted that the judge was wrong to conclude that those proffered by J could not be relied upon. She recognised however that she did not have any up to date medical evidence as to the status of J's addiction problems.

[11] Miss McBride QC who appeared with Ms Brown for G relied upon and adopted the sequential approach to evaluating the evidence in a Convention case described by the Supreme Court (Lord Hope and Baroness Hale) in Re E [2011] 2 FLR 758 namely:

> "1. If the allegations made by G are true do they constitute a risk of harm to Q within Article 13(b)?
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> 2. If the answer to (1) is yes, can Q be protected against the risk?
>
> 3. The clearer the need for protection the more effective any protective measures require to be."

[12] In Miss McBride's submission there was clear and independent evidence of J's erratic and unpredictable behaviour which the judge was fully entitled to accept and

similarly he was entitled to discount the protective undertakings proffered by J as being without value.

Consideration

[13] In the event and especially in light of the well-focused submissions of leading counsel for both parties, this appeal effectively resolves itself into the single question, did the judge arrive at a decision that was open to him? By this we mean:

(i) Did he understand the law and apply it?

(ii) Did he make findings of fact that were open to him on the evidence?

(iii) If the answers to (i) and (ii) are yes, when he applied the law to those findings of fact did he reach a conclusion that was properly within his discretion?

[14] The demarcation between the roles of the judge at first instance and of the appellate court in matters such as this was plainly expressed by Lord Wilson in Re S (A Child) [2012] UKSC 10 at para 35:

> "As we have explained, the Court of Appeal failed to appreciate that the mother's fears about the father's likely conduct rested on much more than disputed allegations. Equally, it paid scant regard to the unusually powerful nature of the medical evidence about the mother, in particular of her receipt of regular psychotherapy while in Australia. This conferred an especial authority on Ms MacKenzie's report, of which the court scarcely made mention. Overarchingly, however, it failed to recognise that judgement about the level of risk which was required to be made by Article 13(b) was one which fell to be made by Charles J and that it should not overturn his judgment unless, whether by reference to the law or to the evidence, it had not been open to him to make it. Charles J was right to give central consideration to the interim protective measures offered by the father. But his judgment was that, in the light of the established history between the parents and of the mother's acute psychological frailty for which three professionals vouched, they did not obviate the grave risk to W. It must have been a difficult decision to reach but, in the view of this court, it was open to him to make that judgment; and so it was not open to the Court of Appeal to substitute its contrary view. The fact that Charles J had

not received oral evidence did not deprive his judgment of its primacy in that sense. The decision of the House of Lords in Re J (A Child) (Custody Rights: Jurisdiction) [2005] UKHL 40 concerned the Court of Appeal's reversal of a judge's discretionary dismissal of an application under the Children Act 1989 for a specific issue order that a child be summarily returned to Saudi Arabia. Baroness Hale with whose speech all the other members of the Committee agreed said:

> "12.… Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter. On that ground alone … I would allow this appeal."

[15] The approach of this court must therefore be, not whether its members (or any of them) consider they would have reached the same conclusion as did O'Hara J, but whether it was open to him to reach the decision that he did? In the first place it has not been suggested that he misunderstood or misapplied the law. Secondly, his findings of fact based upon considerable material from the independent police and medical sources available to him and the contradictions between that material and assertions by J are not seriously challenged and there was an absence of medical or other evidence, which ought to have been readily available to J, to confirm his assertion that he had "turned over a new leaf". Thirdly, the judge's conclusions based upon the facts as he found them that Q is at grave risk of physical or psychological harm or of being placed in an intolerable situation were his return to Canada to be ordered and moreover that the undertakings offered to avert those risks by a man with J's frailties could not be relied upon cannot be faulted. In those circumstances the decision of the judge not to order the return of the child was one open to him make. The appeal is accordingly dismissed.