

THE HIGH COURT

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980

AND

IN THE MATTER OF COUNSEL REGULATION (EC) No. 2201/2003

IN THE MATTER OF K.K. AND K.K. (MINOR)

BETWEEN:

P.K.

APPLICANT

and

M. M.

RESPONDENT

Judgment delivered by Ní Raifeartaigh J. on the 14th November 2017.**Background**

1. This case came on for hearing before me on Monday, the 13th November, 2017. The proceedings concern an application by Mr. P.K., the father of two boys aged 10 and 8, for the return of his children to Poland pursuant to article 12 of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "the Hague Convention"), together with a declaration that the respondent wrongfully removed the children from Poland within the meaning of article 3 of the said Convention.

2. This is the second occasion upon which an Irish court has had to rule on an application by Mr. P.K. under the Hague Convention. On the 15th December, 2016, this Court made an order for the return of the children to Poland, on foot of a finding that they had been wrongfully retained in Ireland after a holiday visit to their mother, who has been living in Ireland since 2014. Ms. M.M. had signed a form promising to return the children to Poland after a fixed period, but did not do so. The arrangement envisaged by the December 2016 court order for the return of the children was that the children would return to Poland in the care of their mother. The case was then mentioned to the Court on a number of occasions between January and May 2016, as the whereabouts of Ms. M.M. and the children was unclear, although it was believed that they had returned to Poland. In May 2017, the Court was told that proceedings had been heard before a Polish court in April 2017 and that the mother and children were definitely in Poland. As a result, the first set of Hague proceedings were then struck out, as the original order made by the Irish Court required that the mother return the children to Poland and did not purport to deal with matters thereafter.

3. The present proceedings came before the Court by way of a fresh application by Mr. P.K. under the Hague Convention and Regulation 2201/03 by reason of the fact that the mother came back to Ireland with the children after the April 2017 proceedings which took place in Poland. This Court has been furnished with a copy of the decision of the Polish court in April 2017. This decision refused her application for custody of the children on the basis of prematurity, namely that the evidence had not been collected thoroughly at that stage. It therefore seems that this decision was an interim or interlocutory decision, rather than a final decision, but it is clear that the Polish court did not give her permission at that point in time to bring the children to Ireland. Nonetheless, Ms. M.M. then came back to Ireland with the children.

4. The document commencing the present proceedings was a special summons issued on the 8th August, 2017. On the 6th September, 2017, the Court made certain orders, including an order that the respondent M.M. be restrained from removing the children from the jurisdiction of the Court or from the address at which they were then living, and an order requiring that their passports to be surrendered to the solicitor for the applicant pending the determination of the proceedings. On the 4th October, 2017, the Court made an order that a psychologist, Dr. Fiona Moane, who had assessed the children previously for the purpose of the original proceedings, carry out an assessment of the children's current views, in particular as to whether they had an objection to returning to Poland. Ms. M.M. did not obtain legal aid and on the 17th October, 2017, she swore an affidavit in these proceedings.. A further document was submitted to the Court on behalf of the applicant dated the 6th November, 2017. While this was notarized, it was not sworn as required by Irish procedures, and so the court permitted him to give brief evidence in Court on the date of the hearing that its contents were true; thus, it can be equated with an affidavit for present purposes. Mr. P.K. also stated in evidence that after the April 2017 court proceedings in Poland, negotiations about where the children would live were ongoing between the parties' lawyers when Ms. M.M. left Poland for Ireland. Mr. P.K. was emphatic that he did not consent to their being brought to Ireland.

The reports of Dr. Moane concerning the children's views

5. The reports of Dr. Moane in respect of the children's views were finalised on the 3rd November, 2017. The younger child (K.K.), aged 8, described various negative and sometimes 'scary' experiences of his father and said that he did not want to see his father at all, whether in Ireland or in Poland. He said he enjoyed school, that he has friends, and that he was happy with his living situation in Ireland, with an aunt and uncle living with them, and his mother working in a shop. He said that his father sometimes telephones to have a chat with them, but he himself never wanted to talk to him. Dr. Moane considered him to be a "well-adjusted 8 year old boy" who, as such, would naturally be most influenced by the parent he was closest to, namely his mother. She did not consider that he was 'unduly influenced' as he seemed to be very genuine about his stated preference. She thought that he did not demonstrate a secure attachment with his father and that it appeared to be one of avoidance. She went on to say that it is a common strategy for children coping with ineffective parenting to split parents into the "good" and "bad" parent, thus idealizing one parent and overly demonizing the other parent. It may be noted that K.K. had the assistance of an interpreter for his interview with Dr. Moane; thus, it

appears that he is not entirely comfortable with the English language.

6. As regards the older child (also K.K.), aged 10, Dr. Moane reported that he was restless and agitated at interview and said that he did not want to talk about his father any more. He also reported negative experiences from when he was living with his father. He said he was very happy in Ireland, in his school and in his living arrangements. He said that his father telephoned them a lot in Ireland because he missed them, but that it was never a happy conversation and it was always about his father wanting the two boys to stay with him. He was "adamant" about wanting to stay in Ireland, and did not want his father to come on family holidays, and did not want to visit his father. He said he would be shaky and nervous while visiting of father. Dr. Moane described him as having "very strong views about what he would like for his future" and that he had become more negative towards his father since her last interview with him one year earlier. She did not think that he was 'unduly influenced' by his mother, but again said that he might be overlooking his mother's flaws while exaggerating those of his father. She said that he was "more confident and assured about wanting to remain in Ireland with his mother and have a minimal relationship with his father at this stage of his life" but that in terms of attachment, he seemed "somewhat ambivalent" as he was willing to engage in telephone conversations with his father. It may be noted that it appears that K.K. had been told that his mother had "won" the various custody disputes, which is not in fact the correct legal position.

7. Both children reported their father as drinking too much and sometimes being drunk. This matter is strongly contested by the applicant and he pointed out that a Polish court had at one stage sent a probation officer for an inspection to his home, and also that the Polish courts had consistently awarded physical custody to him. There seems to be no doubt that the respondent mother has had significant problems with alcohol. This is noted in the Polish court's decision of April 2017, and counsel for the applicant drew the Court's attention to a newspaper article, exhibited to his client's affidavit, which gave an account of a sentence imposed by a Polish court in respect of Ms. M.M. arising out of an incident when she was severely intoxicated and in charge of the children. This was not ultimately disputed by Ms. M.M., who told the Court that she had since then received treatment for her problems with alcohol.

The Submissions of the Parties

8. At the hearing, Mr. P.K. was represented by solicitor and counsel, while Ms. M.M. represented herself. She had the assistance of an interpreter, as did Mr. P.K. Counsel on behalf of the applicant submitted that his client clearly had legal custody of the children under Polish law and was exercising those rights at the time of their removal to Ireland within the meaning of the Convention. He submitted that there was no consent to their removal to Ireland. It was submitted that none of the provisions of Article 13 of the Convention applied. In particular, it was submitted that the views of the children, as reported by Dr. Moane, amounted to no more than a "preference" rather than an objection within the meaning of the Convention. Further, it was submitted that even if the Court took the view that the children's views amounted to an "objection", the Court's discretion should be exercised in favour of their return because of the flagrant flouting of court orders by Ms. M.M.; that because of the children's ages (10 and 8), their views should not be given undue weight; and that while Dr. Moane had said there was no 'undue influence' in respect of the children by the mother, it was inevitable that children of this age living with their mother for over a year would be influenced by her views and her preference for living in Ireland. It was argued that the Court should not reward Ms. M.M. for unlawful removal of the children to Ireland and allow her to profit from this wrongdoing by refusing the children's return on the basis that they were now settled in Ireland. It was also argued that Ms. M.M. could not be allowed to engineer a situation of "grave risk" by asserting that she would not return to Poland with the children and then asserting that they would suffer psychological harm if they were returned to their father.

9. Ms. M.M. submitted in the first instance that Mr. P.K. had in fact consented to the removal of the children from Poland, that he had known their address while they were in Poland and knew they would be returning to Ireland so that one of the children could take his Holy Communion in Ireland. The main thrust of her submission, however, was that the children were now well settled in Ireland, happy with friends and in school, had little or no relationship with their father, were scared of him, and did not want to return to Poland. She said that she herself could not return to Poland because she had neither work nor accommodation there and that it would be harmful to the children for them to be sent back to live with their father because, she said, he did not care for them properly, and they were scared of him.

Legal Analysis

The applicant's rights of custody

10. The first matter in respect of which the Court must be satisfied is whether the applicant father, who was not married to the respondent, had rights of custody and was exercising them at the time of the removal of the children to Ireland. Having regard to the fact that he was named on the birth certificate of the children, together with the court order dated the 10th March, 2015 of the Warszawa Praga-Polnoc District Court, designating the place of residence of the two children as the place of residence of their father, and the decision of the same court dated the 11th April, 2017 rejecting Ms. M.M.'s application to amend the decision on parental authority, I am satisfied that he had a legal right of custody in respect of the children under Polish law. The children had always lived with him until they came to Ireland to their mother in the summer of 2016. It seems that the mother had left and gone to Ireland without them two years before that, in 2014. There then followed the events between summer 2016 and summer 2017 described above. In all of the circumstances, I am satisfied that Mr. P.K. had rights of custody and was exercising them at the time of the removal within the meaning of the Convention.

The issue of consent under article 13(a) of the Convention

11. The next matter arising is whether the applicant father P.K. consented to the removal of the children to Ireland after April 2017. The burden of proof with respect to establishing consent pursuant to article 13 (a) of the Convention is on the respondent in respect of this matter; she has to prove consent on the balance of probabilities with clear and cogent evidence. In her affidavit, Ms. M.M. said that Mr. P.K. gave the children voluntarily to her and did not impose any conditions and was aware that they would complete their education in Ireland, including the youngest son taking his First Holy Communion. Having regard to the history of M.M.'s dealing with regard to the children, together with Mr. P.K.'s evidence (set out above) that Ms. M.M. took the children out of Poland at a time when discussions between the lawyers were ongoing, I am not satisfied that Ms. M.M. has discharged the burden of proof in this regard. I find that Mr. P.K. did not consent to the removal of the children to Ireland after April 2017. Accordingly, I find that there was a wrongful removal of the children to Ireland from Poland after April 2017 within the meaning of article 3 of the Convention.

12. As the application for their return was made within one year of the wrongful removal, the 'well-settled' defence under article 12 of the Convention does not arise.

Grave Risk and article 13(b) of the Convention

13. Ms. M.M. sought to argue, in effect, that the return of the children to Poland, which in effect would mean their return to their

father would expose the children to psychological harm or otherwise place the children in an intolerable situation. While she did not use the language of the Convention, this was, in my view, the substance of what she was saying when she argued that the children would be unhappy returning to their father as they were afraid of him and in arguing that he did not care for them properly. Counsel on behalf of the applicant argued, as noted above, that Ms. M.M. was not entitled to create a situation by refusing to return to Poland and then label it as one of 'grave risk' to the children. He also argued that there was nothing in the history of interactions between father and children to suggest, objectively, that there was any reason to fear "grave risk" if the children were returned to him. I agree with the submissions on behalf of the applicant in this regard. The Polish courts have had quite a number of interactions with this family, and Mr. P.K.'s affidavit indicates that at one point the court ordered an inspection by a probation officer, who reported no objections to Mr. P.K. or to the harmony of the home. Since April 2015, the Polish court has consistently maintained a regime whereby the father had the right to physical custody of the children. Further, it seems to me that it would be contrary to the policy of the Convention if the court were to accept a grave risk created by the respondent's own refusal to return to the country from which there had been a wrongful removal by the respondent herself, where the refusal is based upon a mere assertion of a lack of income or accommodation in that country, and the country is actually the country of her own nationality and previous residence.

The views of the children and Article 13 of the Convention

14. The next matter arising is whether the children have objected to being returned, within the meaning of article 13 of the Convention. A three-stage approach to this issue was approved in *C.A. v. C.A. (otherwise McC)* [2009] 2 IR 162, being: (1) whether or not the objections to return are made out; (2) whether the age and maturity of the child are such that it is appropriate for the court to take the objections into account; and, if the answer to that is in the affirmative; (3) whether or not the court should exercise its discretion in favour of retention or return.

15. Regarding the question of discretion, the Supreme Court in *A.U. v. T.N.U. (Child Abduction)* [2011] 3 IR 683 emphasised that the court, when having regard to a child's objections, should consider "the nature and strength" of the objections; the extent to which they are "authentically" the child's own objections or the product of an abducting parent; the extent to which they coincide or are at odds with other considerations relevant to the child's welfare; and the general Convention policies and purposes. The Chief Justice also said that the courts should "not lightly exercise a discretion to refuse or to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country" and that "such courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie".

16. Having regard to the views of the children as expressed to Dr. Moane, a summary of which has been set out above, it seems to me that the older child has a clear objection to returning to Poland and that the younger children has a "preference" for not returning to Poland. However, even as regards the position of the older child, as to the question of discretion I am of the view that the policy of the Hague Convention to deter the wrongful removal of children weighs heavily in favour of return in this case, for the reasons set out by counsel on behalf of the applicant, set out above, and having regard to what was stated by the Supreme Court in *A.U. v. T.N.U.*, set out above.. I also agree that in circumstances where the children have been living with their mother only for over one year, and where they are only 10 and 8 years old, they are likely to have adopted the coping strategies described by Dr. Moane and are likely to have idealized one parent over the other, and that this, while completely understandable from the child's psychological point of view, is something the Court should bear in mind when considering what weight to place upon their wishes. I am of the view that the Court's discretion in this case should be exercised in favour of an order returning them to Poland.

A Stay on the Order for Return

17. However, I am very concerned for the well-being of these two children, who have endured a lot of disruption over the last 15 or so months. Also, they have been living with their mother exclusively since summer 2016. I do not think it would be in their best interests to remove them suddenly from Ireland, in the middle of a school term, with Christmas approaching, and to send them back to their father without any preparation. Further, the Polish court, which is the court of their habitual residence, is much better placed to rule on issues of custody, and may be interested to know the most recently expressed views of the children, namely the views they expressed to Dr. Moane. It seems to me that the ideal situation would be if these reports were brought to the attention of the Polish court, which would then decide as soon as possible, in light of all the available evidence concerning this family's history, what custody and living arrangements are best for these unfortunate children who have been caught up in a bitter custody dispute between their parents. For this reason, I intend to place a stay upon the order for return in order to facilitate the progress of proceedings in the Polish court because I believe it to be in the best interests of the children themselves.

18. For clarity, I emphasise that my reasons for my dealing with matters in this way are three-fold; (1) because the children are in the middle of a school term; (2) because of the contents of the psychological reports and (3) because of the disruption in their lives they have experienced since summer 2016. I do not wish a situation to occur where I would cause further disruption to the children by sending them back to Poland today, only for a Polish court ultimately to rule that they may remain to Ireland with their mother. If a Polish court ultimately rules that they may remain in Ireland, then the stay will have the effect of preventing such disruption. However, if the Polish court rules that they may not remain in Ireland, the stay will come to an end and the order for return will take effect. However, in those circumstances, the return of the children would, hopefully, take place after practical arrangements have been put in place and the children have been mentally prepared for another move.

Decision

19. I will grant a declaration that the children were wrongfully removed to Ireland within the meaning of article 3 of the Hague Convention and that the children should be returned to Poland pursuant to article 12 of the same Convention.

20. I will place a stay on the order until the first Hague Luxembourg Court list in this Court in January 2018 if, and only if, there is an undertaking from the respondent that the Polish proceedings already in existence will be progressed as soon as possible, and in particular, that Ms. M makes/progresses an application for custody of the children and seeks the permission of the Polish court for them to live in Ireland.

21. I will order that the psychological reports prepared in Ireland in respect of the children be released from the *in camera* rule governing these proceedings so that they may be shared with the Polish court dealing with the existing custody proceedings between the parents, and the legal teams representing Mr. K and Ms. M. in those proceedings. If requested, I will also make a similar order in due course with regard to the pleadings in the case and the transcript of the audio recording of the hearing.

22. I will be asking that a copy of this judgment be copied by the Irish Hague Convention liaison judge (Finlay Geoghegan J.) to the Polish authorities and that a request be made that the Polish application in respect of the children's custody and residence be dealt with as speedily as possible in light of the disruption that has already been caused to these particular children and having regard to

the international aspect to the dispute.

23. I will put the matter in for mention on a date before the end of this term to ascertain whether any progress has been made in the Polish proceedings by then.