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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF E

(FAMILY LAW ACT 1986 ENFORCEMENT: FOREIGN ORDERS: HAGUE CONVENTION: RESIDENCE ORDER: VOICE OF THE CHILD)

GILLEN J

[1] This judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other persons identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of the family must be strictly preserved.

APPLICATIONS

[2] The following proceedings are now before the court concerning a child E who is currently 12 years of age:

(i) Wardship proceedings instituted by M, the grandmother of E, (and M2, M's husband) seeking an order that the child be made a Ward of Court. The Master of the Family Division has already made such an order and the application is for the wardship to be renewed.

(ii) An application by C, who is the mother of E, who seeks enforcement pursuant to Section 29 of the Family Law Act 1986 of an order made on 13 January 2005 in the High Court of Justice Family Division Principal Registry in London by the then President of the Family Division, Dame Elizabeth Butler-Sloss. Paragraph 1 of that order, which was the subject of this application, read as follows:

> "In relation to paragraph 1 of the said summons, the grandmother shall make the child (E) available for contact as and when the court in Chile so directs and

> further that she shall return E to the Republic of Chile as and when required to do so by the Chilean Court."

That order was a consent order made after negotiations had occurred in the case. I have seen the summons which preceded that Order dated 31 October 2994, and it is clear that in paragraph 1 of the summons no issue of custody was sought but simply an order of contact.

(iii) An application by C for the recognition and enforcement of orders made in Chile on 2 February 2005 and 25 May 2005 when the Chilean Appeal Court issued a decision upholding a first instance order of the Chilean Court requiring E to be returned to her mother in Chile at the end of her school year namely June 2005.

(iv) An application brought by the Official Solicitor on behalf of the child E whereby the child seeks a residence order that she live with M and M2.

[3] Mr Long QC, who appeared on behalf of M and M2 with Mr Ritchie, indicated that the object of the wardship proceedings had been to create a holding situation until this court was in a position to determine the future of the child.

BACKGROUND

[4] The background facts in this case were largely undisputed. As I will later set out, I heard evidence, inter alia, in this matter from C, M and M2 and combining the common issues with my determination of those matters that were disputed between them, I have concluded that the following is the relevant background.

C is the mother of E and is a Chilean national. M is the maternal grandmother and is also a Chilean national. The father of the child is another Chilean national, CH. CH and C had formed a relationship in 1992, E was born in 1993 and sadly in 1996 the relationship terminated. E's father thereafter had sporadic contact with the child until 1997 when it ceased although some contact was re-established in 2003. In Chile the child had contact with M. However M moved to England in or about 1998 for work reasons and whilst there established a relationship with M2. M was involved in lecturing on human rights and M2 was engaged in international dispute resolution. C is a journalist by occupation. By agreement E travelled to England in October 1998 to spend Christmas with M, C indicating that at that stage it was her intention the child should return on 31 December 1998. It is common case however that whilst E was away, C suffered mental health difficulties of a depressive nature and also renal failure. It is M's case that when she took E back to Chile early in 1999, C's circumstances were very bad. She was attending a psychiatric clinic and felt unable to met E's needs. C concedes

that as a result of her difficulties, she discussed the care of E with her mother and it was agreed that E should live with M. This arrangement was formalised in a court order. I had the benefit of reading this order which, when translated, read as follows (sic):

> "1. Both parties agree that the permanent legal guardianship of the child in question will be in the hands of the applicant, legitimate mother of the respondent and under whose responsibility she has been for the last two months.
>
> 2. The respondent authorises the departure of the minor from the country on all occasions that the guardian requires and for the time that is needed because she lives in London, Great Britain, where the child will travel to live with the family group made up by her grandmother, having affirmed that the father of the minor abandoned his minor once she was born and since then has not been heard from, not knowing his whereabouts.
>
> 3. The applicant accepts the exercise of the legal guardianship and asks the court to approve this agreement."

The grandmother was the applicant and the mother C was the respondent. After the order was made E returned to London with M where she and M2 then created a household for the child to live in. In February 1999 E attended a primary school in London. She had no English when she started school but she was a hardworking student according to M, settled well there and is bi-lingual in English and Spanish although her first language is clearly now English. It is common case that during 1999, probably the summer, C came to London to visit. It was M's case that prior to this telephone calls had been sporadic from C to E. C concedes that although she would have been able to resume care of the child in 1999, by the end of that year she learnt she was going to be made redundant and so she delayed any plans she had for the return of E to Chile. It is common case that E then visited her mother in March 2001 in Chile accompanied by M and M2. C alleges that she tried to discuss E's permanent return at that stage but M would not countenance it until she could see that C had a steady income from employment. I frankly doubt this and I was more impressed by the assertion of M that in fact there were no discussions at that stage about return particularly since C had not found employment at that stage. C states that in May 2001 she found employment. By August 2001 she was financial secure and she approached her mother to discuss the return of the child to Chile. I believe that that did occur and that discussions did ensue between them. I believe that M was

unhappy about C's stability at that stage and her capacity to look after the child and that this precipitated C into issuing proceedings in Chile to have E returned and to discharge the guardianship order. M alleges she was only served with the summons in October 2002. C concedes that there were delays in serving and effecting these proceedings. In any event I am of the view that M had concluded that E was settled in the United Kingdom. I am satisfied that there had not been a great deal of direct contact between E and her mother since 1999 other than what I have outlined above and M felt that the circumstances needed to be fully investigated before she could sanction a return of the child to C. C commenced Hague Convention proceedings in October 2003. It is common case that she did meet with E in England during December 2003/January 2004. It was clear at this stage that relationships between M and C were at an extremely low ebb. M disputed the Hague Convention proceedings on the basis that the child had not been abducted and that she was in England with the full consent of C. It is clear to me that both the proceedings in Chile and in England were the subject of a number of postponements over some months and indeed in the case of Chile over some years.

[5] In the course of the English proceedings, the child was interviewed on 21 January 2004 by a representative from CAFASS, Ms Nicola Bassell. I am satisfied that at that stage, E indicated to the officer from CAFCASS that she had no objections to returning to Chile other than she would miss her grandmother. The officer recorded:

> "In terms of maturity, I would say that she has a level of maturity beyond her years. This was demonstrated not only by her ability to engage easily in conversation for a significant length of time, but the thought and balance with which she gave her answers to my questions. She is able to look at situations from the perspective of others and, for example, think about how her grandmother might feel. She speculated as to the reasons why the two most important people in her life, her mother and her grandmother, have difficulties with each other."

Further in the course of that report the officer recorded:

> "As we were finishing, E told me that she does not want to make her grandmother sad, so I put it to her that it sounded as if she wants to be with her mother. She nodded in agreement. She told me that what she wants most of all is for this to be over."

[6] In December 2003/January 2004, C visited E in London. C refused to stay with M or M2. It is common case that E enjoyed her mother's visit.

[7] Proceedings were of course still ongoing in Chile and E also spent the summer of 2004 in Chile with C ie between July and August 2004. During her time in Chile E spoke to the Chilean judge in the Fourth Juvenile Court in San Diego. This was dated 20 August 2004 and again I had the benefit of reading that in translated form. In the course of that interview the child is recorded as saying inter alia:

> "I'd like to live with my mum and my gran. I have enjoyed the time here and I would like my mother to come to live with us in England. I have told that to my mother and she told me she would do so if she would get a job there. I do not know if I would like to come to study to Chile as I do not know any school here. I do not know how they work and I do not know if I would get used to it.
>
> If I were to stay with my gran in England, I'd like to come each year to say with my mother. One month of the summer holidays as we have six weeks free of going to school. If I were to stay in Chile I would also like to visit my gran in England in February for about ten days and my mother could go with me if she would like to. The last thing I would like to add is that I love my mum and my gran. I love them both equally. If my mum would move to England, I'd like to live with both but if it would not be possible I'd live with my mother as girls my age live with their mother and I could go to see my gran at anytime. My gran has told me she would not come to live in Chile but that she would come to visit."

[8] During 2004 C made a number of appearances on television and radio representing her view of the story regarding E. During the summer of 2004 it is also noteworthy that M and M2 had decided to move to Northern Ireland where M2 is from, and following their marriage in September 2004, with the leave of the court in London, they came to Northern Ireland with E and have lived there ever since. The child commenced a local grammar school in 2004 and is clearly doing extremely well there. She is an intelligent girl and also a gifted musician playing the cello with the school orchestra. It should be recorded that C was contacting E by telephone during this period up to twice per week. C recorded a number of those telephone calls and this clearly upset E who had been unaware that this was being done. On 11 December 2004 the

child wrote a letter to the Chilean Court which again I have before me and from which the following quotations emerge:

> "Dear Judge,
>
> This is a letter to tell you that I have decided where I want to live, Ireland, with my gran and (M2). I want to grow up to be a wildlife photographer or film maker. I can only think that living in Ireland, next to all the wild places, will help me with my skills of tracking down animals. This also means I shall live in a healthy environment which was why I wanted to move here from London. I have all the support I need from M and M2. I cannot think what my life would be like in Chile. I don't want to hurt anyone but I want to live in Ireland. I think it would be best if my mum said sorry to everyone who she has harassed because of this stupid case so she can visit me often or move here. I hope you can stop the case and help my mother understand that I love her but I want to live HERE. I will tell this to my mum AGAIN."

On 13 January 2005 the consent order to which I have earlier adverted was made in London. Before me M indicated that this consent was given because she and M2 wanted the matter determined and she had been unaware of the real strength of the child's feelings which became manifest after the order was made. Thereafter on 2 February 2005 and 25 May 2005 the Chilean orders were made to which I have already adverted. In between the two Chilean orders M and M2 sought and obtained a wardship order in the High Court of Justice in Northern Ireland because she said the child had implored her and M2 to seek protection for her here in Northern Ireland.

[9] I am satisfied that upon this child discovering that an order had been made for her return to Chile by the Chilean Court, the child became profoundly upset. I believe the evidence of M when she states in her affidavit that upon hearing the ruling, E's immediate reaction was to say she would not return to Chile even if she was sent to prison. She felt the judge had not listened to her, that M was now not listening and she wanted to bring her own case. I am also satisfied that the child is being truthful when she had indicated that when speaking to her mother on the telephone after the Chilean Court order had been made and told her mother that she did not want to live in Chile, her mother had been somewhat insensitive with her and had threatened to physically remove her from her life here in Northern Ireland. M was concerned that the court in Chile had not contacted her, asked for any assessment of the circumstances, that no social services reports

or investigations had been carried out on her home, and that the child's voice had not been heard appropriately.

[10] As I will indicate in some detail later in this judgment, I considered that it was extremely important that given the maturity of this child, her voice should be heard in this case and she should be permitted to be represented by the Official Solicitor. Accordingly I directed that the Official Solicitor would participate in this case and represent the views of the child to the court. Accordingly Ms McGaughey, appeared on behalf of E instructed by the Official Solicitor. I had the benefit of two reports from the Deputy Official Solicitor dated 3 May 2005 and 5 October 2005. From these reports I have discerned that the wishes and feelings of this child are as follows:

THE WISHES AND FEELINGS OF THE CHILD

[11] I commence by stating that it is my clear impression that the Deputy Official Solicitor ("DOS") has accurately summarised the position in this extract from her earlier report:

> "This is serious girl who is remarkably self assured and articulate for her age. She clearly has thought deeply about various aspects of the case. I was most impressed by E. I do not feel that she has been unduly influenced or pressurised in any way by her grandmother and step-grandfather. She expressed herself in a very direct and clear manner. She obviously feels very strongly about the issues and she is very conscious of her right to be heard and participate in the legal process. E had prepared for the interview by compiling her own `case' summary, a copy of which was attached."

[12] I read that case summary, I listened to the evidence of Dr Leddy, a Child and Adolescent Psychiatrist and I formed the clear impression that the DOS was entirely accurate in so summarising this child. That view was underlined by a reading of her school report of the winter of 2005 and the comments of her teachers. Against that background I have distilled the following matters from the reports of the DOS:

1. On all the occasions that the DOS has seen or spoken to this child namely 14 April 2005 on her own by telephone after the Chilean Appeal Court decision, in consultation with counsel on 20 June 2005, with the child alone on 27 June 2005, in telephone conversations with E subsequent to June 2005 at a contact session with her mother on 29 September 2005, in a conversation with E alone after the termination of that contact visit and at a further contact visit on 1 October 2005, this child has remained absolutely adamant that she

wishes to remain living in Northern Ireland with M and M2 and does not wish to return to live with her mother in Chile. She has been unbending in that view throughout her discussions with the DOS and counsel. I am absolutely satisfied that this is a genuinely held view and that it has not been given as a result of pressure or influence from M or M2.

2. It was extremely unfortunate to say the least that C's mother had decided to terminate contact with the child since before Easter 2005 and the summer 2005. The child had been unsure as to why her mother had suddenly ceased to make this contact. In evidence before me C informed me that she had been having some unproductive conversations with the child about returning to Northern Ireland and had taken some professional advice as to how she should deal with the matter. She had been advised that she should cease conversation in the meantime. Whilst I accept that this decision by C may have been a product of her conversation with a professional friend it clearly may have upset E very much indeed and for my own part I consider it was most unwise.

3. The visit of the child to Chile in the summer of 2004 clearly had a very important effect upon her. Contrary to the denial by C which I totally reject I am satisfied that E was telling the truth when she said that C was living with a partner and that her mother had exhorted her to deny this. The child found that she did not have any friends of her own age in Chile, that she was the eldest of the child within the wider family circle and that there were no other children in the family circle of her age. Her father had spent two days with her but has not contacted her since. I have no doubt that this influenced the child's current thinking. She told the DOS that after her holiday in Chile with her mother E she moved to Northern Ireland with M and M2. She had come to a firm decision around the end of November 2004 that she wished to remain living in Northern Ireland with M. She told the DOS that having settled into her new home in Northern Ireland and started her new grammar school, she felt she could make an accurate comparison between her life with her grandmother in Northern Ireland and her life with her mother in Chile based on her experience during the summer. She was now 100% sure that she did not want to go and live in Chile. In a rather mature way, the child asserted that her standard and quality of life in Northern Ireland were better than in Chile, she is attending an excellent school and making extremely good progress there as evidenced by her school report. She referred to the fact that her entire education has been undertaken in English and she felt she would have major problems undertaking her education in the medium of Spanish which she is not fluent in. She told the DOS that she did not feel Chile was her home any more and if she had to go back to Chile she would "really hate it". She repeated that her school life here is very important to her and she would miss it greatly. I am satisfied that she feels that if she had to go back to Chile she would lose contact with her grandmother which is something "she would really dread" and she felt that her grandmother had helped her

enormously in terms of her overall development, assisting her with schoolwork, helping her to build friendships and teaching her to be independent.

4. The child indicated that she would be very angry with her mother if she had to return to Chile and did not feel she would ever be able to properly settle there. She expressed anger at her mother's recent actions feeling that her mother had failed to respect her thoughts and feelings for example recording her telephone conversations which particularly upset her. She stated that her mother had told her that if she did not return to Chile willingly then she would be forced to conclude that her mother was just choosing to ignore her wishes and feelings. She was unhappy in May 2005 with the current telephone contact stating that her mother made her feel very uncomfortable on the telephone and did not really listen to what she said. She also expressed upset that her mother had publicised the case on television and newspapers in Chile.

5. The child asserted that she felt absolutely no pressure from her grandmother, that her grandmother had assured her that her main concern is for E to be happy and she will do whatever E wants, and the main difference between her grandmother and her mother is that her grandmother is putting her first whereas her mother just puts herself first.

6. Dealing with the interview with the representative from CAFCASS, the child asserted that at that time, in January 2004, her preferred option would have been for her mother to actually come and live in London so that she could have both her mother and grandmother in her life. This interview had taken place shortly after she had been to stay with her mother in London over the Christmas and had enjoyed that stay very much. In essence she was making the case that her views about Chile had subsequently changed as a result of her sojourn during the summer of 2004.

7. Dealing with the interview of the Chilean judge on 20 August 2004, the child indicated that she had not actually asserted she wanted to go and live in Chile and did raise concerns about having to go to school there.

8. I was absolutely satisfied that this child wants this matter to end and for a final determination to be made. She told the DOS subsequent to June 2005 that she had had nightmares arising out of her concerns that she might have to go and live in Chile. She has had a number of recent telephone calls with her mother that has caused her upset and made her feel pressurised. She has had contact with her mother on three occasions shortly before this hearing and the child acknowledged that whilst the contact had gone well, she felt her mother was "pushing her". I share entirely the view of the DOS that the very lengthy court proceedings which have occurred both in Chile and England have resulted in E's views becoming very entrenched and there is now some

measure of concern about the emotional impact upon this child resulting from all the court proceedings. I think it is absolutely vital that both the grandmother and the mother recognise that this battle is causing this child grave upset and that resolution must be finally arrived at with each party accommodating themselves to the new outcome.

[13] THE EVIDENCE

1. Dr Fionnula Leddy, Consultant Child Psychiatrist

This witness provided a report of 28 September 2005 together with an addendum of 5 October 2005. In the course of those reports, and in her examination in chief and cross-examination, the following matters emerged from this witness:

(i) The child unequivocally stated that she wishes to remain in Northern Ireland with her grandparents. She has made this clear to Dr Leddy on each occasion she saw her.

(ii) Dr Leddy was asked to assess the child's maturity and competence to assist the court to determine what weight should be afforded to her expressed wishes and feelings.

(iii) It was Dr Leddy's view that the child is feeling the whole responsibility of these prolonged proceedings. She needs the court to make a decision about her relationship with the two women in her life.

(iv) E has had indirect contact with her mother by letter and telephone apart from the three recent contact meetings in the months leading up to this trial. However these interactions have been reported by E and her mother to be difficult. She has strong negative views about her mother. She felt her mother had behaved badly to her for example broadcasting about her on Chilean television and taping the telephone conversations. The witness recognised that all this was liable to cause upset and could well erode the relationship they had had. She has lived a long time with her grandmother, and her expectations are high of remaining here having developed as a member of the family with the grandmother over these very important years between 5 and 12. Moving is going to inevitably be disruptive although it would help if she did have the support of her grandmother in so doing. However she conceded that the move could be overwhelming and there was a risk that she would not reconcile with her mother or, alternatively, it would take so long that it would be damaging to her. The nature of the relationship with her mother is not ideal in order to let E reconcile herself to a change. It is going to be very difficult for the mother to manage the child. It is possible on the other hand that this child, who is slightly emotionally delayed, could after some period of grieving become reconciled to her mother.

(v) E told Dr Leddy that she had only ever wanted to go back to Chile for holidays. She said that when she was younger she had always wanted to live with her grandmother. Significantly she told Dr Leddy that when she was younger she loved her mother and did not want to hurt her but that she now no longer loves her mother. When asked what made her think that she did not love her mother, she told Dr Leddy that this had changed just before Christmas. She felt that a telephone conversation had not been helping her to make a good connection with her mother and that she did not like the telephone. This had made her realise she did not love her. When asked what was the main thing that made her stop loving her mother she said it was the horrible things that her mother had said about her grandmother. It was the witness' evidence that this reflects her anger. Dr Leddy felt that these statements revealed some lack of insight even in a child so young.

(vi) At a later stage E told the doctor that she feels that her mother wants her back because she "wants to be a mother and to do mothering things." She said "what I can't understand is why she can't have another child and leave me." She told me that her grandparents cannot understand this either and that she thought that her mother might be seeking her return because she is jealous of her grandmother.

Dr Leddy found this somewhat troubling because the grandparents had not been able to explain the situation to her.

[14] The child told Dr Leddy that she sees herself looking after her grandmother in the future because her grandmother has thin bones. In other words she sees herself in a caring role in the future for her grandmother. Dr Leddy again found this unusual although it might be associated with the tug of war that is going on between these two figures in her life. The child feels she has to keep closely to her grandmother. It was in this context that Dr Leddy expressed some concern about the upbringing that this child was undergoing. Apart from the fact that it is not usual to be reared by one's grandparents, and she does have her grandparents as replacement figures, nonetheless the views which she expressed about her lifestyle concern Dr Leddy. The following quotations from the report are of moment at para. 4.04:

> "I asked her if she feels happy or sad and she told me 'I am completely happy with my life. I don't think any changes would make me better.' She told me that between the age of 5 and 10 years she was more serious than other children and had less fun with other children because she tended to live in neighbourhoods without young company. She told me that at school she would have fun but that she always felt different to other children and felt she did not connect with them. She told

> me that she is now getting on well with other 12 year olds provided they like books and don't criticise classical music. She told me she has three very good friends, all of whom love classical music and books. I asked her what are the important things in her life and she told me that these include books, music, going to school to learn new things, having good friends, going home at the end of the day and chatting with her grandparents."

[15] Dr Leddy felt that she was capable of seeing drawbacks in living with her grandmother and recognising that all was not perfect. She recognised she has missed out somewhat on a carefree early childhood. Dr Leddy concluded that E is conscious that she misses out by not being in the day to day care of her mother. Her mother's care has not always been adequate, but perhaps at its best it may have offered a more light-hearted environment. Dr Leddy was somewhat concerned about the child and saw her a second time. The extract from Dr Leddy's report of October records "subsequent to further reading of my interview with E of 13 September 2005, my concerns remain high. When I reconsider the way that E describes her life (her acknowledgement that she has been a child who has to a large extent observed rather than taken part in the normal fun of childhood, and my disquiet over her description of the manner in which her grandmother apparently manages to get people to do her bidding, and lastly, her mother's apparent inability to foster her relationship with her mother), I find E's decision to remain in Northern Ireland somewhat surprising and even sad. E has not taken into account that the child should be with her mother unless there is good reason against this. She is putting insufficient value perhaps on those things which she is losing out by not being with her mother and failing to identify the more normal fun loving aspects of childhood which she has lost. Dr Leddy expressed the fear that this is a child who perhaps spends too much time with adults in mature company.

[16] I was very impressed by the informed and insightful manner in which Dr Leddy had approached this task. Her evident uncertainty about what was best for this child was palpable. She did feel that this child fully understood the choices to be made and the consequences that could follow. Dr Leddy concluded by summarising her position in this way. If the child stays in Northern Ireland she will miss out on the day to day care with her mother, but on the other hand she has been such a long time in the care of her grandmother where her identity has been formed and that any change now could be very disruptive. At the very least she is going to be difficult for her mother to manage and there is a question as to whether the mother has the skills to be able to deal with her.

[17] I pause here to observe that subsequent to the evidence of Dr Leddy, the Official Solicitor, properly and responsibly, interviewed the child on 10

October 2005 in the light of what Dr Leddy's addendum report had recorded. Prior to this the child had been unaware what had been in that report. The DOS records the child stressing that she does have friends like other children and that whilst she had told Dr Leddy she had three best friends she generally is friendly with most of the people in her class. One of the children is in the senior orchestra with her. She agreed that the children do go to the library at break-time but that at lunch-time, after they have eaten in the canteen, they normally "just hang out". She stressed that she does have one of her school friends back to her house or is invited to their house after school every two weeks or so. The location they live in is fairly remote and there are no friends within walking distance. However she does see one child who is slightly younger than her once a week or thereabouts. She also attends a Quaker meeting in Coleraine and participates with some older children in quizzes, games etc. When told that there was a distinct possibility that she might have to return to Chile her response was to write to the DOS stating "on no account will I go, Northern Ireland is my home and will remain this way". She stated she felt "completely miserable" at the thought of going back to Chile. I have formed the clear impression that as the DOS said this is a somewhat serious minded little girl, like many children who live with somewhat older grandparents (who are both in their mid to late 50s) of an intellectual bent. Having heard M and M2 give evidence I have no doubt that they are a serious minded couple and that this child is developing in a way that you would expect living with such carers. She is interested in classical music and books and I suspect that Dr Leddy may have perhaps failed to fully appreciate that although the child's interests may be more serious than those of most 12 year old children, this is genuinely what she wants to do and how she wants to spend her time. I am satisfied that E has clarified the situation of her friendships with the DOS and I am fully convinced that she has appropriate and normal friends just like any other child her age. It is important that E should be told that this is my view at the conclusion of this case. I find nothing whatsoever unusual or strange about her love of music and books and I hope very much that she will continue to engage these pursuits.

C, THE CHILD'S MOTHER

[18] I have read a number of statements from the mother and much of her evidence repeated the contents. In the course of her examination in chief and cross-examination the following additional matters emerged:

1. She pressed me with criticism of her mother when she had been a child. She said that her mother had failed to let her know that her father had been looking for her after her parents parted when she was 1½ years of age. She criticised her mother for urging her to engage in academic pursuits to the

extent that when she succeeded being a perfect and successful pupil she was simply told she was doing only her duty. Their lives were circumscribed to timetables in a structured and planned manner. I find these attacks upon M to be unhelpful and in many ways contrived in my view to undermine the strengths that M clearly brings to life with E. I repeat that M is clearly a woman of an intellectual bent but the love which she has given to E over these last seven years satisfies me that it is both appropriate and enriching.

2. When pressed as to why she had recorded the telephone calls of E without telling her, C insisted that it was simply a means of illustrating the child's wishes and feelings without pressure. I observe at this stage that I found this somewhat insensitive and an illustration of how this mother perhaps failed to understand fully how upsetting a child could find this. Similarly she found some difficulty understanding that publishing the child's picture and story in the press, again without the child knowing, was likely to embarrass and upset her. I regard her explanation that a journalist, who had spoken to her, had caused the matter the matter to be on television without her fully appreciating what was happening to be disingenuous. I have no doubt that she deliberately orchestrated media exposure in this matter given her job as a journalist in order to bring about pressure to succeed in the court hearings. Her excuse that she caused details of the proceedings to be published so that she could obtain help I find unconvincing. The Hague Convention cases had been initiated in October 2003, and the newspaper article had appeared on 25 July 2004. Hence it was rather difficult to understand how that article could have contributed in any way to assisting her, as she told me was the case, about her Hague Convention hearing.

3. When taxed as to why she had only visited the child twice in England over the years and never in Northern Ireland until this hearing her answer was that it was all too expensive to come over to the United Kingdom. I was left singularly unpersuaded about this particularly since I had before me an affidavit from her father indicating that he would undertake to contribute the necessary costs of studies, both school fees and private school fees for his granddaughter E in the event of C being out of work. If this mother had really wished to visit this child more often, I find it difficult to understand why this offer of finance from her father could not have been forthcoming to facilitate her visiting more often this child in London or in Northern Ireland.

4. When asked about the problems of reconciling E to a change to living in Chile, C seemed to feel that any problems would end in a very little time because of the love she would give the child together with all the support and professional help available. I sensed that C simply did not understand the depth of feeling that this child presently harbours. Her approach resonated with the complaint that the child repeats namely that her mother does not listen to her. I have not the slightest doubt that C loves E very much, and doubtless has a very important part to play in her life, but I was left with

grave doubts as to whether or not she has the skills or understanding to deal with the very delicate problems that would arise if this child returned to Chile. She stated to me that she did not think that the child would suffer anything beyond what an ordinary adolescent would suffer during one of life's many changes. She fails to understand the significance of the fact that the child has spent seven formative years away from her living in the UK. During this aspect of her cross-examination she denied that she had any partner and as I have indicated earlier in this judgment, I reject that entirely and I accept what E told the DOS. I fear that this would be another difficulty that the child would have to encounter reconciling herself to a stranger in the household and C's refusal to either admit that or recognise the problems that could arise again pointed towards a lack of understanding on her part.

[19] Overnight during the course of her evidence, after I had raised questions about the school that the child would go to, how her music would be accommodated and paid for, C adduced evidence from her father indicating that he would meet the cost of her studies, that Chile had a Chilean Children and Youth Orchestra Foundation, and that there were excellent schools available in Santiago, producing some clear information about such a school. This all seemed to me to be somewhat reactive and I was surprised that she had not considered producing material of this kind substantially in advance of this hearing. It served to underline to me that C has not fully thought out the consequences of this child returning or how she would accommodate the particular needs and requirements of this little girl prior to coming to this court.

M, THE GRANDMOTHER

[20] M had made a number of statements. In the course of her examination and cross-examination, she repeated a number of the points in those statements and in addition the following matters emerged:

1. She described E as a very lively child, animated, full of interest and imbued with curiosity. She enjoys reading books, listening to music, playing with friends and projecting herself. This is precisely the picture that I had anticipated of this child.

2. She repeated the history that I have already outlined and insisted that E had said she would cause a scandal if forced to return to Chile. She thought that her change about living in Northern Ireland occurred once she had returned from Chile in the summer of 2004. She had consented to the order in January 2005 because she had not appreciated that E would insist that she wished to be heard. The child thinks that her mother does not listen to her and that she is incapable of discussing the real issues that arise. E told her that she is not able to talk to her about these important issues.

3. When pressed as to why she agreed to allow the Chilean court to determine the outcome in this case (and indeed had stated this in her affidavit of June 2004), she insisted that she had been prepared for the decision to be made but had now resisted further proceedings when the full weight of E's opposition had become manifest. She emphasised again and again that the child was adamant that she would not go back to Chile and that this was fuelling M's insistence now that the child be given an opportunity to have her voice heard fully in this forum. In answer to Ms Dinsmore QC who appeared on behalf of the mother, she denied that she was engaging in sophisticated court hopping. She asserted that E simply wants to be listened to. M insisted that if the order was to the effect that the child was to leave Northern Ireland, she would cooperate in every way possible. Moreover she would also visit her in the future. However M felt that the child's views had changed since being interviewed by CAFASS in light of her experience in Chile. The witness repeated that the child had said that she wants these proceedings to be over and to remain in Northern Ireland. She told Ms McGaughey on behalf of the Official Solicitor that when she returned from Chile the child had been uneasy and one day, whilst reading a book, E had suddenly said to M that she felt she belonged her in Northern Ireland and wanted to stay.

[21] I found M a very convincing, thoughtful and insightful witness. She has essentially been the carer of this child for seven years now and she, together with M2 have been the primary adults in this child's life. I became convinced as I listened to her that she was not applying any pressure to this child and she simply wanted what was best for her. I have no doubt that she loves this child deeply and has been in my view a model carer for her over the last seven years. I recognise only too well the dangers set out by Dr Leddy and that living in the household with M and M2 can at times be a serious experience for a child without some of the lightness that other families might be able to provide. I think this has influenced the child but nonetheless I was satisfied that this was a woman who fully understands the needs of a young girl of 12 and who whilst clearly encouraging the virtues of intellectual pursuits, would not do this to the exclusion of the joyous aspect of being young.

M2, THE HUSBAND OF M

[22] This man made a statement and in the course of his examination in chief and cross-examination the following additional matters emerge:

1. He recognised that he was the main male adult figure in this child's life. She treats him as her step-father and calls him by his Christian name. He described her as a lively, intelligent, warm and captivating child. Insightfully he described her as "a wonderfully curious child". That is precisely the image that I have of her. She is a child who likes the challenge of new books and becomes bored by light books. This witness is an expert in conflict analysis

and as with M, I feel that the more serious aspects of life probably take a priority with him. He described how when the child is troubled, she likes to practise her cello. All of this might point to a child living with serious older carers, but I reiterate that I found nothing unacceptable in this. Whilst a lighter less serious household can also bestow different benefits on a child, I find nothing in his evidence that led me to believe that this household is anything other than wholly appropriate for this little girl. He recorded how when she was informed of the Chilean court decision, she was "surprisingly upset". He described how in his view she would be devastated if she had to leave her school and her family. He repeated that E feels her mother does not listen to her and gives no indication that she really understands her problems. She illustrated this by indicating that when the mother was recently in Northern Ireland, the child wanted her to come to their house, to see her play the cello and listen to her music. Sadly the mother felt unable to do this and I found this account to be again somewhat distressing in looking at a future in Chile. He resisted the suggestion that he and M have usurped the position of this mother and I was very impressed by his response that whilst they very much wanted E, they did not need her. They could have had a life of their own travelling around the world with their pursuits, but that they felt that this child was best served by being with them. He noted the child had become more hostile to the mother in the last year particularly when the child ascertained the surreptitious telephone recordings and media publications. He said that other than the two occasions that C had come to the United Kingdom to see E, there had, until recent months, been fairly sparse telephonic contact with the child.

[23] I was very impressed by this witness. I was absolutely satisfied that his motivation was entirely fuelled by a desire to provide the best life for this child even though he is not a blood relative. I have no doubt that he and M could have a very full life even without this child but that her entry into their lives has elicited from the two of them a proper and responsible determination to ensure that her best interests are served.

Conclusions

[24](i) I commence my consideration of this case by recognising that the mutual enjoyment by parent and child of each others company constitutes a fundamental element of family life and that any measure hindering such enjoyment can amount to an interference with the right to such protection by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) (see Johanson v Norway (1996) 23 EHRR 33). I have no doubt that in normal circumstances any step which breaches the bond between parent and child should be regarded as a temporary measure to be discontinued as soon as circumstances permit and that wherever possible any measure of alternative temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. Equally I recognise that in

Yousef v The Netherlands (2003) 1 FLR 210 at 221 paragraph 73, the European Court of Human Rights stated:

> "The court reiterates that in judicial decisions where the rights under Article 8 (of the European Convention) of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interest is necessary, the interests of the child must prevail."

(ii) Article 8 of the ECHR provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of … or for the protection of the rights and freedoms of others."

(iii) I restate the principles that I set out in Re S, N and C (Non-Hague Convention Abduction: Habitual Residence: Child's Views) (unreported) GILF5201 where I adverted to what I believed was the gathering momentum of the importance of listening to children and taking account of their perspectives when decisions are being made about them. One important yardstick against which the family justice system in Northern Ireland must be evaluated is Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) to which the United Kingdom is a signatory. Article 12 provides that:

> "12(i) States parties shall assure to the child who is capable of forming his or her views the right to express these views freely in all matters affecting the child, the views of the child being given due weight and accordance with the age and maturity of the child.
>
> 12(ii) For this purpose there shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

It must be remembered that a child is a person with human dignity and not merely the object of adult dispute. A child's fundamental rights, including the right to be heard, must be respected in all forums including the confines of Hague Convention case as well as domestic law. A child therefore possesses the right to self-expression. I am aware that a court must be wary not to give undue weight to the views of children particularly when they are very young. The views of children in abduction cases require particular scrutiny and the court must be satisfied that the child is capable of giving his or her own view in the particular circumstances of each case. When as in this case there is a Hague Convention aspect, there must be some "gateway findings" as indicated by Waite LJ in Re S (a minor) (abduction: acquiescence) (1994) 1 FLR 819 at 826. Moreover, the court must be mindful of the danger of being the instrument of further abuse to the child by laying on his or her inadequate and frail shoulders the burden of the ultimate decision in a case where they may already be emotionally torn, together with the ever present danger of a child being coached by one of the parties, most probably the resident party. As I stated in Re S, N and C, I do not believe it is helpful or appropriate for me to set in stone the age at which a child is likely to be of sufficient maturity to give informed views. That will undoubtedly vary according to the individual intelligence and maturity of the individual child and the circumstances of the case. Nor do I believe there is any fixed method for obtaining those views. In this case I had the benefit of the deputy Official Solicitor and an analysis from an independent child and adolescent psychiatrist. I have not the slightest hesitation in concluding that this child was of sufficient maturity to give informed views. Accordingly I came to the conclusion that it was necessary to afford representation of this child in order to facilitate appropriate court decision-making. I respectfully adopt the words of Hale LJ (as she then was) in Re A (Contact: Separate Representation) (2001) 1 FLR 715 at para. 31 where she said:

> "The evidence is now quite clear that children whose parents are separating, and especially if their parents are in conflict with one another, need a voice, someone who was able to listen to anything they wish to say and tell them what they need to know. Sometimes they need more than this and that is someone who is able to orchestrate an investigation of the case on their behalf. This does not always mean that they need separate legal representation. Often their needs can be met by the parents themselves; often they can be met by the Court Welfare Service but the Court Welfare Service cannot always make a thorough investigation of what needs to be done. As I said in Re N (unreported) 1 February 2000, anyone with experience of trying private family disputes encounters cases from time to time where separate

representation of a child or children is necessary or highly desirable."

(iv) It was my clear view in this instance that if this child's rights under Article 8 of the ECHR were not to be infringed and if she was to be provided with any chance to influence the outcome of this case so as to avoid thereafter a smouldering sense of injustice if she were to be denied input, I considered that the only effective way to do this was by separate representation. The end result here was that this child was spoken to on a large number of occasions by an extremely experienced and able deputy Official Solicitor. I was therefore able to find a consistent thread in the views of this child which aided me enormously in assessing the evidence of Dr Leddy and provided an informed background to the occasions in which the child have been spoken to by the Chilean judge and by the representative from CAFCASS almost two years ago. I pause to observe that courts must be wary to place undue weight on short interviews to make what may be a very complex assessment as to the threat or cogency of the child's views. One of the dangers of court meetings may be the peril of placing a substantial burden on the child who is expected to articulate her views in the course of a short period not wanting to hurt or offend two meaningful adults in her life. A child may feel inhibited from expressing her real views over a short period despite the sympathetic skills of a CAFCASS officer or a judge. I am satisfied in this case, that the real views of this child have emerged over the course of the meetings with the deputy Official Solicitor and with Dr Leddy. Whatever may have been the views expressed to the Chilean judge or to the CAFCASS officer now a substantial period ago in the life of this child, I am certain that I now have before me the genuinely held views of this child and I have taken them into account as an important factor albeit not the sole determining matter in this case.

(v) Section 1 of the Family Law Act 1986 defines a Part I Order in relation to the exercise of the inherent jurisdiction as:

> "An order made by a court in England and Wales and the exercise of the inherent jurisdiction of the High Court with respect to children –
>
> (i) So far as it gives care of a child to any person or provides for contact with or education of that child; but
>
> (ii) Excluding an order varying or revoking such an order."

(vi) Where a "Part I Order", made by a court in England and Wales, is in force with respect to a child who has not attained the age of 16, then, subject to certain exceptions, the Order must be recognised in any other part of the

UK as having effect in that order part as if it had been made by the appropriate court in that other part and as if the court had jurisdiction to make it (see Section 25(1) of the Family Law Act 1996). To enforce the order in another part of the United Kingdom, it must be registered and enforced in accordance with the provisions of Section 25(3) of the 1986 Act.

(vi) I have come to the conclusion that for the purposes of these proceedings the order made by Dame Elizabeth Butler-Sloss did not come within a "Part I Order". In the first place, this order does not give care or control of this child to anyone. I reject the argument of Ms Dinsmore that it is sufficient for the purposes of the Act if the Order enables care to be given to the mother as and when Chile would decide it. I do not believe that that constitutes "giving care of a child" within the ambit of Section 1(1)(d)(i) of the 1996 Act. Insofar as the English Order made provisions for contact, it did not make provision for contact with the mother but simply made provision for contact with the grandmother. Accordingly this is not a contact order that the mother can seek or is seeking to enforce, there being no order for contact with the mother. I therefore dismiss the application to enforce the order of 13 January 2005 made in the High Court of Justice, Family Division in London.

(vii) Turning to the application for recognition and enforcement of the orders made in Chile on 2 February 2005 and 25 May 2005, I recognise that considerations of comity have long played a part in the approach of the English and other common law jurisdictions. In English law in the 19th century, the Foreign Order was generally determinative of the decision in England relating to a foreign child such as in Nugent v Vetzera 1866 LR 2 EQ 704. With the advent of the principle of the paramount interest of the child , comity remains a material consideration and the needs of close co-operation internationally between the courts of different States is a very important aspect of our law. In essence, comity represents an understanding that exists between courts of different jurisdictions for the mutual recognition and enforcement of the orders made by the other (see Dicey and Morris on the Conflict of Laws 13th Edition, 1999 at 1-010, 14-006). Thus English law has provided at a relatively early stage for the recognition of the decrees of foreign courts concerning the status of the parties, for example divorce decrees and adoption orders. The same however is not true of foreign custody orders. The English courts have indicated a disinclination to be bound by foreign custody orders prompted by two considerations. The first is that a custody order by its nature is not final and it at all times subject to review by the court which made it. The second is that pursuant to the Children Order (Northern Ireland) 1995, the welfare of the child is the first and paramount consideration. As early as 1951 in McKee v McKee (1951) AC 352, the House of Lords had adopted this approach in custody cases. In that instance, at p. 364, Lord Simonds:

> "It has been said that the weight or persuasive effect of a foreign judgment must depend on the circumstances of each case. In the present case there was ample reason for the trial judge, in the first place, forming the opinion that he should not take the drastic course of following it without independent inquiry and, in the second place, coming to a different conclusion as to what was for the infant's benefit. For not only was the child two years older at an age when two years makes a material difference, but the facts, which, as appeared in the face of the Californian order, had influenced that court had substantially changed. …… This conspicuous change of circumstances demanded an independent inquiry ……"

(viii) This principle had an even earlier providence in cases involving previous custody orders made by a foreign court in Re B's Settlement (1940) CH. 54 where the court was dealing with Section 1 of the Guardianship of Infants Act 1925 which set out that the court in deciding questions of custody "shall regard the welfare of the infant as a first and paramount consideration". At p. 63 Morton J said:

> "In my view, under S. 1. of the Guardianship of Infants Act 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration whatever orders may have been made by the Courts of any other country."

In essence therefore, whilst I have absolutely no doubt that foreign court orders as distinguished as those before me which were made in Chile, must deserve grave consideration, the weight to be given to them in Northern Ireland must depend on the circumstances of the case with the welfare of the child being paramount. An order made very recently with no relevant change of circumstances being alleged, will doubtless carry great weight. To that extent I must bear in mind that the Chilean orders have been made within the last few months. Nonetheless, while I have great respect for those courts, I do not believe that they had the benefit that I had of independent representation of the children or prolonged and numerous interviews of the

children by an experienced person such as the deputy Official Solicitor in this case coupled with the opinion of a child and adolescent psychiatrist Dr Leddy. The last judicial interview with the child had taken place over one year ago and that with the CAFCASS officer approaching two years ago. I do not believe that the currrent views of the child , now so trenchantly set out before me, were present to the mind of those courts. It may be that the passage of time has further served to entrench her views but I am absolutely satisfied that this is a mature and responsible child despite her tender years and that she wants to remain in Northern Ireland. If Article 12 of the UNCRC is to have any meaning, and if children are to be treated with dignity and respect, then, provided that the child has attained a sufficient age and degree of maturity at which it is appropriate to take her views into account, they should be given considerable weight. I recognise that Dr Leddy has some misgivings about this child remaining with grandparents of mature age, but I am equally swayed by the concern she expressed as to the dangers of this child being forcibly or against her will returned to Chile in circumstances where her mother has not had daily care or experience of her for almost seven years. This is an intelligent child who has fitted in extremely well to school and social life here in Northern Ireland. For the last seven years the two main carers in her family have been M and M2. I cannot believe that it is in the child's best interest after all these years to now risk her happiness, her educational progress and her emotional stability by forcing her to return against her clearly stated wishes. For whatever the reasons, be they economic, medical or disinclination, the fact remains that this mother has made very limited contact with this child over the last 6/7 years and I am unpersuaded that she has either the skill or the knowledge of this child to recognise and deal with the effect that dislocation could now have upon her. The cessation of contact for several weeks during this year, her failure in the course of her evidence before me to recognise fully the extent of the problems she will have to face, the failure to draw up comprehensive and concrete plans for her return to Chile and her failure to visit or contact this child on a much more regular and frequent basis over the years, all indicate to me that whilst this mother dearly loves this child, she has insufficient insight at this stage in her life to obviate the clear risks that a return at this stage would precipitate. This relationship needs to be slowly and painstakingly rebuilt between mother and child. I am certain that with the pressure of this case off, steps can be taken to rebuild the mother/child relationship with lengthy holidays in Chile and increased telephonic and written contact in the forthcoming months and years. In short I feel there was much strength in the submission by Ms McGaughey, who appeared on behalf of the Official Solicitor, that there could be an irrevocable erosion of the mother/daughter relationship if overnight she is forced back into her company. I had the benefit of watching this mother giving evidence, an exercise of which Dr Leddy was deprived. Whilst I have no doubt that this mother will be helpful and loving, I entertain great doubts about her capacity to help in the adjustment process of a return to Chile which might be long and difficult for

this child. I believe it would be quite wrong and against the interests of this child to take the risk of returning her to Chile at this stage. In coming to this conclusion I bear in mind what Lord MacDermott said in J v C 1970 AC 668, where a ten year old child of Spanish parents had lived with foster parents for several years and the court refused to return him to his parents in Spain. At 715 Lord MacDermott said:

> "3. While there is now no rule that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation ….
>
> 4. Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that such serious harm even to young child may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case."

I consider therefore that I have balanced the rights of this mother and of this child (and for that matter the Article 8 rights of M) and have come to the conclusion that the paramount interests of the child in remaining in Northern Ireland must prevail.

(ix) I turn then to consider the application under the Hague Convention. I have decided to dismiss this application for two reasons:

(a) This application is brought on the basis of wrongful detention. The child is under 16 years of age and since the case is made on behalf of the parent that the wrongful detention emanates from in or about June 2005 following the orders of the Chilean court and the order of Dame Butler-Sloss,

it has been brought within one year from the date of the alleged wrongful detention. The mother has been granted rights of custody by order of the Chilean court. However for a Hague Convention application to succeed, the applicant must establish that the child was habitually resident in the contracting State (in this case Chile) immediately before his wrongful removal or detention. The question of whether a child is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case.

I have dealt in detail with my views on the approach to habitual residence in the case Re S, N and C to which I have earlier adverted at paragraph 24(iii) of this judgment. I therefore borrow what I said in that judgment at paragraphs 5 et seq:

> "I consider that the following are the principles which should determine a court's approach on the issue of habitual residence.
>
> (i) The question of whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. (see Re J (a minor) (abduction: custody rights) 1990 2 AC 562. The concept of habitual residence is widely accepted in family law cases throughout the Hague Convention countries and beyond principally because of the flexibility of the notion and its ability to respond to the demands of a modern mobile society which to some extent serves to trump the notion of domicile or nationality. It is worthy of note that in order to preserve that notion of flexibility, no definition has ever been embraced within the Hague Convention or any of the subsequent Hague conferences.
>
> (ii) The court should normally stand back from the evidence and take a general view rather than conducting a microscopic search. Rules concerning the burden of proof are inapposite to the approach of the court which is neither adversarial, nor inquisitorial, but sui generis (see Re N (child abduction: habitual residence) 1993 2 FLR 124.
>
> (iii) There is general agreement on a theoretical level that because of the factual basis of the concept there is no place for an habitual residence of dependence (see Beaumont and McEleavey "The

Hague Convention on International Child Abduction" at page 91). The reality is however that in practice it is often not possible to distinguish between the habitual residence of a child and that of its custodians. In Re F (a minor) (child abduction) Butler-Sloss LJ (as she then was) stated:

> 'A young child cannot acquire habitual residence in isolation from those who care for him. While 'A' lived with both parents, he shared their common habitual residence or lack of it.'

(iv) It is rarely possible for one parent unilaterally to terminate the habitual residence of a child by removing the child from the jurisdiction wrongfully in breach of another's rights ….. In substance therefore both in Hague Convention cases and, as in this instance, non-Hague Convention cases, a wrongful removal or retention must not be allowed to bring about a change in habitual residence of the child involved because to allow otherwise would legitimise the abductor's act unless wholly exceptional and particular circumstances. In Re J (a minor) (abduction: custody rights) 1990 2 AC 562, in the course of a Hague Convention case, Lord Donaldson said:

> 'In the ordinary case of a married couple, in my judgment it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights.'

The rationale is derived from the view that an habitual residence can only be acquired voluntarily and cannot therefore result from a wrongful act. Obviously the passage of time maybe the exceptional circumstances that will override that principle eg. if the child has resided in the particular country for many months and is well integrated into the local environment."

Applying those principles to this case, I have come to the conclusion that this child's habitual residence is Northern Ireland. Apart from two holiday visits to Chile, this child has been regularly resident in the United Kingdom now for over six years. She is entirely settled in to the environment in terms of her ties, friends, school, activities, language and habits. It must not be forgotten that when she came to the United Kingdom, her carer namely M had permanent legal guardianship of her given by a Chilean court in 1999. There is no doubt that an appreciable period of time and a settled detention will be necessary to enable someone to acquire an habitual residence. The necessity for spending an appreciable period of time in the new State was authoritatively stated in what is now a leading case on the acquisition of habitual residence, Nessa v Chief Adjudication Officer (1999) 1 WLR 1937. That case approved and followed Lord Brandon's speech in Re J (a minor) (abduction: custody rights) 1992 AC 562 where His Lordship had indicated that an appreciable period of time and settled intention was necessary to enable habitual residence to be acquired. In Nessa v Chief Adjudication Officer, Lord Slynn said at p. 1942 para. H:

> "I do not consider that when he spoke of residence for an appreciable period, Lord Brandon meant more than this. It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, durable ties with a country of residence or intended residence, and many other factors have to be taken into account."

It is my view that the close connection between this child and her carers M and M2, who clearly had an habitual residence in the United Kingdom, together with all the aspects of her life to which I have earlier adverted persuade me that she met both criteria of Lord Brandon, namely of having been here now for several years and with a settled purpose in mind.

(b) If I am wrong and the child is habitually resident in Chile, I must then consider any defence which arises under the Hague Convention. Under Article 13, the judicial authority may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views. The court has to consider whether the views are genuine and are expressed of the child's own free will. (See Re R (a minor: abduction) (1992) 1 FLR 105.) It is for the judge to decide whether the child's objection and degree of maturity should be taken into account and whether or not further investigation of the matter should be made. If the child's objection to return results solely from a

desire to remain with the abducting parent, who in turn does not wish to return, then little or not weight will be attached to the child's objection. (See S v S (child abduction) (child's views) (1993) Fam. 242. However, as I said at para. 16 of Re S, N and C (supra):

> "Undoubtedly in some instances a child conceptually will have difficulty distinguishing between the place to which he objects to return and the person to whom he will be returned, and the court must act sensitively and purposefully in looking at the overall circumstances of the objection to return."

I reiterate that I have no doubt that this child is of sufficient age and maturity to form a clear view about her wish to return. I do not believe that this wish is the result of any pressure or influence on the part of M or M2. Moreover I do not believe it is centred on the wish to remain with M or M2 as much as a desire to remain in Northern Ireland and carry on the way of life that she has now been following for some time. I believe this is a clear case where a mature child has unequivocally made her views clear and that it is in her best interests both psychologically and emotionally to remain in Northern Ireland with M and M2 in the knowledge that she will be and must be afforded substantial access to her mother at appropriate times in the future. In coming to this conclusion I am fortified in my determinations by the most recent case of Z v Z (abduction: child's views) (unreported) (2005 EWCA Civ. 1012) (to be published in the forthcoming 2005 Family Law Reports) where the Court of Appeal in England approved the views of Balcombe LJ in Re R (see page 27 above). In terms therefore the policy of the Convention and its faithful implementation by the courts of contracting States should always be a very weighty factor to be brought into the scales, whereas the weight to be attached to the objection of the child will vary with her age and maturity. In the exercise of the discretion under Article 13, the court must balance the nature and strength of the child's objections against both the Convention considerations and also general welfare considerations. I recognise that there should be no presumption that a child be not returned merely if he is of sufficient age and maturity for his views to be taken into account, but that a careful discretion should be exercised giving weight both to the policy of the Convention and to the welfare needs of the child. Carrying out that exercise, I have come to the conclusion that had it been necessary for me to so determine i.e.had I determined that she was habitually resident in Chile at the relevant time I would have undoubtedly concluded that this was a case where the child should not be returned given her age and maturity and the strength of the views that she has expressed against returning.

(x) Finally I shall now consider the residence order application made by the child in this instance. A child is not automatically entitled to apply for an Article 8 order and therefore needs leave to apply. The child may be granted

leave only if the court is satisfied that she has sufficient understanding to make the application. Even if satisfied that the child does have sufficient understanding, leave will only be granted if the court considers in all the circumstances that it will be appropriate to grant leave. The essential question is not whether the child is capable of articulating instructions but whether the child is of sufficient understanding to participate as a party in the proceedings, in the sense of being able to cope with all the ramifications and give considered instructions of sufficient objectivity. (See Re N (contact: minor seeking leave to defend and removal of guardian) (2003) 1 FLR 652. In that regard such matters as the length of the proceedings, the nature of the proceedings, the likely future conduct of the proceedings and the likely applications that would need to be made must all be taken into account.

I took these matters into account when considering the application by the child for leave and given the information that I had as to her age, maturity, capability and understanding, I concluded that leave should be granted and accordingly I made an order to this effect on 26 September 2005 pursuant to Article 10(a) of the Children (Northern Ireland) Order 1995. In doing so I also concluded that the granting of leave would be in the best interests of the child, that there was some likelihood of success and in the knowledge that jurisdiction to allow child applicants should be applied cautiously and reserved for matters of importance. (See Re C (contact: jurisdiction) 1996 Fam. 79.

Having granted leave, I now must consider the application in light of the following articles of the Children Order (Northern Ireland) 1995:

(a) Article 3(1) which obliges a court to determine any question with respect to the upbringing of a child with the child's welfare as the court's paramount consideration.

(b) Article 3(3) of the 1995 Order which sets out the welfare checklist.

(c) Article 3(5) of the 1995 Order which states:

> "Where a court is considering whether or not to make one or more orders under this Order with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

I have come to the conclusion that it is appropriate to make an order in this case settling the arrangements as to the person or persons with whom this child is to live namely that this child should live with M and M2. I wish to make it absolutely clear that whilst this residence order automatically gives parental responsibility to those in whose favour it is made ie. M and M2, it

does not extinguish the parental responsibility of her parents. It does not affect the legal relations between this child and C and merely settles the practical arrangements relating to her accommodation. The duration of this residence order will end once the child has reached the age of 16 years unless the court orders that it is to have effect beyond that age. I do not consider it appropriate in this case that that should have effect beyond 16 at which age the chid can apply again if she wishes.

I have come to the conclusion that there should be a residence order for the following reasons:

(i) Taking into account the paramount interests of this child, for the reasons I have already set out, I have concluded that this child should reside with M and M2 in Northern Ireland so that she can continue the lifestyle and education that she currently observes. I have taken into account all the circumstances of the evidence that I have already outlined. I do not believe it would be in her best interests to return to Chile at this stage and to do so I believe would invoke risks of irreparable or longstanding emotional damage to her.

(ii) I do not intend to slavishly rehearse all of the sub-articles of Article 3(3) of the 1995 Order, but I have considered all of them. In particular:

(a) I have ascertained her wishes and feelings and considered this in the light of her age and understanding. It will be clear from what I have already said that these point towards a residence order being granted.

(b) Her emotional and educational needs are in my view best met by remaining here in Northern Ireland attending the grammar school at which she is achieving such success.

(c) The likely affect of a change in circumstances which would bring about a return to Chile in my view would make her unhappy, rebellious and unsettled to the extent that it could well damage her emotionally in the future.

(d) I think she is at risk of suffering emotional damage if she is now to be taken away from a home where she has found happiness and security and exposed to the uncertainty of life in Chile.

(e) I am not satisfied that her mother is capable of meeting her needs at this stage for the reasons I have already set out, for example at paragraphs 118,19 and 24(viii) of this judgment.

[25] I have considered the range of powers available to me and in particular whether or not I should adopt the no principle order. I have concluded that

in order to afford this child the appropriate measure of security and stability, it is necessary that a residence order be made in the terms that I have outlined above.

[26] The determinations that I have arrived at in this case have not been made without considerable thought searching and difficulty on my part. The paramount interests of the child, save in the Hague Convention proceedings, have been the dominating factor in my deliberations. I earnestly believe that this will now create a new atmosphere and new relationship between mother and child which will remove the current rancour and bitterness which punctuates their relationship. I have not the slightest doubt that with the certainty that these orders provide to this child, she will now find the strength and security to be able to resume a natural, loving and fruitful relationship with her mother. To that end it is crucial that there be very substantial contact arrangements made between this child and the mother so that their relationship can continue to flower. I intend to give the parties two weeks in order to arrive at mutually agreeable terms of contact, which for obvious reasons will have to take place during school vacations, and which, in the absence of agreement, I will determine.

[27] I conclude by discharging the wardship proceedings and making the orders in the terms that I have hereinbefore set out.