Translation from the German language

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**Higher Regional Court of Thuringia**

File #: 2 UF 485/19
47 F 519/19 Jena Local Court

[crest]

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with……..

# Order

In the family matter

[redacted]
- Respondent and Complainant in the Complaint Appeal proceedings -

Legal counsel:
Lawyers [redacted] Ref.:7/19

-v-

[redacted] born on [redacted], Argentina
– Applicant and Respondent in the Complaint Appeal –

Legal counsel:
**Federal Office of Justice (Bundesamt für Justiz) – Central Authority,** International Custody Conflicts, Adenauerallee 99 - 103, 53113 Bonn, Ref.: II 3 - SR - A9 - E **-**118/19

Delegated legal counsel:
Lawyers [redacted] Ref.: 19/00199

Further parties involved:

Children:
1) [redacted] born on [redacted] July 2015

Guardian ad litem:
[redacted] Ref.: 0248/19

2) [redacted] born on [redacted] May 2017

Guardian ad litem:
[obliterated] Ref.: 0248/19

*Jugendamt* (Youth Welfare Office):
**Sömmerda District Commissioner's Office**, Youth Welfare Office, Wielandstraße 4, 99610 Sömmerda, Germany, Ref.: 453.50/57/19

for the return of minor children as per Art. 12 Hague Child Abduction Convention

the 2nd Family Chamber of the Higher Regional Court of Thuringia in Jena,
represented by the Presiding Higher Regional Court Judge [redacted],
Higher Regional Court Judge Dr. [redacted] and
Higher Regional Court Judge [redacted]

r u l e d a s f o l l o w s :

I. The Respondent's complaint appeal [*Beschwerde*] against the Order, issued by Jena Local Court – Family Court – dated 24 October 2019 (47 F 519/19), is rejected.

II. The court costs for the complaint appeal shall be borne by the Respondent.

III. The value of the proceedings of the complaint appeal shall be set at € 5,000.00.

IV. The Respondent's application that legal aid be granted in respect of the complaint appeal proceedings shall be refused.

## R e a s o n i n g :

### I.

The subject of the proceedings is the Applicant's wish to have his daughters [redacted] and [redacted] returned to Argentina under the terms of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCAC).

The Applicant, born on [redacted] and the Respondent born on [redacted], have been married since 2012 and are the parents of the children concerned, who were born in 2015 and 2017.

The parents – both of whom are architects – met in Buenos Aires in 2007. The Respondent moved to be with the Applicant in 2008 and lived there in his house; they married in 2012.

The family had most recently been living with the two daughters in one of the Applicant's two

houses. The Applicant is an architect employed by the City of Buenos Aires and does additional freelance work in the same field; the Respondent had initially been working in an employed position as an architect from 2008 to 2012. She then founded a language school with a friend and taught German there. After the birth of the daughter [redacted] in 2015, she worked in the administration of the language school before ceasing paid work altogether after the birth of [redacted] in 2017.
Under Argentinian law, the parents are entitled to rights of custody on a joint basis. Under Art. 641b) of the Civil and Commercial Code of Argentina, both parents are deemed to be exercising joint parental responsibility in the event of a separation.

The Applicant allowed the Respondent, with written permission recorded by a notary public dated 26 December 2018, to take the daughters to Germany from 30 December 2018 until 30 January 2019 (Court file p. 20). During the stay at her parents' residence in [redacted], the Respondent took [redacted] to a paediatrician and child psychologist in January 2019 (Court file p. 121). On 29 January 2019, she informed the Applicant that she was no longer planning to return with the daughters to Argentina.
She has been residing with the daughters at one of her parents' houses in [redacted] ever since.

The Applicant approached the German Central Authority with a request for help under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCAC) (Annexes 2 to the Petition, Court file p. 18-19). He made an application via the Federal Office of Justice as Central Authority for Germany on 3 September 2019 (received by the Court on 4 September 2019), to have the Respondent obliged to return the children [redacted], born on [redacted] July 2015, and [redacted], born on [redacted] May 2017, to Argentina.

The Respondent claimed that she had wanted to separate from her husband as early as 2016, but that he had rejected mediation as a precondition for divorce. The daughters were, she said, threatened by the paedophile tendencies of the Applicant's son [redacted].

After appointing a Guardian ad Litem for the children (Court report p. 61 et seq.), having the Youth Welfare Office become involved (Court report p. 106 ff) and the oral hearing on 17 October 2019 (Court report p. 276 et seq.) at which the children and all other participants were heard, Jena Local Court – Family Court, in its order dated 24 October 2019, ordered the return of the children within two weeks of the decision becoming final and binding and further ruled on other elements of the matter.

With regard to the details, please see the Order issued by the Local Court.

The Respondent lodged a complaint appeal on 15 November 2019 against the Order issued by

Jena Family Court served on her legal counsel on 4 November 2019. Therein, she repeats the claims she made at the court of first instance, and supplements this with the information from statements made by friends of hers living in Argentina, that the inflation and the general economic conditions in Argentina represent, in the event of their return, a danger to the children's wellbeing. After all, she is unable to continue living in Argentina herself.

The Guardian ad Litem of the children, the lawyer Mr [redacted], suggested during the complaint appeal proceedings that the complaint made by the mother be rejected as the Order issued by the Local Court corresponded to the law as it stands. For more details regarding the lawyer's views, see the statement dated 3 December 2019 (II, 387 et seq.).

With reference to further details, especially regarding the testimony of all of the parties at both instances, please see the court files.

The Chamber, in its Order issued on 21 November 2019, ordered the immediate effectiveness of the decision being contested.

## II.

The complaint appeal brought by the Respondent is admissible, as per Sec. 40 Subsec. 2 German International Family Law Procedure Act (*IntFamRVG*) in conjunction with Secs. 58 to 65 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*FamFG*), however, it is substantively without foundation.

The Family Court, whose comprehensive and thorough considerations are referred to by the Chamber for the purposes of avoiding unnecessary repetition, was correct to order that the Respondent return the children without undue delay to Argentina, as she had wrongfully retained [redacted] and [redacted] in Germany beyond 30 January 2019, before which time it is not contested that she had had permission to take them to Germany (Art. 3 para 1, Art. 12 para 1 HCAC).
There is no aspect of the complaint appeal lodged which would lead to any other assessment.

1. Specifically, it cannot be said to have been proved that the two children would be exposed to a grave risk of physical or psychological harm or be placed in an intolerable situation in the event of their return (Art. 13 para. 1b HCAC).

a) In this respect, the difficulties which, due to the nature of the matter, are associated with any return – as already stated correctly by the Family Court – shall be discounted from the outset.

The mechanism for the return of the children to their last place of habitual residence before they were removed to a different country is in place to prevent parents from bringing about sets of circumstances [advantageous to themselves] and ensure that it is in fact the courts seised in the country of origin that ultimately decide upon the issues of parental custody and parental access to the children (Art. 1 HCAC). In this manner, the Convention serves the children's best interest and is compatible with the constitution. Thus, only unusually severe endangerment of a child's welfare, going well beyond the usual difficulties associated with a return, can be taken into account; the mere fact that the proceedings on custody must take place in the country of the [child's] last habitual residence, however, does not have to be taken into account in respect of the consequences (see Federal Court of Justice *FamRZ* (Family Law Magazine) 1999, 85 [87], *FamRZ* 2016, 1571 [margin Nos. 13 et seq., 17 et seq.] Karlsruhe Higher Regional Court *FamRZ* 2010, 1577 [1578]).

b) In this case, it has not been raised in any testimony, nor is it otherwise apparent, that there are any serious threats to life and limb of the children or other serious difficulties, which would, in the event that such exceptional circumstances existed, prevent the competent courts of the country of origin from conducting the proceedings in the correct manner. This was stated in a satisfactory manner by the Family Court in the decision being contested. The Guardian ad Litem too, in his report, and after lengthy conversations with the mother and the children, correctly highlighted that the difficulties within the marriages, and issues of maintenance and parental custody issues need to be clarified by the competent court in Argentina. In addition, the Respondent's actions after it was alleged that the daughter [redacted] had been sexually abused by [redacted] showed that it is also possible for comprehensive and effective protection to be offered to a child in Argentina, should this be necessary. Furthermore, no wrongdoing on the part of the son of the Applicant [redacted] towards [redacted] has actually been proved, as the Respondent stated herself in her testimony that he had been acquitted in the criminal proceedings she had brought against him.

The Chamber wishes to make it known that the report drawn up by Sömmerda Youth Welfare Office does not take into consideration the special characteristics of the HCAC or the strictness of the criteria laid out in Art. 13 para. 1b HCAC when it makes its assessment that living in Germany would be more in line with the children's best interests than living in Argentina.

The children's centre of vital interest is generally chosen by the parents and the children are unable to influence it in any way.

The Respondent's presumption that there is a possibility she may lose parental custody proceedings carried out in Argentina does not represent an intolerable situation for the children as per Art. 13 para. 1b of HCAC, as return proceedings cannot be used to predict the result of

parental custody proceedings in the country of origin (see Hausmann, ibid, margin No. 185 and many other sources).

b) The parent who is retaining the child cannot invoke as a reason the disadvantages the child would suffer as a result of a change of the primary caregiver if the parent invoking such a risk actually caused it her/himself by refraining from accompanying the child – something which could be reasonably expected of her/him (Federal Constitutional Court, *FamRZ*, 1999, 85 et seq., margin No. 68). If the abducting parent declines to accompany the child on the return, s/he cannot justify her argument with the fact that the return of the child without her/his accompaniment would expose the child to a grave risk of harm (see Nuremberg Higher Regional Court, Order dated 5 July 2017 – 7 UF 660/17 - juris]).

2. Nor does the complaint appeal bring forward any new indications which would confirm the presumption of an endangerment of the children's wellbeing, i.e. that which is said to emanate, as claimed by the Respondent, from the risk of sexual attacks by the son [redacted], who was born in 2000 (Art. 13 para. 2 HCAC). It is uncontested that he was acquitted from allegations of sexual abuse, as is the fact that he does not live in the same household as the Applicant. [The Chamber is] satisfied that the aspects of the Order which is being contested were correct both legally and substantively; this was based mainly on the personal hearing of the two girls by the Judge at the Family Court, the written reports from the other experts and the findings of the oral hearing; nothing is to be added to the Local Court's decision.

3. The assessment of the Family Court is in no way brought into doubt by the statements made by the Respondent's friends in Argentina, which are believed to have been made at her behest. The criticisms of the economic and political circumstances in Argentina do not stand in the way of any return and are apparently based on an erroneous understanding of the peculiarities of the return proceedings and the reasons for their being prevented under Art. 13 HCAC. The only arguments brought forward by the Respondent in her complaint appeal are all of the variety that cannot be considered within the framework of Art. 13 para. 1b HCAC. The return of the children to their previous centre of vital interest, where they had lived since birth, represents a restoration of the status quo ante in the framework of joint custody and offers the possibility for a decision to be made by the competent Argentinian judiciary on the subject of custody rights.

It is possible that the points raised will be considered when making a decision on matters of divorce, child maintenance and the custody of the children. However, the competent court in Argentina must be given the opportunity to make such a decision, this means that the circumstances brought about by the mother's wrongful actions must be reversed and the children returned without delay to Argentina

4. The statement gathered by the mother from a paediatrician in Germany in early 2019, after the latter had a conversation with her and a short encounter with the daughter [redacted], was deemed correctly by the Family Court not to have contained sufficient indications that it met the criteria under Art. 13 HCAC so as to prevent such a return and is thus of no significance in this regard.
The mere suggestion of any potential criminal prosecution of the Complainant in the country of origin is generally of no relevance in return proceedings (see Federal Constitutional Court, *FamRZ* 1999, 85 et seq., margin No. 68, Federal Constitutional Court, *FamRZ*, 1997, 1269 et seq., see also Völker *FamRZ* 2010, 157 et seq., Hausmann ibid, N margin No. and further sources). Any sentences handed down under criminal law, which, incidentally, do not always have to entail terms of imprisonment, are usually the consequence of unlawful behaviour on the part of the parent concerned. It is further worthy of mention that the Respondent can most certainly expect to be subject to criminal prosecution in Germany too if she fails to comply voluntarily with the current order to return [the children], coercive enforcement of such an order is, as a rule, associated with the German law enforcement authorities becoming involved in the matter.

The fact that the economic conditions in Argentina would be less favourable to the Respondent than those in Germany does not represent a grave risk of physical or psychological harm for the children, nor do such conditions make it unreasonable for the Respondent to accompany [redacted] and [redacted] on their return (see *MüKoBGB* [Civil Code Commentary]/Siehr, ibid, Art. 13 margin No. 9 et seq., margin No. 11). The Respondent had apparently been living in Argentina since 2008. The Applicant, whose application for legal aid she countered by testifying that he is the owner of two properties worth a total of USD 800,000 between them (p. 134 of the court file) has sufficient income and assets owing to his work as both an employed and freelance architect. It is not apparent why she could not have him pay maintenance.

With regard to the report drawn up by the Youth Welfare Office dated 14 October 2019, it is worthy of note that the parent retaining [the children], as stated, cannot invoke the fact that a change of primary caregiver would be disadvantageous for the child, if she herself actually causes this situation to occur by refraining from accompanying the child – something which could be reasonably expected of her.

The Chamber is dispensing with the option of having an expert compile a report on the issue as to whether the return would represent a risk of physical or psychological harm to the daughters, as such an approach would not be compatible with the special principle of expedited proceedings which apply to the present proceedings (see Völker *Fam-RZ* (Family Law Magazine, 157 et seq., 185 et seq.). Furthermore, as has been demonstrated, there are not sufficient indications, even in the Respondent’s testimony, that the children would be placed at

a disadvantage which would go beyond that which is acceptable in cases of wrongful retention. No concerns were raised in relation to the further actions ordered by the Local Court for the enforcement of the obligation to return [the children]. Nor can any objections be raised to the costs of the return being levied upon the Respondent (Art. 26 para. 4 HCAC).

The Order to return [the children] is compatible with Art. 8 European Convention on Human Rights. This provision is, as per the precedent of the European Court of Human Rights (ECHR), to be construed in light of the HCAC (ECHR decision of 11 December 2006 No. 41092/06, juris). The fact that the HCAC, in its aims to protect children from being wrongfully removed or retained, naturally brings with it hardships for both parents and children, is accepted by the ECHR. The Chamber has taken note of the principles put in place in this respect by the ECHR; specifically, the decision was made giving due consideration to the specific circumstances of the individual case. Several reports were submitted, from both the Guardian ad Litem and the Youth Welfare Office, on the personal circumstances of the children and these were taken into account by the Chamber in making its decision.

Finally, the Chamber wishes to point out that the proceedings at hand concern only the return of the daughters [redacted] and [redacted] to Argentina so as to restore the status quo ante such as it was prior to the retention; this Order therefore should not be construed as a decision on custody rights. In relation to the Respondent's complaints in relation to the modus operandi of the Guardian ad Litem, the content of his statements and her suggestion that a different Guardian ad Litem be appointed, there are no grounds for this to occur. In this respect, please see the statements of the Chamber in its order dated 21 November 2019, in which immediate effect of the decision was set out.

The Chamber has reached its decision without repeating the matter in an oral hearing with the parties, as it is not expected that this would lead to any additional findings which would lead to a different decision (Sec. 68 Subsec. 3 sentence 2 Act on Proceedings in Family Matters in conjunction with Sec. 14 IFLPA).

The decision on costs has been made as per Sec. 14 No. 2 IFLPA in conjunction with Sec. 81 Act on Proceedings in Family Matters and Art. 26 para. 4 HCAC). In proceedings under the HCAC; including this one, for the sake of fairness, the parent that has behaved wrongfully has to carry the costs associated with the parent left behind exercising their right to a return of the children as well as any such costs which are associated with the return itself.
The Chamber wishes to point out that it would have within its gift (as per Sec. 44 Subsec. 2 IFLPA), should it be necessary, the ability to initiate coercive enforcement of the decision to return [the children] immediately, i.e. within two weeks, after the order becomes final and binding. The mother should understand that it would be very much in the best interests of the

children to spare them the difficulties that would occur in such an event.

The rejection of the application made by the Respondent for legal aid in the complaint appeal proceedings is based on the consideration that the appeal had, from the outset, no prospect of being successful (Art. 25 Hague Child Abduction Convention, Sec. 43, Sec. 14 No. 2 IFLPA in conjunction with Sec. 76 Subsec. 1 Act on Proceedings in Family Matters, Sec. 114 Subsec. 1 sentence 1 German Code of Civil Procedure (*ZPO*)). No appeal mechanism on the grounds of law shall be available against the decision on legal aid (see Federal Court of Justice, *FamRZ* 2012, 1374 and 1629).

The decision on costs has been made as per Sec. 20 Subsec. 2, Sec. 26 Subsec. 4 IFLPA, Sec. 81, Sec. 84 Act on Proceedings in Family Matters, Art. 26 para. 4 Hague Child Abduction Convention. The value of the proceedings was set as per Sec. 40, Sec 45 Subsec. 1 No. 3, Sec. 3 Subsec. 3 Act on Court Fees in Family Matters (*FamGKG*).
The decision on the costs of the complaint appeal proceedings stems from Sec. 84 Act on Proceedings in Family Matters in conjunction with Sec. 14 IFLPA.
No appeal on the grounds of law is possible (Sec.40 Subsec 2 sentence 4 IFLPA), and as such this main decision in the matter is valid upon its issuance (see Federal Court of Justice, *FamRZ* 2008, 2019, 1990, 283).

| [redacted] | [redacted] | [redacted] |
|---|---|---|
| Presiding Higher Regional Court Judge | Higher Regional Court Judge | Higher Regional Court Judge |

Issuance of the judgment (Sec. 38 Subsec. 3 sentence 3 Act on Proceedings in Family Matters):
Submitted to the registry on 5 December 2019

[redacted] Judicial Officer
Clerk of the Registry

Certified
Jena, 5 December 2019
[seal illegible]
[signature illegible]
[redacted], Judicial Officer
Clerk of the Registry

Sprachendienst Bundesamt für Justiz
AVS-Nr.: 6338-2020