

**THE HIGH COURT**

**IN THE MATTER OF THE CHILD ABDUCTION AND**

**ENFORCEMENT OF CUSTODY ORDERS ACT 1991**

**AND IN THE MATTER OF THE HAGUE CONVENTION ON THE**

**CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

**AND IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003**

**AND IN THE MATTER OF S, A CHILD**

**BETWEEN**

**LANCASHIRE COUNTY COUNCIL**

**AND**

**V.S. AND A.A.**

**APPLICANT**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Reynolds delivered on the 27th day of October, 2017**

1. This is a case in which the applicant seeks the return of S., a child born on the 27th day of February, 2015, to the jurisdiction of England and Wales, the Courts of England and Wales having determined that he was wrongfully removed from that jurisdiction on or about 1st August, 2017.

**The Parties**

2. The applicant is the local authority in the north west region in the United Kingdom.
3. The first named respondent is the mother of the child (hereinafter referred to as "the mother").
4. The second named respondent is the father of the child (hereinafter referred to as "the father").
5. The child was born on the 27th day of February, 2015, and is now two years and eight months old. The child is currently placed in the custody of the Child and Family Agency pending the determination of the within proceedings.

**Chronology**

6. Until in or about July 2016, both parents, who are of Lithuanian origin, lived in England.
7. The family has been known to the local authority since October 2015, when the local authority received a domestic violence notification from the police. Due to ongoing concern for the ability of the mother to keep both herself and the child safe, care proceedings were brought before the English courts.
8. The father subsequently left the jurisdiction and now lives in Waterford.
9. A Care Order was granted by the Family Court at Preston on the 14th July, 2016, and is exhibited in the grounding affidavit of the applicant herein.
10. Thereafter, the mother and child went to live at a mother and baby unit. The local authority was happy that the mother appeared to care well for the child and demonstrated a resolve to maintain her separation from the father. On that basis the Care Order, whilst placing the child in the care of the local authority, provided for him to be placed with his mother, subject to the Home Placement Agreement that was in place between the applicant and the mother.
11. The Care Order further provided as follows:-
 

"While a Care Order is in force no person may cause the child to be known by a new surname or remove the child from the United Kingdom without the written consent of every person with parental responsibility for the child or the leave of the court."
12. In June, 2017, the mother indicated her intention to travel to Lithuania to visit family and sought the consent of the applicant in that regard. However, it is now clear that whilst this request was being processed, the mother wrongly removed the child on the 4th July to Lithuania. Some weeks later, the mother brought the child to live in Ireland with the father of the child at his address in Waterford.
13. During the course of July and August, the applicant sought to make contact with the mother in circumstances where a number of attempted unannounced statutory visits had been unsuccessful. Subsequent enquires through Interpol revealed that the child had been taken by the mother to reside in Ireland with the child's father.
14. The applicant was extremely concerned regarding the safety of the child and applied to the Family Court in England for an order providing for the return of the child to England.

**The English Return Order**

15. In making the Return Order on the 14th September, 2017, the Family Court in England made certain findings as follows:-

(a) that S. was habitually resident in England;

(b) that S. was wrongfully removed from England on or about 1st August, 2017;

(c) that the courts of England and Wales have jurisdiction over S. in respect of matters of parental responsibility by virtue of the relevant European Council Regulation (Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility).

Further, the Court confirmed that the child was to be returned to the local authority.

#### **Proceedings before this Court**

16. The special summons in this case issued on the 18th September, 2017. The applicant obtained an Order on the 19th September, 2017, placing S. in the care of the Child and Family Agency pending the determination of the within proceedings. Further, the Court has received regular updates on S.'s care and welfare since the making of that Order.

17. The respondents were denied legal aid for the purposes of representation in these proceedings. However, an interpreter was made available to the respondents for the hearing on the 24th October, 2017, and the Court further facilitated the parties by hearing oral evidence from the mother on behalf of both respondents in circumstances where they had failed to file replying affidavits.

#### **The Law**

18. Whilst most applications under the Hague Convention are brought via the Central Authority under s. 10 of the Act of 1991, s. 11 provides that such applications can also be made directly to the Court:-

"Nothing in this Part shall prevent a person from applying in the first instance to the [High] Court under the Hague Convention in respect of the breach of rights of custody of, or breach of rights of access to, a child removed to the State."

19. Article 3 of the Hague Convention provides the definition of wrongful removal of a child as follows:-

"The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

20. Article 5 of the Hague Convention provides a definition of rights of custody:-

"(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

21. Article 12 of the Hague Convention provides for the return "forthwith" of a child who has been wrongfully removed for a period of less than one year:-

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

22. Article 13 of the Hague Convention provides for non-return in certain circumstances:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

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

#### **The Applicant's Position**

23. The applicant submits that S.'s removal to Ireland was wrongful and in breach of rights of custody attributed to it by the Care Order, which directed parental responsibility to rest with the local authority.

24. The sweeping effect of a care order in England is set out at s. 33 of the Children Act 1989 as follows:-

“33. Effect of care order ....

(3) While a care order is in force with respect to a child, the local authority designated by the order shall—  
(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which—

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child,

may meet his parental responsibility for him.

25. Accordingly, it is submitted that the applicant enjoyed rights of custody, in particular by reference to Article 5 of the Hague Convention, which provides for the right to determine the child's place of residence.

26. Further, it is submitted that those rights of custody were being exercised by the applicant at the time of the child's removal. It is clear from the Care Order (which appears to be the equivalent of a Full Care Order in this jurisdiction) that the child was placed in the care of the applicant, albeit that he was placed with his mother thereafter pursuant to the Home Placement Agreement as recorded therein.

### **The Respondents' Position**

27. The mother gave oral evidence on behalf of both respondents to the proceedings. She conceded that she was aware that she required the consent of the applicant before the removal of the child from England and Wales. She contended that a return to England would be traumatising not just for the child but for all of the family, particularly in circumstances where the respondents no longer have any place of residence or employment there.

28. On cross-examination, she conceded that a Home Placement Agreement was in place with the local authority pursuant to the Care Order made on the 14th July, 2016.

### **Conclusions**

29. There can be no dispute but that the child was habitually resident in England at the time of his removal. Further, the mother accepts that the consent of the local authority was required before removing the child from that jurisdiction.

30. In determining whether or not the applicant was exercising custody rights at the time of the removal, the Court is mindful of the decision of Finlay-Geoghegan J. in *M.J.T. v. C.C.* [2014] IEHC 196 where the Court enunciated that a broad interpretation should be applied to the concept of the 'exercise of custody rights' as follows:-

“There appears to have been limited consideration by the courts of this issue and as to what facts will be considered as preliminary evidence of the actual exercise of custody rights for the purposes of Article 3(b) of the Convention. Nevertheless, it is possible to discern from the decisions to which my attention was drawn by counsel and one other that, firstly, the courts take a very liberal view as to what will constitute the exercise of custody rights, and, secondly, that it does require the demonstration by an applicant/parent that he either did or attempted to maintain contact or a relationship with his child.”

31. Accordingly, it is clear that the local authority retained full parental responsibility for the child, including custody rights by virtue of the Care Order, and indeed, was exercising those custody rights in circumstances where there had been numerous attempts to contact the mother and carry out unannounced statutory reviews.

32. The only potential defence raised by the parents to these proceedings is that a return to England and Wales would cause further trauma not just for the child, but also for the parents.

33. Clearly this objection falls short of the “grave risk” defence based on Article 13 of the Hague Convention, particularly in circumstances where this application is brought in order to ensure that the child is himself protected from the risks that gave rise to the Care Order.

34. In this regard, the Court has considered the issue in light of the recent Court of Appeal decision in *R. v. R.* [2015] IECA 265, particularly in the context of returns between Member States of the EU:-

“Where, as in this instance, one of the risks being referred to is a risk of physical or psychological harm of the boys, it is also clear that the courts in this jurisdiction will normally place trust in the courts of the country of habitual residence to be able to protect the children, and indeed, the mother, from any such harm. This is particularly so where the state of habitual residence is a member of the European Union and Article 11 of Regulation 2201/2003 applies to the return.”

35. In all the circumstances, I must grant the relief sought directing the return of the child to his place of habitual residence and note that the matter will be listed for directions within seven days of the return of the child to England and Wales, when the court shall consider what further orders shall be made.

36. I will hear from the parties in relation to the necessary arrangements that are required to be put in place to give effect to the Order.