

# **UK Supreme Court Rules on Concept of Rights of Custody under Brussels IIa Regulation**

On 15 May 2014, the Supreme Court of the United Kingdom delivered its judgment in *In the matter of K (A Child) (Northern Ireland)*.

The Court issued the following press summary.

## **BACKGROUND TO THE APPEALS**

This appeal concerns the meaning of the words ‘rights of custody’ in article 3 of the Hague Convention on the Civil Aspects of International Child Abduction (‘the Convention’), and in the Brussels II Revised Regulation (EC) No 2201/2003 (‘the Regulation’) which complements and takes precedence over the Convention between most member states of the European Union. A child is wrongfully removed or retained in a country under the Convention if such removal or retention is in breach of ‘rights of custody’. The issue is whether the rights of custody must already be legally recognised and enforceable, or include informal rights (termed ‘inchoate rights’), the existence of which would have been legally recognised had the question arisen before the removal or retention in question.

The proceedings concern a boy (‘K’) born in Lithuania in March 2005. From the time of his birth until 2012 he lived with and was cared for by his maternal grandparents. His father separated from his mother before he was born and has played no part in his life. His mother moved to Northern Ireland without K in May 2006 and has lived there ever since. A month after K’s birth she authorised her mother to seek medical assistance for K and, before she left for Northern Ireland, executed a notarised consent for her mother to deal with all institutions in relation to K on her behalf. In 2007 a court order was made in Lithuania putting K under the temporary care of his grandmother. This order terminated when K’s mother returned in February 2012 seeking to take K into her own care. K’s mother also applied to withdraw the notarised consents. Meetings were held at the Children’s Rights Division of the local authority where orders were made for her to have weekly contact with K. She was advised that legal proceedings against her mother to obtain custody of K would be costly and protracted and

decided instead to seize K forcibly in the street while he was walking home from school with his grandmother on 12 March 2012, and to travel immediately back to Northern Ireland with him by car and ferry.

The grandparents were told by the Lithuanian authorities that they had no right to demand the return of K. However, in February 2013 they issued an originating summons in Northern Ireland seeking a declaration that K was being wrongfully retained in breach of their rights of custody. Maguire J refused their application, and their appeal against his decision was dismissed by the Northern Ireland Court of Appeal.

## JUDGMENT

The Supreme Court by a majority (Lord Wilson dissenting) allows the appeal, finding that the grandmother did enjoy 'rights of custody' such that K's removal from Lithuania was wrongful. It orders that K should be returned to Lithuania forthwith. If K's mother wishes to apply for permission to argue at this very late stage that any of the exceptions to the court's obligation to return K found in article 13 of the Convention apply, this order will be stayed if she makes her application within 21 days. Lady Hale gives the only judgment of the majority. Lord Wilson gives a dissenting judgment.

## REASONS FOR THE JUDGMENT

The courts of states parties to the Convention have on several occasions dealt with applications based on inchoate rights of custody [23-42]. In England and Wales such rights have been recognised where the person with legal rights of custody had abandoned the child or delegated his primary care to others [44], but other countries have taken a less expansive view. The Convention is not concerned with the merits of custody rights but it will only characterise a removal of a child as wrongful if it interferes with a right of custody which gives legal content to the situation altered by the removal. Thus it is not enough that K's removal was a classic example of the sort of conduct which the Convention was designed to prevent and to remedy, given the harmful effects on K of wresting him from the person he regarded as his mother and taking him without notice to a country where he knew no-one and did not speak the language [50-51]. The rights relied on by K's grandparents must amount to 'rights of custody' for the purposes of the Convention.

The majority considered that the English courts should continue to recognise inchoate rights as rights of custody under the Convention and the Regulation, provided that the important distinction between rights of custody and rights of access was maintained, and provided that (a) the person asserting the rights was undertaking the responsibilities and enjoying the powers entailed in the primary care of the child; (b) they were not sharing them with the person with a legally recognised right to determine where the child should live and how he should be brought up; (c) that person had abandoned the child or delegated his primary care to them; (d) there was some form of legal or official recognition of their position in the country of habitual residence (to distinguish those whose care of the child is lawful and those whose care is not); and (e) there is every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being while the long term future of the child could be determined in those courts in accordance with his best interests [59].

These conditions applied to the situation of K's grandparents. The Children's Rights Division was supervising the situation on the basis that K remained living with his grandparents while having contact with his mother. Taking K out of the country without his grandmother's consent was in breach of her rights of custody [61-62].

It followed that the court was bound under the Convention to make an order to return K to Lithuania forthwith. It may be that the grandparents would be content with legally enforceable contact arrangements and the mother now has every incentive to agree to these. If the mother were to seek permission at this late stage to raise one of the exceptions in article 13 to the court's obligation to order the return of the child within 21 days, the order would be stayed until the hearing on the first available date in the High Court to determine whether such permission should be granted to her [66].

Lord Wilson would have dismissed the appeal. In his view the rights of custody enjoyed by K's grandmother were terminated on the mother's return [71]. Even if the courts in Lithuania might have maintained the status quo while K's future was decided, this did not amount to recognition of rights of custody in the grandparents [72]. The Convention application should therefore have been dismissed. As a result, a welfare inquiry into K's interests could then have been conducted under the Children (Northern Ireland) Order 1995, in which his

grandparents might have been granted an order for contact or even residence [84].