

**THE HIGH COURT****2009 36 HLC****IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991****AND IN THE MATTER OF THE HAGUE CONVENTION****AND IN THE MATTER OF COUNCIL REGULATION (E.C. 2201/2003****AND IN THE MATTER OF K B (A CHILD)****BETWEEN****E W****APPLICANT****AND****S A B****RESPONDENT****AND BY ORDER****THE HEALTH SERVICE EXECUTIVE****NOTICE PARTY****JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 28th day of April, 2010**

1. This is an application for the return of the child named in the title to Scotland, pursuant to the Hague Convention, on the Civil Aspects of Child Abduction ("the Hague Convention"), as implemented in this jurisdiction by the Child Abduction and Enforcement of Custody Orders Act 1991, and Council Regulation (E.C.) 2201/2003 ("the Regulation"). The proceedings were commenced by Special Summons issued on 6th November, 2009. The applicant is the paternal grandmother of the child. The respondent is the child's mother. The father has not taken part in the proceedings. The father and the mother are not married and were never married to each other.

2. The child was brought to Ireland in June 2009. The child is currently in the care of the Health Service Executive ("HSE"), pursuant to an interim care order made on 17th July, 2009, and continued in force from time to time. The child is living with a foster family in Ireland and attending primary school. The HSE was joined as a notice party to the proceeding and represented by counsel and solicitor at the hearing of the application.

3. By order of 9th December, 2009, it was ordered, pursuant to Article 11(2) of the Regulation that Elaine Fitzgerald, a clinical psychologist, interview the child in relation to the matters specified in the order and report to the Court thereon. This was for the purpose of giving the child an opportunity to express her views and be heard in the proceeding. Included amongst the matters in the order of 9th December was the question as to whether the child objects to being returned to Scotland. Ms. Fitzgerald provided a report to the Court on 20th January, 2010, setting out her interview with the child. I am satisfied, on reading that report that the child does not object to being returned to Scotland. Whilst the mother had raised the potential defence of the child's objections in her replying affidavit, counsel, on her behalf, at the hearing, sensibly did not pursue this as a ground of defence.

4. At the hearing, counsel for the grandmother sought the order for return of the child to the jurisdiction of the Courts of Scotland, on the basis that there was a wrongful removal of the child to Ireland in June 2009 on the following grounds. The child was habitually resident in Scotland until June 2009; that either the grandmother or a Scottish body or institution known as 'The Children's Hearing', or both, had rights of custody within the meaning of the Convention in relation to the child in June 2009; that they were exercising those rights of custody and that the removal of the child from Scotland to Ireland was in breach of those rights of custody.

5. It is not in dispute that the child was habitually resident in Scotland until June 2009. It is also not in dispute that neither the consent of the grandmother nor the Children's Hearing to the removal of the child was obtained. The mother resists the order for return, first, on the basis that neither the grandmother nor the Children's Hearing had rights of custody within the meaning of the Convention. She also disputes that the Children's Hearing is a body or institution which may have rights of custody as envisaged by the Convention, or that it was exercising rights of custody in relation to the child in June 2009. If it is established that the removal of the child to Ireland was a wrongful removal, within the meaning of the Convention, then the mother contends that the return of the child to Scotland would expose the child to grave risk or place the child in an intolerable situation, within the meaning of Article 13 of the Convention and that the Court should exercise its discretion against making an order for the return of the child.

6. There are two preliminary matters to which I need refer before considering the substantive issues.

7. The grandmother was granted leave in February 2010 to amend the special endorsement of claim on the Special Summons to claim that she is entitled "to rely on rights of custody that were vested in the Scottish Courts at the time of the wrongful removal". The application for leave to amend was granted on an affidavit of the solicitor for the grandmother. That affidavit makes clear that the amendment is based upon a "supervision requirement" of the Children's Hearing originally made in 2007, and continued in force. Counsel for the mother in the written legal submissions for this hearing contended that the Children's Hearing did not form part of the Courts system in Scotland, and even if it was established that the Children's Hearing had rights of custody, that it did not follow that the Courts of Scotland had rights of custody, as claimed in the amended Special Summons. At the hearing, I granted leave to the grandmother to amend further the special endorsement of claim in para. 5 to claim that she is entitled "to rely on rights of custody that were vested in the Scottish Courts and/or the body or institution known as the Children's Hearing at the time of the wrongful

removal”.

8. I made this order, pursuant to O. 28, r. 1 of the Rules of the Superior Courts which permits the Court to allow a party amend his endorsement where it is “necessary for the purpose of determining the real question in controversy between the parties”. I was, and am satisfied that at all material times since the application for the amendment in February 2010, the issue between the parties has been whether or not rights of custody were vested in the Children’s Hearing and not in any other court or body or institution in Scotland. There was no prejudice to the mother in permitting the amendment at the hearing as it was clear, at all material times, that this was one of the issues to be determined in the proceedings.

9. The second objection made by counsel on behalf of the mother was to the Court admitting into evidence the copies of purported decisions of the Children’s Hearing exhibited in the affidavits sworn on behalf of the grandmother. It was contended that these did not meet the criteria in s. 5(4) of the Act of 1991, for the purpose of being regarded as duly authenticated so as to benefit from the provisions of s. 5(1) of the Act of 1991. Section 5 of the Act of 1991, insofar as relevant, provides:

“(1) For the purposes of Article 14 of the Hague Convention a document, duly authenticated, which purports to be a copy of a decision or determination of a judicial or administrative authority of a Contracting State other than the State shall without further proof be deemed to be a true copy of the decision or determination, unless the contrary is shown.

. . .

(4) A document purporting to be a copy of a decision, determination or declaration of a judicial or administrative authority of a Contracting State shall, for the purposes of this Part, be regarded as being duly authenticated if it purports—

(a) to bear the seal of that authority, or

(b) to be certified by a person in his capacity as a judge or officer of that authority to be a true copy of a decision, determination or declaration of that authority.”

Article 14 of the Hague Convention provides:

“In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.”

10. In these proceedings, the copies of the relevant decisions of the Children’s Hearing had been exhibited in the grounding affidavit sworn by the solicitor for the grandmother. In the replying affidavit of the mother, no objection was taken to those documents being admitted into evidence, nor was it contended that they did not accurately record the decisions made by the Children’s Hearing. On the contrary, the mother deposed that she had been present at the hearings and referred expressly to certain of the decisions exhibited for the purpose of contending that they had an effect other than that being contended for by the grandmother.

11. On the facts of this application, I was satisfied that I should, admit the copies of the decisions exhibited as evidence of the decisions taken by the Children’s Hearing without requiring either that they be sealed or certified in accordance s. 5(4) of the Act of 1991. Section 5 appears to me to be an enabling section which permits proof of decisions or determinations of judicial or administrative authorities in a contracting State if they meet the criteria to be duly authenticated under section 5(4). However, it does not preclude the Court from admitting, as evidence of decisions taken, copies exhibited in affidavits which do not meet the relevant criteria where no objection is taken by the other party either to the existence of the alleged decisions or to the content of the documents as recording the decisions taken.

12. In reaching this decision on the facts herein, I would emphasize that it is preferable that the Central Authority require that copies of decisions of judicial and administrative authorities of other Contracting States be sealed or certified, as specified in s. 5(4) of the Act of 1991, in order that the Court may without further proof regard them as duly authenticated and, accordingly, deemed to be a true copy of the relevant decisions unless the contrary is shown.

### **Wrongful removal**

13. The onus is on the grandmother, as applicant, to establish that there was a wrongful removal of the child to Ireland in June 2009. Article 3 of the Convention provides:

“The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

14. Article 5 provides that for the purposes of the Convention ‘rights of custody’ “shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”.

15. Counsel for the mother disputed the grandmother’s right, in these proceedings, to rely upon an alleged breach of rights of custody of the Children’s Hearing. First, she contended that the grandmother in these proceedings could only rely on an alleged breach of rights of custody of the grandmother. This submission is not well founded. There is nothing in the Convention which requires the application for the order for return to be made by the person whose rights of custody are alleged to have been breached. The entitlement of a personal applicant to rely on rights of custody vested in a court of the State of habitual residence was expressly recognised by the Supreme Court in *H.I. v. M.G.* [2000] 1 I.R. 100, at p. 132, and has since been consistently applied by the High

Court.

16. Secondly, she disputes that the Children's Hearing is a body or institution of the type envisaged in Article 3 of the Convention and, thirdly, disputes that it had rights of custody in relation to the child within the meaning of Article 5, which it was exercising at the date of the alleged wrongful removal.

17. The proper approach of the Court to determining whether or not there was a wrongful removal from the State of habitual residence was recently considered by me in *Nottinghamshire County Council v. K.B.* [2010] IEHC 9, where I said:

"13. It is well established, in this jurisdiction and others, that it is for the requested Court, in this case the Irish High Court, to determine whether or not there was a wrongful removal from the State of habitual residence within the meaning of Article 3. Further, that such question potentially requires a determination, *inter alia*, of the following questions:

(i) What rights did the relevant person hold under the law of the State of habitual residence?

(ii) Are those rights, however described, 'rights of custody' within the meaning of Article 5 of the Convention?

14. Whilst each of the above questions are for determination by the requested Court, the first question is one which must be determined in accordance with the laws of the State of habitual residence; whereas the second question is determined in accordance with the Convention, as implemented into the law of the requested State *i.e.*, in this instance, Ireland. Further, the term 'rights of custody' within the meaning of Article 5 of the Convention must be given an autonomous meaning in accordance with the case law on the Convention."

18. The Supreme Court has upheld the decision made by me in the above case, but has not yet delivered its reasons for the decision.

19. In this application, there is an additional first question as to the nature of the institution known as the Children's Hearing in accordance with the laws of Scotland and whether that institution comes within the type of body or institution referred to in Article 3 of the Convention.

20. It appears that Article 3 is intended to refer to bodies or institutions of many differing types, including those which may not have separate legal personality. It is well established that courts come within the definition. The Perez-Vera explanatory report on the Convention, commenting on Article 3, at para. 80, states:

"... Article 3 envisages the possibility of custody rights being attributed to 'an institution or any other body', and is expressed in deliberately vague and wide terms. In fact, during the Fourteenth Session, the inclusion within the scope of the Convention of situations in which the child is entrusted to an institution was not challenged. Now, since there are bodies other than institutions which have children in their care, the term used was extended so as to apply equally to those bodies with legal personality and to those which, as an arm of the State, lack separate personality."

21. In these proceedings, an affidavit of laws was obtained on agreed questions from Ms. Rachel Iris Mary Shewan, a solicitor specialising in Family Law, in Scotland. She said she prepared the affidavit at the request of the Scottish Central Authority, Scottish Government. Whilst questions had been agreed between the parties in this jurisdiction, it appears from Ms. Shewan's affidavit that she received additional factual information from the Scottish Government not deposed to in the affidavits to which she refers in her affidavit. Insofar as I have had regard to her affidavit, I have not relied on matters of fact which she states she was informed by the Scottish Government.

22. One of the questions Ms. Shewan was asked to address was "what is the legal nature of the body or forum known as a 'Children's Hearing'?" Her response to that question is:

"The formation of the Children's Panel and Children's Hearings is provided for in Section 39, Chapter 2 of the Children (Scotland) Act 1995. This section provides that in every separate local government area, there shall be a Children's Panel, which is a panel of individuals recruited, appointed and trained in accordance with Schedule 1 of the Children (Scotland) Act 1995 and from whose numbers shall be constituted Children's Hearings to deal with the cases of individual children. Three Panel members must run the Children's Hearings, at least one of whom must be a woman and at least one of whom must be a man, and there is no requirement that any member be legally qualified. Children's Hearings are public authorities and are as such obliged by the Human Rights Act 1998 to act in a manner that does not infringe any of the rights protected by the European Convention on Human Rights. They also satisfy the Article 6 requirement of being independent tribunals."

23. In the course of the hearing before me, counsel opened to me the Children (Scotland) Act 1995. Article 14 of the Convention, as implemented by the Act of 1991, permits this Court to take direct judicial notice of the laws of Scotland. I have considered the Act and, in particular, the provisions to which Ms. Shewan refers. The Children's Hearing is also the subject of a decision of the First Division, Inner House, Court of Session in *S. v. The Principal Reporter and the Lord Advocate* [2001] Scot. C.S. 82. which appears to be authority for the view expressed by Ms. Shewan that the Children's Hearing is an independent Tribunal for the purposes of Article 6 of the European Convention on Human Rights. It does not appear to be part of the Court system, as such, in Scotland. There is a right of appeal from certain of its decisions to the Sheriff Court.

24. I have concluded, in accordance with the laws of Scotland, as explained by Ms. Shewan and supported by the provisions of the Children (Scotland) Act 1995, and the decision of the Inner House of the Court of Session in *S. v. The Principal Reporter*, that the independent tribunal known as "the Children's Hearing", (which under s.39(2) of the 1995 Act is the name given to the sittings of the Children's Panel), whilst not having legal personality is a body of the type envisaged by Article 3 of the Convention when given the broad meaning indicated at par.80 of the Perez-Vera report..

25. The next issue, therefore, is what rights the Children's Hearing had in relation to the child according to the laws of Scotland in June 2009.

26. Section 52 of the Children (Scotland) Act 1995, provides for the referral of children who meet certain criteria to the Children's Hearing. Where a child is referred, the Children's Hearing must consider whether compulsory measures of supervision are necessary in respect of the child, in accordance with s. 52 of the Act. Under s. 70 of the Act, where the Children's Hearing is satisfied that compulsory measures of supervision are necessary in respect of a child, they may make a requirement which is to be known as a

"supervision requirement". Section 70(3) provides:

"(3) A supervision requirement may require the child -

(a) to reside at any place or places specified in the requirement; and

(b) to comply with any condition contained in the requirement."

Section 70(4) permits the Children's Hearing to specify a place in England and Wales (in addition to Scotland). Ms. Shewan states such supervision requirements are enforceable.

27. The facts pertaining to the decisions made by the Children's Hearing in relation to the child the subject of this application are not in dispute. The first decision with a supervision requirement was made on 21st March, 2007. The child had prior to that been referred to the Children's Hearing. The decision of 21st March, 2007, did not include a specification of the place at which the child should live. She was then living with her mother, but the decision did specify a requirement that she was to have no contact with her father. The child subsequently lived with foster parents. It is unclear whether this was initially pursuant to a decision of the Children's Hearing, as the relevant decision has not been produced. However, there has been produced a decision of 30th April, 2008, which appears to have varied a requirement to reside with named persons (foster parents) to a requirement to reside with the paternal grandparents at their address. It also included a requirement that contact with the mother and father be supervised. A further decision was made on 19th February, 2009, pursuant to s. 73(9) of the 1995 Act, continuing the supervision requirement, with a condition that the child reside with the paternal grandmother at her specified address. It also included, as a varied condition, that the child have supervised contact with the mother and the father, once *per* week, and that the contact must be supervised by the local authority.

28. The reasons for the decision of the Children's Hearing of 19th February, 2009, include a statement that the panel had decided to continue the supervision requirement "with an early review of approximately eight weeks to allow [a named] social work department to implement supervision and provide an up to date report". That review does not appear to have taken place and the mother makes a complaint of this. Nevertheless, the supervision requirement continued by the decision of 19th February, 2009, was not limited in time, and in accordance with s. 73 of the 1995 Act, may remain in force for at least one year.

29. Accordingly, I have concluded that at the date of the removal of the child from Scotland in June 2009, on the evidence adduced she remained a child referred to the Children's Hearing who was the subject of an enforceable supervision requirement that she live with her paternal grandmother at her home. Further, in accordance with the powers conferred by the Children (Scotland) Act 1995, the Children's Hearing continued in accordance with the laws of Scotland to have the power to review, vary and continue its supervision requirement of the child, including in relation to the place at which she should live. Whilst no review took place within eight weeks, as envisaged, there is evidence of a report of a further Children's Hearing which took place on 1st June, 2009, attended by the child, her grandparents and parents and certain social workers, at which a decision was made to appoint a "safeguarder", pursuant to s. 41 of the Act. As the name suggests, this is a person to "safeguard the interests of the child in the proceedings". The report of the decision taken by the Children's Hearing specified certain factual matters relating to complaints being made by the parents and issues which had arisen in relation to the child's care which were to be looked at by the safeguarder. The Children's Hearing was, in June 2009, continuing to exercise its powers in relation to the child which had been referred to it.

30. I have concluded that the above rights which the Children's Hearing had under the laws of Scotland in relation to the child are rights of custody within the meaning of Articles 3 and 5 of the Convention, which they continued to exercise in June, 2009. Whilst similar to a court, the Children's Hearing did not have the day-to-day physical care of the child, nevertheless, it did have the power to determine where the child should live, and also the power to require the child to comply with any condition contained in the supervision requirement. This appears to me to attribute to the Children's Hearing the type of powers of care and control of the child which constitute rights of custody within the autonomous meaning of the Convention. The removal of the child from Scotland without obtaining the agreement of the Children's Hearing and in breach of its supervision requirement that the child reside with the grandmother at her home in Scotland, was in breach of the rights of custody of the Children's Hearing and a wrongful removal.

31. Having regard to this conclusion, it is not necessary for me to determine whether the grandmother also held rights of custody within the meaning of the Convention in June, 2009.

32. It follows from the conclusion that the removal of the child to Ireland in June, 2009 was a wrongful removal within the meaning of Article 3 of the Convention that this Court is obliged, pursuant to Article 12 of the Convention, to make an order for the return of the child, unless the mother establishes, by reason of one of the matters referred to in Article 13, that the Court has a discretion not to order the return of the child. The mother contends that there is a grave risk that the return of the child would expose her to physical or psychological harm or otherwise place the child in an intolerable situation.

33. The law relating to the defence of grave risk in this jurisdiction is well established. In *A.S. v. P.S.* [1998] 2 I.R. 244, Denham J., in the Supreme Court, stated that the test of a grave risk is an extremely high one, where she said, at p. 259:

"The law on 'grave risk' is based on art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.

This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.

The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

34. The mother, in her affidavits to this Court, has referred to allegations which the child is alleged to have made against her grandmother in relation to both physical and emotional abuse. She also asserts that these allegations of the child have not been believed by the social workers in Scotland and were not properly investigated. She also expresses dissatisfaction with the system before the Children's Hearing and a concern that they will not protect the child's interests. The facts are disputed by and on behalf of the grandmother.

35. This Court cannot resolve disputed questions of fact as to what the child may or may not have reported and what may or may not have occurred. The decisions of the Children's Hearing and reasons for their decisions, already referred to, make clear that the

mother has expressed dissatisfaction to the Children's Hearing. Further, in its report from the hearing of 1st June, 2009, the Children's Hearing recognised that there was some failure of the responsible social work department to attend previous hearings. The appointment of a safeguarder appears to have been made by reason at least, in part, of the concerns and dissatisfaction expressed.

36. The mother has not established that, if this Court were to make an order for the return of the child to Scotland, where she may continue to be subject to supervision requirements of the Children's Hearing, this would expose the child to grave risk or an intolerable situation. The system of the Children's Hearing is established by the Act of 1995 which sets up a statutory based system intended to protect and safeguard the interests of children who are in need of support and assistance. As already stated, the Children's Hearing may make compulsory supervision requirements. The Act permits a child (presumably with the assistance of a safeguarder) or any relevant person, which includes a parent, pursuant to s. 73(6), to require a review of a supervision requirement at certain times. The Act also provides for a right of appeal to the Sheriff Court in certain circumstances and for further child protection orders. Section 16 of the Act provides that where under part II of the Act, a Children's Hearing decide, or a court determines, any matter with respect to a child the welfare of that child throughout his childhood shall be their or its paramount consideration. The decisions of the Children's Hearing to which I have referred are taken under part II of the Act. The return of the child to Scotland where she will be subject to decisions taken by an independent tribunal and where her welfare throughout her childhood will be their paramount consideration cannot be considered as exposing her to grave risk of physical or psychological harm or otherwise placing her in an intolerable situation. Accordingly, I find that the mother has not established the defence based on Article 13 of the Convention.

37. There must be an order for the return of the child to Scotland. The child has now been in this jurisdiction since June, 2009. She is attending school and living with a foster family. The end of the school year is approaching. The child, in the interview with Ms. Fitzgerald, conducted as part of these proceedings, has expressed certain wishes in relation to her return to Scotland. I propose making an order that Ms. Fitzgerald's report be released to the applicant and the relevant Scottish social work departments and the Children's Hearing and propose hearing counsel as to what steps should be taken to ensure that the return of the child to Scotland takes place in a manner most suitable for the child.