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Judgment: approved by the Court for handing down
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF Q (A CHILD)

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

Between

J

Plaintiff

and

G

Defendant

RULING ON COSTS

O'HARA J

Introduction

[1] This case has been brought under the provisions of the Child Abduction and Custody Act 1985. I gave a ruling on the substantive issues on 22 December 2014, declining to order that the child in question should be returned to Canada. I have now to consider an application for costs made by the successful but non-legally aided mother against the unsuccessful but legally aided father.

[2] I received helpful submissions from Ms Brown for the mother and Ms Hughes for the father for which I am grateful. I also received considerable

assistance from Ms R Keenan of the Central Authority who provided me and the parties with a very detailed analysis and explanation of the arrangements which are made in this jurisdiction for registering and progressing cases and seeking legal aid.

[3] The father was granted legal aid without any assessment of his means pursuant to Regulation 3A of the Legal Aid (General) Regulations (NI) 1965. Under this provision a person whose application under the Hague Convention has been submitted to the Central Authority in Northern Ireland and on whose behalf a solicitor has been instructed in connection with the application "shall be eligible to receive legal aid whether or not his disposable income and capital exceed the sums specified in Article 9 of the 1981 Order …" This provision applies only to the applicant mother/father – it does not extend to the respondent father/mother who is in this jurisdiction with the child. Accordingly the parties are treated quite differently by the statutory scheme. It appears that that approach is based on the obligations accepted by the United Kingdom under the Hague Convention (and incorporated into the 1985 Act) to ensure that an applicant parent is afforded the facility to bring his/her case before a court with the speed which the Convention calls for.

[4] In this case it is possible if not likely that if the father had been subject to a means test he would not have secured legal aid because he and the mother were in very similar positions. After she left Canada with their child the matrimonial home was sold. Each of them received a sum approaching £40,000 from that sale. That lump sum left the mother ineligible for legal aid in autumn 2014 when this case started.

[5] The issue about the different treatment of parents for the purposes of legal aid has been identified and commented on in a number of decisions. In EC-L v DM (Child Abduction: Costs) [2005] 2 FLR 772 Ryder J awarded costs against a legally assisted mother who issued proceedings under the Hague Convention but then withdrew them on the eve of hearing. He did so on the basis that her conduct was unreasonable and because the fact that she was legally assisted did not prevent an order for costs being made against her. The judge said the following at paragraph 67 of his judgment:

> "I do not believe that it would be wise upon the material presented to this court to create a new category of family proceedings for costs purposes or for new costs principles to be plucked from thin air. If a valid distinction is to be made as between children proceedings generally and Hague Convention proceedings then that will necessitate the formulation by others of new public policy criteria."

He continued at paragraph 68:

> "… it should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a party's conduct has been unreasonable or there is a disparity of means then the court can consider whether to exercise its discretion in accordance with normal civil principles."

[6] More recently Holman J addressed the same issue in Kinderis v Kineriene [2013] EWHC 4139 (Fam). At paragraph 4 the judge described child abduction cases in the following terms:

> "In short, cases of international child abduction are grave cases, conducted through a legal minefield, with which it is very hard for a lay person to grapple without skilled advice and representation. Cases under the Hague Convention are, for very good reasons, normally reserved to the small group of 19 specialist High Court judges of the family division. They are often straightforward for these experienced judges actually to decide. But some of them, including the present case, may be finely balanced and very difficult. The court then needs all the skilled help it can get."

At paragraph 12 the judge acknowledged that the plaintiff father was rightly entitled to non-means tested and non-merits based legal aid. However, he said the following at paragraph 21:

> "I wish to make absolutely clear that I understand and appreciate the need to be prudent with legal aid expenditure, which is also funded by the tax payer. The merits test in screening legal aid applications is, in general terms, a necessary and appropriate one. But in child abduction cases under the Hague Convention and Counsel Regulations Brussels II A, the present procedure operates in a way which is unjust, contrary to the welfare of particularly vulnerable children at a time of great upheaval in their lives, incompatible with the obligations of this state under Article 11(3) of the Regulation, and ultimately counter-productive in that it merely wastes tax payers' funds. The only practical approach, consistent with the tight six week timetable, is an immediate grant of legal aid, to be reviewed if necessary after receipt of any relevant CAFCASS Report. In that way respondents to these applications, who are generally impecunious and highly vulnerable, would have the benefit of proper legal advice and representation at an early stage in these cases

> when they so desperately need it, right through to the final hearing when, as I have explained, negotiations between skilled and experienced negotiators are almost always required in relation to protective measures and arrangements for any return."

[7] The "chronic problem" identified by Holman J was also recognised by Mostyn J in R v R [2014] EWHC 611 (Fam). In that case he made it clear that he accepted that there was a "clear tension between the policy imperatives … and the need for equality of arms …".

[8] In the present case it was properly conceded that the child had been wrongfully removed from Canada by the mother within the meaning of the Convention. That was the basis of the father's case. I then held against the father and for the mother on one of the two defences which she raised and on the way in which I should exercise my discretion whether to order the child's return. In doing so I was critical of the father because of my concerns about the evidence which was produced and the timing of its production. It is against this background that the mother contends that I should make an order for costs against the father.

[9] While it is clear that I can make such an order I will not do so. The father proved a prima facie case against the mother which left the onus on her to establish a defence. If I made an order for costs in circumstances such as the present, I find it difficult to see how orders would not be made in virtually every child abduction case in which the plaintiff parent is unsuccessful. That would sit uneasily with the concept of granting automatic legal aid in these cases in the first place. Accordingly, despite my concern that the mother should have to pay her own costs, I make no order in respect of the defendant's costs and I order the plaintiff's costs to be taxed in the normal way.

[10] For future reference I add the following points:

(i) It may not be apparent to plaintiffs (especially foreign plaintiffs) in these cases that even if they are legally assisted they are still at risk of being ordered to pay the costs of the other party if the application for the return of the child fails. If that is not already clear to them, the Central Authority and the nominated solicitor should advise them of that fact in writing. I understand that was probably not done in the present case.

(ii) I consider that there is an unfairness in the current legal aid arrangements and that the present case illustrates the point. Given the consistently small number of abduction cases in this jurisdiction each year, I urge a reconsideration of the basis on which the defendant parent is allowed to apply for legal aid. Not only do I think that a means test is inappropriate but for the reasons set out so persuasively by Holman J in Kinderis v Kineriene I question whether even a merits test is appropriate. I acknowledge that this is

a particularly difficult time at which to call for an extension of legal aid or for a reconsideration of the basis on which legal aid is granted but at the very least if a defendant parent appears to have an arguable defence on the merits, s/he should not be disadvantaged as against the plaintiff in terms of legal representation.