THE HIGH COURT

FAMILY LAW

APPROVED **REDACTED**

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF COUNCIL REGULATION 2201/20003/EC

AND

IN THE MATTER OF A, A MINOR

[2021] IEHC 429

[2021 No.6 HLC]

BETWEEN:

R.V.

APPLICANT

AND

A.A.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 10th of June, 2021.

1. Introduction

1.1 This is a case in which the Applicant father seeks the return of his 3-year-old daughter to Lithuania. The Respondent mother, the child [named A for the purpose of this judgment] and A's half-brother, all came to Ireland on the 8th of November, 2020.

1.2 The application is made under the Hague Convention of the Civil Aspects of International Child Abduction [the Convention]. The Convention ensures international cooperation in respect of legal issues concerning child custody and welfare. The Convention requires that signatory states trust other signatories in terms of their social services and the operation of the rule of law in their respective nations. The Convention was created to combat the problem of the wrongful removal of children from the country in which they usually reside, usually by a parent, to the detriment of the child's relationship with the other parent. This international agreement recognises the normal incidence of relationship breakdown, which leads to the division of families between households and, given the ease of global re-settlement, between countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction.

2. Background Facts

2.1 A was born in Lithuania. The child has been habitually resident in Lithuania for her short life and is a Lithuanian national. The parties to this case were not married. On the 10th of June 2019, the Respondent and the Applicant reached a settlement agreement, which included access visits for the Applicant with A, maintenance payment provisions and an agreement that A would reside with the Respondent. On the 19th of June 2019, the paternity of the Applicant was confirmed by court declaration. In October of 2020, the Respondent left A in the care of the Applicant for a period of two weeks, so that she could visit Ireland. Upon her return to Lithuania, the Respondent had to self-isolate for two weeks due to the Covid-19 pandemic, during which time the Applicant continued to care for A. On the 8th of November

2020, the Respondent travelled to Ireland with A and her older child, with a view to staying here with a new partner. On the 11th of November 2020, the Applicant made a written request to the Central Authority for Lithuania for the return of his child, and these proceedings began.

3. Summary of the Law

3.1 The Convention requires an Applicant for the return of a child to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights at the relevant time and that the child was habitually resident in the relevant country, the requesting State, at the time of removal or retention. It is accepted by both parties that the child was habitually resident in Lithuania until the time of her removal to Ireland and that the Applicant has rights of custody.

3.2 The Applicant must establish that he was exercising these custody rights at the time of removal. If he succeeds in proving and establishing these matters, the burden then shifts to the Respondent who must satisfy the Court that the Applicant was not exercising those rights, that he consented to removal, that the defence of grave risk arises or that the child is well settled in the requested, or new, State. In the latter two cases, if either defence is established, the Court has a discretion as to whether or not the child must be returned. As a matter of law, the Court has no discretion in respect of return, absent a proven defence, if the Applicant proves the matters set out and his application has been brought within a year of the wrongful removal or retention; in that event, the child must be returned.

4. Custody Rights

4.1 The Applicant father was not named on the child's birth certificate and the Respondent mother argues that she had to take proceedings which established his paternity and ensured

maintenance payments to her. While this is so, the result of those proceedings was a settlement which not only confirmed the Applicant's paternity but which brought him into contact with his daughter, culminating in a full month during which she was in his exclusive care.

4.2 It is apparent that the Respondent enjoys custody rights in respect of A by operation of the laws of the Republic of Lithuania, specifically Article 3.156 (2) of Chapter XI of the Civil Code of the Republic of Lithuania (which deals with equality of parental authority): '*Parents shall have equal rights and duties by their children irrespective of whether the child was born to a married or unmarried couple, after divorce or judicial nullity of the marriage or separation*.'

4.3 The Applicant did not seek any form of formalised access with his daughter at the time of their settlement agreement. However, and significantly, the Respondent and Applicant did agree some access and also agreed that A should reside with him for a month immediately before the child's removal. The law in respect of exercise of custody rights sets a relatively low bar for parents in the Applicant's shoes. Ms. Justice Ní Raifeartaigh, in *N.J. v E. O'D* [2018] IEHC 662, reviewed the authorities and summarised the situation stating that the courts must take a liberal view on the question of the exercise of custody rights and that the focus of the enquiry should be on whether the parent sought to have a relationship with the child, not merely on issues of financial assistance.

4.4 In a recent decision of this Court, in *W.B v S. McC & Anor* [2021] IEHC 380, overnight access alone, some months before the application was brought for the return of the child, provided sufficient proof that the applicant in that case had been exercising his custody rights.

4.5 The Respondent avers that the Applicant missed some access visits and that the Applicant has failed to meet his financial obligations to the child. She submits that the

Applicant had little interest in his daughter. This may well have been the case initially, but it appears to have been superceded by events in October 2020 when he agreed to take care of A while her mother was in Ireland. His having missed some access visits demonstrates that he was enjoying access, even if not attending every such visit and again, this appears to refer to a period before he took over her care for a month. Finally, in Exhibit GB 3, in the decision of the Lithuanian Family Court, it is recorded that on the 5th of June the Applicant had begun visiting his child. This was almost immediately after his paternity of the child was established and constitutes clear and undisputed evidence of his wish to have a relationship with A.

4.6 In respect of maintenance payments, as set out above, in *MJT v CC* [2014] IEHC 196, financial assistance (or lack thereof) should not be the deciding factor as to whether custody rights have been exercised, instead one must look at personal contact or the intention to foster a relationship.

4.7 This Court also notes that, under Article 3.169 of Chapter XI of the Lithuanian Civil Code, the Respondent is prevented from changing her place of residence without the prior written consent of the Applicant or a court order permitting the move without that consent.

4.8 This Applicant, having enjoyed some access visits and having had sole custody of his daughter for one month very shortly before her removal, has established that he was exercising custody rights under the Convention. In all the circumstances, the removal of the child without his consent was wrongful.

5. <u>Settlement</u>

5.1 Article 12 is mandatory: once it is established that retention was wrongful within the meaning of Article 3, the court is required to order the return of the child. The 'defence' of

settlement set out in Article 12 does not apply unless a child has been in the new State for at least one year. As such it does not arise on the facts of this case. A arrived in Ireland in November 2020. There is no discretion under Article 12 for the Court in respect of returning A to Lithuania unless a defence to the wrongful removal is established by the Respondent.

6. <u>Consent</u>

6.1 The burden of proving consent on the balance of probabilities is on the Respondent as she seeks to raise the defence, as per *FL v CL* [2006] IEHC 66. In *R(S) v R(MM),* [2006] IESC 7 Denham J (as she then was) quoted the following summary from *Re K (Abduction: Consent)* [1997] 2 FLR 212 in relation to the defence of consent at para 6.2:

> *"(i) the onus of proving the consent rests on the person asserting it; and*
>
> *(ii) the consent must be proved on the balance of probabilities; and*
>
> *(iii) the evidence in support of the consent needs to be clear and cogent;*
>
> *(iv) the consent must be real; it must be positive and it must be unequivocal;*
>
> *(v) there is no need that the consent be in writing;*
>
> *(vi) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent.*
>
> *I am satisfied that this is a correct analysis of the principles to be applied on the issue of consent and I would affirm, adopt and apply the principles."*

6.2 A letter from the Central Authority (Exhibit GB 2) sets out the Lithuanian law in relation to parental responsibility. The summary of Lithuanian law is clear on the issue of the child's residence; it is to be decided by mutual agreement of the parents. In the event of a dispute, the courts will determine the matter. The Respondent questions the weight of this evidence in respect of the law. However, the evidence remains uncontradicted. The Applicant did not exhibit the Lithuanian Code but the Court notes that the letter exhibited was produced by the International Cooperation Division of the State Child Rights Protection and Adoption Service in Lithuania. Foreign law is a matter of fact, not a matter for legal submissions and the uncontroverted evidence is that explicit consent is required from both parents before a child can be removed from her residence in Lithuania.

6.3 No written or explicit consent to the removal of A is referred to by the Respondent. No conduct which might indicate consent on the part of the Applicant (even if that would be sufficient to justify removal) is referred to by Respondent. As the Applicant made a written request to the Central Authority of the Republic of Lithuania for the return of A two days after she was removed to Ireland, acquiescence does not arise on the facts of this case.

6.4 The Respondent points to the Lithuanian court decision of the 19th of June, 2019 that the Agreement on Peaceful Settlement that "*The parties hereby agree that the minor child A, born on [REDACTED] shall live with the child's mother, the Plaintiff.*" This, she submits, is evidence of consent on the part of the Respondent to the child being removed to Ireland. It was argued that one can construe their agreement as consistent with consent for the child to live with the Respondent wherever she resides. This is not a reasonable construction of the agreement. The child has always lived in Lithuania and speaks only Lithuanian. Her father also lives in Lithuania and sufficiently nearby to enjoy regular access. Not only is this not denied, it is

accepted. There has been a significant disruption to this child's life in moving her to Ireland, particularly because it was done without her father's consent and in circumstances whereby he can no longer visit her. It is clear that any consent to her residing with her mother in the Lithuanian proceedings can only have referred to consent to live with her mother in Lithuania.

6.5 As set out in *Re K*, consent to removal must be positive, unequivocal, clear and cogent: the Applicant has offered an undisputed averment that he did not consent to A's removal and the burden rests on the Respondent to prove that there was consent to the removal. She has failed to prove this on the facts of this case.

7. <u>Grave Risk</u>

7.1 In *CA v CA* [2009] IEHC 460, [2010] 2 IR 162, Finlay-Geoghegan J. described the Article 13(b) defence as a "*rare exception*" to the requirement to return which "*should be strictly applied in the narrow context in which it arises*." The kind of situation which may constitute a grave risk to a child was considered in *RK v JK (Child Abduction: Acquiescence)* [2000] 2 IR 416, where Barron J. cited with approval the formulation from the United States Sixth Circuit of Appeals in *Friedrich v Friedrich* 983 F.2d 1396 (6th Cir. 1993) (at p.451):

> *… a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.*

7.2 Collins J. in *CT v PS* [2021] IECA 132 outlined the history of the cases relevant to an understanding of the objectives of the Hague Convention and concluded at para. 61, "*there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention*."

7.3 The Respondent rests her argument in relation to grave risk on 3 facts:

1) She asserts that the child was upset upon her return to the Respondent's custody after spending four weeks with her father.

2) She asserts that the Applicant evinces a hatred for everyone and that, on one occasion during an access call, by reading his lips, she could see him tell A he wanted to kill her mother.

3) She asserts that she has nowhere to live in Lithuania and, if an order for return is made, the Respondent estimates that she would require €5000 in support and relocation costs. It is submitted that this Court should refuse to return the child if it cannot be established that adequate arrangements have been made to secure the protection of the child after their return.

7.4 Even taken at their height, these allegations do not meet the threshold for grave risk, as set out above. The Respondent alleges that the child was "very stressed "when she returned into her care after living with the Applicant for one month and she puts this down to the "bad character" of the Respondent. While the child may well have been upset at this time, a likely explanation is that the child was upset by being away from her mother for four weeks or at being moved out of her father's care after a month of being primarily cared for by him. It

would be expected that the transfer of care between the mother and father of the child would cause some upset to the child, particularly in a situation in which the father, until that point, had enjoyed relatively limited access to the child.

7.5 Even if the Court takes the alleged threat as being proven, and it is hotly disputed, this does not prove that the child is going to be in an intolerable situation or in a situation of grave risk if returned to Lithuania. At most, there is a dispute between her parents in which one may be very angry with the other but there are no allegations of repeated psychological bullying or damage such as might justify such a finding, nor is there any allegation of physical violence against the mother, still less against the child. The assertion in respect of the Applicant showing hatred may be something that is strongly felt by the Respondent, but it is too general to be a matter on which this Court can act and it does not appear to relate to the child. Again, the Court emphasises that the child was left in the sole care of the Applicant immediately before her removal to Ireland so, whatever his shortcomings, the Applicant is someone with whom the Respondent voluntarily left her child at a time when she must have known of the shortcomings on which she now relies. This Court does not make a finding of fact in relation to the allegations, whether as to a threat or a general attitude by the Applicant towards others, because it is unnecessary to do so. Such allegations are matters of fact for a Lithuanian Court as, even if true, they fall short of establishing that there is any risk to the child if she is returned to Lithuania.

7.6 I am asked to consider the cumulative effect of a number of factors, including the failure to pay the agreed maintenance. None of the individual arguments is sufficient to constitute grave risk in this case and, in the Court's view, each is sufficiently far removed from the very serious conduct required in such a case that the cumulative total of these instances,

even if true, is not sufficient to persuade the Court to refuse to return this child. The facts do not support a finding that protection of the child is an issue in this case and, having made that finding, the issue of undertakings is considered next.

8. <u>Sufficient Undertakings</u>

8.1 It was argued that if an order for the return of the child to Lithuania was made, that any sum intended by the Court to secure the smooth return of the child should be paid as a lump sum before return. The failure to pay maintenance in the past has been relied upon in making this argument. The offer made by the Applicant to pay for the flights of the Respondent and A and to provide maintenance sufficient for 2 months, will ensure that A's material needs are met immediately upon their return. While the Respondent in her affidavit states that her estimated support and relocation cost will be €5000, there is no more evidence to support this assertion and the Court accepts that the offer to pay for flights and two months of maintenance is sufficient.

8.2 The courts in Lithuania are clearly best placed to resolve any general maintenance or other medium to longer-term issues, financial or otherwise. The undertakings given by the Applicant need only be sufficient for a safe return and security on arrival, as set out in *P v B (No1)* [1994] 3 IR 507, at p. 522, per Denham J.:

> "*These undertakings are for the benefit of the child who will remain in the care of her mother on returning to Spain from Ireland pending the Spanish Court hearing the case. In view of the fact that the child is still of tender years, and has at all times been in the care of the respondent, who has indicated that she will return with the child to Spain, the undertakings ensure a secure situation for the child and mother on their return to Spain. The undertakings do not in any*

way usurp the jurisdiction of the Spanish Courts to determine the questions of custody and access."

8.3 The Applicant's failure to pay maintenance as agreed may be deplorable, if true, but it is not within this Court's power to enforce that agreement nor is it fair to remove his daughter from Lithuania, or to prevent her return, as a result. The Court cannot reinterpret the law in that way: if the child must be returned under the Hague Convention, a failure to pay maintenance in full cannot alter the law in that regard.

9. <u>Modulating Effect in Council Regulation 2201/20003/EC</u>

9.1 The Applicant has referred to Article 11(4) of the Regulation which provides that:

"A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

9.2 Conversely, it was submitted by the Respondent that this Court *can* refuse to return A if it cannot be established that adequate arrangements have been made to secure the protection of the child after her return. It is submitted that this Article allows and indeed requires undertakings to protect children on return and that the provision modulates and interacts with the so-called *grave risk defence* in a manner that has the effect of lowering or raising the threshold.

9.3 This argument was made in *CA v CA (orse McC*) [2009] IEHC 460, where the judgement addresses the interaction of the Regulation and the Convention. At p. 175 Finlay-Geoghegan J states:

*"**[35]** The second submission made by counsel for the mother was, in my experience, novel. He submitted that the policy of the Convention in an application such as this where the Regulation also applies must be considered in the context of art. 11(6) to (8) of the Regulation. In Convention cases where the Regulation does not apply, if a requested court determines not to make an order for return of a child then, subject to appeal in that jurisdiction, it is a final order. The court of prior habitual residence of the child has no further jurisdiction under the Convention to make any different order. However, that is no longer the case where the Regulation applies.*

[The provisions of Article 11(6) to (8) of the Regulation requiring a final order from the State of habitual residence, in the event of non-return, are set out in the judgement]

***[36]** It was argued that in an application such as this, even if this court were to make an order refusing to return a child, any dispute in relation to the custody of a child may ultimately be determined by the courts of the child's prior habitual residence and any order made by those courts, including for the return of the child, will be enforceable in the European Union member state in which the child is residing in accordance with s. 4 of Chapter III of the Regulation. Counsel for the mother submitted that this court should take those provisions into account as part of the now combined policy of the Convention and Regulation in determining whether, notwithstanding the objections of the child, the overall policy of those instruments required this court to make an order for the return of the child.*

***[37]** I accept the submission of counsel for the mother that the court should take into account the provisions of art. 11(6) to (8) in addition to the policy of the Convention, as referred to in the decisions of the Supreme Court in B. v B.(Child Abduction) [1998] 1 I.R. 299 and by Baroness Hale of Richmond in In re M. (Abduction: Rights of Custody) [2007] UKHL 55,*

[2008] 1 A.C. 1288, when deciding how it should exercise its discretion in a case such as this where the child's objections are made out. Nevertheless, it does not appear that the potential for the court of habitual residence to make an enforceable order for return pursuant to art. 11(8) takes away from the requirement that this court take into account the policy of the Convention, not only to secure the prompt return of abducted children, but also to deter abduction in the first place, and to respect the judicial process of other contracting states. Nevertheless, it is a factor to be taken into account and the weight to be attached would depend upon the facts of the particular application. Care must be taken that the policy of the Convention to deter abduction is not undermined by giving an advantage in any subsequent hearing to a parent who wrongfully removed children. If the court of the jurisdiction of habitual residence is required to consider custody issues, including an issue of return in the context of the court of another member state having made an order for non-return, there may be such an advantage or a perceived advantage." [Emphasis added]

9.4 In that case, Finlay-Geoghegan J accepted a modulating effect in Regulation cases as a decision not to return is not the end of the matter; the Lithuanian court has the ultimate decision on the welfare of the child. This was, however, expressed to be in a case in which the child's objections were made out. The Convention is a carefully structured regime. The Applicant bears the burden of proving certain matters. Then the burden shifts to the Respondent to prove certain defences. If, and only if, such a defence is made out, the court has a discretion in respect of whether or not to return. In such a case, the Court might consider the overall effect of the Regulation operating with the Convention and the fact that the Lithuanian courts will make a final order in the event the child is not returned. This is not a case in which any defence has been made out. The Court is not at large to consider allowing

the process to continue as the Lithuanian courts will make a final order under Article 11 if there is no return. It is only in such a case that this Court could look at the mitigating effects of Article 11 of the Regulation on the Convention in deciding whether or not to return.

9.5 The Court is also conscious of the practical effect of this argument – it is difficult for a court to make a decision about custody and welfare when the child has always been resident in another state. In any event, it does not arise on the facts of this case as the Court does not have a discretion on the facts presented, and the order to return is the appropriate order in all the circumstances of the case.

10. Conclusion

10.1 The child, A, should be returned to Lithuania and the Court will hear the parties in relation to any further orders which may be required.