



**UNAPPROVED  
THE COURT OF APPEAL**

**Appeal Number: 2016 No.420**

**Birmingham P.**

**Neutral Citation Number [2022] IECA 75**

**Faherty J.  
Murray J.**

**BETWEEN/**

**E.G.**

**APPLICANT/  
APPELLANT**

**- AND -**

**T.P.**

**RESPONDENT**

**JUDGMENT of Ms. Justice Faherty delivered on the 28<sup>th</sup> day of March 2022**

1. This case concerns the removal of the child A by her mother (the respondent to this appeal hereinafter “the Mother”) from Moldova on 10 July 2015 when A was aged eleven months. It will be immediately apparent that the removal of the child is of some antiquity. A is now aged seven and a half years and she has resided in this jurisdiction since her arrival. Her removal from Moldova gave rise to an application by her father (the appellant hereinafter “the Father”) under Part III of the Convention of the Civil Aspects of International Child Abduction (“The Hague Convention” or “the Convention”) for the

return of A to Moldova, being her place of habitual residence. Moldova is a party to the Hague Convention and it has the force of law in that State.

2. The Father asserted that A's removal from Moldova was wrongful for the purposes of Article 3 of the Convention being in breach of his rights of custody as they are understood under the Convention. As is apparent from Article 3, an order for the return of A may only be made if the Father had "rights of custody" for the purposes of the Convention. The application was opposed by the Mother. On 27 July 2016, the High Court (Abbott J.) made an Order refusing the return of A to Moldova. The Father appealed.

3. This Court delivered a judgment on 28 July 2017 (Peart J. writing for the Court). For reasons that will shortly become apparent, the judgment delivered by the Court on 28 July 2017 was not dispositive of either the position of the Father or the Mother on appeal as to the Father's asserted custody rights. Instead, the Court invoked the provisions of Article 15 of the Convention and by Order of 31 July 2017 directed that "*[t]he court of the Republic of Moldova be requested by [the Father] pursuant to Article 15 of the Hague Convention... to give a decision or other determination as to whether the removal of the child the subject of this application from the jurisdiction of the Republic of Moldova, on the 15<sup>th</sup> day of July 2015, was in breach of the Applicant/Appellant's rights of custody under the law of the Republic of Moldova, immediately before the removal of the child on that date, taking all the facts and circumstances into consideration.*"

4. The matter now returns to this Court consequent on the decision of the Court of Primary Instance in Ciocana in the municipality of Chisinau (hereinafter "the Chisinau Court") of 1 March 2018, the decision of the Chisinau Court of Appeal of 10 June 2018 upholding the decision of the Chisinau Court (declaring it "*legal and grounded*") and the decision of the Supreme Court of 4 November 2020 which found no grounds upon which

to admit the Father's appeal of Chisinau Court of Appeal decision. These decisions are considered more fully later in this judgment.

5. Before proceeding further, and to understand the issues that arise for consideration in this appeal, it is helpful to set out the relevant provisions of the Convention:

“Article 3:

The removal or retention of a child is to be considered wrongful where-

(a) it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4:

The Convention shall apply to any child who is habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5:

For the purposes of this Convention-

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take the child for a limited period of time to a place other than the child's habitual residence.

Article 8:

Any person ... claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of another Contracting State for assistance in securing the return of the child. The application shall contain ... [there follows a list of matters (a) to (g) which it is unnecessary to set forth]

Article 12:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith.

Article 13:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes the return of the child establishes that: -

- (a) the person ... having care of the child was not actually exercising custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Article 14:

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions,

formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15:

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.”

6. Again, before turning to the issues that arose for the Court when this appeal first commenced, and to best understand the issues that now arise consequent on the decisions rendered by the Moldovan courts on foot of the Article 15 process, it is necessary to firstly set out the background to the case and the relevant litigation between the parties, both in Moldova and this State.

#### **Background and procedural history**

7. The Father and Mother were married on 1 March 2014. A was born on 4 August 2014. It appears that the parties’ relationship broke down in or around November 2014 and the Father duly left the home he shared with the Mother and A. Thereafter, however, he continued to visit A on a regular basis, up to four times per week.

8. On 7 November 2014, the Mother instituted divorce proceedings in the Ciocana First Instance Court and sought maintenance for A. On 10 December 2014, the parties entered into a notarised agreement whereby the Father gave his consent to the temporary removal of A from Moldova between 10 December 2014 and 10 December 2015 for the purposes

of the Mother obtaining a visa for and to travel to Canada. At the same time the Mother gave her consent for the Father to seek Russian citizenship and a Russian passport for A.

**9.** On 24 March 2015, in the context of the divorce proceedings, the Mother sought that A's "domicile" would be with her (in effect an order seeking custody of A) and again sought financial provision for the child. At or about the same time, she commenced proceedings before the Directorate for the Protection of Child Rights of Ciocana ("DPCR Ciocana") requesting the regulation of access to A by the Father. By its decision of 2 April 2015, DPCR Ciocana directed that the Father would have access to A three days during the week together with provision for Saturday and Sunday access. The Father duly appealed that access schedule but on 28 May 2015, the Municipal Department of the DPCR left the schedule unaltered.

**10.** On 8 July 2015, in the context of the parties' divorce proceedings, DPCR Ciocana, recommended that A's "domicile" should be with the Mother noting that she was in a position to provide good living conditions for the child, that she was in employment and currently on maternity leave, and in view of the fact that the Father had not sought custody of the child.

**11.** It appears that on 9 July 2015 the Mother crossed the border into Romania, apparently for the purposes of obtaining a Romanian ID card which she duly obtained by giving a fictional address in that State.

**12.** On 10 July 2015, the Father exercised his access to A in Moldova in the normal way and advised the Mother of his plans for the following Sunday access. On the same date, he lodged an application in the context of the divorce proceedings requesting that consideration be given to a possible reconciliation with the Mother in circumstances where relations between them had improved. However, the court deferred any examination of

this application pending the response of the Mother to the request and duly adjourned the proceedings to 22 July 2015.

**13.** On 11 July 2015, the Father had difficulties making telephone contact with the Mother. However, on 12 July 2015 he was informed by the Mother *via* Skype that she was away (in Greece) for a rest and that the parties would talk on her return.

**14.** On 13 July 2015, the Father lodged a new claim against the Mother requesting that she be compelled to comply with the access schedule that was in place and that she be restrained from removing A from Moldova without his consent. Subsequently, the Mother lodged a counterclaim seeking an order permitting her to take A abroad without the consent of the Father and prohibiting the Father from crossing any state border with A.

**15.** On 14 July 2015, the Father obtained information from the Moldovan border police that the Mother had crossed the state border on 10 July 2015 and had travelled on a one-way flight (paid for in cash) to Dublin. On the same date, the Father lodged a criminal complaint against the Mother under the Moldovan Criminal Code alleging the illegal removal of A from Moldova.

**16.** It is common case that the Mother travelled with A to Ireland on 10 July 2015 and that she has resided here with the child since that date. It is also undisputed that she did not inform the Father that she intended to travel to Ireland with A prior to her departure in July 2015.

**17.** On 28 July 2015, the Father lodged an application with the Moldovan Central Authority for the return of A. The following day, he lodged a counterclaim in the divorce proceedings seeking custody of the child.

**18.** On 18 August 2015, the Father travelled to Ireland. He duly located A on 27 August 2015 in the company of her maternal grandmother. He took the child and attempted to return to Moldova but was prevented from doing so by the Gardaí shortly before his

departure flight. After a brief period in the care of Tusla, A was duly returned to the care of the Mother.

**19.** On 16 October 2015, the Father instigated a request for the return of A to Moldova pursuant to Article 12 of the Hague Convention, and following a request by the Moldovan Central Authority to the Irish Central Authority, the within proceedings issued on 11 November 2015.

**20.** Meanwhile, in Moldova, in the context of the parties' divorce proceedings, on 12 November 2015, the Moldovan DPCR determined that the Father was a suitable parent to have custody of A. At the same time, given the events that had transpired, and in view of the fact that the Father had counterclaimed for custody of A, DPCR Ciocana withdrew its recommendation that A should reside with the Mother.

**21.** On 13 January 2016, the Ciocana First Instance Court granted the parties a decree of divorce, made financial provision for the Mother and A and determined that given the child's tender age (then one year and five months) she should reside with the Mother. The court rejected the Father's application for custody. The Father duly appealed to the Chisinau Court of Appeal. The custody and access orders were under appeal by the time the Father's application pursuant to Article 12 of the Convention for the return of A to Moldova came on for hearing before the High Court (Abbott J.) on 25 and 26 April 2016.

**22.** On 25 April 2016 the Moldovan authorities launched a criminal investigation into A's removal consequent on the Father's complaint.

***The case advanced in the High Court***

**23.** The Father sought A's return on the basis that the child had been unlawfully removed by the Mother, in breach of his rights of custody under the Convention and that, furthermore, his consent was required to be obtained prior to the permanent removal of A from Moldova. He relied on the circumstances of the Mother's departure from Moldova in



support of his argument that A's removal was never meant to be temporary as contended for by the Mother.

24. The Mother argued that the removal was not wrongful as the Father had only a right of access to A. She asserted that she was entitled to remove the child from Moldova for a temporary period (to which the Father had consented) and that she was only in Ireland on a temporary basis, having come to the jurisdiction in order to improve her English albeit that this plan altered after the events of 27 August 2015 when the Father attempted to remove the child from the jurisdiction. She asserted that it was after this that she decided to stay in Ireland for a longer period and she duly enrolled her elder child in school in Ireland. The Mother claimed that her permanent residence and domicile was Moldova. She contended however that A was habitually resident or resident indefinitely in Ireland. She further submitted that the Moldovan courts had determined that A's residence was with her and in support of that referred to the decision of the DPCR Ciocana of 2 April 2015 which had been affirmed by the Municipal Directorate on 28 May 2015. She also argued that the order of the Ciocana First Instance Court of 13 January 2016 entitled her to reside in Ireland with A indefinitely. She further pleaded Article 13 defences of acquiescence and grave risk.

#### **The judgment of the High Court**

25. Judgment in the matter was handed down by Abbott J. on 27 July 2016. It appears that prior to giving judgment, Abbott J. had indicated that he was ordering a return of the child to Moldova. The Mother then produced the judgment of the Chisinau Court of Appeal of 31 May 2016 in respect of the appeal taken by the Father against the decision of Ciocana First Instance Court of 13 January 2016.

26. The Chisinau Court of Appeal's conclusions on the appeal were set out in the following terms:

*“The primary instance [i.e. first instance court] has examined the case from all points of view it has established and fully clarified all the important circumstances of the case and correctly evaluated the administrative proofs. It determined that the claim lodged by [the Mother] regarding the dissolution of the marriage, determination of domicile of the minor child, collection of alimony for the minor child ... is grounded, while the counterclaim lodged by [the Father] against [the Mother] on the determination of domicile of the minor child with the father is grounded, but upon judging the case it has been established that the relationships between the spouses are so tensioned that the preservation of the family was no longer possible and none of the parties contested the decision of the primary instance court.*

*The primary instance has decided correctly to establish the domicile of the minor child ... with the mother... the said decision being also grounded on the conclusion of the tutelage authority (case sheet 59, vol.1). The College considers groundless and declarative the appellant's affirmations that establishing the minor child's domicile with the father would be in the child's best interests, bearing in mind the age and sex of the child, as well as the fact that her domicile with the mother would have a more beneficial impact both for her psycho-emotional development compared to the option of establishing her domicile with the father, also taking into consideration the tensioned relationships between the spouses.”*

**27.** A reading of the decision of 31 May 2016 establishes that the Chisinau Court of Appeal was fully apprised of the fact that the Mother had left Moldova against the wishes of the Father and that she did not intend to return to Moldova. The court was also aware that the Father’s position was that even though his consent to the permanent removal of A from Moldova was required under Moldovan law he never provided such consent. It also

recorded his claim that the Mother had moved to Ireland with the intention of taking up permanent residence there which the Father contended was proved by the fact that when going to Ireland the Mother had purchased one-way air tickets and by the fact that her elder child had been enrolled in a school in Dublin.

**28.** Abbott J. duly invited submissions from the parties as to the significance of the Moldovan court's decision before delivering judgment. Having heard the parties' submissions, Abbott J. duly delivered his judgment. He stated:

*"... However, just before this Court was to give its judgment I was told that the [Chisinau] Court of Appeal had delivered its judgment on the 31<sup>st</sup> May 2016. The judgment at the Appeal Court shows clearly that welfare issues of the child were taken into consideration against the clear background that the child was taken to Ireland in circumstances where the applicant alleged abduction. Nevertheless, the appellate court affirmed the decision of the lower court that the 'domicile' of the child should be with the respondent [the Mother]. Having regard to my understanding for the need for an autonomous definition of custody under the Hague Convention, and to the judgment of the court on the applicant's counterclaim quoted above, and the pursuit by the applicant of his rights as a parent in the appeal before the Republic of Moldova, I am not satisfied that the applicant had rights of custody to the child within the meaning of the Hague Convention and for the purposes of this application".*

**29.** Abbott J. went on to consider whether A's removal from Moldova was lawful in any event by reason of the consent which the Father had signed. Ultimately, he determined that the obtaining of a consent by the Mother to spend a limited time in Canada appeared, on balance of probability, to be a "ruse" on her part to obtain the Father's consent to take the child out of Moldova with the intent of exiting to Ireland.

**30.** Although he found that the Father was not entitled to an order for the child's return, and while it was, strictly speaking, unnecessary for him to do so, Abbott J. went on to reject the defences that the Mother had offered in the event the removal was found to be wrongful. Abbott J. was not satisfied that the Father had acquiesced to the removal of the child, finding that his actions in August 2015 belied such acquiescence as did his filing of a criminal complaint against the Mother in Moldova and the fact that he had lodged an appeal of the decision of the Chisinau Court of Appeal of 31 May 2016. He also rejected her argument that A's habitual residence had changed, noting that there were ongoing proceedings in Moldova and taking into consideration, what he coined, was the Mother's ambivalence as to the nature of her sojourn in this State. He was also satisfied to reject the grave risk defence finding that the fear that the Father would remove the child to Russia was "merely a speculative possibility" and hence the defence had not been made out.

**31.** In his concluding remarks, Abbott J. referred to certain affidavits as to the relevant Moldovan law which he said were "*ambivalent*" as to whether they favoured the Mother or the Father and which in any event were ultimately "*overshadowed*" by the decisions of the Moldovan courts.

**32.** As already indicated, the Father duly appealed the High Court Order to this Court.

**33.** In summary, the grounds advanced were that the trial judge erred in law and/or in fact in:

- Finding that the Father did not possess rights of custody within the meaning of the Convention;
- Failing to hold that the Father had rights of custody on or around 10 July 2015;
- Finding that the judgment of the Chisinau Court of Appeal of 31 May 2016 vitiated the Father's rights of custody and/or failing to interpret the said

judgment as in no way restricting the exercise of the Father's parental rights or permitting the permanent removal of A from Moldova;

- Failing to give any or any proper weight to the fact that the Father had lodged an appeal in respect of the 31 May 2016 decision;
- Failing to take any or any proper account of the provisions of Moldovan law that required the Mother to have the notarised consent of the Father prior to the permanent removal of the child;
- Failing to distinguish between the temporary removal of the child by a guardian and the circumstances in which a child may be permanently removed from Moldova under Moldovan law;
- Failing to find that A had been wrongfully removed or retained for the purposes of the Convention;
- Failing to vindicate A's rights pursuant to Article 8 of the European Convention on Human Rights;
- Failing to give due weight to the Mother's "ruse" and the Canadian "consent" in respect of A's removal from Moldova;
- Failing to interpret and distinguish the nature of the summary proceedings in respect of costs and the undue delay caused by the Mother up to the handing down of judgment;
- Failing to find that the application was well founded in making an order for costs against the Father.

**34.** The Mother lodged a cross-appeal. In her Amended Notice of Expedited Appeal, she asserted that the trial judge erred in his conclusions in respect of the Father's consent and in his conclusion that the defence of grave harm had not been made out.

***Further legal developments in Moldova***

**35.** Following the judgment of the High Court, there were further legal developments in Moldova. On 30 June 2016, the Ciocana Municipal Court gave its decision on the Father's application to prevent the Mother from removing A from Moldova and to enforce his access rights. It also ruled on the Mother's counter application for an order prohibiting the Father from crossing any state border with A. The reliefs sought by both parents were dismissed.

**36.** A reading of the decision establishes that the Ciocana Municipal Court was aware that the Mother and A were in Ireland. The court found that Article 1 para. 4 of the Moldovan law on entry and exit into the Republic of Moldova, no. 269 – X11 of 9.11.1994 ("the Moldovan law on entry and exit") had been complied with by virtue of the notarised consent executed by the Father from which the court deduced that the Mother had his permission "*to travel for a long period of time outside the country's borders*". It found that the Mother and A had travelled outside Moldova without any difficulties such as the refusal of the other parent to permit such travel and that "*in this case there had been co-operation between the parents*". It went on to state:

*"The Court notes that [the Father] himself in his application and later on in his testimonies, said that [the Mother], according to the legal provisions, had notified him by the internet about her departure across the borders of the Republic of Moldova. Taking into account the notarized statement was valid for 1 year, the court finds that [the Father] admitted the possibility of [his] daughter leaving the Republic of Moldova, together with her mother...for a long period of time".*

**37.** The court went on to find that the access schedule to A "*ceased from the time when [the Father] accepted and consented to [the Mother] to travel across the Moldovan borders with the child*"

38. The Father duly appealed that decision to the Chisinau Court of Appeal. However, before that appeal was heard, on 24 August 2016 the Moldovan Supreme Court gave its decision in respect of the Father's appeal of the Chisinau Court of Appeal's decision of 31 May 2016 rejecting the appeal as inadmissible.

39. On 24 November 2016, the Chisinau Court of Appeal rejected the Father's appeal of the Ciocana Municipal Court's decision of 30 June 2016, finding, as had the lower court, that the permission that the Father had granted meant that the provisions of Article 1 para. (4) of the Moldovan law on entry and exit had been complied with and that the Mother had permission to take A out of Moldova "*for a long period of time*". Notably, however, albeit that the Father was seeking that the Mother comply with the previously ordained access schedule, the Chisinau Court of Appeal characterised his claim as one seeking the return of the Mother to Moldova with the child. However, the court stated that that issue was not within its competence. On 15 March 2017, the Moldovan Supreme Court rejected the Father's appeal of the Chisinau Court of Appeal decision as inadmissible.

40. It was against the backdrop of the aforesaid Moldovan court decisions that the Father's appeal of Abbott J's Order first came on for hearing before this Court on 16 June 2017.

**The judgment of this Court of 28 July 2017**

41. The rationale for the invoking of Article 15 of the Hague Convention is explained by Peart J. at various points in his judgment. At para. 15, he notes that the determination of the appeal required the Court to be satisfied "*that in a Convention sense the father had rights of custody which he was exercising up to the 15th July 2015 or would have exercised but for the removal as provided in Article 3.*" This involved a determination as to whether the right of access to A which the Father was enjoying under arrangements in place prior to A's removal from Moldova was part of what is understood by "rights of custody" for the

purposes of the Convention, or whether it was something separate. It is only where rights of custody are involved that the removal of a child from his or her place of habitual residence will engage the provisions of the Convention. Peart J. was also alert to the consent which the Father had signed on 10 December 2014. He stated:

*“16. Another important question is the significance of the fact that on the 10th December 2014 father signed a ‘Statement’ which gave his consent to the issuing of a visa for baby A for the purpose of mother taking baby A to Canada for the period 10th December 2014 to 10th December 2015. It was during that period that she removed baby A from Moldova, albeit that she came to Ireland rather than to Canada to which father had consented. Mother submits that this consent indicates that he was consensually giving up his access rights for that period at least, and therefore that even if those rights come within the concept of rights of custody in a Convention sense, he was not exercising them or was agreeing not to do so during that period no matter where baby A actually was.*

*17. Another question is whether the consent just referred to excluded any implied consent to baby A going on a temporary basis to another country apart from Canada.*

**42.** Peart J. also noted the absence of a complete consensus in the affidavits of law that were provided to the High Court as to what Moldovan law provided.

*“18.... There is no clear agreement on every question raised for response from the respective lawyers who have provided those affidavits. But there is a measure of agreement that the consent of the remaining parent to a permanent removal of baby A is required, or at least a court order where that consent is not forthcoming, even where the parents are separated. This is said to be the case by virtue of the equal right provisions in Article 58 of the Moldovan Family Code. The experts are in*



*agreement that under Art. 58 the parents of a child have equal rights and obligations in respect of the child whether they are living together or are apart, and that in the event of disputes arising the courts of Moldova will decide issues relating to domicile/custody, and access.*

*19. Where the experts disagree is on whether the mother intended to leave Moldova for a temporary period where no consent was required or whether her actions are more consistent with an intention to leave permanently where consent would be required. Mother's expert considers that her intention was to leave Moldova temporarily, whereas father's lawyer supports the view that at all times her intention was to leave permanently as evidenced by the fact that she had only a one way ticket, paid for it in cash, and did not inform father of her plans. But that is a question of fact to be determined by the court, rather than a matter for the opinion of the experts."*

**43.** Another factor which informed the decision to invoke Article 15 was whether the High Court should have confined its consideration to the facts as they existed in July 2015, or whether, even if it was satisfied that the Mother had wrongfully removed A from Moldova without the Father's consent or wrongfully retained her, the High Court could have regard to the divorce order of the Moldovan first instance court dated 13 January 2016 (which gave custody or residence of A to the Mother) and the subsequent appeal decision dated 31 May 2016 upholding the first instance court, both of which post-dated A's removal from Moldova but which were decided in the full knowledge of the circumstances in which A came with the Mother to this State. As noted by Peart J. at para. 20:

*"...there is no indication or the slightest suggestion that the Moldovan courts consider that mother acted unlawfully or in breach of any [of] father's custody*

*rights. There is no suggestion within these decisions that the Moldovan courts consider that the removal was wrongful and/or that baby A should be returned. The trial judge was greatly influenced by these subsequent events, and it raises the question whether he was entitled to have regard to those later decisions as a basis for considering whether the removal in July 2016 was wrongful for the purposes of Article 3 and Article 12 of the Convention.”*

44. As also noted by Peart J., the trial judge’s conclusion that the Father did not have rights of custody of A for the purposes of the Convention was reached by reference to his consideration of the contents of the Chisinau Court of Appeal decision dated 31 May 2016. The trial judge did not refer to the evidence of the Father that as a matter of fact he exercised rights of access to A several times per week prior to 10 July 2015. Nor did he make reference to the Moldovan Family Code, or consider the legal question of whether, for Convention purposes, there was a distinction to be drawn between rights of access and rights of custody or whether rights of access formed part of what is embraced by “rights of custody” as defined in Article 5 of the Convention.

45. While he duly noted the findings of the Chisinau Court of Appeal of 31 May 2016, and while conscious that that court “*was fully apprised of the fact that mother had left Moldova against the wishes of father, and that she does not intend to return to Moldova*”, Peart J. explained the difficulty that presented for this Court in the following terms:

*“27. As I have already stated, a question arises as to the extent to which the High Court can have regard to court decisions that post-date the removal of baby A from Moldova when considering this State's obligations in relation to an application made to the Central Authority here pursuant to Article 8 of the Convention, and whether instead the Court should confine its consideration of whether removal breached custody rights, and therefore wrongful, to the facts as they are established as of the*

*date of removal. In other words, when the High Court considers whether or not an order for the return of baby A was required to be made under Article 12, is it required simply to ascertain whether the applicant had rights of custody in the country of habitual residence at the date of removal which were being exercised by him, or would have been exercised by him if the removal had not taken place, and if so whether any of the exceptions set forth in Article 13 apply so as to remove the otherwise mandatory requirement to make an order for return under Article 12?*

*28. The trial judge relied solely upon the decision of the Moldovan Court of Appeal for his conclusion that the father did not have custody rights at the time of removal.*

*He did not address the question of whether a right of access to the child is part of the rights of custody as defined in Article 5 and referred to in Article 8. He did not reach any conclusion as to whether or not father was exercising those access rights up to the time of removal. He made no finding of fact as to whether or not the consent which the father gave in writing on the 10th December 2014 to the issuing of a visa for baby A and her removal to Canada for a 12 month period from 10th December 2014 to 10th December 2015 amounted to acquiescence on his part or an abandonment by him of his right of access, and whether the fact that mother came to Ireland instead of travelling to Canada affects that question in any material way. These matters remain undetermined at first instance.*

*29. It seems to me that this Court must consider whether the trial judge was correct to base his conclusion that the father did not have custody rights for the purpose of the Convention on the basis of his interpretation of the Court of Appeal decision dated 31st May 2016 which (a) postdates the removal by almost 12 months, and (b) was made in the context of an appeal against, inter alia, a decision as to whether baby A should be domiciled (reside) with mother or with father. That court was not*

*deciding whether father enjoyed rights of custody, or simply access rights, at the date of removal, and whether those rights were breached by baby A's removal, even though the Court was clearly aware of the facts and circumstances in which baby A had been removed to Ireland by mother” (emphasis added).*

**46.** Albeit noting, as had already been observed by DPCR Ciocana on 2 April 2015 as affirmed by its Municipal Department on 28 May 2015, that the Father had not made an application for custody of A by the time those 2015 decisions issued, Peart J. considered that *“the first and fundamental question that needs to be decided on this appeal is whether the rights of access granted to and enjoyed by father until the removal of baby A on the 15th July 2015 are ‘rights of custody’ as defined in Article 5 and referred to in Article 8 of the Convention”*. If the Father did not have such rights, then *“the Court need go no further since it is only when there is a breach of custody rights that an order may be made under Article 12”* (at para. 32). Peart J. went on to state that the second fundamental question was whether if the Father’s access rights comprise rights of custody under the Convention, the removal of baby A was in breach of those rights as a matter of Moldovan law. He noted that this was a matter on which the experts who provided affidavits of law could not agree.

**47.** Peart J. found that consideration of the first question was assisted by the judgment of Finlay Geoghegan J. in *R.C. v. I.S. (Child abduction: Rights of custody)* [2003] 4 I.R. 431. There, pursuant to orders of the Circuit Court in judicial separation proceedings, the wife had sole custody of the only child of the marriage and the husband had rights of access to the child. Sometime thereafter, the mother removed the child to live with her in Belgium without the husband’s agreement. There was evidence that the husband had been exercising his rights of access prior to the removal. He duly commenced proceedings under the Hague Convention for the return of the child. The determination of the

application involved whether the husband's right of access to the child constituted 'rights of custody' for the purposes of the Convention. Finlay Geoghegan J. duly rejected the mother's contention that following the order of the Circuit Court the husband had merely rights of access and not of custody within the meaning of the Convention stating at p. 440:

*"I cannot accept this submission. The Hague Convention is concerned only between 'rights of custody' and 'rights of access'. As is clear from what is set out above, in Irish law there exist in relation to children, rights of guardianship, rights of custody and rights of access. It is further well established that the term 'rights of custody' within the meaning of the Hague Convention is to be given a broad interpretation in the sense explained in the judgment of Waite L.J. in Re B (A Minor) And Production [1994] 2 F.L.R. 249 and that it is not to be confined to rights which are a right of custody under the domestic law of a signatory state. Having regard to the significant rights attaching to a married parent who is the guardian of a child, albeit the non-custodial parent, under Irish law there appears to me to be an inescapable conclusion that, in the context of the Hague Convention and the distinction made therein between 'rights of custody' and 'rights of access', that such a person has 'rights of custody'.*

*Accordingly, I have concluded that a person, such as the applicant herein, who is a married parent of a child and guardian, albeit jointly with another of the child notwithstanding that he does not have custody of the child under Irish law is a person who has 'rights of custody' in relation to the child within the meaning of article 5 of the Hague Convention."*

**48.** Peart J. also found the decision of the UK House of Lords in *In Re D (a child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2006] 2 W.L.R.989 of assistance as to what "rights of custody" might amount to within the meaning of Article 5 of the

Convention. The case concerned the effect of a Romanian court order which on granting a decree of divorce gave custody of the child to the mother with access to the father. Two years after the divorce the mother removed the child to England without the knowledge or consent of the father. The father brought proceedings under the Convention for the return of the child in the English courts. Both parents filed affidavits of laws. However, the English High Court judge was not reasonably able to determine Romanian law in light of the affidavits filed and he duly directed the father to bring an application before the Romanian courts pursuant to Article 15 of the Convention for a declaration as to whether the removal of the child from Romania was lawful. The application was duly brought before the Romanian court and was appealed to the Court of Final Appeal in Romania. The decision made by that court was that the removal was lawful. However, when the matter returned to the English High Court, the judge permitted further expert evidence (commissioned by the parents jointly) to be adduced which said that the removal was unlawful consequent on which the English High Court directed the return of the child to Romania. The decision was upheld by the English Court of Appeal. However, the House of Lords reversed the decision.

**49.** One of the issues that fell to be decided in *In Re. D* was whether the *ne exeat* entitlements of one parent gave that parent “rights of custody” within the meaning of the Convention. Baroness Hale (who gave the decision of the court) duly held that the right of one parent to have his or her consent to removal sought before any removal takes place amounts to “rights of custody” within the meaning of Article 5 of the Hague Convention. The views expressed by Baroness Hale are considered more fully later in this judgment. Suffice it to say for the moment that Peart J. took particular note of the views expressed by Baroness Hale in circumstances where “*in the present case the father maintains that, notwithstanding that he is the non-custodial parent but with rights of access, his consent to*

*any permanent removal of baby A from Moldova was required, or a court order in the event that he refused to give consent, and that his right exists by virtue of Article 58 of the Moldovan Code which provides for equal parental rights, even when the parties are living apart, and has not been taken away from him by any court order”* (at para. 37). As noted by Peart J., with reference to the *dictum* of Baroness Hale, while a removal might appear to be in the eyes of the requested court to be wrongful under its domestic law, “*what matters is whether it is in breach of rights of custody attributed to a person under the law of the state in which the child was habitually resident immediately before removal*” (at para. 38).

**50.** In *In Re D*, given the academic debate at play in Romania as to how parental rights in respect of the custody of or access to children were divided up, the UKHL held that the trial judge had appropriately decided that it was a case in which to make a referral under Article 15 of the Convention.

**51.** Given the difficulties that presented in the case before him Peart J. considered it appropriate to adopt a similar approach stating:

*“41. The judgment in In Re D is helpful in determining whether it would be appropriate in the present case to request the father to obtain from the authorities in Moldova a decision that the removal of baby A in the circumstances in which this occurred, was in breach of his rights of custody under the law of Moldova immediately before removal on 15th July 2015, taking all the facts and circumstances into consideration. That court will be in a position to consider the effect of the consent to a visa to Canada on the question of whether father gave up his right to consent or object to removal, the fact that mother did not go to Canada but came to Ireland, the question of whether mother should be considered to have intended to leave permanently or only on a temporary basis based on the known facts surrounding her departure on that date. These are just some of the matters that will*

*inform the Moldovan court's decision on whether the removal breached father's custody rights under Moldovan law.*

...

43. *I am of the view that such a request under Article 15 should be made. (emphasis added)”*

52. As already referred to, in deciding to make a referral under Article 15, Peart J. was conscious that the experts who provided affidavits of law in the instant case diverged materially in relevant respects. He also emphasised that *“it is not appropriate for the court here to rely upon an interpretation of decisions by a court in Moldova which not only postdate the date of removal, but which were also made in a context other than in respect of issues strictly arising on an application under the Hague Convention.”*

#### **The Article 15 application**

53. On 18 August 2017, pursuant to the Order of this Court of 28 July 2017, the Father duly filed the Article 15 application before the Chisinau Court.

#### **The decision of the Chisinau Court of 1 March 2018**

54. The Chisinau Court commenced its decision (**Book of Moldovan Court documents Tab 16**) by noting that the Father had been directed by the Court of Appeal in Ireland to make an application in Moldova in accordance with Article 15 of the Hague Convention *“in order to obtain a decision establishing that the abduction or the non-return of the minor child [A] is illegal”*. It then records in some detail the history of the various proceedings between the parties up to the time of the Article 15 application. It noted that for the purposes of the Article 15 application, the Father was invoking various provisions of the Moldovan Family Code, the provisions of Article 1 of the Law on the exit and entry and Articles 3, 4, 11, 12, 14, 15, 19 and 23 of the Hague Convention.



55. As recorded in the decision of the Chisinau Court, the Father's claim was that according to the Moldovan Family Code, he had and continued to enjoy equal rights with the Mother in respect of A, and that A's residence with the Mother did not diminish his rights. He pointed to the provisions of the Moldovan law on entry and exit which required the consent, duly authenticated by a notary, of both parents for the permanent removal of a child to another State. He claimed that he had not provided such consent to the Mother and that, in the absence of such consent, the Mother was required to apply to court to dispense with his consent which had not been done. He also argued that any issue as to with which parent a child should reside in Moldova could be resolved only by a judicial determination and that that determination (in favour of the Mother) had only been rendered on 31 May 2016 when the Mother was resident in Ireland with A without having obtained his consent for A's permanent removal. Essentially, his claim was that the Mother had taken the child permanently abroad without his consent. Her intention to reside permanently abroad was, he claimed, evidenced by the following factors:

- The Mother had not booked a return ticket to Moldova;
- She had not adduced evidence that her sojourn abroad was for the purposes of a holiday as she previously intimated in the divorce proceedings;
- Upon arrival in Dublin she had rented a two-story house;
- Following her travel to Dublin, the Mother never advised the Father of A's whereabouts or the expected date of her return to Moldova;
- A's maternal grandmother and the Mother's elder child from another relationship arrived in Ireland on 3 August 2015;
- The Mother's failure to adequately explain the reasons for her travel to Ireland and the different explanations she had proffered, to wit, that she travelled there

on holidays, to improve her English language skills and because of alleged fear of the Father;

- The Mother's internet announcement looking for a "full time" job in Romania;
- The fact that she was one month and seventeen days in Ireland by the time the Father lodged an application with the Moldovan Central Authority for A's return;
- The Mother's statement to the Irish Police that she had decided to remain permanently in Dublin; and
- The enrolment of her elder child in a school in Dublin.

**56.** Accordingly, he claimed that in the absence of his consent, or a court order dispensing with that consent, A's removal to and retention in Ireland was illegal according to Moldovan law.

**57.** As the decision of the Chisinau Court records, the Mother did not appear at the hearing of the Article 15 application but claimed through her solicitor that the Father's claim was groundless.

**58.** Having heard the participants and examined the documentation including material referable to the criminal complaint lodged against the Mother, the Chisinau Court rejected the Father's claim. In the first instance, the court observed that according to paras. 118 and 121 of the Moldovan Code of Civil Procedure ("the CCP"), the onus of proving the claim was on the Father. It also had regard to Article 123 of the CCP, holding that the principle of *res judicata* meant that "*facts established by an irrevocable judicial decision in a civil case...need not be proved again*". It noted that the provisions of Article 1 para. 4 of the Moldovan law on entry and exit provided that in order to establish the "domicile" of a minor child abroad, the consent of both parents was required in the form of a declaration

authenticated by a notary. The declaration was required to state the scope of the travel, its duration and the country of destination. The court stated:

*“Should the minor travel abroad for establishing his/her domicile there, it requires the declarative consent of both parents produced in written [form] and signed before a notary, or, in the absence of parents, the consent of the child’s legal representative expressed in a decision of the tutelage authority.”*

**59.** The Chisinau Court went on to recite that pursuant to the provisions of Article 3 of the Hague Convention, the removal or retention of a child is unlawful *“a) when it takes place in violation of a right of custody conferred to a person , an institution or another authority acting separately or jointly, according to the law of the state where the child has his/ her usual residence immediately before the removal or non-return and, b) If at the moment of travel or non-return the said right was effectively exercised...”* or would have been exercised if not for the removal. It noted the refusal of the Irish High Court to direct A’s return and that the Court of Appeal in Ireland had directed the invoking of the Article 15 procedure for the Father to apply to the Moldovan courts *“to obtain a decision establishing that the abduction or non-return of the minor child [A] is illegal”*.

**60.** The Chisinau Court was satisfied, *inter alia*, as to the following: on 2 April 2015 the CPCR Ciocana had regulated access to A by the Father which had subsequently been approved by the CPCR Municipal Directorate on 28 May 2015; the parties were divorced on 13 January 2016 by the *“irrevocable decision”* of the Ciocona First Instance Court where it had been determined that A was to reside with the Mother with the Father’s counterclaim for custody having been declared inadmissible, a decision that was upheld by the Chisinau Court of Appeal on 31 May 2016 and the Moldovan Supreme Court on 24 August 2016. The Chisinau Court also noted that the decision of Ciocona Municipal Court of 30 June 2016 rejecting the parties’ respective applications for injunctive relief and

which also rejected the Father's (and the Moldovan DPCR's) claims that the Mother was obliged to comply with the previously ordained access schedule. That decision was upheld by the Chisinau Court of Appeal on 24 November 2016 and the Chisinau Court noted that on 15 March 2017, the Moldovan Supreme Court had declared the Father's appeal from that decision inadmissible.

**61.** The Chisinau Court next took note of the fact that the Father had provided a notarised consent to the Mother on 10 December 2014 in order for her to obtain a visa for travel to Canada with A between 10 December 2014 and 10 December 2015. It noted that on 10 July 2015, the Mother crossed the Moldovan border with A and duly travelled to Dublin. It went on to hold that the Father's claim that A had been wrongfully removed was "groundless" since Article 1 para. (2) of the Moldovan law on entry and exit provided that a child could leave the country in the company of one parent. It stated:

*"Based on the above, the judiciary instance considers that the claim of [the Father] is groundless and lacking the proper legal support, as the art. 1 para. (2) of the Law on the entry and exit from The Republic of Moldova... expressly stipulates that the minor have the right to exit and to enter the Republic of Moldova only in the company of one of their legal representatives ...*

*As mentioned above, the minor child [A] has crossed the state border of the Republic of Moldova via the Chisinau International Airport with the flight Chisinau – Dublin in the company of her mother... this fact was not contested by [the Father]."*

**62.** Quoting from the *res judicata* provisions of the CCP, the Chisinau Court went on state that as outlined in the "irrevocable" decision of the Ciocana Municipal Court of 30 June 2016, the Mother had left Moldova with A to go abroad without any difficulty such as a refusal by the Father to give consent and that the Mother's departure with A was with the

cooperation of the Father. Moreover, it noted that the Father had confirmed that the Mother had informed him (*via* the internet) of her departure abroad, as she was required to do by law. The Chisinau Court opined, with regard to the duration of the travel abroad to which the Father had consented:

*“Bearing in mind the special term of the declaration – one year, the instance considers that [the Father] admitted the possibility of [his] minor daughter leaving the territory of the Republic of Moldova, together with her mother... for a long period of time.*

*In these circumstances the judiciary instance considers that the argument of [the Father] that the journey of 10.07.2015 and the subsequent retention of the child [A]...was illegal, invoking the provisions of art.1 para. (4) of the Law on the entry and exit from the Republic of Moldova No. 269 – XI11... 09.11.1994, must be rejected as groundless.”*

**63.** Albeit recognising that Article 1 para. (4) of the Moldovan law on the entry and exit stipulates that when a minor leaves the country for permanent living abroad the consent of both parents is necessary, and that such consent must be confirmed by a declaration authenticated by a notary, the Chisinau Court found that the Father *“did not provide any proofs that pursuant to the provisions of art. 30 of the Civil Code would confirm with certitude that [the Mother] departed with the minor child ... to the Republic of Ireland for establishing her domicile there.”* In those circumstances, the Chisinau Court found that the provisions of Article 1 para. (4) of the Moldovan law on entry and exit from the Republic of Moldova were *“inapplicable”*.

**64.** The Chisinau Court also noted that the criminal investigation which had been instigated on 25 April 2016 following the Father’s allegation that the Mother left Moldova without his consent contrary to the provisions of Article 1 para. (4) of the Moldovan law

on entry and exit had been terminated “*due to the lack of the constituent elements of the offence*”.

**65.** The court thus concluded that based on the foregoing it had not been established pursuant to Article 3 of the Hague Convention in combination with Article 15 thereof, that the journey of the minor child A together with the Mother from the Republic of Moldova to Ireland was illegal in the sense of Article 3 of the Convention. Therefore, the Chisinau Court considered it necessary “*to reject to the full extent*” the Father’s claim that the Mother had unlawfully removed A from the Republic of Moldova or illegally retained her in Ireland.

#### **The father’s appeal of the decision of 1 March 2018**

**66.** The Father duly appealed the decision of the Chisinau Court. On 4 July 2018, the Chisinau Court of Appeal dismissed the appeal, upholding the Chisinau Court’s decision of 1 March 2018. On 28 November 2018, the Moldovan Supreme Court admitted the Father’s application for a reversal of the Chisinau Court of Appeal’s decision and duly quashed the decision and remitted the matter back to the Chisinau Court of Appeal for re-hearing.

**67.** By a decision given on 26 February 2019, the Chisinau Court of Appeal again rejected the Father’s appeal and upheld the decision of 1 March 2018. On 3 July 2019, the Supreme Court granted the Father’s application to reverse that decision and duly annulled it and directed a re-trial in the Chisinau Court of Appeal.

**68.** In both instances, the Chisinau Court of Appeal’s decisions of 3 July 2018 and 26 February 2019 were quashed on technical grounds.

**69.** By a decision dated 10 June 2020, the Chisinau Court of Appeal rejected the Father’s appeal and duly upheld the decision of the Chisinau Court of 1 March 2018 declaring it to be “*enforceable and final*” subject to any appeal to the Moldovan Supreme Court within two months of the notification of the decision.

70. By its decision of 4 November 2020, the Moldovan Supreme Court rejected the Father's application for a reversal of the 10 June 2020 decision as inadmissible noting in its rejection of the application that while the Father had clearly highlighted his disagreement with the decision of the Chisinau Court of Appeal, the arguments he advanced did not identify any errors or omissions on the part of the Chisinau Court of Appeal such as would have rendered his application admissible.

71. The consequences therefore were that the decision of the Chisinau Court of 1 March 2018 was upheld by the Chisinau Court of Appeal in its decision of 10 June 2018.

**The decision of the Chisinau Court of Appeal of 10 June 2018**

72. As had the first instance court, the Chisinau Court of Appeal commenced its decision by reciting the factual background in considerable detail including the decisions made by the Moldovan courts prior to the filing of the Article 15 application in August 2017.

73. The court had regard to Article 385 of the CCP which provides that an appellate court, after ruling on the appeal, was entitled to dismiss the appeal and to uphold the decision of the first instance court. It noted that Article 239 of the CCP provided that the court's decision "*must be legal and grounded*" and that the court based its decision "*only on the circumstances ascertained directly by the court and on the evidence investigated in the court hearing*". It also noted that pursuant to Article 118, "*each party must prove the circumstances it invokes as grounds for its claims and objections, unless the law provides otherwise*".

74. The Chisinau Court of Appeal proceeded to record the various proceedings between the parties concerning the custody and access of A and which resulted in the decision of the Ciocana District Court of 13 January 2016 as duly upheld by the Chisinau Appeal Court on 31 May 2016. It noted the further decision of the Ciocana Municipal Court of 30 June 2016, as upheld by the Chisinau Court of Appeal on 24 November 2016 and the

Moldovan Supreme Court on 15 March 2017, which dismissed the Father's application for an order prohibiting the Mother removing A from crossing the state border without his consent and his claim for the enforcement of the access schedule and which also rejected the Mother's application for injunctive relief against the Father. The court observed that by notarised affidavit of 10 December 2014, the Father gave his consent to the Mother for temporary travel to Canada during the period 10 December 2014 until 10 December 2015 with the child A. It noted the circumstances of the Mother leaving Moldova on 10 July 2015 and her travel to Ireland, and that on 11 November 2015 proceedings were instituted in the High Court in Ireland by the Father for the return of A.

**75.** The Chisinau Appeal Court went on to note the High Court's rejection of the application, that on 28 July 2017 the Irish Court of Appeal had determined that it was not possible to ascertain whether the removal of A to Ireland was unlawful because it was not clear about the relevant law in Moldova which was to be applied in Ireland and that it had postponed the appeal pending such clarification. It duly noted that on 18 August 2017, the Father filed his petition in Moldova "*by which he requested the ascertainment that the travel on 10<sup>th</sup> July 2015 and the withholding in the Republic of Ireland of the child [A]...was illegal*".

**76.** It noted that the Chisinau Court which was "*vested with the trial of the case*" had concluded that the action was unfounded, a conclusion the appellate court deemed to be "*correct*".

**77.** The court then had regard to the provisions of Article 1 paras. (2) and (4) of the Moldovan law on entry and exit, noting that pursuant to Article 1 para. (2), minors in Moldova had the right to leave and enter the state "*only accompanied by one of their legal representatives...designated by a statement [indicating] the purpose of the trip, its duration and the country of destination.*" It went on to state:



*“If the minor goes to reside abroad, the consent of both parents whose signatures are notarized is necessary...”*

**78.** After citing the provisions of Article 3 of the Convention, the court stated that the rights of custody as referred to at subparagraph (a) of Article 3 *“may follow, inter alia, from an award of full right, from a court or administrative order or from an agreement in force under the law of that state.”*

**79.** At p.7 of its decision, the Chisinau Court of Appeal emphasised that “the child [A] crossed the state border accompanied by [her] mother...based on the statement of [the Father] for taking the child out of the country”, in other words, that the child had left Moldova with the Mother with the written consent of the Father.

**80.** Next, quoting from the CCP, it went on to state that facts as found in a judgment in a civil case between the same parties were binding on subsequent courts and cannot be challenged in subsequent proceedings involving the same parties. This, the court noted, was based on the principles of *res judicata* so as to ensure legal order and stability. While the principle did not debar subsequent proceedings, nevertheless, *“a judgment establishing the facts stated, as well as irrevocably accepted findings, enjoys the absolute presumption of truth and cannot be contradicted by another judgment”*. Accordingly, this *“makes impossible another assessment in another process of facts and legal relationships, which have already been established by a court decision”*.

**81.** Accordingly, the court noted that on 30 June 2016, the Ciocana Municipal Court had found both the Father’s and the Mother’s respective applications for orders restricting the other from bringing A across the Moldovan state border (and the Father’s application for adherence to the previously set out access schedule) to be unfounded, a decision which had been upheld by the Chisinau Court of Appeal on 24 November 2016 and again upheld by the Supreme Court on 15 March 2017. It also noted that the criminal investigation which

had been initiated on 25 April 2016 had been closed “*due to the fact that there is no crime*”.

**82.** The Chisinau Court of Appeal went on to find:

*“In the case, the provisions of art. 1 paragraph (4) of the Law on the exit and entry into the Republic of Moldova...are not applicable and neither are the provisions of art. 3 of the Convention met”.*

**83.** It found that the Father had not submitted evidence which confirmed that the Mother had left Moldova and travelled to Ireland with A with the intention of permanently residing there. With reference to Art. 386 of the CCP, the court opined that “*a legal decision on the merits cannot be quashed only for formal reasons*” and that the Father had not argued in the course of the appeal that he had evidence which he did not have the opportunity to present at first instance and which would be capable of overturning the conclusions reached by the first instance court. The court found that “*the essence of the allegations on appeal are similar to those set forth before the first instance, which were correctly settled*”.

**84.** The court duly found the decision of the Chisinau Court of 1 March 2018 “*legal and grounded*” and on that basis rejected the Father’s appeal. As already mentioned, on 4 November 2020, the Moldovan Supreme Court deemed the Father’s appeal of the Chisinau Court of Appeal’s decision inadmissible.

**85.** It is in the context of the Moldovan courts having ruled on the Article 15 referral that the matter now returns to this Court.

### **Discussion**

**86.** The principal issue which arises in this appeal is whether having invoked the Article 15 procedure, the Court is obliged to accept the decision of the Chisinau Court of 1 March 2018 as upheld by the Chisinau Court of Appeal on 10 June 2020 and effectively also by

the Moldovan Supreme Court in circumstances where that court by its decision of 4 November 2020 declared the Father's appeal of the Chisinau Court of Appeal's decision inadmissible.

**87.** The question arising has to be considered in the context of what is the effect, for Hague Convention purposes, of the judgment of the Chisinau Court of 1 March 2018 as upheld by the Chisinau Court of Appeal on 10 June 2020 and whether this Court can be satisfied that the rulings of the Moldovan courts pursuant to the Article 15 referral were arrived at within the autonomous meaning of "custody rights" under the Convention. The question also requires a consideration of the obligation on the Moldovan court in an Article 15 referral.

**88.** As required by the Convention, upon such referral, it falls to the court in the requesting State to whom the Article 15 referral is made to render a decision as to whether the removal was wrongful or otherwise under the laws of that State. The requesting court must reach its decision by having regard to the provisions of the Convention. As Article 15 provides, what the court in the requesting State must do upon an Article 15 referral is decide whether "the removal or retention was wrongful within the meaning of Article 3 of the Convention", in other words, decide whether the parent seeking the return of a child had rights of custody (as understood in a Convention context) under the laws of the requesting state and if so whether those rights were breached. Ultimately, however, as Baroness Hale explains in *In Re. D*:

*"...it is for the court to which the application [for return] is made, not the authorities of the requesting state, to decide whether the removal was wrongful within the meaning of article 3. The court must apply its own view of the Convention as best it can in light of what it knows."*

**89.** That the Court is not bound by the decision of the requesting court pursuant to an Article referral was well understood by Peart J. in his judgment of 27 July 2017 when he stated:

*“Upon the receipt of a determination of that question from the Moldovan court, it will remain a question for determination by the Irish court as to whether the removal was wrongful under Article 3. Clearly the determination of the Moldovan court on foot of the request under Article 15 will inform that decision of the Irish court as to whether the removal was 'wrongful' for the purposes of Article 3, but it remains a matter for the Irish court to make that final determination.”*

**90.** Accordingly, the question that remains for this Court is whether A’s removal was wrongful under the Convention particularly in circumstances where the Father claims that notwithstanding the decisions rendered by the Moldovan courts on 1 March 2018, 10 June 2020 and 4 November 2020, the removal of A remains squarely within the parameters of the Convention as to its alleged wrongfulness. His submission is that this Court should discount the decision of the Chisinau Court of 1 March 2018 as upheld by the Chisinau Court of Appeal on 10 June 2020. I will shortly address the arguments made by the Father in this regard.

**91.** Firstly, however, I consider that the provisions of Article 5 of the Convention bear repeating. The removal or retention of a child will be wrongful where “it is in breach of rights of custody attributed to a person...under the law of the State in which the child was habitually resident immediately before the removal or retention” and where those rights were being exercised at the time of removal or would have been but for the removal or retention. As set out in Article 4, for the purposes of the Convention “rights of “custody” “shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”. “Rights of access” “shall include the

right to take a child for a limited period of time to a place other than the child's habitual residence". Neither concept is further defined in the Convention save that Article 21 makes provision, *inter alia*, for the effective exercise of access rights.

**92.** As is by now well-rehearsed, the Father's position is that he had custody rights as of the date of A's removal from Moldova. He was not, of course, the parent with whom A resided in Moldova prior to her removal on 10 July 2015 nor was he charged with her day-to-day care. Prior to her removal, he was exercising access to the child pursuant to the access schedule devised by the DPCR Ciocana on 2 April 2015 as upheld by the Municipal Department of the DPCR on 28 May 2018. It is common case that if the Father had purely rights of access to A (not encompassing custody rights) her removal will not be considered wrongful for Convention purposes.

**93.** That being said, it is, of course, well established that rights of custody and rights of access, in the words of Baroness Hale in *In Re. D*, "*are not mutually exclusive concepts*". As she explains:

*"A person may have both rights of access and rights of custody. The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amounted to rights of custody or do they not? States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between the parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with the different package of rights which that entails. This is by no means an unusual way of looking at the matter. Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or*

*qualified by the necessary effect of a court order or an enforceable agreement between them.”*

**94.** The “*bundle of parental rights*” referred to in *In Re. D* includes a “right of veto” giving one parent who may or may not also have rights of access the right to insist that the other parent does not remove the child from the home country without his or her consent or a court order.

**95.** After a detailed review of caselaw across the common law world and Scotland, Lady Hale held “*that a right of veto does amount to ‘rights of custody’ within the meaning of article 5(a) [of the Convention]*”.

**96.** Lord Hope in his judgment in *In Re. D* explained the position in the following terms:

*“The Convention is an agreement between states. It seeks to address the problems that arise where a child is moved across international borders. It does not concern itself with disputes about the exercise of custody or access rights within the country of the child’s habitual residence. The right to determine the child’s place of residence has to be seen in that context. The word ‘place’ in the phrase ‘the child’s place of residence’ must be taken, for Convention purposes, to include the country of the child’s residence. A right to object to the child’s removal to another country is as much a right of custody, for those purposes, as a right to determine where a child is to live within the country of residence”.*

**97.** From the outset, in his Article 12 application in this jurisdiction, the various proceedings before the Moldovan courts in 2016 and in the case that he made in the Moldovan courts in the course of the Article 15 application, the Father asserted that he had custody rights for the purposes of the Convention by virtue of the provisions of Article 1 para. (4) of the Moldovan law on entry and exit. As far as this Court is concerned, there is no question but that is the case, the Father’s *ne exeat* entitlements under Moldovan law

amount to rights of custody. Albeit it was posited to the contrary in the court below, in the submissions now being made to this Court by the Mother, she accepts that the rights provided for in Article 1 para. (4) of the Moldovan law on entry and exit amount to custody rights within the meaning of the Convention. To the extent, therefore, that the trial judge purported to determine the Father's rights of custody for Convention purposes solely by reference to the custody decision of the Chisinau Court of Appeal of 31 May 2016 (which was concerned only with which parent A would reside on a day to day basis), that was an incorrect approach. Moldovan law clearly provided for *ne exeat* entitlements (equating to rights of custody under the terms of the Convention) which were applicable to the Father (subject of course to any argument that those rights may have been waived or rendered inapplicable).

**98.** The argument the Father advances before this Court is that in the decisions given by the Moldovan courts subsequent to the Article 15 referral did not assess his claim that A was wrongfully removed in the context of his rights of custody within the meaning of the Convention. He asserts that the consent which he gave in December 2014 was wrongfully viewed by the Moldovan courts as determinative of his rights of custody under Moldovan law. He asserts that the Moldovan courts did not explain what "custody", "domicile" or "access" meant in Moldova's legal order. He further contends that the Chisinau Court of Appeal in its decision of 10 June 2020 did not elucidate on the nature of his rights at the time the Mother left Moldova with A. Rather, as was the case with the Chisinau Court, the Chisinau Court of Appeal expressed itself bound by the decisions made by the Moldovan courts in 2016 and which were rendered a year after the Mother left Moldova.

**99.** The Father further contends that the Chisinau Court's conclusion of 1 March 2018 that A's removal was not unlawful (as upheld on appeal) appears to be based on findings that:

- The Father had previously agreed to A being removed to Canada between December 2014 and December 2015;
- Accordingly, he had contemplated the removal of A for “a long period of time”;
- The Mother was entitled to remove the child temporarily from Moldova;
- The Father failed to prove that the Mother removed the child with a view to residing permanently in Ireland; and
- Previous decisions of the Moldovan courts in 2016/2017 had made the foregoing findings and had found that A should reside with the Mother given her young age.

**100.** He argues that the foregoing findings were used by the Moldovan courts charged with making a decision pursuant to the Article 15 referral to support a conclusion that he did not have rights of custody at the time of A’s removal when in fact, as he alleges, the bulk of the findings were actually suggestive of rights of custody inhering in him insofar as the Moldovan courts recognised that he had a right to a veto on A’s permanent removal from Moldova, pursuant to Article 1 para. (4) of the Moldovan law on entry and exit.

**101.** Asked by the Court how the Moldovan courts should have approached the Article 15 referral, counsel for the Father submitted that the focus should not have been on the Father’s consent but rather that the Moldovan courts, in the first instance, should have explained, by using the analogy employed by Baroness Hale in *In Re D*, how the cake of parental responsibility was divided in Moldovan law. Counsel asserted that the Moldovan courts did not explain how parental rights are divided and only addressed the issue before them by saying that they were bound by the facts as found in previous decisions of the Moldovan courts in 2016. It is further submitted that it is unclear whether the Moldovan courts found A’s removal temporary or permanent.

**102.** I am not persuaded by the Father’s submission that there was no engagement in the decisions of 1 March 2018 and 10 June 2020 with the nature of his rights or whether they



constituted rights of custody for the purposes of the Convention. The submission that the decisions must be read as meaning that the Moldovan courts concluded that rights of custody for Convention purposes never inhered in the Father is, in my view, a mischaracterisation of the ruling of the Chisinau Court of 1 March 2018 and the Chisinau Court of Appeal decision of 10 June 2020.

**103.** By and large, the operative decision of the Chisinau Court of 1 March 2018, as upheld on appeal, answered the question referred under Article 15 of the Convention by reference to three matters:

- (1) The decisions the Moldovan courts had previously made in the context of the divorce proceedings and other applications made by the parents, including the finding that A's domicile/residence lay with the Mother;
- (2) The Moldovan law on entry and exit as set out in Art. 1 paras. (2) and (4) thereof; and
- (3) What the Chisinau Court itself inferred from the facts of the case, including the level of cooperation between the Father and the Mother and the fact that the Father had signed a permission for A to exit Moldova for the purposes of travel to Canada for a twelve-month period.

**104.** With regard to (1) above, had the Chisinau Court in its decision of 1 March 2018 relied solely on the 2016 decisions rendered by the Moldovan courts in the context of the parties' divorce proceedings, their respective proceedings for injunctive relief and the Father's application for enforcement of the access schedule, I accept, for the reasons set out by Peart J. in his judgment of 28 July 2017, that such reliance could not be taken as an authoritative or binding answer to the Article 15 application which this Court directed be made in Moldova. However, that is not what occurred in this case. By its reference to Articles 3, 5 and 15 of the Convention, the Chisinau Court was clearly aware of the

Convention and the question which this Court required to be addressed. While it is the case that the question was addressed in part by reference to prior decisions of the Moldovan courts referable to the parties, more significantly the Chisinau Court looked to the provisions of Moldovan law, the evidence the court itself had relating to the relations between the parties and the level of their cooperation, and the permission granted by the Father on 10 December 2014. Thus, the factors listed at (2) and (3) above are of particular importance, to my mind, in addressing the question of whether this Court should accept the ruling of the Chisinau Court (as upheld on appeal) as conforming to Convention principles.

**105.** Albeit that it is not expressly stated in the decision of 1 March 2018 that the Father had rights of custody as understood for Convention purposes, on any reading of the decision, and the decision of the Chisinau Court of Appeal of 10 June 2020, it is sufficiently clear that the Moldovan courts accepted that he had rights of custody under Moldovan law, evidenced by their reference to the provisions of Article 1 para. (4) of the Moldovan law on entry and exit (which provides that a parent has the right in law to object to the permanent removal of his or her child from Moldova) and the consent he signed on 10 December 2014 agreeing to A's removal from Moldova for a period of one year.

**106.** Pursuant to Article 1 para. (4) of the Moldovan law on entry and exit, the Father had both a self-executing right to provide or withhold his consent to the removal of A and a right to apply to the Moldovan courts to prevent a permanent removal. In other words, the Father's *ne exeat* entitlements as provided by Article 1 para. (4) (equating to "rights of custody" for Convention purposes as per the *dicta* of Baroness Hale and Lord Hope in *In Re. D*) were implicitly recognised by the Chisinau Court (and the Chisinau Court of Appeal) as being engaged, or potentially engaged, in the context of their consideration of whether A's removal was unlawful under Moldovan law. In this context the Moldovan courts also had regard to the provisions of Article 1 para. (2) of the Moldovan law on entry

and exit which provided that minor children could exit the country in the company of one parent.

**107.** In their consideration of the national law, both the Chisinau Court and the Chisinau Court of Appeal took note of the permission granted by the Father on 10 December 2014, duly notarised as required by law, from which the Moldovan courts inferred that the Mother had permission from the Father to remove A “*for a long period of time*”, and from which they found (as had been determined by the Chisinau Municipal Court in its ruling on 30 June 2016) that the Father had cooperated with the Mother in this regard. Those factors, in conjunction with what the Chisinau Court found was the Father’s failure to adduce sufficient proof that the Mother’s departure with A to Ireland on 10 July 2015 was with the intention of permanently residing there, satisfied that court (and the Chisinau Court of Appeal) that there was no breach of the Father’s custody rights in July 2015 and further satisfied those courts that A’s removal in July 2015 and subsequent retention in Ireland was not wrongful under the Convention.

**108.** Before this Court, the Father asserts that the operative decision of the Chisinau Court (as upheld on appeal) is vitiated by its reliance on the decisions of the Moldovan courts in 2016, in particular the decision of the Ciocana Municipal Court of 30 June 2016. As I have already said, it would have been wrong had the deciding courts in the Article 15 referral based their conclusions that A’s removal was not wrongful by having regard solely to the 2016 decisions given that those decisions were not addressing the factual circumstances at issue here through the prism of the Hague Convention. However, I am satisfied that the operative decision that is presently under consideration was in fact a full-merits consideration of the parties’ circumstances against the backdrop of the relevant provisions of Moldovan law and the requirements of the Hague Convention. While it is certainly the case that the Chisinau Court references the decision of the Ciocana Municipal Court of 30

June 2016 (as upheld on appeal), it is nevertheless clear from the face of the decision of 1 March 2018 that the Chisinau Court arrived at its conclusions based on the materials and evidence before it. As the decision states, the Father's claim was rejected "*[h]aving heard the participants in the process present at the hearing, having examined the documents and the materials of the criminal case...*" All of this was done in the context of the Article 15 referral, where the Chisinau Court was cognisant that the question to be addressed was the lawfulness or otherwise of A's removal under Moldovan law. Thus, insofar as the argument is advanced that the Chisinau Court and/or the Chisinau Court of Appeal reached their decisions by reference only to the principles of *res judicata*, I reject that submission.

**109.** The Father's principal complaint is that the Moldovan courts conflated the issue of consent with his rights of custody for the purposes of the Convention. He submits that while this conflation may be legitimate for the purposes of Moldovan law, that is not the position as a matter of Convention law. He further argues that the question of assessing any consent that he may have given only falls to be considered in the context of any defence the Mother may put up to a finding of wrongful removal, as per the provisions of Article 13 of the Convention and Convention jurisprudence. He asserts that the giving of such consent was not to be conflated with the primary obligation on the Moldovan courts in the context of the Article 15 referral to address his rights of custody prior to A's removal in accordance with Convention norms.

**110.** With the greatest of respect to this argument, I do not consider that the Chisinau Court's (or the Chisinau Court of Appeal's) reliance on the consent the Father signed on 10 December 2014 amounted to an abdication of their obligation to consider his asserted rights of custody prior to the removal as understood under the Convention, or equates to a finding by those courts that rights of custody did not inhere in the Father pursuant to Moldovan law. Nor do I consider that the Moldovan courts erroneously conflated rights of

custody with the issue of consent. The reliance placed by the Moldovan courts on the consent signed by the Father on 10 December 2014 has to be seen in the context of the Father's *ne exeat* entitlements as provided for by Moldovan law (which, as I have found, were implicitly accepted by the Moldovan courts as inhering in him and which equated to rights of custody) but in respect of which the Moldovan courts, in the decisions of 1 March 2018 and 10 June 2020, clearly found the Father had effectively waived by virtue of the consent he signed on 10 December 2014. Accordingly, I am satisfied that when the Moldovan courts looked at the issue of consent, they did so in the context of their consideration of the Father's substantive custody rights as provided for under Moldovan law.

**111.** This waiver of the Father's *ne exeat* entitlements, coupled with the other factors to which I have alluded above, constitute the basis, upon which, in my view, it was open to the Chisinau Court to legitimately conclude that A's removal to Ireland on 10 July 2015 was not unlawful and the basis upon which the Chisinau Court of Appeal found that the provisions of Article 1 para. (4) of the Moldovan law on entry and exit were not met, given the factual matrix as found by the Chisinau Court, and in respect of which the Chisinau Court of Appeal, itself capable of making findings had the Father adduced further evidence supportive of his case (as per article 239 of the Moldovan CCP), did not find any basis to depart from the conclusions of the lower court.

**112.** Accordingly, the Moldovan courts have answered the question of whether A's removal from Moldova was unlawful under Moldovan law in the negative. It bears repeating that both the Chisinau Court decision of 1 March 2018 and the Chisinau Court of Appeal decision that followed on 10 June 2020 were full merits cases in which the Father's evidence was heard and considered. Both decisions refer to his submissions all of which were fully ventilated in the decisions. Moreover, again at the risk of repetition, as is

apparent on the face of both decisions (i.e. from the recitals of the applicable provisions of Moldovan law and the Convention), the Moldovan courts were conscious that the issue to be decided was whether A's removal was in breach of the Father's rights of custody under Moldovan law and that that question had to be decided in the context of the provisions of the Hague Convention. Furthermore, the deciding courts were conscious that the proceedings in Ireland had been adjourned until the Father's rights were "*fully clarified*". As can be seen, the Chisinau Court concluded that there was no breach of his rights "*to the full extent*", a conclusion upheld by the Chisinau Court of Appeal. In turn, the Moldovan Supreme Court in its decision of 4 November 2020 found no basis upon which to admit the Father's appeal of the Court of Appeal's decision.

**113.** It is, I accept, arguable that the decisions of the Moldovan courts of 1 March 2018 and 10 June 2020 could have been formulated in a more comprehensive and straightforward manner. While it may be that the manner of the reasoning of the Moldovan courts may not be akin to what one would expect to see in a common law jurisdiction, any frailty that may attach to the decisions in that regard is not, in my view, a sufficient basis for this Court to disregard the findings made by the Moldovan courts in answer to the Article 15 referral. This is particularly so when the ruling of the court in the requesting state (which is binding between the parties in that State) has been requested by the Court of Appeal in this State pursuant to Article 15 of the Convention as to the content and effect of Moldovan law and in circumstances where the question asked by this Court has been answered at the highest court level in the requesting State (the Father having exhausted all avenues of appeal in Moldova).

**114.** It is of course the case, as stated by Baroness Hale in *In Re. D*, that "*[g]iven...that the Convention terms has an autonomous meaning, it is possible to contemplate the possibility that the [f]oreign court's characterisation of the effect of its domestic law in*

*Convention terms is mistaken*". However, as again noted by Baroness Hale, "[t]he foreign court is much better placed than the English to understand the true meaning and effect of its own laws in Convention terms. Only if its characterisation of the parent's rights is clearly out of line with the international understanding of the Convention's terms ... should the court in the requested state decline to follow it."

She further opined:

*"While ultimately, therefore, the decision [to order a return of the child or not] is one for the courts of the requested state, those courts must attach considerable weight to the authoritative decisions of the requesting state..."*

**115.** Again, while there may, in the words of Lord Hope in *In Re D*, "be situations where the court feels that there may still be room for argument as to what the article 15 determination amounts to", I do not consider that the decisions here fall into such a category, notwithstanding my view that they could perhaps have been expressed in more straightforward terms. There is sufficient clarity in the decisions to convey to this Court what the Father's rights were *vis a vis* the child A at the relevant time and whether those rights were "rights of custody" within the meaning of Article 5 of the Convention and, if so, whether those rights were breached by A's removal from Moldova. After a full-merits hearing (where the Father had full opportunity to be heard) in the lower court, and on appeal (where again he had full opportunity to ventilate his claim), the Moldovan courts determined (for the reasons already outlined) that the Father's rights of custody for Convention purposes (which the Moldovan courts implicitly recognised inhered in him) were not breached by A's removal from Moldova in July 2015. That decision was arrived at in circumstances where it cannot be said that the Moldovan courts misdirected themselves as to the requirement for Convention purposes for an autonomous meaning to be applied to "rights of custody", the Moldovan courts' adherence to this requirement

manifest in their having taken account of the Father's *ne exeat* rights under Moldovan law and whether those rights had been breached or were otherwise inapplicable in all the circumstances of the case.

**116.** Thus, for the reasons set out above, this Court sees no basis upon which it should depart from the decision of the Chisinau Court of 1 March 2018 as upheld on appeal at the highest level in Moldova. The decision of the Chisinau Court (as upheld on appeal) is that the removal of A from Moldova was not wrongful for the purposes of the Convention. In the words of Baroness Hale in *In Re. D*, the decision “*was not out of line with the international understanding of the Convention’s terms*”.

**117.** In view of my findings in this regard, there is no necessity to embark on any discussion as to whether A should be returned to Moldova some seven years after she arrived in this jurisdiction, or the process by which that question should be determined at this remove.

### **Summary**

**118.** For the reasons set out above, I would dismiss the Father's appeal of the Order of the High Court of 27 July 2016.

**119.** In view of the conclusions I have reached in respect of the Father's appeal, there is no requirement to embark upon a consideration of the Mother's appeal and, for that reason, I propose that no order be made in respect of that appeal.

**120.** The matter will be listed on a date to be advised for the disposal of the Father's appeal of the High Court order made against him and to hear such applications as may be made in respect of the costs relating to the within appeal.



