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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

CD

and

EF

IN THE MATTER OF AB (A MINOR)

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Mr Lavery KC & Ms Rice BL (instructed by Bernard Campbell and Co Solicitors) for the Applicant
Ms McGrenera KC & Ms Downey BL (instructed by McIvor Farrell Solicitors) for the Respondent
Ms Murphy BL (instructed by the Official Solicitor)

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KINNEY J

Introduction

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

[2] Nothing must be published or reported in any way which allows this child or any related adults to be identified directly or indirectly in any way.

[3] I had the benefit of affidavit evidence from the parties along with position papers. I am grateful to counsel for the submissions I have received and for the level of agreement that was reached in this case.

[4] By an originating summons the plaintiff sought, amongst other orders, a declaration that the removal and subsequent retention of the child AB was wrongful, an order that the child be returned to the plaintiff pursuant to article 12 of the Hague Convention and an order that the courts in Northern Ireland do not have jurisdiction in matters of parental responsibilities regarding the child.

[5] The parties narrowed the issues in this case and provided the court with an agreed position on a number of matters.

[6] The parties are agreed, and I find, the following matters:

(1) The subject child was habitually resident in Switzerland immediately prior to his removal.

(2) The defendant accepted the plaintiff had rights of custody which were being exercised immediately before the child's removal on 24 December 2021.

(3) The child was removed from Switzerland on 24 December 2021 by the defendant and a period of less than one year had elapsed before the proceedings commenced.

(4) The removal of the child was wrongful in accordance with Articles 3 and 12 of the Convention.

[7] The areas of dispute between the parties centred upon the veracity of the allegations made by the defendant in her affidavit and whether the allegations, if true, placed AB at grave risk. If grave risk is established the court must also determine whether the protective mechanisms available in Switzerland are adequate to secure the protection of AB after their return and finally whether the court should exercise its discretion not to return AB.

The Evidence

[8] The plaintiff and the defendant are the father and mother respectively of AB. Both came originally from Eritrea and by various means made their way to Switzerland, the father first and then followed by the mother. They had married in Ethiopia on 13 March 2015. They lived as a family in Switzerland. AB was born in Switzerland on 5 November 2016.

[9] The defendant asserts that her relationship with the plaintiff was characterised by domestic violence. The defendant asserts that as soon as she arrived in Switzerland the plaintiff pressurised her into having sex with him on an almost daily basis. If she did not consent, the plaintiff forced himself on her. The plaintiff did not provide money for the defendant to purchase food and clothing. She alleged that the plaintiff insulted her and beat her regularly. She begged him to agree to a divorce. She could

not tell anyone about what was happening in her family, and she was left completely isolated with AB. The defendant said she did not think anyone would believe her allegations against the plaintiff as he was well liked in the community and "everyone thought that he was an angel." The defendant alleged that the plaintiff was adamant that his behaviour would not change. He eventually agreed to a divorce. The defendant said that the plaintiff handled the divorce application and that she had no knowledge of the processes or the lawyers. She only attended once at the courthouse and was there for approximately one hour.

[10] The defendant accepted that the plaintiff was not abusive to AB but said that he was not an involved father. AB witnessed some of the abuse and in particular the abusive language of the plaintiff. The defendant said that the plaintiff continued with emotional and verbal abuse and said he would kill AB with a knife and then kill the defendant.

[11] The plaintiff and defendant were divorced in Switzerland on 17 September 2019. The defendant had custody of AB and the plaintiff had visitation rights. The plaintiff also had a requirement to pay maintenance each month. The plaintiff continued to avail of contact and also paid the maintenance until the defendant left Switzerland.

[12] The defendant stated at paragraph 18 of her affidavit that she did not believe the plaintiff lived nearby following the divorce as he came by train to see AB. She sought to avoid him, and she did not ask him questions. She limited contact with the plaintiff to phone calls and WhatsApp solely about AB.

[13] The defendant then recounted that on a Thursday in December 2021 the plaintiff attended at her home for contact with AB. When she opened the door, the plaintiff came in and began choking her with his hands, shouting that he was going to kill her. The defendant asked the plaintiff what he wanted from her and did he want her to leave. The defendant said the plaintiff said he did not know and then said that he did want the defendant to leave Switzerland. This was the only occasion that the defendant alleged physical assault against the plaintiff subsequent to the divorce.

[14] On the defendant's account the plaintiff then made all the travel plans for the defendant and AB to travel to the United Kingdom along with providing money required for such a journey. He made arrangements for the defendant to meet an Eritrean man in Amsterdam to help arrange onward travel to the UK.

[15] The defendant said that the plaintiff worked out all of the details of the trip, although it would appear that the plans fell apart by the time the defendant reached Amsterdam and it was left to the defendant to reorganise her travel plans in order to get to the UK. The defendant said the plaintiff did not seek to make any plans to see or speak to AB and told her that she should destroy their only means of contact. The defendant subsequently discovered that her maternal aunt was also in

Northern Ireland seeking asylum and that they met by coincidence in the hotel where they were staying.

[16] The plaintiff in his affidavit evidence denied the defendant's allegations entirely. He said he never demanded sex from her without consent and that the pregnancy was planned. He provided financially for the family including private schooling for the defendant to assist her to learn the language. He asserted that the defendant's request for a divorce followed a quarrel at home after which the defendant did not speak to him for almost two weeks. As the defendant's visa to remain in Switzerland was a marriage residence permit, the plaintiff was concerned that if they divorced the defendant may not be able to stay in Switzerland. He explained to her that in order for the defendant to be able to stay in Switzerland they had to remain married for three years. The defendant agreed to wait. The plaintiff asserted that the defendant's brother travelled from Luxembourg to try attempts at reconciliation. The plaintiff said that when the defendant made it clear that she wanted a divorce he did not stand in the way but consented to it. The plaintiff said that he was a hands-on father and fully involved in the care of AB.

[17] The plaintiff alleged that the defendant approached him. She told him that her uncle was getting married in Ethiopia and that she and her aunt, who lived in Amsterdam, wanted to go to the wedding. The plaintiff confirmed that he bought flight tickets for her and AB to Amsterdam along with a new phone. He paid for the Covid test required for both the defendant and AB. The defendant reimbursed him for these items. The plaintiff also gave cash to the defendant for her trip. On 26 December the plaintiff sent a text message to the defendant to check that they had arrived in Ethiopia safely. Thereafter, the plaintiff's attempts at contact failed. The plaintiff asserted that he would never have put AB at risk by making him travel to the UK without a visa.

[18] When the defendant did not return as planned the plaintiff contacted members of her family and was given conflicting information. He did not know where she was until eventually contact was made through the Eritrean community to advise him that the defendant and AB had been seen at a church in Northern Ireland. The plaintiff then initiated proceedings.

[19] On her arrival in Northern Ireland the defendant made an application to the Home Office for asylum. There is no dispute that in her initial contact and asylum registration questionnaire she provided a completely false account of her background and travel to the United Kingdom. That history was quite detailed, including references to being pregnant and being raped in Libya because she had not paid her money on time, having to subsequently pay for a journey by sea and that she was hit by a metal bar on her leg whilst in Libya. She said she had applied for asylum in Germany in 2016 and had been fingerprinted in Switzerland but only for border crossing. She said she stayed in the Sudan for seven years. One question on the form stated that it appeared she may have had an opportunity to claim asylum on occasions on her way to the UK. The defendant answered that she did not want to apply

anywhere else, her intentions were to come to the UK. She was asked if she had any evidence that she was in any of the countries she had mentioned and she said she did not. She was asked if she had any close family in any other European country and she said she did not.

[20] The defendant subsequently completed a preliminary information questionnaire for her asylum application to which she appended a statement. In that statement she provided an account which was closer to the account given in these proceedings.

[21] However, there were still significant differences and inconsistencies. In her asylum statement she said that after the divorce the plaintiff would sneak around to her house. On one occasion he was by her door when she opened it and he fell through it onto her. She questioned him as to what he was doing, and he started cursing. She said the argument got to a point where he said that it would be better if she left the country and the defendant agreed. She was tired from everything and wanted to be away from him. There was no mention in this statement of her status in Switzerland, or of the allegation of strangulation made in her affidavit to this court. The defendant said in the statement she had never been in Sudan, Libya, Italy, Germany, France, or Belgium. She said that this was the story the plaintiff made her tell.

[22] Although the form to which the statement is attached is dated 29 March 2022 an issue arose late in proceedings as to when the statement was actually made. Despite requests for clarification, none was forthcoming. The statement concludes

> "I was surprised to receive papers from the court in relation to my son, my ex-husband claims that I took him away from him without him knowing which is not true as he was the one that gave the idea for me to come here."

[23] I am satisfied that the statement made by the defendant was made after she had received the originating summons and papers in this case and was aware of the information and allegations provided by the plaintiff to this court before she changed her account in her asylum application.

[24] In her position paper of 9 February 2023 the defendant provided further detail saying that the plaintiff was exceptionally abusive to her. He was regularly physically abusive, and this occurred on an almost daily basis, an account significantly at odds with her affidavit in August 2022. She asserted in her position paper that she left Switzerland due to the ongoing domestic violence and due to a specific threat made by the plaintiff to her and to AB. She said that the plaintiff told her that he wanted to make her scared and that he would find her wherever she would go. This does not sit easily with her account that the plaintiff told her to destroy all methods of communication with him when she got to the UK.

[25] In her statement to the asylum authorities the defendant said that AB had settled well in school, was making big improvements and did not require any other professional support. She believed that being away from the abusive environment had helped her son to get better. In her affidavit in August 2022, she said that AB required no additional supports. He had taken well to school and enjoyed all aspects of school life. He had made several friends and was a very different child. At paragraph 33 she said that AB has flourished. At paragraph 34 she said that he never spoke about his father.

[26] In her position paper and in submissions to the court I was told that after facetime contact with his father there was a decline in AB's behaviour. It was confirmed in submissions that there was no allegation that the plaintiff had abused AB. However, the defendant believes that AB's behaviour is affected by the plaintiff's treatment of her. The defendant asserted that in school he has drawn pictures of fighting between his parents, and he has been referred to counselling. These matters were first put forward in the position paper although I was told they had been raised in early January this year.

[27] However, there is no supporting evidence, such as a letter from school or from counselling, to support these assertions.

[28] There is a reference to a blade being found in AB's schoolbag. However, it is clear from the context of that paragraph that this happened before AB came to Northern Ireland.

[29] The only other independent evidence before the court is a short affidavit from CD, an individual in Switzerland that the mother claimed had spoken with her at AB's christening and had made comments about the plaintiff. CD denied the assertions made by the defendant and said no such conversation had taken place.

The law relating to the Hague Convention proceedings

[30] Article 3 of the Hague Convention provides:

> "The removal or the retention of a child is to be considered wrongful where:
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> (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
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> (b) At the time of the 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 subparagraph (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."

[31] The mechanism for the return of a child is contained in Article 12 of the Convention which provides:

> "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."

[32] There is no dispute between the parties that AB was habitually resident in Switzerland immediately prior to his removal and that the plaintiff had rights of custody being exercised immediately before his removal in December 2021. It is accepted that the removal was wrongful in accordance with article 3 and 12 of the Hague Convention.

[33] Essentially the issues resolve as to whether or not the defendant can rely on Article 13 of the Hague Convention. This states:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that:
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

[34] The defendant relies on both limbs of the Article 13 defences. The burden of establishing an Article 13 defence rests with the defendant. If the defendant is able to prove that one of the exceptions is made out, then the court has a discretion to refuse

to return the child. It is not an automatic barrier to the return of the child, it simply changes a required return to a discretionary return.

Consent

[35] In her affidavit the defendant asserted that she had the consent of the plaintiff to remove the child from Switzerland. In *Re PJ (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051 Ward LJ stated that consent to the removal of a child must be clear and unequivocal and that the burden of proving consent rests on the person who asserts it. He went on to say at paragraph 48;

> "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."

[36] The leading authority on acquiescence is *Re H* (Minors) [1998] AC 72. Consent comes before the removal or retention of the child, acquiescence follows it. Lord Browne Wilkinson concluded that:

> "Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions… The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent."

He also noted:

> "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 wronged parent and evidence of his intention."

[37] The issue of acquiescence was considered in this jurisdiction in the matter of *G and A* [2003] NI Fam 16. Whether a plaintiff's behaviour amounts to acquiescence will depend on the circumstances of the case. The court said:

> "The court must determine whether in all the circumstances the wronged parent has, in fact, gone along with the wrongful abduction… (The acquiescence) must amount to an acceptance of the post abduction situation."

Grave risk

[38] Article 13 (b) of the Hague Convention provides a second exception where there is a grave risk that the return of a child would expose it to physical or psychological harm or otherwise place the child in an intolerable position.

[39] In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 the Supreme Court said:

> "32. First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.
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> 33. Second, the risk to the child must be 'grave.' It is not enough, as it is in other contexts such as asylum, that the risk be 'real.' It must have reached such a level of seriousness as to be characterised as 'grave.' Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
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> 34. Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation' (emphasis supplied). As was said in *Re D*, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate.'" Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort, and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the

harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35. Fourth, article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13b the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

[40] The court also has a residual discretion not to order a return of the child depending on the particular circumstances of each individual case. In *Re M (Abduction: Zimbabwe)* [2007]UKHL 55 Baroness Hale said at paragraph 42:

"In Convention cases, however, there are general policy considerations which may be weighed against the interests

> of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.
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> 43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare…"

Consideration

[41] A central plank of the mothers Article 13 submission is based on the behaviour of the plaintiff as alleged by her. I must therefore assess the evidence and information she has placed before the court. It is clear that her various accounts are riddled with inconsistencies. The narrative has developed in what appears to be an evolutionary way, as the defendant attempts to meet queries and challenges that have emerged. I am not satisfied that I can rely on the evidence provided by the defendant in this case. The inconsistencies are not minor. They are significant. Her story has developed over time with more detail being added and with explanations being given for earlier behaviour once the inaccuracy of the earlier account has been drawn to light. On the evidence before me the defendant has not been open, frank and honest in her account.

[42] The defendant's objection on the grounds that the plaintiff consented to the removal is based on her account. That account as I have pointed out has been inconsistent in its detail regarding the circumstances in which the plaintiff allegedly suggested the mother should leave. On one account she has given, domestic violence continued on an almost daily basis while she lived in Switzerland. On the other account she only saw the plaintiff when he arrived for contact with AB at the agreed times. On one account he spontaneously and without reason attempted to strangle her. On her other account she caught him outside her door and challenged why he was there. He cursed at her and an argument ensued. There was no mention of strangulation.

[43] In either account there is no explanation for why the father would take these extraordinary steps. On the evidence before me he was consistent in his contact with his son. The mother made no attempt to engage with any of the authorities in Switzerland about any alleged abusive behaviour by the plaintiff, even after they were

divorced and living quite separately. The defendant accepts that he provided money for what he believed to be a holiday trip to Ethiopia. He did attempt to contact the plaintiff after she had left and there are text messages of his attempts to make contact.

[44] The defendant challenges why the plaintiff only sought the return of AB some six months after she had left. She provided as possible explanation that the plaintiff deliberately waited until her asylum and residence status in Switzerland had expired before seeking the return of AB in an effort to make sure she could not also return. I find this a far-fetched explanation and I am satisfied a much more likely explanation is that given by the plaintiff. He simply did not know where the defendant had gone with his son until she was seen at a church in Northern Ireland shortly before he initiated proceedings.

[45] I am therefore not satisfied on the balance of probabilities that the plaintiff consented to the removal of AB to the United Kingdom, or that he acquiesced to the wrongful removal.

[46] I am further not satisfied on the balance of probabilities that AB faces a grave risk that he will be exposed to physical or psychological harm if he was to return to Switzerland.

[47] Miss Murphy on behalf of the Official Solicitor in her submissions made it clear that for understandable reasons the Official Solicitor did not meet with the child. I am not engaging at this stage in a welfare analysis for AB, but I give weight to the submissions made by the Official Solicitor. I accept and acknowledge that there can be a profound effect on a child who witnesses the physical and emotional abuse of a parent. I am also satisfied that the impact on a primary carer's ability to care for a child can give rise to a grave risk. However, I am not satisfied in this case that the mother has shown, on the balance of probabilities, that such a scenario exists. The first time that there was any suggestion that AB was suffering from any effects since leaving Switzerland was in the mother's most recent position paper. Before that she was painting a very different picture about how he was flourishing. I am not satisfied with the mothers inconsistent account of her experiences in Switzerland, particularly after the divorce which was completed in 2019.

[48] I am satisfied as to the adequacy of the judicial protections available to both the mother and AB in Switzerland. In reaching my conclusions and in particular in my evaluation of the evidence I am mindful of the limitations involved in the summary nature of these proceedings and that I did not hear oral evidence. I must however look to the future and that is the situation as it would be if AB is returned to Switzerland.

[49] Even if I were wrong in my analysis of the risk, I am satisfied that the undertakings provided by the plaintiff to the court, and which he offers in any event to the mother and to AB, are adequate, proper, and sufficient protection for AB.

[50] This leaves the final ground of the mother's objection. This is based on her potential status if she were to return to Switzerland. The mother argues that the risk of not being able to stay in Switzerland and the risk of being returned to Eritrea would place AB in an intolerable situation.

[51] I am satisfied on the basis of the information provided from the Central Authority and also from the Migrationsamt in Zurich that neither the defendant nor AB will be at risk of being expelled by the Swiss authorities after their re-entry to Switzerland. I am further satisfied that the defendant on her arrival at Switzerland will be able to go to accommodation of her choice and will be entitled to financial support from social services in Switzerland. She will immediately be able to claim social benefits. She can take steps before leaving Northern Ireland to accelerate the processes. AB will be able to return to his old school and the defendant will be able to initiate any appropriate legal proceedings which will include measures to protect her from physical or psychological harm.

[52] This contrasts, to some extent, with her position in the UK. She is currently progressing her asylum application here but it has not yet been granted. No one in the course of these proceedings could provide me with the equivalent assurances as to the mother and AB's status if her asylum application was not successful.

[53] Miss Murphy has opened to the court the case of *G v G*. It was not a matter considered by the other parties in their submissions before me. As there was an apparent urgency I asked for their written submissions on this matter by the close of the following working day. I am most grateful not just for adherence to the timetable but for the quality of the submissions received.

[53] In *G v G* [2021] UKSC 9 the Supreme Court considered an appeal brought by the mother of G, an eight-year-old girl born and habitually resident in South Africa. The mother wrongfully removed G from South Africa to England in breach of the father's rights to custody under South African law. He sought the return of G under the Hague Convention and the mother sought to oppose a return order, relying on article 13 (b) and 13 (2) (child's own objections). In that case, as in this, proceedings were complicated by the fact that on arrival in the UK the mother made an application for asylum, naming G as a dependent.

[54] Lord Stephens JSC delivered the judgement. He said that the case raised important questions as to the interplay between the 1980 Hague Convention on the one hand and asylum law on the other. Particular focus was brought to the relationship between the provisions which protected refugees from refoulement, that is, the expulsion or return of a person to a country where they may be persecuted, and on the other hand the requirement to return a child under the Hague Convention to the country from which the child or the child's parent sought refuge. Lord Stephens recognised that the time taken to determine an asylum application could frustrate the return of a child under the 1980 Hague Convention and there was also a substantial

risk of sham or tactical asylum claims being made by the taking parent with the intention of achieving that objective.

[55] The Supreme Court made a number of determinations which are directly relevant to these proceedings.

[56] The first is that where a child is named as a dependent on an asylum application, it can be understood to be an application by the child. At paragraph 121 Lord Stephens said:

> "Accordingly, I consider that a child named as a dependent on the parent's asylum application and who has not made a separate request for international protection generally can and should be understood to be seeking such protection and therefore treated as an applicant."

[57] Second, the court considered whether a dependent who objectively can be understood to have made a request for asylum is entitled to protection from refoulement pending the determination of the request so that a return order cannot be implemented. In considering this aspect the Supreme Court considered the terms of the Procedures Directive. Article 7 of the Procedures Directive obliges member states to permit those seeking asylum to remain in the relevant state until the determining authority has made a decision.

[58] However, any factual findings made in the Hague convention proceedings are not made by a determining authority and do not bring to an end the protection provided by Article 7. At paragraph 128 the court said:

> "Rather, if a return order were made and implemented before the Secretary of State has discharged her obligation to determine whether the child is a refugee this would effectively pre-empt her decision. Furthermore, the implementation of a return order made in 1980 Hague convention proceedings would deny applicants the right to have their claims for asylum determined by the determining authority."

At paragraph 129:

> "… I consider that the obligation in Article 7 binds the State in its entirety so as to preclude any emanation of the State (including the High Court) from implementing a return order so as to require an applicant to leave the United Kingdom whilst their asylum claim is being considered by the 'determining authority.'"

[59] The court went on to say that an asylum applicant has protection pending the determination of an application and that until the request for international protection is determined by the Secretary of State, a return order in the 1980 Hague convention proceedings cannot be implemented (paragraph 134).

[60] The Supreme Court then looked at what steps the High Court could take and, in particular, whether a pending asylum application is a bar to the determination of the Hague Convention application, the making of a return order, or the implementation of the return order. Lord Stephens referred to the findings of the Court of Appeal in the case before him. Having quoted paragraph 147 of that judgement, he then said at paragraph 157ff:

> "For my part I consider that the court can consider the merits of the 1980 Hague convention proceedings even if the factual issues overlap with the asylum claims, so long as the prohibition on determining the claim for international protection is not infringed.
>
> 158. Furthermore, if as a result of the decision of the Secretary of State in relation to the asylum process a reconsideration of the 1980 Hague Convention proceedings is required, then the court has power in England and Wales under FPR r 12.52A or under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention: see In re B (A child) [2021] 1 WLR 517).
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> 159. I consider that the Court of Appeal's clearly reasoned conclusion that "any bar applies only to implementation" cannot be faulted and was plainly right."

[61] I was also referred to a subsequent Court of Appeal decision. In *Re R (A child) (Asylum and 1980 Hague Convention Application)* [2022] EWCA Civ 188 the factual background was different. The parents and the child were Ukrainian nationals. There had been a history of proceedings relating to the child including Hague convention proceedings. A return order was made in 2019 and the mother and child returned to Ukraine. However, the mother and child left Ukraine again in October 2019 and came back to England, leading to the father's second application under the Hague Convention. A further return order was made in August 2020. The mother had contested that application. She further applied to set aside the return order on various grounds, and these were also dismissed. At the end of October 2020, the mother further applied for a stay on the basis that an application for asylum had by then been made. Asylum was granted in May 2021. After considering the matter the High Court set aside the return orders and dismissed the father's application under the provisions of the Hague Convention. The father appealed.

[62] At the outset Moylan LJ acknowledged that there was a small but increasing number of cases involving the Hague Convention and a child who was the subject of an application for asylum.

At paragraph 69 the court said:

> "The Supreme Court in *G v G* rejected at [157], the mother's contention that the High Court should neither determine the 1980 convention proceedings nor make a return order when there was a pending asylum claim by either the taking parent or the child. Lord Stephens agreed, at [159], with the Court of Appeal's conclusion that "any bar applies only to implementation." In addition, he said at [158]:
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> "Furthermore, if as a result of the decision of the Secretary of State in relation to the asylum process a reconsideration of the 1980 Hague convention proceedings is required, then the court has power in England and Wales under FPR r 12.52A or under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention: see *In Re B (A child)* [2021] 1 WLR 517)."
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> This last paragraph was a general observation as to the courts power to set aside any order following the determination of a linked asylum claim. It is clear, for the reasons set out below, that it was not envisaged that the grant of asylum would, of itself, prevent a return order being made in the 1980 Convention proceedings."

[63] The Court of Appeal considered the context of the issue it was considering. At paragraph 100 it stated:

> "This case and *G v G* are addressing the very small cohort of asylum cases when the same family are involved in an asylum claim and an application under the 1980 Convention. Nothing said in either has any wider application. Further, the differences in the respective procedures as referred to in *G v G* and *Re A (A child)*, provides good reasons for the court to ensure that an asylum claim and even the grant of asylum do not subvert the fair and proper determination of an application under the 1980 Convention."

[64] The Court of Appeal determined that the High Court had been wrong to dismiss the father's application simply because of the grant of asylum and without any further consideration of its merits. The application was remitted.

[65] The plaintiff argues that these proceedings should be distinguished from *G v G*. Here the defendant, and by extension AB, are claiming asylum from Eritrea. The Swiss authorities have made it clear that neither the defendant nor AB are at risk of deportation and will be entitled to a range of benefits in that jurisdiction. A return order to Switzerland would not breach the principle of non-refoulement. The plaintiff argues that *G v G* was based on the breaching of this principle.

[66] I have carefully considered the argument made by the plaintiff. It is clear that a primary concern of the Supreme Court was the prospect of a child being returned under the Hague Convention proceedings to a country from which that child was also seeking refuge under asylum proceedings. It is also clear that both Supreme Court and the Court of Appeal in the later proceedings acknowledged not just the small number of cases in which this problem arises but also the risk of inappropriate or tactical asylum applications. The defendant in this case has latterly argued that her asylum application seeks to both avoid return to Eritrea due to human rights abuses but also to avoid return to Switzerland due to the risk of harm emanating from the serious level of domestic violence she alleges.

[67] I do not consider that it is the function of this court to determine any aspect of the mother's asylum application or how she may wish to present that to the Secretary of State. I have made findings of fact based on the evidence before this court. I do not consider that the Supreme Court decision can be read as narrowly as suggested by the plaintiff. Paragraphs 128 and 129 referred to above are clear statements that it is not just the risk of refoulement which prevents the implementation of a return order. In particular a return order if implemented could effectively pre-empt a determination for asylum. I am satisfied this is not a case to be distinguished from the principles set out in *G v G.*

[68] However, I am satisfied that this court should not simply stay proceedings without making any determination. In *G v G* at paragraph 160 Lord Stephens JSC said:

> "The Court of Appeal concluded at paragraph 154 that as a general proposition 'the High Court should be slow to stay an application prior to any determination.' As the Court of Appeal acknowledged, that is a general proposition, so that there may be cases where it is appropriate for the court to exercise its discretion to stay the 1980 Hague Convention proceedings pending determination by the Secretary of State of an asylum claim. However, the general proposition is entirely consistent with the aims and objectives of the 1980 Hague Convention including the obligations of expedition and priority. Also, it has the benefit of making available to the Secretary of State a recent High Court decision on the evidence

available to it, and tested to an extent by an adversarial process, of an application for summary return."

Conclusion

[69] The burden of proof in relation to showing an exception under Article 13 of the Hague Convention rests upon the person opposing the child's return. In this case consent, acquiescence and grave risk are argued. I am satisfied that consent or acquiescence exceptions have not been proven by the defendant. I am satisfied that the defendant has not met the standard required, on the balance of probabilities, to show grave risk. In any event, I am satisfied that appropriate protections are available in Switzerland to deal with any issues which may arise. I consider that the undertakings being provided by the plaintiff are comprehensive and appropriate and I do not consider this is a case where I should exercise my residual discretion to refuse a return order.

[70] I therefore make the declaration that the removal of AB to Northern Ireland was wrongful and in breach of the rights of custody of the plaintiff pursuant to Article 3 of the Hague Convention.

[71] I declare that the courts in Northern Ireland do not have jurisdiction in matters of parental responsibilities regarding AB.

[72] I make an order that AB be returned to the plaintiff in Switzerland but that the return order shall not be implemented until the conclusion of the asylum proceedings currently being considered by the Secretary of State in relation to AB.

[73] A copy of this judgment should be provided to the Secretary of State.