



Neutral Citation Number: [2023] EWHC 3041 (Fam)

Case No: FD23P00531

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29 November 2023

**Before:**

**MR DAVID LOCK KC**  
**SITTING AS A DEPUTY HIGH COURT JUDGE**

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**Between:**

**A**

**Applicant**

**- and -**

**B (1)**  
**BRISTOL CITY COUNCIL (2)**

**Respondents**

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**Ms Miriam Best** (instructed by **Osbornes Solicitors**) for the **Applicant**  
**Mr Tadhg Barwell O'Connor** (instructed by **Lyons Davidson Solicitors**) for the **First Respondent**  
**Mr Simon Miller** (Instructed by **Bristol City Council**) for the **Second Respondent**

Hearing date: 24 November 2023  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

**This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.**

**Mr David Lock KC:**

1. On 23 October 2023 Mr A (“**the Father**”) issued an application in the High Court under the Child Custody and Abduction Act 1985 (“**the 1985 Act**”) seeking an order that his son, C (“**C**”), should be returned to Ireland where C is habitually resident. The respondent to this application is Ms B (“**the Mother**”). This judgment is primarily concerned with the question as to whether, given, the highly unusual facts of this case, the Father should be able to return to Ireland with C on an interim basis pending the final hearing of his application for a return order. I have decided to make an interim return order but would stress that this order is only made because of the very particular and highly unusual facts of this present case. Even though I have decided to make a return order in this matter, I would stress that this judgment is not intended to give the green light for other parties to make applications for interim return orders in other cases. An interim return order will be a highly unusual remedy and I have been prepared to make the order here because of the highly unusual facts of this particular case.

**The facts**

2. C, who was born on 12 December 2012 and is aged 10 and will shortly have his 11<sup>th</sup> birthday. C had been living with the Mother and the Father at an address in Ireland and it is common ground that he is and remains habitually resident in Ireland. The application was supported by a witness statement from Ms Lauren Hall of Osbornes Law who acts in this matter on behalf of the Father. Ms Hall explained that the Father is a national of a Baltic country who has been habitually resident in Ireland since 2012. She explains that the Mother is British but was, until recent events, habitually resident in Ireland. The Mother and the Father married on 10 October 2010 and C was born in Belfast where the couple were living at the time of his birth. He holds UK citizenship. They subsequently moved to the Republic of Ireland. The Mother and the Father separated in about February 2023 but, for a while, they continued to live in the same residence.
3. C is a child with substantial disabilities. Ms Hall explains:

*"I am instructed that C is autistic and was diagnosed with autism at 4 years old. I am instructed that C is more non-verbal than verbal. I am instructed that in Ireland C was in receipt of various additional support, including attending a [a school] which specialises in meeting the needs of pupils with special educational needs. This includes by tailoring the curriculum for these students (including C), and helping children by using play therapy and language therapy etc. C in particular qualified and was receiving this additional help.*

*I am instructed that when feeling stressed and or anxious, C has meltdowns and outbursts. I am instructed that when this happens, the parties, and particularly the Applicant Father (given the Mother's own mental health – information below), would have to physically restrain C to prevent him from causing injury to himself and others."*

4. Ms Hall makes further reference to the Mother's mental health. She says:

*"I am instructed that the Respondent Mother was diagnosed with pulmonary embolism in 2022, which unfortunately made her extremely ill. The Applicant Father is of the view that this impacted the Respondent Mother's mental health, and that the Mother was subsequently diagnosed as clinically depressed and prescribed with antidepressants. The Applicant Father supported her through this time including arranging for her to see the GP and accessing private therapy, through his work insurance policy. I am instructed that the Mother's moods and behaviour gradually became more concerning, and in October/November 2022, the Mother was told by the GP that there was a real possibility she could have psychosis. The Mother was prescribed with anti-psychotics and referred to the Irish Mental Health Services ... . I am instructed that the Father was doing all of the day-to-day caring for C whilst the Mother was dealing with her mental health".*

5. Ms Hall then relates her instructions about a series of incidents in which C's actions had triggered outbursts from the Mother and vice versa, with the Father intervening on each occasion to restrain C and to attempt to calm the Mother. I appreciate that this is the Father's account of these incidents, and the Mother may well recall these events in a very different

way, but there is no serious dispute that C is a child with profound disabilities and that the Mother has very serious mental health challenges.

6. Ms Hall explains how the Father was persuaded to agree to the Mother taking C on holiday to visit the maternal grandmother in Bristol for the maternal grandmother's birthday on 8 July 2023. The Mother was due to have travelled to Dublin with C for a flight on 8 July 2023, but they appear to have missed the flight and travelled to Bristol the following day. Communication between the Mother and the Father started well but, after a few weeks, the Father became concerned about the arrangements to return C to Ireland to start the new school year, which was due to start on 30 August 2023. The Father then started to receive some text messages with bizarre wording and became concerned that the Mother's mental health was getting worse. Some of those messages were exhibited to Ms Hall's witness statement and they are strongly indicative that the Mother was undergoing a serious mental health crisis.
7. The Father instructed solicitors who wrote to the Mother in a letter dated 24 August 2023 requesting her to bring C home to Ireland to start the new school term but she did not do so.
8. As a result of the lack communication from the Mother, the content of some of the messages that were being sent and the fact that C was not being brought back to start the new term on 30<sup>th</sup> August 2023, the Father asked the social worker that assists the family in Ireland whether a welfare check on C and the Mother could be done in Bristol. The Irish social worker got in touch with the child protection department at Bristol City Council ("**the Local Authority**") and a welfare check was done over the telephone on 4th September 2023. Although the email reporting back to the Irish social worker, and then passed to the Father, came from a social worker at the Local Authority, it is now clear that she was reporting a conversation that had taken place between a social worker employed by the Local Authority, Mr Gavin Strong, and the Mother. The Mother explained to Mr Strong that she had moved to Bristol because she believed that "*C was being put in the corner at school and did not have the right teachers*". The Mother explained that she was trying to find a school place for C but knew that he would require a psychological and physical assessment. She explained that she and C were staying in the same room at her mother's house but were "*technically homeless*" and asked for help with finding accommodation.

9. Mr Strong subsequently provided more details of his involvement with the Mother in a letter to the High Court dated 14 November 2023. This said:

*"I have been involved with C since 23.10.23. My involvement was triggered by a referral raising concerns that B had been verbally abusive to C. The referral described an incident where B had locked C outside and calling him a 'fucking retard'. I completed a home visit to B and discussed the current situation for B. B explained that she had moved back to England after separating from A. B had not explained that there were any court proceedings ongoing at this point. I completed a mapping with B to ascertain what family members she had to support her and began completing a S.17 assessment to understand C's needs and explore support as I felt C was very isolated and vulnerable. Alongside this B had raised concerns about C being sexually abused... at his short break, where she had explained that there was an incident where he had stripped. B was able to explain that this had been investigated and no further action was taken. During this visit I was concerned about B's mental health, B presented as distrustful and anxious. I had suggested that B goes to the GP around her mental health during this visit.*

*Separately from the concerns in relation to B's mental health. The initial referral from 23.10.23 had mentioned that a member of the household was an archived Registered Sex Offender, but gave no details of his convictions. Disabled children's social work team requested more information from the police on 23.10.23 and received a response on 1.11.23. This additional information triggered a strategy discussion on 3.11.23. The outcome of the strategy discussion was to complete Section 47 enquiries to ascertain if C is at risk of, or is likely to experience significant harm whilst in the care of his mother. Currently, a S.47 enquiries and a S.17 assessment are open in relation to C living with his mother at ...*

*Following a strategy discussion held on 3.11.23, I called B and explained that there was a multidisciplinary professionals meeting where everyone was worried about C living with this individual due to his previous convictions. I asked B if she was aware of the individual's convictions, and she said she was. On the phone, I explained to B that she is not to leave the individual alone with C over the weekend due to the risk. I continued to say that I would visit the family home on 6.11.23 to create a robust safety plan with the family whilst I complete S.47 enquires. B agreed to this and said she understood.*

*However, B cancelled the visit on 6.11.23 with a text reading 'have to. Cancelled 4pm meeting'. I called B to explained that she has had to take her mum to hospital as she is unwell. B sounded stressed and cut off the line before I could request to complete a visit on 7.11.23. At this point, I understood that this was a stressful situation for B and she had assured me that C was with her in hospital over the phone. Therefore, I responded with a text saying 'Hi B, the purpose of my visit is to safety plan around [name redacted] and assess the level of risk. As well as exploring what other support we can offer. I understand you have to take your mum to hospital, but I need to complete a visit tomorrow. I will come round at 11:00. Thanks, Gavin.'*

*When I visited on 7.11.23 at 11:00, the individual was alone caring for C whilst B visited her Solicitor. This was very concerning considering my previous conversations and communication with B. I called B and requested that she comes home as it is not safe for C to be left alone in the individual's care. B only returned home after her solicitor overheard the conversation I was having with B. B's solicitor suggested that B returned to C which she did. I stayed at the property with the individual and C whilst we waited for B to arrive".*

10. Mr Strong describes how he attempted to agree a plan with the Mother that would protect C, but he then received a series of what he described as "worrying and disturbing messages" from the Mother, some of which had a sexual content. I do not need to set those messages out in full in this judgment, but I fully accept that Mr Strong, who is an experienced children's disabilities social worker, was fully justified in being very concerned about the content of the messages. Mr Strong said:

*"I then responded by saying 'B I need to see C today. I am really worried about his and your well being. Where are you both? If you won't agree I will need to call the police to complete a welfare check'. B responded with a picture of a women taken from the internet and said 'call her instead."*

11. When Mr Strong and a police officer visited the property, they were effectively required to leave after having a brief conversation with the Mother. Mr Strong was therefore faced with having to make an assessment as to whether C was safe in the Mother's care. His report states:

*"B was in denial about the individual's previous convictions and was bringing up seemingly random sexually oriented topics instead of answering my questions. B was convinced that I do not work for the local authority and that the current situation was a conspiracy. B explained that she thought I was here because of her sister in Australia who has sex with dogs. B also said that she was sexually assaulted by BW bullies in school. Timelines for this do not make sense and it was clear to me that B was experiencing some significant distress. B continued to speak about seemingly unrelated sexual topics ...*

*B also suggested that I was stalking her on social media. I kept attempting to bring the conversation back to C with the support from the police officer, but unfortunately this was not possible.*

*At this point, the police and I agreed that B was not safe to care for C due to there being very limited protective factors. I had previously tried to call B's sister N earlier in the day and her phone was off. I had also spoken to ..[B's mother] ..who had said that C was at home with her. However, it transpired that B's mother was still in hospital, and she had lied to me. Police officers also explained that they had spoken to B's mother on the phone when they had arrived and it seemed that she also didn't believe that I was a Social worker and appeared to believe B's views. I was significantly concerned about the sexual nature of my conversation with B and it was decided that C was taken into police protection.*

*Alongside this, as part of completing S.47 enquiries I had previously spoken to the head of C's school who explained they had also been concerned about B's well being and mental health. Specifically, School had explained that they had received worrying messages to a previous member of staff in September 2023. Andrew explained that they had been communicating with A about C for some time as they felt that B was unable to engage with the support they offered.*

*My final concern relating to C is his own vulnerabilities. C has a diagnosis of Autism, which impacts his understanding, behaviour, and communication. C does have some verbal language, however this is limited and he is not clearly able to express how he*

*feels when asked. C has been isolated in Bristol since he came to Bristol in July 2023. C is away from his support network in Ireland and I am concerned that he is not accessing all the support available to him to aid his development.*

*After C was placed in police protection on 10.11.23 and moved to a place of safety, without prompt at 19:00 C looked at me and quietly said 'did him up the bum'. This made me very worried as I would not expect this phrase to be said by a ten-year-old boy. I worry that C may have heard this language in the home environment, considering all the sexual language being used by B in her communication with me."*

12. Mr Strong explained that, if C were to be returned to live with the Mother at the Mother's address, this would involve living in the same property as a man who is a registered sex offender. In such circumstances, he said that the Local Authority would consider issuing public law care proceedings.
13. Once C was in police custody, he was accommodated in a specialist children's home and Mr Strong called the Father who then travelled to Bristol. The Local Authority then handed care for C over to the Father. The Father explained that he had no accommodation in Bristol and could not afford to rent accommodation for him and C. As a result, the Local Authority have been accommodating the Father in a hotel in Bristol since 13 November 2023. The Local Authority agreed to take on the cost of funding the hotel accommodation for the Father and C from 22 November 2023.
14. These proceedings were commenced on 23 October 2023 following a referral that was made to ICACU on 5 October 2023. The Mother was served on 25 October 2023 and the matter was first listed before Ms Justice Henke on 3 November 2023 when the Judge made directions. Those directions were made prior to the events which led to C returning to the care of the Father. As part of those directions, the Mother agreed to lodge her passports and C's passports with her solicitors. In a normal international custody case, the effect of lodging passports would be that it would not be possible for anyone to remove the child from the United Kingdom. However, Ireland is part of the UK/Ireland "Common Travel Area". The Father has retained his passport and thus, in practical terms, I was told that there is nothing preventing the Father from travelling back to Ireland with C as he does not need C's passport in order to be able to travel back to Ireland with the child. I appreciate that the purpose of the

passport undertaking, which was given as part of the order of Ms Justice Henke, was to prevent the Mother from taking C to a third country. It is not clear to me whether it was appreciated at the time that C would not need his passport to travel back to Ireland.

15. Paragraph 9 of the order of Ms Justice Henke required the Local Authority to file a “*short letter/report*” on a number of issues relating to C. That is the origin of the letter to the High Court from which I quoted above.
16. Paragraph 12 of that order required the mother to file and serve her Answer, a statement in support and any evidence which she seeks to rely upon by 4 pm on 21 November 2023. It also provided that the mother was to include a list of what medical records she has obtained in respect of her mental health from Ireland.
17. The Mother filed her Answer but I was told that, as a result of her mental health, she has been unable to file any evidence in the proceedings. However, the Answer is reasonably detailed and it provides that the Mother relies on article 13(b) of the Convention and on child objections pursuant to article 13(2), albeit the Answer raised the possibility that the child “may” object to a return. The case advanced by the Mother under article 13(b) was as follows:

*“The mother believes that there is a grave risk of physical or psychological harm to the child and that they will be placed in an intolerable situation if he is returned to the Republic of Ireland. In support of this contention, the mother relies on the following, among other things:-*

- i The mother has no home to return to in the Republic of Ireland;*
- ii The mother has no family in the Republic of Ireland and will be isolated and lonely upon a return;*
- iii The mother has no financial support in the Republic of Ireland;*
- iv The mother has no support network of any kind in the Republic of Ireland;*
- v The mother is concerned that she may be arrested upon a return for alleged child abduction and the child could be removed from her care which would place the child in an intolerable situation.*

*It may be necessary for a full mental health assessment of the mother to be carried out in the course of these proceedings. If the child is in the mother's care at a final hearing and the mother is ordered to return the child to the Republic of Ireland, or if the child returns to the Republic of Ireland with the father, the impact of such a return on the mother's mental health and her availability to care for the child going forwards will need to be explored further.*

*If the child is not in the mother's care at the time of a final hearing and the father collects the child to effect his return to the Republic of Ireland, the mother believes that the child will be placed in an intolerable situation because of the separation from her care in circumstances where she has been the child's primary carer since birth and there is a grave risk that the child could be subjected to psychological harm."*

18. Following the hearing before Ms Justice Henke, C was returned to being cared for by the Father. As a result, the matter came back to the High Court before HHJ Parker, sitting as a Judge of the High Court, on 15 November 2023. At that hearing the Father gave the following undertaking:

*"The father undertakes to the court, having received the benefit of legal advice and a warning from the court, not to remove the child, C... from the jurisdiction of England and Wales pending further order of the court".*

19. By the date of that hearing the Mother's solicitors were becoming concerned as to whether the Mother had capacity to conduct the proceedings due to her mental health. They therefore sought and obtained permission to instruct Dr Katherine Donnolly to conduct an assessment of the Mother's capacity pursuant to the Mental Capacity Act 2005. Dr Katherine Donnolly subsequently reported to confirm that, in her opinion, the Mother did have capacity to conduct these proceedings but that she would need the support of an intermediary.
20. It was clear that the Father had told HHJ Parker that he wanted to return on an interim basis to Ireland and that issue needed to be urgently resolved. Paragraph 13 of that order provided:

*"The next hearing on 24 November 2023 shall be listed for 2 hours before Mr D Lock KC (DHCJ). On that occasion, the court shall consider:*

- a. The father's application for an interim order to return to Ireland pending the conclusion of the proceedings;*
- b. Any application for funding to enable the father to remain in this jurisdiction to care for C pending a final hearing or other support services either party may seek from the Local Authority;*
- c. Further directions required to progress this matter in light of the mother's capacity assessment, such as the filing of the mother's evidence and any Part 25 application; and*
- d. Whether the child should be joined as a party with the appointment of a Children's Guardian".*

21. The primary issue before me at the hearing on Friday 24 November 2023 was therefore whether to make an order under section 5 of the 1985 Act to permit the Father to take C back to his home in Ireland on an interim basis pending the final hearing of this matter. Three parties were represented before me at the hearing, namely the Father, the Mother and the Local Authority. The Local Authority played a significant role in this case and provided valuable evidence and I consider that they should be joined as a party in case this matter goes further.
22. I accept the circumstances of this hearing were intensely difficult for all parties. The position of the Father was that he wanted to return home to Ireland with his son for multiple reasons. He was absent from work whilst in England and was living with his son in a hotel room in a modest hotel. His son has special educational and psychological support needs which he could not fulfil in England because C was not able to access specialist services whilst living in Bristol. However, whilst acknowledging the strong opinions of her client, his counsel was initially reluctant for me to make an interim return order as she appeared to be concerned that seeking such an order would breach her duties to the court because such an order was wrong in principle, especially given the difficulties in the Mother's participation and absence of any evidence from the Mother. Whilst, in the end, I disagreed with counsel for the Father, I acknowledge that she was acting entirely properly in drawing the court her reservations about the order she was instructed to seek on behalf of her client.
23. Counsel for the Mother, Mr Barwell O'Connor, was in an invidious position because his client was only present via a remote link in Bristol and communication was difficult because of his

client's mental health difficulties. I heard some evidence from the social worker, Mr Strong, and then adjourned for about 2 hours to give Mr Barwell O'Connor an opportunity to take instructions from his client before cross examining Mr Strong. Unfortunately, the effect of the social work evidence was to upset the Mother so much that she was unable to give Mr Barwell O'Connor any instructions. He could not therefore proceed with cross examination and could only request a further adjournment and invited me not to make any order relating to an interim return until he was able to cross examine Mr Strong. Unfortunately, it became clear that this would necessitate an adjournment of some weeks and possibly into January 2024 when the intermediary would be available.

24. The position of the Local Authority was firmly that the present arrangements were unsustainable even in the short term and that C should return to Ireland. Mr Strong gave clear and compelling evidence about the shortfalls of the present situation. He was clearly very concerned about the Mother's mental health but was also concerned that he had reached an agreement with her that she would not leave C alone with her brother, on the grounds that he was a registered sex offender, and yet had found C alone with the brother when he made an unannounced visit only a few days later. Mr Strong explained to me that, prior to these events, he had information about C and his parents but he rapidly realised that this was a mother who, as a result of her mental health difficulties, was struggling to meet the needs of her child. He said he was concerned that, on 10 November, the bizarre and sexually charged text messages from the Mother meant that, at that point, there were risks to C in being in his Mother's care. He said that, since C had been placed with the Father, he had supervised a contact session with the Mother on 21 November 2023 and she had appeared to be significantly better than she had been when he saw her on 10 November 2023 but, given her fluctuating mental health condition, he would still be concerned about any proposal to return C to his Mother's care.
25. Whilst I accept that this evidence was not tested by Mr Barwell O'Conner because he was without instructions, I have to give this evidence considerable weight because this was evidence from an experienced professional social worker who has been closely involved in the welfare of this child and has first-hand experience of the consequences of the Mother's mental health. This is not, I stress, either a matter of reaching adverse judgments about the Mother or blaming her. I am acutely conscious that she appears to be having a serious mental health breakdown and is in need of professional mental health support. I also express no views at all

about the extent to which she is a competent and caring parent at times when she is not suffering from a mental health crisis, but the evidence shows that, at this time, there are sufficient concerns about the Mother's ability to parent C that it would not be appropriate to return C to her care.

26. In contrast, Mr Strong said he had formed a good impression of the Father's ability to care for C, albeit in very difficult circumstances where they were both living in a hotel room in a city away from his home country and with very little support. He said that the Father had shown that he understood C's needs and was honest about how difficult it was for C living in a hotel. Mr Strong explained that the past few months had been really difficult for C because, as a child with autism, he needed structure and routine in order to feel safe and that all this had been taken away from him. Mr Strong said he was concerned that C was isolated in Bristol because he was away from his peers and everything that was usual for him. His firm conclusion was that the Father was doing his best in very difficult circumstances, but it would be far better for C to be allowed to return to the structure and routine he had in Ireland before he was abducted.
27. Mr Strong also explained that he had had an in-depth discussion with the head of the specialist school which C attended until July 2023 and where he was due to start the new term on 30 August 2023. The head explained the school's approach to support C, as a largely non-verbal child with significant autism. He explained the speech and language therapy and occupational therapy support that was available to C as well as activities to promote his learning and development. Mr Strong expressed the view that these appeared to him, as a social worker specialising in disabled children, to be an entirely appropriate package of measures. The school head also explained that C has access to day care support which he enjoys. Mr Strong confirmed this and said that C had communicated to him that he wanted to go back to this facility and could not understand why he could not do so.
28. Mr Strong said that the school head explained that places at specialist schools in Ireland were in huge demand and that the system in Ireland was that places were held open for 28 days if a child was not attending but, after 28 days, the place could be reallocated to another child on a permanent basis. He was told that C's place had technically lapsed because he had been absent for more than 28 days and there were other children who could be allocated the place. However, to date, no allocation had been made and so C would be able to return to the school

if he were to return shortly. However, his school place could be re-allocated to another child at any time and the overall impression I got from his evidence is that it would, in all probability, be lost if C failed to return shortly. Mr Strong was asked what steps could be taken in England to replicate the type of support that C was getting in Ireland. He said that the route to accessing special educational support in England was through the Education, Health and Care Plan (“EHCP”) process and that securing the necessary assessments to produce an EHCP plan would involve a number of different professionals and, due to pressures on the system, would take a period of months. Then, once an EHCP plan had been produced, it would be necessary to identify a placement that was able to provide the proper level of support for C and to allocate the resources necessary to support that placement. That is sadly a long process that takes many months.

29. Mr Strong was asked about the level of support that he could offer to C and his Father when they were in Bristol. He explained that the Local Authority could only offer limited family support which the Father found helpful, but it was not the specialist support C needed.
30. Mr Strong was clear that the Father living with a disabled child in a modest hotel was far from ideal. The Local Authority accepted that it would be possible for the court to make an order to require the Local Authority to provide the Father with more suitable accommodation. However, Mr Miller on behalf of the Local Authority explained that the Local Authority have an acute shortage of housing accommodation and sadly support a large number of families with children in hotels, which they accept is hugely challenging. Whilst the Local Authority accept on the basis of *Re A (Abduction: Interim Directions: Accommodation by Local Authority)* [2010] EWCA Civ 586; [2011] 1 FLR 1, it would be possible for the court to require the Local Authority to accommodate the Father and C in a property pending determination of this matter, Mr Miller explained that it would only be possible to do so by giving them priority over other families who are accommodated in hotels and whose children have more substantial needs. It seems to me that, as a matter of principle, that would be highly undesirable. I consider that, as far as possible, the Local Authority should allocate its limited stock of residential property in accordance with the needs of those who are seeking its assistance and not by reference to who has or has not secured court orders. In my judgment, it would not be right to require the Local Authority to allocate accommodation to the Father and C in preference to other families with greater needs because that would, in effect, involve queue jumping.

**The potential timetable if C were not to return to Ireland immediately.**

31. I was given the following information about the potential timetable if no interim return order was made. As noted above, Dr Donnolly has reported that the Mother does have capacity to conduct these proceedings, but she advises that the Mother will need the support of an intermediary. I indicated that, if these proceedings were to continue, I was content to agree to appoint an intermediary to support the Mother but the initial indications from the Mother's solicitors were that it would take at least a month before an intermediary could be appointed. The Mother's evidence could not be prepared until an intermediary was involved and thus, in practice, the Mother would not be in a position to serve her evidence in reply until early 2024. She has also asked for a psychiatrist to be appointed to provide a report on the Mother's mental health. I agreed to that appointment and it was indicated that a report could be obtained relatively quickly, in approximately two weeks.
32. This case has been given a provisional listing for a trial in February 2024. Although the Father's counsel tentatively inquired if it might be possible to obtain an earlier trial date, that seems to me to be unlikely because the Mother will need to file her evidence once the intermediary is appointed and the Father will need an opportunity to respond to that evidence.
33. It thus seems to me that, unless I permit the Father to return to Ireland with C, the Father and C will have to remain living in a modest hotel in Bristol for about the next 3 months and C will not have any specialist educational or psychological support during that period. Further, there is a very significant chance that, even if the Mother's application is dismissed in January or February 2024, by the time C returns to Ireland he will have lost his place at the specialist school. Alternatively, if C is to remain in the UK with the Mother on a longer term basis, she has no settled place of residence and it is likely to be a significant time before an EHCP plan can be prepared and he will be able to access appropriate specialist support in England and, throughout that time, C will not be able to access the specialist support he needs.
34. I have no reason to think that this is what the Mother intended when she decided to leave Ireland to bring her son with her to live in Bristol. However, it seems to me that, unless I allow C to return to Ireland now, there is a very significant chance that he will not be able to access specialist education and psychological support for an extended period. I am not in a position to assess the likely detrimental impact on C of being excluded from appropriate specialist education and psychological support for an extended period but, on a purely welfare basis, it

seems to me that the case that he should return to Ireland at this time is, in my judgment, overwhelming.

35. Nonetheless, Mr Barwell O'Conner submits that, as a matter of principle, this is an order I should not make. Somewhat surprisingly, that submission received tentative support from Ms Best on behalf of the Father on the basis that, as far as she was aware, there is no precedent for such an order. To be fair to Ms Best, she expressed the view that she was concerned as an officer of the court that any move to summarily determine the issues today would be a breach of the Mother's article 6 rights and that she would be very concerned that any such decision would be overturned by the Court of Appeal, and that would further delay C's return to Ireland. In contrast, Mr Miller on behalf of the Local Authority strongly submitted that I should accept that it was in C's interests to return to Ireland and submitted that, whilst recognising the difficult position of the Mother, on these facts I should not shirk from making an order under section 5 providing for an interim return.

### **The Law**

36. Both the Mother and the Father have parental rights and responsibilities for C. I have not received any evidence about the position of parents under Irish law, but I was invited to assume for the purposes of this hearing that there is no significant difference between the law of England and Wales and the law of Ireland in this area. I am content to proceed on that basis.

### **Should the Father be released from his undertaking not to return to Ireland with C.**

37. The facts of this case are highly unusual and, following the hearing, it seemed to me that the parties had all been proceeding in this case on the basis that, once the Father made an application to this court for a return order, the only legal route by which C could return to Ireland would be by this court making a return order. It appears to have been assumed that, as long as these proceedings have not been resolved, the only lawful route for C to return to Ireland would be through orders made in these proceedings. Having considered the matter carefully following the court hearing, it seems to me that this common assumption is wrong because the existence of these proceedings does not remove the Father's normal parental rights.
38. There are two Hague Conventions which are relevant to this issue, namely the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25th

October 1980 (“**the 1980 Convention**”) which is at Schedule 1 to the 1985 Act and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children concluded on 19th October 1996 at The Hague (“**the 1996 Convention**”). The 1996 Convention formerly took effect as UK domestic law as a result of the European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2010. However, following the withdrawal of the UK from the EU, those Regulations were revoked. However, the 1996 Convention now has effect in UK domestic law as a result of amendments made to the Civil Jurisdiction and Judgments Act 1982 by s.1 of the Private International Law (Implementation Agreements) Act 2020: see *B v C (No. 2) (1996 Hague Convention Art 22)* [2023] EWHC 2524 (Fam) at paragraph 43.

39. In order to understand the effect of any parental rights which remain in force, notwithstanding the fact that the Father has made an application under the 1985 Act and the 1980 Convention, it is necessary to start with the provisions of the 1996 Convention. The 1996 Convention confirms in its preamble that “*the best interests of the child are to be a primary consideration*”. I note the subtle but important difference between this wording and the wording of section 1 of the Children Act 1989 which provides that “*the child’s welfare shall be the court’s paramount consideration*”. The objects of the 1996 Convention are stated to be as follows:

“*The objects of the present Convention are -*

- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;*
- b) to determine which law is to be applied by such authorities in exercising their jurisdiction;*
- c) to determine the law applicable to parental responsibility;*
- d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;*
- e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention”*

40. The “measures” referred to in Article 1 include “*the attribution, exercise, termination or restriction of parental responsibility*”: see Article 3. Article 5 provides:

*“(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.*

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

In this case it is agreed that C is habitually resident in Ireland and accordingly, under UK domestic law, the Courts of Ireland have primary responsibility to take measures to protect C. Both parents have parental rights under the law in Ireland and these rights are not removed by the 1996 Convention.

41. Article 7 of the 1996 Convention creates specific rules in the case of wrongful removal or retention of the child. This is a wrongful retention case because it is agreed that C came to the UK with his Mother for a holiday, but it is conceded that the Mother has acted wrongfully in failing to return him to Ireland prior to the start of the school term on 30 August 2023. Article 7 provides that, in the case of wrongful retention, *“the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State”* and at least one other condition has been satisfied. In this case it is accepted that C continues to be habitually resident in Ireland and thus Article 7 provides that the courts in Ireland keep their jurisdiction to make welfare decisions concerning C in accordance with the rights of the parents under Irish law.

42. Article 7(3) then provides:

*“(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child”.*

43. The UK is the state *“in which he ... has been retained”* for these purposes. Article 11 then provides:

*“(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.*

*(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.*

*(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.*

44. The meaning of this provision and its inter-relationship with return orders under the 1980 Hague Convention was examined by the Supreme Court in *In the matter of J (A Child)* [2015] UKSC 70, [2016] AC 1291 (albeit that was not a 1980 Convention case). Lady Hale observed that the scheme of the 1996 Convention was to give the courts of the child’s habitual residence primary jurisdiction, with the courts of the place of the child’s presence only having a secondary jurisdiction: see paragraph 34. However, Lady Hale confirmed that the courts of the place of the child’s presence were able to use the powers under articles 7(3) and 11 of the 1996 Convention to make orders where these were necessary for the child’s welfare and that they could be classified as urgently needed orders. Lady Hale confirmed that any welfare orders made in respect of a child by this Court, acting as a court of a secondary jurisdiction, will be enforceable in the home state under part IV of the 1996 Convention. However, orders made by this Court, as a court with secondary jurisdiction, will lapse once orders are made by the Courts in the home state: see article 11(3). It seems to me that this framework assumes that the parents continue to have parental rights under the law of the home state throughout the period when orders may be made in either state.
45. The 1980 Hague Convention has effect in domestic law as a result of the 1985 Act. Article 3 of the 1980 Convention defines the meaning of a “wrongful” retention as a retention which is in breach of the rights of custody of the left-behind parent under the laws of the state of habitual residence of the child. Rights of custody are widely defined in article 5 to include “*rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence*”. There is nothing in the 1980 or the 1996 Conventions to suggest that the rights of custody of the left-behind parent are suspended by the wrongful act of the

abducting parent or by the act of the left behind parent in commencing proceedings seeking a return order and, on the contrary, the whole purpose of the Conventions was to uphold parental rights. It thus appears to me that the Father's parental rights under Irish law (and for domestic purposes his parental rights and responsibilities under the Children Act 1989) remain in force even though he has brought these proceedings.

46. In a more normal case, the left behind parent is, in practice, unable to exercise his or her custody rights because the child has been abducted by the abducting parent and the only way for the left behind parent to secure an orderly and clearly lawful return of the child to the state of the child's habitual residence would be for the left behind parent to obtain a return order under the 1980 Convention. However, this is a highly unusual case because the child protection authorities in the state to which the abducting parent has travelled have intervened on welfare grounds to take the child away from the abducting parent and have only refrained from taking child protection proceedings because the left behind parent, namely the Father, was prepared to travel from Ireland to Bristol and to resume caring for C. Mr Strong explained that that action meant that the Local Authority were satisfied that C was no longer at risk and so did not make an application for an Interim Care Order.
47. The Father cared for C between 13 November and 15 November 2023 when he was not under any form of court order which required him to continue to keep C in Bristol. In those circumstances it seems to me important to examine the legal issue as to whether the Father would have acted in breach of any legal duty if he had travelled back to Ireland with C.
48. For the reasons set out above, in my judgment the Father retained his parental rights at all times. It follows that, as long as the Father genuinely formed the view that it was in C's best interests to resume living in Ireland and resuming his place at the specialist school, returning home with C before 15 November 2023 would have been a lawful exercise of his parental responsibility. The Father would not be "abducting" C within the meaning of the 1980 Convention because he would be taking the child back to his place of habitual residence. He would therefore not be breaching the Mother's rights of custody under Irish law. Further, by commencing these proceedings, in my judgment the Father cannot be taken to have given any form of implied undertaking that he would not return to Ireland with the child absent either a court order or the Mother's consent. If, after he had commenced proceedings, instead of the Local Authority becoming involved, members of the Mother's family had realised that the Mother was unable to care for C and that the child needed specialist support, and they had

contacted the Father and asked him to collect C, the Father would not have been acting unlawfully in coming to Bristol to collect his son and taken him home to Ireland. He would simply have been exercising his parental rights in a responsible way notwithstanding the fact that no return order had been made in the proceedings.

49. This case is also unusual because, in contrast to what happens in other cases, although the abducting parent has the child's passport, on these facts it would have been possible for the left behind parent to take the child across international borders in order to bring the child home. That is possible because of the Common Travel Area. It follows that in my judgment, the Father would have been acting lawfully if he had travelled back to Ireland with C between 13 and 15 November 2023.
50. The Father did not, of course, take that step and did not threaten to do so. He may well have believed that he was not entitled to do so, or assurances may have been sought by the Local Authority and obtained from him that he would stay in Bristol. Instead, he has stayed in Bristol with C and taken a full part in the legal process. Any right that he may have had to take C back to Ireland changed when the Father appeared before the High Court on 15 November 2023 and gave an undertaking not to return C "*pending further order of the court*". Although I do not have a statement of the reasons that the Judge sought that undertaking, it seems to me that it was clear that he wanted to preserve the position for a short period of time because he also listed this hearing which was due to consider "*The father's application for an interim order to return to Ireland pending the conclusion of the proceedings*".
51. Having considered matters carefully, it seems to me that directing the court to consider whether to make an interim return order under section 5 of the 1985 Act puts matters the wrong way around. In the highly unusual circumstances of this case, in my judgment the first issue to consider is whether to continue to require the Father to give an undertaking that he will not return to Ireland with C. Given that, absent his undertaking, he is lawfully able to return with C, it seems to me that the question of an interim order under section 5 of the 1985 Act is, in fact, wholly unnecessary. The Father has said that, if he is allowed to return to live with C in Ireland whilst these proceedings are being considered, he is prepared to give undertakings (a) to return C to the UK if his application for a return order is refused and (b) that, pending the resolution of the proceedings in this court, he will not make any application to the Courts in Ireland in relation to C.

52. I accept that C's passport is held by the Mother's solicitors. If the court is prepared to release the Father from his undertaking, there would be no justification for the Mother's solicitors continuing to hold C's passport.
53. The question as to whether I should release the Father from his undertaking, pending the final hearing of this case, can only be answered by asking whether, absent the undertaking, it would be appropriate to impose an injunction on the Father to prevent him taking C back to Ireland pending the final hearing of this case. On the assumption that any return would only be an interim measure, I consider that I should approach the question of imposing an interim order on the same *American Cyanamid* basis as any other interim measure (save that damages on either side are not a relevant consideration).
54. The first question is thus whether the Mother has a seriously arguable case that she is likely to be successful in opposing the application for a return order. That raises a substantial difficulty because the Mother has not yet put in any evidence, and indeed will probably not be able to do so until she has the benefit of an intermediary with whom she can work to prepare her case. Nonetheless, her solicitors have been able to file an Answer on her behalf which sets out the areas where she would wish to provide evidence.
55. The Mother's Answer makes it clear that the Mother feels she has no support system in Ireland, feels alienated from Ireland, fears the effect of a return on her mental health and, in summary, explains that she has no intention of returning. However, the defence under article 13(b) is not that a return would be intolerable for the Mother but that it would be intolerable for the child. Thus, assuming that the Mother sticks to her stated intention not to return to Ireland, the high point of the Mother's case is:

*"the mother believes that the child will be placed in an intolerable situation because of the separation from her care in circumstances where she has been the child's primary carer since birth and there is a grave risk that the child could be subjected to psychological harm".*

56. As I have indicated above, the Father disputes that the Mother has acted as the primary carer for C at least in recent months. I cannot resolve that issue and so will assume that the Mother would be able to show that she has been C's primary carer, save for periods when she has been unable to do so because of her own mental health. However, in assessing intolerability, I

must ask whether it would be intolerable for C to return to Ireland during the period of time prior to the child's welfare being the subject of a decision of the Court in Ireland. These are summary proceedings and, of course, it is very difficult to judge the Mother's case in advance of the Mother's evidence but, on this aspect of the case, the key evidence is not about how the Mother feels but about how things would be for C if he were to return with the Father and the Mother were to stay in England. There is no indication at all from Mr Strong that C is reacting adversely to being cared for almost exclusively by his Father, even in the wholly artificial environment of a hotel, and only with limited supervised contact with his mother. The evidence of this highly experienced social worker who specialises in supporting disabled children is that returning C to Ireland where he would be able to resume his place at the specialist school is very much in his best interests. That evidence must mean that his assessment is that a return would be very far from being intolerable for C. In the context of the particular facts of this case, that is strong evidence to rebut any intolerability case.

57. As I indicated to counsel during the hearing, I accept the evidence from Mr Strong that C, as an autistic child, needs both stability and specialist support. He is not getting that in England and further, it seems that whatever the Mother might say, C will not get that support in the medium term if he stays in England. In contrast, he would have stability and specialist support in Ireland. Further, if he does not return at this time, his place at the specialist school is in jeopardy and thus, even if the Father wins this case, he may return in February to find that C has lost his place at the specialist school and has to start the difficult process of trying to find a new specialist place, no doubt in competition with other parents who are looking for support for their own children.
58. In the circumstances of the case, I have to ask what evidence the Mother could possibly advance, along the lines set out in her Answer, which could surmount the high hurdle of showing that it would be intolerable for C to return to Ireland. C would, of course, lose regular face to face contact with his mother although electronic contact arrangements could no doubt be put in place and some form of irregular face to face contact may be possible. However, taking account of all the evidence set out above, in my judgment, given the shape of the case that the Mother has set out in her Answer, I cannot envisage any evidence that the Mother could possibly advance that would show that there was a seriously arguable case that the high threshold of intolerability will be met. No evidence from the Mother can overcome the problem that C needs specialist educational and psychological support and, in the period between now and the conclusion of a welfare court case in Ireland, that support is only

available to C in Ireland. It is plainly in C's best interests to be able to access the specialist support that he needs and this support is only available in Ireland. He would, of course, gain benefit from contact with both of his parents, but in my judgment it is far more important for him to have that specialist support, with the support of one parent in person and one parent electronically, as opposed to the possibility and perhaps even the probability of losing that specialist support at The specialist school and having to start again trying to find specialist support in either England or Ireland. I thus reject the idea that the Mother has any realistic prospect of being able to show that a return would be intolerable for C.

59. The only other basis on which the Mother seeks to defend this case is child objections. However, the response states "*the child may object to a return*". Hence, at this stage, the Mother is not able to advance a case that C is actively voicing objections, only that he may do so. C is nearly 11 and so may well be of an age where, with other children, any objections would be carefully considered. Mr Strong's evidence is that C's disabilities mean that he is largely non-verbal but he is missing the day care support that he accessed in Ireland and has communicated that he cannot understand why he is unable to access it. That goes against any suggestion of child objections. However, even if it were possible to interpret C's limited communications as amounting to a level which meant they amounted to objections to returning to Ireland, it seems to me inevitable that only limited weight could be given to them given C's disabilities and given the countervailing consideration that the specialist support he needs is only available in Ireland.
60. Thus, it seems to me that the only conclusion I can reach is that the Mother will not be able to raise a seriously arguable case that she could persuade the court not to make a return order on the basis of child objections.
61. Given that I consider that the Mother is unable to raise a seriously arguable case that she can resist a return order, it seems to me that it would not be right to impose an injunction to prevent the Father from being able to exercise his parental rights by returning with C to Ireland on an interim basis.

**The balance of convenience.**

62. However, even if were to be wrong about the ability of the Mother to raise a seriously arguable case, if this were an injunction application I would have to ask where the balance of convenience lies. Mr Barwell O'Connor argues that there is a real risk that the Father will

breach his undertakings not to commence proceedings in Ireland and that, once the Irish courts are seized of the matter, they may make orders which will prevent the Father returning C to England. I have analysed the law below but, for the purposes of an interim injunction, I accept that this is a theoretical risk. However, in my judgment, the risk that the Father will breach his undertakings must be relatively small and, even if he were to do so, it must be relatively unlikely that the Irish court will override a carefully set balancing position which allowed C to return on an interim basis against solemn promises by the Father that he would be returned if the English courts ruled against his application for a return order. Nonetheless, I accept that this has to be a factor in the balance of convenience.

63. However, that factor has to be balanced against (a) the real harm that C is facing at the moment as a result of being deprived of the specialist support he needs as an autistic child, (b) the fact that he is living in wholly unsuitable accommodation, namely the Ibis Hotel in Bristol, (c) the fact that the Father has been taken away from his home and, no doubt, his job and is having to live in a city in a state far from home and (d) the more significant harm he will suffer in the future if he loses his place at the specialist school and is left without any package of specialist support either in England or Ireland. In my judgment, those factors far outweigh the risk that the Father will breach his undertakings. Accordingly, if I were to be wrong in reaching the decision that the Mother will be unable to raise a seriously arguable case, given the undertakings offered by the Father, I would have refused to grant an injunction to prevent the Father exercising his parental rights by returning to Ireland prior to any final hearing of this matter. It follows that, I accept the undertakings that the Father has offered and release the Father from his undertaking not to return to Ireland with C pending the final hearing. I also require the Mother's solicitors to return C's passport to the Father.
64. If I am right that, absent any continuing undertaking, the Father is able to exercise his parental rights lawfully by travelling back to Ireland with C, then there is no need to address the related but different question as to whether an order should be made under section 5 of the 1985 Act which makes express provision for an interim return. Nonetheless, in case I am wrong in the above analysis, I will next consider whether I would have been prepared to make an interim return order under section 5 of the 1985 Act.

### **Should an order be made under section 5 of the 1985 Act?**

65. I am told that there is no previous authority that any counsel has been able to find as to whether the powers of the court under section 5 include or exclude the possibility of the court making an interim return order. I therefore have to consider the matter from first principles.

66. Section 1(2) of the 1985 Act provides:

*“Subject to the provisions of this Part of this Act, the provisions of that Convention set out in Schedule 1 to this Act shall have the force of law in the United Kingdom”.*

67. Section 5 of the 1985 Act, which is within Part 1 of the Act, provides:

*“Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application”.*

68. The position taken by the Mother’s counsel, Mr Barwell O’Connor, was that although the wide words of section 5 appeared to include the possibility of an interim return order, as a matter of principle, such an order should never be made or at least should not be made in this case because it would, in effect, amount to a final disposal of the case. His case was that, even if such an order was supported by an undertaking by the Father to return the child pending a further hearing, it was wrong in principle because, once the child was returned to Ireland, the child was effectively beyond the jurisdiction of this court and hence making an interim return order would take effect as a final order albeit one that was purportedly made on an interim basis. He submits that, if an interim return order were to be made, no undertaking by the Father to return the child to the UK in the event that this court rules in favour of the Mother would be enforceable in Ireland because, once the child was physically returned, the Irish courts could, upon an application by the father, resume exclusive jurisdiction over the child arrangements and could make a welfare order to prevent the child returning back to the UK. He also submits that, even if no such order is made, any undertaking offered by the Father would only be enforceable in the courts in England and Wales and, if the Father were to stay in Ireland, he would be immune from any action to enforce the undertaking.

69. In broad terms, the position taken by the Local Authority is that even if this is right, it should not prevent the court making an order if that is required for the welfare of the child. Counsel for the Father said her client was desperate to return to Ireland, but she was concerned that any interim order could not properly be made at this stage for the reasons that the Mother's counsel has advanced and that, to do so, before the Mother had filed any evidence would be a clear breach of the Mother's rights under article 6 ECHR. She was thus concerned that any interim order made at this stage would be overturned by the Court of Appeal and that the delay caused by an appeal would ultimately mean that it would be even longer before her client was able to secure a return for C to Ireland. She was therefore, on instructions, initially inclined to agree directions which would have the effect of requiring the Father to remain in hotel accommodation in Bristol until the final hearing, which she hoped would be able to be moved to January from the present proposed dates in February. However, after obtaining further instructions, she sought an interim return order given her client's clear concerns for C's welfare.
70. For the reasons set out above, I do not accept Mr Barwell O'Connor's submission to the extent that he argued that an interim return order will be tantamount to final order because either (a) any welfare orders made by this court will automatically lapse as soon as C returns to Ireland or (b) will lapse if the father makes any application to the Irish court upon return to Ireland. On the contrary, I accept that the undertakings given by the Father (a) to return C to the UK if his application for a return order is refused and (b) that, pending the resolution of the proceedings in this court, he will not make any applications to the Courts in Ireland in relation to C are protective measures which can be enforced by the courts in Ireland under the terms of the 1996 Convention unless and until the Irish courts take it upon themselves to make welfare orders relating to C.
71. However, I accept Mr Barwell O'Connor's submission that, if C returns to Ireland, it would, at least in theory, be open to Father to breach the terms of the undertaking that he has given in these proceedings by making an application to the Court in Ireland and, if he did so and the Irish court were to make a welfare order requiring C to remain in Ireland, any order made by this court to require the Father to return C to Ireland would cease to be enforceable in Ireland. I am doubtful however that this factor is decisive or has the weight that Mr Barwell O'Connor seeks to attribute to it.

72. I do not accept that the theoretical possibility that the fact that, following an interim return and notwithstanding the undertakings given by the Father, the Irish court could assert primary jurisdiction and thus could make welfare orders which would mean that C stays in Ireland. The Father would face an obvious difficulty in making such an application because, in doing so, he would be acting in breach of his own undertaking not to make such an application. There would, accordingly, be a strong case that any such application would be an abuse of process. Further, if that were to happen, the Father could be punished by this court for breach of his undertaking. Nonetheless, I accept that, if this were to happen and the Irish court agreed that it should assume jurisdiction and make welfare orders relating to C, this court would effectively be prevented from further considering whether to make a return order. That is a factor which, in my judgment, would prevent an interim return order in many cases. However, of itself, it does not mean necessarily mean that an interim order should be refused in all cases or that any limitation should be read into the width of the powers that Parliament intended to Court to have under section 5 of the 1985 Act.
73. I have reached that conclusion that, as a matter of law, I am not barred from making such an order in exercise of the section 5 powers for the following reasons:
- a. The wording of section 1(2) is that the terms of the 1980 Convention form part of UK domestic law "*Subject to the provisions of this Part of this Act*". That form of wording suggests that if there is any conflict between the provisions in Part 1 of the 1985 Act and the 1980 Convention, the terms of Part 1 of the 1985 Act have precedence. Thus, in my judgment, the wide words in section 5 allowing the court to make orders in the welfare interests of a child where it considers it is appropriate to do so should not be curtailed by reference to the provisions of the 1980 Convention;
  - b. The words of section 5 are cast in what appears to be a deliberately wide way, namely "*give such interim directions as it thinks fit for the purpose of securing the welfare of the child*". In this case, in my judgment, the welfare of the child can only be secured by allowing him access to specialist autism support and that is only available to him in Ireland. Thus, the only way I can give interim directions to achieve the statutory objective is to make an interim return order and, if I refuse to make that order, I will be acting directly contrary to C's welfare. I do not consider that it would be right to interpret the powers under section 5 in a way that runs directly contrary to the child's welfare. If there were to be any concern that this construction could conflict with the

scheme of the Convention, the width of the powers under section 5 cannot be cut down for the reason set out at paragraph (a) above;

- c. One of the objectives of the 1980 Convention, as set out at article 7(b) is “to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures”. I have identified that C is presently suffering harm by having to be looked after by his Father alone without proper support and the evidence shows that the only way of remedying this is to allow his interim return. Thus, far from conflicting with the aims of the 1980 Convention, on these particular facts the making of an interim return order supports the purposes of the 1980 Convention;
- d. Chapter III of the 1980 Convention is concerned with the Return of Children. Article 18 provides “The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time”. It thus seems to me that this Article expressly reserves the power for the High Court to order either a final or an interim return if the Court considers that it is appropriate to do so on welfare grounds; and
- e. I must also place weight on the fact that, under the 1996 Convention, which is also part of UK law for the reasons set out above, “the best interests of the child are to be a primary consideration”. In my judgment, an interim return to Ireland is in the interests of the child because that is the only place that will give C the stability and support that, as a disabled child, he so badly needs and that delaying a return is likely to inimical to his best interests for the reasons set out above.

74. I accept that the court should only consider making such an order in a relative unusual case where the court is satisfied that, despite the fact that there is a theoretical possibility that jurisdiction could transfer to the courts of the country of habitual residence and thus the High Court may find itself in the position where it is disabled from refusing to make a return order, such an order is necessary for the child's welfare. However, this is a highly unusual case on its facts and is one where I am satisfied that an interim return order is both appropriate and necessary to protect C's welfare. It follows that, I consider that it is open to me to accept the Father's undertakings and to make an interim return order and, if it were to be necessary, I would have been prepared to do so.

**Should I make a final decision in these proceedings.**

75. When I gave an extempore judgment, I expressed the view that the Mother's case was so weak that I was minded to grant the father's application and make a final return order. This interim application was heard at the end of the 4<sup>th</sup> week after the case was issued. Article 11 of the 1980 Convention requires the courts to act expeditiously and there is provision for a report to be provided if a case is not concluded within 6 weeks.
76. Given the difficulties in this case, if this matter has to proceed to a final trial, I cannot see this case being finally resolved until February 2024 at the earliest. Further, on the basis of the Mother's present Answer, it seems to me almost inevitable that her case will fail. I have however further reflected on whether it would be a breach of the Mother's right to a fair trial to reach a final decision against her when (a) she has failed to put in any evidence and (b) the reason that she has failed to do so is a direct result of her mental health disabilities. Whilst I consider that her case is almost certainly bound to fail on the basis of her Answer, on further reflection I am concerned that she may well not have been well enough to give full instructions to her solicitors and thus, assuming she is able to recover over the next month and receives help from an intermediary, it is just possible that her case will look somewhat different once she is able to formulate it with a good deal of help. She has also heard the evidence of Mr Strong which clearly upset her but, once she has had the chance to consider it, may reflect on whether she wishes to press ahead with her resistance to this application or is prepared to negotiate a voluntary return for C to Ireland until the Irish courts can make a decision on his eventual welfare.
77. I have thus concluded that notwithstanding the obvious weakness of the Mother's present case, contrary to the indication I gave during the hearing, I should not make a final summary order in this case at this stage. Instead of making a final order as provisionally indicated, I will make the following directions:
- a. The Mother is to be supported by an intermediary who should be appointed as soon as possible;
  - b. A report shall be prepared on the Mother's mental health as had been agreed between the parties;

- c. A report should be lodged by Mr Strong of the Local Authority by 4pm on Friday 22 December setting out his understanding of C's wishes and feelings and whether C is objecting to return to Ireland and, if so, explaining the reasons for any such objections;
- d. The Mother is to file her evidence by 4pm on Friday 12 January 2024;
- e. The Father is to file any evidence in reply by 4pm on Friday 19 January 2024;
- f. The Local Authority shall become a party and shall disclose copies of all records they have concerning their interaction with C or members of his family to the parties by 4pm on 15 December 2023;
- g. The Local Authority have the right, if so advised, to serve any evidence that it considers may assist the Court by 4pm on Friday 19 January 2024;
- h. The matter shall be listed for a hearing in the week commencing 22 January 2024 for consideration as to whether the Court can make a summary decision on the papers at that stage and, if not, for directions for the trial in February 2024 as provisionally listed. This hearing should be listed as a hybrid hearing with both the Mother and the Father being able to attend remotely. There is no need for the Father to bring C back to the UK in advance of that hearing;
- i. I accept the undertakings given by the Father as set out above and, on the basis of those undertakings, I release the Father from his undertaking not to return to Ireland with C and I direct the Mother's solicitors to return the child's passport to him; and
- j. I make it clear that, if it was needed (and in my judgment it is not needed) I would have made an interim return order.

**Permission to appeal.**

78. At the end of the hearing on Friday 24 November Mr Barwell O'Connor indicated that he would be seeking permission to appeal to the Court of Appeal if I made any order which resulted in an interim return. Although these issues could be considered to raise a number of novel points which could, on a case with the right facts, merit permission to appeal, I refuse permission to appeal because, on the facts of this case I consider that (a) the welfare arguments in favour of an interim return are overwhelming (either by releasing the Father from his undertaking or by way of a section 5 order) and (b) that it would undermine the policy

of the 1980 and 1996 Conventions to impose such limitations on the Court so that it could not make orders when these were so plainly needed on the facts of this individual case.

79. I thus do not consider that this is the right case to take these points to the Court of Appeal. Nonetheless, I have indicated that I will delay releasing the Father from the terms of his non-return undertaking until midnight on Friday 2 December 2023 to allow a short period of time for the Mother's legal team to reflect on their position and, if so advised, to apply for permission to appeal. During that period, as directed at the hearing, the Father and C shall be accommodated by the Local Authority either voluntarily or by an order under Section 5 of the Child Abduction and Custody Act 1985. I understand that arrangements have been made at the Court of Appeal for urgent consideration of applications in Hague return cases and so I hope that it will not be necessary for any application to be made to extend that timetable. Any such application can be made to me or to the Court of Appeal although I would be cautious about any further extension because any further delay may result in the loss of the specialist school place, which it seems to me to be hugely important to retain if at all possible.