APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/114

Whelan J.
Faherty J.
Allen J.

Neutral Citation Number [2024] IECA 214

BETWEEN

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

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

AND IN THE MATTER OF ARTICLES 11(6), 11(7), 11(8) and 42 OF COUNCIL REGULATION (EC) 2201/2003

AND IN THE MATTER OF J AND K (MINORS)

BETWEEN

W.A.

APPLICANT/
APPELLANT

- AND –

A.T.

RESPONDENT

-AND-

THE MINISTER FOR JUSTICE ACTING AS A CENTRAL AUTHORITY

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 2nd day of August, 2024

1. I have read in draft the judgment which is to be delivered by Whelan J. and I agree with it and with the orders proposed.

2. I want to add some observations in relation to the decision of the High Court in *Z. v. Z.* [2021] IEHC 20 which was referred to by Gearty J. in the judgment under appeal and touched upon in the respondent's written submissions on the appeal.

3. The respondent cited the *dictum* of Simons J., at para. 48, that:-

> *"Notwithstanding that Article 11(7) does not prescribe a specific time limit for the notification of the parties to the proceedings, it is inherent in the nature of the procedure that this should be done as a matter of urgency."*

And went on to suggest that, as Simons J. found in *Z. v. Z.*, prolonged delay can, in some circumstances, lead to the retained jurisdiction of the High Court being lost. Significantly, however, the respondent did not contend that this was such a case and so there was no argument as to whether the proposition that the retained jurisdiction of the High Court could be lost. The point not having been argued, I am not to be taken as deciding it but it is an important point which this Court has not previously – or in this case – been asked to consider.

4. *Z. v. Z.* was, as Gearty J. observed, a notably similar case in terms of facts. In that case, as is this, the mother had wrongfully retained a child following a holiday. In that case, as in this, the requested state made a non-return order on the Article 13(b) ground of *"grave risk"*. In that case, as in this, the requested state transmitted the non-return order and relevant documents to the Irish Central Authority within the outer limit of one month specified in Article 11(6). In that case, as in this, the father made his submissions to the High Court within the outer limit of three months specified in Article 11(7) of being invited to do so. In that case, as in this, there was a long delay between the transmission of the non-return order to the Minister

and the making of the High Court application which the Minister was required to make by O. 133 of the Rules of the Superior Courts.

5. In *Z. v. Z.* Simons J. was highly critical of the delay on the part of the Minister in applying to the High Court for directions. Any such delay, he said – and I entirely agree – is inconsistent with the fundamental principle of the international child abduction regime that matters should be addressed with as much speed as is possible.

6. At paras. 47 to 66, Simons J. considered the legal effect of delay in the Article 11 procedure. Drawing heavily on the judgment of Ní Raifeartaigh J. in *D.M.M. v. O.P.M.* [2019] IEHC 238 – a case in which the father's submission was out of time – and having previously noted, on the authority of *A.O.K. v. M.K. (Child abduction)* [2011] 2 I.R. 498 that the left-behind parent had the option of instituting proceedings without waiting for the Central Authority to make an O. 133 application, Simons J. concluded (at para. 66) that the Irish courts' retained jurisdiction had ceased as a result of the delay and that the court must close the case in accordance with Article 11(7).

7. Against the possibility that he might be wrong in his conclusion that the retained jurisdiction of the High Court had come to an end by reason of the delay, Simons J. went on to address the substance of the father's application and firmly concluded that it would not be in the best interests of the child – who was by then eleven and had been living in Latvia for five and a half years – to order his return to Ireland. As in this case, there had been almost no contact between the father and the child since he had been wrongfully retained and the father had put up no evidence of his capacity to care for and meet the needs of the child.

8. Having regard to the views expressed by Simons J. on the merits of the application, I find it altogether unsurprising that there was no appeal.

9. Absent argument on the issue of whether the residual jurisdiction of the High Court could have been lost or ousted by delay on the part of the Central Authority, it would not be

appropriate that I would express any concluded view on the question. However, I think that it is permissible for me to say – respectfully – that I do not find Simons J.'s reasoning on the question of the legal effect of the delay immediately compelling.

10. In principle, I do not immediately see that any distinction can be drawn between delay on the part of the requesting state and delay on the part of the requested state. I find it very difficult to contemplate that the residual jurisdiction of the state of habitual residence of the child might be ousted by a delay on the part of the requested state in meeting its obligations under Article 11(6).

11. The left-behind parent will necessarily have been party, or at the very least privy, to the proceedings which culminated in the non-return order and so can be expected to be aware of the making of such an order immediately upon or soon after it is made. In Ireland, such a parent will be in a position to move without waiting for the Central Authority to move.

12. That said, Article 11(7) imposes an express obligation on the central authority of the state of habitual residence to formally notify the parties of – and, it seems to me, a corresponding right of the parties to receive from that central authority – the information it receives and invite them to make submissions. If the parents have a right to receive the information from the central authority, it is difficult to see how that could be abrogated by a failure to comply with the obligation to provide it. In this case, the evidence is that the father was advised on 20 September 2021 that the requesting state – Ireland – *"must initiate review proceedings of the case"* after which *"both parents [would] be written to to join the court case."*

13. In this case, unlike *Z. v. Z.*, the Minister was not called upon or afforded the opportunity to explain the long delay between the transmission of the non-return order to the Central Authority – which appears to have been on 11 October 2021 – and the moving of the *ex parte* application on 14 July 2022 and I say no more than that a long time elapsed. It is not obvious

to me that the father could have been expected to anticipate that it would take as long as it did for the Minister to move.

14. Simons J. was undoubtedly correct in saying that it is a fundamental principle of the international child abduction regime that matters should be addressed with as much speed as is possible. But absent a prescribed time for compliance by the Central Authority with the requirements of Article 11(7), it seems to me that it is difficult to say where the line should be drawn. If the left-behind parent has the option of pre-empting the Minister's application, I find it difficult in principle to contemplate that he or she should be criticised for not doing so for as long as it was reasonable to expect that the Minister would move. And it seems to me that on Simons J.'s analysis, the residual jurisdiction might have been lost by the time the left-behind parent could reasonably have been expected to invoke it.

15. Finally, I hope that I will not be thought pedantic when I say that Simons J.'s conclusions at para. 66, variously, that the retained jurisdiction had ceased as a result of the delay and that it would be contrary to the objectives of the Brussels IIa Regulation – in particular the requirement for urgency – to allow the retained jurisdiction to be invoked, do not appear to me to be the same thing.

16. I reiterate that the point was not argued but I offer the view that the issues which I have identified may be worthy of consideration if the question arises in the future.

17. As this judgment is being delivered electronically Whelan and Faherty JJ. have authorised me to say that they agree with it.