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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 22/107345

Delivered: 28/07/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

A MOTHER

Applicant

and

A FATHER

Respondent

IN THE MATTER OF 'RO' A MALE CHILD AGED 18 MONTHS

**Ms Brown (instructed by Millar McCall Wylie Solicitors) for the Mother
The Father did not appear at the final hearing
Ms Rice (instructed by the Official Solicitor) represented the interests of the child**

McFARLAND J

Introduction

[1] On 28 July 2023 I gave a short *ex tempore* judgment in respect of an 18 month old boy. I indicated that a fuller written judgment would be issued, and this is that judgment. I have anonymised the judgment to protect the child's identity. The randomly chosen cipher 'RO' has been used. Nothing can be published that will lead to his identification.

Background

[2] The mother is from Northern Ireland and the father is from a Middle Eastern country (which I will call 'MEC'). They met through social media in or around April 2020 and the mother travelled to MEC to meet the father in person in January 2021. They underwent a Muslim religious marriage ceremony in April 2021. There were tentative plans for the couple to settle in the United Kingdom, but the father's

application to enter the United Kingdom either as a settled worker or as a tourist was unsuccessful.

[3] During this period the mother became pregnant. She returned to Northern Ireland for her ante-natal care, although she did return briefly to MEC in August 2021. RO was born in Northern Ireland in late 2021 and now holds a British passport. It is understood that the father may have obtained an additional passport from MEC for the boy although the mother did not sign any paperwork for it to be issued. The British passport is now in the possession of the father.

[4] After his birth RO lived with, and was cared for by, his mother and her family. The mother did suffer a deterioration in her mental health after RO's birth and she was detained for a short period under the provisions of the Mental Health (NI) Order 1986. After discharge from hospital she continued to care for RO although with social services now involved, her care was supervised by her family for a short period.

[5] The father was not entitled to enter the United Kingdom, but he did travel to the Republic of Ireland and the mother brought RO to have contact with him there in February and again in April 2022.

[6] The mother decided to bring RO to MEC to have contact with the father and his family. They arrived in early August 2022. It was always her intention that she would bring RO back to Northern Ireland. The father is not without influence in medical circles in MEC and in due course the mother was admitted to a hospital in MEC for treatment in respect of her mental health issues. When the mother was discharged from hospital, on receiving assurances from the father that RO would be returned to her care in September 2022, she returned to Northern Ireland on 27 August 2022 leaving RO in the care of the father. The father has failed to return RO to the mother's care.

[7] The mother's sister, the maternal aunt, travelled to MEC in September 2022 and again in October 2022 in an attempt to bring RO back to his mother in Northern Ireland but was unsuccessful.

[8] These proceedings relate to the mother's attempts to return RO to live with her in Northern Ireland. MEC is not a signatory to any of the Hague Convention treaties, and in particular the jurisdiction treaty of 1996 and the child abduction treaty of 1980.

The proceedings before this court

[9] The mother applied on 13 December 2022 for RO to be made a ward of court and for a return order. The Master made RO a ward of court on that date. The matter was then transferred to me on 6 March 2023 for consideration of the return order.

[10] At that time the father was participating in the proceedings and was represented by Ms McGurk of counsel instructed by McCartan Turkington Breen solicitors. The father had commenced proceedings in respect of RO in MEC, but it has been difficult to ascertain the exact status of those proceedings. The latest information has been obtained through McCartan Turkington Breen and the father claims that the court in MEC has ordered that the father have custody of RO. Advice received by the mother's solicitors from a lawyer in MEC is that those proceedings are apparently being dealt with in a Shia Muslim court with Muslim clerics exercising judicial oversight.

[11] The mother's application for a return order from this court was fixed for hearing and evidence was received from the mother on 26 April 2023. The case adjourned on several occasions and then eventually to 28 July 2023 to enable the father to give evidence. In the interim, a court order of 28 June 2023 was made to facilitate contact during August 2023 between the mother and RO in a neutral country in the EU to which the father was entitled to travel. The father at first expressed a willingness to travel to that country, but later indicated that he would not travel.

[12] That direct contact has not taken place, however, members of the paternal family do facilitate a live video contact using an internet platform by which the mother is able to see and communicate with RO on a daily basis.

[13] Several days before the re-commencement of the hearing on 28 July 2023, the father withdrew his instructions from his solicitors and indicated that he did not intend to continue to participate in the proceedings before this court. Leave was granted for his solicitors to come off record. The father, although aware of the date and time of the reconvened hearing, declined to appear.

Jurisdiction

[14] As MEC is not a signatory to the Hague Convention 1996, the provisions of that treaty do not apply when considering whether this court has jurisdiction. Therefore, Part I of the Family Law Act 1986 deals with jurisdiction in child custody matters. The relevant provisions are -

Section 1-(1) ... [I]n this Part 'Part I order' means -

... (c) an Article 8 order made by a court in Northern Ireland under the Children (Northern Ireland) Order 1995, other than an order varying or discharging such an order;

... (e) 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;

Section 19 - (1) A court in Northern Ireland shall not make a section 1(1)(c) order with respect to a child unless –

- (a) it has jurisdiction under the Hague Convention, or
- (b) the Hague Convention does not apply but –

... (ii) the condition in section 20 of this Act is satisfied.

(3) A court in Northern Ireland shall not make a section 1(1)(e) order unless –

- (a) it has jurisdiction under the Hague Convention, or
- (b) the Hague Convention does not apply but –
 - (i) the condition in section 20 of this Act is satisfied, or
 - (ii) 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 20 - (1) The condition referred to in section 19(1)(b)(ii) of this Act is that on the relevant date the child concerned –

- (a) is habitually resident in Northern Ireland, or
- (b) is present in Northern Ireland and is not habitually resident in any part of the United Kingdom, ...

Section 24 -

... (c) “the relevant date” means, in relation to the making or variation of an order –

- (i) where an application is made for an order to be made or varied, the date of the application (or first application, if two or more are determined together), and
- (ii) where no such application is made, the date on which the court is considering whether to make or, as the case may be, vary the order;

Section 41 -

(1) Where a child who –

- (a) has not attained the age of sixteen, and
- (b) is habitually resident in a part of the United Kingdom,

becomes habitually resident outside that part of the United Kingdom in consequence of circumstances of the kind specified in subsection (2) below,

he shall be treated for the purposes of this Part as continuing to be habitually resident in that part of the United Kingdom for the period of one year beginning with the date on which those circumstances arise.

(2) The circumstances referred to in subsection (1) above exist where the child is removed from or retained outside, or himself leaves or remains outside, the part of the United Kingdom in which he was habitually resident before his change of residence –

- (a) without the agreement of the person or all the persons having, under the law of that part of the United Kingdom, the right to determine where he is to reside, or
- (b) in contravention of an order made by a court in any part of the United Kingdom.

(3) A child shall cease to be treated by virtue of subsection (1) above as habitually resident in a part of the United Kingdom if, during the period there mentioned –

- (a) he attains the age of sixteen, or
- (b) he becomes habitually resident outside that part of the United Kingdom with the agreement of the person or persons mentioned in subsection (2)(a) above and not in contravention of an order made by a court in any part of the United Kingdom.

[15] In December 2022, the Master determined that this court had jurisdiction when she made RO a ward of court. This order was made on an *ex parte* basis but when the father became fully engaged with the proceedings no issue appears to have been taken concerning jurisdiction.

[16] In any event, I am satisfied that with the provisions of the Family Law Act 1986 applying, that RO was habitually resident in Northern Ireland on 13 December 2022 when the mother made the application to the court. RO was not residing in Northern Ireland, but he had lived with his mother in this jurisdiction for the entirety of his life up to August 2022 when he travelled to MEC with his mother. There was no intention that his centre of interests would change to MEC, and it was only when his mother’s health deteriorated and then when the father gave certain assurances that RO would return to Northern Ireland in September 2022, that the mother returned home leaving RO in the temporary care of his father. These assurances about RO’s return were repeated to the maternal aunt when she visited MEC on two occasions in the Autumn of 2022.

[17] There was no evidence before the court to suggest that during the period from August to December 2022 that RO’s stay in MEC was anything other than temporary in nature, and certainly no evidence that his centre of interests and therefore his habitual residence, had moved to MEC.

[18] This court therefore has jurisdiction in this case. The jurisdiction is vested in this court under the Children (NI) Order 1995 in respect of a contact order and a return order (the latter being a specific issue order) which are both Article 8 orders, and under the inherent jurisdiction.

[19] The Supreme Court in *Re NY (A Child)* [2019] UKSC 49 determined that both routes were open to an applicant. Lord Wilson at [44] stated:

“There is no law which precludes the commencement of an application under the inherent jurisdiction unless the issue “cannot” be resolved under the [1995 Order].

Some applications, such as for a summary order for the return of a child to a foreign state, can be commenced in the High Court as an application for the exercise of the inherent jurisdiction. But then, if the issue could have been determined under the 1989 Act as, for example, an application for a specific issue order, the policy reasons to which I have referred will need to be addressed. At the first hearing for directions the judge will need to be persuaded that, exceptionally, it was reasonable for the applicant to attempt to invoke the inherent jurisdiction. It may be that, for example, for reasons of urgency, of complexity or of the need for particular judicial expertise in the determination of a cross-border issue, the judge may be persuaded that the attempted invocation of the inherent jurisdiction was reasonable, and that the application should proceed. Sometimes, however, she or he will decline to hear the application on the basis that the issue could satisfactorily be determined under the [1995 Order].”

[20] I am satisfied that because of the urgency just before Christmas it was necessary for the Master to use the inherent jurisdiction route and having accepted jurisdiction on this basis, it is appropriate that any further orders, be they contact or specific issue, can issue under the inherent jurisdiction, and not under Article 8 of the 1995 Order.

Court orders

[21] The next issue is whether the court, in exercise of its inherent jurisdiction, should make any order in respect of its ward.

[22] It has to be recognised that with MEC not being a signatory of any of the Hague Conventions that the effectiveness of any order will be limited.

[23] The circumstances of the relationship between the mother and the father and the geographical and jurisdictional problems thrown up by that relationship mean that so long as the father retains RO within the borders of MEC it is unlikely that any court in MEC will act to enforce an order of this court. The evidence to date also indicates that the father is unlikely to comply with any order of this court and there are not any adequate enforcement powers available.

[24] The court is clearly of the view that the return of RO to the mother’s care is in his best interests, she, having cared for him during the early stages of his life. Despite issues about the mother’s mental health, there is no evidence to suggest that she would be unable to resume care for him. The court has had the benefit of reports from the Court Children’s Service and the Official Solicitor, and neither report raises

current concerns about the mother's ability to care for RO. The reports do highlight the obvious problem about attempting to resolve any contact arrangements between the father and RO, once RO has been returned to his mother's care.

[25] The court is conscious of the observation of Lord MacDermott when dealing with a certiorari application in *McPherson v The Department of Education* (NIJB 22 June 1973) at page 16 that an order of the court "does not usually issue if it will beat the air and confer no benefit on the person seeking it." This is clearly relevant in this case, however having heard submissions from Ms Brown on behalf of the mother and Ms Rice on behalf of the Official Solicitor, I consider that this court should make a return order, requiring the father to return RO into the care of his mother.

[26] Whilst acknowledging that this may have little effect on the father, or the authorities of MEC, there may be a stage in the future that RO may be present within the borders of a country that would permit the enforcement of the order to take place. For this reason, I will make the return order sought.

[27] Ms Rice also suggested that a penal notice should be attached to the existing contact order, requiring the father to produce RO for contact in the EU country during August. In all the circumstances the attaching of a penal notice to that order is not appropriate as it would be extremely difficult, if not impossible, to enforce, and would become a distraction.

Conclusion

[28] This court had jurisdiction in December 2022 because RO was habitually resident in Northern Ireland, and it continues to retain jurisdiction. It is in his best interests that he be returned to live with his mother, so I make that order.

[29] Ms Brown sought an order for costs for her client who is funding the litigation privately and is not in receipt of legal aid. In all the circumstances of this case and taking into account everything that the court has been told about the father including his professional qualifications and employment, I will make an order that the father pay the mother's legal costs, to be taxed in default of agreement.