

THE HIGH COURT

[2013 HLC40]

BETWEEN

K.

APPLICANT

AND

K.

RESPONDENT

Ex tempore judgment of Mr. Justice Michael White delivered on the 27th March 2014.

1. This is an application for the return of two children, SK and DK, aged five and one respectively. The parties were married in Lithuania on 29th July, 2006. Both children were born in Dublin. The children have dual nationality. They are Irish citizens and hold Irish passports and are also Lithuanian citizens. Both adult parties came to Ireland to live and work in September 2004. They were unmarried then. They lived and worked in Ireland. They returned once or twice a year for holidays and to visit family and after the birth of their eldest child S they spent over a month in Lithuania. After the birth of D the parties returned to Lithuania with the children in September 2012. The applicant states it was the intention of the parties to return to live permanently in Lithuania. In March 2013, the respondent, with the children, returned to live in Ireland. The applicant had returned to Ireland on 17th September, 2012 and returned to Lithuania in mid-October 2012 with all the parties' belongings. The respondent states this happened without her consent. The applicant states that the lease in their rented home in Dublin was surrendered by consent of both parties and that the return to Lithuania was with the intention of settling back in Lithuania and beginning a new life there where a new family home was being constructed. The applicant states that the parties cohabited together in the respondent's parent's family home. The respondent disputes this. There is a serious conflict of evidence between the parties as to the nature of the return to Lithuania in September 2012, the surrender of the lease on the rented property in Dublin, the removal of their joint property from Ireland and the nature of their relationship in Lithuania. There are ancillary conflicts about the schooling of the children and the respondent's employment intentions. There is also a conflict about the nature of the relationship with serious allegations made by the respondent of violence against her and a denial by the applicant.

2. This is not an Article 13 case, but a dispute over the habitual residence of the children. Article 1 of the Convention on the Civil Aspects of International Child Abduction, the Hague Convention, which is applied to Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991 states at paragraph a:

"To secure the prompt return of children wrongfully removed to or retained in any contracting state."

Article three states:-

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

The Court has no difficulty with rights of custody and access being exercised by the applicant. It's the issue of the habitual residence of the children, which is very much in issue.

3. Council regulation EC2201/2003, Article 2, rule 11, defines wrongful removal as:-

"The term wrongful removal or retention shall mean a child's removal or retention where:-

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the member state where the child was habitually resident immediately before the removal or retention and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."

4. Article 10 is more or less a repeat of the Convention. It states:-

"Article 10: Jurisdiction in cases of child abduction. In a case of wrongful removal or retention of the child, the Courts of the member state where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another member state and each person, institution or other body having rights of custody has acquiesced in their removal or the retention."

5. It is undisputed that the parents lived in Ireland, for a period of eight years. A conflict has emerged about the habitual residence between 17th September, 2012 and 13th March, 2013. Up to 17th September, 2012 the habitual residence of S and D was the Republic of Ireland.

6. Fennelly J in P.A.S. and A.F.S.[2004] IESC 95, stated "The Court should endeavour, as far as possible, to interpret the Hague Convention harmoniously with the interpretation adopted by the courts of other contracting states. In practice, that means that we should try to follow those decisions. The Convention is an international agreement designed to resolve situations of personal conflict and the principle of comity and mutual trust between jurisdictions is of prime importance. Against this, it has to be recalled that, by universal accord, the issue of habitual residence is essentially one of fact. To quote again from the judgment of McGuinness J in the *C.M.* case, at page 381: "*Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that "habitual residence" is not a term of art, but a matter of fact, to be decided on the evidence in this particular case. It is generally accepted that where a child is residing in the lawful custody of its parent (in the instant case the mother), its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the same rigid rules of dependency as apply under the law of domicile and the actual facts of the case must always be taken into account*". He further stated: "The Convention deliberately left the notion of habitual residence undefined. The courts of the Contracting States have to be free to apply it to the facts, having considered all the circumstances of the case. Human situations are infinitely variable. Habitual residence will be perfectly obvious in the great majority of cases. It is an obvious fact that a new-born child is incapable of making its own choices as to residence or anything else. What the courts have to look at is the situation of the parents and their choices. Where the child has, for a substantial period, been resident in one country with both its parents, while they are in a stable relationship particularly if they are of the same nationality, the answer will usually be fairly obvious".

7. This Court cannot make a decision based on the evidence before it that the habitual residence of the children had changed from the Republic of Ireland to Lithuania in that short period of time, although it is the applicant's contention that there was an intention formed over a period of four years to return to their homeland. The appropriate jurisdiction to resolve that conflict because of the undisputed habitual residence of the children prior to 17th September, 2012, is the Republic of Ireland. The Court refuses the relief sought for return in pursuance of the summary proceedings under the Hague Convention.