



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 269

Record Number: 2016 No. 420

**Peart J.
Irvine J.
Hogan J.
Between:**

G

Applicant / Appellant

- AND -

P

Respondent / Respondent

JUDGMENT of Mr. Justice Michael Peart delivered on the 28th of July 2017

1. G and P are Moldovan nationals, and are the father and mother respectively of baby A who was born in Moldova on the 4th August 2014. Mother and baby A have been in Ireland since the 10th July 2015.

2. Father has made an application under Part III of the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention") for the return of baby A to Moldova, being her place of habitual residence. He asserts that the removal of baby A by mother from Moldova was wrongful for the purposes of Article 3 of the Hague Convention, being in breach of his rights of custody as they are understood under the Convention, and which, he submits, include his right of access to baby A which he enjoyed up to the date of removal, and the need under Moldovan law for his consent to be obtained prior to the permanent removal of baby A from Moldova. (I should observe in passing that it is accepted that Moldova is a party to the Hague Convention and that the Convention has the force of law in that state).

3. Mother on the other hand asserts that under the terms of the custody and access arrangements in place between her and father prior to her departure from Moldova on 15th July 2015 she was entitled to remove A from Moldova on a temporary basis without father's consent; that at the time she arrived in Ireland her intention was to remain here only temporarily for the purpose of visiting other family members, and to learn English, and that it was only father's own actions on the 27th August 2015 that has caused her to remain here longer than her original intention. In that regard it appears that he travelled to Dublin in the last week of August 2015, and on the 27th August 2015 seized baby A from her grandmother who was minding her, and unsuccessfully attempted to take her out of Ireland to Russia via Istanbul. He was apparently arrested at Dublin Airport as he made his attempt to leave with baby A who was thereafter returned to mother having spent one night being cared for by Tusla (the statutory Child and Family Agency). Father had been in possession of a Russian passport for baby A.

4. Mother also asserts that the removal was not wrongful because it was not in breach of custody rights attributed to father, as he had only a right of access to baby A under arrangements put in place in Moldova in the absence of agreement between her and father. Baby A resided at all times with mother, and she submits accordingly that she must be seen as having custody of baby A. Father asserts on the other hand that, for the purposes of the Convention, his right of access comes within the broad meaning of rights of custody under the Convention, and furthermore that the requirement that his consent be obtained prior to any permanent removal of baby A from Moldova, the place of habitual residence of baby A, is itself a right of custody breached on the 15th July 2015. He believes that mother's intention was permanently to remove herself and baby A from Moldova, and relies on undisputed evidence as to the circumstances for mother's departure with baby A for his contention that the removal was never intended to be temporary as mother has claimed.

5. Mother asserts also that even if the Court was to be satisfied that the removal of baby A was wrongful, the High Court was nevertheless not required to make an order for the return of baby A to Moldova under Article 12 of the Hague Convention in view of the provisions of Article 13 which provides for exceptions to a return order where, inter alia, father had given his consent to the temporary removal of A from Moldova, and where if returned there is grave risk that father will again unlawfully seize baby A and bring her with him to Russia from where it will be difficult for mother to achieve a return of baby A.

6. By order dated 27th July 2016 the High Court (Abbott J.) made an order refusing to direct the return of baby A under Article 12 of the Convention. In his judgment the trial judge stated that he was not satisfied that father had rights of custody at the time of the removal of baby A from Moldova, and therefore that the removal of baby A was not wrongful, and that an order for return of baby A should not be made.

7. In arriving at this conclusion he had regard to certain affidavits as to relevant Moldovan law, as well as to a number of court orders made in the family law proceedings between father and mother in Moldova. An order for the dissolution of the marriage, and as to residence and access rights as well as financial matters had issued on the 16th January 2016 but was under appeal by the father at the time of the hearing before the trial judge. However, it appears that a decision of the Court of Appeal in Moldova was handed down on the 31st May 2016 just prior to the date on which Abbott J. had intended giving his judgment. It appears that at that stage he was of a mind to make an order for the return of baby A to Moldova. However, upon hearing that the appeal decision had issued he invited further submissions as to its significance before giving his judgment, and having heard the parties he then delivered his judgment wherein he decided that no order for return should be made. At para. 13 of his judgment he stated:

" ... However, just before this Court was to give its judgment I was told that the [Moldovan] Court of Appeal had delivered its judgment on the 31st 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 of 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.”

8. Even though he was refusing to make the order for return, he went on to state that he rejected mother’s defences of consent and of grave risk, even though it was, strictly speaking, unnecessary for him to do so.

9. Father appeals to this Court against the refusal of the High Court to direct the return of baby A. I should add that in her notice of opposition to the present appeal, mother included a cross-appeal against the trial judge’s conclusion in relation to the father’s consent, and his conclusion that the defence of grave risk had not been made out.

10. Relevant Convention provisions:

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. [emphasis provided]

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.

..... [remainder of this article is not relevant to the present case]

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.

..... [the remainder of this Article is not relevant to the present case]

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.

11. I should draw attention to the fact that Article 3 refers a removal or retention being wrongful where it is in breach of *custody rights*. It does not in Article 3 specifically refer to a breach of *access rights*, even though the initial recital to the Convention refers to the aim of securing protection for “rights of access” in addition to the important matters in relation to custody. Access rights are specifically mentioned in Article 4.

12. Also, Article 8 refers only to a breach of “custody rights” giving rise to an entitlement to make an application for the return of the child. It makes no mention of rights of access as such. Furthermore, each phrase, *i.e.*, rights of custody and rights of access are separately defined in Article 5. One must note also that Chapter IV of the Convention is headed “Rights of Access” and makes certain provisions in Article 21 which relate solely to access arrangements. The question arises whether as a matter of law, if the court of the requested state is satisfied that the removing parent was entitled to “custody” of the child and removes the child from the place of habitual residence, the other parent who has only *rights of access* as opposed to custody has any entitlement to make an application for the return of the child so that he can resume access, and therefore whether Article 12 applies at all in the present case. I will return to that question.

13. In addition to the Convention articles set forth in para. 10 above, an important article is Article 21 which provides:

“21. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of the child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.”

14. Article 21 raises the question whether a person such as father in this case who does not have a custody right in the sense of a right to have the child reside with him, but has a right of access, is confined to making an application under Article 21, and is precluded from seeking a return order under Articles 8 and 12. That would arguably only arise as a question if access rights are not encompassed by “rights of custody”.

Some issues that arise

15. The determination of this appeal requires this 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 involves a determination as to whether his right of access to baby A which he was enjoying under arrangements put in place prior to the 15th July 2015 is part of what is understood by “rights of custody”, or something separate.

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.

18. A further issue arises from what is contained in the affidavits as to Moldovan law which were provided to the High Court. 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.

20. Yet another issue which arises perhaps is 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 mother had wrongfully removed baby A from Moldova without father’s consent or wrongfully retained her, the High Court could have regard to, for example, the divorce order at first instance dated 13th January 2016, and the subsequent appeal decision dated 31st May 2016 both of which postdate the removal of baby A on the 15th July 2015, and were decided in the full knowledge of the circumstances in which baby A came with mother to this State, and in which there is no indication or the slightest suggestion that the Moldovan courts consider that mother acted unlawfully or in breach of any 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 2015 was wrongful for the purposes of Article 3 and Article 12 of the Convention.

21. Finally then, this Court must consider whether in the light of the said orders of the Moldovan courts, and in all the circumstances of this rather unusual case, it would be appropriate to invoke Article 15 of the Convention and require the applicant father to seek a decision or determination from the Moldovan court that the removal of baby A by mother was wrongful within the meaning of Article 3, thereby avoiding a situation where this Court would direct the return of baby A, only to find that following her return the Moldovan

court decides on some application that may be made to it that she was within her rights to leave with baby A in July 2015. It is difficult to see that the kind of disruption to baby A's life would be in her best interests where it would be avoided by invoking Article 15, notwithstanding that some further delay would inevitably ensue in obtaining such a determination.

Father's custody rights

22. The trial judge's conclusion that the father did not have rights of custody of baby A for the purposes of the Convention was, as I have stated, reached by reference to his consideration of the contents of the decision of the Moldovan Court of Appeal dated 31st May 2016. He does not refer to the evidence of father that as a matter of fact he exercised rights of access to baby A several times per week prior to 15th July 2015. Neither does he make reference to Art. 58 of the Moldovan Family Code. Nor does he consider the legal question of whether for Convention purposes there is a distinction to be drawn between a rights of access and rights of custody, or whether rights of access form part of what is embraced by "rights of custody" as defined in Article 5 of the Convention.

23. The Court has been provided with a certified translation of the decision of the Moldovan Court of Appeal upon which the trial judge relied for his conclusion that father did not have custody rights for the purposes of the Convention. It is clear from the decision that the Moldovan Court of Appeal was fully apprised of the fact that mother had left Moldova with baby A against the wishes of father, and that she does not intend to return to Moldova. For example on p. 2 of the translated decision it states:

"From the very day of parting [mother] created obstacles for [father's] good communication with the child. [Mother] does not intend to come back to the Republic of Moldova as she intends to establish herself abroad and to separate the child from her father and the father from the child."

The Court of Appeal went on to note that father has stated, in support of his own counterclaim in which he sought an order that baby A should reside with him and not mother, that even though his consent to permanent removal of the child from Moldova is required under Moldovan law, he never gave such consent.

24. Further evidence within the appeal decision that the Moldovan court was aware of the allegation of abduction being made by father in relation to mother removing baby A without his consent can be gleaned from the following passage on p. 3 of the translated decision which states:

*"The appellant [i.e. father] also mentions that bearing in mind the child's interests, the appellant cannot accept the child's domicile to be established with the [mother], as the child's domicile must be established with the child's father who is able to provide the child with the necessary conditions for her moral, physical and intellectual development, as well as to provide her the possibility to communicate with her mother in normal conditions, without unjustified obstacles and tensioned situations. **The child's domicile cannot be established with the mother, bearing in mind the fact that the child has been kidnapped by her and taken to Ireland, making the communication with the father impossible. Moreover, [mother] went to Dublin for establishing her own domicile there.** This is proved by the fact that Dublin – the capital of Ireland – is not a tourist destination where one could spend a lot of time. At the same time, when going to Ireland, [mother] has purchased one-way air tickets and her elder child [named] has been enrolled to a school in Dublin. Therefore the appellant considers that the child's domicile cannot be established with [mother], as the latter is not taking care of the child but leaves her in the custody of [baby A's grandmother]."* [emphasis provided]

25. The Moldovan Court of Appeal's decision recites its conclusions 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 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 [father] against [mother] on the determination of domicile of the minor child with 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."

26. It is clear from para. 23 of the decision of the Court of Ciocana dated 13th January 2016, which *inter alia* granted a dissolution of the marriage, that the reference to "conclusion of the tutelage authority (case sheet 59, vol.1)" refers to the conclusion of the Children's Rights Protection Authority of the Ciocana district, as the same file reference is referred to in para. 23, namely "dossier 59/". That authority had made a recommendation to the court that the domicile or residence of the child be with mother, taking into account her age and that she was being breast-fed at the time.

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.

30. There seems to be no doubt that prior to the departure of mother and baby A on the 15th July 2015 some form of administrative body (the Directorate) put in place defined access arrangements, and that these arrangements were upheld by a superior administrative body (the Municipal Department). The father's own counterclaim document in the divorce proceedings recites these facts as follows:

"At the session of the Directorate for Child Rights Protection of Ciocana sector [the mother] requested the establishment of meetings 2 times a week (!) on Tuesdays and Thursdays between the hours 6.00 p.m. – 8.00 p.m.

On 02.04.2015 [the Directorate] has established the following timetable of meetings:

Every Monday, Wednesday and Friday from the hours 9:00 a.m. up to 10.30 a.m.; in the first and third Sunday of the month from the hours 4:00 p.m. up to 6:00 p.m.; in the second and fourth Saturday of the month from the hours 4:00 p.m. up to 6:00p.m.

On 08.04.2015 I filed an appeal against the above mentioned schedule.

On 28.05.2015 the Municipal Department for Child Rights Protection upheld the schedule set by the Directorate for Child Rights Protection of Ciocana sector."

31. I note also that decision by the Municipal Division for the Protection of Children's Rights regarding the choice of residence of the minor states that "*the child's father has never made an application requesting that the child's residence be with himself*" [emphasis provided]. In other words he never made what in this State is known as an application for custody, and it appears that it was mother who initiated the application to have an access schedule put in place. I note also that under Article 63 (2) of the Moldovan Code it is provided that where parents live apart the residence of a minor child is, in the absence of agreement between the parents, decided by a court of law which is obliged to request a recommendation from the child protection authority. That is what occurred in this case as I have described already.

32. But at the end of the day, 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 they do not, 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.

33. The second fundamental question is whether, if father's access rights comprise rights of custody under the Convention, the removal by mother of baby A on the 15th July 2015 was in breach of those rights as a matter of Moldovan law. This is a matter on which the experts who have provided affidavits of law do not appear to be in agreement, and in any event is perhaps a matter for the Court rather than for them.

34. The answer to the first question is assisted by the judgment of Finlay Geoghegan J. in *R.C. v. I.S. (Child abduction: Rights of custody)* [2003] 4 I.R. 431. That was a case where a married couple living in Ireland separated and obtained a decree of judicial separation in the Circuit Court wherein it was ordered, *inter alia*, that the wife have sole custody of the only child of the marriage, and the husband have rights of access to the child. Some time thereafter the mother removed the child to live with her in Belgium without the husband's agreement. There was evidence that he had been exercising his rights of access. The husband commenced proceedings under the Hague Convention for the return of the child. During the course of those proceedings the husband sought a declaration from the High Court here under Article 15 of the Convention that the removal of the child from the State was wrongful within the meaning of Article 3 of the Convention. The determination of that application involved the same issue under consideration in these proceedings, namely whether the husband's right of access to the child constituted "rights of custody" for the purposes of the Convention. Her decision was, of course, reached by reference to Irish law, and specifically by reference to the Guardianship of Infants Act, 1964. Nevertheless she referred to the submissions made by the wife to the effect that the husband, following the making of the order by the Circuit Court, had merely rights of access and not of custody within the meaning of the Convention, but rejected the submission, 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. He is a person who has rights "relating to the care of the person" of the child and has the right, jointly with others, to determine, *inter alia*, the child's place of residence. Of course, if there exists a dispute between himself and his joint Guardian on important welfare issues relating to the child, including the child's place of residence, then such matters may have to be determined by a court. ..."

35. I can usefully refer also to the U.K. House of Lords decision in *In Re D (a child) (Abduction: Rights of Custody)* [2006] UKHL 51;

[2006] 2 W.L.R.989 in which the leading opinion was given by Baroness Hale of Richmond with whom other members of the House agreed. A useful summary of the decision, allowing the appeal, can be read in the head note of the reported decision which, as relevant to the present appeal, states as follows:

"... that ... in determining whether the rights of a parent not having day to day care of the child amounted to rights of custody within article 5 of the Convention so as to make removal in breach thereof wrongful under article 3, the United Kingdom courts would recognise any right of that parent arising by court order, agreement or operation of law, to insist that the other parent did not remove the child from the home country without his or her consent or a court order, as being a right of custody; that where the court was unable to resolve the question of whether the removal had been wrongful within article 3 on the evidence before it, and had sought a determination from the requesting state under article 15, that ruling was to be treated as determinative unless clearly out of line with the international understanding of the Convention's terms;"

36. One of the difficulties identified by Baroness Hale in *In Re D* is that of discerning an autonomous meaning of "rights of custody" across all Contracting States. The phrase will have different meanings in different states. The Convention gives a broad definition of "rights of custody" but it is insufficient to exclude ambiguity in a particular case. In relation to the question of rights of access forming part of "rights of custody" she stated at p. 999:

"Nevertheless it is common ground between all the parties to this case that they ["rights of access" and "rights of custody"] are not mutually exclusive concepts. 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 tributes 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. The expert evidence in this case demonstrates that there was serious academic debate in Romania about whether the law adopted the first or the second approach. In the event, the Romanian court adopted the former whereas the single joint expert adopted the latter."

37. Baroness Hale also held that a right of veto – in other words a right to have one's consent to removal sought before any removal takes place – amounts to "rights of custody" within the meaning of Article 5 of the Convention. I refer to that because 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 this 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.

38. Baroness Hale then went on to highlight that, even though a removal might appear 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. In deciding that it was an appropriate case in which to make a referral to the court in the requesting state under Article 15 she stated:

"Plainly, therefore, the first question is "what rights does that person have under the law of the home country?" The second question is, "are those rights 'rights of custody' within the meaning of the Convention?" What is the court in a requested state to do if uncertain of the answers? Article 15 contemplates that it may seek a determination from the authorities of the requesting state".

39. Having referred to the final sentence of Article 15, namely "the central authorities of the contracting states shall so far as practicable assist applicants to obtain such a decision or determination", she went on to state:

"The last sentence indicates that this is something other than the assertion or certificate of the central authority It is a determination by the authorities having the power within the requesting state to make authoritative decisions relating to rights over children The reference to 'administrative authorities' caters for those states in which some decisions about children are entrusted to bodies which are more administrative than judicial in character"

40. Having referred to Article 15, Baroness Hale stated that the determination received upon an Article 15 request for a determination, should be followed and not questioned again unless "it's characterisation of the parent's rights is clearly out of line with the international understanding of the Convention's terms", and "that the foreign court is much better placed than the English [court] to understand the true meaning and effect of its own laws in Convention terms".

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.

42. 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.

43. I am of the view that such a request under Article 15 should be made. The respective experts who have provided affidavits of law for the assistance of the court here are diverging materially in relevant respects. While the trial judge relied upon what was contained in the Moldovan Court of Appeal's decision of 31st May 2016 for his conclusion that the father did not have custody rights, and therefore the removal was not wrongful, I would consider 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.

Conclusions

44. I would therefore adjourn this appeal pending the receipt of a final determination from the Moldovan court on foot of the request which I would favour being directed under Article 15 of the Convention. I would accordingly propose that this appeal should stand adjourned pending the filing of a request by the father with the Moldovan courts in accordance with Article 15 of the Convention seeking a declaration.

45. I would of course expect that in relation to this Court's request to the applicant under the provisions of Article 15 of the Convention, the lawyer acting for father would liaise with any lawyer acting for mother in relation thereto in order to ensure that the interests of both parties are protected in relation to any material to be supplied to the Moldovan court for the purpose of the determination being sought, particularly where, as in this case, there are differing views both as to relevant facts and as to the law.