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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN

A FATHER

PLAINTIFF

-and-

A MOTHER

DEFENDANT

In the matter of a Hague Convention return order in respect of two children

Ms A O'Grady QC with Ms B-L Herdman BL (instructed by John J Rice & Co Solicitors)
for the Mother

Mr H Toner QC with Ms V Ross BL (instructed by Nixon & Co Solicitors) for the Father
Ms S O'Flaherty BL (instructed by the Official Solicitor) for the Children

McFARLAND J

[This is an edited transcript of an ex tempore judgment. It has been anonymised to protect the identity of the children.]

Introduction

[1] This is an application to set aside a return order which I made at the end of May in respect of two children. I heard the submissions on 30 May 2022 and gave my judgment on 31 May 2022, granting a return order under the Hague Convention 1980 ("the Hague Convention") with a stay of two weeks. It had been agreed that the children were both habitually resident in France. I considered two potential Hague Convention defences – the grave risk defence under Article 13(b) and the children's objection defence under Article 13(2). I rejected both defences and in the circumstances I made the order on 31 May 2022. On 8 June 2022, in light of some new evidence that had been provided by the mother, I extended the stay in the

operation of the order to 17 June 2022. I reviewed the matter again on 15 June 2022 and fixed 17 June 2022 to hear submissions. I heard the submissions, reserved judgment over the weekend, and further extended the stay to 20 June 2022. This is now my judgment.

Power to set aside a return order

[2] The jurisdiction to set aside a return order is extremely limited. In the case of *Re F* [2016] EWCA Civ 546 Lady Justice Black expressed a view that in certain circumstances it was desirable in the light of new evidence that the High Court can review cases and decisions rather than go down the appellate route with all the delay and inconvenience that that causes. In *Re W* [2018] EWCA Civ 1904 Lord Justice Moylan gave a judgment which confirmed that the High Court does have inherent powers to review and set aside Hague Convention return orders. In England that led to the amendment of the Family Proceedings Rules. In Northern Ireland the rules were not amended. However, in my view, the English Rules merely codify the inherent power that Lord Justice Moylan referred to and placed certain restrictions on the exercise of the power. I am satisfied that the decision in *Re W* and a later decision after the amendments to the Family Proceedings Rules in *Re B* [2020] EWCA Civ 1057, again delivered by Lord Justice Moylan, set out the approach as it should apply in Northern Ireland. The key factor is whether there has been a fundamental change in the circumstances which sufficiently undermines the basis of the existing return order.

[3] In *Re B* at [89] Lord Justice Moylan set out a recommended structural approach to the matter. Firstly, the court should consider whether to permit any reconsideration. Secondly, if it reconsiders, then the extent of any further evidence. Thirdly, whether to set aside the order. Fourthly, if the court sets aside the order, then it should determine the substantive application in light of all the evidence. At [90] of the judgment Lord Justice Moylan recognised that although there were four stages they could be dealt with in one or two hearings rather than over four separate hearings. He also set out at [91] that there is a high threshold in dealing with these cases and that the High Court should prevent attempts to essentially re-argue the case. The rationale of the Hague Convention is to facilitate rapid decision-making to return children to the country of their habitual residence except in very limited circumstances.

New evidence since the making of the return order

[4] The mother has submitted the following new evidence. To put this all into context the return order was made on Tuesday 31 May 2022 with the initial stay to Tuesday 14 June 2022. The first piece of evidence was that on Thursday 2 June 2022 (that is two days after the return order) the father made numerous telephone calls to a couple who live in Northern Ireland, MM and her husband PM. They are acquaintances of both the mother and the father and it would appear MM is a confidant of the mother and is closely linked to her. She collects the children from

school and assists with other similar arrangements. At 9.00 pm on that day four calls were made to PM, which he declined to answer. At 9:25 pm a phone call was made to MM's telephone and a voicemail message was left. At 9:32 pm a second voicemail message was left on MM's telephone. I have received the transcripts of those voicemail messages and I have also listened to the recordings of the messages. I would consider both as extremely abusive and profane. In the first voicemail message he described MM as a "psychopath", he made threats to her and to a man called C, who I believe is MM's brother, to stay away from the boy. The message included:

"Watch, wait and see."

In the case of C:

"For his own fucking good."

The second voicemail message to MM contained a more direct threat:

"I'm gonna come and rip your fucking life apart."

He then continued:

"You crossed the line, you brought my kids into it and I'm coming, I'm coming, I'm gonna rip [the mother] that's what I'm going to do, that's my premier objective."

He then continued:

"I will do that once, once I have done that I'm coming to rip you apart as well."

He concluded:

"I'm one mother fucker and I'll never stop and I'm relentless."

[5] I consider the tone, and when I say tone, I am referring both to content and the method by which it was delivered, to be clearly threatening. He certainly appeared to be intoxicated and I note this would have been approximately 10:30pm French time. I do not categorise these as the ramblings of a harmless drunk that could be safely ignored with him being left to sleep it all off. I understand these messages have been referred both to the Police Service of Northern Ireland and to the Gendarmerie where the father currently resides.

[6] The second piece of evidence is a further text message that was sent the next day at 15:40 UK time to PM. This was more conciliatory in content, it spoke of "a lot

of trapped emotions”, however, it did not withdraw the threats that were made both to MM and to the mother. He did state that he would not contact the Ms again.

[7] The third piece of evidence is a series of text or WhatsApp messages. It was hard to identify who the recipients were and the relevant dates but clearly they were all after 31 May 2022. The first group of messages was to a person called V. I believe that V is a female. The time was 19:17 and as these were all relating to French mobile telephones I am assuming that is French time. The messages were abusive towards V’s parents, they describe the mother as a “narcissistic psychopathic freak” and continue “I wouldn’t even lower myself to spit on you cunt” and “I’m a winner, that’s the difference” and “the world is my oyster and I plan on exploiting it all” and, finally, “I rule the roost around here and rightly fucking so, I’m the big dog, it’s me who runs the show in [French town], that’s a fact sweet cheeks. You picked the wrong fight.”

[8] The second group of messages relates to what appears to be a WhatsApp group which I believe to be called ‘the Chaud Show’, the members include somebody called CC and somebody called SF. These were sent on a Friday so I am presuming this is either 3 June 2022 or 10 June 2022. These messages were largely meaningless drivel (and I use that as a non-legal expression) and of little relevance to the issue that I am dealing with.

[9] The third group of messages was from a HC. I believe these are messages that were sent by the father to a friend or associate of HC’s, someone called TE, which TE had then forwarded on to HC who had forwarded them on to the mother. There was a message sent to TE on Wednesday 8 June 2022 at 08:03am in which the father stated that he was “absolutely relentless” and, again, “I love being right.”

[10] The fourth piece of evidence was a letter from a medical health practitioner of 6 June 2022. It sets out a consultation with the daughter who is aged 13 years and 11 months. It describes her low mood, thoughts of self-harm although there were no plans to act on any suicidal ideation but that the daughter was extremely worried about the return to France.

[11] The fifth piece of evidence was an e-mail from Women’s Aid concerning the mother which was sent on 16 June 2022. It described ongoing work with the mother. It also said that additional support was being provided for her after the recent threat and described the mother as being “anxious, fearful and concerned about her emotional and physical well-being.”

[12] The sixth piece of evidence is a GP’s report dated 16 June 2022 and it refers to the mother. It described that the mother had been prescribed an anti-depressant drug Sertraline, initially 50mg in March but this had now been increased to a dosage of 150mg in June. (Although the doctor does not give any guidance as to appropriate dosages I am familiar with this drug through my role as a judge both in the family and criminal courts. I take judicial notice of the fact that this is an anti-

depressant drug and that the dosage of 150mg is close to the maximum which is considered to be in the region of 200mg.) The GP's report continues that he had a consultation on 6 June 2022. He described things as getting worse, the mother as being fearful of a return to France and that she was feeling overwhelmed and he did increase the level of medication as a result. There was a further consultation on 16 June and the letter states:

"I feel her mental health is likely to deteriorate should [the mother] return to France."

[13] The seventh piece of evidence is a letter of 15 June 2022 from a priest FD. This would appear to be addressed to the Irish Government or to an Embassy or other consular institution in France because the letter mainly deals with consular advice and support for the mother should she return to France. As I understand it FD is a friend of the mother's father and a trustee of a charitable foundation which her father had set up. It adds little, in my view, to the reported evidence which is already before the court. However, I do accept FD's observations given, of course, the fact that as a priest he would have been engaged in a pastoral role which he would undertake as part of his calling as a priest and certainly the letter displays a concern on the part of FD for the well-being of the mother.

[14] The final piece of evidence is a statement which took the form of a draft affidavit from the mother's mother, the maternal grandmother of the children. In that statement the grandmother says that she facilitated remote video contact between the father and the son on 16 June 2022 and that appeared to proceed normally. Then on 17 June 2022, which I believe is significant because that was the day of the hearing. This phone call was probably just after the court hearing when the father had then telephoned his mother-in-law. She describes the telephone call as a barrage of verbal abuse, he called her deluded, he called her a "fucking psycho" and described her as being "fucking evil" and he described the mother (that is the mother of the children) as a "fucking lying bitch." He also referred to a friend of the mother's in France, a lady called C as a "deluded fuck." Although the draft affidavit was furnished after the hearing on the 17 June 2022, no point was taken by Mr Toner on behalf of the father as to whether I should be permitted to consider its content.

Consideration

[15] That is the evidence that I have received, all of which relates to incidents, statements of the father, messages and telephone calls after I made the ruling on 31 May 2022. The question I have to ask myself is has there been a fundamental change in the circumstances to sufficiently undermine the basis of that return order decision. The focus is, of course, on the Article 13(b) defence that is whether the mother can show that there is a grave risk that return would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation.

[16] The additional evidence that I have received in respect of the female child and her background circumstances, in my view, does not indicate a fundamental change of circumstances. I consider that her condition remains largely as had been described to me prior to the making of the ruling on 31 May 2022. The mother asserts that there has been a fundamental change relating to the father's conduct and his attacks and threats to the mother and others. The court recognises that this can indirectly impact on the children potentially placing them in an intolerable situation as their main carer is going to be adversely impacted and I refer specifically to the judgment of Lord Wilson in *Re S* [2012] UKSC 10. I dealt with this in my ruling on 31 May 2022. I referred to the lack of specific evidence about her vulnerability and also lack of evidence about the father's behaviour. The evidence I noted was limited, yes there had been inappropriate text messages and extremely inappropriate behaviour by the father on an aeroplane at Dublin Airport which required intervention by An Garda Siochana. At that stage there had been no direct threat to the mother's well-being and no history of violence towards her. I do, however, consider that there is a change of circumstances given the evidence since 31 May 2022. The question is whether this new evidence is so fundamental as to undermine the basis of the return order.

[17] The evidence, in my view, also shows a deterioration in the mother's mental health since 31 May 2022. I accept that the GP is to some extent relying on a lot of self-reporting from the mother but there is some objective evidence. I also accept that the GP is not a mental health specialist, however, the threefold increase in the anti-depressant medication is notable as is the GP's opinion that there is likely to be a further deterioration in the mother's mental health. Of course the court looks at the actual mental health not whether the underlying causes are based on reasonable or unreasonable anxieties. I also consider that the threats that the father is now making are significant. These have to be seen in full context. On 31 May 2022 the father knew that he had succeeded, in other words, he had sought from this court a return order and this court had granted him a return order. In due course the children were going to be brought back to France. That is the context. With that in mind the father then sent the text to V "I'm a winner, the world is my oyster, I plan on exploiting it all." Clearly he knew that the mother was going to be forced against her will to return to France with the children and probably to the [French] region. Again, he said to V "I rule the roost down here, I'm the big dog." In the message to TE he said "I am absolutely relentless and I love being right." All the comments made by the father were made by a man who knew the court had already ordered the children to be returned and it appears that he was emboldened by his perceived victory.

[18] We then turn to the actual text messages and telephone calls. It is important to realise that the father has not denied making these calls. He has offered no retraction, he has offered no excuse and he has offered no remorse. There has been a direct threat to the well-being of the mother when he said "I'm gonna rip [the mother], that is my premier object." This is an escalation, in my view, from the previous messages. The abuse and attack has not only escalated as such but it has

broadened now to include the support network that would be available to the mother, in other words, people who she may have thought she could rely on. I am talking about her family in Northern Ireland, obviously the attack on her mother, the attack on her friends in Northern Ireland, I refer specifically to MM and her husband and also to her friendship group within France. I refer to the other individuals in the Whatsapp group and C. In my view, this was a deliberate attempt by the father to isolate the mother and move her away from her support network by threatening those individuals. This escalation and the widening of threats when he knew there was a deterioration in the mother's mental health, in my view, does not only lead me to the conclusion that there was a change of circumstances but it does fundamentally undermine the basis on which I made the order in the first place.

[19] In the circumstances, I consider it is appropriate for me to look at all the evidence again and re-determine the issue. The change in circumstances as I have indicated relates to the indirect impact on the children through the deterioration in the mother's mental health. The French courts, of course, will primarily have the duty to deal with the welfare of the children and should the mother have to return to France any personal protection issues that need to be put in place. However, I do take into account four factors. The first is that the condition of the mother's mental health should be described as extremely fragile. Secondly, should she return to France she will be totally isolated within the French jurisdiction with the father attempting to distance her friendship group from her. Thirdly, these are persistent and virulent attacks by the father on her and they are likely, in my view, to continue and escalate as he has offered no apology, retraction or remorse. Fourthly, as I have said the attacks are not only on the mother but on her safety network and I believe that they will continue as well.

[20] In my earlier ruling on 31 May 2022 I referred to a section of Lord Wilson's judgment in *Re S* at [34] and it is perhaps helpful if I set out the full paragraph:

"In light of these passages we must make clear the effect of what this court said in *Re E*. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that on return the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will objectively be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned."

[21] In the judgment Lord Wilson also analysed the case of *Re E* [2011] UKSC 27 (mentioned at [34] in *Re S*). He said, referring to *Re E*:

“The court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless, were of such intensity as to be likely in the event of a return, to destabilise her parenting of the child to the point to which the child’s situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk.”

[22] In my view, the case now does have sufficient evidence to find that there is actual and objective risk, given the content of the father’s attacks on the mother, her friendship group, support network and also the mother’s fragile state of her mental health.

[23] Taking everything into account I consider that the return of the children to France would create such a deterioration in the mother’s mental health that it would place the children in an intolerable situation. This applies to both children. Each child has his or her own vulnerabilities, the boy in respect of incidents that took place in France, but I am particularly concerned for the girl, because she is vulnerable and without the support and care of a fully functioning mother, in my view, her condition will certainly not improve and is very likely to deteriorate. She clearly will be placed in an intolerable situation. But it does not only apply to her alone, it applies to each of the children.

Conclusion

[24] In all the circumstances and for the reasons that I have set out I propose to set aside my order of 31 May 2022 and I decline in the circumstances to make a return order.