

THE HIGH COURT

FAMILY LAW

**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 2201/2003 AND IN THE MATTER OF D.H. AND D.H. MINORS**

[2018 No. 5 H.L.C.]

BETWEEN

D.H.

APPLICANT

AND

L.H.

RESPONDENT

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 10th day of May, 2018.

1. By special summons dated the 1st February, 2018, the applicant, the father of two children, D.H. born 11th February, 2010 and D.H. born 17th June, 2013, seeks a declaration that the respondent, the mother of the children, wrongfully removed the children from the Czech Republic within the meaning of article 3 of The Hague Convention together with an order pursuant to article 12 of The Hague Convention for the return of the children to the Czech Republic.

2. In the affidavit sworn by the solicitor on behalf of the applicant, it was stated that the children were removed to Ireland on the 22nd November, 2017. Relevant provisions of the Civil Code of the Czech Republic were exhibited to this affidavit, indicating that under Czech law, the unmarried parents of a child have rights of parental responsibility, which includes the right to determine the place of residence of their children. It was alleged that the removal to Ireland was without the consent of the applicant father. The affidavit on behalf of the applicant also indicated that on the 30th November, 2017, the applicant brought an application before a District Court in the Czech Republic for a custody order in respect of the children and that the application would next be before the court on the 12th February 2018. Apparently, it was adjourned on that date (see paragraph 10 below).

3. For most of the period before the hearing in these proceedings, the respondent mother did not have legal aid or legal representation. She obtained legal aid and legal representation only 10 days prior to the hearing before me, which took place on the 9th May, 2018. The unfortunate effect of this was that she did not until a late stage provide a detailed response to the application. Initially, and at a time when she had no legal representation, the respondent mother provided a statement in which she said that, *inter alia*, the applicant was "not a diligent and hardworking father. He did not care about bills and payments relating to our housing, as well as he did not care for alimentation and other needs of the minors during our life together. Another point is a psychological damage suffered mainly by son, [D.] who witnessed father's narcotic drug, marijuana usage even in front of the children." She indicated that she had come to Ireland to work and to secure a better future for the children in terms of education and "to protect them against psychological pressure". She also provided a statement from her own daughter, the step-daughter of the applicant who stated, *inter alia*, that the applicant did not work and did not look after them at all. She said that her mother was permanently in debt and often had no money for bread. She said that he gambled and that his behaviour towards them was "horrible".

4. By affidavit sworn on the 11th April, 2018, the applicant father responded by saying that he was very surprised and disappointed by the claims made by the mother. He said he had known her for over ten years and that they resided together for most of that time. He said he rejected the claims that he did not look after the children and that he squandered and gambled money. He denied that he failed to make adequate provision for his family and that during the course of his relationship "I did my best to ensure that the needs of the respondent and the children were met." He gave no details of whether or not he ever had employment or the extent to which he contributed towards the financial support of the household.

5. Subsequent to the respondent mother obtaining legal representation, she swore a detailed affidavit in which she said, *inter alia*, that she was the main breadwinner as the applicant refused to work and preferred to gamble and use drugs. She said that during their relationship of ten years he worked for less than a year. She said that he often took the money that she earned and used it for his own benefit, leaving the family short of money. She also said that she was in fear of him due to the manner in which he had treated her during the relationship. She described the circumstances in which she came to Ireland as follows. She said that in August 2017 she separated from the applicant and that he moved out of their rented accommodation. She said that he provided her with no help with the rent on the apartment at this time. She said she was unable to continue in her employment as she had no one to help with the childcare which would have enabled her to keep her job. She said that she was unable to get social welfare assistance because the applicant could not be located. Inquiries had been made at the applicant's parents' home, but he was not present and there was no other address for him. She said that she could only receive a children's allowance supplement which amounted to €40 per month. She said that she lodged an application with the court for maintenance on the 9th October, 2017, but was unable to progress this as she did not have an address and merely knew the general region in which he was living. She said that the rent on the apartment was approximately €440 per month. She said that she was served with an eviction notice on the 3rd October, 2017. She said that she had nowhere to live and spent some nights in her parents' home, but that this was not suitable on a long-term basis, because, *inter alia*, her father was suffering from cancer and her children were young. She said that a new partner financed the cost of the tickets for her and the children to travel to Ireland and that, with his support, she has secured accommodation in Ireland for the children. She had arrived in Ireland on the 24th October 2017. She said that she is able to work because he assists with childcare and she has full time work as a housekeeper with a particular hotel, which she named. She said she could not return to live in the Czech Republic as she would have no job, no social welfare, no accommodation and no financial support from the applicant.

6. She also alleged that the applicant was not in any meaningful way exercising his rights of custody after their separation because he had failed to provide any financial support for the children since they separated in August 2017 or to provide for them in any other way, including accommodation. The respondent made some further allegations that she had experienced emotional abuse by the applicant and that the children had witnessed gambling and drug use. As an example of the applicant's attitude toward her, she exhibited a recent Facebook message from the applicant, the contents of which I will not reproduce here. Suffice to say that they are grossly vulgar and insulting to the respondent at a personal level and make no reference to the children.

7. Dr. Colm O'Connor, a clinical psychologist and family therapist, assessed the older child and prepared a report for the Court as to the child's views about returning to the Czech Republic. The younger child was too young for such assessment. The interview was conducted through an interpreter. He spoke to the child about the circumstances of leaving the Czech Republic, whether he had any preference for Ireland or his native country, and his attitudes towards his father:-

"he said his Daddy was not good, was not good to his mother because he used to curse and be angry. He said he liked school in the CR and had friends there but prefers school here. He said the reasons he came to Ireland were to be away from his father who was cross...When I asked him if he had any objections to going back to the CR he said he would not like to go back. He said he would prefer to stay here with his mother. He said he did not want to be away from his mother and brother and he did not want to be with his father. He said he preferred school here in Ireland and liked [M.], his mother's new partner... When I asked him if he might like to see his father on holidays or at special occasions like Christmas or Birthdays he said 'no, I would not like to see him'. He said he speaks to his father on the phone on Saturdays and that's enough and okay for him... In asking him about his father and what he liked or did not like he said he liked when they went outside to play but did not like the fact that he was so cross."

Dr. O'Connor came to the conclusion that on account of his age and shyness, D. was incapable of being able to reveal or articulate the adult reasons behind his current position. He stated that he was too young to understand the meaning of past events in his life; to have a "full autobiographical sense of himself as embedded in a story with a history or future". The only matters which he was capable of forming a view about, according to Dr. O'Connor, were related to his present feelings, experiences and preferences. He found him to be consistent in not wishing to be with or be close to his father and to remain with his mother. However, he stated that these preferences must be understood within the context of his fears, situation and maturity; that children find it difficult to declare preferences for things which only have a long term benefit and unlike adults, value safety and security in the present. He found that D. was necessarily dependent on his mother and that his preferences, declarations and emotions were intimately connected to her, and that he had not yet developed an independent sense of himself. Dr. O'Connor expressly stated that this was not a negative influence, but was instead, "appropriate, natural and inevitable" and critical to a child's development. He said that while it was not possible to assess if D. had been coached, there were no signs of anxiety or guardedness in the session. He described D as "co-operative, calm, smiling, and open throughout". He noted that D. did not display the natural confidence of a child his age due to language and shyness but stated that this may have been due to the interview setting and the long journey the entire family undertook in order to attend the interview. Dr. O'Connor's report also placed emphasis on D's age as an inhibiting factor in taking his views into account, stating that he considered him "to be at the threshold of being too young for this kind of assessment" and "not fully capable of forming his own views and would, like any child in second class, be very reliant on adults in his life to guide and influence him" and thereby inevitably be influenced by his mother and what she felt was necessary for their happiness and that he was "not quite of an age to be able to, or need to doubt or question the motives of his mother." Notwithstanding this, Dr. O'Connor did conclude that D's views in relation to wanting to stay with his mother, not liking his father and not wishing to go to him were "consistent and congruent".

8. On the day of the hearing the court was furnished with an email from the Central Authority of the Czech Republic indicating that the applicant father was prepared to provide the following undertakings:-

"I [D.H.] born 2 March 1975, declare that in case my children are returned to the Czech Republic with their mother I shall provide them with accommodation in 2+1 flat. I shall cover all costs related to housing, as well as maintenance and others. I request that my children be returned to their homeland and I believe that the Irish Court will decide justly. The accommodation is ready for my children. If the children are returned with their mother to the Czech Republic, I will not retain them from the care of their mother, and I will wait until the Czech Court orders who will have the custody over them."

9. The applicant did not travel to attend the hearing and his counsel indicated that he did not know the reason for this as he had no instructions in that regard.

10. The Court was also furnished with an email from the Central Authority of the Czech Republic indicating that the last hearing before the Czech Court took place on the 18th December, 2017, but was adjourned because the court "failed to correctly summon the mother". The next hearing was scheduled for the 12th February, 2018, but was cancelled due to the illness of the judge. The email went on to say that another date for the court hearing had not been fixed.

Was there a wrongful removal?

11. At the hearing it was not in dispute that the children were habitually resident in the Czech Republic prior to their removal to Ireland in November 2017. Further, it was not in dispute that the applicant father had not consented to their removal to this jurisdiction. The existence of a right to custody under the Civil Code of the Czech Republic on the part of the father was not in dispute either. However, there was a dispute as to whether or not he was exercising custody rights at the time of their removal. In this regard, it was common case that the father had fortnightly access to the children after he and their mother separated in August 2017 until they left in November 2017. The submission on behalf of the respondent was that because the father had failed to properly provide for the children in financial and other respects, he had failed to exercise his parental responsibility in the best interests of the child, within the meaning of the Czech Civil Code, and therefore could not be considered to be exercising his right of parental responsibility at the time of their removal. The authorities, including *M.S.H. v. L.H.* [2000] 3 I.R. 390, indicate that a generous interpretation is to be given to the phrase "exercising custody rights" under the Convention. The burden of proof in this regard lies on the person who claims that the applicant who has rights has not been exercising them at the relevant time. In my view, given that the applicant father had lived in the same household as the children for almost all of their lives and was seeing them fortnightly in the short period after the parents had separated and before the children came to Ireland, it could not be said that he was not exercising his custody rights at the time of their removal. I therefore find against the respondent on this particular issue. Accordingly, I reach the conclusion in the first instance that there was a wrongful removal within the meaning of article 3 of the Convention.

Article 13 of the Convention

12. It was submitted on behalf of the respondent mother that the objections of the child D.H. should lead the Court to exercise its discretion under article 13 to refuse to return the children. While it is clear that the older child prefers to remain in Ireland and appears to be happier here, and does not wish to see his father or to return to the Czech Republic, Dr. O'Connor's reservations about the child's age and maturity, noted in some detail above, suggest that I should not place undue weight on this particular child's views about remaining in Ireland. He was considered to be "at the threshold" of being capable of expressing a view, in terms of his age and maturity, and his ability to communicate his views was exacerbated by the language barrier between the child and the psychologist. Obviously, the views of the younger child were not capable of being ascertained by reason of his age. In the circumstances, I do not accept that the child's views, as a standalone ground, should be a reason for refusing to return the children to the Czech Republic.

13. The submission was also made on behalf of the respondent mother that there was a grave risk that the return of these children to the Czech Republic would create an intolerable situation within the meaning of article 13 of the Convention. In my view, this was the most important issue raised in the case.

14. Counsel on behalf of the respondent mother referred to the details given by her on affidavit in comparison to the sparse nature of the denial of the applicant in his affidavit. He denied that he had failed to provide financial support for the children without giving any details at all of whether he had been in employment or in what way he had contributed financially to the household. Counsel for the respondent also pointed to the sparse nature of the undertakings given in the email referred to above. In this regard I note that while the applicant has given general undertakings as to providing accommodation and maintenance support, he has not identified whether or not he has employment, or any figures of what he might pay or any details as to the nature and location of any such accommodation. I note also that this email post-dated the detailed allegations in the mother's affidavit concerning his failure to provide financial or other support to the family. Counsel for the respondent argued, *inter alia*, that the applicant had not attended the hearing and if this were because of financial constraints, this would not bode well for his providing for the children in the future. Alternatively, if he was not interested in attending the application, this suggested that his interest was more about controlling the mother rather than seeing his children. Counsel also questioned whether he could be trusted to honour any undertakings, particularly when the Court did not have opportunity to observe him in court and see his demeanour, together with the history between the parties; in this regard it was suggested that the mother's allegations of emotional abuse were to a degree corroborated by the child telling Dr. O'Connor that his father was "cross and angry" and by the unpleasant Facebook message which showed his insulting attitude towards her. It was also pointed out that the mother had been unable to pursue him for maintenance in the courts of the Czech Republic because he had not made his location known to her. Counsel noted that he had furnished two different addresses (two different house numbers) in his Hague Convention application for return and his court application in the Czech Republic respectively; she also noted that he had given an address in the Czech Republic for the respondent mother when he brought the proceedings before the Czech Court even though he knew at that time that she had left the Czech Republic.

15. Counsel on behalf of the applicant father submitted that the test for grave risk was very high, having regard to the authorities on this matter and submitted that the threshold in that regard had not been reached. He further submitted that the applicant's failure to provide details of employment or financial assistance in his affidavit may have been due to the fact that he was responding to the first affidavit of the respondent mother, in which her own allegations were very generalised. He suggested that the Court might adjourn the matter in order to enable the father to provide further details in support of the undertakings proffered.

16. Having regard to the evidence laid before me, it seems that when the parties separated, the father left the rented accommodation in which they were living, did not furnish any address where he might be found, and failed to make any provision for the financial support of the children. While it is true that his affidavit was sworn in response to the respondent's first affidavit which was quite general, nonetheless his own denial is at a very general level and gives no information at all about whether he had employment or made financial assistance at any time in the past. Further, the email containing his undertakings was sent after the mother had sworn her second affidavit, and it too fails to provide any information which would give the court comfort that he in fact has employment and would be in a position to follow through on his undertakings. Undertakings of this nature usually provide much more detail in terms of what precise sums of money will be available, by what method they will be paid and when, what particular accommodation will be available, and other such details. Further, he has not attended court for the proceedings and the Court is not in a position to assess the likely credibility or honesty of the applicant in giving his very general undertakings that he would provide accommodation and maintenance for the respondent into the future. Further, the Facebook message does not inspire confidence that his attitude to the children's mother is one which would lead him to honour any commitments given. It seems to me that, notwithstanding the high threshold for establishing "grave risk" within the meaning of article 13 of the Convention, there is, in this case, a grave risk that if the mother were forced to return to the Czech Republic with these children, they would be facing a situation without accommodation and with no guarantee of any source of income. In contrast, they are currently living in Ireland where their mother has a job, accommodation, and the children appear to be well settled and happy at school. In those circumstances it seems to me that there is a grave risk of what could be described as an intolerable situation for these particular children in these particular circumstances if they were returned to the Czech Republic.

17. Accordingly, I have decided to exercise my discretion pursuant to article 13 to refuse to return the children to the Czech Republic. The effect of this decision is that, pursuant to the provisions of article 11(6) of Council Regulation 2201/2003, the matter will be notified to the relevant Czech court and the parties will be notified that there will be an opportunity to have the matter considered again by that court in due course.