

APPROVED

REDACTED

**THE HIGH COURT**

[INSERT NEUTRAL CITATION]

**FAMILY LAW**

**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 2201/2003/EC**

**AND**

**IN THE MATTER OF P.S., A MINOR**

**(CHILD ABDUCTION:**

**INTERPRETATION OF COURT ORDER, VIEWS OF THE CHILD)**

[2022] IEHC 515

[2022 No.1 HLC]

**BETWEEN:**

**J.T.S.**

**APPLICANT**

**AND**

**M.K.S.**

**RESPONDENT**

**Judgment of Ms. Justice Mary Rose Gearty delivered on 7<sup>th</sup> day of September, 2022**

**1. Introduction**

1.1 This is a case in which the Applicant father seeks an order for the return of his child, called Paula for the purposes of this judgment, who was removed from Poland to Ireland in August of 2021. It is argued that the Court must summarily return the

child pursuant to the Child Abduction and Enforcement of Custody Orders Act of 1991 and Regulation 2201 of 2003, which implement the Hague Convention on Child Abduction [the Convention] in Ireland. The Respondent replies to the effect that she was entitled to take the child out of Poland in the manner she did on foot of an interim measure of the Polish Courts directing that Paula would have residence with her in the context of divorce proceedings. The Respondent also submits that the Applicant has not proven that he was exercising his custody rights in respect of his daughter and raises the defence of grave risk. Finally, she relies on the views of the child to persuade the Court to exercise its discretion not to return the child.

## **2. Factual Background**

2.1 The Applicant and the Respondent married in 2012 in Poland. Paula was born in 2012. The parties separated in 2020 and divorce proceedings were initiated in Poland. The Respondent also has an older child from a previous relationship. The Respondent describes an unhappy marriage, in which she was subject to emotional bullying, economic control and assaults. The Applicant disputes this.

2.2 The Applicant avers that between late 2020 and August 2021 Paula lived with the Respondent in the same town as the Applicant and he enjoyed access with Paula during this time. The Applicant had access to his daughter under the supervision of a court-appointed guardian by an order of the relevant Polish Court from September

2016. The Respondent accepts that the Applicant did see the child, though states that this was not as frequent as originally intended.

2.3 By letter dated 17<sup>th</sup> of August, 2021 the Respondent informed the Polish Court that due to her difficult financial situation and the need to provide for her children, she was moving to Ireland on 20<sup>th</sup> of August, 2021. She provided the Court with a contact address and requested that future court hearings be dealt with remotely. At about this time, the Respondent removed Paula from Poland and brought her to the State, without the consent of the Applicant. Her older child remained in Poland.

2.4 On the 5<sup>th</sup> of September, 2021 the Applicant made contact with the Respondent via Facebook. He states that it was at this time that he became aware that Paula had been removed to another country. On the 30<sup>th</sup> of September, 2021 he made a written request to the Central Authority of Poland pursuant to the Hague Convention.

2.5 On the 29<sup>th</sup> of December, 2021 on foot of an application by the Respondent, the Polish Court determined that the place of residence of Paula shall be *“any place of residence of her mother”* until the conclusion of the divorce proceedings. The Polish divorce proceedings have been adjourned pending the outcome of these proceedings.

### **3. Purpose of the Hague Convention and the Regulation**

3.1 The objects of the Hague Convention, as set out in Article 1, are *“(a) to secure the prompt return of the children wrongly removed to or retained in any Contracting State;*

*and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”* The Convention was created to provide fast redress when children are moved across state borders without the consent of both parents, and to mitigate the damage sustained to the child’s relationship with the other parent by returning the child to her home. There, the courts where the child lives and where her school and medical records are held, and where witnesses are readily available, can make decisions about her welfare with the best information available. The Convention vindicates the rights of children and ensures comity between signatory states and bolsters the rule of law generally, providing a summary remedy against those who seek to take the law into their own hands.

3.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is an important policy objective that signatory states vindicate the rights and best interests of the child and ensure that custody rights are respected in the event of a move which takes the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

3.3 The Regulation came into force in 2005 and is directly applicable in Ireland, not requiring domestic implementing provisions. Article 8(1) of the Regulation provides

that the courts of the country of habitual residence of the child have jurisdiction in matters of parental responsibility. Article 10 provides that jurisdiction in cases of child abduction remains with the courts of the Member State where the child was habitually resident immediately prior to removal, until one or more specific events occur. Article 11 prescribes conditions which must be followed to obtain the return of a child who has been wrongfully removed or retained in a Member State other than that of her habitual residence. In most respects, it mirrors the provisions of the Convention but it also contains provisions which ensure that the requesting country (here, Poland) retains jurisdiction to review a refusal to return.

#### **4. Wrongful Removal: Habitual Residence and Rights of Custody**

4.1 For the removal of a child to be considered wrongful pursuant to Article 3 of the Convention or under the Regulation, it must be shown that removal was in breach of the Applicant's rights of custody under the law of the State in which the child was habitually resident immediately prior to the removal, and that, at the time of removal, the Applicant was exercising rights of custody in respect of the child.

4.2 The Respondent accepts that, prior to removal, Paula's place of habitual residence was Poland. The Applicant is named on the Child's birth certificate as her father and, under Article 93 § 1 of the Polish Family and Guardianship Code, the Applicant has the same rights and duties as the Respondent in respect of Paula, including rights of custody.

4.3 The Applicant avers that he was exercising these custody rights under the supervision of a court-appointed guardian, pursuant to a Polish court order, made in September, 2016. The Respondent disputes this. She avers that, while the Applicant would see Paula, he did not pay agreed maintenance, and his commitment to access was sporadic, seeing her on average every third week or so. The Applicant disputes this. The key evidence is not disputed: the Applicant did see his child regularly.

4.4 The cases relied upon, *M.S.H. v. L.H.* [2003] IR 390 and *D.M. v. V.K.* [2022] IEHC 252, both concerned an applicant father who was in prison. In neither case was there evidence sufficient to prove that the applicant was not exercising his custody rights. More pertinent are the cases in which the applicant was at liberty.

4.5 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. In a recent decision of this Court, *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 and in a context of an ongoing relationship, provided sufficient proof that the applicant in that case had been exercising his custody rights.

4.6 The Applicant in this case strongly disputes the suggestion that he had minimal contact with his child or that he was not involved in her daily life and there is some supporting evidence in the form of a letter from her school which is addressed to him. But even if the level of contact was low (and it is not necessary to make a finding of fact in this respect) this Applicant has shown that, on the balance of probabilities, he was exercising his rights of custody in respect of Paula at the time of removal.

## **5. Grave Risk**

5.1 Where grave risk is raised as a defence, a court should consider whether the allegations, if true, justify a decision not to return the child. It must be noted that here, as in most such cases, the allegations are denied. It must also be emphasised that this Court has not had the opportunity to assess the evidence after it had been tested by cross-examination, so the issues of fact cannot be decided.

5.2 However, taking the Respondent's submissions at their height, the risk identified is a risk of violence to the Respondent and not to the child. While the issue of whether or not a child is a witness to violence is of concern to any court, it is not, in itself and without evidence of more serious risk such as previous psychological injury, sufficient to prevent a summary return to the left-behind parent. This is not only to vindicate the Applicant's rights but to ensure that the child's best interests are considered. This legal mechanism, that of summary return, helps to ensure that the

courts with access to all the necessary witnesses and records can make significant decisions about risk and welfare on the basis of the best evidence available.

5.3 In *R. v. R.* [2015] IECA 265, the Court of Appeal described grave risk as follows:

*“The onus is on the [Respondent] to establish that there is a grave risk that the return of the boys to Germany would expose them to physical or psychological harm or otherwise place them in an intolerable situation. It is well-established on the authorities that the test is a high one: A.S. v. P.S. (Child Abduction) [1998] 2 I.R. 244, per Fennelly J. at para. 57. Where, as in this instance, one of the risks being referred to is a risk of physical or psychological harm of the boys, it is also clear that the courts in this jurisdiction will normally place trust in the courts of the country of habitual residence to be able to protect the children, and indeed, the mother, from any such harm. This is particularly so where the state of habitual residence is a member of the European Union and Article 11 of Regulation 2201/2003 applies to the return.”*

Concluding, in respect of allegations of physical harm, that:

*“Even if the allegations of the Mother in relation to the historical situation are proven to be correct (and the Court is not indicating that it accepts or rejects them), the Court has concluded that the trial judge was correct in determining that the return of the children with the Mother, in circumstances where the Father agreed to vacate the prior home were such that the return could not be considered as constituting a grave risk to the boys of physical or psychological harm. The Mother has been and is their primary*



*carer, and she, with the assistance of the German authorities and courts, if necessary, is in a position to protect them on return in such factual circumstances."*

5.4 Here, not only is the evidence of risk insufficient to establish that a risk exists, grave enough to trigger this defence, this Court is asked to send Paula back to Poland, a Member State, where the Polish courts are in a better position to assess any risk that might arise and are in a good situation to protect her, if such a risk arises. The Polish courts have already determined that the child will reside with her mother and that the Applicant's access will be in the presence of a court-appointed guardian. The Applicant has undertaken to ensure that there will be funds to establish a home for the Respondent and Paula pending the Polish courts resuming their function in respect of the divorce proceedings. These measures as to residence and supervised access indicate exactly the kind of precaution one would expect in such a case and confirm that the relevant court is fully alive to the issues in this case.

## **6. Permission from the Polish Courts**

6.1 The Respondent relies on the Polish Court Order of the 29<sup>th</sup> of December 2021, granted after the removal, to argue that she was entitled to bring Paula with her to Ireland. This Order provides that the child will have the same place of residence as the mother. An affidavit of laws was obtained from Ms. Małgorzata Kieltyka, a partner in the firm KG Legal Kieltyka Gladkowski, in respect of the meaning of that phrase.

6.2 Ms. Kiełtyka notes that the decision of the 29<sup>th</sup> of December 2021 uses the term “*place of residence*”, a statutory term used in Polish Family and Guardianship cases. She explains that it should be understood as the town or city, and not the country, where the Respondent lives with the intention of permanent residence. Ms. Kiełtyka notes that for a minor to move to another country is a significant matter according to the practice and jurisprudence of the Polish Courts.

6.3 Ms. Kiełtyka concludes that the Order of the 29<sup>th</sup> of December 2021 means that the child shall live with her mother in each and every place of residence of the Mother. According to Polish law, she concludes that this refers to each and every place of residence of the mother within Poland, and not elsewhere. Therefore, in her opinion, the Order of the 29<sup>th</sup> of December 2021 did not give the Respondent the right to take Paula to live outside of Poland.

6.4 In relation to the Polish court’s knowledge of the Respondent’s move to Ireland with the Child at the time the order was made, Ms. Kiełtyka considered the letter of 17<sup>th</sup> of August 2021, some months before this Order, in which the Respondent advised the court of a change of residence. She also considered the fact that the same court was considering a change of residence (to Ireland) request as part of her divorce application. She notes in this respect that the Respondent did not specifically mention that her daughter, Paula, was coming to Ireland with her. This is significant in the Court’s view also. Further, and a matter not specifically noted in the legal opinion, the Respondent had another child who did not travel to Ireland with her, which

further suggests that the court was not specifically informed that Paula was moving and therefore, could not have permitted this removal. Ms. Kiełtyka concludes:

*“...it could have been understood that the Minor was left under the care of another member of family, because the Mother did not mention in the Pleading that she was moving to Ireland with the Minor.*

*The predominant view of the judiciary in Poland is that when the courts are determining the child’s place of residence (by establishing it to be the place of residence of one of the parents), they usually implicate that it is within the country, and sometimes, when more restrictive view is taken, the town, where the parent resides at the moment of the court’s ruling.”*

6.5 Ms. Kiełtyka is of the view that it would be difficult to give the Order the interpretation contended for by the Respondent, namely, that the Polish court was permitting the removal of the child to Ireland, in circumstances where the Order is interim in nature. She also points out that the letter of the 17<sup>th</sup> of August, from a purely procedural point of view, cannot be seen as an application to which the Court’s decision of the 29<sup>th</sup> of December could be a reaction or a response. Ms. Kiełtyka concludes that the Order does not grant the Respondent permission to remove Paula to Ireland, or any place outside of Poland. No expert view to the contrary was offered.

6.6 The conclusions are supported by references to the details of the order and the letter referred to and by the experience of the deponent in respect of Polish law. Further, they are sensible conclusions which recommend themselves on the basis of

first principles, aside from any knowledge of Polish law. The fact that Paula is not referred to in the letter and the nature of that document (it is not a formal pleading or application) strongly support the conclusions of this expert. There is no averment to the effect that the Court was specifically advised that Paula would be travelling to Ireland prior to making the order in respect of her place of residence. For all these reasons, I accept the expert's conclusions, namely, that the Polish Court did not permit the removal of the child, nor did it retrospectively allow the Respondent to reside in Ireland with one of her children. The removal of Paula, which occurred the previous August, was unlawful. The Order did not act as retrospective validation of this act.

## **7. Views of the Child**

7.1 Under Article 13 of the Convention, if a child objects to being returned, the Court may exercise its discretion not to return the child. This exception to the general rule, a mandatory return, has been the subject of numerous and detailed decisions of the superior courts. The three-stage test applicable was articulated by Potter P. in *Re M (Abduction)* [2007] EWCA Civ 260 and involves ascertaining if the child does in fact object and, if so, what weight attaches to the objection given the maturity of the child. Finally, if established and when assessed, the Court considers if an objection is sufficient to outweigh the counter-balancing objectives of the Convention, taking all other circumstances into account and considering all the aims of the Convention. Article 13 requires the Court to take account of the views of the child, it does not vest

decision-making power in the child and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child. Nonetheless, it is vital to consider the views of the child and whether or not they may influence the Court to take the exceptional step of refusing to return a child as the refusal may be, in her particular case, in her best interests.

7.2 In the Supreme Court decision of *M.S. v. A.R.* [2019] IESC 10, Finlay Geoghegan J. held that the objection to return must, in general, be to the State of habitual residence and not to living with a particular parent, adding that the two may be inexorably linked. Whelan J., in the Court of Appeal in *J.V. v Q.I.* [2020] IECA 302, concluded at para. 69: *"The plain language of Art.13 makes clear that the child's views must amount to an objection to being returned to the State of habitual residence before an exception pursuant to Art.13 is established. In general, the expression by a child of a mere preference to remain with one parent is insufficient to meet the threshold."* Finally, and most recently, the Court of Appeal in *D.M. v V.K.* [2022] IECA 207, at paragraphs 93 to 95, quoted extensively from the judgment of Denham J. in *A.U. v T.N.U.* [2011] IESC 39 and examined the third stage of the process: how a court should approach the balancing exercise of determining the best interests of the child in all the circumstances, including the terms of the objection, the length of any delay and the potential for review under Article 11.

7.3 In summary, Ms. Justice Donnelly outlined that if an objection to return is made out and the maturity of the child is such that the objection should be considered, a careful analysis of the circumstances of the case, balancing the objection of the child

with the objectives of the Convention and considering any objection in its context, is required to decide whether or not the interests of the child favour a return. A refusal to return remains the exception, as opposed to the rule, but this does not mean that there should be a presumption against return; each case is specific to its facts.

7.4 Paula was assessed by Mr. Mike van Aswegan, Clinical Psychologist. She described her school in Poland to the expert, saying that she had a good group of friends. She attended access with her father on weekends and sometimes went swimming. She concluded: *"My Dad wants me to live in Poland, but I don't want to. I want to stay with Mum."* She reports having witnessed her dad hitting her mother.

7.5 Asked about returning to Poland, the expert report states: *"[Paula] repeated that she wished to remain in Ireland with her mother, adding 'My mother has no work in Poland and here we have an apartment and we don't need to pay'."* Asked further about her reasons for her objection, Paula said: *"If I go back to Poland, Mom has no work and has to pay for apartment. Would have to live with Grandma and maybe my Dad no good to my Mom. He come to Grandma's house because he know where she living."* Asked if she would consider visiting her father in Poland, Paula replied: *"If he good to Mom. I want to visit with Mom."*

7.6 I have considered the Applicant's submission, that this is not an objection to returning to Poland *per se*. Nonetheless, it is difficult to characterise these answers as anything other than an objection to returning to Poland. While described in terms of where and with whom she might live, it is almost unrealistic to expect a child of this age to express her attitude to a return without reference to her mum. This appears to

reflect the inexorable link between parent and country, referred to above, and amounts to an objection to returning to Poland, not just because she wants to remain with her mum. Her circumstances generally will, as she sees it, be better in Ireland.

7.7 The next step is to consider whether the child is of sufficient maturity that her objection should be considered. In *Re S. (A Minor) (Abduction: Custody Rights)* [1993] Fam. 242, relied upon by the Applicant, the Court stated: *“Thus, if the court should come to the conclusion that... the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention.”*

7.8 In respect of maturity, the expert’s view is that: *“Children within [her] age range are beginning to think more logically and objectively. At this stage children continue to link their thinking to their concrete experiences. [Paula] is of an age where she could form a view regarding parental conflict and her choices regarding a preferred parent based on her safety needs.”*

7.9 When asked if she would consider Facetime contact with her father, Paula said, *“Now I don’t want to ‘cos I’m scared he will say bad words.”* She added that she did not know her paternal grandparents and did not wish to have contact with them.

7.10 As noted, the facts of this case appear to me to reveal a view that goes beyond the limited objection that Paula wants to live with her mum. The child has an

understanding of the advantages of her current situation and is happy at school here, though it should be noted that she reported no complaints of her school life in Poland. She has many friends in both countries. In respect of visiting her father, she expressly wants her mother with her and noted that he would have to be good to her mum if she was to visit him. This too goes beyond wishing to remain with one parent. Paula is now over 9 and a half years old. She is of an age and maturity that I should take her views into account, and I do so. As to the weight to be attached to those views, the objection is moderately, rather than strongly, expressed. It is tied to the child's wish to be with her mother to a large extent even though, as I have found, it goes beyond this. The expert's opinion was that the child's views appear to have been independently formed and there is no reason not to agree with this conclusion.

7.11 Having found as a fact that the child objects to a return and that, being 9 years old her views should be considered, that they are moderately expressed and strongly linked with a preference to stay with her mum, my conclusion is that a relatively low weight should be attached to these views. Not only due to her young age (had she been 15, any objection would weigh more heavily), but also due to the terms in which she expressed herself and the strong connection she makes between her mother and Ireland, linking the new country with new opportunities for her mother.

7.12 The Court must now consider these views in the context of the objectives of the Convention. While a relatively low weight is attached to the views expressed, they are nonetheless an important factor in this case in that the other circumstances should



be considered so as to decide if the child's objection should persuade the Court not to order her return.

7.13 In *MS v. AR* [2019] IESC 10 Finlay Geoghegan J stated at para. 63-65:

*“There are no presumptions pertaining to the exercise of discretion under Article 13 of the Convention where a child's objections are made out and he or she is of an age and degree of maturity where it is appropriate to take account of the views. The child's views or objections are not determinative or even presumptively so. The court must exercise its discretion on all the evidence before it, having regard to the particular facts and circumstances of the application and the child in question. This discretion must be exercised in the best interests of the child in the context of the application. The court is not permitted to conduct a full welfare assessment for the purpose of deciding whether an order for return or an order to refuse return is in the best interests of the child. That is made clear by Articles 16 and 19 of the Convention. It is a more limited appraisal of the actual circumstances of the child at the date the court is asked to exercise its discretion, based on all the evidence.*

*The Court should carefully consider the nature of the objections and the reasons therefor, and of course, the age and degree of maturity of the child, when deciding upon the weight to be attached thereto...*

*Overall, a court, in exercising its discretion where child's objections are made out under Article 13 of the Convention must be careful to weigh in the balance the general policy*

*considerations of the Convention which favour return and the individual child who objects to return, in order to determine what is, in the limited sense used, in the best interests of the child at the moment. The weight to be given to the general policies of the Convention which favour return and to the objections to return which were made and to other relevant circumstances of the child may vary with time. As has been said, the further one is from a prompt return, the less weighty the general Convention policies will be. In exercising its discretion, a court must take care that it has regard to the fact that the jurisdiction to refuse return is an exception to the general policy and provisions of the Convention. The discretion must be exercised with care, and in the best interests of the child, but not so as to undermine the general policy objectives of the Convention, including deterrence of abduction.*

7.14 The final part of this exercise, therefore, is to carefully consider the views of Paula and decide if these views outweigh the aims of the international agreements which mandate a return or if there is evidence, in her particular situation, which weighs in favour of her remaining in Ireland. In considering her views, I pay particular attention to the following comments from Denham, C.J. in *A.U. v. T.N.U.* [2011] IESC 39 endorsing Baroness Hale, as follows:

*“There is a growing understanding of the importance of listening to a child. As Baroness Hale said in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, at para. 57:*

*[57]... But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right."*

7.15 In the recent case of *E.C. v. J.F.* [2021] IEHC 411, this Court was satisfied that the children, aged 12 and 8, were happier in Ireland than they were in Northern Ireland. They referred negatively to the applicant father during their assessment and objected to being returned to Northern Ireland. Like the current case, this was a case which featured allegations of domestic violence on the part of the applicant. This Court held, nonetheless, that the children should be returned, noting in particular the overarching concern of the Convention, namely to support the relationship of a child with both their parents as being overwhelmingly in the best interests of the child. The Court also considered the fact that the family law aspects of this case were before the Courts of Northern Ireland as a reason to order the return of the children. These issues are directly relevant in this case. The Polish courts are currently considering the parties' divorce application and other relevant issues, including the custody of Paula.

7.16 In the recent case of *D.M. v V.K.* [2022] IECA 207, a case from Hungary relied upon by the Applicant here, the Court of Appeal has since overruled this Court's decision to return the children after a comprehensive review of the facts, primarily noting the facility of Article 11(6) to (8) in such cases, a long delay which led to

language issues for the children and the good relationship they continued to enjoy, albeit remotely, with their dad. In most respects, the current case can be distinguished from *D.M.* There has been less of a delay, less contact with the Applicant and there is no language issue to prevent the child returning to Poland.

7.17 Paula has been in Ireland longer than the children involved in *E.C.* Such delay as there has been here does not, however, approach the 3-year delay in *D.M.*, that the Court of Appeal decided weighed against a summary return. Paula's year in Ireland is a difficult factor to assess as, on the one hand she is secure in her daily life here and it is disruptive to move her but, on the other hand, the case is not one in which there was significant delay on the part of any actor and if the passage of one year alone were a significant factor in favour of a respondent, there would be every incentive to delay in future cases. While this case is not an example of a quick, summary return, neither is it so long-delayed as to warrant refusing to return on that basis alone.

7.18 Bearing these factors in mind, the Court has looked carefully at the facts of the case from Paula's point of view. The Court is conscious of the happy situation of Paula while here in Ireland but must also consider that there is little evidence as to her being unhappy in Poland; on the contrary, she seems to have been a happy child there also. Her objections, as outlined above, are met or accommodated by a situation in which, if she returned, she could live with her mother (which order has already been made in Poland) and if her dad would be good to her mother. The court-appointed guardian will, at the very least, ensure that Paula will not witness any violence (if any has

occurred, the Court has already confirmed it cannot make such findings of fact) and should also ensure respectful conduct to the Respondent if in the presence of the child.

7.19 The Respondent relies also on the jurisdiction of the Polish courts to exercise the so-called corrective jurisdiction, should there be a refusal to return the child. This was a significant factor in the *D.M. v. V.K.* case i.e. that Article 11(6)-(8) of the Regulation permit the court in the requesting State to review any refusal to return on welfare grounds; a full hearing is available to the Applicant should he be unsuccessful here, under that provision. However, this alone could not justify a refusal to return. Here, the Court's view is that her objection does not outweigh the policy considerations of summary return to vindicate the rights of a parent, comity of laws, and vindication of the child's best interests in enjoying security in her place of habitual residence. This view is supported by the facts that she is a Polish child, fluent in the language and with no previous difficulty living in that country. In such a case Article 11 (6)-(8) procedures cannot dictate a refusal to return. I have considered the totality of the facts and the policy objectives in light of the best interests of the child and, considering all these things, the potential for a subsequent hearing by a Polish court does not persuade me that refusing this application to return the child is appropriate.

7.20 In any event, the Polish Courts have begun hearing the family law issues in this case and are best placed to determine custody and welfare issues regarding Paula. This Respondent has removed Paula from Poland without the consent of the Applicant. Paula's relationship with the Applicant has suffered due to her removal

and there is evidence of much reduced contact between the child and her dad. I have very carefully considered the time that she has spent in this country, and it causes the Court concern that the application is being finalised over a year after removal, but this delay is nonetheless insufficient to outweigh the factors set out above. While happy here, there is no evidence of unhappiness, still less of grave risk, associated with a return to Poland, notwithstanding a preference to live with her mum, the Respondent. The Respondent has argued that she will be under severe financial constraints if she is ordered to return Paula to Poland. The Applicant has given an undertaking that he will provide sufficient money to allow the Respondent to live independently of him, with Paula, pending an interim decision on access and maintenance from the Polish courts. The Polish authorities can deal with any interim welfare issues that may arise between the parties and the sum of money in question reassures the Court that Paula's material needs will be met on a return to Poland.

7.21 In these circumstances, Paula's objections are not sufficiently weighty to persuade the Court that an order for her immediate return should be refused.

## **8. Stay**

8.1 The Respondent requests a short stay on the basis that the courts in Poland can be asked to indicate when they will be in a position to decide the issues of custody and residence for Paula. The basis of this application appears to be that if the move to

Ireland is permitted by the Polish courts, there is more security for the child and less disruption. There is no doubt that moves such as this should be minimised, and I note the views of MacGrath J. expressed in *M.W. v. J.C.* [2020] IEHC 260 at paragraph 94:

*“In all the circumstances, including the support structure which is now in place in this country for the child, the fact the proceedings have been instituted in Perth while the applicant resides in Melbourne, the concern of the respondent of the involvement to date of the applicant’s partner, and most importantly in order to minimise, insofar as is possible, disruption to the child, I am satisfied that the court should exercise its discretion to stay the order for return pending receipt of information as to a timeframe for the proceedings in Australia; and to be addressed in relation to undertakings.”*

8.2 As is clear from that paragraph, two of the reasons stated do not apply in this case. There, the applicant had, historically, had minimal contact with his child; the respondent had been her sole carer. Further, that applicant’s partner had intervened in an inappropriate way in the correspondence leading up to the case. While minimising disruption was the key factor, if the courts in Hague cases provided, routinely, for a stay on a return order to allow an application in the country of residence, this would frustrate the Convention objectives.

8.3 However, I note also the case of *C.A. v. C.A. (otherwise C. McC.)* [2010] 2 I.R. 162, where Finlay Geoghegan J. decided to place a stay on a return order to permit the respondent to pursue proceedings in the courts of habitual residence. Finlay Geoghegan J. held that it was not contrary to the Convention to place such a stay

where there were proceedings in being, or intended, for the purposes of seeking approval for the relocation of the child. There, the court was satisfied that it was in the interest of the children that the number of moves between jurisdictions be minimised.

8.4 Here, a short stay is sought in which the timeframe for an application to relocate could be identified and outlined to this Court in circumstances where proceedings are already in being.

8.5 In the most recent case involving an application for summary return, *D.M. v V.K.*, this Court had ordered a stay to allow an application to Hungary and the Court of Appeal commented that such an order was unusual, remarking at para. 118 that a stay in such cases was usually of short duration to allow the practicalities of return to be addressed. While the matter was not considered fully in that appeal, it is clear from the other authorities cited that such stays have been ordered in the past but not for long periods. Bearing in mind the comment of the Court of Appeal, it seems to this Court that if a short stay, to assess the timeframe for an application in the country of origin, is appropriate, then this must be for that purpose only and for a very short time period. Routine deployment of such a stay, or a stay for months rather than weeks, could become a mechanism to frustrate the objectives of the Convention otherwise.

## **9. Conclusions**

9.1 In August of 2021, this child was removed from Poland, where she had always lived, without the consent of her father, who was seeing his daughter regularly. The couple, who are now the parties to this application, were in the middle of court



proceedings in Poland, finalising their divorce. The residence, custody of and access to Paula were issues in those proceedings. While the Respondent had obtained employment here and had alerted the court in Poland that she was moving, she had no court permission to remove Paula. I am satisfied that a later order that the child was to reside with the Respondent, is confined to residence within Poland.

9.2 While the 9-year-old child objects to returning to Poland, her views are moderately expressed and so strongly linked to living with her mother that her views do not outweigh the Convention objectives, including those of security for the child, comity of laws between nations and the maintenance of a good relationship between the child and both her parents. Despite having spent a year here, her best interests, on balance, are served by her returning to her country of habitual residence where the courts who have all her medical and educational records can make an informed decision as to her welfare and long-term interests.

9.3 The Applicant is entitled to an Order returning his daughter. If the application to the Polish court can be heard and determined very swiftly, I will consider a stay to allow this to be done but this can only be accommodated by a very speedy hearing, and such a course is being considered due to concerns about the child's lengthy stay here, coupled with the fact that proceedings are already in being in Poland and in order to disrupt two further international moves of home for this child, in quick succession. Unless such an application can be heard and determined in a matter of weeks, an order to return will follow as a matter of course.