

THE HIGH COURT

FAMILY LAW

[2013 HLC No. 21]

IN THE MATTER OF ARTICLE 11(6) OF COUNCIL REGULATION (EC) 2201/2003 AND IN THE MATTER OF FOREIGN PROCEEDINGS, INITIATED BY M.P. WITH THE PARTICIPATION OF G. O'S., M. K. AND S. K. FOR THE RETURN OF THE MINOR S. P. UNDER HAGUE CONVENTION BEFORE THE POLISH DISTRICT COURT FOR L. FAMILY AND MINORS

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY ACTING AS CENTRAL AUTHORITY

APPLICANT

AND

M. P. AND G. O'S. AND M. K. AND S. K.

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 16th day of September, 2013

1. On 24th April, 2013, the Minister for Justice and Equality, in his capacity as Central Authority for Ireland, issued an originating notice of motion pursuant to O. 133, r. 11(1) of the Rules of the Superior Courts by reason of the prior receipt of a final order of non-return made by the Polish District Court of L. dated 5th October, 2012, in the above entitled foreign proceeding in respect of the child named in the title ("the Child") and other relevant documents pursuant to Article 11(6) of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("the Regulation").

2. It appeared to the Central Authority from the documents furnished to it that as a matter of probability, the Child was habitually resident in Ireland before his removal to Poland.

3. By order made on 24th April, 2013, on an application ex parte by the Central Authority, the Court made an order giving directions for the purposes of complying with Article 11(7) of the Regulation including the service of a notification together with the originating notice of motion and grounding affidavit on each of the respondents named in the title. The first named respondent is the mother of the Child and the second named respondent is the father of the Child. Both appear to be resident in Ireland. The third and fourth named respondents are the maternal great-grandparents of the Child with whom the Child resides in Poland.

4. Article 11(7) of the Regulation provides:

"Article 11

Return of the child

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit."

5. As appears from Article 11(7), the obligation on the Irish Court or Central Authority is to notify the parties to the proceedings in Poland and invite them to make submissions to the Court, in accordance with national law [i.e. Irish law,] within three months of the date of notification so that the Court can examine the question of custody of the Child".

6. As a matter of Irish law, the Guardianship of Infants Act 1964 (as amended) is the relevant legislation pursuant to which a court would examine and determine questions of custody of a child (other than under the Childcare Act 1991 (as amended) which is not relevant on the facts herein). Accordingly, the order made by the Court on 24th April, 2013, gave the following directions in relation to the submissions to be made to the Court in accordance with Irish law:

"2. Any Submission by a Respondent to the Court shall be in the form of Notice of Motion grounded upon Affidavit issued within the present proceedings and seeking such Relief(s) in relation to the child named in the title hereof pursuant to the Guardianship of Infants Act, 1964 as amended and/or such other Relief as the High Court may have jurisdiction to grant in relation to the custody of the said children and such other Directions as may be required.

3. Any such Motion shall in the interests of the child be issued by a Respondent promptly and in any event within 3 months of the date of receipt of the Notification and shall be made returnable to the High Court on any Wednesday in the HLC list AND such Motion shall be served on the Applicant as Central Authority and on the other Respondents named herein at least 4 clear days prior to the return date.

4. On the return date of any motion issued by a Respondent the other Respondents shall appear before the Court or be

represented and the Court shall give such directions for the further hearing of any issues in dispute and the reliefs claimed.

5. The Applicant's originating notice of motion shall be adjourned to the 31st day of July, 2013 **AND** if by that date no Submissions have been made by any of the Respondents by the issue of a notice of motion in accordance with this order for directions then if the Applicant satisfies the Court that each of the Respondents have been served and notified in accordance with this Order at least 3 months previously the Court shall of its own motion close the case pursuant to the provisions of Article 11(7) of Council Regulation (EC) 2201/2003 by striking out the within proceeding."

7. The applicant's originating notice of motion was adjourned to 31st July, 2013 and thereafter, to 4th September, 2013. There was no appearance on either date by any of the respondents and no notices of motion had been issued by any of them.

8. On 4th September, 2013, an affidavit of Ms. Grainne OMahony of the Chief State Solicitor's Office was filed, which proved service on the first and second named respondents on 26th April, 2013 of the notification, originating notice of motion, grounding affidavit and order of the Court of 24th April, 2013. No submission by way of the issue of a notice of motion or otherwise has been made by either of the first or the second named respondent within three months of that date. The third and fourth named respondents were served in Poland on 4th June, 2013, pursuant to Article 10 of Regulation (EC) No. 1393/2007, of the European Parliament and Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents). The third and fourth named respondents have not issued any notice of motion in these proceedings on or before 4th September, 2013. They did, however, send directly to the office of the High Court in Ireland a written document translated into English with a covering letter of 15th July, 2013. In response thereto, they were informed again that any submission should be made by way of notice of motion and that the matter would be next before the Court on 4th September, 2013, and they should arrange to be represented if they wished to pursue any application before the courts in Ireland. There was no appearance on 4th September, 2013, nor any further documents received prior to that date. The Central Authority applied on that date for an order that the proceedings be closed in accordance with Article 11(7) of the Regulation as no respondent had issued a notice of motion within three months of receipt of the notification directed by the Court. Judgment was reserved on that application to this date.

9. On 9th September, 2013, the office of the High Court received a further written document from the third and fourth named respondents dated 29th August, 2013. Notwithstanding that this was received after the hearing on 4th September, 2013, the Court has considered this document prior to giving this judgment.

10. I have concluded that notwithstanding the documents received from the third and fourth named respondents, the appropriate order for the Court to make is to close these proceedings commenced by the Central Authority. Article 11(7) of the Regulation expressly provides that the Court "shall close the case if no submissions have been received by the Court within the time limit [three months of the date of notification]". The submissions referred to are ones to be made in accordance with national law i.e. Irish law. The direction given by the Court in the order of 24th April, 2013, as to the form of submission to be made in accordance with Irish law was by the issue of a notice of motion seeking relief under the Guardianship of Infants Act 1964 (as amended) in relation to the Child and the potential consequences of not doing so set out therein. No such motion has been issued by any of the four respondents within three months of the date of notification to them.

11. The Court may have discretion to extend the time within which a notice of motion might be issued. I reserve my decision for another case as to whether the Court does have discretion to make such an order.

12. I have considered what has been stated by the third and fourth named respondents in the two documents sent by them to the Court. They inter alia contend that the Irish courts do not now have jurisdiction to make a decision on custody in relation to the Child. They also seek to justify the retention of the Child in Poland with them.

13. Even if this Court has discretion to extend the time for the issue of a notice of motion seeking relief under the Guardianship of Infants Act in accordance with the directions given in the Order of 24th April 2013, an extension is not justified on the facts herein. The order which the Court is now making to close the proceedings in Ireland does not conflict with the primary contentions made by the third and fourth named respondents or interfere with the current living arrangements for the Child. Even if the Child was habitually resident in Ireland prior to his removal to Poland, the effect of the order being made to close the proceedings, pursuant to Article 11(7) of the Regulation, means that pursuant to Article 10(b)(iii) of the Regulation, the Irish courts will no longer retain jurisdiction to determine any matter of parental responsibility in relation to the Child. Article 10(b)(iii) provides:

"Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and

(a) . . .

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) . .

(ii) . .

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) . . ."

The condition in Article 10(b)(iii) will be fulfilled when this case is closed pursuant to Article 11(7).

14. As these proceedings relate to a minor, the Court will also make an order pursuant to s.45 of the Courts (Supplemental Provisions) Act 1961 that the proceedings be treated as heard otherwise than in public. The judgment will be published with redactions to remove material which would identify the child. The Central Authority and the respondents are authorised to give the full judgment, the proceedings and all orders made by the Court herein to the Central Authority for Poland for transmission to any relevant court in Poland or to any other person for the purpose of any proceedings in Poland relating to the Child. The Central Authority should send to each of the respondents, by ordinary prepaid post a copy of this judgment and the order made pursuant to it.