

THE HIGH COURT

FAMILY LAW

[2022 No.29 HLC] [2023] IEHC 379

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 SOFIA, A MINOR

(CHILD ABDUCTION: CONSENT, VIEWS OF THE CHILD)

BETWEEN:

A.Q.

APPLICANT

AND

P.Q.

RESPONDENT

**Judgment of Ms. Justice Mary Rose Gearty delivered on the 20<sup>th</sup> day of April, 2023**

**1. Introduction**

1.1 This is a case in which the Applicant father seeks the return of his daughter to Latvia. The case involves a factual dispute as to whether he consented to her removal, an examination of the child's views, and three preliminary

issues in relation to the procedures adopted by the Court and the fairness of the hearing.

## **2. Preliminary Applications**

2.1 The hearing of this case was preceded by three applications, all of which were ruled upon in open court as they arose but I indicated that I would set out my reasons again in this reserved judgment. The first application was to adjourn the case in order to conduct a second interview with the child, the second was for liberty to cross-examine the Applicant on his affidavit, the third to draw the Court's attention to the unfairness inherent in requiring parties to exchange submissions rather than allowing the Respondent to read the Applicant's submissions first and then to respond to them. There was also a fourth application at the close of the case for an adjournment so that the Respondent could file a second affidavit.

### **A. Exchange of Legal Submissions**

2.2 Dealing with the applications in reverse order, the exchange of submissions (as opposed to a direction that submissions be staggered to allow focused replies) was described by counsel as a "*small sin*", which he confirmed meant that it was not the most significant of the three applications. Perhaps anticipating that the Court was not going to adjourn a Hague Convention case for a second exchange of submissions, the application went no further than to note a perceived unfairness. The Court made no direction as a result of this application and proceeded with the hearing.

2.3 In most cases brought under the Hague Convention, an independent assessor's report is obtained on the child's views. After a finite number of affidavits have been exchanged, a hearing date is set on a date which ensures that the report will be available at the hearing. This case was listed several times to ensure that affidavits were completed and filed and, in

February, a hearing date at the end of March was assigned. The exchange of legal submissions takes place only a few days before the hearing and is intended to give the parties and the Court some notice as to what arguments will be made. If a case is properly prepared, there will be nothing new in the legal submissions as they will be based on the facts of the case as set out in the affidavits.

- 2.4 There is a limited number of legal issues which arise in Hague Convention cases. Here, the issues were consent and the views of the child. The submissions are intended to be a road map only so that counsel can anticipate the arguments to be made by the other side and address them in oral submissions. There is no need for submissions to be exchanged in sequence other than in the most complicated cases, which the Court would consider if it had been requested but would not grant unless the case was exceptionally complicated. It is not unfair to require a simultaneous exchange of legal submissions in cases arising under the Convention: not only can the submissions be accurately predicted in most cases, but even where they cannot, the reason for the oral hearing is to enable the two sides to address any argument or submission that they had not anticipated until they saw the written submissions. The Respondent in this case did not identify any argument made in written submissions that had not been anticipated or had rendered the exchange unfair in any way, so the Court proceeded with the hearing on the basis that the exchange had allowed both sides a fair opportunity to make their case and the oral hearing was available to ensure that there was a full opportunity for counsel to address all matters arising.

#### **B. Cross-examination**

- 2.5 The Respondent submitted that she was entitled to cross-examine the Applicant in this case, having served notice of her intention to do so. The

Court was referred to a judgment of Kelly J. in this regard. In *Irish Bank Resolution Corporation Limited (In Special Liquidation) v. Moran* [2013] IEHC 295, Kelly J. made it clear that the right to cross-examine is not an absolute right.

- 2.6 Order 133.5.2 of the Rules of the Superior Courts requires that applications under the Hague Convention be made on affidavit evidence only. Leave to cross-examine is only granted in exceptional cases, given these procedural rules and the nature of such cases. The Respondent must satisfy the Court that she was entitled to an Order to cross-examine. There was no formal application to cross-examine grounded on an affidavit. The application was made on the basis of a notice to cross-examine, filed the day before the hearing. This alone mitigated against granting leave; there must be an evidential basis for the application and it is appropriate that this be set out in an affidavit. The Court heard the substance of the application in any event, which was based largely on the constitutional right to cross-examine.
- 2.7 The Court was guided by the Court of Appeal authority in *Raymond Hegarty v. The Commissioner of an Garda Síochána* [2021] IECA 328, which was a judicial review case. The two procedures are similar in that there is an exchange of affidavit evidence and oral evidence is relatively rare in both types of case. At a key passage, paragraph 36, Noonan J. held:

*“Mere denial or non-acceptance of facts deposed to by a respondent cannot, without more, give rise to a right to cross-examine. Were that to be the position, there would be cross-examination in virtually every case. Even if there is a genuine dispute on the facts in the sense of opposing versions of events being advanced by the parties, cross-examination will in general only be permitted where the resolution of that conflict is essential to the determination of the legal issues that arise.”*

2.8 In this case, the issue in respect of which the notice was served was that of consent. The facts of the case included a claim by the Respondent that the Applicant father consented to his daughter moving to Ireland. The Applicant denied this. The Respondent sought to cross-examine him on this denial. In his affidavit, the Applicant had exhibited a written agreement between himself and the Respondent in which they had both agreed, having been legally advised, that their daughter would remain in the custody of her mum but with ample access to dad and that neither one of them would remove her from the country of Latvia for a holiday without the prior written approval of the other (whether by text message or otherwise). In response, the Respondent provided no supporting evidence of any description and no exhibit of any written consent. Her affidavit contained a formal denial of all that he had said and a specific claim that he had consented verbally, no more.

2.9 In circumstances where the evidential burden was on the Respondent, it was for her to prove that the Applicant had consented. The Applicant provided strong evidence that only a written consent would be expected on the facts of this particular case and that he had not provided one. The Respondent did not comment on that expectation, which was a reasonable one based on what they had both agreed in respect of holidays, let alone moving permanently to another country. Instead, the Respondent relied on her simple averment of a verbal consent, without details of date, circumstances or witnesses. This factual scenario falls short of the exceptional kind of case in which cross-examination should be allowed. There was no material on which to cross-examine other than a bare assertion. Cross-examination was not necessary to resolve this dispute where all the available exhibit evidence suggested that this couple had agreed to reduce any such agreement to writing and no such written

material was available. This factual background, coupled with the very late nature of the application, which was not based on affidavit, persuaded the Court that this was not such an exceptional case as to warrant a departure from the usual rule that the case be decided on affidavit evidence.

### **C. Adjournment to Obtain Further Affidavit Evidence**

2.10 There was an application at the end of the case which relates to this application. The Respondent, having heard the Applicant's legal submissions, asked for an adjournment of the case so that she could file a second affidavit. Counsel for the Respondent told the Court (in replying submissions and not at the outset of the case) that there was now more detailed evidence about the alleged verbal consent. The Respondent had discovered screen shots on her phone which, Counsel argued, would support the submission that the Respondent's sister had a phone conversation with the Applicant. Counsel advised the Court that the Respondent's sister was prepared to swear an affidavit to the effect that in this phone call, the Applicant had agreed to the child moving to Ireland. Her husband, who had also heard this conversation, was also prepared to swear an affidavit confirming that he overheard this consent.

2.11 It is important to recall the factual and procedural history of the case when considering this argument: the hearing had, at this stage, almost concluded. The case had been listed for hearing in February, affidavits having been exchanged. The Respondent's affidavit was sworn on the 23<sup>rd</sup> of February. In this affidavit, there was no reference to any witness to the alleged consent and the only evidence offered was an averment about two phone calls. In the first call, when told the Respondent was moving with their child to Ireland, the Applicant was surprised. In a second call, according to the Respondent, he had said "*if you decided to do so, then fine*". She also avers that when their daughter spoke to the Applicant, he replied "*yes, if you*

*decided that then you can go.*" There was no date suggested for the calls, no phone record and no written record.

2.12 Against that factual background, on the hearing date and in reply to the Applicant on the issue of consent, Counsel raised the issue of a potential supplemental affidavit from the Respondent's sister and her husband. There was no factual basis to accede to this application. There was no suggestion in the initial affidavit that they had anything of substance to offer, indeed neither individual was mentioned at all. The height of their evidence would have been to support the Respondent's version of events but with nothing other than a screen shot of a call between the Applicant and the sister of the Respondent. In other words, there was no independent corroboration of consent, merely a picture which could show that a phone call was made. The Court refused the application on the basis that there was no reason to anticipate compelling evidence on the issue, and furthermore due to the timing of the application.

2.13 If a further affidavit was permitted in this case, it would be impossible to manage future hearings fairly as either side could argue, mid-hearing or as they made closing submissions, that they wanted to adduce further evidence. Unless the case is an exceptional one, perhaps involving documentary proofs from an independent source which bear on an issue in dispute, an application to adduce new evidence is most unlikely to succeed and would render litigation in affidavit cases wholly ineffective. Even those applications that are based on newly discovered and potentially important evidence may not be successful unless the circumstances reveal good reasons why the applicant cannot be faulted for not bringing the whole case before the court at a time before the hearing date. None of these exceptional circumstances applied here: there was no reason why the two witnesses had not been identified previously, there was no reason why the application

was not made before the case began and there was no reason to expect that the Court could attach much weight to averments from close family members neither of whom could adduce written corroboration of consent and with no explanation as to why they had not presented their evidence at the earliest possible stage.

#### **D. Adjournment to obtain a second report on the child**

- 2.14 The final application made at the outset of the hearing was to adjourn the case in order to obtain a second report on the views of the child. It was submitted that the child must have her interests effectively communicated to the Court and that she did not have sufficient English to communicate with the assessor. It was further argued that the Court should not rely on the report given that the assessor should have declined to continue once she realised that the child's English was not good. Submissions were also made about allegations of coaching and the argument in this respect appeared to be that the comments in the report in this regard were unfair and that the independent assessor should not have made such findings.
- 2.15 The independent assessor met the child and reported that she did not have sufficient command of the English language to engage fully in the assessment process. The child (who is now 11) could recite colours in English and could answer basic questions such as how she had travelled to the appointment and with whom. Given that children as young as 3 or 4 can express their views, even if not in sophisticated language, the Court was satisfied that even though the child did not have good English, the assessor was able to ascertain enough information from her to assist the Court in assessing the child's views.
- 2.16 The issue of whether the child's views were independent was addressed in detail in the report. The assessor set out several reasons why she concluded



that others had instructed the child what to say. These included repeated use of the phrase *I love this beautiful country* but, when asked, being unable to say why. She said her dad, the Applicant, did not love her and that in Latvia, she had no friends in school. The Respondent exhibited a school report from the child's Latvian school to show how good her English was. This included school reports and a letter from the child's teacher which confirmed how happy she was and how popular with children and teachers alike. This independent, contemporaneous, documentary evidence contradicted the child's own account that she had not been happy.

2.17 The child's repetition of stock phrases without being able to give more detail would have raised the Court's suspicions about whether these answers could represent the child's independent views. Significantly, the child herself confirmed that her mother and her sister had told her what to say in the interview. The assessor has multiple qualifications, including a social science degree, a child forensic psychology diploma and psychotherapy certification and she has decades of experience in working with children and families (all set out in her report). She concluded that the child's views were not her own and could not be relied upon to reflect her wishes. This view does not bind the Court but it is in line with the Court's own view of the answers given by this child.

2.18 In those circumstances, while the true views of the child have not been assessed, it is difficult to anticipate how a further report would achieve anything more authentic. If anything, the longer the child spends in Ireland without access to her dad (no access has been achieved since January 2023) the more likely the child is to become entrenched in these views. The application to adjourn the case for a further report was refused on the basis that a second report could not be expected to reveal any more than the first in terms of the child's wishes. A second and equally important reason to

refuse to adjourn this case was the urgent nature of the proceedings; it was not appropriate to delay the hearing further. The Hague Convention anticipates a summary return of children who have been wrongfully removed, which aim would be defeated by multiple reports, particularly if a court waits until the child speaks the new language sufficiently well to be able to answer more sophisticated questions.

### **3. Requirements of the Convention**

- 3.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most up to date information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, 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, to apply the same rules in signatory states, 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 recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child

from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

- 3.3 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal. If he succeeds in establishing these matters, the burden then shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence.
- 3.4 This Applicant was not required to prove that he had, and was exercising, custody rights in respect of Sofia. Some months before they moved to Ireland, the Respondent's partner died, and Sofia spent two weeks with her dad just after this sad event. The defence raised was that of consent and the Respondent asked the Court to take the views of the child into account also.

#### **4. Consent**

- 4.1 In the case of *R v. R* [2006] IESC 7, the Supreme Court set out the principles governing the issue of consent in this context, adopting a test proposed by Hale J. in *re K* [1997] 2 FLR 212:
- (i) The onus of proving consent rests on the person asserting it;
  - (ii) Consent must be proved on the balance of probabilities;
  - (iii) The evidence in support of consent must be clear and cogent;
  - (iv) Consent must be real, positive and unequivocal;
  - (v) There is no need for the consent to be in writing;
  - (vi) An express statement of consent is not necessary. Consent may be inferred from conduct but this will depend upon the words and actions of the person said to be consenting viewed as a whole

and her state of knowledge of what is planned by the other parent.

- 4.2 The Respondent bears the burden of proving that consent was obtained. That being so, her Counsel presented her case, without prejudice to the applications to adjourn, and he relied primarily on the written submissions and the material in the affidavits. The Respondent had averred, as set out above, that there was verbal consent but had not provided any date or context for this conversation. It was argued on her behalf that written consent was not required and indeed this is one of the principles long established by the law, but it is also important that consent be clear and cogent and considered in the context of the facts of the case as a whole.
- 4.3 In July of 2014 this couple agreed the terms on which they would separate. The agreement was exhibited by the Applicant and included the following terms: the child was to live with mum, and dad was to have agreed access. Under paragraph 2.5, it was provided that if either parent wanted to remove the child for a holiday, written consent was required one month in advance of the date of departure. This could be by way of text or other written communication. While this refers specifically to holidays, it is common sense to conclude that this was expected and should have been done if the child was moving abroad permanently. There was no such written consent.
- 4.4 The Applicant pointed to exhibit NS1 which was appended to the Respondent's own affidavit. This was a bundle of documents from the child's Latvian school which were said to support the Respondent's position that the child spoke good English. Leaving aside the fact that the Respondent argued the opposite at the hearing when seeking an adjournment of the case as the child's English was not good, the exhibit was a revealing one. It included a letter from one of the child's teachers which

refers to her being a happy and popular child. This directly contradicts the averments of her mum and her own ostensible views that she had no friends in Latvia. The Court considers that a document from an independent source, such as a teacher, is more reliable than the averments of the interested parties in most such cases. This is particularly so here, where the child has frankly told the assessor that her mum and her sister (meaning her mother's niece, it appears from the report) told her what to say.

4.5 While the Court can only make findings on the balance of probabilities, in this case the Court is satisfied that the Respondent has not proved that the Applicant consented. This is not a question of simply preferring his evidence but of looking at all the surrounding facts including the couple's agreement to reduce holiday consents to writing. The proposal that a child would be moved permanently out of the jurisdiction is so much more important than a holiday, that it seems more likely that the parents would insist on written consent being obtained. The fact that none could be exhibited leads me to the conclusion that there probably was no consent.

4.6 This finding of fact is supported by the absence of evidence in the Respondent's affidavit. There is no detail as to when the alleged calls were made, no message, text or letter from any other person who was aware of the alleged consent and no confirmation from the school that they had received consent from the Applicant when the child was being enrolled. No family member wrote to wish them well, by text or otherwise. Nothing was exhibited from the new school, which body would usually want some documentation to explain why only one parent signed an application form. Conversely, if there was consent, the Applicant's signature should be on any such form. There was no such documentation exhibited.

## 5. The Views of the Child

- 5.1 In *A.U. v. T.N.U.* [2011] 3 IR 683, Denham CJ held that the courts should “*not lightly exercise a discretion to refuse or to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country*” and that “*those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie*”.
- 5.2 In the same judgment, the Court relied on the following passage from the decision of the House of Lords in *R.M. (Abduction: Zimbabwe)* [2008] 1 AC 1288 (paragraph 46):

*“In child objection cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: First, that the child herself objects to being returned and second, that she has attained an age and a degree of maturity at which it is appropriate to take account of her views. These days, especially in light of Article 12 of the United Nations Convention on the Rights of the Child, Courts increasingly consider it appropriate to take account of a child’s views. Taking account does not mean that these views are always determinative or even presumptively so. Once the discretion comes into play, the Court may have to consider the nature and strength of the child’s objections, the extent to which they are: “authentically her own” or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that*

*the child's objections should only prevail in the most exceptional circumstances."*

- 5.3 It was submitted that it is the duty of the Court to make the best interests of the child paramount in every case. This is not only the constitutional right of every child but is also the underlying and key aim of the Convention itself. In written submissions, the Respondent relies on the European and Irish Law supporting the position that the views of the child must be heard in cases affecting that child's welfare. The relevant articles are quoted at some length and there is no issue about the importance of these principles.
- 5.4 In this case, however, the child's mother and her niece have frustrated the process of hearing the child's authentic voice, not the courts. This Court appointed an independent assessor as being an appropriate way to discover and consider the views of this child. However, before the assessor could determine what those views were, the Respondent has told the child what to say. It was this conduct which frustrated the Court's fulfilling its duty to hear from the child, not any omission or failure on the Court's part.
- 5.5 The Convention anticipates that, for most children, their relationship with both parents and their security in their homes are crucial factors in their lives and supporting both these things is usually in their best interests. In cases where a parent removes a child from her home, the Convention allows a swift court application to summarily return the child to the country where she lives, where her school and medical records are held and where extended family usually resides. Here, there is no issue about where the child's habitual residence was in July of 2022: it was in Latvia.
- 5.6 The Respondent asks the Court to rely on the child's objection to returning to Latvia. Given the factual finding, set out in some detail above, in respect of the child having been told what to say to the assessor, the Court can

attach little or no weight to the views of the child in this case. As the law makes clear, the views of the child are not the determining factor but, if they are to carry any weight, they must be her own. That the child's authentic views cannot now be determined is probably due to the Respondent and it is difficult, if not impossible to remedy this situation.

5.7 Here, the strong evidence that the child has been told what to say make any assessment of her views, and decisions on whether or not they constitute true objections, meaningless. Whether objections or not, they are not her authentic voice which cannot now be captured due to the influence brought to bear on her by others. The submission that the child's views could not be ascertained due to her lack of English is not well founded. While her English was not good, she was able to express basic ideas and the Court would have accepted an account of the views of a much younger child. There is academic support for the proposition that the views of pre-verbal children can be assessed and acted upon. In this case, the obstacle to ascertaining the child's views was not a linguistic one but one of authenticity; what was being said had been directly influenced by others.

5.8 The Respondent refers to the free movement of people within the European Union to argue that a decision to return this child would contravene that principle. No case law is cited in support of this position, which is not surprising. It would be unusual to see that argument in a Hague case but this Court did not research the question as to whether it has ever arisen. The argument ignores the fact that the principle of free movement does not and cannot outweigh the objectives of the Hague Convention and the Brussels Regulation. Otherwise, it would be an answer to every Hague case.

5.9 The Respondent has also relied on grave risk. She submits that she "*believes there is a possibility that the grave risk to the child would be one emanating from*



*within the child's inner self.*" Grave risk is a well-defined defence. Pursuant to Article 13(b) of the Hague Convention, this Court may refuse to order return of the child if *"there is a grave risk that her return would expose the child to physical or psychological harm or otherwise place her in an intolerable situation"*. The bar to making out the defence is a high one. Case law establishes the kind of risk that has persuaded a court to refuse to return a child; a risk of violence to the child (usually based on evidence of previous violence), a risk of suicide to either the child or to the respondent, or evidence of an event such as famine or war which would render the child's position unsafe, as set out by Fennelly J. in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, at paragraph 57. In *C.T. v. P.S.* [2021] IECA 132, Collins J stated: *"...there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside."* This explains why the burden of establishing such a defence is a heavy one and why a discretion remains for the deciding judge even if a grave risk is identified.

- 5.10 The facts of this case do not support the defence of grave risk and the height of the submission is set out above, that there is a possibility of grave risk. The stated ground (in a footnote to this submission) is that without an assessment report allowing an effective hearing of the child's views, the *"Respondent is in the dark"* as to the extent of the grave risk facing the child if she is returned. In other words, this is pure speculation. Further, in referring again to an effective hearing of the views of the child, the Respondent ignores the fact that it is she who has prevented the Court from hearing her child's true views.

## **6. Conclusion**

- 6.1 The appropriate order in the case is one for the immediate return of this child to her home in Latvia.