Neutral Citation Number: [2010] IEHC 424

THE HIGH COURT

FAMILY LAW

2010 5 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 (E.C.) 2201/2003 AND IN THE MATTER OF K. G., A MINOR

BETWEEN

R. K.

APPLICANT

AND

I. G.

RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin delivered the 13th day of July, 2010.

1. Having heard this case on 10th July, I delivered an *ex tempore* judgment granting the applicant the relief sought. I indicated to counsel for the respondent that should she be so instructed I would formally deliver my reasons. Counsel has received those instructions and, accordingly, I now furnish this judgment.

2. The child at the centre of these proceedings is K. G. who was born in the Czech Republic on 28th November, 2005. She is therefore four years of age. The child was the subject of a court order in the Czech courts of 28th November, 2008. Thus, although the case was not put this way there is a strong case that the Czech courts have custody of the child under the Hague Luxembourg Convention and Brussels IIR. (See G.*T. v. K.A.O.* [2007] I.E.S.C. 55). The applicant is the father of the child. The respondent is the mother of the child. The parties are not married but the applicant and respondent are joint holders of rights of custody in respect of the minor pursuant to the laws of the Czech Republic. The affidavits which have been sworn in the proceedings are rather sparse as to detail. However, the facts as set out are sufficiently clear to allow a decision to be made.

3. The applicant and the respondent entered into a relationship in the year 2001. The respondent contends that after K. was born she was her primary carer. She states that the applicant was in work and (by implication) that she was not. She avers that after the relationship ended she continued to be the primary carer of the child. She claims the applicant did not exercise regular rights of access or custody. This is denied by the applicant.

4. The child was the subject matter of a judgment of a District Court in the Czech Republic on 28th November, 2008. By virtue of that order the custody of the child was placed with the mother and the applicant was directed to pay maintenance.

5. On 22nd April, 2009, the applicant consented to the child travelling outside the territory of the Czech Republic, but for a period only confined to 24th April, 2009 to 24th May, 2009. The child was to be accompanied by her mother. The applicant's formal written consent to that effect has been exhibited in these proceedings. The respondent had indicated to the applicant that she wished to travel to Ireland for a one month holiday. As it transpires this was not correct and the respondent and the child remained in Ireland since that time. The Court has been informed that the respondent has formed another relationship, also with a citizen of the Czech Republic and that the respondent had a child with this man four weeks ago. While there is no evidence on this issue, there are indications that the respondent is heavily under the influence of this man, and subsequent to being informed of the effect of the Court's judgment has indicated that she will not comply with it as her current partner is unwilling to return to the Czech Republic with her.

6. The respondent deposed that she travelled to Ireland to visit members of her family here. She contends she has no other family members in the Czech Republic nor would she have any means of support there.

7. The respondent contends that the applicant not only consented to the child being brought to Ireland but also consented to an extension of this stay and not merely to 25th May, 2009, but beyond. She contends that the applicant delayed bringing the application until 20th January, 2010, eight months after the deadline for the child's return. She states that the applicant has continued to discharge maintenance for the child up until February, 2010, and that he consented or acquiesced to the child remaining in Ireland with her. She states that she informed the applicant that she was pregnant in the month of January, 2010. She says the proceedings were commenced on 20th January, 2010. Her contention is the applicant was unhappy to find that she was pregnant and this motivated the proceedings herein.

8. The respondent now contends that the child is habitually resident in the jurisdiction and that the Irish courts are seized with the jurisdiction to determine the issues regarding K.'s place of residence. The respondent also claims the applicant does not know her father.

9. The applicant's narrative, however, sets out a rather different account of events. He says that after K.'s birth he was fully involved in her upbringing. He denies any question of not having exercised regular rights of custody. He states that he continued to exercise parental responsibility in respect of the child. He states quite clearly that the written consent which he furnished was for a period of one month only and that he did not consent to any extension of the respondent's stay in this country. Moreover, the father states that the mother assured him that she intended bringing K. back to the Czech Republic. He swears that, on two occasions since 24th May, 2009, the mother informed him of the time of her intended return. On both occasions he travelled to Prague Airport. However, the respondent did not return with K. as promised. The second such occasion was in November, 2009.

10. The father states that after the respondent's failure to return on the second occasion he re-entered custody proceedings before the District Court in the Czech Republic. He requested that the child be placed in his custody with effect from 1st December, 2009. He states that he only then became aware of his rights under the Hague Convention and Brussels IIR. On 20th January, 2010 he signed a power of attorney for the purpose of processing an application under the Hague Convention and the Council Regulation for K.'s return. He strongly denies that there was any delay on his part or that he had acted in any manner which would constitute acquiescence or a consent to the child remaining in Ireland. It is noteworthy that this sequence of events is not controverted. I must accept it as evidence. It substantially undermines the respondent's account. In particular, it will be noted that the applicant actually revived the proceedings in the Czech District Court well prior to January 2010.

11. The applicant says that from 24th April for a period of three months he had regular telephone contact with the child. He says that in August 2009, the respondent prevented any further telephone contact with K. and his only permitted contact was by email and text message until April 2010, at which time the respondent prevented all further contact. He denies that he failed to make any effort to contact the child. These averments have not been denied by any subsequent affidavit sworn on behalf of the respondent.

12. Counsel for the respondent, Ms. Grainne Lee, submitted that the child's habitual residence changed as a result of her lawful removal in April 2009. She submits that there is no evidence that the child was wrongfully removed and that therefore the Irish courts have jurisdiction over her. Ms. Lee submits that the child now has a young brother four weeks old and that it is undesirable that the two children should be parted. She submitted that the respondent believed she had the consent of the applicant to remain on.

13. She submits that, in accordance with Article 13 (4) of the Convention an order directing the child's return will create an intolerable situation for the mother. She submits that the child's habitual residence changed three months after the child was removed from the Czech Republic.

14. While these points have been made forcefully I regret I am unable to accept any of them.

15. I accept the submissions which have been made on behalf of the applicant by his counsel, Ms. Marian McDonnell, B.L. In the first place, insofar as the applicant made a consent I must find, on the basis of the evidence, that that consent was for a one month period only. This much is set out in the written consent form which has been exhibited. Second, it is not denied that the applicant travelled to the airport on two occasions in order to meet the mother and the child. This can be consistent only with his having been misled by the mother as to her intentions to return to the Czech Republic. The applicant's evidence has not been contradicted on this point. This uncontradicted evidence is simply not consistent with either consent or acquiescence. Furthermore, I do not consider that there is evidence that the applicant delayed. The *evidence* which is before the Court is that he revived the proceedings in the Czech Republic in November 2009. He then became aware of his rights under the Hague Convention and initiated the proceedings which ultimately came before this Court.

16. I am not persuaded that the child's habitual residence can have been changed from the Czech Republic for the simple reason that while the child was lawfully removed for a period of one month, thereafter, the evidence establishes that her retention outside the Czech Republic is outside the terms of the consent. The retention of the child in this jurisdiction is unlawful. Insofar as the consent was conducted by misleading the applicant I would hold it renders the removal unlawful also. The Czech courts have made orders in relation to the child and therefore held custody over the child for the purposes of the Convention. I do not accept that the Irish courts have or could have jurisdiction in the light of those circumstances.

17. Having regard to the facts of this case, I consider that acquiescence under the Convention means that there has been acceptance of the removal of the child or the retention of the child. Whether there has been such acquiescence must be considered in the light of all the relevant circumstances. On the evidence in this case it matters little as to whether a test for acquiescence is subjective or objective. In either circumstance I consider that the actual evidence itself demonstrates that there was no acquiescence to the prolonged retention of the child outside the jurisdiction. Furthermore, there is no indication of the applicant having been aware of his rights under the Hague Convention for any considerable period of time before acting to assert his right (see *R.K. v. J.K.* (Child Abduction: Acquiescence) [2000] 2 I.R. 417).

18. Relying on that same authority I am entirely unconvinced that there is any evidence of a grave risk or an intolerable situation as is understood under the Convention. The grave risk contemplated in Article 13 of the Convention must be truly serious. There is a very high threshold for this test such as (as instanced by Barron J. in *K. v. K.*) where the return of the child would put that child in imminent danger in circumstances like a war zone, famine or disease or in circumstances of serious abuse or neglect or extraordinary emotional dependence when the court in the country of habitual residence for whatever reason might be incapable or unwilling to give the child adequate protection. There is no evidence of such a situation existing here. While one can only have a degree of sympathy with the respondent in the human situation in which she now finds herself this does not absolve the court from applying the law.

19. The situation here simply does not lend itself to any finding of acquiescence. In *A.S. v. P.S.* [1998] 2 I.R. 244, Geoghegan J. pointed out that Article 12 of the Hague Convention provided that where a child had been wrongfully removed or retained and the proceedings under the Hague Convention had been brought within one year, the judicial or administrative authority of the contracting state *must order the return of the child forthwith*. He pointed out that the article was couched in terms so as to make clear that the judicial or administrative authority of the contracting state was *obliged to return the child* even in a case where more than one year had elapsed, but in that instance subject to the exception that the court need not make an order for return if it was demonstrated that the child was now settled in its new environment. It cannot be said that any of these circumstances have arisen in the instant case. There was no such evidence.

20. Insofar as the issue of consent arises at all I consider that the evidence simply does not establish that there was any consent to the continuance of the arrangement or to the child being kept outside the jurisdiction. The consent was falsely premised. The matter can be put very simply by merely pointing to the undisputed evidence that the applicant appears to have been misled on two occasions, and on both those two occasions went to Prague Airport to meet the child and the mother. I am not persuaded that there are any circumstances in which it could be said that there had been consent in the sense of an agreement that the child should remain outside the jurisdiction outside the time limitation.

21. I am not satisfied that there has been any evidence that the applicant delayed in bringing this application. Insofar as there is evidence on this issue the applicant had described a series of events which do not in any way indicate delay. Delay cannot be a defence on the facts of this case in the light of the time sequence.

22. For completeness I should observe that there is no evidence upon which this Court could conclude that even if the continued presence of the child was lawful that she had established a habitual residence here. There is simply no such evidence before the Court. (See *Case A* 523/07 judgment of the Court of Justice, 2nd April 2009). The habitual residence of the child is in the Czech Republic. Habitual residence cannot be predicated on unlawful removal of the child from one member state to another. The retention of the child in the circumstances outlined in this case renders the retention of the child in this jurisdiction unlawful. The courts of the member state where the child was habitually resident immediately before the wrongful removal or retention would retain their jurisdiction until the child has acquired a habitual residence in another member state. Such a circumstance might only arise when there has been acquiescence in the removal or retention or where the child has resided in that other member state for a period of at least one year after the parent having rights of custody had or could have had knowledge of the whereabouts of the child made not request or move for the return of the child (see Article 10 Brussels IIR Council Regulation EC No. 2201/2003).

23. The child is at this time, four years of age. Consequently, I do not consider any issue arises with regard to hearing the child in evidence. No evidence has been adduced as to any basis upon which this Court could or should have regard to the express wishes of the child. In the circumstances which have arisen in this case I consider that the Court has no alternative but to direct the return of the child forthwith. This was the effect of my judgment on 10th July. The following day counsel on behalf of the respondent brought a number of matters to my attention. These were:

(1) That the respondent was not disposed to accompany the child back to the Czech Republic;

(2) that the respondent was apparently heavily under the influence of her new partner and was receiving social welfare through him;

(3) that the respondent was not disposed in any way to cooperate with the implementation of the order.

It was appropriate that these matters be brought to the Court's attention as, quite clearly, circumstances may well arise where a traumatic handing over may take place which can only be distressing for the child. I have been persuaded, however, that no stay should be granted in this case and that the obligation of the Court is to direct the return of the child forthwith. My attention has been drawn to a brief note of a decision of the Supreme Court in *P.N. v. T.D. extempore*, 8th February, 2008, where following an order of the High Court, the father who was unsuccessful in that court applied for a stay on the order returning the children to France. The Supreme Court refused any stay having regard to the need for speedy resolution of such cases. On the basis of that authority it appears to me that I have no alternative, in the instant case but to direct the speedy of the return of the child. The mother has not attended court. She has sworn just one affidavit. I have been presented with no evidence and no submissions as to any way in which this sad situation could be avoided or alleviated.

24. In the circumstances I have directed that the gardaí should attend for the purposes of the child being handed over at 5.00 p.m. next Thursday. Clearly the applicant does not intend to take any step prior to that time. It is deeply unfortunate that the respondent is not disposed even to grant the applicant access pending the return of the child. While I have considerable sympathy for the respondent, the situation which now exists, with all its potential traumatic circumstances are entirely as a result of her making and that of her new partner. Had I been presented with any evidence as to how this situation could have been avoided I would have had to carefully consider it. I have also made an order preventing the child being removed from the jurisdiction directing that the garda authorities be informed and for the provision of an emergency passport. It was within the respondent's power to return to the Czech Republic or to formulate a plan as to how this situation could be avoided. When there is no co-operation or even proposals a court is left with no alternative but to apply the law. The applicant has given an undertaking to the Court that he will not initiate or take part in any criminal proceedings against the respondent for the abduction of the child. It will be recollected in this context that there is an extant order of the Czech courts in relation to this child. This appears to me to be determinative, even if this Court was incorrect in any of the conclusions identified earlier. (See *G.T. v. K.A.O.* [2007] I.E.S.C. 55 (Supreme Court)).