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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 30/08/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

2018 No. 049505

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL  
ASPECTS OF INTERNATIONAL CHILD ABDUCTION  
(THE HAGUE 25 OCTOBER 1980)

BETWEEN:

RM

Plaintiff

-and-

KM

Defendant

AND IN THE MATTER OF:

H - DOB 27 SEPTEMBER 2005

S - DOB 15 MARCH 2012

MAGUIRE J

**Introduction**

[1] The proceedings which are before the court were issued by the plaintiff on 18 May 2018. They involve the removal of two children from Australia, where they were living, to the United Kingdom and engage the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”). These proceedings, therefore, are aimed at the prompt return of the children and the court bears in mind that, under the scheme of the Convention, the

proceedings before this court are summary proceedings and should be conducted expeditiously on the basis of the information available to the court<sup>1</sup>. In the court's view, it is important to emphasise that it is not its role to become embroiled in the merits of the respective claims to rights of custody. If the children are returned, these will be matters for the Australian court, which in this case is already seized of the issues. Indeed the Australian court has adjourned its proceedings to recommence on 27 September 2018 following the outcome of the present application.

### **A summary of the background**

[2] The plaintiff in these proceedings, who I shall refer to as "RM" or "the father", is currently aged 51. He was born in Northern Ireland but recently, in 2018, became an Australian national.

[3] The defendant, who I refer to as "KM" or "the mother", is currently aged 44. She also was born in Northern Ireland and is a United Kingdom national.

[4] The father and mother, it appears, met while on holiday and formed a relationship. Since then they together have had four children, all girls. They are KN, who is now aged 19; T, who is now aged 18; H, who is now aged 12; and S, who is now aged 6. The couple were married in September 1999. They resided over the years at different addresses in Northern Ireland.

[5] A momentous decision was made by the parents some five years ago to emigrate from the United Kingdom to Australia and the whole family moved there in August 2013. At that time the material before the court suggests that there had been problems in relation to the couple's relationship. In the early stages in the marriage, the family lived with the mother's parents, but this gave rise to tensions, particularly in terms of the father's relationship with the mother's mother. After a time, the family moved to live in Newry which was some 45 minutes driving time from the mother's parents' house. This meant that the mother could only with difficulty keep up her relationship with her parents. This appears to have been a contentious point. Another contentious point was that the father, it is claimed, was spending long hours working. His place of work involved significant driving time to and fro but when he got home it appears that he worked intensely, giving rise to the claim that he was too focused on work to the detriment of family life. The father's perception was rather different and concentrated on the financial needs of the family, though at some stages both parents were working full time. Against this background, it would appear that there were arguments between the parents about

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<sup>1</sup> On this basis the court refused to grant an adjournment of these proceedings sought by the mother's side and resisted by the father's side. This application was made on the morning of the hearing, without prior notice to the court, notwithstanding that the date of the hearing had been fixed over seven weeks before on 13 June 2018.

money and the court has received the impression that both parents were concerned about disharmony in their relationship.

[6] At all events, the issue of moving to Australia arose. The mother had a brother living there, but it seems likely that the father was more enthusiastic about the move than the mother. Needless to say, the move itself entailed significant disruption, especially for KN and T, the older children. It also was not inexpensive to fund.

[7] Once the family arrived in Australia the father appears quickly to have obtained suitable employment and at later stages the mother was also able to do so. The children, save S, who was too young for school at this time, were placed at suitable schools and, in effect, the family's new life began. After a short time, the family was based at Brisbane.

[8] The court does not underestimate the difficulty for the family members engendered by such a change of lifestyle and it is unsurprising that, as time passed, it appears that fissure lines began to develop. Some members appear to have felt homesick, including it would appear, KN and the mother. Old problems also, it seems, resurfaced, and money again became a divisive issue between the parents. It seems likely that the underlying concerns in the marriage which had evidenced themselves after the marriage while the family was living in Northern Ireland, manifested themselves again after a time in Australia. These included complaints by the mother that the father was "controlling" and wanted everything his way; arguments about how money was spent; and arguments on minor issues both between the mother and father and the father and some of the children.

[9] At one stage, the above led to a consensual decision that, while the father would stay in Australia, the others would return to Northern Ireland for a period. This seems to have taken place in the latter half of 2015<sup>2</sup>. At Christmas of that year the father travelled to the United Kingdom to be with his family. His visit seems to have gone down well. The decision was made that the two elder children would return to Australia, as Australia was viewed as creating for them better educational opportunities. The older children in February 2016 returned to Australia and lived with their father until July 2016, when the mother and the two younger children joined them in Australia.

[10] Life in Australia for the whole family began again at this point but there was little reason to believe that this meant that the pre-existing difficulties had been resolved. The children, however, returned to or started at schools in Australia and the mother was able to return to her work as a teacher. The father's working life continued on, as before.

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<sup>2</sup> There appears to have been an earlier suggestion in 2014 that this should happen but it did not materialise.

[11] Unfortunately, old themes re-emerged and the couple broke up in April 2017. Initially the mother and children left the matrimonial home but after a short time the father vacated it so as to enable the mother and children to return to it.

[12] It was in the aftermath of this break up that the family's affairs became subject to court proceedings. It appears that the mother initiated proceedings first, but these were consensually resolved *via* the mechanism of the father, without prejudice, providing undertakings. Later the father himself began proceedings in the Federal Court of Brisbane in respect of the children. These were directed at the parents' relationships with the children and resulted in a consent order being made by the court on 5 December 2017, dealing with the position of the children. This order – technically referred to as an Interim Parenting Order – is important for present purposes and its principal provisions were that:

- (i) The children were to reside with the mother.
- (ii) S was to spend time with the father “as may be agreed between the parents”. However, if there was to be failure to agree specific provisions were made for such contact.
- (iii) The other children, H, T and KN were to spend time with the father as agreed.
- (iv) Specific provision was made for counselling in respect of H who, at the time of the Order, was already receiving it. This was to continue *via* an agency call “All About Kids”. Part of the arrangement was that the mother was not to attend counselling sessions but that H and her father were to attend what was described as “reunification counselling” with a qualified psychologist “for the purpose of re-establishing and restoring a meaningful relationship between the child and [her] father”<sup>3</sup>.
- (v) An arrangement was put in place by the court for a “Family Report” to be prepared by Mr Sean Moriarty, who was described as a Family Consultant, in relation to the care, welfare and development of the children. This part of the Order indicated that “in addition to any matters that the consultant considers important to the welfare of the children”, a number of specific matters would be dealt with in the report which was to be prepared. In this context ten specific matters were set out in the Order. These included such matters as any wishes

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<sup>3</sup> In the event it seems clear that the mother did attend some of H's counselling sessions. Moreover, the reunification counselling referred to does not seem to have got off the ground. The court also notes that mediation was attempted between the father and mother in October 2017 but no agreement could be reached.

expressed by the children; the nature of the relationship between the children and each of the parents; any physical or psychological abuse that the children have been or are likely to be subjected to; and any ill-treatment, family violence or other abusive behaviour that was directed towards a member of the children's family and the likely impact of this on the child.

- (vi) In respect of the issue of travel, the Order contained detailed provisions. The key element within these provisions was that in respect of any travel by the mother, the father was to be provided with "no less than 30 days' notice" of her intention to travel. In addition, no less than 7 days prior to intended departure from Australia, the mother was to provide the father with a copy of the return travel tickets for any child and the itinerary for the period of travel and the intended departure and return dates to and from Australia.
- (vii) The Order also included provisions in respect of schooling which the court need not set out, though it is clear that the intention behind these provisions, *inter alia*, was to enable the father to attend at, and keep in contact with, the children's schools.
- (viii) Finally, in accordance with the terms of the Order, the proceedings were adjourned to May 2018. However, as already noted, by that date the mother had, as described above, removed the children to the United Kingdom without the father's consent.

[13] On 5 April 2018 the father was admitted to hospital for gall bladder surgery. This was an emergency, not a planned, admission.

[14] On 6 April 2018 without any attempt to obtain the consent of the court or the father, the mother, taking advantage of the father's indisposition, left Australia and returned to the United Kingdom with all four children.

[15] On the same day the father, on discovering the position, sought and obtained an urgent Return to Australia Order at the Federal Circuit Court of Australia.

[16] On 7 April 2018 the mother, now back in the United Kingdom, e-mailed the father to say she would not be returning to Australia.

[17] On 10 May 2018 the Attorney General's Office of Government in Australia requested the Central Authority in the United Kingdom to commence Hague Convention proceedings for the return of the two youngest children to Australia.

[18] This resulted in the legal proceedings before the Federal Court of Australia being adjourned to 27 September 2018.

[19] As already noted these proceedings were begun on 18 May 2018. The proceedings include a substantial affidavit grounding them sworn by the father. This has appended to it extensive exhibits. Since the initiation of the proceedings the mother has filed an affidavit (of some length) and the father had delivered a reply to it. In addition, there are affidavits dealing with some legal matters. The court has considered all of these and in what follows will refer specifically to some of them. Of particular importance, the father has exhibited the report of Mr Moriarty, the Family Consultant, appointed by the Australian Court with the consent of the parties. In order to do so, the father obtained the permission of the Australian court to the report being provided to this court. Various counselling and medical records relating to H have also been furnished. As a result of a direction by this court the Official Solicitor in Northern Ireland has provided a report on the two children, H and S, who are the subject of these proceedings. This is dated 12 June 2018 but was based on interviews with the children on 1 June 2018. The father has also offered certain undertakings which the court will make reference to. The court wishes to make it clear that it has fully taken into account the contents of the whole of the case file put before it. The fact that in this judgment not every document or part of a document specifically is referred to does not mean that the court has not had regard to it. In these proceedings, the plaintiff was represented by Mrs Dinsmore QC and Ms Mullally BL; the defendant was represented by Ms Hughes BL; and the Official Solicitor was represented by Ms Murphy. The court wishes to express its gratitude for the well marshalled written and oral submissions it has received. The court also expresses its thanks to Ms Coll, of the Official Solicitor's Office, for the Report she was able to provide to the court so promptly.

### **Mr Moriarty's report**

[20] The court has found the above report to be of assistance in this case, notwithstanding that the report self-evidently was not prepared for these proceedings. Its source is an independent and impartial one and its contents are reasonably wide-ranging and helpful in terms of the background to and the sensitivities surrounding the dynamics of this family. It is based on a series of interviews carried out by the author with all of the family members, save for S who was too young to have usefully contributed. The interviews were carried out on 2 February 2018 prior to the events giving rise to the application now before this court. The conclusions of the report were written at a time when the author had been made aware of the mother's action in returning to the United Kingdom with the children.

[21] Much of the background, as laid out in the report, has been summarised already in this judgment and will not be repeated. There is no doubt that the author was aware of the thrust of the mother's complaints against the father of domestic violence and abusive and controlling behaviour. Equally, there is no doubt that the author was aware of the father's denial of such allegations. The report notes claims that members of the family, in particular H, suffered anxiety as a result the

behaviour of the father. Helpfully the author has set out a variety of disputed points of conflict between the mother and father and between the latter and some of the children. It is right to observe that many of the examples found in the report relate to relatively minor incidents and grievances.

[22] After the breakup of the couple's relationship, according to the Report, there were initially arrangements made for the father to have contact with the two younger children and, for a time, this seems to have been occurring. While it has continued in respect of S, it appears that in respect of H it has been on/off and has been affected by controversies involving the father, including his decision to refuse to consent to the older children going back to the United Kingdom, as he felt this would mean a loss of contact with them, which appears to have been resented by the two older children and H. Issues, which have more of an historic feel, like such how the father dealt with money or where KN and her father were to sit in the living room when watching television appear to have remained points of conflict. On-going disagreements between the father and mother, which appear to have been communicated to the children, as regards an alleged failure by the father to make or make in full child support payments, were also a fertile source of discontent. As might be expected, the father viewed any disaffection on the children's part to him as being caused or contributed to by the influence the mother had on the children. Undoubtedly, there were occasions, it appears, where the adults raised their voices or acted in a shrill way, but these appear to have been rare.

[23] In his interviews with the children, Mr Moriarty relates a similar picture to that already described above. However while there were disputes and the parents were at loggerheads with one another and while the children predominantly appear to attribute blame to the father, at the same time there is little evidence of the father being violent or losing his temper or behaving outlandishly. A broad theme which seems to emerge from the interviews is that the children, as time has gone on, have become more hostile to the father and there appears to be a tendency on their part to see issues in more black and white terms, generally more favourably to the mother and her interests.

[24] The Family Consultant's 35 page report ends with 2 pages of conclusions and recommendations. In the court's view, the following paragraphs are worthy of quotation in full. Mr Moriarty said:

"162. Obviously much of the earlier family history occurred in Ireland, however I think that the overall dynamic and the accumulated stressors has simply been carried on into this environment.

163. The parents cite difficulties prior to coming to Australia, although despite an extensive review of their history, it was difficult to find any uncommon

features although I think it is evident that it worsened through the transition and adjustments. They are a relatively large family which would have complicated their adjustment and this is evident in the variances in the children's emotional reactions as their parents' relationship deteriorated.

164. The other factor is that [the mother] was acutely homesick and did return with the children at one point. The fact that the older children returned before her and were essentially in the primary care of their father in her absence supports the view that she was confident of his care of them.

165. The history of the family following their move here is mixed. The difficulties of the children are noted and I think that the tension between their parents aggravated their personal security. More broadly, I formed a view that the four children enjoyed sound relations with both parents, and whilst the older girls accentuate the negative with their father following separation, there was a lack of any significant information which would detract from a view that they had a close relationship with him.

166. At the time of these interviews, the four children were at different points in terms of their relationship with their father, as can be determined in their interviews. I think that it can be ascertained that this is due to a number of issues: the witnessing of conflict between the parents, their embroilment in that conflict; and exposure to adult information of the issues between the parents. Exposure to the mother's emails and phone has not helped.

167. In examination of the history of the father's relationship with the children, their past conflict with him could not be greatly distinguished from what might be considered normal conflict between any parent and child in the usual course of events. I think that some past issues have been magnified due to the parental conflicts and the children have become intensely aligned with their mother in reaction.



168. In relation to the mother leaving the country with the children, and in consideration of any question regarding their return to this country, I am of the view that they are a close knit sibling group, very aligned with their mother whom, in my view, would be highly opposed to any move for them to return.

169. However, contrary to this I doubt that there would be any resumption of a relationship with their father if they remain in Ireland (and he remains here). I am of the view that it is in their interests to have a relationship with him and that the mother's actions are contrary to their welfare".

[25] Notably, there is little to be found in the Family Report which could be said to sustain charges of ill treatment of the mother and/or children or physical or psychological abuse or violence directed at a member of the family.

### **The Official Solicitor's Report**

[26] The above report was compiled by Ms Coll, a solicitor in the Official Solicitor's Office, following a request by O'Hara J in this court. It is directed to the position of the two younger children, with whom these proceedings are concerned, that is H and S. Both were interviewed by Ms Coll on 1 June 2018, at which time she spoke to them individually.

[27] It appears that Ms Coll also spoke to the girls' mother, as she "was entirely unaware of the reasons for [the mother's] decision to return to Northern Ireland with the children" and wanted some background information so that she was not speaking to the children in a 'vacuum'. Moreover, the court notes that the mother provided Ms Coll with a draft version of her affidavit in these proceedings.

[28] At the hearing of this application the court was told that Ms Coll at the date of her interviews with the children and her discussion with the mother did not have, nor did she later receive, prior to her report being filed, any other papers in the case. Thus she had not seen anything from the father or any of the contents of his affidavits or any of the exhibits, which included the court order of 5 December 2017 (referred to above) or Mr Moriarty's, the Family Consultant's, report.

[29] In her report Ms Coll refers to her meeting with H. Ms Coll described her role as "to ascertain her wishes and feelings about returning to Australia ...".

[30] Ms Coll's impressions were that H "struggled emotionally during [her] interview" and was frequently tearful and upset. She told Ms Coll that she was glad

to have returned to Northern Ireland “as she had disliked the weather in Australia and had missed her grandmother and uncle”. According to H, she did not like it in Australia as she did not fit in. She noted to Ms Coll that she was bullied at school. While the bullying had improved at High School, it remained problematic for her. She said that when she was in Year 6 at primary school things had been bad and she suffered from depression and anxiety.

[31] Notably at this juncture of the interview she then referred to her father as she attributed her anxiety and depression at that time “to the pressure she was feeling from her dad more so than difficulties she was experiencing in school”.

[32] She said her father was “always pressurising her and she stopped seeing him”. She declared that she did not want to see him again. She accused her father of controlling her and claimed that he also controlled S. By way of an example, she said that when S would return from weekend contact, she would say that “Oh daddy really misses you and wants us to be a family again”.

[33] Ms Coll notes that H and her mother got on well. H said also that she had a strong bond with her sister, T.

[34] Ms Coll records that since H’s return to Northern Ireland, she had no contact with the father and did not want any as she recalled “her dad was talking to her about inappropriate things such as disagreements that have taken place between her parents”.

[35] She also recalled that her father had at one stage threatened he would stop paying their school fees and for phones.

[36] Later H remarked that she did not trust her father and accused him of never really caring for her older sisters.

[37] When asked about her parents separating, H said that she never exactly knew what was happening but that there was a lot of arguing throughout her childhood. At one point, she referred to her father “hurting her mum”, without further explanation.

[38] H said she spoke to mum about how she feels and her anxieties about her dad.

[39] In respect of the Family Report, H said her father had wanted KN and T to have contact with him but “we didn’t want that”. She went on: “we had to look at the Family Report because it was about us but we didn’t want to agree to it”.

[40] She then recalled that “they” had planned for a few months to leave for Australia in April and “we” took a risk.

[41] In respect of her meeting with S, Ms Coll noted that she appeared to be sheltered from the difficulties of the family. She said, however, that being now in Northern Ireland, she missed her father. She indicated that she spoke to her father on Facetime, which she enjoyed.

[42] Ms Coll commented that S “appeared blissfully unaware of the important issues that the family are dealing with”.

[43] In her conclusions in respect of her interview with H, Ms Coll noted that she attributed her unhappiness entirely to the behaviour and attitude of her father towards her, her sisters and her mother. No other factor, not even bullying at school, is mentioned.

[44] Ms Coll went on:

“H reports herself to suffer from depression and I am aware that she has been prescribed anti-depressants and has availed of psychological input in Australia ... I would be extremely concerned about H’s mental health if a return order was made and she was forced to return to Australia against her wishes.”

And later, Ms Coll said:

“Whilst H is no doubt suffering emotional anxiety at the moment, I do consider that she has attained an age and degree of maturity at which it is appropriate to give considerable weight to her views.”

[45] As regards S, Ms Coll stated that it was her preference to remain in Northern Ireland with her mum and family and not to return to Australia.

### **Records in relation to H**

[46] In exhibits before the court there are records which are relevant to H. These relate to the time when she was living in Australia.

[47] The following is by way of a summary:

- (a) There are a range of medical records dating from May 2017. Mostly, they are in the form of correspondence between H’s GP (Dr Mott) and others, mainly a psychologist, to whom H was referred. There is a reference in a letter of 15 May 2017 from the GP which refers to H’s parents separating “and alleged DV witnessed by the child”. The GP describes H as “anxious and fearful” and as “increasingly anxious over

her school performance". There is reference to H staying at home "over fears of having to perform at a school musical" but it refers to "no decline in [H's] performance".

- (b) In H's medical records there is a reference to H "always being an anxious child" and to her GP diagnosing her as suffering from an anxiety disorder. Counselling was recommended.
- (c) On 26 June 2017 there is a letter from a psychologist to whom H had been referred. This refers to "increased levels of stress due to parental separation". The psychologist thought that H would benefit from CBT strategies and envisaged H seeing her for 4 to 6 sessions.
- (d) There is a letter dated 18 August 2017 which appears to be from H's GP to the psychologist. This refers to a history of parental separation and of the father "allegedly controlling and can be intimidating". The letter goes on:

"Her (i.e. H's) main triggers for her anxiety is a belief that her school mates are constantly criticising and talking about her, behind her back ... worried about what will happen to her mother and family, especially with recent separation ... Anxious about having to perform in front of a group and will stay home for sports day ... She has expressed ideation (I wish I weren't here) with no plan of self-harm ... She has always been a worrier but her anxiety has progressed markedly in the last few weeks. ..."

The GP says she may soon require medication.

- (e) There is a letter of 8 September 2017 to the GP from the psychologist. By this stage the psychologist had seen H (and the mother) on some six occasions. There was reference to her "responding well" to CBT strategies and to her thinking about how she could solve challenges in her relationship with her father. It is noted that both H and K report this has been successful". It is noted that the school position is a continuing problem.
- (f) Within the documents there is a schedule of missed appointments by H with the psychologist in the period 9 August 2017-19 February 2018.
- (g) There are notes from nine sessions between H and the psychologist. They depict ups and downs in H's outlook and mood. The last of these was in January 2018. At session 8 there is reference to H having

commenced anti-depressants which were said to have had a positive impact. At the date of the last session, there is reference to a day spent by her with her father which had gone well. This was not the only time when contact with the father went well.

### **Undertakings offered by the father**

[48] The court has been provided with a series of undertakings which the father has offered in the course of this litigation. Initially there were seven such undertakings given by him, but shortly before the hearing these were replaced by a second document containing eight undertakings.

[49] The court will only refer to the second document in the interests of economy. These read:

“(1) If it is considered helpful I would fly to Northern Ireland to accompany the respondent and subject children to Australia and to sit separately from the respondent on the flight. I am also content if a return order is made that the respondent and subject children fly without me accompanying them. I agree to pay for the flights for the respondent and two subject children. I also undertake that if the two elder children not the subject of these proceedings wish to return with the respondent and subject children to Australia I will purchase return flights for them.

(2) Not to initiate any criminal or civil proceedings against the defendant in respect of her abduction of the children of the family in or about 6 April 2018 from Australia to Northern Ireland.

(3) The applicant will vacate the property he resides at situated and known as [...], Australia. The respondent and children shall have sole occupancy of same until courts in Australia decide the matters regarding the subject children. I undertake not to enter that property unless I receive written invitation from the defendant while she and the subject children reside there.

(4) To surrender the passports of the children to the Federal Court of Brisbane, Australia, on arrival in

Australia. These will be retained by the court until the court determines otherwise.

(5) That the plaintiff will provide reasonable maintenance to the children until the parties or the court determine otherwise. The respondent agrees to continue making payments as assessed by the CSA of \$2271 per month. I will agree to pay the rent for the property at [...] in the sum of \$550 per week. If the respondent does not wish to reside at that address I will continue to pay the said figure to the CSA and a sum towards rent of \$2400 per month until the court date on 27 September 2018.

(6) The plaintiff agrees not to enforce the terms of the interim parenting order made at the Federal Court of Brisbane, Australia on 5 December 2017 until the court decides what contact is appropriate. The hearing has been adjourned to 27 September 2018. Any contact is to be in accordance with the wishes of H and S.

(7) The plaintiff undertakes to apply for a return visa 155 in respect of the respondent and subject children and pay the costs of obtaining same. He will make application forthwith and would ask this honourable court to facilitate this [by] ordering that requisite documentation of birth certificates and passports be furnished for the said application.

(8) Should the psychological counselling of H require financial support I undertake to assist with same."

### **The mother's affidavit**

[50] As already noted, this affidavit was filed on 8 June 2018 in response to the affidavit of the father grounding the application before the court. It is 18 pages long. It is too long to seek to summarise. The court has, however, carefully considered it, and will provide a flavour of its general thrust.

[51] In broad terms, the affidavit appears to the court to take the form of a statement of the mother's evidence in respect of the issues which are already before the Australian courts, though it also deals with more recent events. It seeks to make

the mother's case overall. It also provides a wide-ranging history, though not always chronologically.

[52] The affidavit, in particular, seeks to impugn the father's personality and conduct from the earliest days of the marriage. For example, at paragraph 8 of the affidavit the mother pronounces that shortly into their marriage the father was "short tempered, verbally aggressive, coercive and controlling". This theme is maintained throughout the affidavit and is expressed trenchantly. Whenever decisions were made she accuses the father of coercing her. At times the father is accused of "aggression/silent treatment" and at other times, as shouting and roaring. In the mother's view, he always got his way and would run rough shod over the position of her and the children. It is claimed that the father targeted KN and started fights between her and T. He physically slapped KN on occasions, it is asserted. When the mother and the children returned to Northern Ireland and he visited, anxiety levels rose and he sought to be controlling again. At this stage, according to the mother, she told him that she no longer wanted to be in a relationship with him due to his behaviour towards her and the girls, particularly KN. Nonetheless, it appears that the father managed to persuade the mother to return the girls to Australia, in the case of KN and T, to his personal care before the mother and the two younger children joined them later. On this, the mother notes, that after discussion with KN and T "we decided to return", a step, she says, she bitterly regretted. On return, the mother alleges that the father quickly reverted to his bullying and aggressive behaviour and fight picking. All of this, the affidavit describes gave rise to anxiety in the home caused by the father and each of the three older children are said to have been affected. The affidavit relates how the father's misbehaviour continued and degraded, how he oscillated between one moment being charming and the next being verbally aggressive and threatening and, at times, petty. At the same time the father's relationship with the mother and the older girls was disintegrating. The mother, in effect, speaks of an ever worsening situation for her leading to her being unable to sleep and being constantly anxious, eventually leading to her and the children leaving the home in April 2017. There then ensued disputes about who would live in the family home; the issuing by the mother of legal proceedings; and eventually the father moving out of the family home and the mother and the children returning to it. A complaint made by the mother related to what she saw as the effect of the father's behaviour on the children, especially H, but not confined to her. H, within a short period of time, she says, did not want to see her father. Among numerous small incidents described in her affidavit, the mother recounts how the father was unwilling to consent to the older children going back to the United Kingdom on holiday. This is said to have had a very emotionally negative effect on H. The mother's concern in respect of the father's manipulation of the child support system is then discussed. This, it is stated, had a profound effect on the family. The mother goes on to refer to an alleged incident, just before she removed the children back to the United Kingdom, in which she maintained that at 10 pm one evening he allegedly said that if she didn't let him see H, he would burn the house down.

[53] As already noted, the father filed an affidavit in response to the mother's affidavit, in which he denied the great bulk of her allegations and stoutly repudiated the mother's charges. It is not proposed to set out the detail of this.

### **The legal framework**

[54] There was a high level of agreement between the parties at the hearing as to the legal framework in respect of an application of the sort. The court will therefore deal with this aspect succinctly.

[55] The principal provisions of the Hague Convention which the court has to apply are Articles 3 and 12. However, Article 13 is important as it gives rise to the court's discretionary powers not to return children to the Contracting State from which they were removed.

[56] Articles 3 and 12, where relevant, read as follows:

“ Article 3

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

Article 12

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 ... 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 ..., the authority concerned shall order the return of the child forthwith.”

[57] The interpretation of these provisions is straightforward in the present case.



[58] Article 13 is central to the present application and is in the following terms, where relevant:

“ Article 13

Notwithstanding the provisions of the preceding Article, the judicial ... 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 –

...

- (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 ... 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.”

[59] The approach to be taken to the above cited parts of Article 13 has been the subject of extensive discussion in the case law. As the case law is not contentious as between the parties, it will suffice for the court to refer to the summary of the legal position provided by MacDonald J in a recent case H v K and Ors (Abduction) [2018] 1 FLR 700:

“[42] The law in respect of the defence of harm or intolerability under Art 13(b) of the 1980 Hague Convention was examined and clarified by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27... The applicable principles may be summarised as follows:

- (i) There is no need for Article 13(b) of the 1980 Hague Convention to be narrowly construed. By its very terms it is of restricted application. The words of Article 13 are quite plain and need no further elaboration or gloss.
- (ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the

exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the 1980 Hague Convention process.

- (iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
- (iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise placed in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
- (v) Article 13(b) of the 1980 Hague Convention looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
- (vi) Where the defence under Article 13(b) of the 1980 Hague Convention is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would

become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Article 13(b) of the 1980 Hague Convention.

[43] Violence per se will not be sufficient to found the defence under Article 13(b) of the 1980 Hague Convention. Having regard to the foregoing provisions, the vital consideration is whether the child and the abducting parent will have sufficient protection if they return to the state of the child's habitual residence...

### **Objections**

[46] The law on the 'child's objection' defence under Article 13 of the 1980 Hague Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022, [2016] 1 FCR 168) and I have regard to the clear guidance given in that case. In summary, the position is as follows:

- (i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.
- (ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Article 13 of the 1980 Hague Convention will be satisfied. An objection in this context is to be contrasted with a preference or wish.
- (iii) The objections of the child are not determinative of the outcome but rather give

rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

- (iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
- (v) At the discretion stage, there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to the 1980 Hague Convention considerations and at all times bear in mind that the 1980 Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

[47] 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 the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general 1980 Hague Convention considerations (*Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 609, [2006] 3 WLR 987, [2007] 1 FLR 961).

[48] Finally on the subject of the law applicable in this case, it is always useful to recall that, as pointed out by Mostyn J in *B v B* [2014] EWHC 1804, the objective of the 1980 Hague Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith in order that the courts in that country can decide his or her long term future. It is likewise important to recall that a decision by the court to return a child under the terms

of the 1980 Hague Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence deciding the long-term position.”

### **General observations**

[60] As indicated earlier in the judgment, the court must work with the materials it has before it. These reveal a significant level of disputes of fact which this court is not in a position to resolve and which may later be the subject of a substantive hearing in Australia or in this country. The task of this court is to determine the venue of any later hearing in accordance with the principles established by the Hague Convention.

[61] Having considered the materials before it, the court will, however, offer the following general observations:

- (i) It is inclined to give substantial weight to the Family Report prepared by Mr Moriarty and to his assessment as formulated in his concluding section, which the court has cited above. It does so because he was the Consultant appointed by the Australian court with the consent of the father and mother. In these circumstances, his independence cannot seriously be questioned. It also seems to the court that his report was carefully prepared. He interviewed all of those involved, which included the three elder children, and his assessment appears to this court to be thoughtful and balanced. While it cannot be excluded that at a later hearing inroads could be made into the reliability of his evidence, upon testing, this, in itself, is not a reason for this court, performing its function, not to place reliance on it.
- (ii) The court is not of the view that it should give substantial weight to the affidavit of the mother filed in these proceedings. This is for a number of reasons. First of all, and self-evidently, the mother cannot claim to be an independent source. Secondly, her affidavit, which stands in sharp contrast to the materials included in the Family Report, and its conclusions, appears to the court to have been made in the aftermath of events which she engineered and which do no credit to her. Thirdly, her affidavit, it seems to the court, goes to extremes in terms of the way in which it characterises the father. It effectively blames the father for everything negative about the family’s life and for every ill experienced by her or the children. The unrelenting criticisms of the father throughout a marriage of nearly 19 years duration are difficult for the court to accept at face value. While the court can appreciate that no marriage is perfect and every marriage has its up and downs, it is difficult to reconcile many of the basic facts of this couple’s decision

making with the picture the mother has painted before this court. This is especially so in relation to the decision to return to Australia in 2016. While she regrets making that decision, she was a party to it. But more than that, she appears to have been content to permit the two older girls - KN and T - to return to live in the care of their father in Australia for four or five months, before she and the younger children, who were finishing their school commitments in Northern Ireland, joined them. That decision was made while she and the children were in Northern Ireland at a time when the marriage was around 17 years old. Fourthly, where there is high level of factual dispute in a case of this nature, the court is bound to consider the question of the credibility of the key actors. In a case like this, necessarily the exercise is a limited one, as the evidence the court has is in documentary form. All the court can do is to consider the materials filed. However, in this case, there are materials which the court has read which invoke on the court's part a high level of concern about the mother's reliability. For example, the mother's e mails to the father after he had told her that he was having to go into hospital for an operation reflect duplicity on her part, presumably because her plan to remove herself and her children to the United Kingdom had to be disguised. It is also impossible for the court to overlook two letters found in the papers sent by the mother to education providers in Australia in 2016 when she was seeking to obtain school places for the younger children upon their return to Australia later that year. The e mails which were dated February 2016, were written by her in Northern Ireland and include the remarkable statement that her mother had passed away on 12 January 2016, with the inference that this event having occurred, she would be returning to Brisbane shortly. As is clear from other materials in the trial bundle, her mother had not passed away as she had represented to the Australian authorities. The court is left to ask itself what light this shines on the mother as a reliable witness when she is prepared to act in this way in respect of a much more minor issue affecting her children than that which is being determined by this court? Fifthly, the court, notes that many of the allegations contained in the mother's affidavit lack any form of corroboration in circumstances where the court would have expected supporting material to be filed. Sixthly, the mother's e mail to the father of 7 April 2018 after she had returned to Northern Ireland with the children offers a sharp contrast in terms of the reasons for removing the family back to the United Kingdom to her account as provided on affidavit to this court. Overall, the court, while not discounting the affidavit of the mother will treat it with caution.

- (iii) The court is also prepared to give greater weight to the Family Consultant's Report than to the Official Solicitor's Report where there is conflict between the two. It is of this view because the former Report

is, in its opinion, more balanced in relation to the range of interviews carried out and in respect of its exposure to the differing viewpoints. As the court has already noted, a problem in respect of the Official Solicitor's Report is that it was written without any exposure to the father's case in any form or to the papers relating to this application, including the Family Consultant's Report. In these circumstances, it is built, in part at least, on the information provided by the mother, including that contained in her draft affidavit for these proceedings.

- (iv) The court believes that the issue of the influence of her mother and sisters on H's views is an important one which does not appear to have been explored in the Official Solicitor's Report. This will be discussed further later, but at this point the court registers that it is inclined to give weight to the Family Consultant's views in this regard, especially where he refers to the children's exposure to adult e mails and phones by the mother and where he comments on the close knit sibling group being aligned with the mother.

### **The court's conclusions on the issues it has to decide**

#### *(a) Wrongful Retention*

[62] The court is satisfied that the terms of Article 3 of the Hague Convention are met in this case and that the removal by the mother of the children was wrongful and in breach of the father's rights of custody in Australian law. These rights, the court holds, were at the time of the removal being exercised by the father. Moreover, the children were habitually resident in Australia immediately prior to their removal.

[63] The court is also satisfied that the terms of Article 12 of the Convention are met as the period of one year since the date of the wrongful removal had not elapsed at the point when these proceedings were launched. It follows that the court should order the return of the two younger children forthwith, unless it exercises its discretion under Article 13 not to do so.

[64] The above assessments were not in dispute at the hearing and, in effect, the fulfilment of the terms of Articles 3 and 12, was conceded.

[65] The court wishes, however, to say that the removal of the children appears to it to have been premeditated, flagrant and planned, though its final execution was opportunistic in the sense that the mother was able to make use of the fact that the father had to go into hospital for a gall bladder operation as the occasion for the final step. The court is also of the view that the mother well knew that what she was doing was unlawful. Her design was to avoid the role and function of the Australian court, which was already seized of the issues as they affected the position of the children. It is a testament to the mother's faith in the strength of her own case, as it has now been set forth in this court, that rather than advance it to an Australian

judge, she chose to abduct the children and, it would appear, involve them in a conspiracy to pre-empt the resolution of the legal issues in relation to their upbringing, by removing them to the United Kingdom.

(b) *Grave Risk of harm or intolerable situation*

[66] The burden of proof on this issue rests on those opposing return. What must be shown is that there is a grave risk that a return of H would expose her to physical or psychological harm or otherwise place her in an intolerable situation. The court, in arriving at its conclusion on this issue, will take into account the totality of the material concerning H available to it but, in particular, will have regard to the undertakings which have been offered by the father in this case (which are set out at paragraphs [48] and [49] above) and the records in relation to H (which it has summarised at paragraph [47] above).

[67] The court accepts that H is a child who appears to have been negatively affected by stress and anxiety. It is not clear, however, whether this has all been caused by disharmony in her parents' marriage or how much of it is attributable to other factors. There is plain reference in the records the court has summarised to H always having been an anxious child and to bullying at school and to her worrying about having to perform in public. The better view, therefore, may be that these may all be factors. However that may be, in the court's view, it is not surprising that the stresses in her household in recent years will have been the cause of significant concern as to her psychological well-being. The court can well appreciate that events in this family – which span both the issue of which part of the world the family should live in and the issue of the breakdown of relationships – as depicted in the Family Consultant's Report, which the court views as the most accurate indicator, are bound to take their toll on a young person vulnerable to pressure.

[68] The extent of the toll can be informed by the fact that H had been assessed by her GP and referred to a psychologist for counselling and had attended counselling sessions. However, the records show that H has, in the past, responded positively to these and the court has no evidence from the records or from any psychological or psychiatric report filed in these proceedings to suggest that there is a real concern about self-harm or serious future harm or to suggest that her condition is chronic or untreatable.

[69] In this connection, while the court notes that since H has come to Northern Ireland there appears to have an appointment arranged for her with CAMHS, this has yet to take place.

[70] In these circumstances the court has also considered the undertakings which have been offered by the father. These show that, if H was to be returned to Australia, she will not be faced with having to have contact with her father, a situation which would only change by reason of a further judicial decision in that jurisdiction. This should provide her with reassurance. In addition, the court also notes that the father is willing to provide financial support for further psychological



counselling should that be required. The court notes that access to health care services in Australia, judged by what is contained in the papers before it, does not seem to have been a problem.

[71] The court's conclusion is that those who have opposed the return in this case on balance have failed to establish that the risk in respect of H is 'grave' or such as to place the child in an intolerable situation, even in the absence of protective measures. However, in the presence of such measures, the court is of the clear view that the level of seriousness implicit in the requirements of Article 13 (b) has not been demonstrated.

[72] There is no basis, in the court's judgment, for any concern that S's return would place her at grave risk of harm or would involve her in being placed, if returned, in an intolerable situation. In this regard, it should not be overlooked that S had been enjoying regular contact with her father, including sleep-overs, until recently. While it has been suggested that it would place S in an intolerable situation if she alone was the subject of a return order, the court does not anticipate this circumstance arising and does not need to deal with it.

(c) *Objections on the part of S and H*

[73] In respect of this issue, there is a distinction to be drawn between the cases of S and H.

[74] As regards S, it is not the court's view that she is in fact objecting to return. In the court's opinion, at most, she has expressed a preference, if she has even done that. But, even if the court was wrong in this view, the court would not, in any event, accept that S has attained an age or maturity which it would make it appropriate to take her view into account.

[75] S is only 6 year of age and there appears to be a wide acceptance, which the court endorses, that she has been sheltered from the difficulties within this family and is, to use Ms Coll's language, 'blissfully unaware' of the underlying issues. In these circumstances, there is no basis for believing that S has the level of understanding or maturity which would have to exist for her view, if she has one, to be taken into account.

[76] In contrast, as regards H, the court is prepared to accept that she has expressed an objection to being returned to Australia and that she is of an age (12) and degree of maturity at which it would be appropriate to take it into account.

[77] On this issue, H's case goes through the 'gateway' and the court accepts that what she has said goes beyond a preference or wish.

[78] The court will, therefore, take H's view into account. However, her view is not determinative of the issue of her return and it is for the court to decide in the exercise of its discretion whether to make a return order or not. H's view is but one factor to be considered alongside all other relevant factors.

[79] In balancing the various relevant factors in this case the court has decided that H's objection is not of sufficient weight to overbear the factors which support a return order in this case.

[80] The court reaches this conclusion for the following principal reasons:

- (i) While accepting that the objection expressed by H is her view, it believes that it is the product of what Mr Moriarty has described as the intense alignment of the children's views with those of the mother. As he has pointed out, the mother is opposed to any move for the children to return and the court is of the view that H, in particular, is to an appreciable degree reacting to this cue or trigger. In this regard, the court has been particularly struck by H's use of language, during her interview with Ms Coll, which the court considers supports its concern on this point. As noted at paragraphs [39] and [40] above, her language is consistent with her identifying herself as part of a group, as demonstrated by the use of plural cases such as 'we' and 'they'. The depth of a view formed in this way, in the court's estimation, is questionable.
- (ii) There is a real fear in this case that if a return order is not made, there may be no resumption of any relationship between H and her father. Such an outcome would not be in H's best interests, especially in the longer term, though H may not see this presently. It is important to appreciate that apparently immutable views, especially if inherited, to a greater or lesser extent, from others, do not obliterate the existence of a previously better relationship between H and her father which, even in relatively recent times, has involved successful episodes of contact between the two.
- (iii) Substantial weight should, in the court's view, be afforded to what may be described as the policy in favour of return which is of great importance to the operation of the Hague Convention. In particular, there is a need for the court to be robust in ensuring a prompt return when this is appropriate in the interests of children in general and to prevent abductors from obtaining an unfair advantage.
- (iv) In the present case, the return of the children, in the court's judgment, will best serve their overall interests, as it is right that the venue for consideration of their future welfare and upbringing should be settled in the jurisdiction of their habitual residence.
- (v) The court also bears in mind that the purpose of a return order is to enable the court which is already seized of the case to carry out its functions in respect of the care and up-bringing of young children. The court is confident that in the Australian proceedings it will be open to all concerned to raise any relevant issue and to seek to persuade the

court of the value of the particular case made. As such proceedings are already underway and are due shortly to be re-convened, there should be no obstacle to the Australian court speedily deciding what steps should be taken. A possible outcome will therefore be that the mother could be given permission to re-locate the children in the United Kingdom and such an outcome is not precluded by the making by this court of a return order.

- (vi) It seems to the court that H's fears or concerns ought to be capable of being assuaged by the cumulative impact of the undertakings provided by the father in this case together with the control which the Australian court can exercise upon the parties to the proceedings.
- (vii) It will, of course, be open to the elder two young adults to return to Australia if they (or either of them) wish to do so. It is a matter for their choice. While often there will be advantages to adult members of the family maintaining close relationships with parents and younger family members, in modern society this can be achieved in a variety of ways. The court does not consider that it is a weighty argument against the making of a return order that it might result in a situation in which adult siblings and other members of the family may end up living in different places.

[81] For the avoidance of doubt, the court will make it clear that, if its conclusion expressed above in respect of S not having expressed an objection to return and/or her lacking the requisite age and maturity to require the court to take her view into account, should be wrong, the court, in its discretion for similar reasons to those given above in respect of H, would arrive at the same conclusion in S's case as it has reached in H's case.

### **Conclusion**

[82] For the reasons which the court has given, it is of the firm view that this is a case in which it ought to make a return order in respect of H and S. This should take effect forthwith. The court will, of course, hear from the parties about the practicalities which inevitably must be accommodated when this sort of order is made. As the adjourned hearing in Australia is scheduled for 27 September 2018, the court believes the return of the children should occur within such a timeframe as will enable that hearing date to be preserved. The court will expect the mother's co-operation to ensure that Resident Return Visas are procured without delay.