**Record No. 2018/22 HLC**

**THE HIGH COURT**

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

**ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

**AND**

**IN THE MATTER OF COUNCIL REGULATION 2201/2003**

**AND**

**IN THE MATTER OF N. B., A CHILD**

**BETWEEN:**

**R.B.**

**Applicant**

**-AND-**

**D.K.**

**Respondent**

**Judgment of Ms. Justice Ní Raifeartaigh delivered on the 21st day of November 2018**

**Nature of case**
1. This is a case in which the applicant (the father of a child) seeks the return of the child to England and Wales pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "the Hague Convention") and EU Council Regulation 2201/2003. The child, N, who is three years old, is currently living in Ireland with his mother, the respondent in these proceedings. The date upon which they came to live in Ireland is the core matter in dispute in the case. Counsel on both sides of the case agreed that there was a single net issue in the case, namely as to where the child had its habitual residence at the relevant time, and that the Court was required to resolve a conflict of fact in this regard.

**The evidence**
2. Among the few matters not in dispute are the following facts:

a) The Child N was born on the 8th September, 2014 within the jurisdiction of England and Wales.

b) The applicant is the child's father.

c) The mother and father were not married to each other but the father had rights of custody under the law of England and Wales by virtue of having been named upon the birth certificate.

3. The applicant took the first step necessary to instituting these proceedings by an application on the 8th June, 2018 to the Central Authority of England and Wales. The proceedings were commenced on his behalf by way of Special Summons dated the 17th July, 2018. This document stated that the respondent mother had wrongfully retained the child in Ireland in April 2018 when she failed to return the child following an agreed holiday. The affidavit of solicitor Ms. Grainne Brophy averred that the child had always been habitually resident in England and Wales and that the applicant had been living with the mother and child in that jurisdiction until April 2018. He said that he consented to the mother bringing the child to Ireland for a three-week holiday but that at the end of the period, the mother refused to return the child. He exhibited text messages between them dated May and June 2018. While the translation of these messages leaves room for dispute as to the details, it is at least clear in general that they were in dispute about the return of the child at that stage.

4. Ms. Brophy's affidavit also exhibited a statement signed by the applicant father in the presence of an English solicitor which contained the following information and assertions. The applicant is a Lithuanian national and the respondent a Latvian national. The applicant said that the child "has been living in England throughout his life and has been attending [a named nursery] for the last six months". I will refer to this nursery as the English preschool. He said that he and the respondent had shared a rented house in Liverpool, but that due to problems in her behaviour, namely "that she constantly lied to me", they separated on the 13th April, 2018. He said that one of the issues was that he "strongly suspected" that the respondent had got married in Ireland but she would not provide a straight answer. He exhibited a marriage certificate showing that the respondent had married a Mr. S in Ireland and that this marriage was registered on the 3rd August, 2012. The respondent's date of birth is January 1994, and accordingly she was aged 18 at the time of the marriage to Mr. S.

5. The applicant said that he gave his consent for the respondent mother to take N to Ireland for two to three weeks on the 15th April, 2018, but that the respondent refused to return the child at the end of April. She returned to England on the 28th May, 2018 and asked the applicant for the child's passport. He did not agree to this because of what she had said about not returning the child. She then threatened that he would never see the child again. He says that the respondent attended the Latvian embassy in London, claimed that the child's passport was lost, and was issued with an interim travel document on the basis that she was in the process of obtaining a new one.

6. Among the documents exhibited by the applicant was a letter dated the 21st November, 2017 indicating that an appointment had been made for the child to see an orthoptist on the 18th December, 2017. There was a further letter dated the 1st March, 2018 stating that the ophthalmology department had received a referral for the child and to contact them to book an appointment. The applicant also exhibited a photograph of a room which he said was the child's room in England; it is a typical child's room with patterned curtains, toys, and so on.

7. The Special Summons was served on the respondent mother on the 2nd August, 2018. The mother attended Court in person on the 27th August, 2018 and indicated she was making an application for legal aid. The Court directed that she file a replying affidavit on or before the 12th September, 2018 whether or not she had obtained legal representation by then. This was made very clear to the respondent. She did not comply with this deadline. On the next occasion, the 12th September 2018, the Court noted with some irritation that she had not complied with the deadline and extended the deadline to the 24th September, 2018. Solicitors entered an appearance for the respondent on the 28th September, 2018. An affidavit of the respondent mother was filed on the same date, although peculiarly on its face it states that it was sworn on the 28th June, 2018, several days before the Special Summons was served on the mother. Further, the applicant subsequently swore that it was not served upon him until 1st October, 2018. Counsel for the respondent informed the Court that the date of swearing was incorrect and that it had in fact been sworn in September 2018.

8. In a document entitled "Defence", although such a pleading is not usual in Hague Convention proceedings, it was denied that the child's habitual residence was at all times England and Wales. It was further denied that the applicant enjoyed rights of custody and/or that he was exercising rights of custody at the time of the child's retention, although this was not subsequently pursued. It was pleaded that the applicant had consented to the child's retention in Ireland and denied that there was any wrongful retention in April 2018.

9. The respondent mother's first affidavit was short and in my view failed to provide a coherent, meaningful chronology of events. Indeed, it might be said to have raised many more questions than it answered. The respondent, who is Latvian, stated that she had been living in Ireland with her family since 2009. She did not explain how she met the applicant or the circumstances of her pregnancy, but indicated that she became pregnant and claimed that the applicant offered her money to have an abortion. She made certain generalised allegations, including that the applicant had engaged in alcoholic and abusive behaviour to her during their relationship. She says that she was living in Ireland and that she regularly brought the child to see the applicant in England. She said that she travelled to England for a few days in August/September 2016 with the child, and then onwards to Lithuania for two weeks to stay with the applicant at his mother's house. She said that in October 2016, she brought the child to Ireland with the consent of the applicant. Notably she did not further elaborate the nature of this consent i.e. whether it was for a short visit to Ireland or a long-term change of residence. She referred, without explanation, to her marriage to Mr. S in 2012, several years before her pregnancy and the birth of N, and exhibited the marriage certificate. She did not say anything further about this relationship with Mr. S or the history of this relationship during the period between 2009 and 2018. She said the child was now living in Ireland, was closely bonded to his relatives, and had his playschool, friends, and GP in Ireland. She said that she was always friendly with the applicant but that on the 28th May, 2018, she visited the applicant for 4 days with the child and the applicant was "very hostile and abusive" towards her. She did not give any particulars of this or as to why this might have been so.

10. She exhibited the following documents:

i) The marriage certificate between her and Mr. S. from 2012.

ii) A number of letters from friends. Two of these were letters from friends in Dublin, who said that the respondent was only in England for one year during the period 2009-2016 and that she moved back to Ireland in 2016. Two letters were from people in a rural county where the respondent's own mother lives, and said that their children played with N. These are very short documents from friends, containing no details, and upon which I place very little weight.

iii) A document showing that she was employed by a particular Irish firm since the 13th July, 2018, which is of no assistance to the issues the Court has to determine as it post-dates the period in dispute.

iv) An undated Irish GP card, and a letter from a Dublin GP dated the 7th September 2018 indicating that the child 'has been a patient of this practice since 7 /11/2016 when he came here for a mild respiratory infection'. I do not place much weight upon this as children who travel between two jurisdictions regularly are often registered with doctors in two countries.

v) A letter confirming that a particular company is acting as accountant to Mr. S, which is irrelevant for present purposes.

vi) The child's birth certificate.

vii) A letter from a playgroup in Dublin stating that the child started there on the 3rd September, 2018, which post-dates the disputed period;

viii) A Vodafone bill in relation to July-September 2016 in the names of the respondent and Mr. S at a Dublin address.

ix) Some photographs, including photographs showing a child's bedroom, complete with toys and so on.

x) A letter from the Private Residential Tenancies Board addressed to the respondent at the Dublin address, referring to it being a tenancy registered from the 3rd November, 2014. This appears to be inconsistent with her own case, which I understood to be that she was living in England at this stage, but in any event it does not speak to the October 2016-April 2018 period.

xi) Documents from a Business and Computer Training Institute from 2012, which show that the respondent completed a certificate in June 2013, which is irrelevant for present purposes.

11. The applicant father swore a replying affidavit dated the 12th October, 2018. He said that it was untrue that the respondent had moved to Ireland with her family in 2009. He said that while her family moved to Ireland, she remained in Latvia and did not move until 2011, when she moved to England and Wales to take up a job with a mutual friend, one Mr. A.S, a letter from whom was exhibited. Again, I am not disposed to place weight upon letters by friends of parties to the proceedings. The applicant said that he lived with the respondent as a couple from July 2011 to April 2018, when the relationship broke up, and that during this time, she had the baby, N.

12. He said that while they lived together, she travelled to Ireland 2-3 times per year to visit her family. He alleged that during one of those trips, she entered a "sham marriage" with Mr. S, a non-European citizen, for which she received a sum of €5,000.00. He said he believed that she continued to receive monies from Mr. S in order to pretend that she and he remained in a genuine relationship. He said that he discovered this only after she had gone through with it, and that she refused to divorce him when the applicant asked her to, because Mr. S needed to be in Ireland more than five years before he was eligible for residency. He said she took two trips to Ireland each year to visit her family and deal with issues concerning her marriage to Mr. S and in fact told him that her proposed trip

to Ireland in April 2018 was to deal with issues arising in relation to Mr. S's immigration status and that she would be in Ireland for 3 weeks

13. He said that the respondent was working for the same company as himself (a clothes recycling company, which I will refer to by the initials R.P.) and that he himself worked as a truck driver for the company. He said that N attended pre-school in England since September 2017. He said that he did not consent to her going to live in Ireland with N.

14. He said that the respondent returned to England on the 28th May, 2018 and he refused to hand over the passport, as a result of which the respondent took the child and did not allow him to see him since then.

15. The applicant also exhibited a number of documents, the most important of which I consider to be as follows:

> (i) a document dated from the English company R.P. showing that the respondent had worked there during the months of November 2017 and March 2018, together with a further document from this company recording her departure date as the 27th April 2018.
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> (ii) A document showing that the child was attending the English preschool on the 25th September, 2017, and had an upset tummy on that date.
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> (iii) Documents relating to two tenancy agreements between a third party and both the applicant and respondent in respect of an English address. However, there is only one page of a document relating to a tenancy agreement of the 24th August, 2017 and while the respondent is named on this page, the rest of the document is missing and there is no signature. The second document is a tenancy agreement dated the 21st June, 2016, in respect of the same address, it does not appear that the respondent signed it.

16. Because of the conflict of fact as to where the respondent was living between 2016 and April 2018, I gave liberty for notices to cross-examine to be served. On the 15th October, 2018, the parties were cross-examined on their affidavits, further details of which are set out below. At this hearing, there was also documentary evidence from the English preschool showing that the child was marked as present on 49 half-days between the 18th September 2017 and 18th March 2018. There are several periods of prolonged absence: for three weeks between the 2nd and 22nd October, 2017; and for almost three weeks between the 8th November 2017 and 27th November 2017. There also some periods of school closure, such as the mid-term break in October and Christmas holidays. Counsel on behalf of the respondent sought to have the English preschool records ruled inadmissible and argued, among other things, that in the absence of a photo of the child, it could not be certain that the records referred to N. Further, it was argued that the statistical summary provided by the school of child's attendances and absences was unreliable. I place no reliance at all on the statistic presented and instead am relying on the record of attendances of the child, which are set out day by day for the whole period. In view of the fact that the respondent herself gave evidence that she registered the child with this school, and given that the child's name and date of birth is set out upon the records, along with the child's parental names and home address, I find the submission that the record of attendances might relate to a different child frankly absurd.

17. Under cross-examination, the applicant said that he started a relationship with the respondent in 2011, and that she had moved directly from Latvia to England. He said she came to England to take up a job with his friend, who had written the letter exhibited in his affidavit. He said that she often visited her mother in Ireland and he had no difficulty with that. He said that he and the respondent had a good relationship between 2011 and April 2018, and that they often travelled together. He said that he himself worked as a truck driver, full-time, with R.P., a company in England. He said the child was registered to start in the English preschool with a start date in September 2017 and did attend there in the afternoons. He accepted that he had kept the child's passport in May 2018 and said this was because he did not want her taking the child from him to Ireland. He said he had never given consent to the child being permanently removed to Ireland, but had consented to her taking the child to Ireland on holidays to visit family. He said that he had three children from a marriage (now divorced) and had a good relationship with them. He said he heard that the respondent had engaged in a "sham" marriage with a man in Ireland, and that he had heard this around the end of 2016 or beginning of 2017 (some four years after the marriage actually took place), and that she had been paid €5,000 for it, with regular payments of €300 thereafter. He said he heard of this from one of her friends, and he had messages on his phone about it. He said he asked her get a divorce from this other man but she said had to wait 5 years before this could be done.

18. The respondent was then cross-examined. She accepted that she had registered the child at the English preschool at the end of July 2017. She said she did not include this in her affidavit because she did not think it was important. She said that she never worked in the R.P. company and that the work records exhibited were not hers, and that they must have been falsified. She said that she moved to Ireland from Latvia in 2009; that she went to see her father in England in 2013, and there met the applicant and became pregnant. She said she came back to Ireland, then lived in England from 2014-16, after which she came back to Ireland. She said that Mr. S was from Pakistan and that she had lived with him before and after she lived in England. She denied that it was a "sham" marriage and said that the applicant knew she was married to Mr. S when he first met her. I did not find the evidence of the respondent at all persuasive, and her chronology of events seemed very odd. Further, the documents from R.P. Ltd, and the English preschool tended to contradict her evidence. Nonetheless, I wished to give her a further opportunity to produce work records from Ireland and I was also interested in further detail from the English company. Accodingly, and with considerable reluctance, because of the need for expedition in child abduction cases, I directed at the conclusion of this hearing that further steps should be taken with regard to the evidence. I directed that affidavits should be obtained from the Irish company with which the respondent said she had worked, that further information should be obtained from R.P. Ltd with regard to her alleged employment in England, and that the applicant should exhibit the text messages which he alleged referred to the 'sham' marriage and payment of €5,000.

19. As a result of those directions, the Court was subsequently furnished with a letter dated the 18th October, 2018 from R.P. Ltd. saying that the respondent had been employed there for two years, having commenced employment on the 20th February 2017. Copies of her P60 and P45 were furnished. A further letter dated the 26th October, 2018 said that she worked with the company from the 20th February 2017 until the 27th April 2018 for 25 hours per week, and that she worked in several different "Cash for Clothes" shops and could work different hours each day for maximum of 25 hours per work. Detailed payslips were furnished, apparently showing she was paid weekly for every week during the period 28 July 2017 to end April 2018. This documentation was detailed and on its face appeared to be in order.

20. The applicant swore an affidavit pursuant to my direction that he exhibit the Whatsapp messages on his phone which he said referred to the payment of €5,000 for the alleged sham marriage. These messages were translated from Russian by Word Perfect Translations. The interpreter afforded to the applicant for the oral hearing intervened at several points to say that she did not consider the written translation to be accurate. Counsel for the respondent submitted that the Court should not rely on the text messages at all in view of the fact that there was doubt as to whether the words recorded were accurately translated. Further, it

was not entirely clear as to who had sent each or received of the messages in question. After some initial questions in relation to the messages, counsel for the respondent declined to cross-examine any further in relation to them and instead submitted that the court should not place any reliance on them. I do not consider that the messages are legally inadmissible, but I do approach the weight to be placed upon with considerable caution for the reasons put forward on behalf of the respondent. Nonetheless, there are certain passages in these emails that may be given some weight, for three reasons: (1) there were certain words and phrases the translation of which was not in dispute, and to which the respondent's response under cross-examination was not that the words were inaccurately translated but rather that she did not know what she meant by them or what they were about; and (2) these particular passages or words indicate, at least a general level, what was under discussion; and (3) the messages do not stand in isolation but rather can be considered in conjunction with the other evidence in the case. The relevant excerpts from the message which can be given some weight are as follows:

*24th November 2017*

☐ "Immigration does not have any serious suspicions, they know when and where I flew….'

☐ "I am bored here. I want to go home." Followed by question 'So, when are you coming back home?" to which the answer was "Monday". I note that in fact the respondent does not dispute that she flew to England on Monday 27th November 2017.

*25th November 2017*

☐ *"It is regarded as help for a few months. Is already no help any more".* To which (it is accepted by both sides, the applicant replied): "*I think that help is when you come and do what's needed and come back but you nearly start living there*". She answered "*My mother and me also believe it is enough. There was agreement that I would come and sign papers etc. but not to live there…My mother also says that I should have my own life*". The respondent said in cross-examination that she did not know what this was about. I note that counsel on behalf of the respondent relies on the phrase '*you nearly start living th*ere' to support the view that the respondent was already living in Ireland as of that date (25th November 2017). I do not accept this. The word 'nearly' qualifies the statement, and the applicant is complaining about the fact that she is spending so much time in Ireland; this is very far from illustrating that the applicant and respondent had agreed that the respondent would live permanently in Ireland with the child, particularly when one considers the overall context of why she appears to be in Ireland.

☐ There was later a reference to divorce and "*And if we get divorced in Latvia, this divorce won't be valid in Ireland*'. The respondent equivocated in her evidence as to whose divorce was being discussed, and said it might have been her mother.

☐ Later: "*My mother also got divorced and everything is fine here…You just need to prove that you have lived for 5 years and it is the same in the UK*". The use of the word "also" here makes it clear that the previous discussion cannot have been about her mother's divorce.

☐ There was a discussion about money and particular sums and at one point, the statement: "*We have agreed to do this way: They promised me 5,00*0…" In cross-examination, the respondent said she did not know what this was about. Howeve,r in re-examination, she thought it was about a sum of €5,000 that her mother had promised to give her because she owed it to her, but she never in fact got it.

☐ *"My mother knows how to do it all and she said what she would do that I should get everything"*

☐ "*How long will it take and it will cost me nerves, for 1 or 2 years*". Response: "*No for a few months, he disputed these documents*". Response: "He disputed these documents and it takes a month. I am going to lose my patience; I don't know how long it will take". Response: (accepted that she said) *"I know my honey…I am losing mine".*

☐ *"Now he is just waiting for this paper".*

21. The respondent mother swore a further affidavit dated the 25th October, 2018. She said that she met Mr. S in 2011 (this would have been when she was 17 years old) through a mutual friend, and her mother was also present. She said they clicked immediately and started talking and meeting. They got married in 2012 as they were "very much in love from the moment they meet with each other". She described a normal marital relationship and denied she had received money for the marriage. She said there were some troubled times when it was discovered she had a child with the respondent but they had reconciled in 2016. She exhibited certain photos. I note that there are photos from the wedding between the respondent and Mr. S together with some undated photos of N in the company of Mr. S and the respondent, and some undated photos of the respondent and N in places such as Dublin zoo. It is not possible to tell what age the child is in the photos of N in the company of Mr. S and the respondent; they could be in the 2-3 age group. In my view, in the absence of independent date evidence (such as metadata from the electronic device from which they were taken) as to when the photos were taken, I can place little if any weight upon the photos showing Mr. S in the company of the child. Needless to say, the photos of the marriage show nothing other than that there was marriage; and the photos of the respondent with her child (without Mr. S) at Dublin zoo and such places show nothing more than that, and do not speak to the validity of the marriage between the respondent and Mr. S.

22. The affidavit went on to exhibit a number of documents, including the following:

☐ A letter from the Dublin playgroup stating that N started there on the 3rd September 2018 and speaks and communicates in English only;

☐ A letter dated the 15th August, 2018 indicating that child benefit would be paid to the respondent;

☐ Revenue documentation dated the 31st October 2017 showing that the respondent submitted a return for the year ended December 2016 in respect of beautician work by her;

☐ An ESB bill for the period September to November 2017 for the Dublin address in the name of the respondent and Mr. S;

☐ A residential tenancy agreement for the 12 months, signed 3rd November 2017 between a third party and Mr. S, the respondent, and a third man;

23. The Court also before it a letter from an Irish cleaning company dated 19th January 2018, which stated that the respondent had commenced working with that company on the 23rd October, 2017, was 'currently employed by our company', and 'has worked for our company for a number of weeks'. The Court was informed that despite strenuous efforts on behalf of the respondent, the Irish company declined to provide any affidavit or further details.

24. Under continued cross-examination at the second hearing, the respondent said that she had met Mr. S when she was 17, and that she, her mother and Mr. S were living in her mother's house. She married him when she was 18. She left for England in 2013 but on friendly terms. Mr. S used to send her money regularly, through her mother, during the period 2013-201616. She was cross-examined about the photos she had exhibited, but as I have said above, I do not think these advance the case much further in the absence of any firm data about dates. She said that she worked in England with a charity called "Changing Lives on your Doorstep", which managed events where clothes, food, toys and so forth were available for charity. She continued to deny that she ever worked with R.P Ltd.. She denied that certain paperwork in Ireland had been generated for the purpose of dealing with Mr. S's visa application. She could not explain why the letter from the cleaning company in Ireland was dated January 2018 (a time when the present proceedings were not in existence). She denied that this and other documents came into existence in order to assist Mr. S with his visa application,but accepted that Mr. S applied for a visa at the end of the summer or during autumn 2017. As regards the WhatsApp messages, she did not know what divorce was being talked about, or why immigration was mentioned, or what €5,000 might be in question, although in re-examination she thought this was a sum owed by her mother to her which she never ultimately received. She insisted that her marriage to Mr. S was a genuine marriage, that they were very happy, and had plans for the future which included having a baby together.

25. In further cross-examination of the applicant with regard to the WhatsApp messages, he denied that the message concerning her "nearly living there" proved that the respondent was already living in Ireland in autumn 2017. He said that he had not reported the "sham" marriage to the immigration authorities but that a friend of his had done so, although he had no evidence of this. As noted above, counsel for the respondent declined to cross-examine further in relation to the WhatsApp messages following a number of disputes about their accuracy which broke out during the hearing. Finally, the applicant said that he had no influence with R.P. Ltd., as he was a mere employee, working as a truck driver.

**Relevant Legal Principles**

26. It is well established that the burden of proof is on the applicant to prove on the balance of probabilities that the habitual residence of the child in question was, at the time of the removal or retention, the jurisdiction of the requesting State. It is also well established that, where the respondent alleges that there was consent to a removal or retention, the burden of proof rests upon the respondent to prove this matter on the balance of probabilities.

27. The question of how a Court is to determine habitual residence for the purpose of The Hague Convention and Council Regulation 2201/2003 has been discussed in numerous authorities. These authorities make it clear that the question of habitual residence is highly fact-specific (*PAS v. AFS* [2004] IESC 95, [2005] 1 I.L.R.M. 306); and that mere physical presence of a child within a jurisdiction does not of itself establish habitual residence and that the court should take into account factors such as the degree of integration in a social and family environment, as well as the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State (*A v. Finland*, Case C-527/07) [2009] E.C.R. I-02805*, Mercredi v. Chaffe*, Case C-497/10, *C v. M*, C-376/14 PPU). In *DE v. EB* [2015] IECA 104, the Court of Appeal (Finlay Geoghegan J.) discussed the situation where one parent (who had custody rights) did not consent to the permanent change of residence of the child, and how this affects the question of habitual residence, saying:

> "[32] Accordingly, in my judgement, counsel for the mother is not correct in her submission that when a national court such as the High Court is assessing "all the circumstances of fact specific to the individual case" an overriding consideration must be as to where in fact the centre of interests of the child at the relevant time lies, in particular by reference to her integration in a social and family environment in the Member State to which she has been removed and in which she is living at the relevant time for the assessment. It is rather the case that, as appears from the judgment of the CJEU in *C. v. M*, all of the relevant factors must be taken into consideration, including of course the centre of interests of the child at the relevant time and where relevant, one weighed against the other. The reasons for the child's move and conditions under which she came to be in the second Member State are also relevant factors. In a case such as the present — where both parents hold parental responsibility and each have a right to participate in a decision as to where a child should live — *a consent given for a visit of limited duration or, to put it another way, the absence of a consent to a change in the habitual residence is a factor to be taken into account and weighed against other relevant factors*. It does not appear to me that the judgments of the CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factors should be given an overriding consideration. The weight to be attached to each will depend on the facts of the individual case. Differing considerations will apply depending on all the different factors identified by CJEU.
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> [33] It is accordingly clear from the case-law of the CJEU that *a court should properly take into account as a factor the absence of consent of one parent who holds parental responsibility to a move of the habitual or ordinary residence of the child to another Member State.* It follows that the court must weigh that factor against other relevant matters of fact identified which — as the CJEU put it in *C. v. M*. — might demonstrate a degree of integration of the child in a social and family environment in the State to which she has moved. Those latter facts may include the intention of the other parent to settle permanently with the child in the other Member State as manifested by steps taken and all the other potential factors identified by CJEU in paras 50–53 of *C v. M. The question of parental authority may be of particular relevance to an assessment of the intention of the other parent who may wish to settle permanently with the child in the new Member State but may not be in a position to make that decision unilaterally if the other parent also holds parental authority.*
>
> [34] If it were otherwise it could set at nought the entire concept of wrongful retention. In all cases of alleged wrongful retention, the child will have spent time in the Member State to which it has moved. It is of the essence of wrongful retention, as distinct from wrongful removal, that the child moved lawfully from its Member State of habitual residence to another State but has not returned at the end of the period for which the permission or consent was given. Wrongful retention will only arise if at the end of the permitted period the child remains habitually resident in its State of origin. Unless a court may give appropriate weight to the conditions and permissions under which or reasons for which the child moved together with all other relevant identified factors in assessing habitual residence it is difficult to envisage wrongful retention as a concept surviving." (emphasis added)

That one of two parents, both of whom have custody rights, cannot unilaterally decide to change the child's habitual residence was emphasised in *K.W v P.W* [2016] IECA 364, where Hogan J said:-

"[35]. The authorities establish that young children can lose their habitual residence where the family makes a settled decision to leave one country (in this instance, Australia) in order to take up residence in another country (in this case, Ireland) and do in fact take up residence in that other country: see, e.g., in *re B (Minors: Abduction) (No.2)* [1993] 1 F.L.R. 993; *PAS v. AFS* [2004] IESC 95, [2005] 1 I.L.R.M. 306 and *AS v. CS* (Child Abduction) [2009] IESC 77, [2010] 1 I.R. 370. On the other hand, it is clear from the judgment of this Court in *DE v. EB* [2015] IECA 137 that a unilateral decision by one parent to move a child to another country without the consent of the other is a factor which militates against a finding that there had been a change of habitual residence."

**Application to Facts**

28. In the present case, there was a conflict of fact as to where the child had his habitual residence and whether and when it had changed. In essence, the applicant father said that the child had always lived with him and his mother in a family unit until April 2018, but that in April 2018 she went to Ireland, with his consent to the child going there for a period of weeks, as she had done previously and regularly, but that he had not consented to the child going to Ireland on a permanent basis. He said he had never consented to the child going to live in Ireland on a permanent basis. The mother's chronology was more confusing, but it seems that her case was that she returned to Ireland to live with the child in 2016, with the consent of the applicant, and that in Ireland, she was living with a man who she had married in 2012; that she used to visit the applicant in England regularly with the child until May 2018 when he became hostile and aggressive to her for reasons unexplained.

29. In all cases where there is a conflict of evidence as between two parties, it can be difficult to decide between two opposing testimonies. A court frequently looks to contemporaneous or documentary evidence for assistance with the task. The task is a difficult one where the proceedings are essentially summary in nature, as the present proceedings under the Hague Convention are. These difficulties were further exacerbated in this case because of language issues. For example, contemporaneous messages between the parties kept on phones were printed out and then translated, but there were many disputes about the proper translation. These messages were in Russian. Further, the applicant's oral evidence was relayed through an interpreter and the respondent, although she gave evidence in English without the assistance of an interpreter, is a Latvian. Further, it seems to me from the evidence as a whole that, on any view the facts, the respondent mother spent a lot of time in both England and Ireland, with the child coming back and forth with her, and so it is not necessarily a clear-cut situation as it might be in other cases, where the parties own a house, have a stable long-term job and possess other clear indicators of habitual residence. She may have had part-time work at different stages in both countries, and there were various rental addresses involved in England and Ireland, as well as the address of her mother in Ireland, who lived in a rural county.

30. Nonetheless, I have had the opportunity to observe both parties giving evidence, and to examine a number of documents. I have reached the conclusion on the balance of probabilities, which is the appropriate standard in this context, that the applicant has proved that the child's habitual residence was that of England and Wales until April 2018. In the first instance, quite apart from the more general issue of precisely when the mother moved back to Ireland permanently, I am satisfied beyond doubt on the narrower issue of consent, namely that there was no consent on the part of the father at any time to the child coming to Ireland to live on a permanent basis, a fact which is of considerable importance on an analysis of the issue of habitual residence, as discussed above. Indeed, quite apart from the evidence of the applicant, the respondent herself never explicitly or clearly asserted that the applicant consented to her moving with the child permanently to Ireland in 2016. Incidentally, while I am dealing with this issue of consent, I wish to place on record my dismay that the written submissions on behalf of the respondent asserted that the applicant had said in his first statement at paragraph 4 that he had given his consent. What he had actually said was: *"I originally gave my consent for the respondent to take N to Ireland for two to three weeks on 15th April 2018* [he then exhibited some messages and continued] *….when the end of the holiday was approaching, the respondent suddenly changed her mind and refused to return to the UK with N on the basis that she did not have money for a return. I offered to pay for the return tickets but the respondent refused. It was at the end of April that the respondent first refused to return to the UK with N".* I cannot let such a serious inaccuracy pass without comment. Under Hague Convention law, there is a clear difference between a consent to take a child on holiday and a consent for the child permanently to live in another country. For submissions on behalf of the respondent to quote from the statement of the applicant in such a selective and incomplete manner so that one type of consent is presented as an entirely different type of consent is sloppy, at best, and misleading, at worst.

31. Returning to questions of law, my finding of fact that the applicant father never gave his consent to the child living permanently in Ireland weighs heavily against the proposition that the child's habitual residence in England had ceased by April/May 2018. This is clear from the decisions *DE v. EB* [2015] IECA 137 and *K.W v P.W* [2016] IECA 364 case, discussed above. In the absence of a consent from the applicant father to a change in the child's habitual residence, the respondent mother was not entitled, as a matter of law, unilaterally to change the child's habitual residence, no matter how firmly she herself wished to settle in Ireland with the child. Otherwise, as Finlay Geogheghan J. said in *DE v. EB*, the whole concept of wrongful removal or retention would be 'set at naught'. Accordingly, even if the mother did move to Ireland some time earlier than April/May 2018 and the child had since then integrated into playschool, a network of relatives and friends and so on, I find that there was no change of habitual residence in the absence of the father's consent.

32. I am not in any event persuaded, as a matter of fact, that the mother moved back to Ireland on a permanent basis in 2016 or prior to April 2018, based on the cumulative effect of the following pieces of evidence:

(a) The records from the English preschool, which show substantial attendance dates by the child there between September 2017 and March 2018, at a time when the mother claims to have been living in Ireland, together with the sworn evidence of the mother that she herself registered the child with this school in July 2017.

(b) The R.P. Ltd. records, which include detailed payslips in respect of the mother having worked in England for the period September 2017 to April 2018. I have no evidence in support of the unsubstantiated claim on behalf of the respondent that these are falsified documents or any reason to believe that the applicant had such influence with this company that he could have persuaded them to produce falsified documents.

(c) I place some weight on the WhatsApp messages from the applicant's phone, in which issues of immigration, divorce, and payment are discussed, as well as references to the respondent coming 'home' to England (as of November 2017). These are consistent with the applicant's version of events, namely that one of the reasons she was travelling to Ireland was to assist Mr. S with his ongoing visa issues. This would also explain the various documents tending to suggest that the respondent was living in Ireland in autumn 2017 (a time at which, the respondent accepted in evidence, issues had arisen with regard to Mr. S' visa). The fact that she is named on a tenancy agreement in Ireland does not prove she was living in Ireland any more than a tenancy agreement in England proves that she was living in England. But there is ample motive for such documents to come into existence if in reality she wished to assist Mr. S with a visa application on the

basis that their marriage was genuine and they were living together. Conversely, no motive has been suggested by the respondent for the applicant having suddenly become dissatisfied with an arrangement whereby she lived in Ireland and came to visit regularly with the child, such that he would have his employer and a playschool in England generate false documents.

(d) The overall narrative of the respondent, which in my view lacks credibility. Her overall narrative appears to be that she married Mr. S in 2012, lived with him for some time, then went to England in 2013, where she met the respondent and became pregnant; lived there for some time with the applicant despite that fact that he (on her account) did not want the baby, and was abusive to her; that she was receiving money from Mr. S during this period that she was living with the applicant and the baby; and that she (for reasons unexplained) left England in 2016, resumed living with Mr. S; but stayed friendly with the applicant and travelled to see him so he could see his child, and only ceased to do so when he became (on her account) hostile and aggressive towards her in May 2018, again for reasons which are unexplained. This narrative is most peculiar and I did not find her evidence credible on many fronts.

(e) I also take into account that she flatly denied having worked in R.P. Ltd. and yet said in cross-examination that she worked with a charity company in England which did the same type of work, namely dealing with recycled clothes. This seems rather too much of a coincidence to me to be truthful.

33. Counsel for the respondent complains that it would be unfair for the Court to rely upon the R.P. company records and not the Irish company document when drawing inferences about where the respondent worked during autumn 2017. A distinction can of course be drawn between the detail provided by the English company (weekly pay slips, P45, P60) when compared with the Irish company (a one-page letter). But in any event, I should emphasise that what leads to my conclusion is the cumulative effect of each of the pieces of documentary evidence and their consistency or otherwise with the overall narrative of each of the parties as presented on affidavit and in oral evidence, not any one particular piece of evidence, as well as each of the parties' presentation in the course of cross-examination. As noted, I did not find the testimony of the respondent persuasive or credible.

34. In conclusion, for the reasons set out above, I am satisfied that the child N has been the subject of a wrongful retention in Ireland because the applicant has satisfied me on the balance of probabilities that the child's habitual residence had not changed as of the end of April/beginning of May 2018 when his mother refused to return him to England. For completeness, I also find that, insofar as the respondent relies upon the defence of consent, she has failed to establish on the balance of probabilities that the father gave his consent either to a permanent removal or retention of the child in Ireland. I will therefore make an order for the return of the child to the jurisdiction of England and Wales.

35. In order to allow for an appeal, I will place a stay upon the execution of this order pending the expiry of the time limit for an appeal, with time of course running from the date of the perfection of the relevant order for the child's return.

36. I would like to refer this judgment to the Irish immigration authorities for further investigation, having regard to some of the evidence in the case. However, as this is an in camera matter, such a move needs to be approached with caution and I will not take any step in that direction without alerting the parties in the first instance and giving them an opportunity to address me on any relevant law. This should not prevent the perfection of the order and the progress of any appeal with regard to the Hague Convention issues.