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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

VS

Plaintiff;

-and-

GA

Defendant.

IN THE MATTER OF BA (A MINOR)

(Hague Convention: habitual residence: consent: acquiesence)

KEEGAN J

Introduction

[1] This is an application brought by the plaintiff for return of the child BA to Australia under the provisions of Article 12 of the Hague Convention 1980 as enacted by the Child Abduction and Custody Act 1985.

[2] The identities of the parties have been anonymised in order to protect the interests of the child to whom this judgment relates. Nothing must be published or reported which allows this child or any related adults to be identified in any way.

[3] Mr Morgan BL appeared for the plaintiff. Ms Gilkeson BL appeared for the defendant. I am grateful to both counsel for their oral and written submissions and I commend them both for the high quality of their representation.

Background

[4] The plaintiff in this case is an Indonesian national living in Australia who is the mother of the child. The defendant is a Northern Irish national who previously lived with the plaintiff in Australia. He is the father of the child. The parents were not married. The defendant is named on the child's birth certificate and it was accepted that he has parental responsibility for the child. The child is currently living with the father in Northern Ireland. The mother travelled to Northern Ireland to attend at the hearing of this case and she has remained in Northern Ireland since the hearing and has been afforded extensive contact with the child.

[5] The defendant is a 35 year old man. In 2003 he spent a year travelling in Australia and then decided he would like to return and he did so in 2007. He travelled to Australia in that year to take up work as a mechanic. The plaintiff and the defendant met in Australia in 2012. The defendant was employed until July 2012 when he sustained a serious injury at work which resulted in him being incapacitated and unable to work.

[6] The plaintiff is a 23 year old woman. She became a permanent resident of Australia on 21 June 2012. She was working as a service operator at the airport in Perth when she met the defendant. The plaintiff remains in that employment.

[7] The relationship between the plaintiff and the defendant began in 2012. It is described as turbulent in the affidavits and it appears that it was characterised by frequent separations. The child was born on 21 June 2014. This case relates to events some 18 months after that. The mother and father's case about living arrangements and family life in those months varies considerably. I summarise the conflicting cases made as follows. The plaintiff says that she was living with her mother after the birth of the child, she then moved in with the father. The plaintiff makes a strident case that the defendant father was very controlling and abusive. By contrast the defendant father avers that the mother had a fractured relationship with her mother. He avers that the mother had been sexually abused by her mother's ex-husband. The father makes a particular case that he was concerned about the maternal grandmother. He queried her suitability as a carer for his child. He also avers in his affidavits that the mother needed counselling regarding her childhood. The defendant father states that he was a supportive father to his child. The plaintiff accepted in her affidavit that she had been abused by her mother's ex husband on one occasion. She averred that the counselling she attended was to deal with issues in the relationship. She rejected the suggestion that she has mental health problems and the case that her mother was an unsuitable person to be around a child.

[8] It is common case that the mother always worked. The father could not work after the child was born due to his incapacity. He therefore looked after the child when the mother was at work. The mother worked shifts which also allowed her to spend considerable periods with the child. The mother made the case that the father wanted her to give up work to be a full time mother and to leave her work. The father has an ongoing civil claim in relation to his injury. The mother stated that he would have to return to Australia for a court case in relation to this. There was also uncontradicted evidence that the defendant has subtantial debt in Australia following his loss of employment.

[9] The parties agreed that there had been discussions about coming to live in Northern Ireland. There is some difference in relation to the exact date of this. The father states that in July 2015 the family began talking about moving to Northern Ireland. The mother does not concede that date but she accepts that later on that year there were some discussions in relation to the issue. In any event in September 2015 the father's parents sent over money to Australia for the purpose of facilitating a Christmas visit from their son, the plaintiff and the child. The grandparents had never met this child and so a visit was agreed. A booking was made for the defendant and child to travel to Northern Ireland for a Christmas holiday on 23 December 2015. The plaintiff mother was unable to travel at that time due to her busy schedule at the airport so she decided to come later in the New Year. She travelled to Northern Ireland on 13 January 2016. The intention was that the family would return to Australia on 31 January 2016.

[10] It appears to be common case that the visit to Northern Ireland was a success. The plaintiff stated that during the stay in Northern Ireland a discussion took place about the child staying for a further period of time. The defendant stated that this was agreed in Australia prior to travel. In any event this would allow BA to get to know her grandparents. I note that there is reference to the grandmother being ill and presumably that was also a reason for the visit and stay in Northern Ireland.

[11] It was argued by the plaintiff that there would be a further period of approximately 6 months whereby the father and child would remain in Northern Ireland and then they would return to Australia. In the intervening time the mother would return to Australia. It seems to have been agreed that when the mother returned to Australia that she would apply for Australian citizenship. Whilst the mother was in Northern Ireland the father arranged for her to attend a solicitor to sign a declaration that the father had sole parental responsibility during the time when she was out of the jurisdiction. It appears that this was to allow the father to obtain Housing Executive accommodation. That is apparent from a stamp on the letter. The mother did attend Redman Solicitors with the defendant's sister and she signed a document dated 27 January 2016 which contains the following averment:

> "The said VS hereby agrees to GA having sole responsibility of BA during a period commencing

> from 1 February 2016 to 20 June 2016 whilst Miss S is not in the jurisdiction."

[12] There is a difference between the parties as to what was to happen after the 6 months. The defendant stated that the mother was returning to Australia to obtain her citizenship and that she obtained temporary accommodation for 5 months commencing in January 2016. At the time when the parties left Australia the parties were looking for new accommodation as their lease appears to have expired. The defendant's case was that the intention remained that there would be a permanent move by the entire family to Northern Ireland. The defendant said that the mother was to come back to Northern Ireland. The defendant also referred to email correspondence between him and an estate agent of 15 December 2015 which includes the following:

> "We have actually decided to try living in Northern Ireland for a while as my parents are unwell. If that doesn't work out we will be sure to give you a call or email to see what properties you have available as we found you excellent to deal with."

[13] The plaintiff did not accept that a permanent move was ever agreed. The parties also disagreed about the exact date when a separation was communicated. This was however sometime between February and March 2016. Thereafter it is clear that the content of the communication deteriorated. The defendant also refers to the plaintiff having a new relationship and the plaintiff did not deny the development of a new relationship around that time. The defendant's case was that the mother intended to return to Northern Ireland even after the separation.

[14] In and around 16 May 2016 through a series of text messages it became apparent that the defendant was not returning with the child to Australia. Also around this time the paternal grandfather revoked a letter of support for the plaintiff to come to Northern Ireland. This letter of support was important as it was the basis for the plaintiff's visa. The defendant informed the plaintiff of this by text. Hence upon the paternal grandfather's withdrawal of support the plaintiff had to surrender her passport and could not travel. On 3 June 2016 the father obtained an Interim Prohibited Steps Order at the Family Proceedings Court. There were also reported difficulties in or around this time in relation to the plaintiff establishing contact with BA by way of Skype and other indirect means.

[15] It then appears that the plaintiff contacted solicitors in Australia. The plaintiff avers that she was advised to make contact with solicitors in Northern Ireland. She then made contact with a solicitors firm in Northern Ireland on 17 June 2016 and this led to an application being made to the Central Authority to pursue Hague Convention proceedings on 19 June 2016. The application is dated 6 July 2016.

The evidence

[16] In this case I considered the affidavits of the plaintiff. These are dated 3 July 2016 and 29 August 2016. I allowed the plaintiff to file an additional affidavit during the course of proceedings. The father's affidavit of 10 August 2016 was also considered by the court. I read the skeleton arguments filed by both counsel. There was some discussion about the necessity for oral evidence but neither party pursued a formal application. In any event, this case was about the interpretation of social media messages rather than oral conversations.

[17] Before turning to the arguments I do intend to set out the evidence relied upon by way of messaging between the parties. I had some difficulty interpreting this evidence as it was presented in a haphazard format. I consider that if this type of evidence is being relied on it needs to be verified, there needs to be proper dating of the evidence and there needs to be a clear indication of what the evidence actually is. In this case the evidence of social media communication was in a number of different forms including text, email, Facebook and screen shots. It seems to me that the parties should compile this type of evidence into a properly indexed bundle before the court with proper verification. In this case I was assisted in that both counsel filed useful schedules of the documentary evidence being relied on however there remain some difficulties establishing the context of messages and in dating messages. This will be apparent from paragraphs 18 and 19 which follow where I set out the material relied upon by both parties.

[18] In addition to the affidavits, Mr Morgan, referred me to the following specific matters on behalf of the plaintiff.

- Text message from defendant's sister to the plaintiff dated 4 January 2016 stating "GA says you guys thinking of moving here?" answer "WHAT NO"

- Text message from defendant to plaintiff on 2 May 2015 stating inter alia "If you want to be BAs mother then quit your job and look after her and then maybe get a part-time job when she's older".

- Text message from defendant to plaintiff on 8 May 2016 stating inter alia "If I get money from government it's none of your business" in response to a question from the plaintiff asking if he received benefits.

- Record of counselling attended by the plaintiff. This is a document dated 15 July 2016 from Centre Care. It states "This is to advise that the abovenamed client has attended Centre Care's general counselling services on a number of dates between May and July 2016".

- Letter regarding the child's attendance at a GP practice in Australia. This letter states that the patient was registered with the practice on 29 October 2014 and was last seen on 18 December 2015.

- The child's return flight ticket dated 31 January 2016.

- Text message from the defendant regarding rejection of an application for benefits in Northern Ireland and stating inter alia "So we need to think about what to do if they don't". This it is said was 2 February 2016.

- Defendant's debt schedule showing a debt in Australia of $63,568.58 and other correspondence from lenders regarding the defendant's financial situation.

- Text message from the defendant dated 2 February 2016 stating "Flights are cancelled so there is no plan now - just take it day by day fill out more forms and wait." This was in reply to a text message from the plaintiff stating "Whats your plan".

- Text message from the defendant stating "Anyways I gotta go coz I got to get up early to get a letter done in the morning to send off to stop your abusive mother getting anywhere near our daughter" "Are you still coming back over here?" This is purported to be in March 2016.

- Text message of 25 March 2016 from the defendant stating, inter alia "have you made any plans yet and on what you want to do? I mean about coming over here for BA".

- Text message of 13 May 2016 from the plaintiff stating inter alia "yeh sure I'll be happy to take her home for 5 months since you'll be having her for 5 months by the time I come over".

- Text message of 13 May 2016 from the defendant asking about the plaintiff's plans for childcare for BA in Australia and the plaintiff's response states "she will stay with me of course!"

- Text from the defendant to the plaintiff of 15 May 2016 threatening to cancel her letter of invitation dated 15 May "so I should tell dad to cancel the letter of invitation since you're going to try and kidnap BA and somehow try to take her back to Australia without her passport!! ".

- Text exchange in June 2016 in relation to the plaintiff telling the defendant that BA will be returning to Australia, defendant says "she won't be going with you", plaintiff replies "she will".

- Text exchange in relation to the plaintiff's allegation that the defendant was blocking the plaintiff's text messages "Think its better you don't try to contact any of us until after court. Especially with the bullshit lies you been telling people I'm blocking you now". There is no date in relation to this.

- Text exchange at exhibit VS 29 of the plaintiff's second affidavit which the plaintiff states shows the defendant not permitting indirect contact.

- Plaintiff's flight itinerary to travel to Northern Ireland on 15 June 2016 and return on 7 July 2016.

- The plaintiff informing the defendant of her flight dates to come to pick BA up 15 June 2016 and return to Australia on 5 July 2016.

- UK Visa cancellation letter. This is a letter of 9 June 2016 from the British Embassy in Manilla. It is entitled –

  "With reference to the application that you lodge for a visit visa, it has come to light that your circumstances have changed since this entry clearance was issued…. You state you wish to visit your daughter in the UK and you state you will reside with Mr [A] as his letter of sponsorship states. However he has withdrawn his offer of sponsorship…. I am therefore revoking your entry clearance accordingly"

- Message from the defendant to the plaintiff -

  "then if we've enough money we can travel back together to do it and I can sort out the storage unit if we come back here for good but that's just me thinking out loud we can discuss it later".

[19] In addition to the defendant's affidavit, Ms Gilkensen, referred me to the following.

- Flight calculation and bookings for Sunday 31 January return flight for the defendant.

- Paragraph 28 of the plaintiff's affidavit wherein it is stated –

  "It is correctly stated by the defendant that our property lease was up in Perth around January 2016 and we were trying to look for cheaper accommodation. But this was not part of any plan to immigrate to Northern Ireland. When I returned to Australia in January I took a lease for 5 months because it had been agreed that the defendant and BA would stay in Northern Ireland for about this period and I expected the defendant and BA to return to Australia from Northern Ireland at that time. We would then get a property that could accommodate us all. Our finances were very limited so it did not make sense to take larger accommodation when it was just me at that time. The defendant may have had a plan in December and January not to move back to Australia but he had not told me this or agreed it with me".

- Email from a neighbour Cheryl Houdek. This email is dated 31 July 2016 to the defendant. In the body of this email this refers to the following "when they told me they were leaving and returning to Northern Ireland I was happy and sad for them, but I knew would be good for them as they had no family in Australia as VS has had a falling out with her mum and wasn't on good terms with her." Also in this email it states "VS was busy trying to pack up the remainder of household and put items into storage which GA had set up for her before they left.

- Text messages between the plaintiff and the defendant's sister of 4 January 2016. This reads:

> "GA saying you guys thinking of moving here". The reply appears to be "what no – jokes… yes - ha ha!!! Ur funny! But I'll have to stay here until May/June- Which is not fun".

- Text message to the defendant's mother from the plaintiff which appears to be 19 April 2016 and which refers to the following:

> "I was so happy there with BA, with all my family. But I had no choice, for better future, I had to come back here to get my visa sorted so I could live there with my family without any visa restrictions, and to have a job (getting transferred from Perth Airport to Belfast) instead of being jobless and without holding visa that doesn't let me work (the tourist visa that I had at the time) I don't know if this message makes sense to you I hope it does. I know that I said I am ok with me coming back here to work, save some money, and try and get my visa sorted but its not ok when I'm not getting let to see my daughter. I honestly am not even comfortable to see his face and would prefer to contact you/dad …"

- Paragraph 50 of the plaintiff's skeleton argument. This reads as follows:

> "During their separation in different countries the parties communicated by means of large numbers of text messages; sometimes as many as 100 in a single day. There is not a single text from the plaintiff stating that she agrees to move to Northern Ireland (or referring to an earlier agreement to do so) or agreeing that BA would live in Northern Ireland. If there had been such an agreement one would expect text messages addressing some of the following

> issues: the plaintiff quitting her job in Australia, the plaintiff's feelings about leaving Australia and living in Northern Ireland, the plaintiff's views on leaving her mother and brother behind in Australia, the specific living arrangements for the plaintiff, the defendant and BA in Northern Ireland, specific employment possibilities in Northern Ireland for the plaintiff, the bringing to an end of the plaintiff's and the defendant's life and commitments in Australia. It is respectfully submitted that the absence of such text messages is strongly indicative that there was never an agreement for the parties to move to Northern Ireland. Given the way that the parties communicated the absence of such evidence is telling."

- Text messages between the plaintiff and the defendant "I got so frustrated when I found out 6-9 months I thought what am I gonna do. But yeah lets discuss it later x". Then the reply "Lets get your tourist visa and prepare for u to move here". Then the reply "So just travel over with my Indonesian passport?"

- Text message in March 2016 "Are you still coming back over here. Reply "I'd love to be with my daughter on her birthday".

- Text messages in February 2016 between the plaintiff and the defendant "So no I am not moving because you decided for me. It might have came across that way when I say things but deep down inside I am coming over there because I want to be with my family. I want whatever works out best for all of us wanna be with my family I want whatever works out best for all of us".

- Paragraph 43 of the plaintiff's affidavit where there is an assertion that the plaintiff intended to travel to Northern Ireland only to "pick up BA and bring her back to Australia".

- Quotation for flights to Northern Ireland dated 6 May 2016. This is for travel on 15 June 2016 and includes the plaintiff only.

- Paragraph 38 of the plaintiff's affidavit. This refers to various texts in and around 13 May 2016. These read "yeh sure I'll be happy to take her home for 5 months since you'll be having her for 5 months by the time I come over." There is a further text where the defendant writes "Where will she stay. Who will look after her while you are working". In reply there is a text "She will stay with me of course I will ask work to put me down as a casual instead of part-time and while I'm working I will put her in childcare".

- Text message between the parties in March 2016 "Are you still coming back over here". Reply "I'd love to be with my daughter on her birthday".

- The letter from the British Embassy dated 9 June 2016 already referred to.

- Paragraph 40 of the plaintiff's affidavit reads as follows –

> "At this time there was still uncertainty as to what was happening, it was very difficult to deal with the defendant and I had split up and relations between us were not good. The defendant texted me on 3 June 2016 stating `do you plans for the future regarding you moving here or are you going to stay in Perth?'. This shows that in June of this year there was still no agreement between us about where BA would live. There was another text message exchange between the defendant and I where I say `Then I will take BA' meaning I will take her back to Australia and the defendant replies `She wont be going with you' and I respond that `She will'."

- VS25 an exhibit of Facebook Messenger traffic between the parties in June 2016.

- Exhibit VS23 text messages between the parties in May 2016.

- Exhibit VS26 further text messages between the parties in June 2016.

- Paragraph 27 of the plaintiff's affidavit. This refers as follows –

> "I left Northern Ireland in January 2016 expecting the defendant and BA to return to Australia in and around 5-6 months. As stated we did not agree a precise date when they would return, we generally pretty loose arrangements with things and did not plan everything out. In my mind I thought that June 2016 would be a good time to return as BA could celebrate her birthday with the defendant's family and this was a long enough period for the defendant's family to get to know her. At that time there was no reason for me to be suspicious of the defendant: we were still in a relationship and he had a court case in Australia which he had to return for and his car and all his possessions were there. Our life was there so I assumed that he would return there. Nothing had happened to say that he was not returning to Perth.

Our friends in Perth expected to see the defendant, BA and I when we returned from Northern Ireland."

- Paragraph 62 of the plaintiff's skeleton argument. This refers to issues of acquiescence in text messages between the parties.

- Paragraph 9 of the plaintiff's affidavit. This refers to the fact that the plaintiff avers that she was sexually abused once by her mother's ex-husband and text messages between the plaintiff and the defendant's mother.

- Text messages in April 2016 between the plaintiff and the defendant's mother.

[20] As can be seen from the foregoing it is difficult to piece together all of the emails, texts and material relied on. I also have struggled to find a coherent sequence. I now set out in summary the arguments made by both counsel on behalf of the parties.

Submissions of the parties

[21] Mr Morgan BL on behalf of the plaintiff made the following arguments. This is only a summary of his searching and well-researched written submissions along with his oral submissions.

(i) Mr Morgan argued that there was a wrongful removal in this case from 24 December 2015 because the consent obtained by the defendant to travel to Northern Ireland with the child was nullified as a result of deception and fraud. He referred to the case of T v T 1999 2 FLR 1051 in this regard.

(ii) There was wrongful retention in this case from May 2016 as a breach of the January agreement had occurred by that stage and was communicated to the plaintiff.

(iii) The habitual residence of this child is Australia. The move to Northern Ireland was a visit. It was a temporary move and as such no change of habitual residence has occurred.

(iv) For such a monumental change of permanent residence there should have been clear consent and that is not found in this case. Acquiescence is not established after the agreement was reneged upon. Again this is because the messaging between the parties does not represent a clear and unequivocal threat.

(v) The plaintiff's actions and reticence in this case is explainable by the defendant's controlling behaviour. That is particularly illustrated by his withdrawal of visa support after May 2016.

(vi) This is not a case where the defence of grave risk is made out.

(vii) Undertakings have been provided and deal with any issues of concern that the defendant may have.

In summary Mr Morgan argued that this was a clear case where there should be a return order made.

[22] Ms Gilkeson made the following points which again are a summary of her excellent written argument and intuitive oral submissions.

(i) There was no issue as to the plaintiff having rights of custody that were being exercised.

(ii) The central question is a factual dispute about the intention behind the visit to Northern Ireland which began in December 2015. What was the plan? Ms Gilkeson says that the plan was for a permanent move.

(iii) If there was any doubt about the original plan the agreement in January 2016 which was formalised in the solicitor's office should make matters clear.

(iv) Ms Gilkeson argues that once there was a relationship breakdown and issues arose about the agreement that the plaintiff acquiesced in the child staying in Northern Ireland.

(v) Ms Gilkeson argues that there is no wrongful removal or retention. Ms Gilkeson argues that habitual residence changed and became Northern Ireland. Ms Gilkeson suggested that this could have occurred a day after arrival in Northern Ireland given the intention to reside permanently here. If that argument is not sustainable she says that over time the child has integrated achieved stability in Northern Ireland and she referred to various matters such as the child attending church, nursery and being integrated in the local community.

(vi) Ms Gilkeson did not press the argument that an Article 13(b) defence was raised. She referred me to her submissions on this point but realistically accepted that this requires a very high threshold.

(vii) Ms Gilkeson disputed that the father is a controlling individual and she said that there was no evidence for this.

(viii) Finally if a return were to be ordered by the court Ms Gilkeson indicated that the father's position was that he would also wish to return with the child.

Legal context

[23] The 1980 Hague Convention was adopted into our domestic legislation by the Child Abduction and Custody Act 1985. This was to accord proper recognition to the principle that a child's interests must be protected in international disputes between estranged parents. In particular the purpose of the Convention is to protect children "from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence as well as to secure protection for rights of access. "

[24] In Re E (Children (Abduction: Custody Appeal)) [2011] UKSC 27 the court reiterated that whilst the best interests of the child or children concerned is a primary consideration this does not mean that the welfare of the child or children must be propelled to a level where it becomes the court's paramount consideration. The court reiterated the point that these are summary proceedings, and the policy of dealing with cases with expedition is established. The court hearing a Hague Convention does not conduct a welfare hearing that is to be decided by the court of habitual residence.

[25] Article 3 of the Convention provides:

> "The removal or retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

[25] Article 12 of the Convention provides the mechanism for return. It reads as follows:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the

commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

[26] In terms of the issue of habitual residence the Supreme Court has looked at this issue on a number of occasions recently. Counsel agreed that the decision in Re A (Jurisdiction: Return of Child) [2013] UKSC 60 is a current exposition of the law. At paragraph 54 of her judgment Baroness Hale of Richmond states:

"Drawing the threads together therefore:

(i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.

(ii) It was the purpose of the 1986 Act to adopt a concept which is the same as that adopted in the Hague and European Conventions B11R must also be interpreted consistently with these Conventions.

(iii) The test adopted by the European Court is the place which reflects some degree of integration by the child in a social and family environment in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

(iv) It is now unlikely that the test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

(v) In my view the test adopted by the European Court is preferable to that earlier adopted by the English courts, they focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from

Shah should be abandoned when deciding the habitual residence of a child.

(vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependant. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

(vii) The essentially factual individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

(viii) As the Advocate General pointed out in paragraph AG45 and the court confirmed in paragraph 43 of Re A (Area Freedom, Security and Justice) it is possible that a child may have no country of habitual residence at a particular point in time. In the case of LC (Children) No: 2 [2014] UKSC 1 the Supreme Court considered that there had to be a degree of integration in a social and family environment for habitual residence to be established and that regard should be given to the individual child's own state of mind during the present period of residence there. The test from Mercredi v Chaffe [2011] 1 FLR 1293 holds true save that the reference to permanence in the case of Mercredi v Chaffe has now been more suitably translated as stability. Therefore, the test arising is whether the duration reflects an adequate degree of stability in the particular facts of each case."

[27] The Court of Justice of the European Union in A(Case C-523/07) 2009 2 FLR 1 and Mercredi v Chaffe 2011 1 FLR 1293 held that in addition to physical presence other factors must show that the presence is not temporary or intermittent. Duration of stay is one factor but there is no golden rule in relation to the length of time needed to acquire habitual residence. Parental intent also plays a role RE KL(Abduction: Habitual Residence: Inherent Jurisdiction) 2013 UKSC 75. This will have to be factored in, along with other relevant factors in the circumstances of each

particular case to decide if a move from one country to another has a sufficient degree of stability to constitute a change of habitual residence.

[28] There have been further Supreme Court decisions in relation to habitual residence which are recited in detail in the counsel skeleton arguments. I do not intend to rehearse the points made in these cases however I do draw some particular assistance from the dicta of Lord Wilson in Re B (A Child)(Reunite International Child Abduction Centre Intervening) [2016] UKSC 4 where using a see-saw analogy he provided some examples in relation to how habitual residence may be won or lost. These are as follows:

> "(a) The deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state.
>
> (b) The greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day to day life in the new state, probably the faster his achievement of that requisite degree.
>
> (c) Were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and conversely were any of them to have remained behind and thus to represent for him a continuing link with the old state probably the less fast his achievement of it."

[29] It is also correct that the principle that habitual residence could not change unilaterally has been overtaken. In Re H (Abduction: Jurisdiction) [2014] EWCA Civ 1100 Lady Justice Black stated as follows:

> "Given the Supreme Court's clear emphasis that habitual residence is essentially a factual question and its distaste for subsidiary rules about it and given that the parents purpose and intention in any event plays a part in the factual enquiry I would now consign the rule whether it was truly a binding rule or whether it was just a well-established method of approaching cases to history in favour of a factual enquiry tailored to the factual circumstances of the individual case."

[30] In relation to consent the case of T v T (Abduction: Consent) [1999] 2 FLR 912 states that a consent may be nullified if it is proffered on the basis of a

misunderstanding or a fraudulent type intent. Counsel also agreed that Re PJ (Abduction: Habitual Residence: Consent) [2009] 2 FLR 1051 is the leading case on this issue wherein Ward LJ summarised the position as follows:

> "(i) Consent to the removal of a child must be clear and unequivocal.
>
> (vii) The burden of proving consent rests on him or her who asserts it.
>
> (ix) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal."

[31] In relation to acquiescence counsel rightly referred to Re H (Minors) (Abduction: Acquiescence) [1998] AC 72. This authority is well-established and so I do not intend to recite the principles in detail. Suffice to say that the issue is one of fact. This authority does point out "the trial judge in reaching his decision on the question of fact will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wrong parent than to his bare assertions and evidence of his intention." But that is a question of the weight to be attached to the evidence and is not a question of law. This authority indicates that the burden of proof is on the abducting parent.

[32] Counsel also recited the authorities in relation to the grave risk defence in their skeleton arguments. I am not going to rehearse these well trammelled authorities. Realistically Miss Gilkeson did not make a strong case in relation to this issue. She accepted that the test upon which a court would establish this defence being made out is extremely high and as articulated in various authorities. One recent authority on this issue is AT v SS (Abduction: Article 13(b): Separation from Carer) [2015] EWHC 2703 where McDonald J stated the following:

> "(i) The burden lies on the person opposing return. It is for them to produce evidence to substantiate one of the exceptions.
>
> (ii) The risk to the child must be grave, it is not enough for the risk to be real.
>
> (iii) 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 she gets home."

[33] I also bear in mind that there is also a residual discretion not to order return in depending upon the circumstances of a particular case. This flows from the House of Lords decision of RE M(Abduction: Zimbabwe) 2007 3 WLR 975.

Consideration

[34] I have considered the submissions of the parties and the legal principles that are outlined above. I bear in mind that these are summary proceedings to determine where a welfare hearing should take place. I am not determining issues of welfare which would require the resolution of factual disputes.

[35] The issue of rights of custody was properly conceded. I do not consider that much turns on the categorisation of the parties care of the child. There are no court orders in place which define this. Both parties have parental responsibility. The plaintiff was exercising her rights of custody. It follows from this that the plaintiff had a right to veto any change of residence as part and parcel of her rights of custody. It seems to me that this case is best described as a joint care arrangement. In any event, there has been a breach of custody rights in this case.

[36] I then turn to questions of habitual residence, wrongful removal and retention. In looking at these questions, the common issue is the intent and agreement of the parties in relation to travelling to Northern Ireland. Was this a temporary or permanent move? That is the core consideration in this case. I will deal with these questions in the following sequence.

[37] In the circumstances of this case I do not consider that a wrongful removal is established. At paragraph 10 of his affidavit the defendant states that the plan was to return. I cannot be satisfied that there was a fraud or a misunderstanding about the travel arrangements in December 2015. It seems to be tolerably clear that the parties both agreed that the child would travel to Northern Ireland to see her grandparents. This was for a short period over December into January 2016. Return flights were booked. The stay was extended by agreement until 20 June 2016.

[38] I have also come to the conclusion having looked at the evidence that has been put before me that there was no clear plan for a permanent move to Northern Ireland. I accept that a move was discussed. I accept that a longer term holiday/temporary move was agreed in January 2016 but I do not go beyond that and it seems to me that the evidence points towards the child staying in Northern Ireland for a 6 month period only rather than permanently. In my view the letter that was signed at Redmond Solicitors adds weight to this proposition. The text messages and other evidence that has been presented to me highlight various ideas but do not in my view present a clear and unequivocal case for a permanent removal.

[39] I agree with Mr Morgan that if there was to be something as fundamental as a move from Australia to Northern Ireland it should be spelt out in a much clearer way. In my view any proposal was only ever in the embryonic stages. There was no clear plan for fundamentals such as housing, employment, or financial support. For instance, it is clear from the social media exchange that if benefits were not available in Northern Ireland there would be a problem for the family. The parties continually ask, what is the plan? They refer to changes of mind. They seem to want to test the waters about the potential for a life in Northern Ireland. In my view they chop and change so much about this, that there is no coherent or consistent thread. The only certainty I can find is that the parties agreed that there would be a holiday in the first place and then a 6 month extended stay.

[40] I cannot see that the family made arrangements to leave Australia permanently or indeed to set up home in Northern Ireland. I take into account the evidence presented from the defendant's neighbour. However I treat this with a degree of caution as I was not presented with the email request for information. I do not know the context of the request and whether certain directions became apparent from the e-mail to the neighbour. This was not evidence on affidavit and as such I give it limited weight. I do not consider that the e-mail to the estate agent is definitive as it reflects the defendant's point of view only and even that is uncertain as to the future. The father averred that the plaintiff effectively sold off everything when the child moved. However I cannot see that this case is made out on the basis of the ongoing dialogue about arrangements between the parties.

[41] In my view there has been a wrongful retention in this case. I have decided that there was an agreement in January 2016 that the child would stay in Northern Ireland for approximately 6 months and then return to Australia. It seems to me that there has been a wrongful retention from in or around 16 May 2016 when the defendant indicated to the plaintiff that he would not abide by the agreement and that the child was not going back. After that, it also appears to me that there is no clear and unequivocal line taken by the plaintiff whereby she agreed to the child staying in Northern Ireland. I do not consider that the plaintiff delayed unduly from May 2016 when she obtained legal advice which led to the issue of proceedings. There was a suggestion that the plaintiff took a short holiday at that time. Even if that is correct it does not change my view in relation to delay or acquiescence.

[42] I also pay particular regard to the fact that the defendant wished to stop the plaintiff from coming to Northern Ireland by relinquishing the letter of support. This led to a situation where the plaintiff lost her visa and had to surrender her passport. Miss Gilkeson accepted that this matter is not dealt with in the defendant's affidavit at all and that it was not a savoury part of his case. She could offer no explanation. The only true explanation that can be given for this is that the defendant wanted to prevent the plaintiff coming and getting her daughter. In my view this is an example of control and it confirms the authenticity of the plaintiff's argument in relation to the defendant's' personality.

[43] I also accept that the defendant made it difficult for the plaintiff to avail of indirect contact once she indicated an intention to come to Northern Ireland to retrieve the child. That is clear from the social media exchange where the defendant refers to 'blocking' the plaintiff. I understand the defendant's case about the plaintiff's new relationship. Implicit in his case is that the plaintiff changed her mind about Northern Ireland because of her relationship. I understand how the defendant might think that. However the relationship is peripheral to the fact that the plaintiff did not agree to a permanent move.

[44] I consider that the social media exchanges must be seen in context. By way of example, the part of the e-mail of 19 April 2016 relied upon by Ms Gilkeson is preceded by a long narrative in which the plaintiff expresses her unhappiness and includes reference to GA making her feel meaningless. Many of the messages are also open to interpretation. I agree with Mr Morgan that the plaintiff's messages have to be seen in the context of a controlling relationship. I have already decided that the plaintiff has established a case in relation to this issue given the defendant's behaviour regarding the visa letter. It has been argued that some of the social media exchanges effectively prove acquiescence after the wrongful retention. I do not accept that proposition. Firstly, I return to the fact that there is no coherent plan for a permanent move. If there was such a plan I fail to see why the letter from Redman solicitors is framed as it is. Also after the retention in May 2016, I cannot see that the plaintiff agreed to the child remaining in Northern Ireland.

[45] It seems to me that the defendant, once in Northern Ireland, simply wanted to stay and be with his family. However, that was not with the agreement of the plaintiff and as such it cannot be countenanced by law. This is a classic case of over holding after a temporary move. I am not entirely convinced that the defendant was running away from debt although that suspicion was raised. It was accepted that the defendant has issues to resolve in Australia about his injury at work.

[46] I also consider that the child's habitual residence has not changed from Australia. I accept that the child has been in Northern Ireland for some time. However my finding in relation to the agreement between the parties sets a context for this. It was agreed that the child was habitually resident in Australia before leaving for Northern Ireland in December 2015. There was an agreement that she would simply stay in Northern Ireland for 6 months. That was a temporary stay after which the child would return. In my view that does not result in an adequate degree of stability needed to change habitual residence. Despite her best efforts Ms Gilkeson did not convince me that by virtue of the child's residence and activities in Northern Ireland that there was the requisite degree of stability established.

[47] I further consider that once there was a reneging from the agreement in May 2016 the child's habitual residence could not change because at that stage there was a wrongful retention. It seems to me that this child has a home in Australia where she was born and lived most of her life. There is stability in that society and

integration there and I do not consider that the child has changed habitual residence or that it was the intention that the child would change her habitual residence. I pay particular attention to the guidance of Lord Wilson in Re B and upon doing so I find that this young child was deeply integrated in Australia, there was no adult pre-planning for a permanent move, and her mother did not move with her. It follows that I consider that the grounds are made out under Article 12 for a return of this child to her country of habitual residence on the basis that she has been wrongfully retained in breach of VS's rights of custody contrary to Article 3 of the Convention.

[48] There are three exceptions to a requirement for an immediate return of the child under Article 13 of the Convention. The burden of proof in relation to the exceptions lies upon the person opposing the child's return. In this case consent, acquiescence and grave risk are argued. It will be apparent from the foregoing paragraphs that I do not consider that the consent or acquiescence exceptions have been proven.

[49] I do not consider that this case meets the high standard to satisfy the grave risk defence. Ms Gilkeson did not actively pursue this argument in her oral submissions. In any event, even if this case were made out, I consider that protections could be provided in Australia to deal with the types of issues raised. Any valid welfare concerns can be dealt with by way of undertakings until the Australian courts deal with the case. In addition I do not consider that this is a case where I should exercise my residual discretion to refuse a return order. I see no reason why the spirit of the Convention should not be upheld by the summary return of this child.

Conclusion

[50] Accordingly, I accede to the plaintiff's application. In her most recent affidavit the plaintiff provided undertakings and they seem to me to be comprehensive and to deal with the issues raised by the father. However, given the father's position and in particular his creditable stance that he would return to Australia were a return order to be made, I will allow the parties some short time to identify the practical steps for return, to refine the necessary undertakings and to prepare a draft order.

[51] I make a return order in this case.