Neutral Citation Number [2012] IEHC 188

THE HIGH COURT

[2012 No.7 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 (EC) 220112003 AND

IN THE MATTER OF NICOLE DILLON, A MINOR

BETWEEN

RP

APPLICANT

AND

SD

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan on Article 11(2) decision given on the 9th day of May, 2012

1. This application raises important and difficult questions as to the obligations imposed on the High Court in applying Article 11(2) of Council Regulation (EC) 2201/2003 ("the Regulation") in proceedings to which it applies concerning a young child.

2. The child at the centre of these proceedings was born on 26th May, 2007, and hence will only be five years old later this month.

3. In the proceedings, the applicant, who is the father of the child, seeks an order pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") as implemented by the Child Abduction and Enforcement of Custody Orders Act 1991, for an order for the return of the child to England. It is alleged that the child was wrongfully removed to Ireland by the respondent, her mother, on or about 4th January, 2012.

4. The father and the mother were never married to each other. It is not in dispute that the child was habitually resident in England in January 2012; that as the father was entered on the Birth Certificate of the child, he has parental authority and that his consent to the removal of the child to Ireland was not obtained. In addition, there have been proceedings in being between the father and mother before Barnet Civil and Family Courts in relation to the child since 2010.

5. Subsequent to the removal of the child, there were proceedings before the High Court in England between the father and the mother. There were orders made by the English High Court on 10th, 19th ,24th and 31st January, 2012, certain of which I will refer to further.

6. Since coming to Ireland, the mother gave birth, on 6th February, 2012, to a boy. The applicant is not the father of the boy. The father of the boy currently lives with the mother and the child the subject matter of these proceedings in Ireland.

7. These proceedings were commenced by the issue of a summons on 28th February, 2012, made returnable for 7th March, 2012.

Motion

8. The mother in the present application seeks an order pursuant to Article 11(2) of the Council Regulation that the child be interviewed for the purposes of ensuring that she is given an opportunity to express her views and be heard in the proceedings. The application is grounded on an affidavit of the mother. The father had not filed an affidavit in advance of the hearing. Counsel for the father opposed the application, in reliance in particular on the order of the English High Court of 31st January which records, *inter alia*, that the Court considered, pursuant to Article 11 (2) of the Regulation, in the light of the child's then age of 4 years and 7 months that "it was inappropriate to give her an opportunity to be heard".

9. I reserved my decision on the Article 11(2) application.

10. An affidavit sworn by the father on 19th April, 2012, was subsequently filed and made available to the Court as part of the case management of the substantive proceedings. The matter was mentioned and counsel for the mother was concerned that I would take it into account in reaching my decision on the Article 11(2) application. The affidavit is primarily directed to substantive issues in the proceedings. I indicated that I had read the affidavit. At para. 6, the father addresses issues relating to the motion. They are primarily matters of comment and do no more than raise issues which the Court, as a matter of commonsense, would consider having regard to the age of the child and the affidavit sworn by the mother and relied upon at the hearing of the application. Accordingly, whilst I had read the affidavit, it did not appear to me necessary to put the matter back for further argument.

11. I gave my decision refusing the application on 9th May 2012 and this judgment sets out the reasons for my decision.

Applicable Law

12. Article 11 (2) of the Regulation provides:

> "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."

13. The current practice in the High Court is that, in applications for the return of a child pursuant to the Hague Convention to which Article 11(2) of the Regulation applies, the child is given an opportunity to be heard by being interviewed by an appropriate expert pursuant to an order made by the Court who then reports to the Court. Whilst the procedure may not be ideal, having regard to the absence of any specific resources available to the Court to arrange for children to be heard, it has worked reasonably well. There are a limited number of persons who have undertaken this work and built up a familiarity and expertise. There is, in all instances, a written report made to the Court. The interviewer will be required to attend at the oral hearing only if either required by the Court or either of the parties. The interviewer is also asked to make a limited assessment of the child, and in particular, her maturity and ability to form her own views.

14. Having regard to the obligations of expedition in Article 11(3) of the Regulation, as a matter of practice, the Court requires a decision to be made at an early stage in the proceedings as to whether the child is of an age and degree of maturity such that he or she will be given an opportunity to be heard in this manner and the interview is carried out at an early stage in the proceedings.

15. In this application, neither party disputes that the Court should apply the principles set out in the judgment in *MN. v. R.N. (Child Abduction)* [2009] 1 I.R. 388, which were approved of by the Supreme Court in *Bu v. Be (Child Abduction)* [2010]3 I.R.737.

16. It is not necessary for me to repeat in full the principles or the reasons thereof. Insofar as I now summarise them, I am not intending in any way to deviate from the fuller statement in MN. v. R.N. In summary, they are:

> a. The starting point in the application of Article 11(2) is that the child should be given an opportunity to be heard. The Court is only relieved of that obligation if it would be inappropriate to do so either by reason of the age or degree of maturity of the child.
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> b. Article 11(2) should be applied having regard to Recital 33 of the Regulation so as to respect the rights granted to a child in Article 24 of the European Union Charter of Fundamental Rights, and indirectly having regard to Article 12 of the United Nations Convention on the Rights of the Child. Hence the primary consideration of the Court in determining whether or not a child should be given an opportunity to be heard is whether on the evidence before the Court, the child appears *prima facie* to be of an age or level of maturity at which he or she is probably capable of forming his or her own views on matters of relevance to them in their ordinary everyday life.
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> c. In addition to the specific evidence before the Court in the case, a judge must inevitably rely on his or her own general experience and commonsense in determining the age at which *prima facie* a child is capable of forming his or her own view about matters of direct relevance to them in their ordinary everyday life.
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> d. In construing Article 11(2), the Court must also take into account the other subparagraphs of Article 11 including the requirement for expedition in Article 11(3).

17. In *MN v. R.N.*, the child at issue was just over six years old. On the evidence

before the Court, I concluded that he was of a maturity at least consistent with his chronological age. I concluded that "anyone who has had contact with normal six years olds know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life". I determined that the child had a right to be heard pursuant to Article 1I (2). No appeal was taken against that decision.

18. In *Bu v Be* in the High Court, an order of 17th February, 2010 indicates that I refused an application made by the mother, appearing in person, that the child be given an opportunity to be heard pursuant to Article 11 (2) of the Regulation. I appear to have done so in an *ex tempore* decision in the case management list and do not now recall precisely the reasons given. The child was then approximately five years and three months old. At the full hearing of the return application in tbe High Court in March 2010, Edwards J. gave judgment, [2010] IEHC 77, directing tbe return of the child to the jurisdiction of the courts of Latvia. The mother again appeared in person. She appealed against the judgment of Edwards J. to the Supreme Court and again appeared in person. It appears tbat whilst no formal appeal was taken against the order of 17th February, 2010, refusing to provide tbe child with an opportunity to be heard as the mother again requested that the Supreme Court hear tbe child, the Supreme Court considered whether or not it would be appropriate to provide the child witb an opportunity to be heard and delivered a separate judgment on tbat issue, *Bu v. Be* [2010]3 I.R. 737.

19. In that judgment in *Bu v. Be*, Denham J. assumed (I believe, correctly) that I had applied the principles set out in *MN v. R.N.*, and at p. 741 of her judgment, stated:

> "While not setting a rigid rule, the High Court considered in *M.N v. R.N. (Child abduction)* [2008] IEHC 382, [2009]l 1 IR. 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."

20. I have reread the judgment I delivered in *MN v. R.N.* Regretfully, I am not clear which part of my judgment gave rise to the view attributed to me in the above extract "that *prima facie* it was inappropriate for a court to hear a child under the age of six". My conclusion in *MN v. R.N.* may lack clarity because of a double negative unwisely used. At para. 32 of the judgment, I stated:

> "On the facts of this application, the child is aged six years and appears from the affidavit evidence of the parents to be of a maturity at least consistent with his chronological age. On those facts, I do not find that *prima facie* he is a child not capable of forming his own views in the sense I have outlined above. It appears to me unavoidable that a judge making such a decision must rely on his or her own general experience and common sense. Anyone who has had contact with normal six year olds knows that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life."

21. The child in this application is younger than the child in respect of whom I refused the application to be heard in *Bu v. Be*. There is nothing in the judgment of the Supreme Court or the judgment of Edwards J. in the High Court which suggests that he was a child with a maturity different to his chronological age.

22. In the Supreme Court, Denham J., in her conclusion in *Bu v. Be*, stated at p. 741 immediately after the passage cited above:

> "In this case Finlay Geoghegan J. held that it was inappropriate that the child be heard. In other words, on the evidence, having regard to her age and maturity, it was inappropriate for the court to hear the child who was five years of age.
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> In all the circumstances of the case, on the evidence before the court, including the age of the child, I would not interfere with the decision of the High Court. For the same reasons, I would refuse the application to this court to have the child heard.
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> Consequently, I would affirm the decision that it was inappropriate that the child be heard and I would refuse the application to this court."

As appears, this decision of the Supreme Court was reached on all the evidence before the Court, including the age of the child. It does not appear to bind the High Court in another case on the evidence before it to hold that it is inappropriate to give a child of 5 an opportunity to be heard pursuant to Article 11(2). Counsel for the father did not submit that the Court is so bound. That is the issue which the Court must decide on the evidence in this case.

Evidence in this Application
23. Counsel for the mother sought to rely upon the averments made by the mother at para. 14 of her affidavit where she states:

> "14. I further say that N ... objects to returning to England. N ... is almost five years of age. She is a very intelligent and competent girl and I believe her mental and intellectual abilities exceed her age. She has been attending school in Ireland at ... since her arrival in Ireland. She is doing very well in school and has even taken to learning Irish. I say and believe that N ... is of an age and degree of maturity that she ought to be provided a full and proper opportunity to express her views and have same considered in this case. As her mother and primary carer I say that she ought to be provided the opportunity to do so. N ... has said to me, unprompted, that she has two Daddy's (*sic*). She says she has a horrible Daddy that lives in ... i.e. the Applicant, and then she has D ...who lives with her who she likes. D... is my partner and father to my newborn child B..."

24. The above has to be considered in the context of the other matters deposed to by the mother which, regrettably, make clear that there is now strong antagonism between the mother and the father. The mother expresses a belief that the father is a dangerous and violent person and a threat to herself and the child. I have formed no view as to whether those concerns are justified, but observe that the antagonism expressed must be taken into account in assessing the above averments of the mother. Insofar as there is both comment and hearsay included in the above, I do not propose taking that into account. The objective facts deposed to are the age of the child and that she has been attending school in Ireland since her arrival in January 2012. There is evidence in the papers exhibited by the solicitor for the father that she had been at school in England prior to Christmas 2012. I am also prepared to accept the mother's observation that she is an intelligent and competent girl and appears to to be doing well in school.

25. On all the above evidence, I conclude that she is, as a matter of probability, a child with maturity at least consistent with her chronological age who is attending school since the autumn of 2012.

26. The next relevant evidence is an affidavit from a solicitor in the Law Centre acting for the mother. She deposes to the fact that, in her experience in childcare proceedings, it would not be uncommon for children of four years of age to have a guardian *ad litem* appointed to act on their behalf and that the guardian *ad litem* will inform the Court of any views that the child may have expressed in respect of matters at issue in the proceedings. She also states that a guardian *ad litem* may be appointed in respect of an infant child who is clearly not capable of expressing any views whatsoever. She correctly points out that the role of the guardian *ad litem* is twofold. The guardian *ad litem* will bring matters to the attention of the Court that he or she considers ought to be considered by the Court and also will interact with the child and discuss matters at issue in an age-appropriate and sensitive manner.

27. Thirdly there is evidence of the order of the High Court in England of 31st January, 2012 according to which the Court considered, pursuant to Article 11(2), that it was inappropriate that the child, having regard to her then age (of four years and seven months), be given an opportunity to be heard.

Conclusions
28. I have reconsidered the principles set out by me in *MN. v. R.N.* having regard to the submissions of Counsel and evidence herein. I do not consider it necessary to alter the conclusions reached on the applicable principles but there are certain amplifications I wish to make and additional matters to which I wish to refer.

29. I accept the submission of counsel for the mother that in determining whether the child should be given an opportunity to be heard, the Court should normally do so on the basis of the current age and maturity of the child. This appears to follow from the obligation imposed to give the child the opportunity to be heard "when applying Articles 12 and 13 of the 1980 Hague Convention". The Court will be applying those Articles at the hearing date or when giving judgment, and hence, there appears no basis for artificially looking at the situation at the date of commencement of the proceedings. Accordingly, I must decide this application in relation to the child upon the basis that she is approximately four years and eleven months. On the evidence, I am satisfied she has a maturity consistent with her chronological age.

30. The obligation is to give the child an opportunity to be heard unless this appears inappropriate having regard to her age or degree of maturity. This requires a court to consider each of those criteria disjunctively and to determine whether it appears inappropriate to give a child an opportunity to be heard by reason of her age alone. The reference in the alternative to degree of maturity in a normal construction of the words used appears directed to a court considering whether it would be inappropriate to give a child of an older age who for some reason lacks maturity an opportunity to be heard. This construction was not disputed by Counsel for either party. Nevertheless, as is clear from the Supreme Court decision in *Bu v. Be*, the Court must consider whether, on the evidence in the particular case, it is inappropriate, having regard to the age of the child in question.

31. The disjunctive criteria were not the subject of express consideration in *MN v. R.N.* or by the Supreme Court in *Bu v. Be.* Whilst I remain of the view that the primary consideration should be that set out in *MN v. R.N.*, it does appear that as Article 11(2) envisages a court determining whether it would be inappropriate to give a child an opportunity to be heard by age alone, it may intend that a court exercise its judgment on a wider basis as to the appropriateness of directly involving a young child in proceedings between his or her parents (or others) by giving him or her an opportunity to be heard notwithstanding that he or she may be the subject of the dispute. Whilst children are undoubtedly sensitive to the existence of disputes, parents should in so far as possible seek to protect young children from being aware of or involved in their disputes and the courts, consistent with its obligations to have due regard for the rights of the child, should also assist in so protecting young children. Giving a child an opportunity to be heard inevitably involves making him or her aware albeit in an age appropriate way of the existence and possibly nature of the proceedings. I consider this to

be a secondary matter which should inform the application of Article II (2).

32. In *MN v. R.N.*, I expressed my conclusion on the proper construction of Article II (2) at para. 27 in the following terms:

> "Applying article II (2) so as to respect the rights granted to a child in article 24 of the European Union Charter of Fundamental Rights (and having regard to the starting point of hearing the child as set out above), I have therefore concluded that the primary consideration of the court in determining whether or not a child should be given an opportunity to be heard is whether the child on the evidence appears *prima facie* to be of an age or level of maturity at which he is probably capable of forming his own views. I say *prima facie* for the following reason."

33. The reason for which I said *prima facie* was that by reason of the expedition obligation imposed on the Court in Article 11(3) of the Regulation, the Court should not engage in a separate professional assessment of the capability of a child to form his or her own views. Rather, the Court should, applying its own commonsense to the evidence already available to it in the case, make its assessment as to whether the child in question was of an age where he or she appeared *prima facie* to be capable of forming his own views. This forms part of a more general approach that the Court must apply Article II (2) in the context of the type of application to which it relates *i.e.* a summary application for return under the Hague Convention.

34. It is important to recall that the Court, in a Hague return application, is not making decisions in relation to the care or custody of the child. This distinguishes the type of proceedings from the care proceedings referred to by the solicitor for the mother in her affidavit in which a court will be considering detailed issues relating to appropriate care for a child and possibly contact with parents, and where a guardian *ad litem* who sees a child over several meetings may bring the views of a very young child on matters of detail to the judge. By contrast, in Hague summary return proceedings, the Convention at Article 19 expressly provides that a decision on return is not to be taken as a decision on the merits of any custody issue. In a case such as this, where a young child has been removed by the parent with whom she was living, a court making an order for return pursuant to Article 12 or 13 will normally seek to ensure, by obtaining undertakings from the applicant, that the child return in the care of and remain with the parent with whom she was living until an application can be brought before a court of the State of habitual residence. Hence, the decision does not alter the person with whom the child is living as would orders in care proceedings.

35. I have noted, on the facts of this case, that whilst the English High Court, in its order of 31st January, provided that, upon her return to England, the child be placed in the care of the father, it also obtained an undertaking from the father that if the child were returned by 7th February, that he would not enforce the custody order before a hearing before the High Court at which the mother would be given an opportunity to make representations. I would anticipate that a judge in this jurisdiction making a return order pursuant to Article 12 or 13 would seek and obtain an analogous undertaking (and possibly others) which would facilitate the return of the child in the care of the mother pending an early application to and determination by the English courts of any continuing disputes. The mother has stated on affidavit (para. 9) that despite her alleged fears in relation to the father, that if the child was ordered to be returned to England, that she would feel compelled to return with the child.

36. Another aspect of my decision in *MN v. R.N.*, which I would like to amplify is my determination that the primary consideration for the Court is whether the child is *prima facie* capable of forming his own views about ordinary everyday matters of direct relevance to him in his everyday life. This was stated in response to a particular submission on behalf of the father in that case. At paras. 29 and 30 of that judgment, I stated:

> "29. Counsel for the father also submitted that the court should consider not just whether the child is capable of forming his own views in general or in relation to everyday matters but rather whether he is capable of forming his own view as to whether he should continue to live in Ireland or return to live in the other European Union member state, as this was the issue to be decided in the proceedings. Counsel submitted that a child of six years *prima facie* was incapable of properly forming his own view on such an important issue as in which of two countries he should live as he would not be capable of understanding the full consequences for him of such a decision.
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> 30. It does not appear to me that this submission is correct on the present application for two reasons. First, the obligation in article 11(2) applies where the court is applying either article 12 or article 13 of the Hague Convention. Article 12 is the provision according to which the court makes the summary order for return. However, in making those orders, the court will often seek undertakings from the applicant for return (intended normally to be of a temporary nature until the courts of the jurisdiction of habitual residence are seized of any dispute) for the purpose primarily of seeking to ensure that the return takes place in a manner which is in the best interests of the child. It may well be that views expressed by a child on everyday matters as to the circumstances in which he was living before he came to Ireland, or his wishes as to his future care including what should happen on return, could be taken into account by a court by seeking appropriate undertakings when making the order for return pursuant to article 12 of the Hague Convention. In accordance with article 24(3) of the European Union Charter of Fundamental Rights, the child's best interests must be a primary consideration in the judicial determination."

37. I remain of the view that as Article II (2) applies to the application of Article 12 of the Hague Convention that this is the proper approach, but would emphasise (as I think is implicit in the above) that the everyday matters I had in mind should at least be of potential relevance to the exercise by a judge of his or her discretion under Article 12 and probably do involve some element of abstract or reflective thinking by the child and an ability to form and express views on circumstances in which the child was or is living or his wishes in relation to living arrangements or contact with parents or others.

38. At this stage in these proceedings, the Court must assume that at the substantive hearing it may be applying either Article 12 or Article 13. Counsel for the mother emphasised in submission a potential defence of the child's objection to a return to England and the opportunity to be given to the child to be heard in relation to this. However, the onus in Article 13 is different. A court must positively conclude that the child has attained an age and degree of maturity at which it is appropriate to take account of the views of the child. Having regard to the age of this child, I consider it improbable that a court would take such a view for the purposes of an Article 13 defence based on the child's objections. Accordingly it does not appear to me that a belief (as deposed by the mother) as to potential objections of the child to a return to England could properly form the basis of the Court giving this child at her age an opportunity to be heard. The proper focus appears to be the potential application of Article 12 or the exercise of discretion if the mother establishes another Article 13 defence.

39. The principal issue which the Court has to decide is whether this child, who, on the evidence, appears to have a maturity consistent with her chronological age and is approximately four years and eleven months old *prima facie* is or is not capable of forming her own views in relation to matters of everyday life, which would be of potential relevance to any issue in the proceedings, including the exercise of a discretion by the Court either as to how a return should take place following an order for return pursuant to Article

12 or the exercise of any discretion if an Article 13 defence were made out.

40. I reached a positive conclusion in *MN 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.

41. I would add that I have had regard to the English High Court order which reached a similar conclusion when the child was slightly younger. However, it has not been of direct relevance to my reasoning as only the order and not the reason for same was available to me.

42. For all of the above reasons I decided to refuse the application.