

THE HIGH COURT

[2004 No. 14 HLC]

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991, ARTICLE 15, AND
IN THE MATTER OF THE MINOR, A.O.,
BORN ON THE 11th DAY OF SEPTEMBER 2001**

BETWEEN**A.O.****PLAINTIFF****AND
M.O.****DEFENDANT****Judgment of Ms. Justice Finlay Geoghegan delivered on the 15th day of December 2004.****Application**

1. The plaintiff is the father of the child named in the title. The defendant is the mother. The plaintiff seeks a declaration that the removal of the child from the jurisdiction of the courts of Ireland was wrongful within the meaning of Article 3 of the Hague Convention.

2. By order of the High Court of the 26th May, 2004 the plaintiff was given liberty to commence the intended proceedings and serve them on the defendant personally at an address in Germany. The proceedings were not served personally. However the proceedings were served by post both on the defendant and her German lawyer. I am satisfied from communications made directly by the defendant with the principal registrar of the High Court and written communications from her German lawyers to the solicitors acting for the plaintiff herein that the defendant and her lawyer in Germany are aware of these proceedings and were aware of the relevant hearing dates. By a fax dated 27th September, 2004 the German lawyers for the defendant indicated that advice had been taken from a senior counsel in Ireland who indicated that they should inform the court of their client's position and also seek legal aid. At that point in time adjournments were granted to permit such an application to be made on behalf of the defendant. Notwithstanding the adjournments granted no appearance has been entered on behalf of the defendant in the proceedings.

3. As will become apparent from the facts recited below the reason for these proceedings is a declaration made by the defendant to the German Courts (in the course of an application under the Hague Convention made on behalf of the plaintiff herein) for the return of the child to Ireland to the effect that she and the plaintiff were never married and a consequential assertion that the plaintiff never had custody rights to the child within the meaning of Article 3 of the Hague Convention.

4. I determined that notwithstanding the declared intention of the defendant to apply for legal aid in this jurisdiction and in view of the times allowed and her failure to enter an appearance that it was now in the interest of justice that this application should be permitted to proceed. The plaintiff in his grounding affidavit properly informed the Court that the defendant is now asserting that she is not and has not been validly married to him. Accordingly this present position of the defendant is a matter which must be taken into account in hearing and determining the application.

Background facts to the application

5. The plaintiff is stated to be Nigerian and the defendant originally from Mauritius. The plaintiff and defendant appeared to have arrived in Ireland on the 18th June, 2001. On arrival or shortly thereafter they each made a claim for refugee status in this country. The child named in the title to these proceedings was born in a hospital in the midlands of Ireland on the 11th September, 2001. The plaintiff states that he and the defendant lived together with the child until early September, 2002 when the defendant left the flat in Dublin in which they were then living. It is stated that the defendant initially resided at a hostel in Dublin and then disappeared. It is stated that in December, 2002 she contacted the plaintiff by telephone and informed him that she was in Germany.

6. In January, 2003 the plaintiff requested the central authority in Ireland to initiate a request in Germany pursuant to the Hague Convention for the return of the child to Ireland.

7. The plaintiff has exhibited correspondence passing between the Central Authority in Ireland and the Central Authority in Germany and communications to him from the Central Authority in Ireland from which the following background to this application appears:

(1) The German Central Authority informed the Irish Central Authority that the defendant is registered in Germany under the last name "L.D.".

(2) The relevant Germany Court indicated that the defendant made a statement to it that the plaintiff and defendant were never married and a consequential assertion that the plaintiff never had rights of custody in relation to the child under Article 3 of the Hague Convention.

(3) The German Court required a copy of the marriage certificate of the plaintiff and the defendant.

(4) Following what I presume to have been an exchange indicating that such a certificate was not available the German Central Authority suggested that a declaration be sought under Article 15 of the Hague Convention to the effect that the removal of the child from Ireland was wrongful within the meaning of Article 3.

(5) The Irish Central Authority wrote to the plaintiff on the 6th May, 2003 informing him of this suggestion, setting out the terms of Article 15 and indicating that he would need to make an application to the High Court for such a declaration and suggesting that he contact his local legal aid board office.

Issues

8. Counsel for the plaintiff correctly identified that his entitlement to obtain a declaration that the removal of the child from Ireland was wrongful within the meaning of Article 3 of the Convention depends *inter alia* on his being able to establish that he had rights of custody in relation to the child which in turn is dependent on being able to satisfy this Court that as a matter of probability he was lawfully married to the plaintiff in the period prior to the removal of the child from Ireland. By reason of the denial made by the defendant to the German Courts it is the fact of the alleged marriage as distinct from the validity of same which is in issue. That is

the first issue which must be determined by the court.

Evidence of marriage

9. The principal evidence adduced on behalf of the plaintiff of the fact of the alleged marriage comprised affidavit evidence of the plaintiff and oral testimony and the production of documents by the Patient Services Manager of the hospital in which the child was born and an Official of the Department of Justice in relation to the records held concerning the application for refugee status by the plaintiff and the defendant.

10. The plaintiff in his first affidavit sworn on the 15th June, 2004 states at para. 3 thereof:-

"I say that I married my wife, M.S.O. (also known as M.S.S.L.) on or about the 11th day of October at Abba in Nigeria."

11. Then at para. 13

"(13) I am advised and believe that the defendant is now asserting that I am not and have not been validly married to her. I say and believe that she is aware that I am in difficulty insofar as it is not possible for me to procure documentation from Nigeria having regard to the circumstances under which we left that jurisdiction. I say and believe that I am the lawful husband of the defendant herein. We were lawfully married in Nigeria in accordance with Nigerian law. The defendant at all material times has acknowledged this and did so in this jurisdiction including in respect of a declaration as a refugee in accordance with s. 17 of the Refugee Act, 1996."

12. In a supplemental affidavit sworn on the 29th October, 2004 the plaintiff stated at para. 2 thereof:

"I say and believe that I was married in accordance with the civil laws of the State of Nigeria to the defendant herein in the civil registry office in the town Abba in Nigeria. Despite my best efforts I have been unable to procure a copy of my marriage certificate."

13. In that affidavit he also refers again to documentation in this jurisdiction in which the defendant represented that she was married to the plaintiff. Certain of the documentation was exhibited by the plaintiff. It is more convenient to refer to it in the context of the evidence given by the witnesses.

14. The Patient Services Manager of the hospital in question brought with him what he believed to be the defendant's medical file relating to the birth of the child on the 11th September, 2001. He personally did not know the defendant and was not present when the various documents referred to and produced by him evidence were completed. However he believed from the general systems of the hospital that the documents accurately recorded information given by the defendant to employees of the hospital and identified a signature on more than one document which he believed to be similar and as a matter of probability to be that of the defendant. These documents record that the defendant was registered in the hospital under the name of "M.O."; that her husband was recorded as A.O. and that each then had the same address at a town in the midlands. Further, a document believed to have been signed by the plaintiff which was completed for the purposes of *inter alia* the registration of the birth of the child records the mother's name as "M.S.O." the date and year of her marriage as being "1 (or 7).10.2000 and the father of the child as being A.E.O.

15. An official of the Department of Justice, Equality and Law Reform produced files relating to the applications for refugee status in Ireland of the plaintiff and the defendant. Insofar as relevant to the issue of the alleged marriage it appears that each of the plaintiff and the defendant completed the standard questionnaire comprising 84 questions which must be completed following an application for refugee status. Questions 1 – 83 inclusive appear to have been completed on each form in similar handwriting. In response to the question as to the date and place of marriage on each form is completed "1 (or 7).10.2000 – ABA. Each identifies the other as the spouse. Each identifies their marital status as "married". The defendant's form identifies her family name as "O" and her other name as "M". She identifies the names of her parents as R.M. and R.M. She states that she was born at Port Louis and gives an address for her parents in Port Louis, Mauritius. The answers to question 84 relating to the reasons for which they were seeking asylum were in very similar terms. The defendant alleged that her problems in Nigeria started "when I got married to my husband who is the only son of his family which is a royal family in U."

16. The plaintiff also produced to the court the original birth certificate of the child which identifies as the father "A.E.G."; the mother as "M.S.G" and her former surname as "M". The birth was registered on the 2nd October, 2001 and each of the father and the mother appear to have signed as the informants.

Applicable law to the proof of marriage

17. Counsel for the plaintiff properly accepted that a marriage will normally be proved by the production of the certificate of registration of the marriage. In this instance no such certificate has been produced.

18. Likewise it was accepted that the plaintiff's alleged marriage to the defendant cannot be established by his own statements. See Phipson on *Evidence* (fifteenth edition) at p .860

19. Counsel for the plaintiff sought to rely upon the information furnished by the defendant in this jurisdiction to the Authorities in connection with the application for refugee status; to the Authorities in relation to the registration of the birth of the child and to the hospital authorities to the effect that she was married to the plaintiff. She sought to rely on same as admissible declarations by analogy with the law relating to declarations in applications for declarations of legitimacy.

20. Counsel for the plaintiff also seeks to rely upon a presumption of marriage which may arise from co-habitation and reputation. I have considered carefully her submissions in this connection and the authorities referred to. The presumption of marriage was usefully analysed by Michael Harrison Q.C. (sitting as a Deputy Judge of the High Court) in *Pazpena de Vire v. Pazpena de Vire* [2000] 1 FLR 460 in that judgment at para. 11 having referred to a number of English authorities between the end of the 18th century and 2001 he stated:

(11) The cases show that the presumption relates to two distinct aspects of marriage: first the fact of a marriage ceremony, then the secondary issue of compliance with formalities. In Rayden and Jackson's *Law and Practice in Divorce and Family Matter* (Butterworths, 17th edn, 1997), it is put as follows, (the same appears in Halsbury's Laws):

4.11 Presumption from cohabitation and reputation. Where a man and woman have cohabited for such a length of time, and in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, though there may be no positive evidence of any marriage having taken place,

particularly where the relevant facts have occurred outside the jurisdiction; and this presumption can be rebutted only by strong and weighty evidence to the contrary. . .

(12) There is no doubt from the cases that there is a strong presumption in favour of a valid marriage where parties have long cohabited as man and wife. . .

Conclusion

21. Firstly, the plaintiff has not satisfied the court of his inability to obtain a marriage certificate from Nigeria. He has not set out any steps taken to try and obtain same or why it could not be obtained through friends who presumably remain in Nigeria.

22. The Court could not be satisfied that as a matter of probability the marriage took place by reason of the declarations made by the defendant in this jurisdiction. The Court has been made aware that there is now a dispute between the parties as to the fact of the marriage. In such circumstances it appears that the Court should require stricter proof of marriage as has been required *inter alia* for bigamy and divorce. See Phipson *op cit* at p.920. Further if the Court were to conclude on the basis of the declarations made by the defendant in this Country that the plaintiff and defendant are married it would effectively be holding that the defendant is by reason of those declarations estopped from now denying that she was ever married to the plaintiff which would be contrary to the decision of the Supreme Court in *K. v. K.* [2004] 1 I.R. 224.

23. Accordingly the Court must consider whether in accordance with the principle referred to above the cohabitation, its length of time and circumstances are such that the plaintiff and the defendant should be considered to have acquired the reputation "of being man and wife" such that a lawful marriage between them will be presumed.

24. It is firstly necessary to observe that this principle derives from cases decided at a time when it was less common for unmarried persons to live together as "man and wife" than it is in the 21st Century. The principle must now be applied with considerable caution.

25. In relation to the length of time, there is no evidence as to how long before they arrived in Ireland the plaintiff and the defendant may have cohabited. There is evidence of cohabitation from the date they arrived in Ireland, 18th June, 2001 until September, 2002.

26. The circumstances of the cohabitation in Ireland appear to be that they arrived together made a claim for refugee status when the defendant was already approximately six months pregnant. They appear to have continued to cohabit together for approximately one year after the birth of the child. In the intervening period it appears from an exhibit to the plaintiffs affidavit that on or about the 5th October, 2001 they lodged with the office of the Refugee Applications Commissioner a withdrawal of their application for asylum by reason of a stated intention to apply to the Minister for Justice, Equality and Law Reform for residency based upon an Irish born child. It is a well established fact that in October, 2001 there existed an administrative scheme under which parents of Irish born children applied for residency by reason of the birth of an Irish child and that a significant number of such applications were granted.

27. I have concluded that having regard to the period of cohabitation of which there exists evidence in Ireland of approximately 15 months and the specific circumstances relating to the applications for declarations of refugee status, the withdrawal of same and the applications for residency based on the birth of an Irish born child that the facts are not such as to give rise to a presumption that the plaintiff and the defendant acquired a reputation "of being man and wife" such that a lawful marriage between them should be presumed.

28. Accordingly I have concluded that the plaintiff has failed to discharge the onus of satisfying the Court that he was married to the defendant at the date of the alleged abduction and it follows that this application must fail.