

**THE HIGH COURT**

**FAMILY LAW**

**[2013 No. 28 HLC]**

**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 AND IN THE MATTER OF COUNCIL REGULATION 2201/2003 AND IN THE MATTER OF H.G.**

**BETWEEN**

**K.G.**

**APPLICANT**

**AND**

**M.G.**

**RESPONDENT**

**JUDGMENT of Mr. Justice Michael White delivered the 19th July, 2013.**

1. This is an application by motion pursuant to Article 11 (2) of Council Regulation E.C./2201/2003 of 27 November, 2003, to have a child interviewed to ascertain her views on certain matters in the context of Hague Convention proceedings seeking her return to France in accordance with French court orders.
2. The applicant K.G. and the respondent M.G. otherwise known as B.O'R. were married in France in May, 2008. They are the parents of a daughter H.G. (the child) who was born in July, 2008, and has just turned five years of age. The respondent applied for a divorce in France in November, 2008. This was eventually granted in April, 2012.
3. There have been a number of orders of French Courts since 2008 in respect of custody and access of the child.
4. This is a complex case where the respondent relies on Article 13 of the Hague Convention (hereafter "the Convention") to resist the return of the child to France, amongst other matters in dispute.
5. Article 13 of the Convention states:-

"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 its return establishes that-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the 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 judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence".
6. Article 11(2) of Council Regulation E.C./2201/2003 states:-

"When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity".
7. The application of Article 13 of the Convention and Article 11(2) of Council Regulation E.C./2201/2003 in Ireland as to the views of children being heard has been comprehensively reviewed in the judgment of *R.P. v. S.D.* [2013] 1 I.L.R.M. 196. That judgment refers to earlier judgments including the Supreme Court decision *Bu. v. Be. (Child Abduction)* [2010] 3 I.R. 737 which applied *M.N. v R.N. (Child Abduction)* [2009] 1 I.R. 388.
8. Mrs. Justice Finlay Geoghegan in *R.P. v. S.D.* while not altering the conclusions reached in *M.N. v. R.N.* amplified the conclusions and referred to some additional matters.
9. This court is not restricted as to age in applying the Article but is guided by the dicta in *Bu. v. Be.*, which states at p. 741 para. 15:-

"While not setting a rigid rule, the High Court considered in *M.N. v R.N. (Child abduction)* [2008] IEHC 382, [2009] 1 I.R. 388 that *prima facie* it was inappropriate for a court to hear a child under the age of six. This is not an inflexible rule, but

will depend on all the circumstances of the case."

10. At para. 40 of the judgment of *RP v. SD* [2013] I.L.R.M. 196, the nature of a child's views are considered in the context of their relevance to the issues in the proceedings. The paragraph states:-

"I reached a positive conclusion in *M.N. v. R.N* in relation to a child who was approximately fourteen months older than this child and a negative conclusion in *Be v. Bu* in relation to a child who was then approximately four months older than this child. Where the decision has to be reached upon the basis of age, albeit having regard to the particular facts of the case, the fair administration of justice does appear to require consistency or a departure therefrom for stated reasons. I have reconsidered my negative conclusion in *Be v. Bu* in the light of submissions made by counsel for the mother in this application. Having done so, I am of the view the child the subject of these proceedings who is not yet five years old, albeit at school, *prima facie* is not of an age where, as a matter of probability, she is capable of forming her own views in relation to everyday matters of potential relevance to the issues in the proceedings, including the exercise by the court of any discretion in the proceedings, and hence, have concluded that she is of an age where it would be inappropriate to give her an opportunity to be heard pursuant to Article 11(2). If I am required to exercise a wider judgment, I would reach the same conclusion. In my judgment, it is inappropriate on the facts of this case, and having regard to the rights of the child, to directly involve the child who is on the cusp of 5 years in the Hague return application by giving her an opportunity to be heard. Depending on the outcome of these proceedings, if there are further proceedings in either jurisdiction relating to her care and custody, it may become necessary and appropriate".

11. I emphasise the sentence in para. 40 of the judgment:-

"...she is capable of forming her own views in relation to everyday matters of potential relevance to the issues in the proceedings, including the exercise by the court of any discretion in the proceedings...".

12. This Court notes the child was seen in Ireland by her General Practitioner, Dr. Diarmuid Mulcahy. Reports from the 2nd November, 2010, are exhibited. He referred her to a Child Psychologist in 2011. Dr. Mulcahy in his report of the 15th March, 2013, confirmed he had interviewed the child "in a way appropriate for a five year old girl" and refers to her answers in that report.

13. In the most up to date psychological report of Margaret Bednarska of the 16th June, 2013, she refers to clinical interviews of the child and her mother on six occasions between the 12th November, 2010, and the 4th April, 2013.

14. The court also notes from the French Rulings there have been Assessments in France.

15. Ms. Bednarska in her Report of the 11th April, 2013, stated:-

"due to her very young age she struggles to understand what is going on around her in terms of custody and living arrangements and is not able to cope with transitions between Ireland and France".

16. In her Report of the 16th June, 2013, she states:-

"In general H.G. appeared relaxed and comfortable with the interview process, however when asked about France, and all the nice places she visited there, she demonstrated anxiety and discomfort, she became tense and pretended she had not heard the question. When the Examiner asked again she showed irritation, said she did not want to talk about it and withdrew for a while from the interaction".

17. The Court's concerns are twofold:-

(1) The child has just turned five years of age. While she may be more mature for her age than other children this court doubts she has the maturity to communicate views to the court which would be of relevance in determining the issues.

(2) The child has been interviewed on so many occasions already from a young age, that a court of trial would have major difficulty attributing any weight to a further report and assessment.

18. The application is refused.