

APPROVED

[2021] IEHC 20

THE HIGH COURT

2017 No. 34 HLC

IN THE MATTER OF ARTICLE 11(7) OF COUNCIL REGULATION (EC) 2201/2003

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
(AS AMENDED)

AND IN THE MATTER OF G (A MINOR)

(CHILD ABDUCTION: RETAINED JURISDICTION FOLLOWING NON-RETURN
ORDER)

BETWEEN

Z (MINOR'S FATHER)

APPLICANT

AND

Z (MINOR'S MOTHER)

RESPONDENT

MINISTER FOR JUSTICE
(ACTING AS CENTRAL AUTHORITY)

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 January 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application for directions regarding the custody of an eleven year old boy. To protect his anonymity, the term "*the child*" will be employed throughout this judgment when referring to this boy. Similarly,

NO FURTHER REDACTION REQUIRED

his parents will be referred to simply as “*the father*” and “*the mother*”, respectively, rather than by their actual names.

2. The child is currently resident in Latvia, and has been resident there since the summer of 2015 when his mother failed to return with him to Ireland. The Latvian Courts have since dismissed an application by the father to have the child returned to Ireland. The father submits that the Irish Courts nevertheless retain jurisdiction in matters of parental responsibility regarding the child, in circumstances where, prior to his wrongful retention in Latvia, the child had been habitually resident in Ireland. Put otherwise, it is said that notwithstanding that the child has been living in Latvia for some five and a half years, Ireland retains jurisdiction over custody and access arrangements. This submission is based on an EU Regulation which provides that, subject to certain contingencies, the Member State of a child’s former habitual residence retains jurisdiction in the case of a wrongful removal or retention.

FACTUAL BACKGROUND

3. It should be noted that details of precise dates and locations and some personal information have been deliberately omitted from the summary which follows, so as to avoid any risk of identifying the child or his parents.
4. The child was born in the last quarter of 2009 in Ireland. The mother is a national of Latvia, and the father is a national of a non-EU State, but is resident in Ireland. The child is a citizen of both Ireland and Latvia. The child’s parents had married each other in early 2009, i.e. prior to the birth of the child. This marriage took place in Ireland, but has since been dissolved by order of a Latvian Court.
5. The District Court had made a safety order against the father in 2014.

6. The mother and child travelled to Latvia from Ireland in the summer of 2015 for a holiday. The mother failed to return to Ireland with the child following this holiday.
7. The father instituted proceedings before the Latvian Courts in October 2015 seeking the return of the child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (“*the Hague Convention*”). The first-instance decision made in the child abduction proceedings had been an order for the return of the child. This initial order is dated 16 November 2015. The proceedings proved to be protracted, however, with a number of appeals and applications for a stay on the return of the child. The proceedings ultimately came to a conclusion on 23 March 2017. On that date, the Riga Regional Court refused to direct the return of the child (“*the non-return order*”). (The formal decision of the court appears to have been drawn up two weeks later on 6 April 2017).
8. Whereas the Riga Regional Court accepted that the child had been habitually resident in Ireland, and that his retention in Latvia had been wrongful, the court refused to return the child by reference to Article 13(b) of the Hague Convention (the so-called “grave risk” defence). This decision was informed by a finding that the child had previously suffered abuse by the father. The court found that there would be a grave risk that the return of the child to Ireland in the permanent care of the father would cause physical and psychological harm to the child. The rationale is explained as follows (at paragraph 16 of the translated judgment).

“The psychologist statements found in the case materials indicate that the minor [...] has shown signs characteristic to children who have suffered from abuse. Therefore, he requires social rehabilitation, safe environment and support from close and loving adults. Also, these statements, as well as the conversation protocols with the child, indicate [the child] has close and loving relationship with the mother, he is emotionally attached to the mother, seeks her help, feels good in his place of residence in Latvia.

In contrast, regarding the child's attitude towards the father, in the majority of the cases it was found that violence resulting from his actions has caused the child health issues – anxiety and fear, including fear from the potential return to Ireland, simultaneously, there are justified conclusions about the physical and sexual violence against the child committed by the father.

The court has no grounds to question the statements and conclusions made by competent persons. Thus, the Civil Case Collegium finds a grave risk that the return to Ireland in a permanent care of [the father] where [the child] as previously suffered from abuse by the applicant, would cause physical and psychological harm to [the child]. The separation from the mother would only aggravate this situation and cause an intolerable situation to the child in the meaning of the Hague Convention, as the mother has cared for the child for a long time, also while they were in Ireland, and the child is mentally dependent from the mother. Also, considering the high level of risk, it is important to note that criminal proceedings have been imitated (*sic*) against the applicant concerning specifically the abuse of [the child] and if the child is actually living with the applicant it is impossible to ensure effective protection of the child from abuse by the father by any legal means.”

9. In accordance with the second paragraph of Article 13 of the Hague Convention, the Riga Regional Court had also taken into account the opinion of the child regarding a return to Ireland. This is summarised as follows (at paragraph 17 of the translated judgment).

“The child has expressed clear and unmistakable objection to the return to Ireland. He has indicated that he wants to live in Latvia, comparing it specifically to his previous life in Ireland. Even though these objections to the return to Ireland are related also with the fear and stress resulting from the experienced violence expressed as not wanting to return to the father, these objections must be taken into account considering that the return is only possible in permanent care of [the father].”

10. As explained under the next heading, the making of the non-return order was formally transmitted to the Central Authority in Ireland on 22 May 2017.

EVENTS FOLLOWING THE MAKING OF NON-RETURN ORDER

11. The fact that the child abduction proceedings in Latvia had resulted in the making of a non-return order had the effect of triggering the procedure under Article 11(6) to (8) of

Council Regulation (EC) No 2201/2003 (“*the Brussels IIa Regulation*”). This legislative provision is discussed in detail presently (at paragraphs 29 and onwards). It may assist, however, in a better understanding of the chronology to explain now that the Brussels IIa Regulation allows the Member State of a child’s habitual residence to override a non-return order made by the Member State of refuge, by directing the return of the child itself. Put otherwise, the Irish Courts would have had jurisdiction to direct the return of the child from Latvia notwithstanding that the Latvian Courts had made a non-return order. One of the principal issues to be determined in this judgment is whether this retained jurisdiction has been lost by reason of delay.

12. The first step in the process under Article 11(6) to (8) involves the Central Authority of the non-returning Member State transmitting a copy of the court order on non-return and the relevant documents to the Member State of the child’s habitual residence. The Central Authority for Ireland is the Minister for Justice (“*the Minister*”).
13. In the present case, the Central Authority for Latvia informed the Department of Justice (“*the Department*”) by email dated 22 May 2017 that the child had been made the subject of an order for non-return. The covering letter indicates that copies of the decision of the Riga Regional Court dated 23 March 2017, and a certified English translation of the decision, were attached to the email. It also indicates that the minutes of the hearing on 22 March and 23 March 2017 and two DVDs were attached. (Exhibit “A” of Catherine Sheridan’s affidavit of 27 November 2017). This material also seems to have been transmitted to the Department by post.
14. It appears that officials within the Department then contacted the respective solicitors acting for the father and mother, and asked each to confirm with their clients that there were no other proceedings pending before the Irish Courts. This correspondence is dated May 2017. The Department seems to have forwarded the matter to the Office of the

Chief State Solicitor on 24 May 2017, for the purposes of an application to the High Court. For reasons which remain unclear, however, a number of months then elapsed, and the application to the High Court was not ultimately made until 13 December 2017.

15. The affidavit grounding the application to the High Court in December 2017 exhibits a tranche of documents which appear to have been received from the Central Authority for Latvia in November 2017. The documentation includes the psychological reports relied upon by the Latvian Court. The precise circumstances in which this additional documentation came to be provided, and, in particular, whether it had been requested by the Department, is not explained.
16. At all events, the High Court made directions on 13 December 2017 as to the formal notification of the mother and father. The order directed that any “submission”, i.e. a submission for the purposes of Article 11(7) of the Brussels IIa Regulation, be in the form of a notice of motion grounded on an affidavit. Any such motion was to be issued promptly, and, in any event, within three months of the date of receipt of the notification.
17. The notification was served on the father on 20 December 2017. The father issued a motion on 9 March 2018. This motion was made returnable to the High Court on 23 April 2018. On that occasion, there was no appearance on behalf of the mother. The title of the proceedings was amended so as to substitute the father as applicant in place of the Minister. Thereafter, the matter was adjourned from time to time before the High Court while the question of service upon the mother was addressed.
18. The mother sent a letter dated 29 January 2019 to the High Court Registrar. This letter was received on 7 February 2019. The translated copy of the letter reads as follows.

“Since the Court in Latvia has already judged on the matters of parents’ custody of the child, access rights and has determined the child’s place of residence, there is no reason for reviewing these

matters once again, because the judgement has already come into legal force.”

19. Although not readily apparent from the terms of the letter, the “judgment” referred to is not that delivered by the Latvian Court in the context of the child abduction proceedings on 23 March 2017. Rather, as is now evident from *subsequent* correspondence from the mother, the letter is referring to a separate judgment delivered in the context of the divorce proceedings between the mother and father in April 2018. It seems that, unbeknownst to the High Court in 2019, the Latvian Courts had already made substantive orders in respect of custody and access to the child in the context of those divorce proceedings.
20. The High Court (Ní Raifeartaigh J.), by order dated 21 May 2019, requested the Latvian Court to appoint a suitably qualified expert to meet with the child in order to ascertain his views on the question of where he should live and with whom. The order also requested that the expert ascertain the child’s view in relation to the father having periodic access (including by letter, text, telephone or skype). This order was made pursuant to the provisions of Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
21. In response to this request, the child was interviewed by members of the Koknese Municipality Orphan’s Court on 27 August 2019. The findings of the court are recorded as follows.

“[The child] has become estranged from his father: conflict between both parents; the great distance between Latvia and Ireland; when staying at VSIA Children’s Psychoneurological Hospital the meeting of the son and father did not take place; the psychologist suggested not to traumatize the boy and not to organise the meetings with his father.

The living conditions of the child can be evaluated as good; all necessary conditions have been provided for the boy’s development and growth in a favourable environment, emotionally positive

atmosphere, by being cared for and loved. The boy does not feel the lack of contact with his father.

Mother provides a child-friendly environment. The boy feels good together with his mother who provides daily care; the child feels safe and stable in the family. The mother has a paid job.

The Orphan's Court believes that the place of residence of [the child] is with his mother, in Latvia. During the conversation any question asked about his father caused a visible anxiety and negative emotions to the boy.”

22. It appears that a copy of an earlier psychological report (prepared by a court-appointed psychologist in January 2018) has been attached by the court to its report of the interview of August 2019. The conclusions of the report of 4 January 2018 are stated as follows.

“Common conclusions:

- 1) [The child] categorically and clearly does not wish to meet his biological father.
- 2) Taking into account the conclusions confirmed by multiple psychological studies, while together with [the father] the boy has experienced emotional and physical suffering, and possibly has suffered sexual abuse from the biological father – which has left psychological, emotional and psychosomatic consequences: motivation or influencing the child to meet or communicate with his biological father should be seen as secondary traumatising and should not be permitted.
- 3) Additional psychological diagnostics during the next 2 years in relation to possible communication of the boy and [the father] is not recommended because it may cause additional traumatising.
- 4) If the boy's aggression increases (which may be caused both by the normative teenage crises and changes to systemic relationships of the family) – repeated rehabilitation is recommended as for a child who has suffered from illegal activities.”

23. The mother wrote to the High Court Registrar again on 24 March 2020. This letter enclosed a number of documents including, relevantly, a copy of a certified translation of the judgment delivered in the divorce proceedings between the mother and father. This

judgment is dated 12 April 2018. The Latvian Court made an order establishing a “separate custody of one parent” in favour of the mother.

24. Having recited the evidence before the court (including the report of the psychologist dated 4 January 2018 cited at paragraph 22 above), the Latvian Court ruling on the divorce proceedings stated as follows (at page 7 of the certified translation).

“The court is of the opinion that a separate custody comply with the child’s interests and it is also substantiated by the conclusion of Koknese Regional Orphan’s Court that was made after getting acquainted with and analysing the particular situation.

After assessing the evidence of the case in the context of explanations given at the assize, considering the opinion of the representative of Koknese Regional Orphan’s Court, the age of the child and the best interests of the child, as well as having regard of Section 10 of the Law on the Protection of Children’s Rights stating that a child has the right to such living conditions and benevolent social environment as will ensure his or her full physical and intellectual development, the court adjudges that there is basis to establish a separate custody of the child [name redacted].”

25. The Latvian Court also made an order restricting the access rights of the father.
26. Returning to the present proceedings, the case had been listed for hearing before the High Court on a number of occasions since December 2019. These dates had to be vacated, however, for various reasons, including as a result of the restrictions on court sittings imposed as part of the public health measures in response to the coronavirus pandemic.
27. The matter ultimately came on for hearing before me on 7 October 2020. Following the hearing, I directed the filing of written submissions in relation to the question of whether the time-limits prescribed under Article 11(6) to (8) of the Brussels IIa Regulation had been complied with.
28. Notwithstanding the fact that the proceedings have, since April 2018, been carried out as between the father (as applicant) and the mother (as respondent), I subsequently invited submissions from the Minister, in her capacity as Central Authority, in circumstances where the proceedings present an issue of general importance regarding the procedure

under Article 11(6) to (8) of the Brussels IIa Regulation. The Minister filed very helpful written legal submissions on 7 December 2020. At a subsequent directions hearing on 14 December 2020, counsel representing the father and the Minister, respectively, confirmed that they did not require that the oral hearing be re-opened.

RETENTION OF JURISDICTION IN CHILD ABDUCTION CASES

29. The fact that the wrongful retention of the child involves two Member States of the European Union has the legal consequence that the provisions of the Hague Convention are complemented by those of the Brussels IIa Regulation (otherwise Brussels II bis). (Council Regulation (EC) No 2201/2003).
30. Relevantly, Article 10 of the Brussels IIa Regulation provides that, in the case of the wrongful removal or retention of a child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction. This is so until the child has acquired a habitual residence in another Member State and one of the following additional contingencies is also fulfilled. See Article 10, subparagraphs (a) and (b) as follows.
- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;
 - or
 - (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
 - (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

- (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
 - (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
 - (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.
31. The rationale underlying this principle, i.e. that the courts of the Member State, where the child had been habitually resident prior to abduction, retains jurisdiction, lies in the *summary* nature of the child abduction procedure. In order to ensure that proceedings in respect of the wrongful removal or retention of a child are dealt with expeditiously, the courts of the requested Member State are precluded from making *substantive* orders in respect of parental rights. Rather, those courts must simply satisfy themselves that the conditions under Article 12 of the Hague Convention are met, and that none of the so-called defences under Article 13 is made out. The fact that the requested courts are not required to engage in a detailed welfare assessment allows for the child abduction proceedings to be determined summarily; ideally, within the six week time-limit specified under the Brussels IIa Regulation. A more detailed assessment of the best interests of the child can then be carried out in a careful and considered manner by the courts of the Member State of the child's habitual residence.
32. The principle that the Member State of origin retains jurisdiction applies even in those exceptional cases where a *non-return order* is made, unless and until one of the contingencies under Article 10 of the Brussels IIa Regulation is met.

33. This rationale has been expressed, in more eloquent terms, by Finlay Geoghegan J. (then a judge of the High Court) in *E.E. v. O'Donnell* [2013] IEHC 418 (at paragraphs 24 and 25 of the judgment).

“The nature of a decision taken by a court on an application for the return of a child who has been allegedly wrongfully removed or retained pursuant to the Hague Convention is important to a full understanding of the purpose and scheme of arts 10 and 11 of the Regulation and the jurisdictions ascribed to the respective courts and procedures to be followed after a decision of non-return. The application for the return of a child pursuant to the Hague Convention is a summary application and once it is established that a child was wrongfully removed from or retained out of his State of habitual residence, the court (unless exceptionally art 20 applies) is bound to make, in a summary way, an order for return unless a defence pursuant to art 13 of the Hague Convention is made out. Even where such a defence is made out and the court decides not to make an order for the return of the child, such decision is only a decision as to whether or not to make a summary order return. It is not a decision on custody. Article 19 of the Hague Convention expressly provides that a decision under the Convention concerning the return of the child ‘shall not be taken to be a determination on the merits of any custody issue’. Hence, a decision on a return application does not preclude a subsequent hearing and determination on the merits of any continuing custody dispute between the parents or other relevant persons before a court having jurisdiction to hear and determine such disputes at the relevant time. One of the purposes of the Hague Convention is to procure the prompt return of children to the jurisdiction of the courts of their habitual residence so that it is those courts which determine custody disputes in the best interests of the child. Articles 10 and 11(6) to (8) of the Regulation are directed to a custody hearing on the merits which may occur after the making of an order for non-return pursuant to art 13 of the Hague Convention [...].

The purpose and scheme of arts 10 and 11(6) to (8) of the Regulation appears threefold:

- (i) to prevent a court which makes an order refusing to return a child pursuant to Article 13 of the Hague Convention from immediately assuming jurisdiction in relation to custody or access disputes concerning the child; and
- (ii) to give the parties an opportunity of having determined a custody dispute on the merits before the courts in the Member State of the habitual residence of the child prior to the wrongful removal or retention; and

- (iii) to create certainty insofar as possible for a child following the determination of the custody dispute by the courts of the Member State of origin, by providing for the making of a return order pursuant to Article 11(8) which, if certified in accordance with Article 42, is automatically enforceable in the Member State where the child is now residing or if the decision does not entail the return of the child, the transfer of jurisdiction in relation to the child to the courts of that Member State pursuant to Article 10(b).”

34. These principles have recently been approved by Ní Raifeartaigh J. (then sitting in the High Court) in *D.M.M. v. O.P.M.* [2019] IEHC 238. Ní Raifeartaigh J. succinctly summarised the purpose of the procedure as being to ensure that the court from which the child was originally wrongfully taken is given the opportunity to make a final determination on the issue of custody where at least one of the parents so requests within the appropriate time-frame, even where the other court has already made an order for non-return pursuant to Article 13 of the Hague Convention.

POWER TO OVERRIDE A NON-RETURN ORDER

35. One of the most striking features of the Brussels IIa Regulation is that the courts of the Member State of the child’s former habitual residence (“*the courts of origin*”) are empowered to direct the return of a child notwithstanding the making of a non-return order by the court of the Member State to which the child had been wrongfully removed (“*the requested court*”). Put otherwise, the courts of origin can, in effect, override the non-return order made by the requested court. This override mechanism is an innovation which is peculiar to the Brussels IIa Regulation: there is no equivalent provision under the Hague Convention.
36. An order requiring the return of a child to the Member State of origin is directly enforceable in all Member States (provided that it has been certified by the courts of origin in accordance with Article 42 of the Brussels IIa Regulation). Another Member

State is not entitled to oppose the recognition of such an order. Thus, an override order enjoys an enhanced status when compared to other types of orders under the Brussels IIa Regulation, the enforcement of which can, for example, be opposed on public policy grounds or because it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought.

37. It should be explained that whereas the allocation of jurisdiction as between Member States in cross-border situations is addressed by the Brussels IIa Regulation, the subsequent exercise of that jurisdiction is subject to the substantive law of the particular Member State. In the case of the Irish State, the substantive law governing matters of parental responsibility is to be found, principally, under the Guardianship of Infants Act 1964. If, in the exercise of its substantive jurisdiction under this domestic legislation, an Irish Court makes an order directing the return of the child from another Member State then that order must be recognised and enforced in accordance with Article 42 of the Brussels IIa Regulation.
38. In the event that the Irish Courts continue to retain jurisdiction in respect of matters of parental responsibility relating to the child in this case (in particular, regarding custody and access rights), that jurisdiction is exercised through the Guardianship of Infants Act 1964. The best interests of the child are the paramount consideration. I will return to discuss the Guardianship of Infants Act 1964 in detail at paragraph 69 below.

PROCEDURE TO BE FOLLOWED IN CASE OF NON-RETURN ORDER

39. Article 11(6) to (8) of the Brussels IIa Regulation prescribes the procedure to be observed where a non-return order has been made, as follows.
 6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a

transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

40. As appears, it is envisaged that a copy of the court order on non-return and of the relevant documents will be transmitted to the Member State of a child's former habitual residence "immediately", and should be received within one month of the date of the non-return order.

41. Thereafter, the parties should be notified and invited to make submissions within three months of the date of notification so that the court of the child's former habitual residence can examine the question of custody. In *D.M.M. v. O.P.M.* [2019] IEHC 238, the High Court (Ní Raifeartaigh J.) emphasised the necessity for expedition in applications of this type. On the facts of that case, the court held that the applicant-father had failed to comply with the three month time-limit, and the proceedings were accordingly closed. I will return to discuss the implications of this judgment in more detail below (at paragraph 48 and onwards).

42. One of the curious features of the procedure under the Brussels IIa Regulation is that whereas time-limits are prescribed for the transmission of the relevant documents (one month), and for the parties to make submissions (three months), there is no time-limit expressly prescribed for the notification of the parties. It is implicit, however, that this procedural step must also be carried out with expedition. Any delay would be inimical to the objectives of the Brussels IIa Regulation.
43. The manner in which the requirements of Article 11(6) to (8) of the Brussels IIa Regulation have been given effect to by the Irish State is as follows. Non-return orders are to be transmitted by other Member States to the Minister as Central Authority (rather than directly to the Irish Courts). If there are no proceedings already in being before a court in the State concerning the custody of, or access to, the child, the Minister is required to issue an originating notice of motion before the High Court seeking the directions of the court for the purposes of Article 11(7). (See Order 133, rule 11(1) of the Rules of the Superior Courts). The originating notice of motion shall be served on the parties referred to in Article 11(7). The originating notice of motion shall be grounded on an affidavit exhibiting the documents received pursuant to Article 11(6).
44. In practice, the Minister will often make an *ex parte* application in advance of issuing the originating notice of motion, and seek directions from the court as to the service of the motion on the parties.
45. Finally, it should be emphasised that it is open to the parties themselves to initiate a custody hearing for the purposes of Article 11(7), i.e. it is not necessary for the left-behind parent to wait for the Central Authority to initiate proceedings under Order 133. The left-behind parent can, instead, institute proceedings themselves under the Guardianship of Infants Act 1964. This was the approach adopted by the left-behind

parent in *A.O'K. v. M.K. (Child Abduction)* [2011] IEHC 82; [2011] 2 I.R. 498. The court confirmed that the procedure was permissible.

“These proceedings were commenced by an originating notice of motion issued on behalf of the applicant on the 4th October, 2010 and made returnable for the 13th October, 2010. In the motion the applicant seeks:-

1. an order pursuant to the Guardianship of Infants Act 1964, as amended, or otherwise, for the production of the child before this honourable court for the purposes of enforcing the order of the District Court dated the 15th September, 2009, as affirmed by the Circuit Court on the 10th December, 2009;
2. further, or in the alternative, an order pursuant to article 11(7) of Council Regulation (E.C.) 2201/2003 for the return of the child to Ireland and into the care and control of the applicant;
3. directions and further and other relief and costs.

Whilst O. 133, r. 11 of the Rules of the Superior Courts 1986 envisages an application following notification of a non-return order to the central authority being commenced by the central authority putting the parties on notice, correctly, no objection has been made to this procedure. Whilst O. 133, r. 11 does not expressly envisage a party commencing the procedure to bring the matter before the court, as is required by article 11(7) of the Regulation, where one is willing to do so, it is probably the most appropriate way for the Irish adversarial system. However, this view does not relieve the central authority of its primary obligation to issue the application pursuant to O. 133, r. 11(1) and put the parties on notice where, as on the facts of this case, it has received the documents from another central authority.”

46. The father in the present proceedings did not avail of this opportunity.

DETAILED DISCUSSION

(1). LEGAL EFFECT OF DELAY IN ARTICLE 11 PROCEDURE

47. The first issue to be addressed by this court is whether the procedure prescribed under Article 11(6) to (8) of the Brussels IIa Regulation has been complied with; and, if not, to consider what is the legal effect of such non-compliance.
48. 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. It would defeat the underlying purpose of the procedure, and would be inconsistent with the imposition of the short one-month and three-month time-limits on the other steps in the process, were a Central Authority to delay in notifying the parties. As stated in *D.M.M. v. O.P.M.* [2019] IEHC 238 (at paragraph 25 of the judgment), it is a fundamental principle of the international child abduction regime that matters should be addressed with as much speed as is possible and compatible with appropriate procedures.
49. On the facts of the present case, a period of some six months was allowed to lapse from the date upon which the Minister, as the Central Authority for Ireland, received a copy of the non-return order (22 May 2017) and the making of the *ex parte* application to the High Court (13 December 2017). The father was subsequently served with the proceedings, and issued a motion on 9 March 2018, that is, within the period of three months allowed by the order of the High Court dated 13 December 2017.
50. The key dates in the chronology can be summarised in tabular form as follows.

DATE	EVENT
23 March 2017	Decision to make non-return order
6 April 2017	Non-return order drawn up
22 May 2017	Copy of non-return order and decision received by Minister
13 December 2017	<i>Ex parte</i> application for directions before High Court
9 March 2018	Father makes Article 11(7) submission by issuing motion
12 April 2018	Latvian Court makes custody order in divorce proceedings
23 April 2018	First return date before High Court
51.	No proper explanation for the delay on the part of the Minister, <i>qua</i> Central Authority, in instituting the proceedings is provided in the affidavit grounding the application.
52.	The written submissions recently filed on behalf of the Minister on 7 December 2020 seek to suggest at §13 that it had been necessary to await receipt of the psychological report relied upon by the Latvian Court before instituting proceedings before the High Court.

“[...] however it was clear in the present case that the psychological report that was central to the non return decision arrived at by the Latvian Appeal Court and its findings based on same were the bases for the Article 13 grave risk defence. This report was furnished by the Latvian Central Authority in November, 2017 thus clearing the way for the issuing of the Originating Notice of Motion that commenced the procedure under Order 133 Rule 11 and Article 11 (6) – (8) of the Regulation. This kind of delay in the provision of the papers that would be required for a Court in this jurisdiction to carry out its functions has been a feature of the operation of the Regulation since its inception. It will be noted that the recast Regulation – Council Regulation (EU) 2019/1111, (appended hereto) and which comes into effect subject to the transitional provisions on the 1st August, 2022, has reorganised the manner in which this corrective jurisdiction is exercised and has removed the intermediate roles of the central authorities on both sides of an international child abduction case unless there are existing proceedings in a court in the state of origin, placing the onus on the left behind parent to institute proceedings under the corrective jurisdiction in the state of the child’s habitual residence before the removal/retention occurred, and removing the provision whereby one Central Authority transmits the papers to another Central Authority

(See Chapter III, particularly Article 29(5)). There may be some implicit acknowledgement in the change in the operation of the corrective jurisdiction, that delays of an unhelpful nature have been occurring at the Central Authority to Central Authority stage since the coming into operation of the Council Regulation (EC) 2201/2003.”

53. With respect, I cannot accept that it was appropriate for the Minister to delay instituting these proceedings for more than six months. Sufficient material had been provided to the Minister’s Department on 22 May 2017, and these proceedings should have been instituted shortly thereafter. In particular, the Central Authority for Latvia had, in its email of 22 May 2017, provided copies of the decision of the Riga Regional Court dated 23 March 2017, and a certified English translation of the decision. As appears from the extracts from same cited earlier (paragraphs 8 and 9 above), the decision of the Latvian Court set out in detail the reasons for the non-return order and provided details of the psychological report. It is evident from a reading of the decision as to why the Latvian Court determined to make a non-return order. The Central Authority for Latvia had also provided minutes of the hearing on 22 March and 23 March 2017 and two DVDs. (Exhibit “A” of Catherine Sheridan’s affidavit of 27 November 2017).
54. Given the inherent urgency of child abduction cases, the application to the High Court should have been made much earlier. Indeed, it is telling that, on receipt of the documentation in May 2017, the Department had, within a matter of days, written to the solicitors representing the parties to the child abduction proceedings, and had provided them with the documentation. The solicitors confirmed that there were no custody proceedings already in being before the Irish Courts. Thereafter, the Department seems to have forwarded the matter to the Office of the Chief State Solicitor on 24 May 2017, presumably for the purposes of an application pursuant to Order 133. No proper explanation has ever been provided on affidavit for the lapse of six months thereafter.

55. A Central Authority, such as the Minister in this case, is not entitled to delay triggering the procedure under Article 11(6) to (8) while it awaits the receipt of all possible documentation from the other Central Authority. The purpose of issuing the originating notice of motion pursuant to Order 133, rule 11 is to commence the procedure under Article 11(6) to (8). It is not necessary for this purpose that absolutely all documentation which may be relevant to a custody hearing be placed before the High Court there and then. Rather, the procedure envisages that the parties will be afforded an opportunity to indicate whether they wish to invite the High Court to exercise its jurisdiction to override the non-return order. If so, the parties will then be afforded further time to put all relevant material before the High Court in advance of a custody hearing. Pointedly, the custody hearing is conducted between the parties asserting custody *inter se*, and, as in this case, the Minister is released from the proceedings. The Minister's role, *qua* Central Authority, is simply to initiate the proceedings. The Minister is not an active participant. It was inappropriate, therefore, to delay instituting the procedure simply because ancillary documentation had been awaited from the other Central Authority.
56. (As noted earlier, the precise circumstances in which this additional documentation came to be provided, and, in particular, whether it had been requested by the Department, have never been explained. Nor has it been explained why a number of documents appear to be date stamped as having been received by the Department as early as 2016. One explanation may be that the Central Authority for Latvia had been providing documents on a contemporaneous basis while the child abduction proceedings wended their way through the Latvian Courts).
57. In this regard, the judgment of the High Court (Ní Raifeartaigh J.) in *D.M.M. v. O.P.M.* [2019] IEHC 238 is instructive. The case is not directly in point in that it concerned delay by a party to the proceedings, rather than delay by the Minister *qua* Central

Authority. The judgment is nevertheless of great assistance in that it explains the nature of the procedure under Article 11(6) to (8), and the necessity for urgency.

58. On the facts of that case, a non-return order had been made by the Greek Courts in respect of a child wrongfully removed from Ireland. The making of the non-return order had been notified to the Minister, as the Irish Central Authority. Proceedings were ultimately issued by the Minister some months later. The court made an order directing that the father of the child be served with the proceedings, and that any submission, i.e. for the purpose of Article 11(7), be made within three months.
59. The issue to be resolved by the court was whether the three-month period ran from the date upon which the father had been served with the proceedings. It had been submitted on behalf of the father that time did not start to run from that date because the documentation served was incomplete.
60. Article 11(6) describes the documents which must be transmitted to the Member State of the child's habitual residence as follows: a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court. Ní Raifeartaigh J. held that this phrase does not require that *all* documents necessary to conduct a custody hearing must be transmitted. Rather, on its correct interpretation, the phrase "a copy of the court order on non-return and of the relevant documents ..." envisages something more minimal, meaning something along the lines of such documents as are necessary to an understanding of the decision of the court concerned. In this context, the court concerned is the court which made the final and authoritative decision on non-return in the other Member State. Insofar as Article 11(7) refers to a "transcript", this must implicitly be read subject to the words "if any".
61. On the facts of *D.M.M. v. O.P.M.*, the father had been furnished with the judgment of the Greek Court of Appeal, and with an extensive social work report. Ní Raifeartaigh J. held

that those documents made it clear what the basis of the non-return order had been, and provided sufficient information to enable the father to decide whether or not he wished to request the Irish High Court to examine the issue of custody.

62. In reaching these conclusions, Ní Raifeartaigh J. emphasised the following aspects of the procedure under Article 11(6) to(8) (at paragraphs 24 and 25 of her judgment).

“The step of transmitting papers and requesting submissions is the beginning of a process rather than necessarily a once-and-for-all transmission of papers for the purpose of the ultimate custody hearing by the Irish court. It may be that, upon notification of their right to make submissions, neither of the parents wishes to have a hearing before the Irish court and the matter will go no further. Alternatively, it may be that one of the parents does wish to have a full custody hearing in the Irish court; in such circumstances, I would envisage that requests could be made to the Greek authority for further documents if they were deemed to be necessary. This would have to be evaluated on a case-by-case basis once the proceedings are up and running, as it were. *However, to seek a full and comprehensive set of documents in all cases at the very outset could be very onerous and seems to me unlikely to be required by the provisions of the Regulation.** For example, I have seen papers transmitted to Ireland pursuant to Article 11(6) where there had been up to seven hearings (including determinations at first instance, appeals and re-hearings) in the country whose courts had decided upon a no-return order; the documentation in such cases must be very extensive and it would seem disproportionate for the Authority in that country to have to gather all the documentation for transmission at the very outset of the process.

Another important consideration is the following one. A fundamental principle of the international child abduction regime (both under the Hague Convention and the Regulation) is that matters should be addressed with as much speed as is possible and compatible with appropriate procedures. *Again, if a comprehensive set of documents had to be gathered in every case before the parents were even told of the Article 11(6)-(8) process and invited to make submissions, I fear that the element of speed would be considerably at risk.** Indeed, in my experience to date, the notification process to the Irish authorities is not at all swift despite the use of the word ‘immediately’ and the one-month time limit referred to in Article 11(6). In point of fact, it may be noted that in the present case, the notification from Greece to Ireland was well beyond the one-month time limit provided for under Article 11(6).”

*Emphasis (italics) added.

63. I am satisfied that these considerations apply, with even greater force, to the role of the Central Authority. There is no justification for the Minister, *qua* Central Authority, delaying in initiating the procedure under Article 11(6) to (8), i.e. by issuing an originating notice of motion in accordance with Order 133, rule 11, pending receipt of ancillary documentation. The role of the Central Authority is largely confined to bringing the matter before the High Court, and serving the parties with the proceedings and relevant documentation. Thereafter, it is generally released from the proceedings. On the facts of the present case, the Minister, *qua* Central Authority, had sufficient material as of 22 May 2017 to allow her to initiate the procedure under Article 11(6) to (8), and she should have done so at that time.
64. The practical effect of the delay on the part of the Minister, *qua* Central Authority, is that by the time the father's submission was first returnable before the High Court on 23 April 2018, one year had already lapsed since the date of the non-return order, and the Latvian Courts had subsequently made custody orders in the context of the divorce proceedings (12 April 2018).
65. The written legal submissions filed on behalf of the Minister observe that the existence of such a custody order in the Member State of refuge does not *per se* preclude the exercise by the Member State of a child's habitual residence of its retained jurisdiction. (The submissions cite, in particular, the judgments in Case C-211/10 PPU, *Povse*, and Case C-455/15 PPU, *P. v. Q.*). This observation is correct insofar as it goes. The observation is, however, predicated on an assumption that the courts of the child's former habitual residence continue to retain jurisdiction. That assumption does not hold good in the present case, where the precise issue which falls for determination is whether the retained jurisdiction of the Irish Courts has come to an end as a result of delay.

66. Having regard to the matters discussed under this heading, I have concluded that the Irish Courts' retained jurisdiction has ceased as a result of the delay in initiating these proceedings, and this court must close the case in accordance with Article 11(7). It would be contrary to the objectives of the Brussels IIa Regulation, and, in particular, the requirement for urgency, to allow the retained jurisdiction to be invoked for the first time more than six months after the making of the non-return order by the Latvian Courts.
67. In circumstances where the child has resided in Latvia for well in excess of the prescribed twelve months and is well settled there, and the Irish Courts have closed the case, jurisdiction is transferred to the Latvian Courts in accordance with Article 10(b)(iii) of the Brussels IIa Regulation.
68. Jurisdiction regarding matters of parental responsibility now lies with the Latvian Courts. Any further applications for custody and access should be made to those courts.

(2). APPLICATION TO RETURN THE CHILD TO IRELAND

69. Lest I be incorrect in my finding (above) that the retained jurisdiction of the Irish Courts has come to an end as a result of the delay in initiating these proceedings, I propose to address the substance of the father's application *de bene esse*. Put otherwise, I will address the application on the assumption that the Irish Courts continue to retain jurisdiction in matters of parental responsibility regarding the child.
70. The father has applied to the High Court for orders pursuant to the Guardianship of Infants Act 1964 (as amended). The principal reliefs sought are as follows (i) an order granting the father joint custody of the child; (ii) an order for the return of the child to Ireland; (iii) an order for access for the father in either Ireland and/or Latvia; (iv) an order for incorporeal access; and (v) an order for interview/assessment of the various parties, including the child.

71. The High Court has already made an interlocutory order requesting that the child be interviewed by the Latvian Courts. (See paragraphs 20 to 22 above).
72. As noted earlier, whereas the allocation of jurisdiction as between Member States in cross-border situations is addressed by the Brussels IIa Regulation, the subsequent exercise of that jurisdiction is subject to the substantive law of the particular Member State. In the case of the Irish State, the substantive law governing matters of parental responsibility is to be found, principally, under the Guardianship of Infants Act 1964. The manner in which this statutory jurisdiction is to be exercised in cases where the Irish Courts retain jurisdiction as the courts of the Member State of the child's former habitual residence has been set out comprehensively in the judgment of the High Court (Finlay Geoghegan J.) in *A.O'K. v. M.K. (Child Abduction)* [2011] IEHC 82; [2011] 2 I.R. 498 (at paragraph 54 of the judgment).

“In summary, my conclusions at this stage in the proceedings are:-

- (i) the substantive proceedings before this court, pursuant to article 11(7), having regard to the submissions already made and notices of motion issued on behalf of the parties, require this court to ultimately determine the dispute between the parties in relation to the custody of the child. Each of the parties seeks custody of the child;
- (ii) in determining that substantive issue, the court has the full jurisdiction it would have in accordance with Irish law, pursuant both to its inherent jurisdiction and the Guardianship of Infants Act 1964, as amended;
- (iii) the exercise of its jurisdiction, including in relation to any interlocutory application, must be informed by the provisions of Council Regulation (E.C.) No. 2201/2003 and, in particular, articles 11 and 42 and the Hague Convention on Child Abduction 1980;
- (iv) its jurisdiction includes the power to make, on an interlocutory application, an order for the return of the child to Ireland. In determining any such application, the court will apply a welfare test in the relevant factual and legal context, but will not conduct a full welfare inquiry of the type which would be done prior to the determination of the substantive custody dispute;

- (v) in determining any interlocutory application for the return of the child, the court must comply with the minimum procedural requirements of article 42(2), including giving the child an opportunity to be heard, unless a hearing is considered inappropriate, having regard to her age or degree of maturity; and
- (vi) the court retains its full jurisdiction to make interim orders for access and custody.”

73. In a subsequent judgment in the same proceedings, *A.O’K. v. M.K. (Child Abduction) (No. 2)* [2011] IEHC 360, Finlay Geoghegan J. emphasised that, in exercising its retained jurisdiction, a court is not confined to carrying out an appeal process in respect of the non-return order made by the requested court. Rather, the court is exercising quite a different jurisdiction, and is required to conduct a full hearing in relation to the custody dispute between the parents. See, in particular, paragraph 30 of the judgment as follows.

“The common starting point is that pursuant to Articles 8, 10 and 11 (6)-(8) of the Regulation, the Court, in ‘examining the question of custody’, is conducting a full hearing in relation to the custody dispute between the parents. In so doing, the Court is exercising its full jurisdiction pursuant, in particular, to s. 11 of the Guardianship of Infants Act, in that it is determining a question affecting the welfare of the Child and it has a general jurisdiction to make such order ‘as it thinks proper’. The Court is directed by s. 3 of the Act of 1964, to regard the welfare of the child as ‘the first and paramount consideration’. Welfare is defined in s. 2 of the Act as comprising ‘the religious, moral, intellectual, physical and social welfare of the child’. This requires the court to consider the welfare of the Child in the widest sense and consider the entire picture presented by the evidence before it. See, *inter alia*, Walsh J. in *O.S. v. O.S.* [1976] 110 ILTR at 57, and Flood J. in *E.M. v. A.M.* (Unreported, High Court, 16th June, 1992).”

74. Finlay Geoghegan J. explained that the best interests of a child are to be assessed by reference to the child’s present circumstances, and the court must take into account the fact that the child may have been living in the Member State to which they have been wrongfully removed for a significant period of time. The court does not put itself in the (hypothetical) position it would have been if the child had not been wrongfully removed. Put otherwise, the court must have some regard to the *de facto* situation created by the

unlawful action of the abducting parent. The fact that the removal or retention was wrongful may nevertheless be relevant:— in making a decision as to what is now in the best interests of the welfare of the child, the court may take into account the fact that the child has been deprived of an appropriate relationship with the left-behind parent as a result of the wrongful removal.

75. A number of significant amendments have been made to the Guardianship of Infants Act 1964 since the two judgments in *A.O’K. v. M.K.* were delivered. In particular, the factors or circumstances to which the court is to have regard in determining what is in the best interests of the child are now set out in detail at Part V of the Act. (This amendment was introduced under the Children and Family Relationships Act 2015, and gives effect to the constitutional amendment which inserted Article 42A into the Constitution of Ireland). The factors and circumstances to be considered include the following (see section 31(2) of the Guardianship of Infants Act 1964).

- (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child’s upbringing and, except where such contact is not in the child’s best interests, of having sufficient contact with them to maintain such relationships;
- (b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);
- (c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child’s age and stage of development and the likely effect on him or her of any change of circumstances;
- (d) the history of the child’s upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;
- (e) the child’s religious, spiritual, cultural and linguistic upbringing and needs;
- (f) the child’s social, intellectual and educational upbringing and needs;

- (g) the child's age and any special characteristics;
- (h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;
- (i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;
- (j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;
- (k) the capacity of each person in respect of whom an application is made under this Act—
 - (i) to care for and meet the needs of the child,
 - (ii) to communicate and co-operate on issues relating to the child, and
 - (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

76. These legislative provisions ensure compliance with the requirement under Article 42A.4 of the Constitution of Ireland that the best interests of the child shall be the paramount consideration in all proceedings concerning the guardianship or custody of, or access to, any child. The legislative provisions also ensure that the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

77. In exercising its statutory jurisdiction, the court must have regard to certain aspects of the Brussels IIa Regulation. First, Article 11(8) and Article 42 confirm that, in cases where it continues to retain jurisdiction, the court of origin has jurisdiction to direct the return of the child notwithstanding the making of a non-return order pursuant to Article 13 of the Hague Convention by the courts of the requested Member State. Secondly, it is necessary for the court of origin to certify its order to ensure that it is

enforceable in all Member States. More specifically, under Article 42 of the Brussels IIa Regulation, the court of origin must certify that the following procedural requirements have been complied with.

- (a) The child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
- (b) The parties were given an opportunity to be heard; and
- (c) The court has taken into account, in issuing its judgment, the reasons for and evidence underlying the order issued pursuant to Article 13 of the Hague Convention.

78. The first two procedural requirements are ones which inhere in the statutory procedure under the Guardianship of Infants Act 1964. The third procedural requirement, i.e. to take into account the reasons for and evidence underlying the non-return order represents an additional requirement.

FINDINGS OF THE COURT

79. For the reasons which follow, I have concluded that it would not be in the best interests of the child to make an order directing his return to Ireland.

(i). History of upbringing

80. The child is well settled in Latvia and no longer has any meaningful connection with Ireland. It would be very disruptive to the welfare of the child were this court to direct his return to Ireland. The child has been resident in Latvia since August 2015, i.e. for a period of some five and a half years. Put otherwise, the child has lived in Latvia for almost half of his lifetime. The report prepared by the Latvian Court at the request of the High Court (“*the report*”) evaluates the living conditions of the child in Latvia as good. Specifically, the report confirms that all necessary conditions have been provided for the

boy's development and growth in a favourable environment, and that he is being cared for and loved in an emotionally positive atmosphere.

81. The report also indicates that the child's educational needs are being met according to his age and development. The child is involved in a wide range of extra-curricular activities.

(ii). Views of the child

82. This court is obliged, under section 31(2)(b) of the Guardianship of Infants Act 1964 to have regard to the views of the child concerned where they are ascertainable. The child's views would also have to be considered before this court could certify any order directing the return of the child pursuant to Article 42 of the Brussels IIa Regulation.
83. The child has stated a clear preference to remain in Latvia. This preference is recorded in the report prepared by the Latvian Court. This report is based on a face-to-face interview with the child. The child is reported as wishing to form his identity in Latvia, and as having said that he wants to live in Latvia his whole life.
84. This wish appears to be independent of his stated view that he does not wish to have any contact with his father. The report of the Latvian Court states that the child does not want to meet his father, and records that any question asked about his father caused a visible anxiety and negative emotions to the child. This is consistent with the earlier psychological report (4 January 2018) which states that the child "categorically and clearly does not wish to meet his biological father".

(iii). Capacity to care for and meet the needs of the child

85. The father has not put any evidence before the court as to his capacity to care for and meet the needs of the child. No evidence has been provided in respect of matters such as, for example, accommodation. This is to be contrasted with the position in respect of the mother. The report of the Latvian Court states that the child "feels good together

with his mother”, who provides daily care; and that the child “feels safe and stable in the family”.

(iv). Benefit of meaningful relationship with both parents

86. An important consideration in the assessment of the “best interests” of the child is the desirability of a child having the benefit of a meaningful relationship with each of his or her parents, and, except where such contact is not in the child’s best interests, of having sufficient contact with them to maintain such relationships. On the facts of the present case, the consequence of the mother’s having wrongfully retained the child in Latvia, and the subsequent delay in the various legal proceedings, is that there has been almost no contact of any kind between the father and child for some five and a half years.
87. In principle, the making of an order directing the return of the child to Ireland would have the potential advantage of facilitating contact between the father and child. This might, again in principle, allow for the relationship between the two to be improved. Unfortunately, however, there are a number of factors in the present case which militate against making a return order. First, the only expert evidence before the court is to the effect that direct contact between the father and child may result in secondary traumatisation of the child. The Latvian Courts have found that there is a history of abuse (including possible sexual abuse). The court-appointed psychologist recommended against any meetings between the father and child. Secondly, the child is reported as having expressed the clear view that he does not wish to meet with his father.
88. The desirability of facilitating a meaningful relationship between the child and his father must be secondary to the paramount consideration which is to ensure the best interests of the child, including, in particular, the protection of the child’s safety and psychological well-being. If there is to be contact between the father and the child, this should take place in Latvia and not in Ireland. This would ensure that the contact takes place in the

child's own environment, with the emotional support of his mother and immediate family. Any contact can be appropriately supervised by the Latvian Courts. The alternative, whereby the child would be ordered to return to Ireland, would be unnecessarily disruptive for the child and would not properly protect his safety and psychological well-being.

(v). *The mother's conduct*

89. As appears from the analysis thus far, the fact that the child has been resident in Latvia for some five and a half years is a significant factor in assessing whether a return to Ireland is in his best interests. It should be reiterated that the mother's conduct in failing to return to Ireland from Latvia in August 2015 represented the *wrongful retention* of the child for the purposes of the Hague Convention and the Brussels IIa Regulation. There is an obvious risk that were a court of origin, in determining custody and access, to attach too great a significance to the length of time for which a child has been wrongfully retained in another Member State, then this might undermine the objectives of the Hague Convention and the Brussels IIa Regulation. The offending parent would, in a sense, have benefited from their conduct by presenting the courts with a *fait accompli*. As explained by the European Court of Justice in Case C-211/10 PPU, *Povse*, the unlawful removal of a child should not, in principle, have the effect of automatically transferring jurisdiction from the courts of the Member State where the child was habitually resident immediately before removal, to the courts of the Member State to which the child was taken, even if, following the abduction, the child has acquired a habitual residence in the latter Member State. The transfer of jurisdiction is instead subject to the conditions prescribed under Article 10.
90. Ultimately, however, it is the best interests of the child—and not any desire to sanction the offending parent as a deterrent to others—which must be the paramount consideration

for this court. On the facts of the present case, this court cannot ignore the reality that the child has lived in Latvia since the age of five years, and is well settled there.

Summary

91. For the reasons outlined above, I have concluded that it would not be in the best interests of the child to order his return to Ireland. Accordingly, the father's application for orders under the Guardianship of Infants Act 1964 is refused.
92. This represents a final judgment, adopted on the basis of full consideration of all the relevant factors, within the meaning of Article 10(b)(iv) of the Brussels IIa Regulation (as interpreted in Case C-211/10 PPU, *Povse*). This has the effect of bringing the retained jurisdiction (if any) of the Irish Courts to an end.
93. It is not entirely clear from the wording of Article 10(b)(iv) whether the court of origin, having declined to make a return order, might nevertheless have jurisdiction to make lesser orders. Might the court of origin, for example, make orders in respect of access arrangements? It is unnecessary to resolve this issue on the facts of the present case. Even if this court had jurisdiction to do so, this would not be an appropriate case to regulate access arrangements. First, for the reasons outlined earlier, if there is to be contact between the father and the child, this should take place in Latvia and not in Ireland. Such contact can be appropriately supervised by the Latvian Courts. Secondly, were this court to make an order in respect of access arrangements, such an order would not have the enhanced status of an order under Article 42. The enforceability of such an order in Latvia would be open to challenge were it to conflict with an order of the Latvian Courts.

CONCLUSION AND FORM OF ORDER

94. The father's application under the Guardianship of Infants Act 1964 for directions regarding the custody of the child (including an order for the return of the child to Ireland) is refused for two reasons as follows. First, the retained jurisdiction of the Irish Courts under Article 10 of the Brussels IIa Regulation has come to an end as a result of the delay on the part of the Minister, in her capacity as Central Authority, in initiating these proceedings. Secondly, and in the alternative, even if the Irish Courts had continued to retain jurisdiction in matters of parental responsibility regarding the child, it would not be in the best interests of the child to order his return to Ireland having regard to the statutory criteria under Part V of the Guardianship of Infants Act 1964. In reaching this latter decision, I have had regard *inter alia* to the views of the child, as recorded in the report prepared by the Latvian Court at the request of the High Court.
95. The fact that this court has not made an order directing the return of the child has the result that there is no conflict between any order of this court and the custody orders made by the Latvian Courts in April 2018 (in the context of the divorce proceedings). The Latvian Courts are now the only courts with jurisdiction in matters of parental responsibility regarding the child, and if the father wishes to pursue an application for access or custody, same should be directed to the Latvian Courts.
96. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required

to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”

97. In circumstances where the father has previously been granted a certificate for legal aid, and where the mother has not engaged any legal representation, I do not propose to make any order as to costs. If any party wishes to contend for a different order on costs, then they are to file written legal submissions electronically by 12 February 2021.

Approved
Gareth S. Mans