

THE HIGH COURT**FAMILY LAW****[2012 6 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 M.P. (A CHILD) AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED****BETWEEN****R.P.****APPLICANT****AND****A.S.****RESPONDENT****JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 29th day of June 2012**

1. The applicant is the father of the child named in the title to the proceedings who was born on 16th November, 2009, in the Slovak Republic. The respondent is the mother of the child. The father and the mother have not been married to each other. They lived together from early 2009 to the time of the birth of the child and continued to do so until 6th January, 2011.

2. The father, mother and the child were all habitually resident in the Slovak Republic in January, 2011.

3. On 7th January, 2011, the mother informed the father that she had left the Slovak Republic and come to Ireland. Since that date, she has resided with her parents in a town in the south of Ireland.

4. The mother returned with the child to the Slovak Republic on 8th May, 2011, and remained there until 22nd May, 2011, when she left again with the child for Ireland and has continued to live with the child in Ireland. The father had access to the child in May 2011 in the Slovak Republic on a number of occasions.

5. In March 2011, the father filed a petition in a District Court in the Slovak Republic for alternate care of the child with the mother. Differing days on alternate weeks were sought. The first hearing was on 7th June, 2011. The mother did not attend on that date and it was adjourned until 13th September, 2011.

6. On 13th September, 2011, the mother attended with a Slovak lawyer. The father did not attend but was represented by a Slovak lawyer. The District Court Order of 13th September, 2011, in translation, having referred to the petition of the father and alternate care sought, records:

"At the proceedings held on 13.09.2011, father of the minor withdrew his petition through his representative.

Pursuant to Section 96, paragraph 1 of Civil Procedure, the plaintiff can withdraw his petition to start the proceedings during the proceedings, and partly or as a whole. If the petition is withdrawn as a whole, the Court shall discontinue the proceedings. If the petition is withdrawn partly, the Court shall discontinue the proceedings in the relevant part.

With respect to the fact that father of the minor withdrew the petition to entrust the minor to alternate care as a whole, the Court decided to discontinue the proceedings as a whole."

7. In the meantime, in July 2011, the father, through the Slovak Central Authority, sought the return of the child to the Slovak Republic. This was transmitted to the Irish Central Authority, and by them, to a Law Centre on 2nd August, 2011.

8. These proceedings seeking the return of the child pursuant to the Hague Convention and Council Regulation (EC) 2201/2003, were only commenced on 27th February, 2012. The cause of the delay between August 2011 and the end of February 2012 is not fully explained in the affidavits sworn by or on behalf of the father. In the grounding affidavit sworn on 27th February, 2012, the solicitor from the Law Centre at para. 15 states:

"I say that the Central Authority has confirmed on or about 9th February, 2012, the current address of the Respondent ..."

The father, in the affidavit sworn in response to the affidavit of the mother, states at para. 12:

"I say that I was unaware of where the Respondent was residing for a significant period of time. I say that I commenced this procedure following the Respondent's removal of M. in or about June 2011. I further say and believe that papers were furnished to the Law Centre in August 2011 for the purposes of commencement of proceedings. I say however that the whereabouts of the Respondent was not verified until February 2012 and thereafter the within proceedings were issued."

9. The undisputed facts indicate the mother responded to Slovak proceedings in the summer of 2011 and attended in Court in the Slovak Republic on 13th September, with a lawyer, when a lawyer for the father was present. It is not clear what steps were taken between August 2011 and February 2012 to ascertain the address of the mother in Ireland if it was not known to the father.

The Law

10. This is an application brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and as it is an application for the return of the child to an EU Member State, Article 11 of Council Regulation (EC) 2201/2003 also applies. The Court, in deciding the application, is exercising a limited jurisdiction. The father, as applicant, must establish that there was a wrongful removal of the child to Ireland within the meaning of Article 3 of the Convention. To do this, he requires to establish that at the date of the alleged wrongful removal:

- (i) The child was habitually resident in the Slovak Republic;
- (ii) The alleged wrongful removal was in breach of rights of custody held by him or another person including the Slovak courts in accordance with the law of the Slovak Republic; and
- (iii) The alleged custody rights were actually exercised or would have been exercised but for the removal.

11. Where wrongful removal is established, then this Court is bound pursuant to Article 12 of the Convention to order the return of the child forthwith where the proceedings have been commenced within a period of one year from the date of the alleged wrongful removal. Where the proceedings are commenced later than one year from that date, then the Court is obliged to make a return order "unless it is demonstrated that the child is now settled in its new environment". Where that is established, the Court may have a discretion whether or not to make an order for return, having regard, in particular, to Article 18 of the Convention.

12. Article 13, by way of exception from the obligation imposed on the Court by Article 12, provides that the Court is not bound to order the return of the child in certain circumstances. The one relevant to the facts of this application is pursuant to Article 13(a) where the person who opposes the return of the child establishes that:

- (a) The person ... having the care of the person of the child ... subsequently acquiesced in the removal or retention."

Issues

13. On the facts herein, it is common case that the child was habitually resident in the Slovak Republic in January 2011. Further, it is agreed that both the father and the mother held rights of custody within the meaning of the Convention in accordance with the Slovak Family Code in January 2011, and that the removal without his consent was in breach of the father's rights. Finally, I am satisfied on the facts that the father was exercising his custody rights at that time. The parties had been living together with the child from her birth until that time.

14. Accordingly, the father has established that there was a wrongful removal of the child within the meaning of Article 3 of the Convention in January 2011. The proceedings were not, however, commenced in this jurisdiction within one year of that date.

15. The mother returned with the child to the Slovak Republic in May 2011. She then again left the Slovak Republic with the child and took the child to Ireland on 22nd May, 2011. In my judgment, the child remained habitually resident in the Slovak Republic in May 2011. One parent, by a wrongful removal, normally cannot change the habitual residence of a child. See *A.K. v. A.J.* [2012] IEHC 234. The father continued to hold rights of custody; he had exercised them by having access to the child in the immediate preceding period. The removal, without his agreement, was again in breach of his rights of custody, and accordingly, a wrongful removal. On the facts herein, I am satisfied that there was a separate and distinct wrongful removal of the child by the mother from the Slovak Republic to Ireland on 22nd May, 2011. Accordingly, it appears to follow that, as these proceedings were commenced within one year of that date, this Court is bound to make an order for the return of the child pursuant to Article 12 unless one of the exceptional circumstances set out in Article 13 applies.

16. By reason of this conclusion, it is unnecessary to consider whether or not the mother has established that the child is now settled in Ireland. This conclusion is not to ignore the fact that the child has been living with the mother in Ireland since January 2011, apart from one (or possibly two) short visits to the Slovak Republic. Those are facts which may be taken into account by the Court in the exercise of its discretion, if it has one, pursuant to Article 13.

17. The second issue is whether on the facts herein, the mother has established that the father subsequently acquiesced in the removal of the child from the Slovak Republic to Ireland. It is contended that the father, by withdrawing the proceedings seeking alternate care before the Slovak District Court in September 2011, acquiesced in the child living with the mother in Ireland, and hence, in the retention of the child in Ireland.

18. The Supreme Court, in a number of cases, including *A.S. v. P.S.* [1998] 2 I.R. 244, and *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416, cite with approval and apply the meaning of acquiescence as expressed by Waite J. in *W. v. W. (Child Abduction: Acquiescence)* [1993] 2 FLR 211, at p. 217:

"The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return."

As mandated by the Supreme Court, the High Court has applied this meaning in a number of decisions including *F.L. v. C.L. (Child Abduction)* [2007] 2 I.R. 630, to which I was referred by the parties.

19. In September 2011, when the father, through his Slovak lawyer, withdrew his proceedings seeking alternate care of the child, he was aware that the child continued to live with the mother in Ireland. He was aware that the mother had taken the child back to Ireland in May 2011. He was also aware of his right to object to the continued retention of the child in Ireland and to seek her return to the Slovak Republic under the Hague Convention as he had given instructions to the Polish Central Authority to commence an application for the return of the child to the Slovak Republic.

20. The grounding affidavit sworn by the solicitor for the applicant, whilst it refers to the adjournment of the Slovak District Court proceedings to 13th September, 2011, does not state what took place on that date. It would appear that the solicitor did not have any instructions from the applicant as to what occurred on 13th September 2011 prior to swearing the affidavit in February 2012. The

withdrawal of the proceedings is referred to by the mother in her replying affidavit and reliance is placed on it and what is stated to be abandonment by the father of his claim in respect of custody to the child as justifying the lawfulness of the retention of the child in Ireland. In response to that affidavit, the father, in his affidavit of April 2011, seeks to explain the withdrawal of the petition in September 2011 upon the basis that he had instructed his attorney to do so as "there was a real possibility of an agreement between the parties regarding the visitation and care of the minor". He also states that "a week period was agreed, within which both parties should reach agreement on the visitation and care of the minor" and suggests that the withdrawal was "a prize concession" for this purpose. The father accepts he was not present at the hearing before the District Court in the Slovak Republic on 13th September, 2011.

21. The mother, in her subsequent affidavit, disputes that any mention was made by the father's lawyer at the hearing on 13th September, 2011, that any agreement was pending. She states that her lawyer had sent a draft agreement in relation to custody issues to the father's representative, but that there has never been any response to this, either before or after the hearing in September 2011. She states there was an unconditional withdrawal of the petition at the hearing on 13th September, 2011, and refers to the terms of the District Court Order in support of that statement. The mother, in her affidavit, and counsel on her behalf, makes the submission that if there were any potential agreement pending, that the father's lawyer would have adjourned the hearing and not withdrawn the petition. It is agreed that, in accordance with the Slovak Family Code, if parents cannot agree on care or custody arrangements in relation to the child, the Court will determine this. The mother contends that this could have occurred if there were any continuing dispute when the matter was before the Slovak District Court in September 2011, if the father had not withdrawn his petition.

22. I cannot accept the explanation now offered by the father as to why he instructed his lawyers to withdraw the petition in September 2011, as such explanation is inconsistent with the objective Court record. I also do not accept his averment as to what he states was said by his lawyer at the Court hearing in relation to there being a real possibility of an agreement between the parties relating to the child. The father was not present at the hearing. There is no evidence from his Slovak lawyer and such averment is inconsistent with the objective Court record. It is disputed by the mother who was present. I reach these conclusions from the affidavits, in the absence of cross-examination, as it is necessary for me to determine this application in a summary manner and do so by reference to the objective contemporaneous order of the Court and not by reference to differing averments.

23. I have concluded that the father's action in withdrawing the petition before the Slovak Court seeking alternate care of the child at a time when he was aware that the child continued to live with the mother in Ireland, is objective evidence of acceptance by him at that time that the child should continue living with her mother in Ireland and is inconsistent with a subsequent pursuit of an application for a summary order for the return of the child to the Slovak Republic. The form of alternate care sought by the father in his petition inevitably required the child to be living in the Slovak Republic. Viewed objectively, the abandonment of that claim indicates the acceptance of the then living arrangements of the child in Ireland which would not permit of such alternate care.

24. Accordingly, I am satisfied on the facts herein that the mother has established that the father, in September 2011, acquiesced in the retention of the child in Ireland. This conclusion gives the Court discretion as to whether or not now to make an Order for the return of the child to the Slovak Republic.

25. In *A.U. v. T.N.U.* [2011] IESC 39, the Supreme Court per Denham C.J., considered, in the context of the establishment of child's objections pursuant to Article 13(b), the general principles applicable to the exercise of the Court's discretion where one of the defences under Article 13 is established. The general principles appear to be of equal application where the defence is that of acquiescence.

26. In *A.U. v. T.N.U.*, Denham C.J., agreed with the analysis of Baroness Hale in *Re M (Abduction: Zimbabwe)* [2008] 1 A.C. 1288, in relation to child's objections and then set out the general approach to the exercise of discretion under Article 13 at paras. 35 and 36 in the following terms:

"35. The Hague Convention provides that in normal circumstances children should be returned after a wrongful removal to the country of their habitual residence. This fundamental principle is in the best interests of the children and is applied generally.

36. It is also the case that in interpreting and applying Article 13 of the Convention that courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance. However, as already pointed out, the Court has discretion pursuant to Article 13(b) in having regard to objections of a child to being returned to his or her country of habitual residence, as outlined above. The circumstances in which children would not be returned are exceptional. As Article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed out in the case of *R.M (Abduction: Zimbabwe)* 1 AC 1288 the extent to which the child's objections 'coincide or are at odds with other considerations' which are relevant to his or her welfare are also relevant."

27. Finally, and of direct relevance to the facts herein, the Chief Justice drew attention at para. 37 of that judgment to the impact of time on the exercise by the Court of its discretion where she stated:

"The balance between the policy of summary return and the operation of the exception may alter with time. In this case the children have been in Ireland for a considerable time. I would endorse the acknowledgment of Baroness Hale in *Re M* [2008] 1 AC 1288 where she states at paragraph 43:

'But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be'. A court should at all times seek to expedite cases arising under the Hague Convention, but circumstances such as have arisen in this case are the exception."

28. Whilst, as already stated, the above statements were made in the context of a case where the relevant defence under Article 13 was the children's objections to return, nevertheless, it appears to me that they apply with equal force to the discretion which I now have to exercise. Applying the above principles, I have concluded that I should not now make an Order for the return of the child to the Slovak Republic. The factors which I have taken into account in reaching this conclusion include the following.

29. The starting point is that the Hague Convention favours the prompt return of children wrongfully removed from or retained out of their country of habitual residence. The underlying principle is that the child's best interests are served by the courts of its habitual residence making decisions in relation to its future care, where in dispute, as they are best placed to do so. The policy of the Convention also includes a deterrent element. However the Convention also expressly provides that a court is not bound to return the child in certain exceptional circumstances one of which is acquiescence. Acquiescence will often, as in this case, result in a significant lapse of time between the wrongful removal and the hearing of the application for return.

30. On the facts herein, a prompt return of the child to the Slovak Republic following the initial wrongful removal in January 2011, or even the second wrongful removal in May 2011, is not now feasible. The lapse of time between those dates and the hearing of the present proceedings in June 2012, having regard, in particular, to the age of the child, is a significant factor. The child was born in November 2009, and consequently, has now lived more than half her life in Ireland. It does not appear to me that the Court should, in exercising the summary jurisdiction under the Hague Convention, make an Order for the return of the child with the consequent disruption and change to the child's living arrangements which (save for certain holidays in the Slovak Republic) have persisted since January 2011. Having regard to the lapse of time, any change to those arrangements should only now be made after a full welfare consideration of what is in the best interests of the child in a full custody hearing. Article 19 of the Hague Convention expressly provides that the decision of this Court on the application for return "shall not be taken to be a determination on the merits of any custody issue". That remains a matter for decision by the courts of the Slovak Republic if there is a continuing dispute between the father and the mother.

31. Article 11(6) to (8) of Regulation 2201/2003 expressly permits the Slovak courts to now examine and decide any custody dispute if either party so requires. It provides:

"6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

32. In accordance with the foregoing provisions, this Court is now obliged to transmit to the relevant Slovak court or the Central Authority for the Slovak Republic the documents referred to in Article 11(6). The courts of the Slovak Republic retain jurisdiction to make decisions in relation to the care and custody of the child and can do so taking into account the full welfare considerations as to what is in the best interests of the child. The mother, in her last affidavit, has indicated that she has commenced maintenance proceedings before a District Court in the Slovak Republic, and she understands that such Court is also empowered at the same time to determine issues on custody and parental rights. Once the details of that Court are made available, this Court will arrange for the relevant documents to be transmitted to this Court. Any judgment of the Slovak District Court which requires the return of the child to the Slovak Republic will be enforceable in Ireland in accordance with section 4 of Chapter III of the Regulation in accordance with Article 11(8).

Relief

(i) An order refusing the father's application to order the return of the child named in the title to the jurisdiction of the courts of the Slovak Republic pursuant to Article 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction.

(ii) An order pursuant to Article 11(6) of EC Regulation 2201/2003 that a copy of this judgment, the Order of the Court to be made pursuant thereto, the transcript of the hearing before the Court and the pleadings, affidavits of the parties and exhibits thereto be transmitted to the Central Authority for the Slovak Republic and the District Court before which the mother has commenced proceedings in the Slovak Republic.

(iii) An Order permitting the parties to disclose to their Slovak lawyers the above documents for the purpose of use in any proceedings before the Slovak courts in relation to the child.