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Judgment: approved by the Court for handing down | *Delivered:* **10/06/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

_____

OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

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IN THE MATTER OF KK (A CHILD)

BETWEEN:

VK
and
AK

Plaintiffs;

-and-

CC

Defendant.

_____

MAGUIRE J

Introduction

[1] The plaintiffs in this case are VK aged 57 and AK aged 58. They are the grandparents of a male child aged 8 who hereafter will be known as KK. The court will refer to VK and AK as the "grandmother" and "grandfather" respectively and as the "grandparents" where appropriate. The defendant is the daughter of the plaintiffs, and the mother of KK. She is aged 28. All of the above are nationals of Lithuania and, so far as the court is aware, were born in Lithuania.

[2] In these proceedings the grandparents seek an order of the court under the Convention on the Civil Aspects of International Child Abduction (hereafter "the Hague Convention") requiring the return of KK to Lithuania from Northern Ireland

where he is currently living. In essence, the grandparents' case is that KK was wrongfully removed by his mother from their care in Lithuania and taken by his mother to Northern Ireland. Ms McBride QC and Miss Connolly appeared before the Court for the grandparents; Mr Toner QC and Miss Lindsay appeared for the mother; and Ms Murphy appeared for the Guardian Ad Litem. The court is grateful to all counsel for their very helpful written and oral submissions.

The facts as known to the court

[3] KK was born to the mother on 13 March 2005. The mother says the father of KK is a Mr M. The grandparents maintain, however, that they do not know who the father is. If he was Mr M, it appears that he has chosen to play no part in KK's life.

[4] A short time after KK's birth, he was left by his mother in the care of his grandparents in a town called Klaipeda in Lithuania. The mother says that this was to enable her to return to the army in which she was serving at the time. The grandparents say that upon leaving KK with them the mother shortly afterwards left Lithuania for Northern Ireland. The mother 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 grandparents from in or around the date of his birth until 12 March 2012. On this latter date an incident occurred which involved the mother and her then partner removing KK from Lithuania as will be described later.

[5] In between 2005 and March 2012, while the accounts of the mother and those of the grandparents differ in detail, the thrust of the evidence is that:

(i) The mother and the grandparents had some measure of phone contact with each other: the mother being in Northern Ireland and the grandparents being in Lithuania.

(ii) On one occasion the grandmother (the mother says together with an aunt) visited the mother in Northern Ireland. The mother has put no date on this visit but the grandmother describes her visiting Northern Ireland in the summer of 2006.

(iii) The mother did visit her parents (the grandparents) for a week or so in late 2006 in Lithuania.

(iv) The mother returned for a visit to Lithuania in February 2012. The purpose of this visit, she says in one of her affidavits before the court, was "to take her son back [to Northern Ireland]". The court will say more about this visit below.

(v) The mother appears to have sent money from time to time from Northern Ireland to her mother in Lithuania.

[6] There are disputes in the evidence as to the extent to which the mother showed interest in KK in the period from his birth to March 2012. *Inter alia*, the grandmother alleges that the mother had little interest in KK, an allegation which the mother disputes. Various particular allegations have been made, for example, the grandmother alleges that the mother has been in various ways dishonest and is a heavy drinker. These allegations (and others) are denied by the mother. The court does not consider that it is necessary for it to determine allegations and cross-allegations of this type in this case.

[7] It does, however, appear clear from the papers that the mother began a relationship with a new partner, a man ZT, sometime after 2005. This led to the two of them setting up home together in Northern Ireland. A daughter was born to them in Northern Ireland on 13 July 2010.

[8] As noted above, the mother and her partner travelled from Northern Ireland to Lithuania in or about February 2012 for the purpose of bringing KK to Northern Ireland. At first, if the mother's account is to be believed, she took steps to take legal advice in Lithuania as to how, through the courts in Lithuania, she could gain custody of KK. But she was told, she avers, that the legal proceedings would be "very protracted and costly". In view of this, she decided, to quote from her statement, "to take matters into [her] own hands and to take the child to live with [her] in Northern Ireland".

[9] It is clear from the mother's statement that she and her partner together in a van abducted KK from the grandmother's custody in the street. The mother described that there was a tug-of-war between the grandmother and her with both at the same time gripping KK. The mother denies the grandmother's account which is rather more detailed. The grandmother states that:

> "On 12 March 2012 I was walking home with [KK] from school. A van drew up alongside us and I heard the defendant's voice shouting, 'pull him, pull him'. A man jumped out of the van and grabbed [KK]. When I would not let him go, the van door was shut on my hand and I suffered injuries, which required hospital treatment".

[10] Thereafter the grandmother says she contacted the authorities about what had happened. The grandmother also says that she required medical treatment as a result of the above incident. Both these contentions are supported by documents which the court has been provided with. Later, in one of the mother's affidavits, she describes how KK was transported via Slovakia, Germany, France and England back to Northern Ireland.

[11] Since arriving in Northern Ireland, KK has been living in the Craigavon area. KK is presently attending a local primary school in Craigavon.

The position of KK while in Lithuania

[12] While it seems clear that from his birth to March 2012 – some seven years or so – KK resided in the care of his grandparents in Lithuania, there is only limited evidence before the court about the legal status of KK during this period. It seems beyond doubt that the grandparents were acting *in loco parentis* throughout the period above. It is not entirely clear what steps were taken legally to regularise their position. The mother's affidavit says little about this save for a reference to her being told by a friend in Lithuania (on a date not given) that her mother was taking preliminary steps in Lithuania to obtain legal care and control of KK.

[13] The grandmother's two statements make limited reference to this subject. The grandmother refers to her understanding of the situation to be that her daughter was simply happy to leave KK with her and her husband. At one point the grandmother states that she obtained "guardianship" of KK just after he was born. This, she goes on to say, gave her authority to make decisions about his health and education. But later in her statement, in the context of events just before the abduction, she states that the guardianship order was discharged in her absence.

[14] Shortly before the hearing of this case two affidavits were filed by the solicitor acting on behalf of the grandparents. These exhibited a range of documents, many of which appear to derive from official sources in Lithuania. Of particular note is a document dated 10 January 2007. It is an order which was made by the administration director of Klaipeda City Municipality giving "temporary care (custody)" of KK to the grandmother. However, it appears from subsequent material that later this temporary guardianship was revoked.

[15] The basis for this latter conclusion is found in a document described as a case summary sent by e-mail from the Central Authority in England and Wales to Social Services in Northern Ireland. It seems likely that the contents of this e-mail have been constructed as a result of information emanating from Lithuania. The e-mail in its material part reads as follows:

> "On 10.01.07 the Director of Klaipeda City Municipality administration by the order no. AD1/60 established temporary guardianship for [KK]. [VK] (the grandmother) was appointed as the guardian …
>
> … On 3.02.12 [the mother] approached the Child Rights Protection Service of Klaipeda City asking to return [KK] to her care …

> … On 22.02.12 Child Rights Protection Service of Klaipeda City held a meeting in order to solve the dispute between [KK's] mother and grandmother regarding the minor's future care. According to [the grandmother] the minor was not psychologically ready to be with [the mother].
>
> … By an order of 28.02.12 of the Director of Klaipeda City Municipality Administration [KK's] temporary guardianship was discontinued."

[16] It would appear that the above account confirms the correctness of what is contained in the grandmother's statement recounted at paragraph [14] above.

[17] It should be made clear by the court that it has not been provided with any material relating to the operation of Lithuanian law. While it may be that such material would have been helpful, the court considers that it should accept the material above at face value. In the court's view, doing this, the likely position of KK in the light of the materials described above is as follows:

(i) At all material times between shortly after the birth of KK and the date of abduction in 2012 the grandparents were the carers of KK and acted *in loco parentis*. At the very least they were *de facto* carers of him.

(ii) The position above was formalised on 10 January 2007 when the grandmother was given "temporary care (custody)" of KK.

(iii) The position at (ii) above subsisted until 28 February 2012 when the temporary care order was discontinued.

(iv) After that date until the abduction matters returned to where they had been (as described at (i) above).

(v) The position, as described at (i) above, was therefore likely to be that which governed the situation at the date of the abduction. As already noted, at this time the mother (as she indicates in her affidavit) had the opportunity to seek custody of KK through the courts in Lithuania but declined to take that opportunity. Instead she resorted to abduction of the child.

[18] The court has also seen translated documents from Lithuania which show as follows:

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

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

[19] The implications of the position described above for the issues in this case will be discussed later in this judgment.

Relevant Treaty Provisions

[20] While the court, at paragraph [2] above, has referred to these proceedings as being brought under the Hague Convention, this should only be viewed as a shorthand description. A more accurate description is that the case is brought under the Hague Convention as complemented by the Brussels II Regulation (Council Regulation (EC) No 2201/2003 (see Recital 17 of the latter). Both Lithuania and the United Kingdom are, of course, Member States of the European Union and are bound by Brussels II. This has the consequence that, as Article 60 of the latter indicates:

> "In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation."

At (e) in the list which then follows reference is made to the Hague Convention aforesaid.

[21] All parties before the court in these circumstances were agreed that the court should decide this case in accordance with the terms of Brussels II where it deals with cases of wrongful removal or retention of a child. The court accepts the invitation of counsel to proceed in this way while acknowledging that there is very little, if anything, which turns on doing so, as the two regimes are virtually identical and are plainly intended to complement one and other, as already noted.

[22] The relevant provisions of Brussels II for the purpose of these proceedings are as follows:

> "Article 11
>
> Return of the child
>
> 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."

The court need not set out the contents of paragraphs 2 to 8 in this judgement as nothing turns on these for the purpose of this case. There are, however, some relevant definitions in Article 2 which the court will set out.

> 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."

[23] The complementary provisions within the Hague Convention are Articles 12 and Article 3 which are materially similar though not exactly the same.

[24] It is not disputed that in this case KK was habitually resident in Lithuania prior to his removal to Northern Ireland and that KK is a child under 16 years. The

real issue in this case is whether or not there has been a wrongful removal for the purpose of Brussels II.

The submission of the parties

[25] For the grandparents, Ms McBride QC submits that it is for this court to decide whether or not a wrongful removal occurred in this case. This, she argues, involves the court considering and answering two questions both of which are to be answered at the date of the alleged abduction: first, what rights of custody did the grandparents hold in Lithuania (which she describes as the "domestic law" question)? Second, do such rights as the grandparents held at the relevant time constitute rights of custody for the purpose of Brussels II (which she describes as the "Convention law question)?

[26] As regards the first question Ms McBride concedes that there is no evidence before the court which would enable it to conclude that there was a judgment giving the grandparents rights over KK in Lithuania. Likewise she concedes that there is no evidence to support the existence of an agreement having legal effect in Lithuania which bestowed rights over the custody of KK on the grandparents. This leaves the issue of whether it can conclude that rights of custody in respect of KK in Lithuania were or had been conferred on the grandparents by operation of law.

[27] On this last issue, Counsel accepted that in respect of this issue also the grandparents face a substantial difficulty. This is that in the absence of expert evidence or other material about the law of Lithuania, which the court lacks, there is no way it can safely form a view about the operation of Lithuanian law and whether it bestowed upon the grandparents in the circumstances which have arisen any rights of custody.

[28] In these circumstances Ms McBride could do little other than accept that the grandparents' rights in respect of the custody of KK at the date of the abduction were in the nature of *de facto* rights of parental responsibility which were inchoate in the sense that they had not developed into legal rights.

[29] However, this state of affairs on the domestic law question, counsel argued, did not mean that the court could not order the return of KK to Lithuania. Indeed the court could do so because while the court must ask and answer the two questions above, inchoate rights can nonetheless, counsel argues, be Convention rights and, if they are, this is sufficient to enable an order for the return of KK to be made.

[30] In support of her submission Ms McBride relied on a number of authorities such as Hunter v Murrow (Abduction: Rights of Custody) [2005] 2 FLR 1119; Re D [2007] 1 AC 619; and Re B (A Minor) (Abduction) [1994] 2 FLR 249. In her submission the guiding light in respect of the Convention law question is an appreciation of the purpose of the Convention. The purpose of it is to protect

children against the disruption and heartache caused by the abduction usually, as here, perpetrated by a parent of a child, which involves the removal of the child from his hitherto habitual place of residence to another country. This is what, in counsel's submission, occurred here. The only unusual feature in this case is that rather than the child being cared for in the state of habitual residence by a parent who enjoys rights usually by operation of law, in this case the child was being cared for by grandparents. From the point of view of enabling the Convention to operate as intended and to serve the function its authors had in mind, the court should conclude that any rights the grandparents have, even if they are of an inchoate variety, constitute protected Convention rights. If they are so to be viewed, a teleological approach to the interpretation of the Convention compels that there should be an order made by this court for return of KK to Lithuania.

[31] For the mother, Mr Toner QC accepted that it was for this court to decide whether or not there was a wrongful removal and also accepted that the two questions referred to above had to be asked and answered. In his submission, however, the correct answer to the first question was that the grandparents enjoyed no rights of custody in respect of KK at the relevant time. While there had at one point been evidence of some sort of guardianship order having been granted to the grandparents, what it amounted to, in terms of legal rights, was wholly unclear. In any event, the evidence before the court, he argued, suggests that that guardianship order had been discontinued before the events of 12 March 2012.

[32] In response to Ms McBride's submission that the grandparents possessed inchoate rights, Mr Toner contended that such were not rights at all and were so lacking in substance to be discounted altogether.

[33] In the mother's case it followed that the answer to the domestic law question was that the grandparents at the relevant time lacked rights. Consequently, there existed no rights which could then be examined for the purpose of the second question. The conclusion compelled by this analysis was that this was not a case in which the court could order the return of KK to Lithuania as the grandparents had no Convention rights of custody which were capable of enforcement in these proceedings. It followed, according to Mr Toner, that these proceedings should be dismissed.

Discussion

[34] Both the representatives of the grandparents and the representatives of the mother were agreed about the two question approach to the issue of whether rights of custody were held by the former. This position is supported by, in particular, the judgement of Dyson LJ (as he then was) in the Hunter case *supra*. At paragraph [46] he states:

> "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".

[35] Applying this approach this court first must consider what rights the grandparents had under the law in Lithuania.

[36] The facts relating to this issue have been set out in paragraphs [3] – [19] above. As already noted, the court does not have the benefit of any evidence about the law of Lithuania. On this issue there must, it seems to the court, be an onus of proof on the grandparents to establish what rights they had. In these circumstances the court has to determine whether any *right* of custody has been established as against something falling short of such a right. On this issue this court is bound to hold that on the balance of probabilities the grandparents have failed to establish the existence of a right of custody which they had at the relevant date (the date of the abduction).

[37] The definition of "rights of custody" in Brussels II is not strictly limited only to rights. The language of the definition gives guidance as to what is included but does not purport exhaustively to list when such rights (and duties) relating to the care of the child arise. However, the definition of "wrongful removal or retention" appears to be tied into the notion of "breach of rights of custody" which have been acquired "by judgement or by operation of law or by agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention". As discussed earlier in this judgement, there appears to be no nexus between the grandparents' rights at the relevant time and these modes of acquisition of rights of custody.

[38] The position might well have been different if the guardianship order in favour of the grandparents of the 10th January 2010 has remained in existence and had not been discontinued just a few days before the adoption.

[39] The conclusion of the court in relation to the domestic law question, applying a test of the balance of probabilities, is that the grandparents enjoyed at the date of the abduction *de facto* rights to care for KK – perhaps what might be described as "moral rights" – but that they did not have "rights of custody" in Lithuania law or, at least, it has not been proved to this court to the requisite standard that they had such rights.

[40] If Mr Toner's submissions referred to above are correct it will follow that the finding of the court on the first question effectively is determinative of the outcome of the case. But before such a conclusion is reached the court must consider whether the case is one in which there is scope for the view, advocated by Ms McBride, that it is the second question whose answer is determinative of the case. It is to the answer to the second question to which the court now turns.

[41] There have been a number of authorities decided in England and Wales which are of interest in relation to the second question. To begin with Dyson LJ in a portion of the quotation omitted from the quotation above drew attention to the words of Lord Donaldson of Lymington in C v C (Abduction: Rights of Custody) [1989] 1 FLR 403 at 413 where he said in an abduction case concerning an abduction from Australia:

> "it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of "rights of custody"".

[42] There is also a line of authority relied on by Ms McBride which contains a similar emphasis on the issue of what falls within the Convention rather than on the content of domestic law. The first of these cases is Re B (citation *supra*). In this case an Australian father sought to have his abducted child returned to Australia from the United Kingdom. He relied on the Hague Convention. In this case 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 statute precluded the father's acquisition of rights in Australia. The judge at first instance had 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 emphasis of the majority was on how the rights to custody should be interpreted in the Convention

and on vindicating the purpose of the Convention. As to the latter Waite LJ, giving the leading judgement, said:

> "The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown of their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, this will involve giving the term the widest sense possible" (see page 260 G).

Later (at page 261 A) Waite LJ goes on:

> "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".

[43] It is fair to say that the grandparents in the present case, having looked after KK for some seven years, were in effect substitute parents in place of the mother who had gone to Northern Ireland. The grandparents would, therefore, appear to be within the category of those with inchoate but recognised rights of custody as that concept has been interpreted by Waite LJ for Convention purposes.

[44] The approach of Waite LJ has, moreover, been applied in subsequent English cases. In Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702 Cazalet J applied the Waite LJ analysis to the position of German grandparents who wished to recover a child they had cared for who has been retained in the United Kingdom by the child's mother. The judge stated at page 710:

> "I have no hesitation in coming to the conclusion that the grandparents held joint custodial rights within the provisions of Waite LJ's definition. In the circumstances to which I have already made detailed reference, they carried out full parental responsibilities over a substantial period of time, and accordingly must be taken to have established joint rights of custody within Article 3".

[45] A similar approach and result also may be found in Re G (Abduction: Rights of Custody) [2002] 2 FLR 703. In that case the court recognized a grandmother's role as a carer in place of the mother and attributed to this role rights of custody for the purpose of the Hague Convention.

[46] Another case to similar broad effect is Re F (Abduction: Unmarried Father: Sole Carer) [2003] 1 FLR 839. In this case Butler-Sloss P placed the emphasis not so much on whether there was a blood relationship between the de facto carer and the parent of the child but on the issue of the exclusivity of the care of the child by the de facto carer during the relevant period.

[47] On the facts of the present case, it is difficult to avoid the conclusion that the grandparents over a lengthy period were the exclusive carers of KK.

[48] If the above line of authority relating to inchoate rights is followed it seems to the court that the grandparents ought to be viewed as having rights of custody for Convention purposes. However, the issue which must be confronted is whether the court should follow this line of authority.

[49] It seems to the court that there may be four reasons why it may be inappropriate to follow the approach set out above.

[50] First of all, on the facts of the present case the court has a concern about whether it can be said that the grandparents at the relevant time enjoyed inchoate rights of custody. The better view of the facts may be that the grandparents had actual rights of custody but that shortly before the relevant time these rights of custody were discontinued by a decision of the provider of rights of custody. While the circumstances in which the decision was made are not entirely clear, the effect of the decision was to remove rights of custody just a few days before the abduction. Consequently there was a loss of custodial rights leaving the grandparents without rights. This is a different situation than that which would be created by the accumulation of de facto rights through caring for KK with those rights awaiting recognition and having an inchoate character.

[51] Secondly, there is a live issue as to whether the inchoate rights of custody line of cases may be viewed as in breach of the authority of the House of Lords as expressed in its decision in In Re J (AMinor) (Abduction) [1990] 2 AC 562. In this case it was held that an unmarried father who served with the mother as a carer of a child had no rights of custody in the law of Western Australia and so had no Convention rights he could rely on after the mother retained the child in the United Kingdom. In this situation, the House held, there could be no wrongful removal or retention of the child. Lord Brandon, giving the leading speech, with which the other law lords agreed, said:

> "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…".

[52] It is difficult to see why this reasoning would not also apply to the de facto rights of care of the grandparents in the present case. While the inchoate rights of custody cases have sought to distinguish In Re J there remains a dispute as to whether this can be done: see, for an interesting discussion of this the judgment of Munby J (as he then was) in Re C (Child Abduction) (Unmarried Father: Rights of Custody) [2003] 1 FLR 252 at paragraph [30].

[53] Thirdly, the recent decision of the House of Lords in In Re D (A Child) (Abduction: Rights of Custody) [2007] 1 AC 619 makes no reference to the inchoate right of custody line of authorities in circumstances where the issue of how rights of custody for the purpose of the Convention were to be identified was directly under discussion. While it would be right to say that the context of the discussion related to the process by which an Article 15 determination may be sought and obtained and how, once obtained, it should be interpreted, Baroness Hale at paragraph [38] stated that:

> "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)".

[54] The above view of "rights of custody" does not appear to contemplate inchoate rights which have yet to be vindicated at law yet it does appear to endorse In Re J as a governing authority in this area.

[55] Fourthly, there has recently been a decision of the European Court of Justice in a case called McB v E [2011] Fam 364 which considers "rights of custody" in connection specifically with the relevant provisions of Brussels II discussed above. This case concerns the familiar situation of unmarried parents who had, de facto, joint care of a child prior to the child's removal by the mother to another country. The court upheld the analysis that the father did not share legal rights of custody and so had no rights of custody for Convention purposes. At paragraph [44] the court, in a statement of general application, stated:

> "…Regulation No 2201/2003 must be interpreted as meaning that whether a child's removal is wrongful for the purposes of applying that Regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place".

This appears to tie the breach of Convention rights to the concept of breach of rights of custody in national law.

Conclusion

[56] As appears from the above there are conflicts in the relevant case law as to how to interpret "rights of custody" for Convention purposes. The point, counsel have indicated to the court, has not arisen before in Northern Ireland. It seems to the court that the better approach is for the court to follow the line of authority beginning with In Re J and ending with the European Court of Justice's view in McB v E. The court is unattracted by the proposition that it should read the international provisions in this case as including inchoate rights of custody. At the relevant time, the removal of KK was not in breach of any legally recognised right of the grandparents in Lithuania law and it follows from this, in the court's view, that there has not been an unlawful removal of KK by the mother for the purpose of the provisions of the Hague Convention when read with the provision of the Brussels II Regulation. The court arrives at this conclusion with a measure of regret as the actions of the mother and her partner in abducting KK in the manner already described cannot attract other than the court's condemnation.

[57] Had the court taken the view that the removal of KK was wrongful, the court indicates that it would have ordered the return of KK to Lithuania in accordance with Article 12 of the Hague Convention. While there was some suggestion in the papers that the mother would rely on one of the so called defences found in Article 13 of the Convention, these were not pursued at the hearing and, in the court's view, they lacked merit.

[58] For the reasons given the grandparents' application is dismissed.