

**THE HIGH COURT**

**FAMILY LAW**

**[2023] IEHC 770**

**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 SUSANNA, A MINOR**

**(CHILD ABDUCTION: WRONGFUL RETENTION AND SETTLED PURPOSE)**

**BETWEEN:**

**G.**

**APPLICANT**

**AND**

**F.**

**RESPONDENT**

**Judgment of Ms. Justice Mary Rose Gearty delivered on the 14<sup>th</sup> of November, 2023**

**1. Introduction**

- 1.1 This case raises three issues in the context of an application for the return of a child under the Hague Convention. The first; whether it is a wrongful retention when parents move jurisdiction by agreement and one party changes his mind, the second; whether the parties moved with a settled

purpose to reside elsewhere, the third; the implications of this decision, if any, on a parallel asylum application by this Respondent.

- 1.2 The evidence in the case establishes that the parties left home with a settled purpose not to return for a significant time and that the Applicant probably left his family in Spain without any agreement that they would follow him. In these circumstances, he cannot rely on the Convention.
- 1.3 There were pre-hearing submissions regarding which case takes priority when a child abduction case is initiated in respect of an asylum seeker, who claims that the applicant in the Hague process is the reason for her asylum claim. This Court will hear any relevant asylum application listed in the High Court in order to ensure that there is no inconsistency in fact finding.

## **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 he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of the removal or retention. If he succeeds in establishing these matters, the burden then shifts to the Respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence and bearing in mind the best interests of the objectives of the Convention and the best interests of the child. Here, the defence raised is that of grave risk.
- 2.4 More fundamentally, the Respondent also makes the point that the circumstances in which she remained with the child did not amount to a wrongful retention of the child. In this respect, the preamble to the Convention is worth reviewing. There, we see that the purpose of the Hague Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.
- 2.5 As the explanatory report on the 1980 Hague Convention makes clear, one of the objectives of the Convention is the restoration of the *status quo ante*, that is, the situation that existed prior to the wrongful removal or retention of the child. The aim of the summary return procedure is to put the child

back in the environment with which the child is most familiar and, thereby, to restore the continuity of her living conditions. This must be done as quickly as possible, in order to fulfil the objectives of the Convention.

### 3. Factual Background

- 3.1 The Applicant father and Respondent mother in this case are married and their child, whom I will refer to as Susanna, is under 7 years old and was under 4 years old when the family left home and began their journey. The family lived in an Eastern European country until September 2021, when they went to Poland, then (via a third country) to Spain, having booked flights to the same city in England from both jurisdictions. The reasons for the trip are in dispute. The Convention has been ratified by Ireland and by the country of origin, which State is not a member of the European Union.
- 3.2 In late October 2021, the Applicant returned home directly from Spain. He avers that this was on the condition that the Respondent would return with their child soon afterwards. By November of 2022, the Respondent and Susanna, having resided in several other countries, were in this jurisdiction and this application for the child's return was initiated in February of 2023.
- 3.3 The Respondent avers that she never agreed to go home but states that the family had always intended to move to Ireland. She claims that there was no wrongful retention as the Applicant left the family unit after an argument. On arrival in Ireland, she sought asylum. Susanna is named as a dependant on her asylum application and one of the stated bases on which she seeks protection is that of violence by the Applicant against her. The Respondent also relies on the defence of grave risk, pointing to various incidents which, she says, support the submission that Susanna would be put at grave risk if she was returned to her country of origin.

3.4 The Respondent's asylum application has been initiated in this jurisdiction, but no hearing date has been set, probably due to the Respondent's request to the Minister for Justice and Equality and the International Protection Appeals Tribunal [IPAT] that this application should conclude first. This Court was asked to endorse that approach, formally. I took the view that the asylum application was a separate case and entirely a matter for the relevant Minister and IPAT. The statutory process provided by law for such applications must be followed. Insofar as the courts can assist in the procedural efficiency of parallel proceedings, that issue is revisited at the conclusion of this judgment.

#### 4. **The Fact and Date of Retention – Outline Facts and Issues**

4.1 The date of retention in any Hague Convention case is a crucial matter of fact. As such, it is also, ultimately, a matter for the Court to decide. As with all issues in an adversarial process, neither party is entitled to choose whatever date they prefer, both should anticipate their opponents' submissions, and arguments should address all options that are reasonably open, on the evidence. The only possible exception in this regard is where counsel agree a date of retention in a given case but, even here, if the Court is satisfied that a different date is more likely to be correct, this is the relevant finding of fact unless successfully appealed.

4.2 The parties in this case disagree as to the date of retention of Susanna. More fundamentally, there is an issue as to whether there was a wrongful retention at all. The Convention presupposes a removal or a retention, with typical cases involving the physical removal of a child from her home without one parent's consent or the retention of a child when there has been consent to a removal but not for any time after the agreed period. Here, the

family moved together from their home and travelled in Europe, parting in Spain. The circumstances are set out in more detail below but on one account, this is a typical case in which the Respondent wrongfully retained the child, having agreed to come home. On the other account, the Applicant unilaterally decided to leave Spain, with no agreement as to where the child would live and without taking her or arranging for her to follow. If so, there was no removal or retention of the child at that time within the usual meaning of the Convention. The child stayed with her mother by default.

4.3 The Applicant has argued for two dates of wrongful retention. In his submissions to the Court, he argued for the date in early November 2021, when, he argues, it became apparent that the Respondent was not coming back from Spain with his daughter. In June of 2023, in answer to a specific query by the Respondent's legal team in this regard, and in line with his initial application to Interpol, he nominated 25<sup>th</sup> March, 2022, as the date of retention. This was the date when his mother was blocked from the Respondent's social media accounts and it was then, he argued, that the Applicant knew that she was keeping Susanna and not returning with her.

4.4 The Respondent submits that there was no wrongful retention but that the Applicant left the family unit after an argument and returned home, on 21<sup>st</sup> October 2021. She continued to follow the original plan which was to travel to Ireland. This argument aligns with her submission that both parties left their former home with a settled purpose to travel to Ireland for work. While the move may not have been intended to be permanent, it was not a temporary measure, according to the Respondent. If this was so, but only in that event, the child probably lost her original habitual residence when they left home as her parents were natives of that country, as was Susanna. Susanna spoke only that native tongue in 2021, and she had lived there all her life until September of 2021. Her relations, with one notable exception,

remain there. Only a joint and settled intention to leave could have resulted in a change of habitual residence for Susanna.

- 4.5 If the date of retention was 25<sup>th</sup> of March of 2022, this would suggest that there was no wrongful retention in November of 2021 and would create a flaw in the logic of the Applicant's case, which rests in large part on his assertion that the Respondent promised to follow him home within two weeks of his departure, which was on 21<sup>st</sup> October, 2021. His submission in that regard is that he hoped they would return, did not want to go to court and only realised that Susanna would not return when the Respondent blocked contact with his mother, 6 months after the agreed return date.

## 5. **Settled Purpose? Evidence of joint intention**

- 5.1 In September 2021, the parties left their home to find work. Their airline tickets have been exhibited, including tickets for onward flights which were not boarded. The Applicant had secured work in Poland and exhibited the relevant visa. They had no visas to enter Ireland. The Applicant states that the intention of both parties was to find temporary work in the EU to pay off debts that his family had accrued at home. The fact that there were various debts is supported by exhibits of medical documents and invoices.
- 5.2 The Respondent points out that there is no evidence of the debts having been paid and no evidence that the family could not afford these expenses, but taking this averment at face value, the total vouched medical debt is an amount in local currency that I calculate as approximately €2,000. This is the main expense referred to, but other rehabilitation costs are also mentioned.
- 5.3 The Respondent avers that her mother lives in Ireland and that the purpose of their journey was to move to Ireland, via an EU Member State. She notes that, at the time, only Poland allowed visas to those who had not been

vaccinated against the corona virus, COVID-19, and the parties did not want to be vaccinated so they chose to travel through Poland. They also believed it would be easier to enter Ireland from an EU Member State.

- 5.4 The Respondent supports her averments with exhibits of the airline tickets to an English city, stating that they intended to travel on to Northern Ireland and then drive into this jurisdiction. She describes the family's journey to other EU Member States, from where they tried to board flights bound for the same city but, each time, they were refused permission to board as they did not have the requisite visas. There is no real issue between the parties as to which cities they travelled to and what tickets were bought, the issue is with the purpose of the trip which the Applicant says was for temporary employment and the Respondent says was to join her mother in Ireland.
- 5.5 The various tickets and hotels were paid for by the Respondent's mother. When they could no longer afford to travel, after repeated attempts to fly to England, the family went by bus to Spain, where they stayed for some time with a friend of friends, whom I will refer to as Maria. The averment in respect of payment for travel costs was supported by an exhibit which included copies of bank statements and individual electronic payments to the Respondent by her mother, showing total payments of over €12,000.
- 5.6 The Applicant, on the other hand, claims that the Respondent's mother was "experienced in living in Europe and had connections". As a result, he avers that she promised to help them find work in Europe. When this did not happen, he says that the parties decided that they would return home. He refers, in particular, to being in Spain for a period of time, but with no luck in securing any type of work. While he acknowledges an intention to go to Ireland, this was not to live there for any appreciable time. The Applicant says that he left the Respondent in Spain, with her express agreement that she and Susanna would return home approximately 2 weeks later.



- 5.7 The Applicant confirms that he intended to work in Poland, exhibiting a work permit naming a fish factory as his employer in order to support this averment. He later refers to a prospect of employment in a meal factory in Spain. There is no documentary support for the latter prospect, such as an email, text or more formal letter. He avers that he would have preferred to settle in Spain as they had accommodation and the support of Maria there.
- 5.8 There is another aspect to this issue, which is that the Respondent claims that they always intended to seek asylum here. The Applicant states that this was never his intention and that, given that the Respondent's stated reasons for seeking asylum were to escape from him, it is at odds with her claim that they intended to seek asylum together.
- 5.9 In respect of the alleged argument in Spain, there is a stark conflict of evidence: the Applicant avers that this was an amicable decision and the Respondent agreed that she and Susanna would follow him home.
- 5.10 The Respondent describes an increase of tension between the two parties, culminating in a verbal row. She avers that the Applicant left the next day without any request that she or Susanna follow him. This conflict of evidence is explored further below. The Respondent left Spain for a third country, stayed in two other countries, and arrived in Ireland in late 2022.
- 5.11 In April of 2022, the Applicant went to a local police force. This complaint was not exhibited. There is no evidence to support that proposition that this was a request for Susanna's return and it is more likely to have been a request that the police make contact with the Respondent, as this is all that the response addresses. As a result, the police contacted the Respondent, who told them she was in Germany, that she and Susanna were well but that she would not reveal her address. The police letter to the Applicant

dated 2<sup>nd</sup> May 2022, setting out this response, was exhibited. As noted, there is no mention of the child returning or any request that she be returned.

- 5.12 It has since emerged that the Respondent gave a false answer, and she accepts that she was not in Germany at that time. She avers she was afraid that the Applicant would find her and make her return to his home. I have considered this very carefully, as it might suggest that the Applicant had made a request for her return. The Applicant first applied to the Central Authority in Germany, after receiving the Respondent's information, through his local police, that she was there. This application to German authorities is exhibited in the form of correspondence with the Central Authority. There is no mention of the family travelling to Ireland, nor is there a reference to the Respondent's mother who had funded the trip and who was awaiting the arrival of this family. An international search was instigated, in August of 2022, with the help of Interpol. In February of 2023 the current application was made. The Applicant avers that he learned in late 2022 that Susanna was here.
- 5.13 In his application to the Central Authority in Ireland, under heading IV, "factual circumstances of illegal movement or detention of the child", the Applicant claims that he and the Respondent agreed that she and Susanna would follow him home from Spain. He adds that he and his mother were in communication with the Respondent and "*often reminded her the necessity and agreement to travel back*" however the Respondent suspended the contact with his family. The first statement is not correct. There are no reminders to the Respondent about an agreement or about travelling back.
- 5.14 In the same application, the Applicant confirms that he does not want the marriage to end and asks that his family be restored which, he says, can only happen if the mother and child return to their country of origin.

Throughout the application he repeats that the mother has unilaterally made this choice of residence and has impeded his right of guardianship.

## **5. Contemporaneous Text Messages**

- 5.15 The Applicant claims that he would never have agreed to a permanent separation from his family and avers that he made requests for the return of his daughter. He exhibits contemporaneous text messages which, he states, support his version of events. The messages are:

*On 27<sup>th</sup> October, 2021: I see and know the goodness and kindness your mother did for us. And I am thankful to her, but Im irritated as well. Think well about our daughter and everything around us. Dissolution of her family is not best interest of me and I feel nervous about the situation created. I cant do anything without you.*

There are then messages in which he asks about Susanna and how she is. He sends her his love and asks the Respondent to hug Susanna for him.

*On 12<sup>th</sup> November, he sends this message: If you want to tell me anything you can call and we can talk. No one forbids you not to call and talk to me*

*Give [S] a kiss and hug for me, tell her that her daddy loves her so much talk her to the grandma and grandpa as soon as you can.*

*On 18<sup>th</sup> November, the Applicant texted: Are you not going to show me a child? Or what are you going to do at all?*

*On 22<sup>nd</sup> November, still 2021, he texted: I think you are an open minded person, Do I scare you or what is the reason you are not showing me the child? What is wrong with you? I have full right to see the child. Dont you remember that?*

*On 11<sup>th</sup> December, the Applicant texted: If you want our child to be even a bit happy, show her to me. I know you are reasonable and open minded person. Dont*

*make me to take a step. I dont want to. Lets make it easy and show her to me. We all miss her so much. Make a contact and show me a child.*

- 5.16 Over the Christmas period, the Applicant sent some loving messages to his child. There are also complaints to the Respondent about not calling him back. On 22nd December, the Applicant texts that he misses them both and adds: *God will not forgive anyone who dissolute marriage. The only connection which is called the connection of two and constitutes a one, integral part is a husband and wife. This is like this from the age of Adam and Eva. This is not the connection of brother and sister, not the mother and son, but a wife and a husband!*
- 5.17 The Applicant claims that the messages show that he loves his daughter and did not agree to a separation. His averment is that his wife agreed to follow him within two weeks. The Respondent claims that he left them, having argued with her. She avers that he phoned her constantly after he left and that while he wanted to rekindle the marriage it is submitted that he did not ask her to return or, more significantly, to send the child home.
- 5.18 The Applicant has exhibited text messages from his mother to the Respondent in 2022 seeking to visit Susanna and from the Respondent's mother, to him, dated 26<sup>th</sup> September, 2022. The latter reads: *What you want from us, man? I have not bothered any of [your family] and raised [the respondent] alone. Why are you bothering her and what you want from her? I am her mother. I told you. Get it. Tell me what you want. I am telling you a thousand times, no one can decide anything but me.... Even [the respondent] cannot decide anything, already. Me, me and me! Do not run around me. Tell me directly what you want.* The Applicant did not respond to this but relies on it to argue that his wife was under the influence of her mother.

## 6. Evidence of Events in Spain, October 2021

- 6.1 The evidence which explains what happened in Spain is crucial to this decision. The parties' averments are at odds, one with the other, and the exhibits assist in determining which is the more likely version of events.
- 6.2 There was a dispute about the reason for the journey to Spain as the Applicant claimed this was to find employment. According to the Respondent, it was to stay with Maria's family until they had enough money to travel to Ireland. The Respondent avers that she had never met this family before she arrived to stay with them. The Applicant avers that he understood that the family was related to the Respondent's mother but does not vigorously contest this issue of fact, nor does he suggest that the Respondent knew Maria before these events. It is clear from Maria's own account that she, Maria, did not know the Respondent, or her mother, but that a friend of the Respondent's mother's was one of Maria's close friends.
- 6.3 The Respondent describes, in her first affidavit, that while they were in Spain staying with Maria, the Applicant began to talk to his mother on the phone and tried to hide these calls from the Respondent. He told the Respondent that he would like to stay in Spain and seek work there, but the Respondent did not agree to that plan. The Respondent at all times wanted to continue on to Ireland, which was, as she claimed, the agreed plan.
- 6.4 One evening, the Respondent claims that there was a huge argument. She stated that she overheard a call to the Applicant's priest. The Respondent avers that she heard a discussion about arrangements for her to be arrested and for her child to be taken from her. The Respondent became fearful that she would be arrested if she returned to their former home. She also became afraid that the Applicant would abduct Susanna. The Respondent states that she left the apartment in Spain with her child and went to a local park

to decide what to do. She tried to book into a hotel, but they were all full. Maria came to find her. The Respondent returned with Maria later.

- 6.5 On her return to Maria's home, the Respondent told the Applicant that if he abused her again or tried to force her to return to their country of origin, she would phone the police. The Applicant then told the Respondent that he was going to go home. He left her with Susanna in Spain. The Respondent states that there was no agreement that she would follow and there was no agreement that the child would return to their country of origin without her mother. She states that she made her position quite clear to the Applicant and he decided to return home in any event.
- 6.6 Following his departure, the Respondent continued to reside with Maria for a short time, moving elsewhere and trying to gain entry into Ireland via different airports. As described, a year later, they managed to get to Ireland.
- 6.7 After he left them, the Respondent describes the Applicant phoning her constantly. The Applicant's priest called her, saying that the couple should remain together. The Respondent avers that she told the Applicant that she did not want to speak with him. She retained her original mobile number for some months and the Applicant had contact with Susanna during that period, until March of 2022, when the Respondent blocked his number.
- 6.8 The Applicant describes the night in Spain very differently and much more briefly. In his version, the Respondent agreed to follow him home and to bring their daughter home within two weeks. There is no dispute about the date on which he left, which was 21<sup>st</sup> October, 2021. This is only 5 days before the text message, set out in full above, in which the Applicant warns the Respondent not to dissolve their marriage.
- 6.9 There is another source of information about events that night as Maria has written a notarised account describing her memory of that evening which

is exhibited in the Respondent's second affidavit. In this account, Maria confirms that she had not met this couple before, she describes arguments culminating in a row between the parties, she heard the Respondent threatening to end the marriage and Maria describes following the Respondent and persuading her to come home. The discrepancies in her account include a difference in the date (she refers to Hallowe'en instead of the 21<sup>st</sup> of October) and raises concerns as to who wrote the account.

- 6.10 The Applicant responds to Maria's account in his second affidavit. He notes that Maria is a friend of the Respondent's mother's (although this is not quite accurate as she is, rather, a friend of that lady's friend). He goes on to say that Maria allowed them to stay: *"in her home for a number of weeks. Maria cannot therefore be regarded as an unbiased narrator. While I accept that I was tired from our journeys around Europe and searching for work and I may have been stressed, I deny that I was rude or uncaring to [Susanna] or abusive to [my wife]. I accept that I had telephone conversations with my mother while I was in Spain. However, I deny the manner in which these conversations are portrayed in Maria's account. I know that Maria's account is a direct repetition of [the Respondent's] account and some of the statement is written as if [the Respondent] wrote it..."*
- 6.11 The Applicant goes on to give examples of this. Maria has used phrases such as "my mother" and "I was", instead of "she was", when Maria clearly intends to refer to the Respondent and her mother, not to herself, so the words in the first person, "I" and "my", are strong indications that Maria did not write these paragraphs. He notes that Maria's statement refers to Hallowe'en night. He was not even in Spain on the 31<sup>st</sup> of October. In those circumstances, he says, the statement of Maria is totally unreliable.
- 6.12 Finally, the independent assessment of Susanna sheds some light on these issues. When asked about her situation before she came to Ireland, Susanna told the assessor: *"Mother and father were fighting all the time and arguing that*

*they didn't want each other. My mother took me away to grandmother's house and father was calling me every day."* When asked how she knew this, Susanna answered that she had memories in her eyes. The child drew the memories and told the assessor that the picture was one of her father pulling her mummy's hair, and her mummy cutting her hair short. She described: *Mummy screaming and yelling and Daddy yelling and I was watching.*

6.13 When Susanna was asked if she would like to return to her country of origin if her parents weren't together, Susanna answered no. *He'd see me anyway because he calls on the phone.* Another reason she gave for her objection to returning was that her father fights with her and with her mother. She did confirm that she has a good relationship with her father, saying that *he plays on the TV and on the phone and he takes pictures and I like speaking to him.*

6.14 The professional view of the assessor was that Susanna had not been coached or prepared for the interview. Her assessment also included comments about the likelihood of the child describing a lived experience with her references to details such as cutting hair and emotional context. This view and her reasoning is compelling and, in particular, the comment of Susanna having memories of fights "in her eyes" is a likely description of something she has seen herself and not something she was told to say.

## **7. Conclusions of Fact:**

### **The parties' intentions**

7.1 This family travelled initially to Poland. The exhibits reveal that the Applicant's work visa specified his factory employer. Yet the family left Poland after only a few days. In his second affidavit, the Applicant states that he tried to contact this employer. The travel and booking exhibits confirm that they arrived on a Saturday, but booked tickets on Sunday, 5<sup>th</sup>



September to leave, and left on Wednesday. It seems unlikely that the fish factory was available to a potential employee over the weekend. They bought bus tickets to Munich and flights from Munich to Manchester with an onward flight to Barcelona. This was a pattern later repeated: flights to Manchester with another final destination apparent from the travel plan. This appears designed to reassure authorities in Manchester that they would not stay when in fact they did intend to disembark in England.

- 7.2 It is accepted that the parties intended to travel onwards to Ireland. The Applicant avers that this trip was only to find temporary work. If that was the case, the family went to considerable trouble to reach Ireland and I prefer the account of the Respondent in this respect due to: their repeated and elaborate attempts to get to England, with onward flights booked to places they probably did not intend to visit; the short duration of their stays elsewhere; the presence of the Respondent's mother in Ireland; the availability of work in other countries much closer to their country of origin, if temporary work was the true goal of the trip.
- 7.3 The Respondent's mother was living in Ireland throughout the relevant time. She spent over €12,000 on travel tickets and hotel bills as the parties made their way around Europe, including at least two attempts to fly to a city in England. As the Respondent points out, only in Ireland would this family have childcare assistance with their daughter. These factors make it more likely that the family hoped to stay in Ireland for an indefinite period.
- 7.4 I do not consider it likely that the parties undertook so many journeys and spent so much money with the objective of taking temporary work wherever they could find it. The documents in respect of their first prospect of work in Poland and the fact that they did not stay long enough to explore this option, support this view. The expense of their travelling was undertaken, to a large extent, by the Respondent's mother. This is more

likely to have been undertaken to help her daughter to live near her than to help to pay off the Applicant's family debts.

- 7.5 The amount of debt itemised in the Applicant's exhibits, which is a total of approximately €2,000, supports this conclusion. Even if rehabilitation costs and other debts were a multiple of that figure, it is not plausible that the family would spend €12,000 travelling across Europe if a temporary trip to pay off debts, even amounting to half of that sum, was their true purpose.
- 7.6 The Applicant sent a message, exhibited by the Respondent, which refers to their intention to travel until they reached her mother. The Applicant did not, however, in his application to the Central Authority or in his first affidavit, mention his intention to travel to his mother-in-law in Ireland and their failures to achieve this, nor did he mention that this lady had funded their travels. These are puzzling omissions, unless he did not want to concede that his destination was Ireland and that he knew that this remained the likely destination of the Respondent. This appears to be the most likely explanation of his motivation to omit these facts.
- 7.7 The Applicant avers, in his second affidavit, that he tried to get work where he could but that language barriers and their irregular immigration status made this difficult, as did the prospect of arranging accommodation for Susanna. All these factors meant that they did not stay in any one place for long. In my view, this supports the Respondent's version of events. It seems unlikely that this family would move from place to place, as the Applicant describes, with no plan, no visa and no proficiency in local languages in any country. It is more likely that their ultimate objective was to get to a country where they would be helped by a family member; the Respondent's mother.
- 7.8 As regards the claim that the parties intended to seek asylum here, the evidence in this regard is not as helpful as it is in respect of the issues relating to the events in Spain and the general intentions of the parties in terms of their destination. There is no evidence that this family had an

entitlement to reside anywhere in Europe apart from a specific work visa for Poland. They left that country so quickly and without any real opportunity to explore their job prospects that the most likely conclusion is that the couple always intended to go to Ireland, as set out above. Indeed, the Respondent's mother has sworn a very short affidavit exhibiting the transcript of a voice message from the Applicant describing how they would leave Poland quickly to avoid PCR testing or quarantine in respect of the corona virus there. Counsel for the Applicant described their journey as chaotic and it is hard to disagree with this assessment.

- 7.9 There is no requirement to make a finding of fact as to the specific status of either party during their trip or their ultimate, specific intentions in terms of their legal status on entry or their actual prospects of lawful entry. While there were submissions about the necessarily instable position of a family with no legal status, the haphazard but determined attempts of this family to reach Ireland despite having no visas or legal status, persuade me that the matter of their entitlements was a secondary one for the parties. For the purposes of this judgment, it is sufficient to find that Ireland was the intended destination of both parties until they argued in Spain and the Applicant left in order to return home, while the Respondent travelled on.
- 7.10 There is a final contemporaneous message that is relevant to these conclusions. This is the message of 12<sup>th</sup> November, in which the Applicant finishes by asking the Respondent to tell Susanna "*that her daddy loves her so much talk her to the grandma and grandpa as soon as you can.*" This is the translation in the exhibit itself. The words in the original language are exhibited and I cannot confirm the translation, nor could I find the exact match in Georgian as the dates did not appear to be identical.
- 7.11 As exhibited, it could mean either that the Respondent should take Susanna to her grandparents as soon as she can or that she should let her talk to them as soon as she can. Either way, the question arises: which grandparents? If

the words are as translated, “talk her”, this suggests that the Applicant wants the Respondent to arrange for a call with his parents. If the phrase has been mis-typed and should read “take her”, this is more likely to refer to the Respondent’s mother and her partner.

7.12 If the Applicant is referring to the child talking to his parents, this suggests regular communication between them, as indeed the texts themselves confirm. The texts do not refer to Susanna returning, which supports the view that the Applicant knew of the plan to travel on to Ireland and did not object to it, though he was clear that he did not want their marriage to end.

7.13 If the reference is a typo and the Applicant has texted to “take her” to her grandparents, this cannot mean his parents. If it did, why not take her to him, the Applicant? This can only mean take her to her grandmother in Ireland, it seems to me. This possible interpretation of the text is inexplicable unless it refers, as it probably does, to the trip always planned: the trip on which the Respondent continued, which is to join her mother.

### **Conclusions of Fact:**

#### **Events in Spain in October 2021**

7.14 The Applicant claims that the Respondent promised to follow him home from Spain two weeks after he left, with Susanna. But leading up to that date and when that date in November had passed, there was no mention of looking forward to seeing them, no surprise when they did not appear and no question as to where they are, despite frequent texts during that period, all of which are exhibited by the Applicant.

7.15 These contemporaneous texts support the view that his departure was unilateral and that he knew they would continue to Ireland. The texts contain no support for the proposition that the Respondent would follow

the Applicant home. The later messages contain repeated requests that the Respondent show the Applicant his child, but none to the effect that she should have been home by early November and none asking where she was. There is no request from the Applicant that she return the child, there is no reference to any agreement, and it is more likely that the Applicant left without an agreement that the Respondent would follow him. Requests to see the child do not amount to proof of an agreement that she would join him. The messages, while they confirm that the Applicant loves Susanna, do not support his version of how they came to be separated.

- 7.16 I am satisfied that the Respondent's account of events in Spain and thereafter is probably the more reliable version. Maria supports her description of the essential facts which are that the couple had been fighting, they argued on a day in October and the man left Spain the next day. Maria's account is completely incompatible with the Applicant's account and is not a rehearsed or verbatim account which agrees in every detail with that given by the Respondent, which leads me to the view that it has not been dictated to her but is, to a significant extent, her memory of events.
- 7.17 Maria has offered a different date for the argument described. Insofar as the date may have been a different one, this does not mean that Maria is describing things that did not happen. There is no requirement for a party to prove assertions to a level of detail that is exact. In this case, there is no issue about the date on which he left Spain. What is at issue are the events leading up to that departure. And what the Court must assess is which account is more likely to be true. The wrong date is not evidence that Maria is lying, but that she is mistaken about the date, about which there is no issue. She has also given an inconsistent account of what may have precipitated the argument but only insofar as it was a call from the

Applicant's mother as opposed to a priest's wife. What is of more significance is the fact of a call and her memory of frequent arguments.

- 7.18 The argument that she has repeated an account verbatim from the Respondent causes me some concern. This is probably true, in part, as the Applicant correctly points out. She has used phrases that suggest that part of the account was not just suggested to her, but even written by the Respondent for her. This affects the weight I place on her account. Nonetheless, the majority of the letter refers to events that Maria witnessed directly and refers to her children being present during, and affected by, some of the arguments between this couple. The detail in her letter, I am satisfied, probably reflects events that she witnessed.
- 7.19 There is insufficient reason for this stranger to concoct all the details of the account she gives and I am satisfied, given the relatively tenuous connection between Maria and these parties, that Maria had no reason to fabricate her account and it is likely to be reliable insofar as it describes events she witnessed: calls received and made by the Applicant, a serious argument and its immediate consequences, including his swift departure.
- 7.20 The Applicant does not deny receiving calls from and making calls to his mother. These were specifically referred to in the Respondent's account and in that of Maria, who noted multiple such calls. Specifically, she recounted a call on the day of the argument which led to the Applicant leaving their home in Spain the following day. As Maria notes, this meant that his wife and child were left in the home of relative strangers. Again, I note that Maria did not appear to know the Respondent's mother, let alone either of the parties. I do not agree with the Applicant's characterisation of this relationship as one that must lead to a conclusion of bias in the Respondent's favour. Still less can I conclude that Maria had any reason to

provide false testimony to an Irish court in a child abduction case two years after the Respondent left her home in Spain.

7.21 The Applicant has exhibited a notarized letter from one of his friends, whom I will refer to as Jerry for the purposes of this judgment. I have no reason to doubt this man's integrity. Unlike the letter provided by Maria, however, it is clear that Jerry can only confirm what the Applicant told him. All he can add to the account of these events is that he tried to establish contact between the Applicant and the Respondent about a year after the Applicant left Spain. This does not assist with the issue of fact I must determine, which is why the Applicant left Spain and whether there was an argument or an agreement.

7.22 The evidence of the child's view is of relevance in considering this issue. From the assessment, it is likely that the child witnessed enough fighting between the parties in 2021 as to affect her description of her parents in 2023. This supports the account given by the Respondent of a turbulent relationship with many arguments. The Applicant accepts that there were rows as there would be in any relationship, but the assessment suggests a more troubled relationship and, insofar as the child's evidence is concerned, it seems to describe events beyond the usual marital disagreements.

7.23 One of the most significant problems for this Applicant is that, within days of leaving Spain he wrote to the Respondent referring to the dissolution of their marriage. This is wholly inconsistent with his account of an amicable leave-taking during which she agreed to follow him a fortnight later. Further, at this stage he neither asks for the return of his daughter, nor does he apply in Spain, or in their country of origin, for an order that she be returned to him. This situation persists until March of 2022, after the Respondent blocks both him and his mother on her phone. At this point, he contacts his local police. He does not, however, seek Susanna's return

insofar as we can tell from their response to him, the only document he has exhibited. He does not contact the Respondent's mother, nor does he share her details with police, nor does he tell them of their plan to settle in Ireland.

7.24 The Applicant has exhibited a message from the Respondent's mother to him which she sent in September of 2022. This was 11 months after he left Spain. While he relies on this to show that the Respondent is influenced by her mother, the fact of the message also establishes three things: First, the Applicant was in contact with this woman in late 2022. Second, at that time, as the terms of the message make clear, she was in contact with, and was making decisions for, if not with, her daughter. In other words, it must have been obvious that either Susanna was with her, or she knew where the child was. Third, he did not respond to her request that he tell her, directly, what he wanted.

7.25 There is no evidence that he advised anyone in law enforcement or in the Central Authority of his country of origin of her number or details. This was the intended destination of the family in 2021. Yet in 2022, Interpol searches are launched in Greece and this Court has limited information as to what Interpol was told. It was 2023 before there was a search in Ireland for Susanna, at which point the Applicant is able to provide the name, address and contact details for her mother to the Irish Central Authority in his application for summary return.

7.26 The Applicant, understandably, relies heavily on the Respondent's lies to the police and to international investigators in Athens. The Respondent has accepted that she lied about being in Germany when asked in April 2022. In November 2022, the Applicant's lawyers have noted claims that she told Interpol in Athens that she was going, via Sofia, to the Applicant's home. Instead, she went via Sofia to Turkey, from whence she flew to Ireland. Contrary to the Applicant's submission, however, I do not accept that this



confirms that she was aware there was an agreement to return. Nor does it assist the Applicant in establishing that he made any attempt to achieve the return of his daughter by asking either the Respondent or her mother for Susanna's return. The evidence, including all the texts he has exhibited, confirm that he did not request her return.

- 7.27 Events in Athens post-date the Applicant's departure from Spain by over a year. At that point, the only application for the return of the child was in Germany and the Respondent was not aware that he had sought her return. While she may have feared it, he had not in fact requested it at any point, either to her or to her mother when asked to tell her directly what he wanted. The Applicant maintains that he did not know where Susanna was and, strictly speaking, this is so. However, the contemporaneous texts from October 2021 to March 2022 and the follow up text from the Respondent's mother in September 2022 make it likely that the Applicant knew where the Respondent was going and knew how to contact her if he needed to do so. There is no evidence that the Applicant told the Respondent or her mother that he wanted Susanna back in his custody. The tenor of the messages throughout is that he misses Susanna but has ceded custody to his wife. He wants to remain married but has not requested that his daughter return.
- 7.28 The submission was made that the Respondent could not credibly claim asylum from the Applicant while travelling with the Applicant. The substance of her asylum claim is not relevant to these proceedings given the findings of fact listed above. It is inappropriate to comment in more detail, but it may be helpful to note that it is a common feature of domestic violence cases that the victim does not tell anyone what is happening in the couple's private life. I am not making any finding of fact as to whether that was the situation in this case.

## 8. Consequences of the Findings of Fact

- 8.1 The Applicant willingly agreed to go to Ireland with the Respondent, and both probably intended to settle here for an appreciable length of time. It is less likely that the couple hoped to get work to pay off debts and then return to the country of origin. The Applicant argues that there was no right of asylum for him and it is unlikely that he would have agreed to this as there was no lawful basis for him to enter Ireland. Given the cogent evidence of their intentions to travel here nonetheless, the averments on both sides, the exhibits showing the Respondent's mother's financial aid, and the relatively haphazard nature of the various trips taken in furtherance of their objective, this couple was determined to get here and the Applicant was not, in my view, considering the implications of his legal status. The impediment of having no other work visa did not stop him leaving Poland, the only country in which the Applicant could lawfully work, within days. It seems probable that the couple intended to join the Respondent's mother, try to obtain employment and regularise their status once they had arrived here.
- 8.2 The evidence of the circumstances in which the Applicant decided to return home has led me to the conclusion that there was an argument, and that there was no agreement that the Respondent would follow him. While it is clear that he wanted his family to reunite at some point and that he loves his daughter, there is no evidence of any agreement that she follow him, and the Respondent continued with the family's plan to go to Ireland.
- 8.3 The legal consequences of these findings of fact are that the parties left home with their daughter by agreement. They travelled to Spain but failed to get to Ireland as soon as planned. The agreement broke down in Spain insofar as the Applicant decided he no longer wanted to go to Ireland. Instead of working out a new agreement, or attempting to do so, he left his family (with friends of a friend of her mother's) in Spain and, thereafter, texted her

and called, in the hope of persuading her to remain married. He did not ask for the return of his child, nor did he apply in Spain or in his country of origin for custody of or access to the child. None of his texts refers to any such measures, other than saying he did not want “to take any step”, which could mean a legal or police route to enforcing her return. He did not take any step until June of 2022, and that step was never referred to again in any correspondence or communication with the Respondent or her mother.

- 8.4 For the Respondent to retain Susanna in Spain and travel on to Ireland in these circumstances does not amount to a wrongful removal or retention. While, clearly, he wanted to remain married, there is no evidence of his having made any reference to where she or Susanna should live. At no point in 2021 or early 2022, although in contact with the Respondent, does he request that the child be brought back, or alert them as to legal proceedings.
- 8.5 In the circumstances, there is no question of the Respondent seeking consent to remaining in Spain or moving to a new home. Nor is the issue one of habitual residence. The family moved, as a unit, to Spain where the Applicant left the unit. There was agreement that they would abandon their habitual residence for a settled purpose, to reside in Ireland.
- 8.6 In paragraph 9 of his first affidavit, the Applicant states: *I strongly refute the averment made by the Respondent that I returned to [his country of origin] knowing that the Respondent was intending to make further attempts to gain entry into Ireland with [Susanna].* He states that they had agreed that he would return first to find a job and that the Respondent and their daughter would join him at home two weeks later. He concludes that paragraph by saying that he trusted the Respondent and expected her to return with Susanna.
- 8.7 In paragraph 10, he recounts that the Respondent left Spain with Susanna as early as 2<sup>nd</sup> November, 2021. After that, he says the Respondent did not

disclose her location to anyone and took Susanna from country to country before entering Ireland a year later. He says that this was done without informing him or obtaining his consent. He was blocked by the Respondent on her phone and social network applications on the 17th of March 2022, his mother was blocked the following week. He offers no explanation for his texts, throughout the previous 6 months to that date, in which he remains in regular contact, but never seeks Susanna's return, nor does he refer to his message from her mother in September 2022 in this context.

8.8 The affidavits and the exhibits, the text messages, in particular, persuade me that the Applicant left Spain without having asked that either the Respondent or their daughter follow him. He characterises the choices for the Court as being one of accepting his version, an agreement, or the Respondent's version, an argument, but he adds that her version of his departure could not be true as it would suggest he knew that they would travel on to Ireland and he would never have agreed to that. Given that he had, in my view, always intended this, and that it is consistent with all his later texts I am satisfied that, while he missed her, he had consented to his daughter going to Ireland and to staying there for an indeterminate time.

8.9 Even though they left Spain only a couple of weeks after him, while asking the Respondent to reunite with him and seeking regular calls with Susanna, the Applicant does not seek her return or any legal involvement at that time. There is no attempt to seek the return of Susanna between October 2021 and March 2022, when his phone is blocked. This is consistent with his averment that he wanted to be with the Respondent and his daughter but is also consistent with her version of events in which she threatened to call the police and he is hoping to persuade her to reconsider. A month after his number is blocked, in April, local police contact the Respondent and are reassured (falsely) that she is in Germany. The only evidence of a request

that she return Susanna is the exhibit of his application to the German Central Authority which does not mention any connection with Ireland, let alone any intention to travel there or contact details of the Respondent's family there. There is no evidence that the Applicant contacted the Respondent's mother or advised Interpol or his local police about her mother at that time, though he has her contact details and, even before the text of September 2022, as a matter of common sense, he must have known that she would know where Susanna was living.

- 8.10 There are multiple averments and exhibits addressed to other issues in the case and none of these arise on the facts if, as the Court has found, there was no wrongful removal or retention. This is a necessary proof for the Applicant in order to succeed. He has not proved wrongful removal or retention in October or November of 2021. As repeatedly noted above, there is no reference to an agreement that they would follow or any request that the child be returned to him. If, as this Court has found as a fact, there was no such agreement and the Applicant left his family without making any arrangements for them to reunite, then there was no reason under the Hague Convention to prevent the Respondent from bringing her child to any other country, including Ireland, and the Applicant is not entitled to a summary return of Susanna.

## **9. Acquiescence and Habitual Residence**

- 9.1 The argument made to the Court was that the child was wrongfully retained in November of 2021. If, however, the appropriate date was March of 2022, the Court must re-examine the facts in the relevant period. If that date is the date on which his custody rights were breached, the Court must consider his arguments on the basis that he has misrepresented what happened in

Spain, has probably misled Greek authorities about the intentions of the family and the presence of the Respondent's mother in Ireland and nonetheless, the Applicant asks the Court to accept that he made genuine attempts from March of 2022 to achieve the return of his daughter.

9.2 The Applicant first approached the police in this regard on 21<sup>st</sup> April of 2022. As noted, we do not know the terms of his complaint, just their response after they had spoken to the Respondent. She appears to have retained her phone and only the Applicant and his mother were blocked. In June of 2022 the Applicant made his application to German authorities for Susanna's return based on the Respondent's false statement that she was there. But this is not exhibited. By June, the earliest evidence of any request for her return, Susanna had been living in Greece for over 6 months and had left her erstwhile home 10 months before, with both parents, then bound for Ireland. The only exhibits that address this are in the affidavit of Ms. Brophy, at GB 7 and 8, in which there is no request for return of Susanna but an exchange of information about Susanna having crossed the border (which the Applicant knew, because he was with her) and the response from his local police that they had spoken to the Respondent on her WhatsApp number, provided by the Applicant to them to make that contact.

9.3 In September 2022, the Respondent's mother's message arrives. The Applicant's argument in respect of this was to say that he did not take the text messages as an offer to facilitate contact or a genuine offer to maintain his relationship with Susanna. Instead, he sought to secure her return through internal and international legal mechanisms. In any event, his submission continues, the Respondent's mother was in Ireland at that time while the Respondent and Susanna were in different countries of which Spain and Greece are only two. He concludes that it was not in the Respondent's mother's power to facilitate contact between him and

Susanna. It is difficult to accept the claim that his search was genuine. In particular, his averment that he did not know where they were. It was more likely that they were with her, or still on their way to her, than anywhere else and that she knew where they were. If he had sought Susanna, a genuine search would start with the Respondent's mother.

- 9.4 This argument also ignores the plain words of her message which clearly asked the Applicant to tell the sender what he wanted. The Applicant did not respond to this saying that he wanted his daughter back. There is no evidence that he passed on this woman's contact details in his search for his daughter. He refers only to his wish to facilitate contact or to maintain his relationship. These factors undermine his submission to the effect that he was doing everything he could to secure the return of his daughter and casts a new light on his application to German authorities.

## **10. Delay**

- 10.1 The Applicant meets the defence of delay explaining that the time between November 2021, which he posits as the date of retention, and the application in February 2023, is explained by the subterfuge of the Respondent.
- 10.2 This argument is unsustainable in light of the findings of fact above. For the first 6 months of that period, he was in direct contact with her. There is no doubt that the Respondent engaged in subterfuge but equally no doubt that she retained her phone and that her mother was contactable at all times. It is almost inexplicable that the Applicant did not ask, at any time, for Susanna to be returned to him until he went to the authorities in Germany with a request in June of 2022 but even then, Ireland was not mentioned. The only conclusion which can shed light on this omission is that the Applicant was reluctant to mention the true purpose of the trip, which, in the circumstances of his leaving Spain, created a fatal weakness in his case.

10.3 A summary return is only required if the retention was wrongful. It is difficult to characterise the continued travels of this Respondent as a wrongful retention in circumstances where no request was made to her, even via her mother, by the Applicant, for the return of the child.

### **11. Custody Rights, Settled Purpose and Later Date of Retention**

11.1 The Applicant submits that the cases of *M.J.T. v C.C.* [2014] IEHC 196 and *N.J. v. E.O'D* [2018] IEHC 662 are relevant and that the bar is a low one when it comes to evaluating the relationships and actions which might establish that a parent was exercising custody rights.

11.2 The facts of these cases are wholly different to those in the present case. Here, the issue revolves around an argument which arose during a journey which both parents undertook, having left their home voluntarily and probably with the intention of settling for a significant period of time in Ireland. In that situation, what is at issue is the agreement between the parents and not whether the Applicant was exercising custody rights. For the avoidance of doubt, it appears that this Applicant did exercise his custody rights both before leaving Spain and, in seeking to maintain a relationship with Susanna in the subsequent months, afterwards also.

11.3 The Applicant did not emphasise, in oral or written submissions, the possibility of a retention date in March of 2022, having focused on the November date but insofar as it was dealt with, the main thrust of the submissions was that the Respondent and child remained peripatetic in late 2021 and 2022 and, under these circumstances, she remained habitually resident in her country of origin where her father and his family remained, and where she had grown up. Counsel submitted, correctly, that the Convention leans against finding that the child had no habitual residence.



- 11.4 The Respondent relies on *A.S. v. C.S.* [2010] 1 I.R. 371, as support for the proposition that Susanna lost her habitual residence quickly. There, the parties brought their daughter from Australia to Ireland. The father committed to being here for up to a year in the hope of finding employment. The relationship broke down quickly and he returned home after less than two months. The Supreme Court held that this small child had not lost her habitual residence in Australia, a finding based partly on the mixed intentions of the parties when they left home. That applicant retained his employment and had significant possessions in Australia. Their stay here was contingent, brief and insufficient to establish a new habitual residence.
- 11.5 To paraphrase the findings of Macken J., at paragraphs 25 and 26, delivering the judgment of the Court, the Convention does not provide for courts to decide which is the more appropriate parent or jurisdiction for a child but ensures that she is returned to her home if there is a wrongful retention, so that such decisions can be made. A child of 14 months, as in that case, shared, with few exceptions, the habitual residence of her parents.
- 11.6 Macken J. went on to consider the case of a voluntary trip abroad. Where parents agree to abandon their habitual residence, she noted that this is sufficient for a child to lose habitual residence. Having confirmed that, as is well established, the question of habitual residence is a question of fact, the judgment continues, at paragraph 42, as follows:

*Secondly, there is an important distinction between the loss of an habitual residence and the acquisition of a substitute. A person may cease to be habitually resident in a single day if he quits the country with a settled intention not to return but to take up habitual residence elsewhere. By contrast habitual residence in the second country is not acquired on arrival but only after a period that demonstrates that the residence has become habitual and is likely to continue to be habitual depending upon the relevant facts and circumstances. The period of residence after arrival may be brief but it still must be appreciable.*

- 11.7 In the course of her judgment, Macken J. also considered the cases in which a couple agree to a temporary but settled relocation. At paragraphs 49 to 52 of that judgment, Macken J. confirms that the considerations of permanence which apply when considering domicile do not apply when considering the issue of habitual residence. In the latter case, the courts should look at the intentions of the parties and whether or not they have a joint, settled purpose. If this is only to reside somewhere on a temporary basis, this may not change their habitual residence or that of the child.
- 11.8 Here, the Respondent has always maintained that she never intended to return, but the Applicant contests this stating that he left his home only to pay off debts. He also contends that he only left Spain on condition that they would follow. This Court has already outlined why the Respondent's account of both these events is more likely, including not just the Respondent's intention but the Applicant's initial intention to reside in Ireland and his acquiescence in the family continuing their journey.
- 11.9 The Applicant, initially, did not agree that the destination for this couple was Ireland although later averments concede as much. The Applicant maintained his position that the purpose of the trip was to find temporary work, starting in Poland. I have rehearsed all the relevant arguments above and explained why I prefer the account of the Respondent. There is very little evidence of any intention to return and ample evidence of the couple's determination to reach Ireland, expending considerable efforts to do so. The Applicant acknowledges that they did not own their home, but states that the rooms they rented from his parents remained available. There is no exhibit in respect of any other property. While the Respondent co-owned property, there is no such evidence in respect of the Applicant. There was no suggestion that the property was her residence. The fact that she did not sell this property, is not, in the face of all the other evidence, sufficient to persuade me that she was planning to return in the medium or long term.

- 11.10 The Respondent explains that they did not want to draw attention to their long term plans. There is no evidence of changing, or indeed of existing, bank accounts or medical records for the family. The averment about drawing attention to their trip explains this but I note that the Applicant has few exhibits to support his averments that this was a short term plan.
- 11.11 The Applicant's work records, instead of supporting his averment that he had not left his employment, highlight the precarious nature of that job. When he returned, his work records show that he did not recommence work until December. When one considers the amount of money expended in their travels at that point, let alone any debt that he has averred was the reason for the trip, the Applicant has gone back to a much worse financial situation than the one he left.
- 11.12 There is one exception which the Applicant relies upon: he avers that they did not take Susanna's name off the register for her pre-school before they left and the school confirmed this in a letter dated May of 2022. The difficulty is that this period of enrolment is not specified. It may have begun as the family left the country. The Respondent submits that enrolment was from September to June of 2021 - 2022. It is not likely that this family would have returned, even if their first attempt to reach Ireland succeeded, within months. This trip had the hallmarks of a long-term plan. The enrolment does not disturb my conclusions as to the probable intentions of this family.
- 11.13 The Applicant avers that the trip was purpose specific. This is unlikely to be correct, for the reasons set out in full elsewhere in this judgment. The couple probably intended to reside here for an appreciable time, to justify their efforts to get here and due to the expected support from family here.
- 11.14 Insofar as this affects Susanna's habitual residence, it leads to the conclusion that, the settled purpose having been to live in Ireland even if that was contingent on finding jobs, they left their home not intending to return and abandoned their habitual residence there at that point. It is difficult to see

how the Applicant could unilaterally re-establish his daughter's habitual residence there 6 weeks later by the act of returning there without any agreement with the Respondent and without a request that Susanna return.

11.15 This argument applies with equal force to the position in March, 2022. Again, without any agreement and in circumstances where he has still not requested her return, the Applicant could not unilaterally re-establish Susanna's habitual residence in her country of origin over 6 months after she had left that country with both parents, intending to move to Ireland.

11.16 In most cases where habitual residence falls to be decided, the courts must examine the integration of the child and the comprehensive list of factors summarised by Whelan J. in *Hampshire County Council v E* [2020] IECA 100. Here, however, the evidence has led me to conclude that their habitual residence was voluntarily abandoned by the family in September of 2021. It was June of 2022 when there is evidence that the Applicant first formally sought Susanna's return but that application is made without reference to some essential factors. By then, she may have been habitually resident in Greece, but even if not, she had long been absent from her home country, in the company of her mother, with the consent of her father. The facts do not support a re-establishment of her habitual residence in the interim period merely because her father returned there or even when the Respondent made it difficult for him to contact her.

11.17 Similarly, I was invited to compare the length of time Susanna spent in Greece to the length of time she spent in her country of origin. Again, this does not arise on the facts of this case due to her parents' settled intention to leave that country when her habitual residence was, largely, determined by their intentions. Since that trip began, wherever Susanna was habitually resident (and there is evidence to support the Respondent's argument that it was in Greece), it was not in her former home.

11.18 Submissions were also made to the effect that Ireland could not be the child's habitual residence, even now, due to the uncertain legal status of Susanna and the Respondent. While this does not here arise due to the conclusions set out above, as the question is so clearly a question of fact, peculiar to the child's experience, I doubt that this general proposition is correct. A child may integrate well and set down roots even without achieving formal legal status. The test is not to establish a permanent or even necessarily a secure home, but to show habitual residence by establishing sufficient duration of stay with relevant social and family ties.

11.19 In the proceedings *Re A*, Case C-523/07, the Third Chamber confirmed Advocate General Kokott's opinion, at paragraph 43:

*However, 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, and if Article 12 of the Regulation, which concerns the jurisdiction of the national courts with respect to questions relating to parental responsibility where those questions are related to an application for divorce, legal separation or marriage annulment, is not applicable, 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.*

11.20 As Murray J. explained in *A.K. v U.S.* [2022] IECA 65, a court should look at previous residence but the more significant facts are of ties and integration at the relevant time of enquiry, not the child's historical links with a country. If there was an agreed move, even to Spain on their way here, none of them was habitually resident in their country of origin from the date of departure. Indeed, in oral submissions, Counsel for the Applicant submitted that had there been a dispute about custody in Spain, litigation should have taken place there. Her instructions remained, however, that the Applicant's wife had agreed to follow him, with Susanna, but had not done so, hence there was a wrongful retention. As the Court cannot find sufficient evidence to

support this, and the evidence to support the Respondent's position is set out above, my conclusion is that the Applicant ought to have gone to court in Spain rather than leaving with no new agreement as to custody.

11.21 While it is clear that the Convention anticipates that a child will almost invariably have a State of habitual residence, rather than be without one, insofar as it must be decided at all, and in my view it does not, it seems more likely that the child's habitual residence was Greece by June of 2022 than anywhere else. This is due to the child's physical presence there for many months, the evidence of her happy life and friends there, and even bearing in mind that their stay there was one the Respondent hoped would be temporary as they made their way to Ireland. As it proved to be.

11.22 The Respondent relied on *A.S. v M.S.* [2008] 2 I.R. 341 and cited paragraphs 61 to 64 of that judgment where Finlay Geoghegan J. explored the position of an applicant mother who had consented to the child living with her father in England for an indefinite period. In those circumstances, there was no wrongful retention when he refused to return the child although the child did remain habitually resident in Poland. This conclusion followed from the findings of fact (at paragraph 66) that there was no settled intention that the child live in England as a long-term arrangement, that applicant withdrew her consent to the child living in England and she communicated that withdrawal to the father, who refused to return the child. As she had changed her mind as to the arrangement, it was incumbent on her to reach a new agreement or to apply to the relevant custody court, in Poland, where the child was still habitually resident on those facts.

11.23 This compares with the facts here but, in a crucial distinction, both parents left their home with the settled intention of moving to Ireland, even if not permanently. The Applicant, having agreed to travel to Ireland and to stay there indefinitely, abandoned that plan but without making a new

arrangement. When he did not request her return, he agreed, at least tacitly, that Susanna would travel on to Ireland with the Respondent.

11.24 Finlay Geoghegan J. held, in *M.S.*, that the parent who wants to change a custody agreement should, if they cannot reach a new agreement, make a court application, not a summary application for return such as this one. This Applicant did not try to reach a new agreement, nor did he make a custody application in Georgia or in Spain.

11.25 The Applicant here has relied on an agreement for which I cannot find evidential support. He has also argued that the date of retention was November 2021, which argument cannot succeed based on the probable facts as found. If he later changed his mind, his first act should have been to tell the Respondent this and at least ask her to return with her daughter or send her home and, if he could not reach agreement, to apply to the court in which his child was habitually resident or physically present.

11.26 While the Applicant has argued that he did not know the whereabouts of his child for the second half of 2022, he did have the means to gain this knowledge and there is no evidence that he shared this with any relevant authorities until the application to Ireland in 2023.

## **12. Grave Risk and the Asylum Process**

12.1 The Respondent argued that if a wrongful retention was established, the child would be at grave risk if returned to the country of origin.

12.2 The Respondent set out a lengthy history of alleged abuse and coercive control by the Applicant. Given that he has not satisfied the Court that there was a wrongful retention in this case, the matter of a defence does not arise, and it is unnecessary to make findings of fact in this regard.

12.3 Similarly, it is not necessary to make any findings in respect of claims regarding the family members of the Applicant or the Respondent and their respective relationships with the parties. Much of the affidavit evidence and many exhibits addressed specific allegations against various family members. Only the evidence referred to above, which is relevant to the purpose of the family's trip, how the couple parted in 2021, and their intentions thereafter, is pertinent given that this evidence has led to a conclusion on the issue of retention of the child which precludes any decision on the issue of grave risk. All other matters, even those that might affect a view on credibility, are not sufficiently relevant to the key issues to require findings of fact, particularly given the cogent evidence available on those issues, as set out in detail above.

12.4 The issue of the outstanding asylum application is relevant to this question. In that application, the Respondent has argued that she was subjected to violence during the marriage and she submitted to this Court that the Hague Convention application should be heard first so that, if there was a conflict arising from the applications, the asylum process could be informed by findings of this Court. There are few such findings of fact, given the conclusions reached. There is now no barrier to the finalisation of the asylum process and little risk that there will be conflicting findings as to whether or not there was violence to, or coercive control of, the Respondent such as to justify her request for protection. The only potentially relevant fact-finding is in respect of the narrow issue of what occurred in Spain.

12.5 There are many other allegations made by both parties. These refer to matters before the parties began their travels in 2021 and in the aftermath of the Applicant's return home and include issues in relation to wider family and their knowledge of events. It is inappropriate to offer any view



as to their credibility in a judgment where such findings are not necessary in order to reach the conclusion to refuse the summary return of the child.

- 12.6 There were submissions as to the procedural effects of cross-applications such as this one, where one party seeks the return of a child who is the subject matter of an asylum application by the Respondent in the summary proceedings. Both parties submitted relevant case law, and it was extremely helpful to note the procedural guidance in this regard. Should the asylum application be heard in the High Court, the matter should be listed before this Court for hearing.

### 13. **Conclusions**

- 13.1 The Applicant has not shown that there was a wrongful retention of his child. He agreed that the family would leave their country of origin and later changed his mind and returned home. He made no arrangement as to what would happen to his daughter but wanted to stay in touch with her and did so until the Respondent blocked his phone. He did not explore any other method of contact, he did not ask for her return at any point and, although he knew they were bound for Ireland, he did not disclose this to authorities in his home and there is no evidence that other agencies or authorities were given this information. If he wanted custody of his daughter, he should have reached agreement with the Respondent or applied to a court for custody. He has not established that he is entitled to a summary return.
- 13.2 It is not necessary to make findings of fact on the issue of grave risk.
- 13.3 If an asylum application by the Respondent proceeds to the High Court, that matter should be listed before this Court.