

**THE HIGH COURT**

**FAMILY LAW**

[2022 No. 5 HLC]

[2022] IEHC 424

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF  
CUSTODY ORDERS ACT 1991**

**AND**

**IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF  
INTERNATIONAL CHILD ABDUCTION**

**AND**

**IN THE MATTER OF T. AND P., MINORS**

**(CHILD ABDUCTION: GRAVE RISK, VIEWS OF THE CHILD)**

**BETWEEN:**

**L.F.**

**APPLICANT**

**AND**

**S.C.**

**RESPONDENT**

**Judgment of Ms. Justice Mary Rose Gearty delivered on the 29<sup>th</sup> day of June, 2022**

**1. Introduction**

1.1 This is an application by a father for the return of his two children, called Tara and Paul for the purposes of this judgment, both of whom are already the subject of proceedings in England. The defence of grave risk is raised, and I am also asked to consider the views of the children. A summary of the grave risk issue is that the

Applicant is alleged to have been drinking excessively on various occasions, two of which are specified and described in the Respondent's affidavits. It is argued that this should be seen in the light of the failure to address this risk in the country of origin.

1.2 The case involves the kind of allegations that arise often in family law proceedings. The issues raised are serious, distressing and contentious, such allegations affect parents and children deeply, but the issues are not sufficient to justify refusing an order to return children who have been wrongfully abducted.

## **2. Objectives of the Hague Convention**

2.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives, where school and medical records are held and where witnesses are readily available, can make decisions about the child's welfare with the best information available. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, summary remedy against those who seek to take the law into their own hands.

2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respectful nations. This international agreement, to apply the same rules in signatory states, addresses issues arising from

the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

2.3 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. If he succeeds in establishing these matters, the burden then shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence. Here, the only defence of relevance is that of grave risk. There is also an argument that the Court should consider the views of the children in the case and refuse a return on this basis. If, as a matter of fact, the Court finds that the children do object to being returned, the Court retains a discretion on the question of whether or not to return the children.

### **3. Grave Risk: The Legal Test**

3.1 Ms. Justice Finlay Geoghegan set out the legal test for grave risk in *C.A. v. C.A.* [2010] 2 IR 162, at paragraph 21:

*“[T]he evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the order for return, in this case the mother, and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as “clear and compelling evidence”.”*

3.2 Various cases reveal the kind of risk that has persuaded a court to refuse to return a child; usually they involve a risk of violence to the child (usually based on evidence of previous violence) or a risk of suicide to either the child or respondent or of an event such as famine or war which would render the child’s position unsafe, as set out by Fennelly J. in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, at paragraph 57.

3.3 In *R. v. R.* [2015] IECA 265 Finlay Geoghegan J., noting that the risk in that case was of physical harm to a child, emphasised the trust to be put in the courts of the home state to protect the child even in such an extreme situation. In *S.H. v. J.C.* [2020] IEHC 686, this Court rejected the argument that the risk of children being placed in foster care in the requesting state constituted a grave risk in this context. At paragraph 6.11 of the judgment in *S.H.* the following conclusion is expressed:

*“It is clear that the courts in England are both willing and competent to vindicate the rights of these children and safeguard their welfare. It cannot be argued, tenably, that returning the children to a situation where Interim Care Orders are now in place, made by a court of competent jurisdiction with the sole aim of protecting the children,*

*amounts to placing them in a situation of grave risk or puts them in an intolerable situation within the legal meaning of those terms, in the context of the Convention."*

3.4 In this context, it is worth quoting (as Denham J. did in *R.K. v. J.K.* [2000] 2 I.R. 416) from La Forest J. in *Thomson v. Thomson* [1994] 3 SCR 551 at p.596:

*"In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause 'or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation.*

Thus, to paraphrase the conclusion of Denham J., whereas any movement of children from one country to another and from one home to another is upsetting and may involve harm, that is not the level of risk contemplated by the Hague Convention.

3.5 If the defence is established, the Court has a discretion as to whether or not to return. This is exercised bearing in mind the objectives of the Convention and is only relevant if the Respondent demonstrates a grave risk to these children, or that they will be in an intolerable situation, if they are returned to the Applicant's care.

#### **4. Relevant Background Facts**

##### **A. Wrongful Removal**

4.1 The Applicant is the father of Tara and named as such on her birth certificate. He is not named on Paul's birth certificate but has always acted as his father and believes himself to be his father. In any event, he has been recognised as a person with parental rights in proceedings in England. He shared custody of the children until they were brought to Ireland, which occurred in late February, 2022. He made this application on the 3<sup>rd</sup> of March. Both children are British citizens and have lived in England since birth. In family proceedings before the local English Court, the parties agreed that he had custody rights in respect of both children. He did not consent to their removal to Ireland. None of this is in issue and, therefore, the Applicant has established wrongful removal of the children within the meaning of the Convention.

##### **B. Child Care Proceedings in England**

4.2 The parties in this case have a Child Arrangements Order, made on the 16<sup>th</sup> of August, 2021. That Order is exhibited at LF5. It is clear from the exhibit that a social welfare officer was assigned to the case and had spoken to both parties. Her report is exhibited at SC2 and her interviews with the parties were in June of 2021. No safeguarding concerns were raised in that report by either party.

4.3 The Order is a significant exhibit. In the body of the Order, one can read that the two parties to this case, also parties to that case, had agreed in August of 2021 that

an order be made sharing custody of the children. They had also agreed (without any admissions on either part) that neither one of them would take illegal drugs or drink to excess while in charge of the children and that each of them undertook to hand over or collect the children on time or to make contact if late or in any emergency.

4.4 The Order is headed Child Arrangements Order and begins with the following information: The names of the children, the names of both parties, the fact that the Applicant was represented and the name of his solicitor. Still on page one, and under the heading "Warning Notices", the parties are given three warnings. Firstly, they may not publish the names of the children or parties without court permission. Directly beneath this is the second warning: that they may be imprisoned or fined if they do not abide by the terms of the order. The third warning is that it is a criminal offence to remove a child, the subject matter of the order, from the United Kingdom. A similar warning is repeated on page three, again under the heading: "Warning".

#### C. Social and Family Environment

4.5 The children went to school in England until February of this year and their family members, with the exception of the Respondent, all reside there. The children had friends in their respective schools in England and are now making new friends in Ireland. The Applicant and his family still reside in England, the Respondent's mother also appears to reside in England.

4.6 The Respondent avers that the children, when in England and staying with their dad, sleep in the same one-bed room with the Applicant. She has much better accommodation in Ireland and, she avers, has none in England. The accommodation for them at their father's home appears to be considerably smaller than the living space they currently share with the Respondent and her fiancé in Ireland.

4.7 This application is one for the summary return of children wrongfully removed and not an application in respect of the welfare of the children generally. In family law proceedings, one expects to see details in respect of living conditions and other matters, such as maintenance and custody arrangements, addressed by the parties and the courts. In the Hague list, by contrast, unless such details amount to a grave risk, they are not relevant to this Court's decision.

4.8 The Head Teacher and the Inclusion Officer at the school at which both children were enrolled until they were removed from England wrote a letter which is exhibited at LF6. The letter is dated 3<sup>rd</sup> of March and both signatories of the letter confirm that the parent with whom they had regular contact was the Applicant. The letter claims that the first contact either of them had with the Respondent was when she rang the school on the 21<sup>st</sup> of February to say that the children had a tummy bug and would not be in school that day. That was the day that she was taking them to Ireland. The attempts to contact the Respondent further were in vain and voicemails and emails were not acknowledged or responded to.



4.9 However, when one reads the details of the records provided with the letter, it is clear that the Respondent had been in contact with the school before, as she is referred to in at least two other message reports from late 2021. While the letter substantiates the claim that the Applicant was in regular contact with the school, but not the Respondent, the more detailed records contradict that picture. It appears to this Court that both parents were in contact with the school.

4.10 It is also not in dispute that the Respondent had to move to other accommodation in late 2021 due to issues unrelated to this Applicant. From that point, the Applicant became the main contact point for the school. The contemporaneous messages exhibited in the Applicant's second affidavit strongly support his averment that the Respondent effectively disappeared for a number of weeks. It is not necessary to determine, as a matter of fact, where the children spent most of their time. It is clear from the exhibits that there was shared custody, that they lived with both parents and that, when the Respondent had difficulties not related to these events, the Applicant and the Respondent's mother between them cared for the children and ensured that they were in school. The Applicant remained in his job throughout this time.

#### D. Facts relevant to Grave Risk

4.11 Where grave risk is raised as a defence, a court must consider whether the allegations, if true, justify a decision not to return the child. Here, as in most such cases, the allegations are denied. It must also be emphasised that this Court has not had the opportunity to hear the parties and to assess their evidence after it had been

tested by cross-examination, so this exercise is not one in which the issues of fact can be decided definitively. The Court must therefore assess the risk on the basis that the facts asserted are true. In other words, if it is the case that the Applicant was drinking excessively on at least two occasions when he was in charge of the children, are they therefore at grave risk of harm such that a refusal to return is warranted?

4.12 At hearing, it was argued that the Respondent had developed concerns about the children's welfare after the initial court proceedings. She was interviewed about the Applicant, according to the report from the childcare officer in England, on 17<sup>th</sup> of June, 2021. The Applicant was interviewed on 23<sup>rd</sup> of June, 2021. Neither one expressed any safeguarding concerns, and they were specifically asked about this issue for the report. The Applicant said, at that time, that she had no safeguarding concerns, that he was a good father and that the children were happy in his company.

4.13 The Respondent places particular emphasis on the Applicant's drinking. She describes two incidents of intoxication, one of which occurred on 19<sup>th</sup> of December, 2021. Notwithstanding this, as already noted, she left the children in his care after that date, in or around January of 2022, for weeks at a time. The Respondent stated that she had reported incidents of concern to the police, sought confirmation of these contemporaneous reports and swore a supplemental affidavit when she received this information. The police confirmed two such incidents, one in December 2021 as already referred to and one in April of 2020. In other words, the first such incident

was well over a year before the Respondent confirmed to the childcare officer that she had no safeguarding concerns about the children and that he was a good father.

4.14 Since the hearing of this matter, the Court has read the affidavits and has paid particular attention to the exhibits: these include the report from the CAFCASS officer, the agreed Court Order, and the copies of contemporaneous correspondence such as letters and messages between the parties and members of their family or friends, sent before these proceedings began and therefore most likely to have been written without court proceedings in mind. The text messages offer a reliable view of the real state of affairs, revealing that these parties had a fractious relationship. None of the messages appear to the Court to reflect serious childcare concerns on the part of either parent. Meanwhile, clearly, the children were spending time with both parents, which confirms that neither parent had concerns sufficient to justify preventing or restricting contact between children and that parent.

4.15 To put this section into context, it is worth repeating the salient dates: the children were removed from Ireland on 21<sup>st</sup> of February, 2022. The Respondent argues that the children are at grave risk if returned to the Applicant and the two incidents on which she places particular reliance took place in April of 2020 and in December of 2021. After the December date, in January of 2022, she left both children with the Applicant for at least two weeks. This is not a criticism of her, it is a statement of agreed fact. Nor does this mean that she may not have legitimate preferences about where her children should live. However, it undermines the argument that the

children are at risk of physical or psychological harm sufficient to be classified as being at grave risk if they are in his care.

4.16 While the Court agrees that the situation presenting in early 2022 was one that may well have caused distress to the children, it seems to have been caused, in large part, by a breakdown in the arrangements agreed between the parties. While the Respondent states that she made an application to vary the childcare order, no such papers are exhibited. It is also clear that she had unrelated difficulties which led to her effectively disappearing for a short time. Taking her children to live in another jurisdiction is not a reasonable alternative to applying for a variation of a court order. If excessive alcohol consumption by their dad is a matter of concern, and this Court is not in a position to reach any conclusion on that issue, it is a matter for the relevant family court, not a reason to move his children to Ireland without his knowledge or consent. Their removal back to England may indeed be difficult but, as made clear by Denham J. in *R.K. v J.K.*, this is not the level of risk contemplated by the Convention.

4.17 In paragraph 21 of the Respondent's affidavit, she mentions her fiancé. While it is understandable that she and her Irish fiancé want to establish a home in Ireland, this does not justify removing children from their home in this way. While there may have been dissatisfaction about the Applicant's drinking, this is far from the kind of evidence of grave risk that might justify a sudden and covert removal of two children from their home to a country in which they had never lived before.

4.18 The Court is urged to see the allegations in light of the inability of the English Courts to address the situation. There is no evidence of the Respondent having brought these matters to the attention of the local family court, despite proceedings in being in England and a social worker assigned to, and familiar with, the family. On the contrary, when the English Court was made aware of these proceedings last May, arrangements were made for an urgent hearing.

## **5. Child Care Proceedings since the Abduction**

5.1 In the application to the relevant Family Court, on the 11<sup>th</sup> of May, an order of the Court was made providing that the children are to be returned to the Applicant and to remain with him for five days if they are returned to England by this Court. The Respondent was party to those proceedings and agreed that, should the children be returned, they would spend their first few days with their dad. Again, while the Respondent maintains that she felt under pressure to agree, this is difficult to accept if she had real concerns about their safety in his care. If the Respondent is concerned about their safety, arrangements will have to be made by that Court, to vary its order so that they stay with her. The English Family Court is not only competent to deal with these issues, that Court is in a much better position than this Court. This Court has no family, medical or social history of the family at its disposal save the childcare officer's report already mentioned. All such records are in the UK because that is the habitual residence of these children.

5.2 In order to establish this defence, the Respondent would have to show why the English courts could not manage the relevant situation. I am not satisfied that the Respondent has shown that there is any such inadequacy or that the Applicant will not engage with any order made by the relevant English Court; there is no such evidence. The height of the complaint about that Court is that it has not intervened to the satisfaction of the Respondent and there is inconsistency in the children's lives and much frustration in her life as a result. This is, quintessentially, a matter for the English Court. There is no basis to apprehend that the children will not get the services they need in England.

## **6. The Views of the Children**

### **A. Relevant Law**

6.1 The final argument made is that the children are old enough for the Court to consider and act upon their views. Even if the Applicant has, otherwise, made his case for summary return, if either child objects to being returned and is of sufficient maturity that the Court should consider her views, the Court retains a discretion as to whether or not to return the child. Each of the two children have been assessed.

6.2 The three-stage test applicable is one articulated by Potter J. and involves ascertaining if the children do in fact object and, if so, what the weight of the objection is given the maturity of the children. Finally, if established and when assessed, the Court considers if an objection is sufficient to outweigh the counter-balancing

objectives of the Convention. Article 13 requires the Court to take account of the views of the child. It does not vest decision-making power in the child and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child in question. Nonetheless, it is very important to consider the views of the child and whether or not they may influence the Court to take the exceptional step of refusing to return a child.

6.3 In *A.U. v. T.N.U.* [2011] 3 IR 683, Chief Justice Denham commented that: "*A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence.*" In considering whether the child's objections to return are made out, the expression of a mere preference is not sufficient; the word "objection" imports strong feelings as opposed to a statement of preference on the part of the child, to use the words of Whelan J., *J.V. v. Q.I.* [2020] IECA 302 (at para. 69).

6.4 It is clear from numerous cases that the weight to be attached to views of a child increases as the child gets older. One such case is relied upon by the Applicant and is also instructive as to the kind of objections which may arise: In *M.S. v. A.R.* [2019] IESC 10, Finlay Geoghegan J. held that the views of a seven year old child who made a strong objection to being returned to Poland on the basis that his father *beats, screams at him, and grabbed him* ought to be given limited weight given the young age of the child. This is noted, not only as the children in this case are of a similar age, but because of the nature of the stated basis for the objection in that case. There were some comments made as to the nature of the information in that report which cannot be said

of the report before this Court and the questions of the assessor here are set out below, as they substantiate the careful probing that was carried out in this case.

## B. Views of the Children in the Report

6.5 Mr. van Aswegan, Clinical Psychologist, met the children and produced a report setting out their views. The responses in respect of each child were as expected for a child within the relevant age range. In respect of Tara, the report states that she had been living in a town in England and *"She noted that 'it was a bit dangerous' but was unable to expand on this observation"*. Tara said that in England she *"[H]ad fun with loads of kids. Actually I went to two schools, don't actually know what class... such a long time since I was there."* The teachers in her school had been kind and she had good friends.

6.6 In terms of her relationship with her father Tara enjoyed time with her father and, in her words: *"Actually, we went out a lot, walked everywhere. It was kind of fun. My Dad's girlfriend has a daughter who is my best friend"*. She liked living in England *"a little bit"*. She added: *"I don't really like staying with my Dad sometimes. Sometimes he can be a bit mean, he shouts a lot. Sometimes he is a bit kind."* And, *"Dad, I'd go visit him sometimes. We call him lots, nice talking to him. Miss him a little bit. He really misses us."* When asked about when she might see him, she said: *"About once a week 'cos we go to school a lot. My mom said maybe on week-ends."*

6.7 As regards her current situation Tara reported that she is *"living on top of a hill, in the middle of nowhere"*. Asked about where she would like to stay, she said: *"I would*



*like to stay in Ireland with Mum of course. 'Cos I think it's better for me and [Paul] to grow up in."* When asked if she had any objection to returning to live in England, she said that *"I won't like it. I just don't want to go back to England. I like it here, more than in [her home town]"*. When asked why she did not want to go back to England she responded *"I don't know, scared in [that town], a lot of dangerous stuff. I actually don't know"*.

6.8 When asked about his circumstances in England, Paul said that he liked living with Dad adding *"it was super sunny and a park next to our house"*. He shared a bedroom with his sister and had a pet cat. At school: *"I was in first class, before that school I had a school [which he named]. I loved playing with my skateboard and bike and two scooters."*

6.9 As regards future care and living arrangements Paul wants to remain in Ireland being cared for by his mother, adding *"It's better here, in here everyone is nicer"*. When asked if he objected to returning to England he said: *"This is my favourite, its better here 'cos not that much people are kind in England"*. When asked about reasons for this view he could not add anything further.

6.10 Regarding access, Paul suggested *"sometimes we can just see him, on Tuesdays on my birthdays, maybe on a Saturday or speak on the phone"*. Asked to describe his parents, he said Mum was nice and *"Dad, is pretty nice and kind. He's clumsy a little bit, he always loses his keys"*.

#### D. Assessment of the Report: Objections or Preferences?

6.11 I have set out the report in some detail. As can be seen, both children were asked on occasion to expand on their answers but could not do so. The issues addressed and the level of detail is sufficient to enable me to ascertain the relevant views of each child. The assessor knew his role and the questions which this Court must address. Given the ages of the two children, one is seven years old and the other six, his questions were appropriate and open, allowing the children's views to emerge.

6.12 The views of Tara do, in my view, amount to objections and those of Paul amount to the expression of a preference. The reasons given are, particularly in Tara's case, difficult to tease out. She maintains that her home town is dangerous but appears to have no basis for this statement and, despite this ill-defined danger, her general view is that she was happy and had friends there. While she would prefer to remain in Ireland, I cannot read these responses as being a vehement objection to a return but her view goes beyond a preference for remaining here and amounts to a relatively mild objection with a basis that she cannot articulate beyond making it clear that she wants to stay with her mum. Paul's view is that people here are kinder. However, he clearly loves his dad and does not appear to have any strong objection to living in England but has a preference for Ireland which is his "*favourite*".

6.13 Tara's age and degree of maturity must be taken into account in assessing whether her objection should mitigate against returning the children, which is

otherwise mandated by the Convention. The assessor also concluded that she is likely to please persons whom she cares about, and in this case, her mum is likely to be someone she wishes to please. I accept the assessor's view that there was no direct influence from either party, but indirect influence is likely and indeed is very natural.

Mr. van Aswegan notes:

*"Children within [Tara's] age range are still rather concrete in their thinking and see things most often in 'all or nothing terms'. This age group focus on conforming to what people believe to be the right behaviour and they obey rules in order to obtain the approval of those that they care about."*

6.14 Mr. van Aswegan concluded that children of Paul's age:

*'... think in concrete and specific terms. Although they can begin to understand that the perspectives of another can be different to their own, they nevertheless hold great regard for the opinion of authority figures.'*

Similarly, he would be aware of his mother's preference, namely, staying in Ireland.

6.15 Tara is of an age and level of maturity that, even if the objection was a stronger and well-reasoned one, it might not affect the decision of the Court. The objection on Tara's part is not sufficiently cogent or weighty as to counterbalance all the other factors which mandate a return. She does not know why she refers to her erstwhile home as dangerous and has no objection to offer in respect of living with her dad. The

clearest and strongest expression of her wishes is that “*of course*” she wants to live with her mum and she prefers Ireland, where she thinks it’s better for her to grow up.

6.16 The Court is sympathetic to the views of these young children and conscious of the comfortable situation in which the children now find themselves, but this decision must be made in accordance with the law and must reflect the aims of the Convention. The law requires that this Court prioritise the relationship of a child with both parents and the security of children generally. The important objective of ensuring mutual respect of laws in signatory countries is also upheld by ordering the return of these children. The relatively mild objection voiced by one child in this case and without cogent basis other than an understandable desire to remain with her mother, is not sufficient to outweigh these other factors.

## **7. Conclusions**

7.1 The children were wrongfully abducted from England, despite childcare proceedings, which are ongoing in the relevant family courts. There having been insufficient evidence to establish a grave risk to the children or to conclude that they will be in an intolerable situation should they be returned, the Court is not required to consider the exercise of its discretion in this regard.

7.2 The views of the children lean towards remaining in Ireland. Those of Tara are sufficiently clearly stated as to amount to an objection, as opposed to a preference, and

I have considered that in making this decision, but it is not cogent enough to persuade me that her objection should counterbalance the factors in favour of return.

7.3 Given her young age and the factual matrix of this case, an objection would be required to be substantial and more clearly explained before it could be considered weighty enough to override what is otherwise the clear duty of the Court. Paul has a preference for remaining in Ireland but no objection to a return is made out in his case.

7.4 The Court notes that undertakings were given at the hearing as to the manner of the return of the children and arrangements to be put in place in circumstances where the Respondent may not have immediate access to accommodation. The Court will make the Order sought conditional on the payment of an agreed sum in that regard and will hear the parties as to the exact terms of the Order.