

**THE HIGH COURT**

**[No. 2006 10 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, 1980  
AND  
IN THE MATTER OF COUNCIL REGULATION 2201/2003  
AND  
IN THE MATTER OF T. K. AND R. K. (CHILDREN)**

**BETWEEN**

**A. K.**

**APPLICANT**

**AND  
A. K.**

**RESPONDENT**

**Judgment of Gilligan J. delivered on Thursday the 24th day of August, 2006**

**Background**

1. These proceedings concern two children, T.K., born in England in March, 1997 and R.K., born in England in December, 2000. Both children are English citizens. The parties to these proceedings are respectively the father and mother of the children.

2. The applicant and the respondent were lawfully married to each other in England in March, 1998 and were lawfully divorced from each other in England in August, 2001.

3. The children were at all material times habitually resident in England and in fact, throughout their lives, lived at the same house in London. The applicant had contact with the children pursuant to court orders. The respondent concedes that the applicant has custody rights in respect of the two children and that he was actually exercising them. On the 6th day of April, 2005, the respondent removed the two children from England, came to live in Ireland where she has been residing since and has obtained employment as a nurse.

4. In the special summons the applicant seeks primarily, an order pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980, as implemented by the Child Abduction and Enforcement of Custody Orders Act, 1991. In substance, this is an application for the return of the two children to the jurisdiction of the courts of England and Wales for the purpose of enforcing the rights of custody vesting in the applicant and further, or in the alternative for the purpose of enforcing the rights of custody vesting in the courts of England and Wales, a declaration that the respondent has wrongfully removed the said children from the jurisdiction of the courts of England and Wales within the meaning of Article 3 of the Hague Convention and various other ancillary orders.

5. In relation to the ongoing family law proceedings in England, it is clear that the District Family Court for High Holborn, London, was actively involved with respect to the welfare of the children. It is alleged that the respondent was, on an ongoing basis, failing to comply with court orders granting the applicant contact with the children and on the 3rd day of March, 2005, the court ordered that the respondent must make the children available for contact with their father every Saturday starting with effect from the 5th day of March, 2005, for four hours, from 2.00 p.m. until 6.00 p.m. This order had a penal notice attached and effectively followed up on a very comprehensive report as prepared by C.D., a social worker with Southwark Social Services Children's North District. It is clear from this report that the applicant did not wish to fight the respondent for residency of the children but just wished to be able to see them regularly. Ms. D. outlined the history of difficulty with contact between the applicant and the respondent against the background of the acrimonious relationship between the parties but her conclusion was to the effect that the children should continue to reside with their mother, the respondent herein, and that they should have contact with their father, the applicant. Ms. D. was of the view that the children were then currently being denied the opportunity to develop a relationship with their father (who was by now in a new de facto relationship from which there was a child, Nicola, born on the 14th January, 2003) and were restricted in their contact with their half-sibling and paternal extended family, and in her view this lack of contact was potentially emotionally harmful to the children and the risk of harm would increase with age.

6. It is clear from the background information available that the respondent, as early as the 1st day of February, 2005, was making arrangements for a move to Ireland and had paid a deposit on her accommodation.

7. Unfortunately in this case, serious allegations and counter-allegations arise with respect to two letters, the essential features of which are as follows.

8. The respondent says that she wrote a letter as dated 25th February, 2005, which she gave to the applicant in London on 26th February, 2005, at her house, in the presence of her brother K.K. and in this letter she tells the applicant that she is taking the two children to Ireland and that she will be residing at a specific address and that the respondent can make the appropriate arrangements for contact with the children. The applicant flatly denies that he ever previously saw this letter or that it was handed to him in London on or about 26th February, 2005, or that he ever knew where the children were immediately following their wrongful removal from London in April, 2005. Furthermore he says he was out of London working on the very day in question.

9. On the contrary, the applicant alleges that he received a letter from the respondent which was post marked and delivered to him, which letter is dated 5th April, 2005 and which indicated that the respondent and the two children were going to live in Birmingham, England and would be in further contact with him in due course. The respondent flatly denies that she wrote or posted this letter to the applicant.

10. Neither party has retained the services of a handwriting expert and when the opportunity to do so was afforded to the parties neither chose to go down that route.

11. I have before me copies of the two letters, the depositions of the parties as set out in the respective affidavits and I have had the benefit of assessing the demeanour and credibility of both parties who were each subjected to cross-examination on their

respective affidavits. I have the further benefit of an affidavit from S.H., as sworn on the 4th day of August, 2006 and a further supplemental affidavit of the applicant as sworn on the 28th day of July, 2006, together with a further replying affidavit by the respondent as sworn on the 22nd day of August, 2006 and an affidavit of Mr. K.K. which is to be sworn.

12. Having regard however, to the very nature of these proceedings as taken pursuant to the Hague Convention, it is clearly not possible to carry out an exhaustive enquiry into the background circumstances of the two relevant documents. It is in my view however, sufficient to indicate that I am satisfied to come to a conclusion on the balance of probabilities and on the somewhat limited nature of the enquiry before me, that the applicant was not aware as of the 6th April, 2005, where his children had been removed to from England by the respondent and furthermore having regard to the evidence of the applicant himself, I am satisfied to come to a conclusion that whoever wrote and posted the letter of 5th April, 2005, its content had no material effect on the applicant because within a few days of the children being removed he had satisfied himself following a visit to the children's school that it was unlikely that the children were still resident in England and Wales and he made no effort to contact any relevant authority in Birmingham or elsewhere who might have been of assistance to him, if the children had been taken there.

13. On becoming aware that the respondent had removed the children, the applicant contacted the police and the children's school. On 26th July, 2005, the applicant wrote to S. T. C. with a view to ascertaining the respondent's whereabouts and that of the two children, and he received a reply to that letter on 4th August, 2005. The applicant referred back to the courts on 4th October, 2005 and then sought an order that the area housing office furnish any relevant information as regards the whereabouts of the respondent and the two children. In or around January 2006, the applicant received information that led him to believe that the respondent was in the United States of America and with the involvement of the central authorities for The Hague Convention searches were undertaken but proved negative. Also at this time, the applicant may possibly have made some enquiries in Sierra Leone but I note in this regard, having travelled to Sierra Leone where the respondent had extensive family connections, no contact was made with them to ascertain the whereabouts of the respondent and the two children. In March 2006, the applicant received fresh information to the effect that the children were in this jurisdiction and with the involvement of the central authorities the children were traced to Ireland.

14. I am satisfied that the respondent and the children travelled openly to Ireland on a Ryanair flight from Gatwick south terminal to Dublin airport on Wednesday 6th April, 2005. The itinerary receipt as issued by Ryanair clearly describes the respondent and the two children. Furthermore, the respondent and the two children were living openly in a town in Ireland and the respondent obtained employment as a nurse, in her correct name and both children were enrolled in the local school, in their correct names.

15. It is agreed between the parties that the relevant date for the commencement of the appropriate proceedings by the applicant in respect of the reliefs as sought by him is the 24th April, 2006. Accordingly, the applicant's proceedings were instituted one year and 19 days after the children were wrongfully removed from England.

16. The respondent alleges that the applicant consented to or subsequently acquiesced in the removal or retention of the children.

17. The Supreme Court in *R.K. v. J.K.* [2000] 2 I.R. 416 held that the concept of acquiescence should not be interpreted in a formalistic way or by reference to national law. The court held that it should be approached in a strongly factual basis with a common sense interpretation of the term. The court emphasised that acquiescence was a question of the actual subjective intention of the wronged parent, not of the outside world's perceptions of his intentions and that it was therefore a pure question of fact to be determined by the trial judge.

18. It is quite clear to me on the facts as presented that the applicant was actively effecting his right of contact to the children, prior to their removal from their place of habitual residence in England and that he had on a number of occasions accessed the relevant court for this very purpose. Subsequent to the children's removal he again accessed the court on 4th October, 2005, 29th October, 2005, 19th January, 2006, 24th February, 2006 and 20th March, 2006. Furthermore I am satisfied that he approached the central authorities to procure a request for the return of the children in his efforts to locate them. He further made enquiries in the United States where the respondent had an uncle and had previously visited with the children.

19. I am satisfied that the applicant did not acquiesce in the removal or retention of the children as such an attitude would be at odds with the applicants persistent efforts in the family law courts in England to enforce his custody rights. I take the view that neither the evidence of the respondent both orally and on affidavit sustains her case in this regard nor can it be gleaned from the facts that the words and actions of the applicant clearly and unequivocally demonstrated or led the respondent to believe that the applicant was not going to pursue proceedings for the return of the children under the Hague Convention.

20. I am satisfied that the proceedings for the recovery of the children have not been brought before this court within a year of 6th April, 2005 being the date of their removal from England.

21. Article 12(2) of the Convention states:

"The judicial or administrative authority even where proceedings have been commenced after the expiration of the period of one year ...

shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment."

22. It is submitted on the applicant's behalf that Article 12(2) of the Convention has been amended by Article 10 of the Council of Regulations (EC) 2001/2003 (Brussels IIR.) to the effect, that the return was mandatory even where more than a year has elapsed and in any event time does not begin to run against an applicant until such time as he has had or should have had knowledge of the whereabouts of the child.

23. The Brussels IIR. became directly applicable in Member States on 1st March, 2005. The creation of the regulation was controversial as certain Member States believed there was no need for EC intervention in this domain. However as a result of a compromise reached by way of negotiating the drafting of the regulations, para. 17 of its recital provides that the Hague Convention continues to apply in intra/community abduction cases, in particular to Article 11, but will be complemented by the regulation. Article 60(e) of Brussels IIR., provides that in relations between Member States the regulation shall take precedence over the Hague Convention only insofar as they concern matters governed by the revised Brussels IIR. At the time of the implementation of Brussels IIR. it was agreed between the member states that the Convention remains the legal basis for the return of abducted children between Member States but Brussels IIR. has made some refinements.

24. Article 10 of Brussels IIR. deals with the jurisdiction of the child's former place of residence where there has been a wrongful

removal and provides that in general the courts of the habitual residence immediately prior to the removal retain jurisdiction until the child acquires a new habitual residence. However, if the person with rights of custody acquiesced in the removal/retention, or more than one year has elapsed and that person having known or ought to have known of the child's whereabouts failed to request the return and the child has become settled in the new environment, the courts of the habitual residence do not retain jurisdiction.

25. I am not satisfied from the arguments advanced before me that Article 10 of Brussels IIR. supersedes Article 12(2) of the Convention and in these circumstances I propose to rely on Article 12(2) of the Convention to decide the issue that arises herein.

26. As previously indicated, I am satisfied that the respondent travelled openly to Ireland, has resided and worked in Ireland under her correct name, and that the children have been enrolled in school and participated in any relevant activities under their correct names. I am satisfied that the respondent and the children were living openly and identifiably in Ireland.

27. This court (Finlay Geoghegan J.) made an order on 31st May, 2006, pursuant to s. 47 of the Family Law Act, 1995, that Dr. A.D. a consultant child and adolescent psychiatrist assess the children and report to the court for the purposes of the court exercising its discretion pursuant to Article 13 of the Hague Convention on the following matters:

1. The degree of maturity of T.K. the eldest child;
2. Whether T.K. objects to being returned to England; and
3. If T.K. does object to being returned to England.

(a) The grounds of such objection and

(b) Whether any objections expressed have been independently formed or result from the influence of any other person including a parent.

28. It does appear that the remaining issues to be decided are:

Firstly, whether or not the children are settled in their new environment and in this regard it appears to be accepted by both parties that the children should not be separated and in any event on the basis of the information available to me, I would not countenance for the purpose of this application that the children should be separated;

Secondly, if the children are settled in their new environment, does the court have a discretion to order a return; and

Thirdly, if appropriate the position relating to the older child T. and her indication that she does not wish to be returned to England.

29. The respondent avers that the children are settled in their new environment. She says that they live in a fine house in a lovely area and have been there since April 2005. The children she says have settled very well into their school and she refers to a school report for T. which I have read and considered. As can be seen therefrom, T. does appear to be making good progress in school and she is integrating well with her classmates and teachers. The respondent says that the children have made many friends and joined a number of clubs and that they are totally integrated in the local community. T. is a member of her school's after school art club and she also participated in the St. Patrick's Day parade in 2006. The respondent avers that it would be extremely upsetting for the children were they to be removed from the place to which they have become so attached.

30. The school report as dated 23rd June, 2005 is signed by the class teacher and by the principal of the school, and each states that T. is a bubbly bright clever girl who can do her work well and is anxious to learn. She coped well in her new class and is able for the programme. She may find Irish difficult next year. Her self-confidence, attitude to school, attitude to other pupils, involvement in school activities, the use of library books, homework, attendance and punctuality are all graded as excellent and her general behaviour very good. She scores 'very good' in the subjects of religious education, Irish, English, Mathematics, History, Geography, Science, Arts Education, Physical Education, Social Personal and Health Education, and Computer IT work and it is clear that she has some difficulty with Irish only scoring fair, which is perfectly understandable.

31. Pursuant to the order of this court (Finlay Geoghegan J.) as made on 31st May, 2006, Dr. D. carried out an assessment of the children on the 9th June, 2006, at her consulting rooms. She did not make contact with the children's school in London or obtain any background papers in relation to their circumstances. She had a brief interview with the respondent herein but did not have the opportunity to make any contact with the applicant.

32. Dr. D. specifically records in her report that according to the respondent's account, she had described that she had informed the applicant that she was moving to Ireland and left her correct address. The respondent also informed Dr. D. that the applicant had bought the eldest child a mobile telephone but this phone was subsequently broken by the children. The respondent described to Dr. D. that she had returned to London on a few occasions since her move to Ireland but she was afraid to make contact with the applicant for fear that she would be arrested. It is to be noted that the respondent previously worked as a nurse at a hospital in London and was now employed as a nurse in a town in Ireland. Her contract is temporary and she worked part time, occasionally full time and she resides in rented accommodation. Apparently as of the date of interview, the applicant had obtained a council flat and was waiting for a key and hoped to remain in Ireland.

33. It is apparent from the content of the report of Dr. D. that both the respondent and T. are stressed in relation to the outcome to the present proceedings.

34. T. in describing her lifestyle in Ireland indicates that she likes her school and that there is a big yard in the school and she likes to play there. She enjoys working on the computer and watching educational programmes on the school television. She has a best friend and after school, either goes to the babysitter or stays in school in the homework club. Dr. D. asked T. as to three magic wishes and she indicated that she would like to stay in Ireland, to have a rabbit and to make her mother and sister happy. She describes a confiding relationship with her mother and that on occasion her mother is strict. She describes herself as mostly happy.

35. When she lived in London, she used to see her father every weekend on a Saturday. He collected herself and her sister, and took them to McDonalds or the park or to his house and she looked forward to these visits. She described how sometimes her father bought her gifts if it was, for example, her birthday. She described that he was not cross that she had little contact with her father's

new wife and she describes no frightening or upsetting experiences while in the company of her father. She indicated that London was boring and that she liked Ireland better. She made her first holy communion while in Ireland and had a happy celebration and enjoyed her day. She described that she was not looking forward to moving to fourth class as she will get more homework. She described a positive relationship with her mother's boyfriend. When asked whether she would like to stay in Ireland or return to London she replied clearly that she would prefer to stay in Ireland and indicated that her father could come over to Ireland to visit her. When asked whether she would like to stay in Ireland, even if it would mean not seeing her father for a long time she indicated that although this would make her sad she would prefer to stay in Ireland.

36. In discussing the mental state of T., Dr. D. states *inter alia* that she appeared somewhat sad about the loss of contact with her father. Her mood was overall cheerful and she gave her views thoughtfully and clearly and her I.Q. appeared to be in the average range and rapport was easily established and maintained.

37. Dr. D. was of the view that T. was of age appropriate maturity. T. does object to being returned to England on the grounds that she is happy in Ireland, that she has friends there, is settled at school and that overall she has a nicer life in Ireland than she had in London, in terms of the quality of her house which she described as bigger, the quality of her play space which she described as larger and the social network that she is part of which appears to offer more opportunity for fun and friendship from her perspective. Insofar as Dr. D. could judge she could not establish that undue influence had been exerted on T. Dr. D. does accept however, that T. is naturally likely to be influenced to a significant degree by her mother who is her primary carer and with whom she appears to have a close bond. However, insofar as a nine year old can form an independent opinion in relation to such a matter it appeared to her to be independently formed.

38. In the opinion of Dr. D., in relation to the present living, educational and social circumstances of T. and her sister it appeared to her from the children's description of their life in Ireland that they are well settled in their new environment and both children articulated that they favoured their present circumstances in Ireland over their previous living circumstances in London, notwithstanding the sadness they both described in not having contact with their father.

39. The words "settled in its new environment" has given rise to some judicial divergence.

40. Bracewell J. in *Re N (minors) (abduction)* [1991] 1 Fam L.R. 413 held that "settled" should be given its ordinary natural meaning and this she held involved two constituent elements. Firstly, a physical element of relating to being established in a community and an environment, and secondly, it has an emotional constituent denoting security and stability. Bracewell J. added that the new environment encompasses "place, home, school, people, friends, activities and opportunities" but not per se the relationship with the parent which had always existed in a close, loving attachment, and that, Bracewell J. stated could only be relevant in so far as it impinges on the new surroundings.

41. The analysis in *Re N* of two constituent elements has been followed in England and Wales but not in Australia where it was held in *Director General Department of Community Services v. M and C.* [1998] 24 Fam L.R. 178 that the test and the only test to be applied, is whether the children have settled in their new environment and disapproved the statement in *Graziano v. Daniels* [1991] 14 Fam L.R. 697 that the test was more than that the child was happy, secure and adjusted to the new surroundings. The full court in Australia disapproved the two constituent elements analysis as being potentially misleading.

42. In Scotland the Inner House in *P v. S. and A. and West Lothian Council*, [2002] Fam L.R. 2, drew attention to the fact that Article 12(2) does not raise the question of whether the abducting parent is settled. But where a young and dependent child is living with the abducting parent he or she will necessarily be tied to the abducting parent in many ways, not least emotionally and the Inner House said that it is unrealistic and wrong to ignore the parent's circumstances and intentions upon which the child's degree of settlement is dependant.

43. The words of the French Text of the Convention provide some further enlightenment as to the meaning of Article 12(2). The French text uses the words 's'est intégré dans son nouveau milieu' which translates as 'is integrated in his new environment'.

44. In *Cannon v. Cannon* [2004] E.W.C.A. Civ. 1330 at 186 – 8 Court of Appeal, Thorpe L.J. stated

"... a broad and purposive construction of what amounts to 'settled in its new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay..."

45. I propose to follow the dual criteria as set out by Bracewell J. in *Re. N. (Minors) (Abduction)* which involves two constituent elements. Firstly the physical element and secondly the emotional constituent.

46. I take the view that notwithstanding that Article 12(2) is silent as to the burden of proof, it follows that the burden of satisfying the court in respect of the Article 12 exception must rest with the party opposing the return of children wrongfully removed from their place of habitual residence being in this case the respondent.

47. I do not believe, in the particular circumstances of this case, that the respondent's role as to whether or not she is settled in her new environment can be disregarded and her role in my view is important. She quite clearly made appropriate arrangements for her future in Ireland, securing employment and what appears to be very suitable rented accommodation and she has gone on to apply for a County Council house and it appears that she may have been successful with regard to this application. Her employment is pursuant to a contract and while it is temporary employment, she is working both part time and full time. She expresses a clear desire to remain in Ireland and her position when taken in conjunction with the views as expressed by T. and having regard to the content of the report from Dr. D. all appear to indicate that the children are integrated in their new environment, that they have become established in the local community and their emotional status denotes security and stability.

48. I accordingly come to the conclusion on the balance of probabilities that the children are settled in their new environment.

49. Notwithstanding that I have come to the conclusion that the children are settled in their new environment, I take the view that I have a discretion to order a return pursuant to Article 18 of the Convention. I am satisfied that this discretion must be exercised in the context of the approach of the Convention bearing in mind the best interests of the children. I also have to bear in mind the view that has been expressed by the older child T. that she does not wish to be returned to the place of her habitual residence.

50. I am satisfied in the particular circumstances of this case that both children have a very strong and loving attachment to their mother the respondent herein and she appears to have brought them up particularly well. I am equally satisfied that the children's

father, the applicant herein exercised his rights of contact with the children and that they enjoyed and benefited from his company and that his contact with them was a necessary and essential ingredient of their childhood.

51. I take the view that it is of some significance that, in the particular circumstances of this case, the respondent had actual *de facto* residency rights over the two children with the applicant having rights of contact with the children which immediately prior to their removal from their place of habitual residence had been increased to four hours every Saturday.

52. A view has been expressed by the older child T. that she does not wish to be returned to the place of her habitual residence. T. is nine years of age having as previously indicated been born on the 11th March, 1997. She was eight when brought to Ireland by her mother and nine at the date of the institution of these proceedings.

53. Lowe, Everall and Nicholls on "International Movement of Children: Law, Practice and Procedure", (2004) at p. 360 succinctly deals with the question of the relevant age at which the views of a child can be taken into account when stating:

"So far as age and maturity of the child is concerned as the Pérez-Vera report says 'all efforts to agree on a minimum age at which the views of the child could be taken into account failed since all the ages suggested seemed artificial even arbitrary.' Consequently the Convention itself is silent on the matter although it seems fair to say that those involved in the drafting process generally had in mind older children and probably would have agreed that a child under the age of 12 would not normally be considered as possessing sufficient maturity"

54. Balcombe L.J. stated in *re R. (Child Abductions; Acquiescence)* [1995] 1 FLR 716 at 729:

"English Courts have refused to lay down any chronological threshold below which a child's objections will not be taken into account but he added the younger the child is the less likely it is that it will have the maturity which makes it appropriate for the court to take its objections into account."

55. The general impression that I deduce from the information available to me is that T. as a nine year old girl has attained age appropriate maturity. It also appears that she is a bright, bubbly child who does well at school and has the capacity to adjust to given situations. While quite clearly she is of a very tender age, I take the view that I must have regard for the view as expressed by her, but primarily I look to the reasons as advanced by her for not wishing to be returned to England.

56. The basis of the objection to being returned is that she is happy in her new environment, has friends there, is settled at school and that overall she has a nicer life than she has in London in terms of the quality of her house which she described as bigger, the quality of her play area which she described as larger, and the social network that she is part of and which appears to offer more opportunity for fun and friendship from her perspective.

57. In my view of some significant importance is the fact that T. makes no objection to being returned to England on any ground associated with her father and the evidence available suggests that all her dealings with her father to date have been harmonious and that she is sad at the lack of ongoing contact with him.

58. In coming to a conclusion on this aspect, I am acutely conscious of the best interests of T. and her sister R. I am conscious that both children, against the background circumstances of this unfortunate case, have had a contact relationship with their father and that the severance of that relationship has caused sadness to both children and that the view of C.D., the social worker who prepared the report of the 21st January, 2005, was to the effect that an ongoing lack of contact between the children and their father is potentially emotionally harmful to the children and that the risk of harm will increase with age. I take the view that I have to bear in mind, the approach and purpose of the Convention itself, and the fact that the children are settled in their new environment. I accept without reservation that an order for the return of the children will undoubtedly at this point in time cause them considerable upset. Against this background, I have to weigh the nature and basis of the objections as advanced by T. for not wishing to be returned to her place of habitual residence and in doing so, I come to the conclusion in the exercise of my discretion that the long term best interest of T. far outweighs the nature and extent of the basis of the objections as raised by her in coming to a decision that she should be returned to England. It follows that R. should also be returned. In these circumstances I will hear the submissions of counsel as to the form of any necessary order to be made herein.