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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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Between:

A GUARDIAN

Plaintiff/Appellant

-v-

A FATHER

Defendant/Respondent

IN THE MATTER OF DX (A FEMALE CHILD AGED 11½ YEARS)

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Ms M-A Dinsmore QC with Ms M Mullally BL (instructed by PJ Flanagan & Co Solicitors) for a Guardian/Appellant
Mr B Devlin BL (instructed by Quigley MacManus as agents for McGovern Associates Solicitors) for the Defendant/Respondent

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McFARLAND J

Introduction

[1] This judgment has been anonymised by the use of a randomly selected cipher DX for the name of the child to protect her identity. They are not her initials. Nothing can be published that will identify the child.

[2] The Guardian made an ex parte application on 26 November 2021 for a number of orders, the principle one being a wardship order in respect of DX. Master Wells after conducting an oral hearing on 30 November 2021, declined jurisdiction holding that the courts of the Republic of Ireland ("RofI") had jurisdiction in respect of same, and that the Guardian had accepted jurisdiction.

[3] The Guardian appealed the decision of Master Wells on the 8 December 2021 and the matter came on for hearing on 13 January 2022, with the Father appearing through his counsel.

Background

[4] The court has relied upon a narrative of events which has been provided by the Guardian. Some events and orders have been corroborated by official documentation. The Father asserts that some of the information provided by the Guardian is inaccurate.

[5] DX was born on 31 May 2010 in RofI and her birth certificate records the name of the mother who is a Hungarian national. The certificate records the Father as the Father of the child. The Father is originally from Pakistan. It is the court's understanding that children born in RofI after 31 December 2004 no longer acquire Irish citizenship as of right. DX is a Hungarian national, presumably by virtue of her mother's nationality, and the court has been provided with a copy of the child's Hungarian passport. The Guardian has stated that she believes that the Father has obtained a Pakistani passport for DX although this is denied by him. It can be assumed that DX has a dual Hungarian/Pakistani nationality. The Guardian is an Irish citizen.

[6] The mother of DX abandoned her as an infant and the Guardian became her main carer. This appears to have resulted from an informal arrangement through a mother and toddler playgroup which the Guardian attended with her child. The Guardian was residing in RofI during this period. On 5 December 2013 Leitrim Circuit Court made an order appointing the Guardian and the Father as joint guardians (under the provisions of the Guardianship of Infant Acts 1964 to 1997) and made certain provisions as to residence and contact. By a further order of 8 July 2014 Leitrim Circuit Court ordered that the Guardian be appointed *in loco parentis* to DX. A final order of the same court of 8 March 2019 made a consent agreement between the Guardian and the Father a rule of court. That agreement dealt with various issues including residence and contact, including a shared residence agreement from September 2019 with DX residing with the Father for nine consecutive nights, followed by DX residing with the Guardian for five consecutive nights. It also included an acknowledgment by both parties that the habitual residence of DX was RofI. It is understood that this order was complied with in general terms, although the nine nights/five nights regime was adjusted to follow a regime broadly along the lines of weekdays with the Father and weekends with the Guardian.

[7] In December 2019 the Guardian changed her residence to Northern Ireland ("NI"). DX continued to reside with both the Father and the Guardian in accordance with the broad terms of the agreement. She continued to attend school in RofI.

[8] In early 2020 the Father indicated a wish to return to Pakistan with DX, for a

stated reason of seeing his mother, although he misled the Guardian into believing that he had purchased return air flights. The Father eventually travelled in early 2021. The Guardian drove the Father and DX to Dublin airport to catch the flight on 16 January 2021.

[9] The Father did not return with DX to RofI on the stated date for return, and the Guardian contacted the police and other authorities. Eventually both returned to RofI on 23 October 2021 and the Father was arrested for child abduction on his arrival in Dublin. He is currently on bail awaiting trial. The Guardian reports that the Father voluntarily consented to the police placing DX in her care. It is reported that the Father disputes such a consent was given, but it is also reported that the police have indicated to the Guardian that it was, and if it had not been given, police powers to remove DX to a place of safety would have been invoked.

[10] Since her return on 23 October 2021, DX has lived with the Guardian in NI, she attends school in this jurisdiction and is also registered with a general medical practitioner.

[11] The Guardian has instructed solicitors in RofI with a view to seeking a variation of the existing orders to permit DX's relocation to NI. It is also reported that preliminary contact with the Father's solicitors in RofI indicate that the Father has instructed them to make an application under the Hague Convention 1980 seeking a return of DX to RofI. In this judgment I will be referring to two Hague Conventions. The one which many refer to as 'the Hague Convention' is the 1980 Convention. In this judgment I will describe it as "the Hague Convention (Child Abduction)." The other Convention of 1996 relates to jurisdiction and I will refer to it as "the Hague Convention (Jurisdiction)".

The application, first instance decision and appeal

[12] The Guardian made the application on an ex parte basis seeking various orders, including wardship, appointment of her as Guardian to DX, confirmation of residence with her (and related orders), and a prohibited steps order prohibiting DX being removed from Northern Ireland. The basis of the application was a concern on the part of the Guardian that pending resolution of outstanding matters DX would be abducted and removed to Pakistan. The Guardian has referred to the Father obtaining a Pakistani passport for DX and the Father's marriage to a woman in Pakistan, with a reference to him setting up a home for DX in Pakistan.

[13] As stated at [2] Master Wells declined jurisdiction as RofI retained jurisdiction given the habitual residence of DX in that country, and the existing court orders.

[14] There are three grounds of appeal. Firstly, Master Wells erred in law in determining that DX was habitually resident in RofI and not NI. Secondly, Master Wells failed to place weight on the applicability of the Hague Convention (Jurisdiction) as the current international agreement dealing with recognition and

enforcement of cross-border orders. The third ground, stated to be that Master Wells failed to give weight to periods of time when DX resided in NI and between December 2019 and January 2021, and since October 2021. This is not really an additional ground as it is inextricably linked to the first ground.

Wardship jurisdiction

[15] In *A Father v A Mother* [2018] NIFam 10, I dealt with the wardship jurisdiction in the context of the Children (NI) Order 1995 ("the 1995 Order"). At [10] I set out the test and questions to be considered:

> *"First, can the welfare of the children be best secured under the provisions of the [1995 Order]? And secondly, are the children in such a state of jeopardy that the immediate supervisory role of the court is required?"*

Habitual residence and jurisdiction

[16] Following the cessation of the United Kingdom's membership of the European Union, the withdrawal arrangements provided that issues relating to jurisdiction, recognition and enforcement of family orders would be governed by Council Regulation 2201/203 ("Brussels IIA") in relation to proceedings commenced on or before 30 December 2020. As the current proceedings were issued in November 2021 the appropriate international convention is now the Hague Convention (Jurisdiction).

[17] The Family Law Act ("the 1986 Act") is not available to the Guardian. It defines a Part I Order at section 1(1)(e) as:

> *"an order made by the High Court in Northern Ireland in the exercise of its inherent jurisdiction with respect to children –*
>
> *(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but*
>
> *(ii) excluding an order varying or discharging such an order."*

Mrs Dinsmore QC conceded that the Guardian was not pressing her case under the 1986 Act. This was an appropriate concession give the decision of the Supreme Court in *A v A* [2013] UKSC 60 which held that an application for an order in wardship under the court's inherent jurisdiction fell outside the provisions of section 1. Had the 1986 Act applied it would have afforded the Guardian a possible and more obvious jurisdictional route by virtue of the provisions of section 19(3) which allows either a Hague Convention (Jurisdiction) route through habitual residence or a route relying on mere presence and necessity – "*the child concerned is present in*

Northern Ireland on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection." (Section 19(3)(b)(ii))

[18] The main focus of the appeal has been on the issue of DX's habitual residence. The Hague Convention (Jurisdiction) recites that its purpose is "*to improve the protection of children in international situations*" and has a stated objective of the determination of "*the State whose authorities have jurisdiction to take measures directed to the protection of the person and property of the child.*"

[19] Article 5 of the Hague Convention (Jurisdiction) provides as follows

> "*(1) The judicial or 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.*
>
> *(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."*

Article 7 provides that in the event of a wrongful removal or retention of a child, the State in which a child was habitually resident immediately before the removal or retention keeps its jurisdiction until a new habitual residence is acquired. Article 8 allows for a State which has jurisdiction by virtue of a child's habitual residence if it considers that another State is better placed to assess the child's best interests, to invite that State to assume jurisdiction. Emergency and temporary measures can be taken pending a State which has jurisdiction taking the measures required in the situation (Article 11).

[20] The correct approach to this application is as follows:

a) Determine the habitual residence of DX (at the time of the Guardian's application on 26 November 2021);

b) If the habitual residence is in NI, then determine whether the court in RofI is better placed to assess the best interests of DX, and if so request it to assume jurisdiction;

c) If a court in RofI is not better placed, then consider whether this court can and should exercise its inherent jurisdiction by first considering whether the welfare of DX can be best secured under the provisions of the 1995 Order and if not, then is the child in such a state of jeopardy that the immediate supervisory role of the court is required;

d) If the habitual residence is in RofI (or elsewhere) this court should decline jurisdiction, but before doing so consider if there is a state of urgency that

requires the implementation of necessary measures on a temporary basis.

[21] The concept of habitual residence is well established as a result of the courts exercising jurisdiction under the 1996 Act, Brussels IIA and both of the Hague Conventions. There has not been a different approach to the definition of 'habitual residence' in the different instruments. Lady Hale in *A v A* at [35] referred to the CJEU decision in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 and the recognition that the Hague Conventions (Jurisdiction) and (Child Abduction) were part of the legislative history of Brussels IIA, Thus, in the words of Lady Hale – *"it would appear that the purpose of both the 1986 Act and [Brussels IIA] was to adopt a concept which would apply across the board"* (at [35]).

[22] The existing approach is well-established and understood. It is essentially a fact finding exercise. Keegan J in *K v Y* [2020] NIFam 16 at [32] summarised the approach as follows:

> *"The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. Parental intention is relevant but not determinative. It is the stability of the child's residence as opposed to its permanence. There must be some degree of integration the acquisition of which will depend on the facts of each case. The child is at the centre of the exercise as it is the child's integration which is under consideration."*

The approach must also be child-focussed, as emphasised by Hayden J in *Re B* [2016] EWHC 2174 at [18]:

> *"[T]he child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties."*

[23] Cobb J in *Re L* [2016] EWHC 1844 established a list of relevant factors and this list was built upon later that year by Hayden J in *Re B*. Both relied on the jurisprudence of the UKSC and the CJEU, and sought to distil and highlight key factors to be considered. These factors have received approval from Keegan J in *K v Y* and from Moylan LJ in *Re M* [2020] EWCA Civ 1105. Borrowing from their efforts I consider the following factors are applicable in this case:

a) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment;
b) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses;
c) It is possible for a parent or guardian unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent;
d) A child will usually but not necessarily have the same habitual residence as the parent(s) or guardian(s) who care for him or her. The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.
e) Parental or a guardian's intention is relevant to the assessment, but not determinative;
f) It will be highly unusual for a child to have no habitual residence. Usually a child will lose a pre-existing habitual residence at the same time as gaining a new one;
g) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there;
h) The relevant question is whether a child has achieved some degree *of* integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident;
i) The requisite degree of integration can, in certain circumstances, develop quite quickly;
j) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents or guardians being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.

[24] On the issue of a child losing a pre-existing habitual residence and then gaining a new one (as is asserted by the Guardian in this case) Lord Wilson in *Re B* [2014] UKSC 4 at [45] gave the analogy of a see-saw:

> *"Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."*

Moylan LJ in *Re M* at [63] indicated that judges when applying this concept should concentrate on the situation at the relevant time in the new State, rather than consider the degree of connection (or lack of connection) with the old State. The issue was whether a habitual residence had been maintained or gained, rather than one having been lost.

Consideration

[25] It is absolutely clear that DX was habitually resident in RofI in January 2021 at the time of her departure to Pakistan. Although the Guardian has alluded in her Notice of Appeal to periods of residence in NI between November 2019 and January 2021, there is no evidence to suggest that these periods were of such a nature that would suggest a stable residence in NI. Both the Father and the Guardian accepted habitual residence was in RofI, they asked the court that their agreement be made a rule of court, and weekend visits to the Guardian could in no way support the Guardian's contention that somehow habitual residence shifted during this period.

[26] There is no evidence to suggest that DX became habitually resident in Pakistan, and the Father does not assert this to be the case. There is prima facie evidence that she was either unlawfully abducted to, or unlawfully retained in, Pakistan. Under the provisions of Article 7(1) of the Hague Convention (Jurisdiction), DX retains her habitual residence in RofI until such times as she has acquired habitual residence in another State.

[27] The Guardian has asserted that she had been given permission from the authorities in the RofI, through the actions of the police at Dublin airport, to remove DX from RofI. I do not accept this to be the case. From what has been described, all the police did on the Father's return from Pakistan was arrest him. This necessitated the police taking steps to protect DX, being a child in his immediate care, and they did this by passing her into the care of the Guardian, who had been appointed as a guardian by the courts of the RofI. In any event mere permission to remove a child from RofI would not in itself somehow sanction a change of habitual residence.

[28] The evidence presented by the Guardian concerning DX's residence in NI is sparse. DX had lived here for 34 days at the time of the application. She commenced school on 2 November 2021 (with a very high attendance rate) and she was registered with a medical practitioner. No evidence is presented about any other integration into society in NI, apart from the fact that she has lived with the Guardian.

[29] There remains a lack of clarity about her right to reside in NI. DX is an EU/Pakistani citizen. Her lawfully appointed guardian (based on DX's habitual residence in RofI) has a right to reside in NI. DX does not have such a right to do so on a permanent basis and must rely on the guardianship order from the courts of the RofI.

[30] The Guardian, as guardian of the child, still recognises the jurisdiction of the RofI courts both to maintain her right to care for the child, and to make decisions concerning DX's future. This is evidenced by the Guardian's recent application to the court of the RofI.

[31] The reality is that DX has no connection to NI, either through her shared ethnicity through birth or through her maternal or paternal family connections. Her only tie is that she has been brought to NI by her guardian having spent the whole of her life habitually resident in RofI, the country of her birth and where she had put down her roots to the extent of full integration.

[32] In the circumstances, the Master was entirely correct in determining that DX's habitual residence on 26 November 2021 was RofI.

[33] The only remaining issue would be the consideration of Article 11 of the Hague Convention (Jurisdiction). The Master's order does not indicate whether the Master considered this, or whether she was referred to it at the hearing before her.

[34] Article 11 (1) and (2) provides:

> *"In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.*
>
> *The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation."*

[35] The urgency to which the Guardian refers relates to a concern on her part that the Father will abduct DX and remove her to Pakistan. The Guardian has applied to the court in the RofI but her counsel has referred to the speed (or lack of speed) with which the matter is being dealt with. I make no comment on this assertion, although I doubt that a court in the RofI whatever the period of delay before hearing an application, would not take steps in the event of a genuine emergency.

[36] The Guardian's case is based on three factors – the Father's possession of a Pakistani passport in the name of DX (which the Father denies), his marriage to a woman in Pakistan, and a prospect of a forced marriage for DX. Absolutely no evidence has been presented to the court to support this final factor.

[37] The court recognises that there is a risk of abduction, in the sense that there is a possibility that it might occur. The risk is based on the Father's conduct in 2021, however this must be balanced by a number of relevant factors. The first is that this

risk must have been considered by the criminal courts in RofI before they granted him bail, as a risk of flight and a risk for committing offences would have been foremost in its considerations. The second is that any intervention by this court, and to some extent any intervention by a court in RofI, will not eliminate the risk. The Guardian is the lawful guardian of DX, by virtue of an order from a court in the RofI where DX is habitually resident. This order and the Guardian's status is recognised in NI. This would give the relevant authorities (police and border officials) within NI (and other parts of the United Kingdom) to intervene in the event of the Father presenting DX at an embarkation point, notwithstanding his possession of a passport in her name.

Conclusion

[38] Taking everything into account, I consider that the Master was correct to determine that DX was habitually resident in RofI and, further, to decline to take measures of protection.

[39] The appeal is therefore dismissed. There will be no order as to costs between parties, but there will be the usual order providing for the taxation of the costs of any legally assisted parties.

[40] I direct that a copy of this judgment be provided to the presiding judge at Leitrim Circuit Court to facilitate the management of the case within that court.