



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 208

Record Number: 2019/249

**Whelan J.
Baker J.
Kennedy J.**

In the Matter of Section 15(2) of the Child Abduction and Enforcement of Custody Orders Act 1991

and

In the Matter of Article 15 of the Hague Convention on the Civil Aspects of International Child Abduction

and

In the Matter of Council Regulation (EC) 2201/2003

and

In the Matter of The Guardianship of Infants Act, 1964

and

In the Matter of N.T. (a Child)

BETWEEN/

D.T.

APPLICANT/APELLANT

- AND -

I.B.

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 17th day of July 2019

Introduction

1. This is an appeal against the judgment and order of Ms. Justice Ní Raifeartaigh made in the High Court on the 1st May, 2019, [2019] IEHC 454. The said order was perfected on the 9th May, 2019. The appellant's application for a declaration pursuant to s.15(2) of the Child Abduction and Enforcement of Custody Orders Act 1991 ("the 1991 Act") and Art. 15 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention") that the removal of his son N.T. (hereinafter referred

to as "George" to preserve his privacy) from Ireland on the 25th July, 2016, was wrongful within the meaning of Art. 3 of the Hague Convention was refused.

Background

2. The family history and background was set out in significant detail in the High Court judgment. The essential details include the following: The appellant is the father and the respondent is the mother of George. The appellant is an Irish national. The respondent is a citizen of Belarus. The parties were married to one another on the 11th October, 2013, in Belarus. Thereafter they resided in Ireland. George, their only child, was born in Ireland on 21st April, 2015. At all material times from birth he resided with his parents in Ireland. The family resided in Ireland until the 25th July, 2016. The appellant became fearful that the respondent might take their son out of Ireland without his consent and so removed the minor's passport from her control.

3. Under Irish law the parents have equal rights of custody pursuant to s.6 of the Guardianship of Infants Act 1964, as amended. Neither was at liberty to remove the minor from the jurisdiction of the Courts of Ireland without the prior consent of the other parent or leave of the Court. The respondent did not seek prior leave of the Court to remove George. On 25th July, 2016, when George was aged 15 months the respondent left Ireland with George and travelled to Belarus. Neither the respondent nor the minor have ever returned to this jurisdiction. George is now aged four years and two months. It appears that the appellant had contact with his son for the last time on the 5th June, 2017, although he saw him in late December 2017 – over a year and a half ago.

Request for Return

4. The Hague Convention had entered into force between Ireland and Belarus on the 1st January, 2001. The respondent failed to return to Ireland and by 27th July, 2016, the appellant had commenced engagement with the Irish Central Authority. In August, 2016 the father further engaged with the Central Authority in Ireland, established pursuant to the provisions of the Hague Convention, to seek assistance in securing the summary return of the minor through the Central Authority in Belarus. According to the appellant's chronology, on the 11th August, 2016, his application for summary return pursuant to the Hague Convention was forwarded by the Irish Central Authority and accepted by the Belarus Central Authority pursuant to the provisions of the Hague Convention. Separately, on the 26th August, 2016, the respondent filed for divorce in the Soviet District Court of Minsk, Belarus. On 15th September, 2016, the Belarus Central Authority confirmed that the application for summary return under the Hague Convention was being sent to a competent national Court. On the 8th October, 2016, the appellant travelled to Belarus and in November, 2016 the divorce proceedings between the parties came before the Belarus Courts and were adjourned to the 5th March, 2017.

5. Following apparent misunderstandings as to whether the Hague Convention proceedings had been disposed of by the Belarus Courts, ultimately on the 16th April, 2017, the appellant applied to the Soviet District Court in Belarus for the return of George pursuant to the Hague Convention. The application was refused on the grounds that the case ought to have been brought before a criminal Court since it involved child abduction. The father appealed the decision to the Minsk City Court and that appeal was unsuccessful. It was disposed of on or about the 7th July, 2017. On the 10th September, 2017, the said decision of Minsk City Court not to initiate Hague Convention proceedings was appealed to the Chief of the Minsk City Court whom also upheld the said decision.

6. On the 14th February, 2018, the Supreme Court of Belarus overturned the prior decisions of the lower courts and "instructed the lower courts to initiate Hague Convention proceedings".

7. On the 23rd March, 2018, the Hague Convention Application seeking summary return of George to Ireland was heard in the Soviet District Court "and the case was put forward for decision on the 5th April, 2018". On the latter date the Court refused the application for summary return.

8. On the 14th June, 2018, the said decision came on by way of appeal brought by the appellant before Minsk City Court which upheld the decision of the lower court on the grounds that the appellant had given no evidence to disprove the respondent's claim "that he consented to her taking [George] to Belarus."

9. It appears that on the 27th March, 2019, an article was published "in the Supreme Court's official magazine highlighting [the appellant's] case and recognising the mistakes that were made and giving instructions for future cases". This all occurred in Belarus. An appeal was lodged on the 4th April, 2019, to the Supreme Court of Belarus both in relation to the Hague Convention decisions and in relation to divorce proceedings between the couple.

Article 15 proceedings in Ireland

10. The father issued a special summons out of the Central Office of the High Court on the 15th March, 2019, which was heard on the 29th April, 2019. There was no appearance by or on behalf of the respondent before the Irish Courts. Judgment was reserved and delivered on the 1st May, 2019, refusing the relief sought.

11. The appellant conducts this appeal as a litigant in person, although he appears to have been represented by counsel before the High Court. It appears the respondent had been served with the proceedings on the 20th March, 2019, but she did not appear, nor was she represented in the course of the High Court proceedings. In the course of her judgment in the High Court Ní Raifeartaigh J. observes that at para. 4 that she granted an order giving liberty to issue and serve the proceedings on the respondent in Belarus, but she had reservations as to whether the appellant had *locus standi* in view of the wording of Art. 15 of the Hague Convention "which envisages a request from another jurisdiction before the Court will become seized of such an application".

12. The primary relief being sought before the High Court was a declaration of wrongful removal of the minor George pursuant to Art. 15 of the Hague Convention. Article 15 provides as follows: -

"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."

13. It will be recalled that the objects of the Hague Convention as specified in Art. 1 are: -

"a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”

Remaining live issues now

14. To identify what, if any, issues relevant to Art. 15 of the Hague Convention are live at this time it is necessary to consider the exhibits and the book of evidence furnished. Exhibit “B” confirms that the Irish Central Authority had received an acknowledgement email from the Belarusian Central Authority on the 15th September, 2016, “in which they stated that they had acquired an address for the respondent and sent the application to the competent court.” Exhibit “B” includes what appears to be a transcript or translation of a court hearing of the 3rd October, 2016 before the Court of Sovetskiy District of the City of Minsk. The respondent does not appear to dispute or deny that the appellant was her husband and father of George, and she does not suggest that he is not the holder of rights of custody within the meaning of the Hague Convention at any point.

15. Exhibit “D” incorporates a translation from the Russian language into English of the order of the panel of judges for civil cases of the Minsk City Court of the 7th July, 2017. The order sets out particulars of the arguments made by or on behalf of the appellant to the Court in support of his application to reverse the decision of the lower court as being incorrect. The translation states: -

“Having discussed the reasons of the individual appeal of the plaintiff and having examined materials, the panel of judges does not find reasons for vacating of decision.”

It also provides –

“According to Item 1 of Article 245 of the Code of Civil Procedure the judge rejects the case due to lack of the [complainant’s] right to appeal the court if:

(1) The claim is not subject to proceedings due to its lack of jurisdiction.”

Elsewhere, at Part 3 of the order the translation provides –

“... The Court reasonably refused the plaintiff to initiate the case due to lack of the right to appeal the Court, due to its lack of jurisdiction Under such circumstances there are no reasons for vacating of decision.”

16. The matter appears to have come by way of appeal before the Presidium of Minsk City Court on the 14th February, 2018, on appeal against the order of the Sovetskiy District Court of the City of Minsk made on the 10th May, 2017, and the order of the judicial division for the civil cases of Minsk City Court of 7th July, 2017, in regard to the refusal to initiate Hague Convention proceedings seeking the summary return of the minor George. The latter Court concluded that there “were no bases for refusal to initiate a case due to lack of the [complainant’s] right to appeal” and the Presidium proceeded to reverse the order of the Sovetskiy District Court of the City of Minsk of the 10th May, 2017 and the order of the judicial division for civil cases of the Minsk City Court of 7th July, 2017, in regard to the refusal to initiate a case. Whilst documentation relevant to the matrimonial issues between the parties has been exhibited it is not relevant to the Hague Convention proceedings which are *sui generis*.

17. Exhibit “G” appears to be a translation of the court decision in Belarus of the 5th April, 2018, by the Sovetskiy District Court of the City Minsk. The summation of findings include a reference that the marriage between the parties had been dissolved in Minsk on the 2nd June, 2017, and due to the fact that the appellant was not involved in regard to the documentation for George’s travel and that the respondent moved him secretly out of Ireland it was noted that the appellant sought the return of the minor to Ireland. It is recorded that the application is dismissed.

18. Exhibit “H” is a translation of the determination of the Appellate Court to Minsk City Court. It appears that the determination of the panel of judges was that the lower Court had reasonably refused the claims of the appellant and rejected the appeal.

Procurement of travel documents by the respondent

19. It is noteworthy that by letter of the 28th August, 2018, the Embassy of the Republic of Belarus in London confirmed to the Embassy of Ireland in London that the minor is a Belarusian citizen, and “all citizens of Belarus living abroad must have a valid Belarusian passport.” It was also stated that “Re-entry Certificate is issued for entry to Belarus of citizens of Republic of Belarus who were born abroad and who do not have a valid Belarusian passport. A Re-entry Certificate can be issued on the basis of an application made by one parent (legal representative of a minor). The consent of the second parent is not required.” (emphasis added)

Recent Developments in Belarus

20. Over three months have elapsed since the lodgement of the second appeal with the Supreme Court of Belarus in relation to seeking summary return of the minor pursuant to the Hague Convention.

21. At the hearing of this appeal on 28th June, 2019, the Court was informed by the appellant that the Supreme Court of Belarus had within the previous two weeks delivered judgment refusing to direct a summary return of George to Ireland pursuant to the Hague Convention, apparently on the grounds that a period of over 12 months had elapsed since the date of the wrongful removal of the minor and that he was now settled in his new environment in Belarus. Apparently reliance was placed by that Court on Article 12 of the Hague Convention.

22. The appellant advised that he has further appealed that decision and that such an appeal is possible from the Supreme Court of Belarus to the Presiding Judge of that Court. It is unclear whether that is a review or a full appeal. Neither is it clear when that process is likely to conclude.

Judgment of the Irish High Court

23. The judgment of the High Court appealed against reviews events in Ireland and Belarus as between the parties in connection with their domestic divorce proceedings as well as the child abduction proceedings brought pursuant to the Hague Convention. It considered a significant corpus of authorities and academic commentary in regard to Art. 15 of the Hague Convention. Jurisprudence from several jurisdictions was considered, including the Israeli Supreme Court. Consideration was given to the Explanatory Report on the Hague Convention of Professor Pérez-Vera, and aspects of that commentary have been considered in the jurisprudence.

24. At para. 37 of the judgment the High Court judge observed: -

"Counsel on behalf of the applicant sought to persuade the Court that there was an issue on which Irish law had a distinctive character and that this should be clarified for the Belarussian Court. This was on the issue of whether a child's removal with the consent of the left-behind parent is a wrongful removal for the purposes of Article 3 of the Hague Convention. It is true that there has been some divergence, for example, as between different Courts in England and Ireland on this particular issue; however, in my view, these divergent approaches concern an issue of Convention law rather than an issue of Irish law."

Thereafter, particularly at para. 44 the judge observed that it was not necessary for her to resolve an issue as between competing interpretations of the relationship between Art. 3 and Art. 13 of the Hague Convention since she was coming to a conclusion that it would be inappropriate to embark upon an Art. 15 enquiry since the issue emerging was purely one of Convention interpretation without any requirement for an input from an Irish Court on any issue pursuant to domestic Irish law.

25. She concluded that the fundamental obstacle to the appellant's application was that he sought a ruling from the High Court on a matter of Hague Convention law which was being actively agitated before the Courts of Belarus in circumstances where no dispute as to applicable Irish law which could potentially render it appropriate for an Irish Court to become involved had been identified. The judge commented, *obiter*, that she was prepared to accept on the basis of English authority that an applicant may have *locus standi* to request a ruling under Art. 15 even where there has been no request from another State pursuant to Art. 15 of the Hague Convention provided such an application would properly serve the purposes of Art. 15 of the Hague Convention. She was also prepared to accept, *obiter*, that an Irish Court may have to resolve disputed issues of fact in order to make a ruling in circumstances where an Art. 15 application is properly before it. She reached the conclusion that an Irish Court should not proceed to entertain an application pursuant to Art. 15 or grant a declaration pursuant to its terms in circumstances where the court of another country is already seized of that issue pursuant to the Convention and where there is no disputed issue of Irish law upon which the Court can usefully rule which would be of assistance to the other court.

26. The trial judge was satisfied that the appellant had acquired rights of custody on the birth of George pursuant to s.6 of the Guardianship of Infants Act 1964, as amended. The High Court's view was that the issue now for determination before the Courts in Belarus was whether there was consent on the part of the appellant to the George's removal and that is the matter which required to be determined in accordance with the principles of the Hague Convention. As such there was no good reason identified why an Irish Court should be contributing in any way to that determination.

Notice of Appeal

27. The appellant contends that the refusal of the High Court to make the orders sought pursuant to Art. 15 of the Hague Convention, 1980 is contrary to the principles of the Hague Convention. Further, it was argued that it is the Courts of habitual residence which are best placed to make decisions regarding custody and they retain jurisdiction until such time as the decision has been finalised not to return the child. It is further contended that the Irish Courts are mandated to grant a declaration: -

"My argument is that that the Irish Courts are legally mandated to hold the procedure on declarations both in national law and international treaties and if it is to either award or deny the giving of the declaration then it must do so based on its own merits, not those of anywhere else..."

He comments that he has not had access to his son since June 2017. He contends: -

"Since the divorce in June 2017 I have been denied all access to my son despite the fact that officially I still have joint custody in all jurisdictions. There is no legal body in Belarus which can enforce this without me obtaining an order from the Court to do so and I cannot obtain such an order without entering into access/custody agreements which will be considered as acquiescing to the removal/retention."

He asserts that the Courts in Belarus have placed the burden of proof of consent on the appellant rather than on the respondent.

Discussion

28. Article 15 of the Hague Convention is *prima facie* restricted to obtaining decisions or determinations as to whether the removal of a child is wrongful. It falls to be considered in the context of s.15 of the Child Abduction and Enforcement of Custody Orders Act, 1991, as amended.

29. Section 15 of the Act provides: -

"15.—(1) The Court may, on an application made for the purposes of Article 15 of the Hague Convention by any person appearing to the Court to have an interest in the matter, make a declaration that the removal of any child from, or his retention outside, the State was wrongful within the meaning of Article 3 of that Convention.

(2) The Central Authority in the State shall take action or cause action to be taken to assist the person referred to in subsection (1) of this section in making an application under this section if a request for such assistance, in such form as may be prescribed, is made by him or on his behalf by the Central Authority of another Contracting State."

30. The primary objective of Art. 15 is to provide a determination as to what rights a left-behind party has under domestic law in circumstances where an abduction is alleged.

31. The issue will normally arise wherever it is asserted or suggested that an applicant who seeks the summary return of a child pursuant to the provisions of the Hague Convention is not the holder of rights of custody under the laws of the State of habitual residence. In other words, where it is contended that the removal of a minor across trans-national borders was not wrongful or in breach of any rights of custody attributable to an applicant.

32. There is no contention in any of the documentation made available to this Court in the context of this appeal, including translations of orders and excerpts or *précis* of hearings before various courts in the State of Belarus, the requested State, that it was being contended by the respondent or by any party or the courts or any judge that the appellant is not the holder of rights of custody *vis-à-vis* the minor George. Neither is it contended now, it would appear, that one parent is entitled to remove a minor out of Ireland without the prior consent of the other parent who is also the holder of rights of custody.

Mootness

33. The decision of the Belarus Supreme Court, as relayed to this Court by the appellant, appears to indicate that its refusal to order summary return was based on the passage of time since removal and not on an acceptance by that Court of a claim of consent on the part of the appellant as was alleged at previous hearings. It is noteworthy that three years have now elapsed since the minor was removed from Ireland.

34. From that procedural history it is clear that the specific issue which arises on this appeal is now, strictly speaking, moot. The question which was determined by Ní Raifeartaigh J., and which is the subject of this appeal, was as to whether a declaration pursuant to Article 15 of the Hague Convention and s.15 of the 1991 Act ought to be granted to the appellant to assist in the Hague Convention application pending before the Belarus Courts. That application has now been determined and, as pointed out above, a summary return of the minor was refused by the Supreme Court in reliance on Article 12 of the Hague Convention. The precise question which was determined by Ní Raifeartaigh J. and which, therefore, arises on this appeal, is moot.

35. However, the issue was not moot at the time when the appeal to this Court was initially brought. That factor, of itself, would not, of course, warrant the Court hearing an appeal which is moot.

36. The precise parameters of Article 15 of the Hague Convention and its relationship with s.15 of the 1991 Act give rise to potentially complex issues that will require to be fully argued in an appropriate future case. There are no special and unusual circumstances arising or identified which could satisfy this Court that it is appropriate to hear the appeal notwithstanding its mootness. This Court does not have jurisdiction to make determinations on the Article 15 application in circumstances where the litigation has been disposed of in Belarus on two separate occasions up to Supreme Court level. The latest adjudication of the said Supreme Court took place within the past few weeks.

37. The appellant confirmed that he now contemplates bringing proceedings seeking access to his son. Same are separate and distinct from the proceedings brought pursuant to the Hague Convention seeking summary return of the minor. Apart from some formal application or appeal now in train to the head of the Supreme Court, the child abduction proceedings in Belarus are concluded. The decision was grounded on Article 12 of the Convention and it would appear that the issue of the initial removal not being a "wrongful removal" as was previously contended for was not the primary basis of the decision. Hence, there is no basis for this Court to make a determination in this appeal.

38. This Court refrains from expressing any view as to whether the High Court was correct or not in its interpretation of Article 15 of the Hague Convention.

Conclusions

39. This Court makes the following findings:

- (a) The appellant was the holder of rights of custody regarding his son at the date of his removal from Ireland three years ago.
- (b) Under Irish law his prior consent was required to remove his son from Ireland.
- (c) Under Irish law the abduction of a child is a criminal offence.
- (d) Since early August, 2016, the appellant has instituted and pursued child abduction proceedings in Belarus seeking the summary return of his son
- (e) Over three years have now elapsed since the minor was removed from the jurisdiction of the Irish Courts.
- (f) Recently the Supreme Court of Belarus has considered, for the second time, issues by way of appeal from the lower courts in Belarus regarding the appellant's claim seeking the summary return of the minor to Ireland.
- (g) The most recent decision, as reported to this Court by the appellant, was a refusal to make the order sought on grounds of the passage of time and in particular that over 12 months had elapsed and the boy had now settled in Belarus.
- (h) In fact the minor has been in Belarus for over 3 years now.
- (i) It appears a form of appeal is being made to the President of the Supreme Court. The appellant indicated that he does not expect that a summary return will ensue from that process of review.
- (j) In substance this Court infers that the Hague Convention proceedings in Belarus have to all intents and purposes concluded now.
- (k) Thus, to embark on a consideration of the grounds of appeal would be entirely moot since they could serve no purpose in the Hague Convention proceedings in Belarus – although the appellant believes they would be of assistance in contemplated access proceedings. However, the use of article 15 of the Hague Convention and s.15 of the 1991 Act is confined to abduction proceedings alone.
- (l) This Court expresses no view as to whether the findings and conclusions of the High Court judge were correct or not. All the issues arising will fall to be determined on another occasion and will require to be fully and comprehensively argued.
- (m) This appeal has become wholly moot prior to the appeal hearing date due to the determination of the Belarus Supreme Court.

40. Accordingly, I would decline to make any order in this appeal since recent events have overtaken the necessity for or appropriateness of any such determination. I would reserve to another day a comprehensive determination of the ambit and operation of Art. 15 of the Hague Convention on International Child Abduction signed at the Hague and s.15 of the Child Abduction and Enforcement of Custody Orders Act, 1991.

