

THE HIGH COURT

FAMILY LAW

[2023] IEHC 182

[2022 No.24 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 PAWEL, A MINOR

(CHILD ABDUCTION: HABITUAL RESIDENCE, VIEWS OF THE CHILD)

BETWEEN:

M.

APPLICANT

AND

M.

RESPONDENT

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

**1. Introduction**

1.1 The Applicant seeks the return of his son, called Pawel for the purposes of this judgment, to Poland. Pawel is in his mid-teens and has lived in Poland and in Ireland. His parents, the parties, are both Polish. The Applicant now lives in

Poland with his partner and their child, and the Respondent mother lives in Ireland with her partner and their child, so Pawel has a sibling in each country.

- 1.2 In accordance with the Hague Convention and the Brussels II b Regulation, which govern the abduction of children: if the child has been retained in Ireland without the consent of his father, if his father has and was exercising custody rights in respect of Pawel, and if the application was made within a year, the Court must return him as soon as possible so that the courts in Poland can decide on custody and access arrangements if the parties cannot agree on these matters.
- 1.3 The Respondent argues that Pawel was not habitually resident in Poland at the relevant time and she also submits that he objects to being returned, on which basis, she argues, the Court should exercise its discretion not to return him.

## **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 swiftly. The courts where the child lives and where social welfare, school and medical records are held and witnesses are available can make decisions about the child's welfare with the best and most recent information. The Hague Convention ensures comity between signatory states and bolsters the rule of law generally, providing an effective, speedy 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. Two vital policy objectives for signatory states are, firstly, vindicating the rights of the child in respect of her relationships with both parents

and, secondly, vindicating the custody rights of a parent where a co-parent moves to another jurisdiction, taking the child from his habitual residence.

- 2.3 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. If he succeeds in establishing these matters, the burden then shifts to the respondent if she has raised a relevant defence. There is no issue here in respect of the exercise of rights of custody and, the application having been made within a year of the child's removal, the Court is required to return Pawel unless one or both of the issues raised, habitual residence and the child's objection, are decided in favour of the Respondent.

### **3. Habitual Residence**

- 3.1 This is a question of fact and the factors which the Court must take into account have been canvassed in many recent cases and are authoritatively listed in *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. 1-14309. In *Hampshire County Council v. CE and NE* [2020] IECA 100, at paragraph 77, Whelan J. listed the key factors in identifying where a child is habitually resident, referring 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.
- 3.2 The parties in this case, having married and settled in Ireland, separated some years ago. In 2021, the Applicant relocated to Poland, with his partner and their baby. Similarly, the Respondent has a child with her partner in Ireland. The Respondent's mother lived in Poland and, in 2021, the Respondent made arrangements to travel there with Pawel as her mother was unwell. Her partner and other son did not leave Ireland. This alone suggests that her intention was not to relocate to Poland, which she confirms. In respect of Pawel, however, he was enrolled in a school near the Respondent's mother's home.
- 3.3 From mid-2021 until February of 2022, Pawel had an uninterrupted stay in Poland, amounting to 7 months in total. He visited Ireland from February until at least the

end of April 2022, travelling back to Poland in time for a baptism on the 7th of May. From the date of his return in May, he remained in Poland until August, which amounts to another 4 months. That period, all else being equal, reflects an adequate degree of permanence.

3.4 The reasons for Pawel's stay in Poland are significant. The Applicant submits that there was an agreement between the parties that they would permanently move there and that this is supported by Pawel being registered in a Polish school. There appears to have been no intention for the Respondent to move to Poland permanently, however. Exhibit GB 6 is a confirmation, dated 9<sup>th</sup> September 2021, and signed by the Respondent, that Pawel lives in Krakow. Exhibit GB 7 is the parties' application for home schooling in respect of Pawel. The application was made on the same date: 9<sup>th</sup> of September, 2021. The Respondent claims that the child was only moving to Poland because she expected to be spending more time there with her mother, who had been unwell. The Respondent's mother died, sadly sooner than she had expected, in October 2021, the following month.

3.5 It is agreed that his parents had wanted Pawel to be home schooled. This fact indicates an intention that the move would be a more permanent relocation for Pawel than for his mother. The Respondent confirms at her affidavit, at paragraph 11, that she intended that her child stay in Poland so that she could look after her mum and that her mother's death changed the circumstances. However, she did move Pawel to Poland, she did not put a time limit on the move, and there is no averment that the relocation was event specific. The Respondent also argues that she was misled by the Applicant and had not understood that home-schooling was available in Ireland. Whether misled or not, the decision that he would avail of that school programme indicates a decision that he would relocate to Poland. The Respondent's reasons for agreeing, even if she was misled, are no longer relevant to the question of where Pawel was habitually resident in 2022.

3.6 While the Respondent's intention may have been to stay only while she could assist her mother, she enrolled the child in a Polish school. The Applicant did not understand that this move was related to or dependent on the Respondent's

mother and her condition. He notes, correctly, that when she died unexpectedly soon in October 2021, Pawel did not move back to Ireland. The Respondent avers she did not want to interrupt Pawel's schooling at that point, but his term had just begun, the previous month, in September. This confirms the Court's view: Pawel was habitually resident in Poland at that time.

3.7 A number of other factors must be considered in deciding where the child was resident in August 2022: The child visits both countries regularly; the family has strong roots in both countries; both parties are Polish citizens; the child is Polish. There was some debate about his entitlement to Irish citizenship but what is more important in an investigation of the relevant facts, in this Court's view, is that no such application has been made and he has a Polish passport.

3.8 The linguistic skills of the child are of limited assistance as Pawel speaks Polish and English fluently. Texts from his parents are in Polish, it is his mother tongue and Polish is spoken in both homes. However, and probably due to his more recent schooling having been in Ireland, through English, he is currently struggling with having to study various subjects in Polish. From maths to geography, one can readily appreciate that this requires a different level of fluency than might be required in the family home.

3.9 The social integration of a child can determine a child's true centre of interests. Here, there are clear signs of integration in both places. Pawel's mother and younger brother are in Ireland, but all of his extended family are from Poland and he clearly has strong family ties in both places. He is close to his grandfather, the Applicant's partner and his young sister in Poland, but also to his brother in Ireland and the Respondent's partner. There are letters appended to the affidavit which indicate that the boy's grandfather considered the family were now in Poland permanently, likewise the Applicant's partner was surprised by the removal of the child. Since the views of the Grandparent and partner are likely simply to reflect the view of the Applicant, rather than being independent proof of intention, the Court can attach relatively little weight to the letters, but they provide some support for the proposition that the Applicant's view was genuinely

held. There is evidence of Pawel having few friends in Poland which, according to the Applicant, was due to his having been home-schooled.

3.10 Finally, and as a matter of common sense and in accordance with the relevant law, a young child's place of habitual residence will depend to a large extent on his parents but with an older child, he has his own centre of interests which may differ from either, or even both parents.

3.11 While I accept what the mother now says, that had she known this could be done from Ireland she would have enrolled him here, that does not alter the fact that he was enrolled in Poland at a time when she expected to be in Poland for an indeterminate time. Pawel was due to begin at school in person last September, when he would, in the ordinary course, have had a much better chance of settling in and making friends. Unfortunately, he has remained in Ireland for the beginning of that school year.

3.12 The Applicant confirms, at paragraph 22 of his affidavit, that Pawel packed only his summer clothes in August 2022 for his trip to Ireland, and that most of his belongings remain in Poland. In exhibit NM5, the Court has read an exchange of messages between the parties. As these were contemporaneous, the Court places some weight on them and considers them a reliable source of information about what the parties intended at that time. The exchange makes it clear that the Applicant intends travelling to Ireland to retrieve his son and the Respondent insists that he must bring his passport with him, which appears to mean that she wants the child's passport which the Applicant has. This provides mild support for the view that Pawel had relocated to Poland, where his passport was kept.

3.13 Similarly, there is an exchange of messages in August 2022 at exhibit GB9. This suggests, in the court's view, that while the Respondent was taking the child to Ireland, the Applicant understood that he would be returning to Poland. While the Respondent seeks to persuade him to let Pawel finish school in Ireland, the Applicant refuses to consider this. The thrust of this exchange provides further support that there was no agreement that Pawel return to Ireland, either in August

or subsequently. It appears that the Respondent was aware that the plan was for Pawel to remain at school in Poland.

- 3.14 On balance, in the Court's view, Pawel changed his habitual residence from Ireland to Poland in September 2021. Had this been a temporary change, he would have moved back to Ireland with his mum when her mother died. Further support for this view can be found in the assessment of the child's views. In this report, the assessor notes that Pawel understood that he had lived in Ireland until July 2021, when he moved to Poland. This was not a temporary stay in his own or in the Applicant's view. If the Respondent thought otherwise, she did not share it with the Applicant and indicated that the child would finish his schooling in Poland. These factors point strongly to Poland as being the child's habitual residence by August of 2022. Residence need not be permanent to be habitual. Poland was where Pawel lived, went to school and that country was where he expected to stay at least in the medium term.

#### **4. Views of the Child**

- 4.1 Again, the law in this respect is well settled. In short, the Court retains a discretion not to return if a child objects to that outcome. In such a case the child must be mature enough and the objection sufficiently strong and cogent that the Court should act upon the objection even after balancing the child's view against the main objectives of the Convention, which tend to favour immediate return.
- 4.2 An independent Clinical Psychologist was appointed as the Court Assessor. He met Pawel last month and prepared a report setting out their views. The Court is always concerned to take the views of a child into account and does consider that the maturity of the child, as set out by the assessor, coupled with the child's age, make it incumbent on me to consider this objection carefully. On the 3-stage test applicable, firstly, it is the Court's view that Pawel has an objection to returning, albeit one that is mildly expressed. He does not want to have to make new friends again and would prefer to remain in Ireland. While this is not a direct objection to living in Poland, his comment that he is finding studying in Polish more difficult

is so related to living in the country that his overall view amounts to an objection within the meaning of the Regulation, in my view.

- 4.3 The word “objection” imports strong feelings as opposed to a statement of preference, to use the words of Whelan J. in *J.V. v. Q.I.* [2020] IECA 302 (para. 69). Pawel’s views, as recounted to the assessor amount to an objection, rather than a preference, as a matter of plain meaning. It is not simply that he would prefer to remain here, his responses indicate an objection to returning and are based on specific difficulties in language and the anticipated loss of friends. He comments also on family dynamics in Poland being more difficult in some respects.
- 4.4 I do not accept that the report suggests that he was coached. Not only has the assessor discounted this possibility, but the concerns expressed by Pawel are quintessentially those of a teenaged boy rather than those of his mother.
- 4.5 Pawel is now 15 and I take his views seriously as he is mature enough that the Court should afford them significant weight. The Court is required by law to balance these views with the important objectives of the Regulation which governs this case. While the Court must take account of Pawel’s views, this does not vest decision-making power in him; this would place an unfair burden on him.
- 4.6 Pawel’s stated objections to return and negative comments about living with the Applicant are relatively mild and not sufficient to outweigh the counter-balancing factors. In particular, the Court notes the objectives of the Regulation which include discouraging the removal of children to another jurisdiction without both parents’ consent. This is an important objective of the Regulation and is in the long-term interests of Pawel and of all children.
- 4.7 The important objective of ensuring mutual respect of laws in contracting states is also upheld by ordering the return of Pawel.

## **5. Conclusion**

- 5.1 Pawel must be returned to Poland where an application can be made to the relevant court if his parents cannot agree on where he is to live in the immediate



future. In a relatively short time, he can make this decision for himself but until then, this Court is required to order his return.