THE HIGH COURT

FAMILY LAW

[2023] IEHC 443

[2022 No.14 HLC]

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 HANS, A MINOR

(CHILD ABDUCTION: HABITUAL RESIDENCE, EXERCISE OF CUSTODY RIGHTS, GRAVE RISK, VIEWS OF THE CHILD)

BETWEEN:

W.W.

APPLICANT

AND

D.D.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 3rd of July 2023

1. Introduction

1.1 A child of under ten years, called Hans for the purposes of this judgment, was removed by his father from Germany in 2021 and brought to two other

countries before his arrival in Ireland in 2022. While there are several disputed issues, central to this case are the questions of the child's habitual residence at the time of removal and whether rights of custody were being exercised by the child's mother, the Applicant, at the relevant time.

2. **Objectives of the Hague Convention**

2.1 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 all relevant records are held and witnesses are available, can make decisions about the child's welfare with the best and most recent information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law, providing an effective, summary remedy against those who seek to take the law into their own hands.

2.2 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 contracting 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 resettlement 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 his habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

2.3 Under the Convention an applicant must prove, on the balance of probabilities, that she has rights of custody, that she was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. If she 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.

2.4 Here, the Respondent argues that Hans was no longer habitually resident in Germany when he moved to Ireland and that the Applicant was not exercising her rights of custody in respect of Hans, having rarely seen him in recent years. These are matters for the Applicant to establish. If she succeeds, the Respondent raises the defence of grave risk, which is coupled with an argument that the Court should exercise its discretion not to return the child due to the views Hans has expressed to an independent assessor.

3. **Habitual Residence**

3.1 The Applicant contends that Hans was habitually resident in Germany at the time of his removal to Ireland, but this case has a complicated history. The Respondent argues that the child was no longer resident in Germany, or, in the alternative, had no place of habitual residence at the material time. Such a phenomenon has been referred to in the case law.

3.2 In its judgment in Case C-523/07, the Third Chamber confirmed that a child may have no habitual residence, saying at paragraph 43:

> *"… it is conceivable that at the end of that assessment it is impossible to establish the Member State in which the child has his habitual residence. In such an exceptional case … the national courts of the Member State in which the*

child is present acquire jurisdiction to hear and determine the substance of the case pursuant to Article 13(1) of the Regulation."

Case C-523/07 was endorsed by Lady Hale in the decision of the UK Supreme Court in *Re A* [2013] UKSC 60.

3.3 The see-saw analogy of Lord Wilson in *Re B.* [2016] UKSC 4 was discussed during legal argument in this case. This analogy suggests that a child must have habitual residence somewhere and that, as the child detaches from a former home and puts down roots in his new home, habitual residence is acquired. The English Court of Appeal in *Re M.* [2020] EWCA Civ 1105 has recently ruled on a similar argument, pointing out that the see-saw analogy can assist but should be used with caution.

3.4 In the first instance judgment in *M*'s case, the analogy led to a disproportionate focus on historical factors which weighed heavily against the acquisition of a new habitual residence. As Lord Justice Moylan pointed out, the question in each case is on the current situation and on the child's circumstances at the relevant time. In *Re M.*, the children had been living in England for a year, were attending school, and had made friends. Their level of integration was such that, according to the Court of Appeal, it was clear that they were habitually resident in England in July 2019 when their mum (who had become pregnant with her new partner) retained them there contrary to an agreement reached with their dad in July 2018.

3.5 In *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. 1-14309, the First Chamber of the European Court of Justice considered the interpretation of 'habitual residence' for the purposes of the Regulation, which uses the same phrase, in the same context. That Court observed, at paragraph 44, that "*[i]t merely follows from the use of the adjective 'habitual' that the residence must have a certain permanence or regularity.*" At paragraphs 46-56, the test is described

as one of fact, in the context of a Regulation aimed at identifying the relevant jurisdiction in light of the best interests of the child. The concept is intended to reflect some degree of integration by the child in a social and family environment. The conditions and reasons for the child's stay are relevant, the child's age is important, along with indications as to whether presence is temporary or intermittent, though no duration of stay is required. A parent's intentions may indicate a transfer of habitual residence.

3.6 In *Hampshire County Council v. CE and NE* [2020] IECA 100, at paragraph 77, Whelan J. took the view that *Mercredi* and further decisions of the CJEU suggest a non-exhaustive list of factors which may be relevant to the issue. She concluded that: "*It is the child's habitual residence which is in question, not the parents', and it is the child's level of integration, rather than the parents', in a social and family environment which must be analysed by the court determining the question.*" Whelan J. referred to the linguistic, social and familial circumstances in each case and the nationality of the child, along with the stability of the child's environment.

3.7 Applying these principles to the facts here, this child is a German national and, until he moved here, German was his principal language. In May of 2021, the Respondent went to America, bringing Hans. In August of 2021, the Respondent brought the boy to Austria, after which they moved to Ireland in November. While it was submitted that he never lived in Germany after May of 2021, this does not appear to be correct. Hans refers to being with his grandparents in Austria, having travelled there from Germany, not from America, but this is not a significant issue in this context.

3.8 The purpose of the trip to America was for a work project. The word "*temporary*" is used in the Respondent's own description of the journey and a written request to the school is exhibited. Here, he asks that the child be removed from the school register for a period of months, ending in July of

2021, the end of the school year. The argument was made that this was a permanent situation but that contradicts most of the surrounding facts.

3.9 The Respondent, in the same exhibit, reassures the school about the homework Hans will undertake, which seems an odd communication if the child is never to return to that school. Everything about his correspondence with the school suggests a temporary absence. If a child is being removed from a school permanently, a parent is likely to make this clear. No such message or information was exhibited. Even if the two never returned to Germany but went straight to Austria from America, there is no evidence that they had lost their habitual residence in Germany at that point.

3.10 While in Austria, the only facts established in evidence were that Hans saw his grandparents while he was there. There is nothing in the Respondent's affidavit about their circumstances there, there is no suggestion that they rented or bought a home there, set up a bank account there or ever intended to stay there. There is, thus, no basis for a finding that this family was habitually resident either in America or in Austria. While this is a matter for the Applicant to prove, the child's nationality, his fluency in only one language (German), his schooling, his friends and his family members all suggest that Hans was habitually resident in Germany and there is no evidence to counter this submission. The only relevant evidence suggests a temporary relocation to America, followed by a period of time in Austria but with no evidence at all as to its purpose.

3.11 While the case law suggests that the child may, exceptionally, have no habitual residence, the facts of this case do not support such a finding. Here, Hans left his school in May 2021, but this was expected to be for a period of just over a month, due to end in July when it appears likely that the Respondent intended to return home to Germany. Instead, the boy was brought to the Respondent's parents' home in Austria. This was during a

school holiday and there is no indication that it was intended to be a permanent move. In November of 2021, they moved to Ireland.

3.12 Finally, in each communication with the Applicant, which the Respondent had undertaken to a court to make before any significant decision in Hans' life, but which invariably came after he had made the decision or the move, there was indeed information only about where they were living and no suggestion that they had moved away from Germany permanently.

3.13 Throughout this period, the boy retained his habitual residence in Germany, in my view. There is no evidence that the Respondent had made irrevocable (or any) steps to move away permanently, the boy's language is and was German. His school friends, his mum and his older sibling all live in Germany. He was sufficiently mature as to have a life of his own in that country and evidence of a more permanent move, probably with signs of social integration, would be necessary before Hans could be said to have acquired a new habitual residence. There is no evidence of any such signs in 2021 and I am satisfied that Hans was habitually resident in Germany in November of 2021 at the time of his removal to Ireland, even if he travelled here from Austria. His history and roots remained in Germany, and Hans had not integrated into any other country at that point nor had this small family begun to put down roots elsewhere. The unilateral decision of his father to move to Ireland did not instantly change Hans' habitual residence.

3.14 This timing is significant as it means that the Applicant has made her application within 12 months of the removal of the child. Therefore, if she can show that she was exercising her custody rights and if the Respondent cannot establish one of the defences, she is entitled to a summary return.

4. **<u>Exercising Custody Rights: The Legal Test and the Facts of this case</u>**

4.1 The case law suggests that proving the exercise of custody rights is a relatively easy task once a parent shows sufficient interest in the wellbeing of a child. As McGuinness J. commented in *M.S.H. v. L.H.*, [2000] 3 IR 390, where the applicant was serving a prison sentence: "*There are many circumstances in which one parent may have a low level input into the day to day physical care of a child"*. She went on to hold that the monthly visit of the children to their father in prison was sufficient to establish that he was exercising these rights. The trial judge had made the same ruling and had referred to the difficulty for a parent serving a prison sentence or suffering from a disability who might otherwise be deprived of their rights.

4.2 The Respondent relies on *M.U. v. N.R.* [2017] IEHC 828 in which Ní Raifeartaigh J. found that, from May 2015 to September 2016, starting when the Respondent left the family home and ending when she was in Ireland, the Applicant took no steps to exercise his custody rights: he made no attempt to seek access to the children; he did not invoke the court's powers to locate them; he did not pay maintenance. On that basis Ní Raifeartaigh J. held that he could not establish the exercise of rights required by Article 3.

4.3 Here, the Respondent contends that, as in *M.U.*, the Applicant was not exercising her rights of custody over Hans at the time of his removal. The facts in this respect are relatively unusual. The parties are German citizens, and both have rights of custody in respect of Hans. Their relationship broke down in 2019, at which time the Applicant relinquished custody of their son while in the throes of alcohol and drug addictions. She sought treatment but did not successfully complete it at that time.

4.4 The Supreme Court decision in *Child and Family Agency and B v. The Adoption Authority of Ireland and C and Z* [2023] IESC 12 was discussed in legal

argument. There, Mr. Justice Hogan had considered the situation of a mother who had addiction issues and who had become unable, essentially, to perform many of her parental duties. The biological mother, Ms. C, brought an action against the Adoption Authority, opposing a foster mother's application to adopt her child.

4.5 The Respondent father in the instant case became the sole carer for Hans pursuant to an agreement between the parties in 2020 although the parties explicitly retain joint custody rights. The agreement, as set out in a court ruling in January of 2020, was exhibited and confirms that the parties agreed that Hans would live with his dad but that his mother would be informed "*in good time*" about any significant events in his life, and that he would have contact with his mother and his older sibling.

4.6 The Respondent acknowledged in this agreement that it was important to him that Hans had contact with his mother, but no specific access was agreed other than a commitment to arrange the first meeting, provisionally planned at a named youth office. It was not specified in the agreement that the Applicant would undergo treatment for her addictions although lawyers referred to her attending therapy in their submissions to that court.

4.7 It is notable that in the psychological report submitted completed in September 2019 for those proceedings, the author describes how the Applicant is undergoing a period of stress, notes that she is now open to therapy and praises the Applicant for unselfishly giving full custody to the Respondent and for putting the needs of Hans for stability before her own desire to see him. Her exact words, as reported by the psychologist (and translated), were that she wanted to keep him "*away from her problems*".

4.8 The author of the report notes that the Respondent father has agreed to talk to Hans so as to avoid any impression that his mum does not want to see

him, as Hans has been asking for her. This professional concludes that it is crucial for the Applicant to stabilise and to resume the mother-son relationship with Hans. This appears to be the foundation for the agreement between the parties, as set out by the court in January 2020.

4.9 While the Applicant acknowledges that she has not seen Hans since July of 2019, and has had minimal contact with him, the reasons for this lack of contact are in dispute. One exhibit that sheds light on this is an email exchange on which both parties rely. The Respondent writes to the Applicant in August of 2020 asking her if rehabilitation has commenced and if she has any interest in the life of their son. She responds angrily that he keeps the boy away from her. This is an exchange which concerns the Court. While an angry response may, in this case, be from a person still in addiction and therefore in an emotional state, I cannot dismiss its contents.

4.10 There is no suggestion in the initial message that contact has been attempted by the Applicant or facilitated by the Respondent. Instead of any such offer by the Respondent there is a request about the Applicant's rehabilitation. While this was not a condition of contact, it is common sense to suggest that no parent will send a child to access with an addict while fears remain for his welfare but in this case, there is no surrounding evidence whatsoever. The request reads as though it is a pre-condition of contact that the Respondent be given a medical report that the Applicant has completed therapy. There is no such condition attaching to the agreement of 2020 although she has, of course, indicated that she will undergo therapy. More worryingly, the Respondent refers to his having prevented contact and there is no reply to this allegation. In his affidavit, the Respondent refers to the Applicant having made no court application for access to or for custody of Hans. He states that access had to occur through a specific Youth Office

but this is a provisional measure set out in the agreement and there was no bar to the Respondent facilitating contact generally.

4.11 It is more likely than not, on the limited evidence available, that the Respondent did make it difficult for the Applicant to see her son. While his reluctance to arrange a meeting may be explained by the history of the relationship, and the Respondent's view of this history is clear from his German lawyer's submissions, nonetheless, there was not just an onus on the Applicant to seek contact, there was an onus on the Respondent to facilitate contact. His characterisation of the Applicant having abandoned Hans confirms that his impression, no matter how genuinely held, is not fair to the Applicant. It does not align with the psychologist's conclusion that the Applicant recognised that the boy would be more secure, in late 2019, with the Respondent but with access to her.

4.12 This conclusion is further supported by an exchange in November of 2020. Hans broke his arm and the Applicant discovered this when she saw a photo of him on social media with his arm in a cast. The texts exchanged thereafter make it clear that she was concerned about Hans, and that the Respondent did not accept this assertion. He protested that there was no need to tell her about the injury but that he was replying because of the court agreement. He told her (on a later request for an update) that stitches had been removed. This is another disturbing exchange. While the Respondent argues that receiving birthday cards from the Applicant had upset Hans as there were only two such cards and no other contact, giving this information about his health to his mother could not have upset Hans and there was no reason to withhold it or give it grudgingly.

4.13 There is a pattern in the Respondent's approach to keeping the Applicant informed of significant developments. He has consistently advised the Applicant *after* the event when he and Hans have moved house, or even

country. This is an indication that he does not and did not think it important to keep her informed about their son's life. He has repeatedly breached the agreement that he would inform her in good time of such events. This too supports my conclusion in respect of his having obstructed resumed access.

4.14 I have sympathy for the Respondent in this regard, as he has clearly been a caring and responsible father in many ways and may have good reason to be sceptical about the Applicant's efforts to rehabilitate herself. But this does not justify hindering contact between them. He does not appear to have made much, or any, effort to facilitate the child's contact with his mum. He maintains the position that it is a matter for the Youth Office to arrange but this contradicts his agreement that it is important for Hans to have a relationship with his mum. Nor does he appear to consider her efforts genuine or persistent enough to merit any effort on his part to re-establish contact between them. None of this is in the child's best interests.

4.15 The Respondent has argued that arrangements in respect of the Applicant's other child have been mis-stated, that the older child does not live with the Applicant and that any contact with his mother will not necessarily lead Hans to contact with his sibling. I do not accept this submission. Despite her difficulties, it is clear that the Applicant has maintained contact with an older child. She has not stated anything that would mislead in respect of where that child is living. Hans is likely to have more contact with this sibling if he is returned to Germany, even if in the Respondent's care. Some arguments are addressed to the impracticality of returning Hans to his mum's care, but this was not sought by the Applicant who seeks his return and her continued role as joint custodian of the child with a right to determine his place of residence, rather than suggesting that she will take over the custody of the child.

4.16 The Respondent has argued throughout his submissions that the Applicant has not paid him maintenance in respect of Hans. This is not disputed. There was no reference to maintenance in the court agreement of 2020 and, in circumstances where the Applicant was seeking treatment for addiction issues from September 2021, in the throes of that addiction in 2019 and still having outpatient treatment in 2022, this is perhaps not surprising. While it is a factor in all such cases, it is rarely a deciding factor and, in the circumstances of this case it is not significant, in my view.

4.17 Returning to the authorities which bind me, this case has more in common with the facts of *M.S.H.* than with *M.U.* in that this Applicant did not make no effort to contact her child as occurred for a period of over a year in *M.U.* On the contrary, and despite not being kept informed about his progress or his address, she sought information about Hans' welfare on at least one occasion which appeared to arise from genuine concern, and which was met with begrudging information. The psychologist who prepared the report in September of 2019 noted that she loved her son. This may not be clear to the Respondent and perhaps has not been evident to him due to her earlier conduct, but the fact remains that the Applicant has tried to learn about how Hans is, albeit her efforts were not as vigorous as they might have been. This failure on her part is largely explained by her addictions, from which problems it is notable that she sought to protect Hans.

4.18 Comparing this case with *Child and Family Agency and B v. The Adoption Authority of Ireland and C and Z* [2023] IESC 12, there is a vast difference between the situation of the two children. In *re B.*, the child had been raised by foster parents and the biological mother had visited the child, albeit not frequently, in the years preceding the case. The foster mother applicant proposed adopting B and her biological mother objected, unsuccessfully. Hans wants to see his mum, according to the assessor's report, and there is

no question of the Applicant in any way supplanting the Respondent or interfering with his rights. On the contrary, he has interfered with her rights of custody without notifying her of his intentions or allowing her to exercise her custody rights in that regard.

4.19 Finally, I note that the Respondent, when advising the Applicant of his changes of address asked her, more than once, to relinquish her right to joint custody so that he did not have to keep her informed of their whereabouts. She never did so and, having agreed that she would enjoy joint custody in 2020, she was still entitled to have some input into the child's permanent residence in 2022.

4.20 In all of the circumstances, noting that she has maintained contact with another child despite her difficulties, accepting her assurances now and in 2019 that she did what was best for Hans at that time, noting the efforts she made to find out more about his life and the Respondent's failure to keep her informed in a timely way about Hans, the Applicant was probably exercising her custody rights at the time of the removal of Hans to Ireland. The main obstacles to the Applicant's exercise of custody rights were her addictions and the Respondent's failure to accommodate access and keep her informed of developments in Hans' life. These obstacles should not result in her losing her rights. She showed sufficient care for the person of Hans that I am satisfied she was exercising her rights of custody at that time.

4.21 There was a discussion during the hearing of the effect of unconscious bias on a decision such as this one. I have reflected on these facts, including those that pertain to grave risk, as the issues of contact and addiction arise in that context also. I am satisfied that if the genders of the parties were reversed, evidence as to a father's addictions, a father's efforts to find out more about his child and a mother's poor adherence to the agreement reached in 2020 would have led me to the same findings of fact in this case.

I consider the exercise a useful one as there is no doubt that cultural expectations of men and women are different, and often unfairly so, even in 2023. This should not lead to decisions which are gender-based in terms of having different expectations from litigants based on gender. Decisions should be made on a logical basis, as free from unfair bias as is possible in human interactions, which often depend on bias as a useful neural shortcut. One way to achieve that result is to switch the genders of the parties and examine the reasoning in the case afresh in order to eliminate hidden biases.

5. **Culpable Delay**

5.1 Article 12 of the Hague Convention provides that:

> *"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."*

5.2 The Respondent argues that the Applicant has been guilty of culpable delay in bringing and proceeding with her application such that the Convention ceases to apply, and the child should remain in Ireland.

5.3 The relevant facts for the purposes of this argument are that Hans was first removed to America in May of 2021 and this was done without the knowledge of the Applicant, despite the agreement that the Respondent would inform her about significant events in the child's life. Hans was then brought to Austria in August. The Applicant has exhibited correspondence which confirms that she instructed a solicitor in Germany in September of 2021 to initiate Hague Convention proceedings for the return of Hans from

Austria. For whatever reason, these proceedings were not instituted by the time Hans was brought to Ireland in November.

5.4 The Applicant submits that she was suffering from addiction and psychological issues at the time the removals occurred. She has exhibited correspondence and reports which confirm that she was receiving treatment throughout the latter half of 2021 and entered in-patient treatment for her addiction issues in September 2021, which ended in December. Her outpatient treatment appears to have continued. In June of 2022 the Respondent made a written request to the Central Authority of Germany for the return of Hans to his place of habitual residence.

5.5 These proceedings were issued in July of 2022 and were adjourned from February to April as settlement talks were ongoing. In April of 2023, the Court was asked to set a hearing date as talks had broken down. The parties were offered a hearing date in May but an assessment date for Hans was not available and both parties requested more time than the first proposed date in June in order to prepare for a contested hearing.

5.6 The two significant delays in the case occurred from November 2021 to June of 2022 and from July 2022 to July 2023. One was caused by the Applicant's delay, the other by a delay in the court process in a case in which settlement talks began, albeit late in that process.

5.7 As for the first delay, I am satisfied that the Applicant made an effort to ensure the return of her son from Austria in September of 2021. The Applicant spent the following months in a facility trying to address her addiction issues and, it appears, successfully doing so. It is not unreasonable to conclude that she was still labouring under a disability during the 6 months that followed. I use the word advisedly and conscious that this addiction might be viewed as a self-imposed difficulty. Given the

many and poorly understood reasons for addiction, I am not prepared to conclude that this was a difficulty of the Applicant's own making. From the point of view of her child, she took steps to address these problems over the last few years and it is certainly in his interests that she has done so. While her application was not prompt, nor was it unduly delayed, particularly when one considers her personal circumstances.

5.8 There was no argument addressed to the second delay. The rights of a child must include allowing time for his parents to settle their dispute as this is manifestly in his best interests. Nonetheless, and while no legal argument was addressed to this part of the delay, the Court must consider it and accepts that this was a longer process than it should have been, which is, in part, the responsibility of the Court itself, and I will consider that delay and its possible effects in determining the appropriate outcome in such a case.

5.9 The time allowed for settlement talks in this case amounted to two months but there was a consequent delay in making progress in the case as the assessment of the child did not take place during that time, nor was a final affidavit filed until talks broke down. Counsel were not in a position to argue the case for another two months. This was an unsatisfactory outcome for all involved and cannot operate to the disadvantage of the child. The Court bears some responsibility for case progression and will consider this delay with particular care when addressing the assessor's report and Hans' views.

5.10 In considering whether there was culpable delay such that the Convention summary process is no longer appropriate, however, given my conclusions as to the original period of delay and the justification for at least two months of the court process, I cannot agree with this argument. It would be a dangerous precedent to find that time afforded to encourage settlement talks operates against one the parties engaged in that process. There is a

real risk that in future cases such a finding might be used to avoid settlement talks or to use such talks to delay the process and then to encourage the Court not to return a child who has spent more time in Ireland. It may still be in the child's best interests to refuse a return, but this delay is only one of the surrounding facts which must be considered in identifying Hans' interests. In that context, whether it is culpable delay or who is responsible for it, are matters that are no longer relevant.

6. **Grave Risk**

6.1 The Convention provides, at paragraph 13(b), that:

> "*[T]he 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 …*
>
> *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.*"

6.2 Ms. Justice Finlay Geoghegan set out the legal test for grave risk in *C.A. v. C.A.* [2010] 2 IR 162, at paragraph 21:

> "*[T]he evidential burden of establishing that there is a grave risk … is on the person opposing the order for return … and is of a high threshold. The type of evidence which must be adduced [must be] 'clear and compelling evidence'.*"

6.3 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.

6.4 In *C.T. v. P.S.* [2021] IECA 132, Collins J. outlined the history of the cases relevant to an understanding of the objectives of the Hague Convention. He concluded:

> "*…there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention.*"

The burden of establishing such a defence is a heavy one and a discretion remains for the deciding judge even if a grave risk is identified.

6.5 In *R. v. R.* [2015] IECA 265 Finlay Geoghegan J. noted that the risk in that case was of physical harm to a child and emphasised the trust to be put in the courts of the child's habitual residence to protect the child even in such an extreme situation.

6.6 Finally, and importantly, the Court must consider the facilities available in the requesting State to assess or mitigate the risk presenting. To paraphrase Fennelly J. in the Supreme Court decision in *P.L. v. E.C.* [2008] IESC 19, [2009] 1 I.R. 1, the real issue for this Court is whether there is evidence to suggest that the German courts are unable or unwilling to protect Hans if he is at grave risk of harm.

6.7 The allegation of grave risk in this case arises from the assertion that the Applicant has taken no steps to maintain a relationship with Hans, and that she has made no proposals as to where and how the Respondent and Hans would live and how they would be provided for on their return. The issue of non-contact is one that has been considered in detail in the section on exercising custody rights, above. There is no evidence offered to substantiate the claim that the Respondent cannot afford to relocate or will not be able to find accommodation in Germany should they return.

6.8 While the Court notes that the Respondent clearly has taken a view that it is a matter for the Applicant to assert her rights more vigorously through the courts, this is not a view that the Court shares. This is due, in part, to addictions for which she was successfully treated by 2022, but also due to a lack of facilitation on his part. In those circumstances, a lack of contact which was initially agreed to so as to protect the child and then protracted in part due to the Respondent's failure to facilitate it, cannot now constitute a grave risk to the child. The existence of a grave risk to the child is a matter for the Respondent to prove and he has not done so. Further, the ability of the German courts to mitigate any risk is clear from the history of the case.

7. **Views of the Child**

7.1 The three-stage test applicable is one articulated by Potter J. and involves ascertaining if a child does in fact object and, if so, what the weight of the objection is given the maturity of the child. Finally, if established and when assessed in that way, the Court considers if an objection is sufficient to outweigh the counter-balancing objectives of the Convention. Article 13 requires the Court to take account of the views of the child. It does not vest decision-making power in the child, and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child in question. Nonetheless, it is very important to consider the views of the child and whether they may influence the Court to take the exceptional step of refusing to return a child.

7.2 In *A.U. v. T.N.U.* [2011] 3 IR 683, Chief Justice Denham commented that: "*A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence.*" The weight to be attached to views of a child

increases as the child gets older, see for instance *M.S. v. A.R.* [2019] IESC 10, at paragraph 64.

7.3 In considering whether the child's objections to return are made out, the expression of a mere preference is not sufficient; the word "*objection*" imports strong feelings as opposed to a statement of preference, in the words of Ms. Justice Whelan in *J.V. v. Q.I.* [2020] IECA 302.

7.4 In the decision of the Court of Appeal in *M. v. M.* [2023] IECA 126, Donnelly J. emphasised that: "*It is a truism that each case turns on its own facts.*" She relied on the decision of the Supreme Court in *M.S. v. A.R.* [2019] IESC 10, reiterating the principles relating to the exercise of discretion. According to Donnelly J., the reference to return as an "*exception to the general policy*" ought not to be seen as importing any test of exceptionality into the exercise of the discretion. Her conclusion was that the exercise of its discretion must be considered on all the evidence before the Court.

7.5 In the circumstances of *M.*, Donnelly J. held, at paragraphs [87]-[90]:

> "*The task of the judge in the exercise of her discretion is not to weigh the child's views against the Convention principles or objectives that favour prompt return but to assess the individual circumstances of the objecting child in light of those principles and objectives which require return. This exercise must be carried out in light of all of the evidence. When one considers the exercise in that light it becomes clear why the child's views are not determinative. Those views are but one part of the assessment of the child's individual circumstances which must be considered against the background of the Convention's policies and objectives…*
>
> *The particular objective of the Convention/Regulation which is to deter child abduction rightly weighs heavily in the balance of the discretion here as does the policy of prompt return. The child's objection also has to be considered. All*

those things are of undoubted importance in the balancing exercise, but they are not the only matters. In one sense, it can be said that they form the outer ends of the balance beam, but a judge is required to move inwards from those set parameters and consider all of the relevant circumstances that need to be considered. Sometimes the relevant factors may be those factors which form part of the child's objections but, on many occasions, the relevant factors may include issues to which the child has not adverted. Either way it is important for a court to articulate the relevant circumstances that are being considered in the exercise of the discretion…

The upper age limit for return of a child under the Hague Convention is 16 years and the closer one gets to that, the weightier the objection becomes. Maturity as well as age must also be taken into account, however."

7.6 In *J.K. v L.E.* [2022] IEHC 733, the respondent father had taken two children on holiday, initially, and decided to remain when they appeared to be happily settling in Ireland. However, the family had been in the middle of court proceedings after the parties separated. Despite the strongly expressed objection of the eldest child, which involved a threat of self-harm, this Court ordered that both she and her sister be returned to Sweden. This was in circumstances where the child's objection did not counterbalance the factors in favour of return, particularly when considering her best interests:

"*Rachel's objections arise in circumstances where there has been ongoing evaluation and support for her in Sweden. Any risk to her will require professional evaluation beyond the contents of the Assessor's report in this case, and what is contained in that report is insufficient to sustain a defence that Rachel will be at grave risk should she be returned. There is no evidence that the relevant authorities in Sweden are unable or unwilling to treat and mitigate any risk arising.*"

7.7 In *A.Q. v. P.Q.* [2023] IEHC 379, since upheld by the Court of Appeal in *A.B. v. C.D.* [2023] IECA 158, the child, Sofia, expressed views which this Court found were so heavily and directly influenced by her mother that the Court could not rely on those views. In assessing the views of the child, this factor is significant. Where the views expressed cannot be said to be those of the child herself, they can be afforded no weight.

7.8 Hans was assessed by an expert assessor. Asked for his views on being returned to Germany, Hans said: "*I really don't want to live there because I love Ireland. Daddy wants to live in Ireland too. I don't know why, but we are in a church and the apostles said we should live here in Ireland.*" Hans reflected that, in Germany, "*I lived with mum until I was four and she was taking much drugs and was screaming very loud and once she kicked my brother.*" This was information, he explained, that his dad had told him and then he remembered. He said "*I really like it here in Ireland and I want to stay here and I want to visit Germany but I don't want to live there.*" Hans told the assessor: "*Daddy said to tell you I really want to live in Ireland and that is my wish too.*" When asked for reasons why he would object to living in Germany, Hans said: "*God sent the apostles to say to us to move here to Ireland. My dad taught me all this stuff.*"

7.9 When it came to describing his school life, his reason for preferring Ireland appears to include the fact that he now wears a uniform but did not have to do so in Germany. He did recall having at least one friend in Germany but said that they talked about "*crazy things*" in school there. Here, he described his friends, but only in terms of their wearing a uniform, and was able to describe the various subjects he studies, including the tin whistle.

7.10 Hans told the assessor that he wanted to visit Germany and said that the rest of his family was there. He said that he wanted to see his mother again as he had not seen her for a long time. Hans then drew a picture of his

mother for the assessor and said she was screaming. This part of the report makes difficult reading when one considers that the child bears no responsibility for this lack of contact.

7.11 All of the facts of the case are relevant to the balancing decision in which the Court must now engage: the child came here over a year ago but came as a German national who spoke only German. He is under 10 years old and still remembers Germany fondly enough to want to return, albeit only for a holiday. He likes his school here but has no coherent complaints about his school in Germany. He clearly wants to see his mum though he does not refer to his sibling other than as a child who now has no parents, which is what the Respondent has told Hans.

7.12 The Respondent avers that he has no family in Germany but that is not the case for Hans, whose mother and extended family all still live there, and Hans told the assessor about this. He also referred fondly to his grandparents in Austria. While the Respondent noted that the Applicant had moved to Munich which was hundreds of miles from their former home, she responded by explaining that this was when she thought they were going to be living in Austria, with his parents. Munich is much nearer Austria than their former home.

7.13 If the child is not returned, the reality is that he is likely to have no relationship with his mother and her family, including the child's only sibling. The terms of the child's objection to returning to Germany are not independently stated and rely in large part on what he has been told is God's plan for him. When Hans explains that he wants to stay in Ireland, he makes it clear that his father has told him to say this before adding that he wants it too. While this may be the case, none of what he has told the assessor amounts to a serious objection to returning to Germany or re-establishing contact with his mother, which Hans would like to do.

7.14 Significantly, and as the assessor noted, Hans' views align with those of his father, some were directly dictated by him and it is clear that his father has influenced Hans and these are not independently formed views.

7.15 Taking all of these matters into account, the views of Hans as expressed to the assessor cannot be characterised as his own. They appear to be the views of his father, being repeated to the assessor to please his father. This is a combination of natural wish to please on the part of Hans and the Respondent's direct request of him which would be very difficult for a child to ignore or disobey; the Respondent is his primary carer, after all. In those circumstances, it is not appropriate for the views Hans has expressed to outweigh all the other considerations in the case which favour return.

8. **Conclusions**

8.1 Hans was removed from his habitual residence without the Applicant's consent at a time when the Applicant, despite her addictions and a lack of facilitation on the part of the Respondent, wanted to remain in contact with her son and was exercising her rights of custody. I am satisfied that the views expressed by Hans should not outweigh all of the other considerations in this case. As the influence of his father has clearly affected the child's views, it is difficult to characterise them as the views of the child himself or to place much weight on those views.

8.2 I have considered very carefully the length of time Hans has spent here. This has been longer than is ideal in any Hague case but the argument that he should not be uprooted once more is undermined by the Respondent's history of moving him from Germany to America, to Austria and then to Ireland in the space of one year. He will be returning with his dad to a country he knows well, where his mother lives and where the language is

his mother tongue. The best interests of Hans are served by returning him to Germany and I will hear the parties as to how best to facilitate that return and whether undertakings are necessary in this regard.