

THE HIGH COURT**(2012 No. 1 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) 2201/2003 AND IN THE MATTER OF J M (A MINOR)****BETWEEN****W M****APPLICANT****AND****K M****RESPONDENT****JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 2nd day of May 2012**

1. This judgment is given in an application brought on behalf of the respondent by notice of motion seeking an order dismissing and/or striking out the proceedings having regard to the order of the District Court in B ..., Poland, Third Family and Minors Department of 19th January, 2012.

2. In the substantive proceedings, the applicant is the father of the child named in the title who was born in Poland on 7th September, 2005. The mother is the respondent. The father and the mother were married to each other in Poland in 2002. Unhappy differences unfortunately arose and by order of 17th December, 2008, the marriage was dissolved by divorce by a Regional Court in Poland. In the same order, as translated, the Court granted custody of the child to both parents and ruled that the "place of residence of the child will be every place of residence of the mother".

3. Subsequently, the child primarily lived with the mother. The father had access. There are disputes as to what precisely occurred between 2008 and the mother taking the child with her to Ireland, allegedly without the consent or knowledge of the father, in October 2011. Those disputes are not relevant to the issues to be determined on this application. It is not in dispute that the order of the Regional Court in relation both to custody and the place of residence of the child remained in being and applicable until October 2011. In 2009 the father made an application to change the place of residence of the child but then withdrew it.

4. On 17th February, 2010, a district court in Poland made an order granting the father the right to take the child to live with him for two weekends per month and certain weeks during the holidays. Further, the mother signed a document in June 2011, stating (as translated) that, at the time of going abroad for work purposes during the period from June to September, 2011, "total parental care during my stay outside the country will hold the father ...". This appears to have been intended to transfer total parental care for the child to the father for the period from June to September, 2011. There is a dispute as to whether the child lived with the father or maternal grandmother in the mother's absence.

5. The mother came to Ireland to work between June and September, 2011. She returned to Poland and subsequently left Poland in October, 2011 with the child and took her to Ireland.

6. The father maintains that the child was taken to Ireland without his knowledge or consent and, as such, the removal was in breach of his rights of custody. The mother maintains that the father was aware that the child was travelling with her to live in Ireland. Separately from this contention, the mother also maintains that by reason of the Regional Court order at the time of the divorce providing that the child was to reside with the mother, that she was entitled to bring the child to Ireland without obtaining the consent of the father.

7. On 17th January, 2012, by the issue of a special summons, the father's proceedings were commenced in this jurisdiction. He had signed an authorisation pursuant to Article 28 of the Hague Convention in favour of the Central Authority of Ireland or their designated representative on 7th November, 2011.

8. The father had also made an application on 2nd November, 2011, to the District Court in Poland seeking a change in the child's place of residence from that of the mother to that of the father. The mother states she was not aware of the Polish proceedings. The mother deposes that the documents were served on her brother who did not make her aware of the proceedings. The Polish District Court dismissed the application of the father in a decision of 19th January, 2012. The "justification" of the Polish Court for its decision has been translated and the present application of the mother is based upon that decision.

9. Counsel on behalf of the mother submits that it is clear from the justification that the Polish Court was aware that the child is now living in Ireland and did not require the child to return to Poland and hence these proceedings must fail and should therefore be dismissed.

10. The father has lodged an appeal against the District Court decision of 19th January, 2012. Counsel on his behalf submits that the decision of the Polish District Court of 19th January, 2012, is not determinative of these proceedings.

Conclusion

11. I have concluded that, independently of the fact that the Polish Court decision is under appeal, this Court should not now dismiss

or strike out these proceedings by reason of the decision of the Polish District Court of 19th January, 2012. The decision may well be relevant to take into account in the ultimate determination of these proceedings, but it does not appear to permit or require the Court to now dismiss the proceedings without determining the father's application for the following reasons.

12. The essential elements of the father's claim in the proceedings are :

- (i) the child was habitually resident in Poland until October, 2011; and
- (ii) the father held rights of custody in relation to the child in October, 2011 which were being exercised; and
- (iii) the child was removed from Poland by the mother in October, 2011 without his consent and, as such, in breach of his rights of custody and hence the removal was a wrongful removal within the meaning of Article 3 of the Convention; and
- (iv) the Irish courts are bound pursuant to Article 12 of the Convention to make an order for the return of the child to the jurisdiction of the courts of Poland.

13. The mother in the proceedings does not dispute that the child was habitually resident in Poland until October, 2011, or that the father had rights of custody which were being exercised at that date. She does dispute that the father's consent was required to permit her to bring the child to live with her in Ireland in October, 2011. On that basis, she disputes that the removal of the child from Poland to Ireland was wrongful within the meaning of the Convention and, accordingly, there is no basis for the making of an order pursuant to Article 12.

14. It is well established that the Irish Court must decide whether or not there has been a wrongful removal of the child within the meaning of Article 3 of the Convention in accordance with the Irish law applicable to the Convention as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act, 1991. See *H. I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110. This requires the Irish Court to determine whether the removal was in breach of the rights held by the father under the law of Poland in October, 2011. At present in the Irish proceedings, there is no appropriate evidence of Polish law in relation to the central question as to whether, having regard to the Polish Regional Court order of 2008 granting custody of the child to both parents, and providing that the place of residence of the child be that of her mother, the consent of the father was required to permit the mother to take the child with her to live in Ireland.

15. The father and the mother, in their affidavits, have each made contrary assertions. Neither are lawyers. The father, at para. 6 of his affidavit has stated:

"The Supreme Court of Poland has found where it is proposed to remove a child from Poland for more than two months, the person leaving with the child or applying for a Passport for the minor must have the consent of the other parent with parental authority, such consent must be certified by a notary public, and in the event such statement cannot be obtained, the consent of the Court must be obtained prior to departure."

The mother, at para. 20 of her affidavit, states that:

"It was at all times my belief that I was entitled, due to the residence order in my favour in the context of our divorce, to remove J... from Poland as I did in October 2011 ..."

16. It is not appropriate for the Irish Court to determine the issue as to whether or not the removal of the child by the mother in October, 2011 was or was not in breach of any right held by the father under Polish law at that date on the basis of the above evidence. The Court will require evidence from an appropriately qualified independent Polish lawyer.

17. Unless the father withdraws his application for the return order pursuant to Article 12 of The Hague Convention, then the Irish Court is obliged to determine that application in these proceedings. For the reasons already set out, the father's entitlement to an order for return depends in the first instance on the resolution by the Irish Court of the disputed question as to whether or not there was a wrongful removal of the child by the mother from Poland to Ireland in October, 2011 within the meaning of Article 3 of the Convention which in turn depends on whether the removal was in breach of the then rights of the father under Polish law.

18. I have concluded that such disputed issue was not determined by the Polish District Court in its decision of 19th January, 2011. The Polish District Court did not address the issue in its decision as to whether the removal by the mother of the child from Poland to Ireland was in breach of any right then held by the father under Polish law. Rather, as appears from the justification of its decision, the father's application to change the place of residence of the child from that of the mother to that of the father was determined by reference to the best interests of the child. In its justification (as translated) the Court having referred to certain case law stated:

"The supreme interest of the child as a primary criterion for any decisions regarding the child has been indicated as the only prerequisite to alter the decision. What results from the above is also that if the child's interest requires that, the Court is obliged to change the minor child's residence place

...

In this case [the father] was expected to present evidence supporting the circumstances which would justify a change of minor J ...'s residence place. Yet, the applicant failed to present any evidence confirming the circumstances in question.

...

The fact that [the mother] changes her residence place or work has no influence whatsoever on the decision to take in this case. As long as there is no jeopardy to the child's interests or her safety, life and health as well as her correct development, these circumstances will not be taken into account when determining the child's whereabouts. Especially that nowadays a change of residence or workplace is a common phenomenon and should not be considered as negative. This means only that people take attempts to shape their life adapting flexibly to the times and demands.

[The father] should prove that minor J ...'s interest is threatened in some way. As it has been determined, J . . . attends the kindergarten, takes active part in school plays which means she found her place among her peers. Besides, in Ireland there is also maternal grandmother of the girls. Thus, she is not entirely deprived of contact with her family.

It is obvious that minor J ... misses her father and longs for contact with him. No doubt, the applicant stayed in a very close relationship with the daughter and was very attached to her emotionally. However, this is not a prerequisite to alter the child's residence place.

The residence place had been determined as that of her mother's. And it must be stressed that this happened after the bilateral agreement. The applicant had never questioned correctness of the care provided by [the mother] to the minor daughter and he withdrew the application for a change of residence place presented in 2009.

This mode of proceedings is not the most adequate to regulate the applicant's situation which is, without any doubt, complicated and unfavourable. However, it is important to stress that the Court analyses the situation from the point of view of the minor child, i.e. whether in this particular situation her interest requires any change of the Court Decision. The analysis of the case does not lead to a conclusion that minor J...'s interest is undermined or violated and, at the same time, no circumstances are present justifying a change of her residence place.

As the application has not been proved grounded and the evidence has not been presented, the Court has dismissed the application in its entirety."

19. It does not appear to me that the Polish District Court in its above decision has addressed the question as to whether or not the removal by the mother was in breach of rights of custody then held by the father under Polish law. Rather, the Polish District Court determined that the father had not adduced evidence before it that the best interests of the child required a change in her place of residence from that of the mother to that of the father.

20. Insofar as the affidavit sworn by the mother on 5th March, 2012, herein indicates an intention to attempt to make out one of the defences under Article 13 of the Hague Convention, the decision of the Polish District Court is not determinative of any such defence.

21. For completeness I wish to add that I have considered Article 10 of Council Regulation (EC) 2201/2003. Even if the decision of the Polish District Court of 19th January, 2012, is "a judgment on custody that does not entail the return of the child" within the meaning of Article 10(b)(iv), it does not result in the courts of Poland losing their jurisdiction over the child as the child has not yet resided in Ireland for a period of one year as required by Article 10(b). Counsel for the mother, correctly in my view, did not seek to rely on Article 10 in this application.

22. Accordingly, I refuse the respondent's application for a dismissal or strike out of the proceedings at this stage. As already stated, this decision does not preclude the respondent relying on the decision of the Polish District Court at a full hearing of these proceedings. However the applicant, for the reasons stated, remains entitled to have the Irish Courts determine his application for an order for the return of the child to Poland pursuant to Article 12 of the Convention.

23. I will hear the parties as to the further directions to be given for the purposes of determining the proceedings as expeditiously as possible.