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*(subject to editorial corrections)**

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**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985**

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**Between:**

**VK and AK**

**Appellants;**

**-and-**

**CC**

**Respondent.**

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**Before: Morgan LCJ, Higgins LJ and Coghlin LJ**

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**MORGAN LCJ (delivering judgment of the Court)**

[1] This is an appeal by the grandparents, VK and AK, of KK against the decision of Maguire J given on 10 June 2013 refusing their application under the Child Abduction and Custody Act 1995 for the return of KK to Lithuania. It is the appellants' case that the child was wrongfully removed from their care in Lithuania by his mother, CC, and brought to live with her in Northern Ireland. Ms McBride QC appeared with Ms Connolly for the appellant, Mr Toner QC with Ms Lindsay for the respondent and Ms Keegan QC with Ms Murphy for the Official Solicitor representing the child. We are grateful to all counsel for their helpful written and oral submissions.

**Background**

[2] KK was born to the respondent in March 2005. The whereabouts of his father are unknown and he has played no part in the child's life to date. A short time after

KK's birth, he was left by the respondent in the care of his grandparents in Lithuania. The respondent says that this was to enable her to return to the army in which she was serving at the time. The appellants say that upon leaving KK with them, the respondent shortly afterwards left Lithuania for Northern Ireland. The respondent says that she left Lithuania after serving a further period in the army and began living in Northern Ireland in or about May 2006. Whatever is the correct version, KK, it appears, has continuously lived with the appellants from in or around the date of his birth until 12 March 2012.

[3] Between the date of his birth and March 2012, the learned trial judge concluded that although the respondent was in Northern Ireland and the appellants in Lithuania they had some measure of phone contact with each other. On one occasion the grandmother visited the respondent in Northern Ireland. Her recollection is that the visit occurred in 2006. The respondent visited the appellants for a week or so in late 2006 in Lithuania. The respondent sent money from time to time from Northern Ireland to her mother in Lithuania. There was a dispute between the grandmother and the mother about the extent to which the mother showed interest in the child during this period but the learned trial judge did not find it necessary to reach a conclusion on that disputed evidence.

[4] The respondent began a relationship with a new partner, ZT, sometime after 2005. They then set up home together in Northern Ireland. A daughter was born to them in Northern Ireland on 13 July 2010. The respondent and her partner travelled from Northern Ireland to Lithuania in or about February 2012 for the purpose of bringing KK to Northern Ireland. The respondent's account is that she took legal advice in Lithuania as to how, through the courts in Lithuania, she could gain custody of KK. She was told that legal proceedings would be protracted and costly and she decided to take matters into her own hands in order to bring the child to Northern Ireland.

[5] It is clear from the respondent's statement that she and her partner together abducted KK while the child was walking home from school with the grandmother. The respondent described a tug-of-war between the grandmother and her with both at the same time gripping KK. The respondent denies the grandmother's account which is rather more detailed. She said that a van drew up alongside her and the child and she heard the respondent's voice shouting, 'pull him, pull him'. A man jumped out of the van and grabbed KK. When she would not let him go, the van door was shut on her hand and she suffered injuries, which required hospital treatment. KK was transported via Slovakia, Germany, France and England back to Northern Ireland. Since arriving in Northern Ireland, he has been attending a local primary school. After a difficult start he appears to have settled down.

**The conclusions of the learned trial judge**

[6] The court was not provided with any material relating to the operation of Lithuanian law but on the basis of the material available to it, concluded that the likely position of KK was that at all material times between shortly after his birth and the date of abduction in 2012, the appellants were his carers and acted *in loco parentis*. At the very least they were his de facto carers. The position was formalised on 10 January 2007 when the grandmother was given temporary care (custody). On 28 February 2012 the temporary care order was discontinued and after that date until the abduction matters returned to where they had been.

[7] The court saw translated documents from Lithuania which showed:

(a) that the grandmother had been granted an authorisation by the respondent on 13 April 2005 to visit all medical institutions and hospitals with KK; and

(b) that on 20 April 2006, the respondent signed a power of attorney giving the grandmother authority to receive the passport of KK and to deal with legal and governmental institutions in respect of KK on the respondent's behalf. The power of attorney was stated to be valid until 20 April 2016.

[8] The question in this case was whether KK had been wrongfully removed for the purposes of Brussels II. The learned trial judge noted that there were conflicts in the relevant case law as to how to interpret rights of custody for Convention purposes and that the point had not arisen before in Northern Ireland. Following a line of authority beginning with In Re J (A Minor) (Abduction) [1990] 2 AC 562 and ending with the European Court of Justice's decision in McB v E [2011] Fam 364, the learned trial judge rejected the proposition that he should read the international provisions as including inchoate rights of custody. On the balance of probabilities the appellants failed to establish the existence of a right of custody at the relevant date, the date of the abduction. Accordingly, the removal of KK was not in breach of any legally recognised right of the appellants in Lithuanian law. There had not been an unlawful removal of KK by the respondent for the purpose of the provisions of the Hague Convention when read with Brussels II.

**The submissions of the parties**

[9] The parties are agreed that KK was habitually resident in Lithuania prior to his removal to Northern Ireland. As both the United Kingdom and Lithuania are Member States of the EU, the Court must determine whether there was a wrongful removal/retention in the sense of Article 2(11) of Brussels II which takes precedence in these circumstances over Article 3 of the Hague Convention. The parties are also

agreed that the approach to be taken is that set out in Hunter v Morrow (Abduction: Rights of Custody) [2005] FLR 1119:

> "[46] There is no longer any doubt as to the approach that a court should adopt when determining whether the removal or retention of a child is wrongful…the first task is to establish what rights, if any, the applicant had under the law of the State in which the child was habitually resident immediately before his or her removal or retention. I shall refer to this as "the domestic law question". This question is to be determined in accordance with the domestic law of that State. It involves deciding what rights are recognised by that law, and not as to how those rights are characterised…[t]he next question is whether those rights are properly to be characterised as "rights of custody" within the meaning of Arts 3 and 5 (b) of the Hague Convention. I shall refer to this as "the Convention question". This is a matter of international law and depends on the application of the autonomous meaning of the phrase "rights of custody". Where, as in the present case, an application is made in the courts in England and Wales, the autonomous meaning is determined in accordance with English law as the law of the court whose jurisdiction has been invoked under the Convention."

[10] The appellants' case was that they had duties relating to the care of the child as they had exclusive care of him and were responsible for all of his needs. Ms McBride submitted that the court should adopt the broad view of rights of custody identified by the majority of the court in Re B (A Minor) (Abduction) (1994) 2 FLR 249 when determining what was described in Hunter as the Convention question. It was submitted that in accordance with the definition in Article 2(9) Brussels II, the appellants exercised rights of custody at the time of the abduction.

[11] Wrongful removal as defined by Article 2(11) requires the rights of custody to be acquired by "judgment or by operation of law or by an agreement having legal effect under the law of the State where the child was habitually resident immediately before the removal or retention". At first instance Ms McBride conceded that there was no evidence before the court which would enable it to conclude that there was a judgment giving the grandparents rights in respect of KK in Lithuania and that there was no evidence to support the existence of an agreement having legal effect in Lithuania which bestowed rights of custody on the grandparents. The appellants' case proceeded on the basis that rights of custody had been conferred by law. In the

absence of any affidavit of laws that was always going to be a difficult case to make out.

[12] In this court Ms McBride submitted that the appellants had acquired rights of custody by agreement. She relied upon paragraph 70 of the Explanatory Report by Elisa Perez-Vera dealing with recommendations adopted by the 14th session in 1980 where the author says:

> "Lastly, custody rights may arise according to Article 3 by reason of an agreement having legal effect under the law of that State. In principle, the agreements in question may be simple private transactions between the parties concerned in the custody of their children. The condition that they have "legal effect" according to the law of the State of habitual residence was inserted during the 14th session and placed a requirement that it would have the "force of law", as stated in the preliminary draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has "a legal effect" in terms of particular law, it seems that there must be included within it any sort of agreement which was not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. It is therefore submitted that The Hague Convention is not concerned with legal rights under the law of habitual residence, but with rights which were actually being exercised and to which the Courts of that State would not totally disregard as having no legal effect within that State".

[13] It was submitted that the respondent's actions in granting authorisation to the grandmother to visit medical institutions and hospitals with the child and also the signed Power of Attorney amounted to an informal agreement which, although without force of law, the courts in Lithuania would not disregard in accordance with Perez-Vera's Explanatory Report. The respondent's assertion that she had been advised that legal proceedings would be very protracted and costly was also consistent with that submission.

[14] The respondent submitted that the appellants' argument that rights of custody were acquired by agreement was not made in the lower court where it was

conceded that there was no evidence to support the existence of an agreement with legal effect. The appellant concedes that any agreement was informal without force of law. The appellant is seeking an impermissible reading down of the words 'legal effect'. The answer to the domestic law question is that the appellants did not have rights under Lithuanian law at the time of removal of the child.

[15] It was also argued that the observation of the learned trial judge that McB v E 'appears to tie breach of Convention rights to the concept of breach of rights of custody in national law' was correct in light of Article 3 of the Convention. The application of the concept of inchoate rights necessarily involved the UK courts in deciding that sufficient rights existed for Convention purposes absent evidence of the existence of rights or even in the absence of rights as recognised in the state of habitual residence. This detachment of Convention rights from the law of the state of habitual residence was impermissible and was the fundamental flaw in the concept of inchoate rights.

[16] For the child the Official Solicitor noted that the proceedings had been commenced almost one year after the removal. The child had initially showed signs of disturbance when brought to Northern Ireland. He appeared to have been more settled recently. If he had to return a risk of disturbance was possible.

**Consideration**

[17] The Hague Convention on child abduction was incorporated into domestic law by the Child Abduction and Custody Act 1995. The Convention is complemented by the Brussels II Regulation (Council Regulation (EC) No 2201/2003) which takes precedence where EU member states are concerned. There is no dispute between the parties that this is a case which falls to be determined in accordance with Brussels II.

[18] The relevant provisions of Brussels II are Article 11(1) and definitions in Article 2(9) and (11):

> "Article 11
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> Return of the child
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> 1. Where a person…having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention…in order to obtain the return of the child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the

wrongful removal or retention, paragraphs 2 to 8 shall apply."

"Article 2

Definitions
….

9. The term "rights of custody" shall include rights and duties relating to the care of the child, and in particular the right to determine the child's place of residence.
…

11. The term "wrongful removal or retention" shall mean a child's removal or retention where

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."

The complementary provisions within the Hague Convention are Articles 12 and 3 which are materially similar.

[19] In light of the confusion over the status of the various orders in relation to the child in Lithuania we directed enquiries to be made after the hearing in order to establish the position in relation to the orders in force at the time of the abduction. The first order in respect of which we sought clarification was that dated 20 April 2006 which was a power of attorney granted by the mother to the grandmother giving the grandmother authority to receive the child's passport and to deal with all legal and governmental institutions. The mother issued a withdrawal of consent

dated 2 March 2012 as a result of which the power of attorney was no longer valid. It was not, therefore, in force on the date of the removal.

[20] The second order was that dated 10 January 2007 giving temporary care of the child to the grandmother. On 28 February 2012 that order was discontinued as a result of which there was no guardianship order in force on the date of the removal. It appeared, however, that the child had been receiving psychiatric attention while in Lithuania and it was recommended that he should visit the doctor once a week. The Child Rights Protection Service in the city in which the child resided with his grandparents arranged a temporary communication plan for the minor and grandparents to facilitate those visits. That was still in force on the date of the removal. Subsequent to the removal of the child the mother telephoned the Child Rights Protection Service and advised them that the child was now resident in Northern Ireland and that she would let the grandmother know.

[21] The line of authority supporting the view that inchoate rights of custody fall within the Hague Convention begins with the majority decision of the English Court of Appeal in Re B. That was a case in which an Australian father sought to have his abducted child returned to Australia from the United Kingdom, relying on the Hague Convention. The child was illegitimate and so it was argued that in no true sense did the father actually have rights of custody to the child in Australian law. Effectively, it had been submitted on behalf of the mother that the statute precluded the father's acquisition of such rights in Australia. The judge at first instance found that the father had no automatic custodial right of any kind in Australia but that nonetheless he had acquired rights which amounted for Convention purposes to rights of custody by virtue of his active role in caring for the child and the status others had accorded him and other similar matters. Accordingly, the judge below found for the father. On the mother's appeal, the Court of Appeal by a majority upheld the judge's decision. The court recognised that the concept of rights of custody was broader than the simple concept of custody alone. The emphasis of the majority was on vindicating the purpose of the Convention.

[22] Waite LJ delivered the judgment of the majority. He said:

> "The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognise as established rights – that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out the duties and enjoying privileges of a custodial or parental character which, though not yet formalised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned… The answer to that question

> must, in my judgement, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether any of those functions fall to be regarded as "rights of custody" within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative, or friend who has assumed the role of a substitute parent in place of the legal custodian".

[23] There are certain features of this case which may have been material to the decision. The parents separated in 1990. The father remained in contact with the child. In April 1992 the mother left Australia and returned to Britain. The child was then cared for by the maternal grandmother and the father. In 1993 the grandmother wished to visit Britain for a holiday with the child. The father would not agree to the child leaving Australia for longer than six months. At a meeting with the father's solicitor a minute of a consent order was drawn up which included a provision that the child could be taken out of Australia for the purposes of travelling for up to the six months. The document was sent to the mother in Wales who signed it. The grandmother deposited a bond with the father's solicitors to cover any action that might be required to recover custody of the child before leaving. The father obtained the approval of the draft Order by the Adelaide court shortly before he was informed that the mother had already applied for wardship in Britain.

[24] The particular circumstances in this case are important because they demonstrate the basis upon which Staughton LJ, the other member of the majority, concluded that he could infer that there was an agreement between the parents which conferred rights upon the father. The reasoning of Peter Gibson LJ, who was the dissenting judge, was that the father had de facto rights but at most had an agreement from the mother to consent to an order if the court was prepared to make it. He concluded, therefore, that the father did not have rights of custody by reason of an agreement having legal effect under the law of Western Australia. It is apparent, therefore, that Waite LJ alone was prepared, if necessary, to take a very broad view of "rights of custody" as including de facto rights in certain circumstances uninhibited by the need to establish any court order, rule of law or agreement.

[25] Although Waite LJ's view might on that analysis be judged a minority view there is no doubt that it has subsequently been followed and applied. There has, however, been substantial criticism that it is inconsistent with two House of Lords decisions. The first of those decisions is Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562. The parents were unmarried and lived in Western Australia. The mother decided to return permanently to England and left Western Australia with the child without the father's knowledge. The father applied for the child's return under the Hague Convention. Lord Brandon considered the father's rights of custody:

> "Having regard to the terms of article 3 the removal could only be wrongful if it was in breach of rights of custody attributed i.e. possessed by the father at the time when it took place. It seems to me, however, that since section 35 of the Family Law Act 1975-1979… gave the mother alone the custody and guardianship of J and no order of a court to the contrary had been obtained by the father before the removal took place, the father had no custody rights relating to J of which the removal could be a breach. It is no doubt true that, while the mother and father were living together with J in their jointly owned home in Western Australia the de facto custody of J was exercised by them jointly. So far as legal rights of custody are concerned, however, these belonged to the mother alone…".

[26] We consider that this passage is irreconcilable with the approach of Waite LJ. It is plainly authority for the proposition that de facto custody will not be sufficient to constitute rights of custody under the Convention or Brussels II. The House was not dealing with a case in which there was an issue as to rights of custody acquired by agreement and we would be cautious, therefore, about implying any conclusion in relation to that particular circumstance.

[27] The second House of Lords case is Re D (Abduction: Rights of Custody) [2007] 1 AC 619. This was a case in which a Romanian order on divorce gave custody of a two-year-old child to the mother with the father being granted staying contact of 78 days per year. In 2002 the mother took the child to live in England without the knowledge or consent of the father. The father sought the child's return. The English court sought a determination from the Romanian court pursuant to Article 15 of the Convention as to whether there had been a wrongful removal. The Romanian court held that the father's rights amounted to rights of access and did not include any right of veto of measures taken by the mother. When the case returned to England the judge then assigned to hear the application resolved not to accept the Romanian determination. An appeal to the Court of Appeal was unsuccessful. The House of

Lords allowed the appeal holding that the Article 15 ruling was to be treated as determinative unless clearly out of line with the international understanding of the Conventions terms.

[28] The leading judgment was given by Baroness Hale with whom all of the other members of the House agreed. She dealt with the approach to rights of custody at paragraph 38.

> "In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to "rights of custody". To hold otherwise would be to remove the distinction between "rights of custody" and "rights of access" altogether. It would be inconsistent with the decision of this House in In Re J… There an unmarried father had no parental rights or responsibility unless and until a court gave him some; but he did, of course, have the right to go to court to seek such an order. This was held not to amount to "rights of custody" within the meaning of article 5 (a)".

[29] From this review of the authorities we consider that we are bound by precedent to conclude that de facto custody with a right to go to court to seek an order is insufficient on its own to constitute rights of custody for the purposes of Brussels II. We accept that the House of Lords authorities do not exclude the possibility that rights of custody might be established where the de facto custody is accompanied by an agreement that is capable of legal enforcement.

[30] The final case to which our attention was drawn was McB v E [2011] FLR 364. That was a case in which an unmarried Irish father and British mother of three children lived together for a number of years in Ireland. The mother removed the children to Britain and the father sought a return. Irish law required an unmarried father to obtain a ruling from the court in order to acquire rights of custody. The case was referred to the ECJ to determine if such a provision was compatible with Brussels II. The court held that the law of the member state where the child was habitually resident determined the conditions on which the father acquired rights of custody. In particular the court held that rights of custody include rights to determine the child's place of residence given by the relevant national law. The father did not acquire such rights unless by order of the court.

[31] Applying the reasoning from the House of Lords and the ECJ to this case we agree with the learned trial judge that this was a case in which the grandmother had rights of custody by way of court order until 28 February 2012 when the temporary

care order was discharged. We also consider that it could be argued that she had rights of custody by way of agreement until 2 March 2012 when the power of attorney was discharged. There is no evidence of any continuing rights acquired by the grandparents by an agreement having legal effect in Lithuania thereafter. We agree with the learned trial judge that at most the grandparents had de facto custody rights which do not constitute rights of custody for the purposes of Brussels II.

**Conclusion**

[32] We wish to make it clear that we consider the actions of the mother reckless. It is fortunate that the child was not more severely damaged. Such reckless conduct indicates a need for close monitoring of the position of the child. We consider, however, that the grandparents did not have rights of custody so that the appeal must be dismissed.