

THE HIGH COURT

FAMILY LAW

[2012 No. 12 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 2201/2203 AND IN THE MATTER OF O-K-D AND O-K-D, MINORS

BETWEEN

M-K-D

APPLICANT

AND

K-W-D

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 21st day of September, 2012

1. The applicant is the mother of the two boys named in the title to the proceedings and seeks their return to the jurisdiction of the courts of Poland pursuant to the Hague Convention on Child Abduction and Council Regulation 2201/2003. The respondent is the father of the boys. The father and the mother are Polish nationals and were married in Poland in 2000.
2. The elder boy, to whom I will refer in this judgment as Peter, for the purposes of anonymity, was born in December, 1999, in Poland. The younger boy, to whom I will refer as Paul, was born in Ireland in July, 2007.
3. The parents and Peter lived in Poland until October 2005. In October 2005, the father moved to Ireland. The mother and Peter joined him in February 2006. All four lived together in Ireland until August 2010. By agreement, the mother returned to live in Poland in August 2010 and the two boys went with her.
4. There is a dispute between the father and the mother as to whether there was an agreement at that time that if Peter wished to return to live in Ireland that he could do so.
5. Since August 2010, the father has visited the mother and the boys regularly in Poland. In July 2011, the boys spent three weeks in Ireland with the father. The father alleges that they did not wish to return to Poland at the end of that trip. Nevertheless, they did return.
6. The father went to Poland in December 2011. It is agreed that, initially, he indicated that he also proposed returning to live in Poland at that time. However, he then changed his mind. It is agreed that he travelled between Poland and Ireland several times between December 2011 and February 2012. By this time, the relationship between the father and the mother had, unfortunately, seriously deteriorated.
7. There is a significant dispute as to what occurred between the father and the mother between February 2012 and 7th March, 2012, when the father returned to Ireland taking the boys with him. In summary, the father deposes that there were approximately five discussions; it was agreed that it would be best for the boys to live with him in Ireland and that the mother gave her permission and consent that he bring the boys to Ireland. The mother denies these discussions or that she gave her permission and consent. It is undisputed that the father did not tell the mother which day he was leaving for Ireland with the boys. He explains this by reason of a further deterioration of relations between the father and the mother and that he did it to spite the mother. It is also agreed that the father texted the mother on arrival in Ireland to let her know that they had arrived safely in Ireland.
8. The mother made a complaint to the Polish authorities and on 20th March, 2012, signed a request for return pursuant to the Hague Convention to the Central Authority of Poland which was forwarded to the Irish Central Authority and received on 29th March, 2012.
9. These proceedings were commenced on 11th May, 2012.
10. Since their return to Ireland, the boys have lived with their father and Peter went to school, initially, in his former primary school, and in September, has commenced secondary school. Paul initially went to a kindergarten and in September, commenced junior infants.
11. An order was made pursuant to Article 11(2) of Regulation 2201/2003 for the interview and assessment of both boys by Ms. Anne

O'Connell, consultant clinical psychologist, for the purpose, primarily, of giving Peter the opportunity to be heard in the proceedings. A similar order was made in respect of Paul, notwithstanding his relatively young age by reason of his sibling status.

12. Ms. O'Connell interviewed each of the boys on 5th July, 2012, in the presence of an interpreter. The report of Ms. O'Connell makes clear that Peter had good English and only required to consult the interpreter on rare occasions. Paul, on the other hand, is described as having very little English and was interviewed with the assistance of the Polish interpreter.

Issues

13. It is common case that the boys were habitually resident in Poland in March 2012; that the mother had rights of custody which were being exercised within the meaning of Article 3 of the Convention and that the removal of the boys from Poland was in breach of the rights of custody of the mother and wrongful removal within the meaning of Article 3 of the Convention.

14. Counsel for the father submits that the Court has a discretion, pursuant to Article 13, not to make an order for the return of the boys to Poland and that the Court should exercise its discretion against making an order for return. He does so, primarily on two grounds:

(i) First, he submits that the mother consented to the removal of the boys from Poland to Ireland in March 2012, and accordingly, pursuant to Article 13(a), the Court is not bound to make an order for return.

(ii) Secondly, he submits that it is established the Peter now objects to being returned to Poland and has attained an age and degree of maturity at which it is appropriate to take account of his views, and accordingly, pursuant to Article 13, the Court has a discretion not to make an order for return in respect of Peter. Whilst he accepts that no similar finding can be made on the evidence in respect of Paul, he submits that the finding in respect of Peter gives the Court a discretion in respect of both boys since to make an order for return of Paul alone would place him in an intolerable situation.

15. Whilst an alleged "grave risk" defence had been raised, at the hearing, counsel for the father accepted, as he had to do, having regard to the decisions of the Supreme Court in *A.S. v. P.S.* [1998] 2 I.R. 244, and *R.K. v. J.K.* [2000] 21.R. 416, and *S.R. v. MMR.* [2006] IESC 7, that the evidence herein does not meet the threshold required to establish that there is a grave risk that an order for the return of both boys to Poland would expose the boys to physical or psychological harm or otherwise place them in an intolerable situation. Counsel maintained the defence of grave risk for Paul if he were to be returned alone.

Consent

16. Article 13 of the Hague Convention provides that the Court is not bound to order the return of the child if the person who opposes its return establishes that:

"(a) the person ... having the care of the person of the child ... consented to ... the removal;"

17. The Supreme Court in *S.R. v. M.M.R.* [2006] IESC 7, per Denham J. (as she then was) with whose judgment the four other members of the Court agreed, approved of the following principles for the purposes of determining the issue of consent in Hague cases:

"(i) the onus of proving the consent rests on the person asserting it; and

(ii) the consent must be proved on the balance of probabilities; and

(iii) the evidence in support of the consent needs to be clear and cogent;

(iv) the consent must be real; it must be positive and it must be unequivocal;

(v) there is no need that the consent be in writing;

(vi) it is not necessary that there be proof of an express statement such as

'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent."

18. In accordance with the foregoing principles, in this application the onus is on the father. He must prove the consent on the balance of probabilities. The evidence before the Court is primarily the affidavit evidence of the mother and the father and affidavits sworn on behalf of the father by a neighbour of the mother in Poland and a friend of the father in Ireland. Neither party sought to cross-examine the other or the other deponents on the affidavits sworn.

19. The father's averments in relation to the alleged consent are not specific. He refers to the fact of approximately five discussions with the mother in February 2012, in relation to the future of the boys during which he contends that he and the mother both agreed that it would be best for the boys to live with him in Ireland and states the mother "gave me her permission and consent to bring the boys back with me, and on one occasion she told me to bring them back with me to Ireland". The mother, at para. 7 of her first replying affidavit, expressly denies that she "ever agreed with the [father] that he could return to Ireland with the children. Further, there were never any discussions between us regarding this". It is not possible to resolve this conflict on affidavit. Counsel for the father sought to rely on the affidavit sworn by the neighbour in Poland in which she states "I knew about plans of [the father] regarding leaving for Ireland with children and the mother knew very well about it too". However, the deponent does not state her means of knowledge that the mother knew about it too.

20. In my judgment, as the onus is on the father, he has failed to establish in accordance with the foregoing principles that the mother gave a real positive and unequivocal consent to the boys moving from Poland to live in Ireland in March 2012. The father's failure to inform the mother of the date upon which he proposed leaving Poland with the boys is, in my view, inconsistent with the mother having given a real and unequivocal consent to the move. Further, the undisputed evidence is that the mother left each of the boys to their school or kindergarten on the morning they left and went back to collect them in the afternoon expecting to find them. The mother was given no opportunity to say goodbye to the boys who were leaving for Ireland. Again, this is inconsistent with the mother having given a real and positive consent to the move to Ireland.

21. Whilst I note the father's explanation in relation to a deterioration in the relationship between the father and the mother, I do not find this convincing. Each of these parents is clearly concerned for the wellbeing of their boys. It appears to me that if the father really believed he had the consent of the mother to take the boys to Ireland, that he would have told the mother of the proposed leaving date and allowed the mother participate in the preparations for their move.

22. Further, there are no actions of the mother consistent with her having given consent. She made an application to the Polish Central Authority on 20th March, 2012, within two weeks of the boys' removal to Ireland which is a short time and consistent with no consent.

23. Accordingly, I have concluded that the father has failed to establish that the mother gave a real and unequivocal consent to the removal of the boys from Poland to Ireland in March 2012, and the defence pursuant to Article 13(A) of the Convention fails.

Boys' Objections

24. Peter was 13 years 7 months old at the date of his interview by Ms. O'Connell. Ms. O'Connell, an experienced child clinical psychologist, records Peter as objecting to returning to Poland. From the report of the interview, it appears to me the basis for Peter's objections include the following:

(i) Peter stated that when his mother brought him back to Poland (presumably, in 2008), she told him that he could return to Ireland if he wished. However, Peter stated that she does not now want to return and did not want the boys to go either.

(ii) Peter is scared of having to make further changes in his life and moving again and having to organise a school in Poland. He referred expressly to the fact that he missed exams in Poland which would help decide where he would attend secondary school in Poland. The evidence is that he was due to take such exam shortly after he came to Ireland.

(iii) Peter expressed a preference for his school in Ireland and indicated that he did not like his school in Poland. He also stated that the people in Ireland were nicer than in Poland.

(iv) Ms. O'Connell expressly records that Peter did not express any reservation about either parent except he referred to his unhappiness about the fact that his mother left him to look after Paul on his own, sometimes until late at night whilst living in Poland.

25. As a matter of fact, I am satisfied that Peter does now object to being returned to live in Poland. Further, whilst the objections are understandable given the manner in which he has moved between Poland and Ireland since 2006, they are not very strong objections and are rooted in a desire for stability and a preference for life in Ireland. Further, it is clear that Peter is a highly intelligent and academically bright young man and described as articulate. Ms. O'Connell describes him as overall "a thoughtful and clear-sighted boy who has thought about his situation and is clear as to what he would like".

26. Peter is of an age and degree of maturity where it is appropriate for the Court to take into account his views. However, as is well established, taking into account a young person's views does not mean that such views are or should be determinative of the issues in the proceedings. A finding that Peter objects and that it is appropriate to take into account his views gives the Court a discretion not to make an order for return, but the Court must exercise that discretion in accordance with the policy and principles of the Convention and having regard to the overall facts of the case in the best interests of the children.

27. In the present application, Peter is not the only boy the subject matter of the application. The application for return is also in respect of Paul who has just passed his fifth birthday. At the date of his interview and assessment, he was not yet five years old. Understandably, the record of his interview does not indicate that Paul has an objection to returning to live in Poland. Even if this were so, Paul is not yet of an age or on the evidence a degree of maturity at which it would be appropriate for the Court to take into account his views.

28. Counsel for the father referred me to the decision of Baker J. in the English High Court in *W.F. v. R.J. and Others* [2010] EWHC 2909 FAM. This is a helpful and thoughtful analysis of the position under the Convention where the objections of an elder child to return are made out so as to give the Court a discretion, but the application also relates to a younger child in respect of whom no distinct defence giving rise to discretion is made out. He considers a number of earlier English cases in relation to the problem which he summarises at para. 37 in the following terms:

"In a case involving a number of siblings, does the Court (a) establish whether or not the gateway to discretion is open in the case or each child before going on to consider the exercise of discretion; or (b) consider the position of the sibling group together and exercise a discretion 'in the round'."

29. Counsel for the father submits that this Court should adopt the second approach and exercise the discretion in the round. This was the approach favoured by Baker J. in *W.F. v. R.J. and Others*. He did so, in particular, upon the reliance of the Court of Appeal decision in *Re T (Abduction: Child's Objections to Return)* [2002] FLR 192, and a consideration of the Court of Appeal judgment in *Zaffino v. Zaffino (Abduction: Children's Views)* [2006] 1 FLR 410.

30. Counsel for the father submitted that if this Court were to exercise its discretion so as not to make an order for return of Peter but considered that it had no discretion in respect of Paul, that an order for the return of Paul alone would, having regard to the close sibling ties, place him in an intolerable situation upon his return to Poland, and that accordingly, the Court should exercise its discretion in the round so as not to make an order for return in respect of both boys. This, he submitted, was in accordance with the approach of the Court of Appeal in *Re T.* and by Baker J. in *W.F. v. R.J.*

31. I have decided that on the facts of this case, it is not necessary for me to consider these difficult and interesting legal principles or to resolve same. It appears to me preferable to leave the resolution of those legal questions for a case where they may be determinative of the Court's approach. I have come to that conclusion as I have decided on the facts before me in this application, even if the Court does have a discretion not to make an order for return in respect of both Peter and Paul, that on balance, notwithstanding Peter's present objections, that I should make an order for the return of both boys to Poland. My reasons for reaching this conclusion are as follows.

32. This Court must exercise its discretion in accordance with the object and policy of the Convention in the context of the totality of the evidence in the case and in the best interests of the children. These principles have been succinctly stated in a number of leading decisions. In the UK Supreme Court, Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, observed at

para. 48:

"The whole object of the Hague Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home' but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country, and in accordance to the evidence which will mostly be there rather than in the country to which they have been removed."

33. In the Supreme Court, Denham C.J. in *A.U. v. T.N.U.* [2011] IESC 39, stated in respect of the balance to be achieved in the exercise of discretion, at para 32:

"The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. This policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual residence. However, also included in the Convention's policy is Article 13 wherein it states that the judicial authority may refuse to return a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views."

And further, at para 36, stated:

"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."

34. On the facts of this application and on the evidence before me, in my judgment, there are overriding arguments in favour of it being in the best interests of both Peter and Paul that the current and continuing disputes between their parents as to in which country and with which parent they should live and be educated be decided by the courts of Poland and be decided as promptly as possible by those courts. The father, mother and Peter are all Polish nationals. Whilst Paul was born in Ireland, he is a member of what is, essentially, a Polish family and primarily speaks Polish and Polish is spoken between the father and the boys at home in Ireland. The father has sought to introduce in these proceedings evidence from a neighbour in Poland which, if true, would be relevant to a determination of a continuing custody dispute. That evidence is best assessed and tested before the courts of Poland.

35. Further, this is an application to which Articles 10 and 11 of Regulation 2201/2003 apply. The courts of Poland retain jurisdiction to determine any custody dispute relating to the boys, even if this Court makes an order for non-return. Unless the parents can reach agreement about the care and upbringing of the boys, it is inevitable that there be further proceedings regardless of the decision of this Court. The father has already commenced divorce proceedings in Poland and in those proceedings, sought relief in respect of the parental authority of the mother. It is to be hoped that those proceedings can be moved forward swiftly and any continuing dispute in relation to the custody of the boys promptly resolved. A final decision on custody by the Polish Court with jurisdiction should, in absence of agreement between the mother and the father, provide the stability sought by Peter.

36. It must also be emphasised that an application for return pursuant to the Hague Convention is a summary proceeding. The issues which require to be addressed in relation to what is in the best interests of both boys in relation to their future care and upbringing raises a number of difficult questions, having regard to their differences in age and the fact that they are the only siblings in this family. It is in the best interests of the boys that those issues now be considered by a Court with full jurisdiction to consider all relevant issues and determine those issues in the best interests of the boys, having regard to all relevant welfare issues. This cannot be done in this summary application.

37. In determining how the Court should exercise its discretion, I have also taken into account the fact that the mother commenced this application for return promptly after the removal of the boys from Poland to Ireland. It is well established that the balance between the policy of summary return and the operation of an exception based on a child's objections may alter with time, see *A.U. v. T.N.U.* at para. 37, and *In Re M* [2008] 1 AC 1288, at para. 43.

Conclusion

38. The Court will make an order for the return of the boys to Poland.

39. It is now well established that the Court may place a stay on the order where it is in the best interests of the children to do so and to facilitate an orderly return of the boys. Such a stay would normally only be for a short period. However the length depends on the facts of the case. Having regard to Peter's objections and the reasons therefor, it is important that his return to Poland takes place in the least disturbing way for him. At the hearing, I made enquiries as to the current arrangements for the return of the boys to school in Poland. There was a lack of clarity as to arrangements in place in respect of Peter's schooling. Peter is of an age where there should be discussion with him in relation to his proposed school. It would be my intention to place a stay on the order so as to allow for further discussion between Peter and each of his parents in relation to his schooling and to seek to organise a return at a time and in a manner which will be least disturbing for Peter. Whilst he appears to have discussed his preferences with his father, it is less clear that he has done so with his mother.

40. It is important to emphasise that this decision is not a decision on custody. As pointed out, that is a matter for the courts of Poland. It is desirable, in the interest of the boys, that any continuing dispute be pursued as quickly as possible before the courts of Poland so that a final determination may be made in the interests, in particular of Peter's secondary schooling. The hearing date may also be relevant to the stay.

41. Each parent has, I am certain, the best interests of both Peter and Paul at heart, notwithstanding their differences between themselves. It is important that the parents attempt to set aside their differences and try and reach agreement, having listened to Peter on a plan for the boys to take them through their primary and secondary school years.

42. I will hear counsel on the timing and any terms of a stay on the order for return.

43. As neither parent speaks good English, I am directing that this judgment be translated into Polish.

44. I will also hear counsel as to how the Court's decision and the reasons for it should be communicated to Peter.