Translation from the German language

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[crest]

Issued on 23 April 2020 by submission to the registry

[redacted], judicial employee as clerk of the registry at the Local Court

Hamm Local Court
Family Court
Order

In the proceedings concerning the return

of the minor child [redacted], d.o.b. [In handwriting: XX July 2009], currently residing in:

Guardian ad litem: [redacted]

to which the following persons are also party:

1. Mr [redacted]
   Armenia, Armenia,

Applicant,

Legal counsel: *Bundesamt für Justiz* (Federal Office of Justice) - Central Authority under the German IFLPA (International Family Law Procedure Act – *Internationales Familienrechtsverfahrensgesetz*) - Adenauerallee 99 -103, 53113 Bonn;
[Translator's note: listed twice; the first time in an incomplete fashion]

Delegated legal counsel: Lawyer Ms. [redacted]

2. Ms. [redacted]

Respondent,

Legal counsel: Lawyers [redacted]

3. Gelsenkirchen Youth Welfare Office, Kurt-Schumacher-Str. 2, 45879 Gelsenkirchen [Germany],

Hamm Local Court, represented by Local Court Judge [redacted],
on 23 April 2020
durch den Richter am Amtsgericht

decided the following:

I. The Respondent is obliged to return the child [redacted], d.o.b. XX July 2009, currently residing with the Applicant at the address [redacted], to Armenia, within four weeks of this decision becoming final and binding.

II. In the event that the Respondent fails to comply with the obligation set out under I., she and any other person with whom the child [redacted] is staying shall be obligated to hand over the child – and all of the child's personal belongings which are in their possession – to the Applicant or to a person designated by him, for the purposes of the return to Armenia.

III. The Respondent is hereby informed that, in case of non-compliance with the obligation as set out under point I., the court may – pursuant to Section 44 Subsec. 3 of the IFLPA in connection with Section 89 of the *FamFG* (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction – *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*) impose a regulatory fine of up to €25,000.00; in the event that said coercive fine cannot be recovered or the ordering of such a fine is not likely to result in payment, coercive detention of up to 6 months may be ordered.

IV. With regard to the enforcement of point II., the following is also ordered:

1. The court bailiff is instructed and authorized to remove the child referred to under I. from the Respondent or any other such person as the child is staying with and to hand over the child there and then to the Applicant or another person as determined by the Applicant.

2. The court bailiff is instructed and authorized, in order to ensure the handover is executed, to use direct force against any person who is obliged to carry out the handover and, if necessary, against the child, in accordance with Section 90 Subsec. 2 of the *FamFG*.

3. The court bailiff is authorized to enter and perform a search of the home of the Respondent and the home of any other person the child is staying with.

4. The court bailiff is also authorized to execute the enforcement measures mentioned above at night time, on Sundays and/or official public holidays.

5. The court bailiff is authorized to call on the help of police law enforcement agencies.

6. The Youth Welfare Office [redacted] is obliged, in accordance with Section 9 Subsec. 1 IFLPA,

   a) to make arrangements to guarantee the safe handover of the child [redacted], d.o.b. [redacted] to the Applicant or to a person designated by him,

   b) if necessary, after the handover has been effected, to put the child [redacted] temporarily in the care of an institution or person deemed suitable.

7. An enforceability clause shall not be necessary.

V. The Respondent shall bear the costs of the proceedings, including the costs of the enforcement and of the return.

VI. The value of the proceedings shall be set at €5,000.

The reasons for this are:

I.

The parties to the proceedings are the parents of the child [redacted], who was born in Armenia on [redacted]. The parents and the child are Armenian nationals. Since her birth, [redacted] had lived in Armenia on a permanent basis. The parents had been married, got divorced and had most recently been living in separate households in Armenia.

The child's mother then decided to travel to Germany for a visit, and took the child [redacted] with her. Neither party disputes that when they left Armenia on 21 August 2019, a stay in Germany of only three weeks was planned. The Applicant gave his written consent to a stay lasting until 15 September 2019 (page 15f of the court file).

At the time of departure from Armenia, the Respondent was already pregnant. The child's mother was then, in a doctor's certificate dated 27 September 2019 (page 95 of the court file), discouraged from embarking on any flight of more than three hours.

Between 9 February 2020 and 13 February 2020, the Respondent was in hospital in Gelsenkirchen, where she gave birth to a child (see page 96 of the court file).

In the application which was received by the court on 5 February 2020, the child's father is petitioning the court that the child be returned from Germany to Armenia.

A settlement which had been reached between the parties in the meantime, which obliged the child's mother to make arrangements for the return of the child by 5 April 2020, has been revoked by the Applicant as [redacted] is still residing in Germany with the child's mother.

The Applicant petitions the court that

> the Respondent be obliged to hand over the child [redacted] d.o.b. [redacted], currently resident at [redacted], to him for the purposes of immediate return to Armenia;

> The Respondent petitions the court
>
> that the petitions to the Court [made by the Applicant] be refused.

She is of the opinion that no wrongful retention of [redacted] is taking place. She claims that she was not in a position to travel for health reasons. Furthermore, [redacted] had been in agreement with remaining in Germany. She, [redacted], was said to have settled in well in Germany and was able to communicate with the Applicant by telephone at any time.
It is also claimed that a case as set out in Article 13 I b Hague Child Abduction Convention exists, as the return would entail a grave risk of physical harm. It is stated that it was not possible for the child to be brought to Armenia due to a lack of available flights. It is also claimed that the child cannot be expected to undertake a journey involving several stopovers. At the very least, it is stated, the return is to be refused by applying Article 13 I b Hague Child Abduction Convention *mutatis mutandis*.

With regard to the other submissions made by the parties, reference is made to the written statements which have been exchanged, as well as the content of the transcript of the hearing.
The children's guardian ad litem made a report, as did the competent Youth Welfare Office.
The court heard [redacted] in person.

II.
The application for return is admissible, in particular, the court seized is locally competent in accordance with Section 12 Subsection 1 IFLPA.
The application for return is also well-founded.

1.
The proceedings in question are return proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: HCAC) of 25 October 1980.

2.
The Hague Child Abduction Convention has been in force between Armenia and Germany since 1 October 2009.

3.
The Convention applies, as [redacted] is under the age of 16. The time limit of one year since the retention has not elapsed, as [redacted] did not leave Armenia until August 2019, and the child’s father already submitted the present application on 5 February 2020.

4.

By retaining the child, the child's mother acted wrongfully, as she was not entitled to make a decision on moving the child's place of habitual residence to Germany. The retention of the child in Germany is wrongful in the sense of Article 3 of the Hague Child Abduction Convention. Armenian law provides that both of the child's parents have parental custody. It is apparent that the child's mother also presumes that both of the child's parents have joint custody; otherwise there would have been no need for the declaration of consent she requested from the child's father before her departure from Armenia. There is no court decision on custody rights in existence which has ruled differently from this.

Neither is the wrongful nature of the retention altered by the fact that the child's mother claims that after having arrived in Germany, she asked [redacted] whether she agreed to staying in Germany for a longer/long-term period.

[Redacted] does not hold rights of custody and can therefore not make a decision as to the lawfulness or wrongfulness of a period of residence abroad. Also, in view of the age and level of maturity of the child, it cannot be presumed that [redacted] is in a position to make a well-considered decision about her place of permanent residence.

5.

The fact that the child's habitual residence was in Armenia before being removed is uncontested. This habitual residence in Armenia still exists.

The prerequisites for habitual residence as defined in the Hague Child Abduction Convention are to be ascertained by way of autonomous interpretation of the Hague Convention. Habitual residence as defined in the Hague Child Abduction Convention is always characterized by a certain permanence and regularity of the residence, as well as the existence of such relationships to the surroundings as justify the assumption that the person is socially integrated in the place in which they reside (Frankfurt Higher Regional Court *NJW-RR* (*Neue Juristische Wochenschrift*, *Rechtsprechungs-Report* – New Legal Weekly Journal, Jurisprudence Report) 2006, 938). In the event that the so-defined centre of vital interest is altered, this means that the central protective aim of the Hague Convention – to protect children from being torn away from their habitual surroundings and suffering harm as the result of a wrongful uprooting – is affected. One of the fundamental aims of the Hague Child Abduction Convention is to restore the *status quo ante* as soon as possible, so that a custody decision can be made by the courts of the country of habitual residence (Frankfurt Higher Regional Court, ibid.).

The habitual residence is to be established by the court, taking into account all the circumstances of the individual case. Until her departure from Armenia on 21 August 2019, [redacted] lived in Armenia, as did both of her parents; she was going to school in Armenia and had her social and family contacts there.

6.
The father was actually exercising his rights of custody. The child's mother has not made any claim to the contrary in this regard.

7.
Neither are there any reasons why the child should not be returned.
The conditions set out under Article 13 of the Hague Child Abduction Convention, which state that a return shall not be ordered if certain criteria are fulfilled, have not been met – even if the standards imposed on the courts by the European Court of Human Rights in terms of scrutiny are taken into account. The standards named above represent recourse to exceptions. If the powers of the joint custody holder are, in practice, rendered ineffective as a result of the [other party] taking the law into their own hands by retaining the child abroad, and if in-person contact to the child is made difficult on a permanent basis or even precluded, this may not be in the child's best interests. The issue as to whether and if so, under what conditions a right to residence is in fact compatible with the child's best interests in specific, individual cases is, in the end, a decision which is reserved for the court competent for rights of custody according to the earlier habitual residence of the child (German Federal Constitutional Court, *FamRZ* (*Zeitschrift für das gesamte Familienrecht* – Magazine on all Aspects of Family Law, 1997, 1269). As such, it is the courts of the place of habitual residence until [the abduction] which are competent for deciding on this issue. In order to ensure that this decision on custody rights can be made, the provisions of the Hague Child Abduction Convention set out that, in principle, it should be ordered that any child who has been wrongfully removed to another Contracting State or retained there be returned as quickly as possible. The exception set out in Article 13 Hague Child Abduction Convention is therefore to be construed restrictively (German Federal Constitutional Court, *FamRZ* 1999, 885). In doing so, in a departure from the principle of ex officio investigation, the conditions set out under Article 13 Hague Child Abduction Convention are to be presented succinctly and proven by the abducting parent. This is not what has happened in this case.

a)

To begin with, it can be said that the case at hand does not fall within the scope of Article 13 I (b) HCAC, according to which a return can be dispensed with if it would entail grave harm to the physical or mental wellbeing of the child.

The Respondent, who carries the burden of demonstration and proof in this regard, has not presented adequate grounds which might constitute an impediment to the child being returned. In contrast to what the Respondent believes, a *mutatis mutandis* application of Article 13 I b HCAC cannot be considered as a matter of principle. Article 13 I b Hague Child Abduction Convention is an exceptional provision which is, in principle, not available for *mutatis mutandis* application. Even if, however, Article 13 I b HCAC were to be applicable, whether directly or *mutatis mutandis,* this would not lead to any exemption from a return. The child's mother justified her argument by stating that a return of the child to Armenia is currently not possible in practice. This is, however, fundamentally dissimilar to what would be required for a refusal: namely, that the return would bring about grave harm to the child's physical and mental wellbeing. It has not been shown to be the case that a return really would be impossible in practice in any case. The screenshots provided by the Respondent with regard to this issue do not, at any rate, prove that the return would be impossible in practice. Merely making reference mainly to the internet portal "*billigfluege.de*" [Translator's note: "*billigfluege*" translates as "cheap flights"] is not sufficient; also, the child's mother has only made reference to flight connections via the Ukraine or Belarus. What is more, the travel advisories of the German Federal Foreign Office which have been quoted and of which photocopies have been submitted, do not demonstrate the impossibility of transiting through the countries named as part of an indirect flight. Neither is it discernible that [redacted] would be exposed to a greater health risk in Armenia than in Germany. The Federal Republic of Germany is a country with one of the highest numbers of cases worldwide during the "Covid19 Pandemic". That this would apply to a greater degree in Armenia has not been demonstrated, nor is it apparent.

b)

Neither is it apparent that the Applicant consented to the retention or has subsequently acquiesced – Article 13 I a Hague Child Abduction Convention.

c)

Irrespective of the question as to whether [redacted] would, taking into account her age, even be in a position to make an assessment which carried any weight in terms of the decision to

be made, the case does not fall under Article 13 paragraph 2 Hague Child Abduction Convention either. [Redacted] has certainly not expressed any particular opposition to the prospect of her return.

d)
Neither have other reasons for refraining from the ordering of a return – in particular because the child could be put in an intolerable situation – been presented or otherwise become apparent.
Even in view of the difficulties presented by the Respondent with regard to one travel option (travel duration of more than three days), this does not make the situation intolerable as defined in the provision. Any difficulties which might arise for the Respondent herself are not to be taken into consideration in the assessment, as only [the interests of] [redacted] are to be taken into account.
The actual, comprehensible difficulties have been taken into account sufficiently by the court in that it extended the deadline for the return journey to four weeks after the final and binding effect [of the order].

8.
The decision will only become effective when it becomes final and binding.
The court of first instance is not able to order immediate effect, as set out in Section 40 Subsection 3 IFLPA.

9.
The decisions on enforcement have been made in accordance with Sec. 44 IFLPA, and Sections 88 et seq. *FamFG*.

10.
Upon [the order] becoming final and binding, the court must carry out the enforcement ex officio in accordance with Sec. 44 Subsec. 3 IFLPA. Enforcement of the handover of the child shall be conducted in accordance with Sec. 213a of the *Geschäftsanweisung für Gerichtsvollzieher* (Conduct Instructions for Court Bailiffs).

IV.
The decision as to the costs is based on Sec. 20 Subsec. 2 IFLPA in connection with Sec. 81, Sec. 92 Subsec. 2 *FamFG mutatis mutandis* and Article 26 para 4. of the Hague Child Abduction Convention.

Notice of Rights of Appeal:

The decision may be appealed by means of a complaint appeal (*Beschwerde*).
All those whose rights are infringed upon by this order shall be entitled to lodge a complaint appeal. A complaint appeal against a decision ordering the return of the child may only be made by the Respondent, the child – as long as s/he is 14 or older – and the relevant Youth Welfare Office. The complaint appeal is to be submitted to the Family Court at Hamm Local Court – *Amtsgericht - Familiengericht - Hamm*, Borbergstr. 1, 59065 Hamm, Germany in writing, in German, or declared for recording at the registry. Declaration for recording may be done at the registry of any Local Court [in Germany].

The complaint appeal, including the grounds therefor, must be received by the Family Court at Hamm Local Court within two weeks of written notice of the order being given. This also applies in cases where the complaint appeal has been declared for recording at the registry of another Local Court. The deadline shall be calculated from the date on which the complainant in question is notified in writing of the order. In the event that service on the complainant cannot be carried out, the time limit shall begin at the latest five months after the order was issued. In the event that the deadline is on a Sunday, an official public holiday or on a Saturday, the deadline shall be extended until the end of the next working day.

The complaint appeal must contain the title of the order being contested and a declaration to the effect that a complaint appeal is being lodged against said order. It must be signed by the complainant or a person whom s/he has authorized to represent her/him. Furthermore, the complainant must bring a substantive motion, and list the grounds for it.

Certified
Clerk of the registry at the Local Court
Hamm Local Court

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