

**THE HIGH COURT**

**FAMILY LAW**

**[2016 No. 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 2201/2003**

**AND**

**IN THE MATTER OF L.E. (A CHILD)**

**BETWEEN**

**L.M.E.**

**APPLICANT**

**AND**

**S.A.L.K.**

**RESPONDENT**

**AND**

**LONDON BOROUGH OF HAVERING**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Bronagh O’Hanlon delivered on the 13th day of December, 2016**

1. This case concerns an application for the return of the child L., born on 15th November, 2004, to the jurisdiction of England and Wales pursuant to Article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980. The application is set out in the special summons issued 8th November, 2016. The jurisdiction of England and Wales is subject to both the Hague Convention and Council Regulation (EC) 2201/2003.

2. This Court made a number of orders in this case on 23rd November, 2016 when the respondent was present in court. That order noted the undertaking of the respondent not to remove the child from this jurisdiction pending the determination of the case and her undertaking to attend the hearing of this action on 12th December, 2016. The order further noted the undertaking of the respondent to attend with the child at the appointment with Dr. Anne O’Connell on 29th November, 2016. She did not facilitate this and the views of the child were not assessed in accordance with this Court’s directions and the settled practice of interviewing children in Hague Convention proceedings.

3. The matter came before this Court on 12th December, 2016 along with the linked proceedings under record number 2016/37 HLC. The respondent was not in attendance and the assistance of An Garda Síochána was required to bring her and the child to court.

4. The applicant herein, L.M.E, is named as the father on the birth certificate of the child which is before this Court. The mother of the child is S.A.L.K., the respondent herein. The parents were married to one another on 16th December, 2004 and were divorced in 2012. On 16th April, 2015 an order was made Family Court in London granting the applicant parental responsibility in respect of the child.

5. The applicant alleges that there was a wrongful removal of the child from the jurisdiction of England and Wales on 1st August, 2016 within the definition of Article 3 of the Hague Convention:-

“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 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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”

It is alleged that the respondent came to this jurisdiction by ferry on 1st August, 2016 with the child the subject matter of these proceedings and another child the subject of related proceedings.

6. The child, the subject matter of these proceedings, was born in the jurisdiction of England and Wales. It is the contention of the applicant that the child was habitually resident in the jurisdiction of England and Wales at the time of the alleged wrongful removal by virtue of having lived there her entire life and there being no indication of a change in habitual residence. The child is described as having been under the constant supervision of London Borough of Havering Children and Young Persons Services who have been involved with the child since her birth and this involvement remains ongoing. Evidence has been accepted by this Court of the involvement of the social welfare services in the jurisdiction of England and Wales in the life of this child on an ongoing basis. The history of care in this case and the assertion of her habitual residence remain uncontested.

7. Counsel for the applicant outlined that the applicant has been named on the child's birth certificate as the father of the child and his rights of custody are established by s. 2 and s. 4 of the English Children Act 1989. Counsel for the applicant submits that by virtue of his name on the birth certificate, the applicant has been "registered as the child's father" for the purposes of the English 1989 Act and his parental responsibility flows from that. Counsel for the applicant further outlined that he has rights of custody due to his marriage to the respondent mother.

8. It was submitted that the standard for an applicant to reach to demonstrate that he was exercising his rights of custody is not a high one and he has surpassed it. The question of exercising rights of custody was addressed by Finlay Geoghegan J. in the High Court case of *M.J.T. v. C.C.* [2014] IEHC 196 as follows:-

"The question as to whether there is an onus on an applicant to establish, at least with preliminary or *prima facie* evidence, that the removal of a child is a wrongful removal for the purposes of Article 3 is complicated by reason of Article 13(a) of the Convention which gives the court jurisdiction to refuse the Order the return of a child where the person who "opposes its return establishes that ... the person ... having the care of the person of the child was not actually exercising the custody rights of the time of the removal ..." Where such a defence is raised, the onus of proof is on the respondent."

It is clear that by defining the scope of the Convention and looking at the two provisions together, that the applicant has to provide some preliminary evidence that he actually took physical care of the child as he did in this case. This Court notes the applicant's contention that as soon as he raised a concern about the care of the child and went to the London Borough of Havering with his concern then that access was made difficult for him. This Court accepts on at least a *prima facie* basis the applicant was exercising rights of custody at the time of the removal. This Court notes therefore that the level of contact between the applicant and child need not be significant to amount to exercising rights of custody. The applicant's case is that he was exercising those rights through access visits with the child up to January, 2016 when the respondent refused him further contact because he has reported concerns to the social welfare authorities in England.

9. This Court notes the submission set out in relation to the Supreme Court decision of *M.S.H. v. L.H.* [2000] 3 I.R. 390 where the applicant was serving a prison sentence at the time of the removal and therefore only saw the child approximately once per month for a few hours. McGuinness J. on behalf of the court found that the applicant was exercising rights of custody when she said as follows:-

"whether or not the plaintiff was seeing his children at the highest frequency permitted by the prison authorities (a matter on which this court has no evidence either way), it is clear that he was exercising his right to see them and to maintain his relationship with them. In addition, his application to Oldham County Court to obtain a prohibitive steps order was a clear exercise of his right of custody. Failure to exercise rights of custody must be clearly and unequivocally established".

This Court accepts that the applicant in this case had initiated court proceedings and that he had notified the authorities about his concerns for his child and that he was exercising access until it was stopped by the respondent following his report to the authorities therefore this court accepts that he was exercising his rights of custody.

10. The respondent was due to attend a hearing in childcare proceedings before East London Family Court concerning the child on the 1st August, 2016 but had failed to appear in person. Counsel for the applicant argues that, by virtue of those proceedings, the Courts of England and Wales also have custody rights in relation to this child and have been exercising same. Counsel for the applicant also outlined that the child had to be habitually resident in the jurisdiction of the courts of England and Wales for them to make orders in relation to the child.

11. Counsel for the notice party also submitted that they have rights of custody in relation to the child and that they were exercising those rights. The case of *In Re W. (Minors) (Abduction: Father's Rights)* [1999] Fam. 1 was relied upon as authority for the principle that courts of a jurisdiction where the child is habitually resident may have rights of custody. Lady Hale was cited at p. 16 as follows:-

"I am greatly attracted to the proposition that, where the court is actively seized of proceedings to determine rights of custody, removal of the child from the jurisdiction without leave of the court while those proceedings remain pending is a breach of the rights of custody attributable to the court ... There is something particularly repugnant about a litigant seeking to frustrate the processes of the law in this way. This emboldens me to conclude that the removal of the W. children was wrongful within the meaning of the Convention because it was in breach of the rights of custody attributable to the court."

In the instant case, an order made by the Family Division of the English High Court dated 1st August, 2016 was also before this Court in which Mr. Justice Moore ordered that the children be made wards of court, that the respondent return the children (including the child the subject matter of these proceedings) forthwith to England and Wales and placing the children in the care and control of the London Borough of Havering. It is submitted on behalf of the applicant that the respondent was personally served with the English proceedings on 25th July, 2016, that she was an active participant with legal representation in the English courts and cannot be considered to have been unaware of the proceedings.

12. Counsel for the applicant submitted that no defence has been raised under Article 13 of the Convention. The defences under Article 13 are as follows:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to

being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”

13. It was further submitted on behalf of the applicant that the within proceedings were issued less than one year from the date of the wrongful removal and therefore a return is mandatory pursuant to Article 12 of the Hague Convention.

14. The child the subject matter of these proceedings is twelve years old and therefore her views should be assessed. In relation to assessing the views of the child, Article 11(2) of the Council Regulation states:

“When applying Articles 12 and 13 of the 1988 Convention, it shall be ensured that the child is given an opportunity to be heard during the proceedings unless it appears inappropriate having regard to his or her age or degree of maturity.”

This Court accepts that at twelve years of age the child in this case is of an age where her views ought to be taken into account. This Court made arrangements for the child to be interviewed by Ms. Anne O’Connell Clinical Psychologist on 29th November, 2016. The respondent was present when this appointment was confirmed and undertook to this Court that she would bring the child to the appointment. The respondent failed to do so. This does not take away from the fact that the court itself gave the child the opportunity to be heard. In addition, the court was notified through counsel that a further appointment was offered through solicitors for the applicant but the respondent did not revert with regard to taking up that appointment. This Court made provision by seeking the assistance of An Garda Síochána to have the child produced before the court to be interviewed by the court and to ascertain the safety of the child at that time.

15. Upon the arrival of the child in the vicinity of the courts on 12th December, 2016, this Court arranged to personally interview the child as to her wishes. The child expressed an objection to returning to England on the basis that she preferred her school in this jurisdiction and she had felt bullied in her previous school because it was known that she was in care. She expressed a view that she had been given a clean start in Ireland and she liked that nobody knew about her history in care. This Court found the child to be quite mature and very interested in school in Ireland. She came across as articulate and intelligent. The child stated that she did not know who her father was. Although mature and articulate, this child has been exposed to documents and information which she should not have seen or heard regarding her family circumstances. While this child’s views have been given due consideration, this Court finds that the issues raised by the child, especially the paternity issue, are better investigated by the courts of England and Wales which have a greater degree of proximity. This Court holds that no case has been made out to the standard required under Article 13 of the Convention generally. This Court does not believe that the standards have been met which would either require or allow the Court to exercise its discretion in favour of a non-return order.

16. This court notes that it is very important to ensure that the aims of the convention are not thwarted by the respondent who fails to comply with undertakings she has given in this case in particular in relation to the hearing of the child and in relation to her undertaking to attend at court for the hearing of this case.

17. The respondent was given an opportunity to give evidence and respond in person to the case set out by counsel for the applicant. She did not deny that the child was habitually resident in the jurisdiction of England and Wales. She did not deny that she was aware of the proceedings in the English courts. She alleged that the applicant herein is not the natural father of the child the subject matter of these proceedings. There were extensive allegations about the behaviour of a particular social worker attached to the London Borough of Havering and present in court for the hearing of this case. The respondent also indicated that she has a support network in Ireland and that she would prefer to remain with her children in Ireland as she feels that would be in their best interests. These are issues for the courts of England and Wales who have jurisdiction regarding the welfare of this child by virtue of her habitual residence there.

18. It is the view of this Court that the child the subject matter of these proceedings was and continues to be habitually resident in the jurisdiction of England and Wales. She was born there and there is unchallenged evidence of the involvement of social welfare services in London throughout the child’s life. This Court is satisfied that the applicant has rights of custody under the English legislation and that he has been exercising them up until the point that he was interrupted from doing so by the respondent. This Court hereby declares that the child was wrongfully removed from the jurisdiction of England and Wales. This Court is not satisfied that any defence has been raised. Therefore, this Court orders the return of the child the subject of these proceedings to the jurisdiction of England and Wales along with such other orders as may facilitate such a return.