

**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 (EC) 2201/2003 AND  
IN THE MATTER OF K, A MINOR**

**[2021 No.11 HLC]**

**BETWEEN:**

**T.W.**

**APPLICANT**

**AND**

**A.W**

**RESPONDENT**

**Judgment of Ms. Justice Mary Rose Gearty delivered on the 12<sup>th</sup> of July, 2021**

**1. Introduction**

1.1 This Applicant seeks the return of his son, named K for the purposes of this judgment. K was born in 2014, moved to Ireland in 2015 with his mother, father and half-sister, and remained with his mother when the parties' relationship broke down. In 2017, before taking

the child to Poland, the Applicant signed an agreement in which he stated that he would not prevent the child returning to Ireland to live with his mother. The boy was then 3 years old and had not begun formal schooling.

1.2 Despite that written undertaking, K was made the subject of an *ex parte* custody order obtained by the Applicant father in Poland, in late 2017. The Respondent mother discovered that an interim custody order had been made in December, 2017. It is not clear whether or not the written agreement was disclosed to the Polish courts, but it appears that it was not, or at least not at that stage of those proceedings. Since 2017 the child had lived with his father and a court in Poland has now decided that he is habitually resident there. He is now 6 years of age.

1.3 The Respondent established a successful business in Ireland in 2015 and her daughter, a teenager, is in school in Ireland. On an access visit to Ireland last February, 2021, the Respondent failed to return K to Poland and this application followed in early course.

## **2. The Hague Convention and Council Regulation (EC) 2201/2003 – Burden of Proof**

2.1 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.

2.2 It is well established law that the Applicant in Convention / Regulation cases bears the burden of proof, the standard of proof is proof on the balance of probabilities, and the Applicant must establish that he had custody rights under the law of the country from which the child was removed and was exercising them at the time of removal. If an application was made within a year of removal, that removal is prima facie wrongful and the burden then shifts to the Respondent to establish one, or more, of the defences to the application.

2.3 There is no issue in respect of the following facts in this case: the Applicant is the father of K, and K was in his custody in Poland until the time at which he was retained in Ireland. His application was made within a year of the child being retained here. Thus, the retention of the child in Ireland was wrongful within the meaning of the Convention.

### **3. Defences: Consent, Grave Risk and Objections of the Child**

3.1 The Respondent relies on Article 13 of the Convention and makes three submissions in that regard: one relates to consent, the second to grave risk and the third to the objections of the child. Article 13 concludes with the following direction:

*“In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.*

#### 4. Consent

4.1 The consent argument rests, primarily, on the written agreement. The Respondent concedes that the written agreement of the parties, dated 14<sup>th</sup> October, 2017, is now of “some vintage” to use counsel’s phrase. It is very clear in its terms; *“I, the undersigned [TW] ..., am going with my son to Poland, but I promise not to raise any objections when his mother KW comes to see him in Poland and wants to return with him to Ireland. We made such an agreement, and it is in line with my conviction.”* While this agreement should, of course, have been brought to the attention of the Polish courts in 2017, the fact remains that this Court is now considering an application in 2021 and events have overtaken the agreement. In exhibit KW3, in a text exchange this year, he refers to reporting a kidnapping in a reference to the Respondent retaining K in Ireland.

4.2 In the meantime, the Polish courts have considered both the *ex parte* application of the Applicant for custody of K in 2017, which was granted, and the Respondent’s application, in March of 2021, to retain custody of K in Ireland, which was refused.

On the facts of this case it does not appear that this Applicant consented to the retention of K in Ireland in February 2021, having withdrawn his written consent of 2017. Consent was withdrawn against a backdrop of court proceedings in Poland from which the Applicant’s intentions were clear; he reneged on the earlier agreement and sought to retain K in Poland. However, no proceedings were issued under the Convention at that time.

#### 5. Grave Risk and Intolerable Situation

5.1 The grave risk defence is one that arises frequently in Convention / Regulation cases. It is well established that the kind of risk contemplated by the Convention is usually one that leads directly to the removal of the child and must constitute a real risk of serious harm to the child. It is self-evident from the facts of this case that the height of the Respondent’s case in

this respect constitutes allegations of drug-taking and swearing on the part of the Applicant and watching material which would be inappropriate for children, but her knowledge of these events dates back some years. It is not possible or necessary to decide as a matter of fact whether, or to what extent, these activities occurred or continue to occur. Taking the allegations at their height, even cumulatively, these activities do not constitute a grave risk to a child within the meaning of Convention cases.

5.2 The Respondent in this case, on her own version of events and very much to her credit, agreed to a period during which her very young child would live with the Applicant in Poland. She must have then known, taking these facts to be true for the sake of this argument, that he smoked marijuana and that he watched material to which children should not be exposed. This is not to condone any such behaviour, nor is it to make a finding of fact that anything amiss occurred. The point being made is that an allegation that a child has been exposed to drug-taking, swearing or viewing of inappropriate adult or violent material on a computer or otherwise, falls short of the kind of conduct that must be established before a court can decide that there is a grave risk to a child in the context of Convention proceedings. The Respondent herself took the mature decision that, no matter what her view of his behaviour, the Applicant should have a relationship with his son, if only for the child's benefit. In other words, she allowed the child to go to Poland with his father.

5.3 The behaviour of the child which has, the Respondent says, raised concerns since his return to Ireland does not, in and of itself, establish that he is at grave risk due to any actions of his father. While the Court understands that such concerns may weigh heavily in a parent's mind, the purpose of proceedings such as these is to exercise a summary jurisdiction and decide whether to return a child or not. When grave risk is considered, only the kind of risk

which could not be met by the courts in the country of habitual residence should be the basis for a refusal to return.

5.4 The expert's report, together with the school report from Poland, GB6, weigh against any finding of grave risk. It must be emphasised that the kind of risk anticipated by the case law in this regard is one of serious harm to the child and the two reports referred to confirm that K is, to the credit of both his parents, a well-adjusted child who is described in his school report from Poland as follows: *open; actively participates; shows interest in acquiring new skills; quickly establishes positive relationships with adults and children and is well cared for.*

5.5 The argument was also made that to separate this child from his sister would be to create an intolerable situation for this child. This was teased out in oral argument as the Court has great sympathy with the situation of this young child and his older sister. As a matter of fact, the child did not refer often to his sister when discussing his life with the expert assessor, nor was there evidence of a particularly close bond between them, beyond what might be described as normal for siblings with a large age gap. While acknowledging that the coming years will be crucial in maintaining a close relationship with this sibling, and with some reluctance due to the potential long-term damage this may do, the Court finds as a fact that although it is an important relationship and it will undoubtedly be damaged if the child cannot remain in Ireland, a decision to return the child will not cause an intolerable situation for this child in respect of his relationship with her.

5.6 The most relevant authority relied upon to support an order not to return the child was the case of *In Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192, in which the sibling in question was referred to as the child's "*little mother*", a sibling upon whom the subject of the case had become dependent, in the context of parental conflict. This is far removed from the current case of a 6-year-old boy and his older sister. The overriding

objective of the Convention is to restore children to their habitual residence and to support the courts of that jurisdiction in their function of making detailed decisions on welfare. To paraphrase Baroness Hale in *re D (A Child) (Abduction: Rights of Custody)* [2006] 3 WLR 989, these are not circumstances in which a summary return would be inimical to the interests of the particular child such that it would be contrary to the object of the Convention to require it.

## 6. The Child's Objections

6.1 K was interviewed by a psychologist and an assessment was made available to the Court. K was asked about whether he had an objection to returning to Poland. His first response was recorded as follows: *"K stated that he did not know how he felt about this. He reported that when the topic comes up for discussion, then there are lots of arguments between his parents. K advised that his father was of the opinion that he should be in Poland and his mother has the view that he should live in Ireland. K then stated that he would be really sad if he were not able to live in Ireland."* When asked how he would return, if such an order was made: *"K would not consider the possibility of returning to Poland."*

6.2 K is now 6 years old, nearly 7, and is entitled to have his views considered. As a matter of fact, this Court considers the summary of his responses, set out above, to constitute a stated objection to returning to Poland. The last quotation is a clear statement on that issue and it is not necessary that a child of this age use specific words, such as objection, rather the desires set out in this report should be assessed in order to decide if they constitute an objection on his part to a return to Poland. In my view, they do.

6.3 It was argued that any apparent objection was connected only to his wish to remain with his mother. It is unrealistic not to consider a child's opinion of a country as one which is directly related to the people who live in that country. This objection is one that relates, to

some extent or even to a large extent, to the fact that K's mother is in Ireland. Equally clearly, there is no objection by the child to living with his father. However, and decisively on the issue of whether or not his views constitute an objection, the child would not consider the option of returning to Poland when asked about this as a possible outcome. This goes beyond a preference for one country over another and amounts, in this Court's view, to an objection to returning to Poland. This child is nearly 7 years old and his views were articulated clearly and apparently independently. Insofar as the expert could tell, K's views did not appear to be dictated by, or reflective of, the views of the Respondent. In those circumstances, this Court must vindicate the child's rights by considering K's views carefully and this involves assessing the weight of his objection in the context of the objectives of the Convention.

#### **7. Weight of the Objection and Convention Objectives**

7.1 As is required by law, as set out in *M.S. v A.R* [2018] IECA 181, this Court finds as facts that the objections to return are made out and that the child is of an age and maturity to take account of his views. The third stage of my enquiry is to decide how the discretion under Article 13 should be exercised. The Convention requires that courts consider the social background of the child and it is clear that K has close family and friends, and enjoys activities, in both countries.

7.2 As to the weight of the child's objection, in this case there are factual and policy reasons to ascribe some, but not great weight to the evidence. This child is very young. While he has developed normally and has the maturity one might expect from a 6-year-old (indeed, he is nearly 7), he is not mature beyond his years nor, according to the expert assessor, can he consider issues such as this one in any but the most concrete terms. In Convention cases, greater weight is given to the views of an older child and, as a matter of logic, less weight to the views of a younger child.

7.3 Accordingly, while I am satisfied that he objects to a return to Poland, I must carefully consider the youth of the child and the manner in which his objections are expressed. His objections are not couched in vehement terms. It is significant that K does not object to living with his father, that he has described his life in Poland in positive terms and that his desire, unrealistic as it may be, is that the Applicant could move to Ireland so that he could have a relationship with both his parents.

7.4 The child refers in his answers to the assessor to memories of playing soccer in Poland and having friends there, for instance, which satisfy me that while he has expressed views in respect of Ireland, these are not so strongly held that they should persuade the Court to refuse a return which is otherwise mandatory. He has spent a long period of his short life in Poland, he is getting on well in school there and, while he states he will be sad if he is not here in Ireland, he has also articulated various positive associations in respect of life in Poland, especially in respect of his father and grandmother, both of whom he would like to see often. He has other extended family in Poland also.

7.5 In assessing this child's objections, having considered his personal circumstances, this Court must also weigh in the balance the general policy considerations of the Convention which favour return and the individual circumstances of the child who objects to return, in order to determine what is, in the sense used in Convention cases, in the best interests of that child at this time.

7.6 The overriding objective of the Convention is to deter child abduction. This Court is obliged to consider this aim, which favours the prompt and summary return of children to the courts of their habitual residence. To refuse to return a child is an exception to the general policy of the Convention.

7.7 The broad facts and chronology of this case are worth recalling at this point: The Respondent has wrongfully retained K in Ireland, and in circumstances where K now objects to being returned to Poland, despite having close ties and a rich social background in both countries. The Applicant appears to have wrongfully retained the same child in 2017. The Court has considered the potential for any implicit endorsement of that initial, arguably wrongful, retention. But the fact remains that no proceedings followed that retention. The main aim of the Convention is to deter abduction and this is the first set of proceedings taken in which abduction is alleged.

7.8 A second core principle of the Convention is that the signatory states should be entrusted to uphold the rule of law and matters of welfare should, ordinarily, be decided by the courts in the country of habitual residence. In applications to which the Regulation applies, regard should be had to Articles 11(6) - (8) and the consequences of a refusal to return. Here, the country of habitual residence (now Poland) will have the final decision on custody and welfare issues.

7.9 The objectives of the Convention mandate a speedy return. The Court has also considered the best interests of the child in circumstances where the Applicant was trusted by the Respondent to care for K in Poland and appears to have done so appropriately, as described above. The child has extended family in both countries. Other factors include K's older sister in Ireland and his grandmother in Poland. Both are important relationships in a child's life and, without a full welfare hearing, it is impossible for this Court to determine which might weigh more heavily in the balance in terms of favouring relocation or not.

7.10 As Counsel for the Applicant points out, the Polish court has already refused an application to permit the child to remain in Ireland pending the divorce proceedings. Some of the concerns outlined by the Respondent to this Court were also outlined in those

proceedings and I have carefully considered that aspect of the case, as great respect is due to the courts of another signatory state and member state of the European Union. The relevant Polish court did not know the results of the expert assessor's report, which may have a greater effect on the eventual decision than any views expressed by the Respondent mother. Notwithstanding that, this Court cannot ignore the findings and ongoing proceedings in the Polish courts and, while it has carefully considered the views of the child, the objectives of the Convention and the social background considerations in this case combine to satisfy me that the law requires the Court to order a return of the child to Poland.

7.11 This Applicant took his son to Poland by agreement though it is argued that he reneged on a written agreement that he would return the child. The passage of time has, effectively, rendered Poland the country of habitual residence. Thus, it is the Polish courts which must consider the welfare of this child in a more granular way, including considering the effect of the recent report of the child expert in which the child voices what this Court views as his clear objections to returning to Poland. One of the reasons for his objections is because his mother does not, and cannot, reside there as she has an older child and has made her life here in Ireland. It would be inappropriate to comment further as this is a decision for the Polish court and not one for this Court.

7.12 The expert assessor made some helpful recommendations to the parties in this case at the close of his report which the Court endorses. This is a case in which, even at this late stage, the parties would benefit from a mediated agreement which would be internationally enforceable. Even if they cannot agree on all aspects of the case, it would certainly be of some benefit to attempt to resolve as much as possible. This outcome would be far preferable for their child than continuous court proceedings. It appears likely that trust between the parties has broken down and might only be rebuilt if there was a mutually agreed decision that could

work effectively. Such an agreement would give both parties an element of control which a court decision (either here or in Poland) removes entirely from the parties. At this point, it is not yet clear what the outcome will be of the proceedings in Poland which leaves room for negotiation.

7.13 One thing is very clear: this boy needs both his parents and they know him best. They are, therefore, best placed to ensure that he has sufficient time with all members of his family so as to benefit from the important relationships in his life, which include relationships with his sister in Ireland and with his grandmother in Poland.

7.14 Given the facts of this case, the law requires the return of the child. His parents still have an opportunity to take his future into their joint hands and act together to achieve a solution which is in his best interests.