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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**24/03/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A FATHER

Applicant

-v-

A MOTHER

Respondent

IN THE MATTER OF CX (A MALE CHILD AGED 10 YEARS)

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Ms S O'Flaherty BL (instructed by Guckian Flanagan solicitors) for the Father
Mr B Devlin BL (instructed by the Quigley McManus solicitors) for the Mother

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McFARLAND J

Introduction

[1] It is now exactly one year since the Father issued a C1 seeking a contact order and a parental responsibility order in respect of his 10 year old son. The factual background is not in dispute. The Father lives in the Republic of Ireland and the Mother and son live in Northern Ireland. In his application the Father stated that despite the distance between them (approximately 100 miles) he was able to enjoy contact under informal arrangements with the Mother, but the restrictions of movement put in place both north and south to combat the spread of the Covid-19 pandemic resulted in cessation of all contact with CX.

[2] The history of proceedings is as follows –

a) 23 March 2021 – proceedings issued;

b) 22 April 2021 - Family Proceedings Court adjourned to 6 May 2021;

c) 6 May 2021 – Family Proceedings Court granted parental responsibility to the Father, directed an Article 4 welfare report (described in the order as a 'wishes and feelings report') and adjourned to 1 July 2021;

d) 1 July 2021 – Family Proceedings Court adjourned to 2 September 2021;

e) 2 September 2021 – Family Proceedings Court adjourned to 7 October 2021;

f) 7 October 2021 – Family Proceedings Court adjourned to 4 November 2021;

g) 4 November 2021- Family Proceedings Court directed the court children's officer to observe contact and to provide an oral report and adjourned to 2 December 2021;

h) 2 December 2021 – Family Proceedings Court directed the court children's officer to meet with the parties and adjourned to 23 December 2021;

i) 23 December 2021 - Family Proceedings Court granted an interim contact over Christmas and adjourned to 6 January 2021;

j) 6 January 2021 – Family Proceedings Court adjourned to 3 February 2021;

k) 1 February 2022 - C2 issued by the Father applying for his application to be set down for hearing or alternatively to transfer the proceedings to the Family Care Centre on the grounds that the court was declining jurisdiction as the applicant Father resided in the Republic of Ireland;

l) 3 February 2022 – Family Proceedings Court transferred the application to the Family Care Centre on the grounds of "complexity, specifically in relation to the court's jurisdiction for the making of an order for cross-border contact in the Republic of Ireland following the UK leaving the EU."

m) 24 February 2022 – Family Care Centre transferred the application to the High Court on the grounds of "international element needs to be determined by the High Court."

[3] It is reported that despite the Family Proceedings Court accepting jurisdiction in respect of the matter by making a parental responsibility order, directing an Article 4 report, and making an interim contact order, by January 2022 the Family Proceedings Court, appeared to be declining jurisdiction, refusing to convene a hearing to determine jurisdiction and indicating that the proceedings would be struck out. This precipitated the C2 application to transfer the proceedings out of the Family Proceedings Court with immediate transfer up from the Family Care Centre.

Proceedings in the High Court

[4] The matter came on for review in this court on 23 March 2022, the anniversary of the issuing of the proceedings. At the request of both parties I made a ruling in respect of jurisdiction, namely that the courts in Northern Ireland did have jurisdiction to deal with all aspects of the case. I gave that ruling orally as I was dealing with a very straightforward case with agreed evidence and applying well-established legal principles. I indicated that I would give my reasons in writing. This judgment now sets out those reasons.

Jurisdiction

[5] There is no issue that CX is habitually resident in Northern Ireland. His centre of interests is in this jurisdiction. Both parents agree on this.

[6] Decisions about jurisdiction, even when they involve an international element can be dealt with in the Family Proceedings Court or by the Family Care Centre, and do not need to be transferred to the High Court. The core issue will often be habitual residence which is a well-established concept and is, essentially, a fact-finding exercise. The decision as to where a child is habitually resident is well within the capabilities of the Family Proceedings Court and the Family Care Centre.

[7] Section 9 (1) of the Family Law Act 1986 (as amended) now provides that a court in Northern Ireland shall not make a "section 1 (1) (c) order" with respect to a child unless it has jurisdiction under the Hague Child Protection Convention 1996 ("the Hague Convention 1996"), or to give it its full title - the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. A section 1 (1) (c) order is an Article 8 order made by a court in Northern Ireland under the Children (NI) Order 1995. A contact order, which the Father seeks, is such an order.

[8] The withdrawal of the United Kingdom ("the UK") from the European Union ("the EU") appears to have focussed the minds of the lower courts.

[9] Prior to withdrawal, both the Hague Convention 1996 and the then current EU instrument, Brussels IIA, were applicable. The Hague Convention 1996 applied to all international cases involving contracting states (after 1 November 2012 when it was formally ratified by the UK). In international cases involving contracting EU member states, Brussels IIA supplanted the Hague Convention 1996. The transition arrangements after withdrawal allowed for Brussels IIA to continue to apply to proceedings issued up to 30 December 2020 but thereafter it no longer applied and the Hague Convention 1996 now applies to all international cases. Although these are two different international instruments they both share common themes and concepts and in particular both rely on habitual residence of the child as the core jurisdictional determining factor.

The Hague Convention 1996

[10] I dealt with the application of the Hague Convention 1996 recently in a public law care order case in *Re LS* [2022] NIFam 9 and I carried out a detailed analysis of the Hague Convention and the relevant case-law. I do not propose to refer to the content of that judgment as it is not necessary for the consideration of this case.

[11] Article 5 of the Hague Convention 1996 states that "the judicial and administrative authorities of the contracting state of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property".

[12] Should the court with jurisdiction consider that another contracting state is "better placed to assess the best interests of the child" then the court can request authorities in that other state to assume jurisdiction or invite the parties to the proceedings to apply to the authorities in that jurisdiction (Article 8(1)).

Consideration

[13] The issue in this case could not be simpler. The Family Proceedings Court appear to have been distracted by the residence of the applicant Father in the Republic of Ireland and the fact that he was seeking contact with the child in that country. The Family Law Act 1986 and the Hague Convention 1996 have given the courts in Northern Ireland jurisdiction to deal with cases such as this for many years. All that cessation of the UK's membership of the EU has done is remove consideration of Brussels IIA from the equation. Brussels IIA had supplanted the Hague Convention 1996 in respect of cases involving contracting European Union member states, but now that Brussels IIA no longer is relevant, the Hague Convention 1996 applies.

[14] CX's habitual residence is in Northern Ireland. The courts in Northern Ireland have the primary jurisdiction to deal with the Father's application. The courts in the Republic of Ireland are highly unlikely to be better placed to deal with this issue of contact. Any issues arising out of the Father exercising contact with his son within the Republic of Ireland would be dealt with by an assessment by the courts in Northern Ireland of the welfare test. In any event Article 2 (b) of the Hague Convention 1996 specifically deals with this issue –

> "Measures … may deal in particular with –
>
> *b)* rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access *including the right to take a child for a limited period of time to a place*

other than the child's habitual residence;" (Emphasis added)

[15] In the circumstances the Family Proceedings Court was wrong to consider it had no jurisdiction. It is also most unfortunate that the court waited over 10 months to decline jurisdiction despite, in the interim, accepting jurisdiction by making a parental responsibility order, ordering an Article 4 report and making an interim contact order. If a court considers it has no jurisdiction then it should rule on that point without delay.

[16] There was no reason at all for this case to have been transferred by the Family Proceedings Court and then by the Family Care Centre.

[17] Keegan LCJ recently dealt with the issue of transfer of family proceedings in *Re E & F* [2021] NIFam 48. Judges considering transferring proceedings should take the opportunity to refer to that judgment. The starting point for transfer is Article 5 of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996. The proceedings should be exceptionally grave, important or complex and in particular—

> "(a) because of complicated or conflicting evidence about the child's physical or moral well-being or about other matters relating to the child's welfare;
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> (b) because of the number of parties;
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> (c) because of a conflict of law with another jurisdiction;
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> (d) because of some novel or difficult point of law; or
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> (e) because of some question of general public interest."

Although Keegan LCJ stated at para [16] that cases with an international element could be considered for transfer, this was not a reference to every cross-frontier case and Article 5 (1)(c) is the context for that statement, namely cases involving a conflict of law with another jurisdiction.

[18] I had been minded to transfer the case back, but given the delay to date, I have given directions for the final listing and, hopefully, determination of this straightforward issue concerning contact between the Father and his son.