

**THE HIGH COURT**

**FAMILY LAW**

**[2012 No. 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, AND IN THE MATTER OF COUNCIL REGULATION 2201/2003, AND IN THE MATTER OF V. N.**

**BETWEEN**

**L J.**

**APPLICANT**

**AND**

**V.N**

**RESPONDENT**

**JUDGMENT of Mr. Justice Edwards delivered on the 16<sup>th</sup> day of July, 2012**

1. This is an application pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980, as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act, 1991, and Council Regulation (EU) 2201/2003 for the return of the child named in the title to the jurisdiction of the courts of the Czech Republic.

2. The child (hereinafter referred to as "V") was born in the Czech Republic on 10<sup>th</sup> June, 2003 and is a child within the meaning of the Hague Convention.

3. The applicant is the mother of V and the respondent is the father of V. The applicant and respondent were never legally married.

4. The Court has been given to understand that applicant and the respondent, having both been named as parents on V's Birth Certificate, had, under Czech law, joint custody rights in respect of V. It is further understood that V. lived with his both his parents until they separated (his father moved to Ireland in February 2004), and that thereafter he lived at the home of the applicant/the applicant's parents."

5. The respondent moved to Ireland in February 2004 and currently resides in the west of Ireland (address supplied). He is now in a long term relationship with another woman, T, with whom he has another daughter, S. T also has a son, M, from a previous relationship. The respondent has expressed no intention of returning to the Czech Republic any time in the near future.

6. Beginning in or about 2007, V travelled to Ireland to spend two weeks with his father during the summer with the permission of the applicant. On 21<sup>st</sup> July, 2011, V, accompanied by his paternal grandmother, travelled to Ireland to visit his father and was scheduled to return to the Czech Republic on 15<sup>th</sup> August, 2011. Here the stories diverge. According to the applicant, on 10<sup>th</sup> August, 2011, the respondent sought to have V stay in Ireland until 25<sup>th</sup> August, 2011 and the applicant agreed. V was to return to the care of his maternal grandparents upon his return as his mother was due to enter hospital for medical treatment beginning on 11<sup>th</sup> August, 2011. The applicant was not discharged from her treatment until 9<sup>th</sup> December, 2011. V never returned to the Czech Republic. According to the respondent, he decided not to return the child when he learned that the applicant was in a rehabilitation centre. He contacted V's maternal grandparents and told them that he would keep V in Ireland. He avers that he was not contacted by the applicant until she was discharged from her treatment centre in December 2011.

7. V is currently living with his father at the aforementioned address in the West of Ireland. He also attends school there.

8. The applicant commenced these proceedings in January 2012. The Central Authority for the Czech Republic, namely the Office for International Protection of Children, Úřad pro mezinárodněprávní ochranu dětí, Silingrovoneamesti 3, 602 00 Brno, Czech Republic has by letter to the Irish Central Authority requested the return of the children under Article 12 of the Hague Convention in a Request for Return dated 9<sup>th</sup> January, 2012 attached to its cover letter dated 8<sup>th</sup> February, 2012. The respondent was served with the papers in April 2012.

9. The applicant alleges that V was unlawfully retained in Ireland by the respondent in or about 25<sup>th</sup> August, 2011 without the applicant's consent and without lawful authority to do so, thereby breaching the applicant's custody rights under Articles 3 and 5 of the Hague Convention.

10. The respondent has refused to return the child to the Czech Republic because he believes that the applicant is not in a position to care for him. The respondent avers that the applicant is an alcoholic and works as a prostitute.

**Report of Ms. Clodagh Higgins, Psychologist**

11. Ms. Higgins met with V on 14<sup>th</sup> June, 2012 in the presence of an interpreter pursuant to an order of Ms. Justice Finlay Geoghegan for the purpose of ascertaining the views of V.

12. V reported that the applicant lived with V for the first two years of his life and then moved to Slovenia for work. V remained in the care of his maternal grandparents in the Czech Republic. The applicant returned to her parents' home once a month to visit V. V

reported that, when the applicant came home, she rarely played with him and spent most of her time on the computer. V stated that he missed his mother when she was away. V would speak to the respondent via Skype every day or every other day.

13. V said that he spent most of his free time picking cherries or fishing with his grandfather or shopping with his grandmother. He expressed that he did not have anyone to ride his bicycle with. V stated that he was happy living in the Czech Republic and liked living with his grandparents.

14. V told Ms. Higgins that he is much happier living in Ireland. He gets on quite well with his half sister and T's son. His father plays games with him and they all go to the park.

15. V enjoyed going to school in the Czech Republic and enjoys going to school in Ireland. V reported that he is the most popular boy in his present school in Ireland and is friends with the whole school.

16. V says that he would like to remain in Ireland with the respondent and would be upset if he had to return to the Czech Republic. He had never asked to stay in Ireland before this because he did not think it was possible. V said he would go back to the Czech Republic if his father and new siblings could come with him. He misses the applicant and his maternal grandparents and would like to visit them in a similar way to how he used to visit his father.

17. Ms. Higgins reported that V appeared to be mature for his years and developmentally normal. V was clean and well dressed and appeared to be a happy and talkative nine year-old boy. V possessed a good understanding of what it would mean for him to remain in Ireland and not go back to the Czech Republic, appearing to have weighed up possible outcomes and consequences.

18. In Ms. Higgins' opinion, V was lonely living with his grandparents in the Czech Republic and feels a part of a family here in Ireland. Ms. Higgins reported that V's statements amounted to a preference for living with the respondent and his siblings rather than an objection to living in the Czech Republic.

19. This Court has taken all of the above into careful consideration. There does not appear to be a welfare issue as the evidence indicates that V has two loving families with either of whom he would be well cared for. Therefore the Court does not consider it necessary to resolve the conflicts of fact as set out in the parties' respective affidavits, particularly in light of the concession made by counsel for the respondent that the applicant's proofs in terms of the Hague Convention have been met subject to the issue of the child's objections. The sole issue that this Court is therefore concerned with is what weight and significance should be afforded to V's views.

#### **The relevant law**

20. Article 3 of the Hague Convention provides that:

"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."

21. Where the retention of the child, as in this case, is wrongful and the proceedings were commenced within a year of the wrongful retention then the court must, under Article 12 of the Convention, order that the child be returned to the country of habitual residence. Article 12 provides:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

22. It is admitted that the retention of V in Ireland was wrong. It is admitted further that the applicant was exercising her custody rights over V when the wrongful retention occurred.

23. Article 13 contains the exceptions to the mandatory obligation to return the child provided for in Article 12. The respondent in this case submits that Article 13(b), which is in the following terms, is applicable:

"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."

24. The applicant herein submitted to the Court that taking the objections of the child into consideration is an exceptional circumstance and that the situation which presents itself to the Court in this instance is not such a circumstance. In support of that viewpoint, the applicant referred the Court to a number of decisions of both the High Court and the Supreme Court on the issue of when the objections of a child should be taken into consideration. In *Z.D. v. K.D.* [2008] 4 IR 751, McMenamin J. noted that "*the views of the child are not synonymous with an obligation to bow to the child's wishes*". That view was quoted with approval by Birmingham J. in the High Court in *A.U v. T.N U* [2011] IEHC 268, upheld by the Supreme Court [2011] IESC 39.

25. In his judgment in *A.U v. T.N U*, Birmingham J. stated that he was satisfied from the report presented to the Court by the assessor that the children were bright and that they had clear and firm views. It was, he found, appropriate to take account of those views. However, noting what McMenamin J. had said in *Z.D. v. K.D.*, Birmingham J. continued "*it seems to me that the views expressed by the children have to be seen in the wider context surrounding the application*". The wider context, in that case, was that the applicant did not have custody rights and that the respondent had been awarded sole custody by a court of competent jurisdiction in New York. The behaviour of the applicant had led to the supervised access visits he had been granted being suspended. The applicant had spent very little time with the children, having absconded to Nigeria for a period of three years and having served a prison sentence on his return to the United States. All of the above, according to Birmingham J., made the case before him exceptional and led him to the conclusion that the views of the children were understandable and were given a degree of validity by the factual situation. Denham C.J., speaking for the Supreme Court in upholding the decision of the High Court said that "*a Court in deciding whether a child objects to his return should have regard to the totality of the evidence.*"

26. Denham C.J. referred to the decision of Baroness Hale in *Re M (Abduction: Zimbabwe)* [2008] 1 AC 1288 at para. 46:

"In child objection cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: First, that the child herself objects to being returned and second, that she has attained an age and a degree of maturity at which it is appropriate to take account of her views. These days, especially in light of Article 12 of the United Nations Convention on the Rights of the Child, Courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that these views are always determinative or even presumptively so. Once the discretion comes into play, the Court may have to consider the nature and strength of the child's objections, the extent to which they are: "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

27. The respondent, in his submissions, referred the Court to a number of cases in which the views of the child were accepted and, exercising the discretion afforded to it under Article 13(b), the court refused to make an order returning the child. In *A.K v. A.J.* [2012] IEHC 234, Finlay Geoghegan J. refused to order the return of the children concerned, two boys aged 10 and 7, to Poland. In that case, the children involved expressed the view that they would like to continue to live in Ireland with their father, his new partner and their half sister. They suggested further that, if their father returned to Poland with the whole family, they would be happy to continue to live with him in Poland. Finlay Geoghegan J. considered the totality of the evidence and the factual situation pertaining to the children, including the fact that their father had a new family and a business which he continued to run in Ireland.

28. The court set out and applied the judgment of Denham C.J. at paras. 35 and 36 of *A.U v. T.N.U* above on the general approach to be taken in the following terms:

"35. The Hague Convention provides that in normal circumstances children should be returned after a wrongful removal to the country of their habitual residence. This fundamental principle is in the best interests of the children and is applied generally.

36. 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. As Article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed out in the case of *Re M (Abduction: Zimbabwe)* 1 AC 1288 the extent to which the child's objections 'coincide or are at odds with other considerations' which are relevant to his or her welfare are also relevant."

29. It should be noted that, in *A.K. v. A.J.*, Finlay Geoghegan J. considered that the underlying philosophy of the Convention, that is the prompt return of children to their country of habitual residence, was not possible because the children had been in Ireland for four years. Further, and unusually, the courts in Poland had ordered that the children be placed in the parental care of their father, knowing that he was living in Ireland. It is these exceptional and "unusual" circumstances, as was held by the court, that is the difference between that case and the matter at issue here.

30. In *P. v. P.* [2012] IEHC 31, Finlay Geoghegan J. refused to order the return of a 15 year old girl to Poland, taking her objections into consideration as part of the totality of the evidence presented. In that case there were very serious allegations made against the mother of the girl. Further, she was living in a town in Ireland with her father who had, the court noted, had a job, a home and had created a life for himself. Her older sister was also living close by with her own children. In making her decision, Finlay Geoghegan J. applied the test set out in *C.A. v. C.A. (Otherwise C.McC.)* [2010] 2 I.R. 162, 171 at para. 25:

"Counsel for both parties were in agreement that the proper approach of this court is what has been termed the three stage approach to a consideration of a child's objections. Potter P. in *Re. M (Abduction: Child's Objections)* [2007] EWCA Civ 260, [2007] 2 F.L.R. 72, at p. 87, stated:-

' Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return'."

31. The fact of the matter was, as was borne out by the interview with the child by the court appointed assessor, that she objected to being returned to the care of her mother. That is what would have occurred had the order for return been made. The court referred to the judgment of the UK Supreme Court in *Re E. (Children) Abduction: Custody Appeal* [2011] UKSC 27, a case referred to by the parties hereto, as follows:

"In that decision, the UK Supreme Court considered *inter alia* the application of the Hague Convention by national courts in the context of an article 13 defence subsequent to the judgment of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* [GC] no.41615/07 ECHR [2010]- (6.7.10). That case concerned the interrelationship between Article 8 of the European Convention on Human Rights and orders for return under the Hague Convention.

40. As stated in that judgment, the defence provided for in Article 13(b) of the Hague Convention is one which should be given a restricted application but that does not mean it should never be applied at all. The burden of proof normally lies with the person who opposes the child's return. The standard of proof is the ordinary balance of probabilities. It is for them to adduce the evidence to substantiate the exception."

### **The Court's Decision**

32. Applying Potter P.'s test in *Re. M (Abduction: Child's Objections)* as approved by Finlay Geoghegan J. in *CA. v. CA. (Otherwise C.McC.)*, the first question to be considered is whether or not any objections to a return, as articulated by V, are made out. This begs the question whether or not V has in fact articulated any objections (as opposed to a mere preference). It is clear from the report of Ms. Clodagh Higgins, psychologist, that V is mature for his age. However, he is only just nine years-old. In so far as the report contains any reason articulated by V for not wishing to return to the Czech Republic, it is that V's father will not be there. He wishes to remain in Ireland with his father, his father's partner, his half sister S and his father's partner's son. The psychologist herself has opined that V was "very lonely living with elderly grandparents in the Czech Republic" and that "the move to Ireland has benefited V's development as he has been able to form secure emotional attachments with his extended family which it appears he craved." However, these are not views that have been articulated expressly by V who, in fairness, may not yet have attained the level of maturity to be able to do so. The psychologist says that he is "much happier in Ireland", and that may be so, but there is nothing to suggest that he was seriously unhappy in the Czech Republic apart from the psychologist's opinion that he may have been lonely. It is significant, I believe, that V has not himself articulated any degree of unhappiness before coming to Ireland.

33. It is clear that V has family members in both countries who love him and want to care for him. He appears to have been well treated in both places and there is no physical or material welfare issue about which the Court need be concerned. This Court is not best equipped to determine where on balance V should reside permanently, and it is for this reason that the Courts of the Czech Republic will ultimately be required to make this decision.

34. The law is, reflecting well established policy, that a child in V's position should be returned unless there are good reasons based upon objections raised by the child not to do so. It is a matter for the Court's discretion, but that discretion should be exercised carefully and taking into account both public policy considerations and the welfare of the child. It seems to me that before I would be justified in refusing to return V, I would have to be satisfied that his objection to being returned involved more than a mere expression of preference, and that it would in some respect be contrary to his welfare to return him. I do not consider that the loneliness issue perceived by the psychologist provides a sufficient basis in the circumstances of this case for the Court not to return the child to the Czech Republic. V has only been living in Ireland since 21<sup>st</sup> July, 2011. While this is undoubtedly a long time in the life of a nine year-old, it is not so long as to tip the scales in favor of non-return in my view. V has grown up and has spent the majority of his life in the Czech Republic. His first language is Czech. His entire school life was in a school in the Czech Republic up until last September when he was enrolled in an Irish school. While he is said to be doing well in school here, there is nothing to suggest that he was not doing equally well, if not better, in the Czech Republic where he was being educated in his first language. While he spent much time in the company of elderly grandparents, and to a lesser extent with his mother, and has no siblings in the Czech Republic, it is reasonable to infer that he had the society of young people of his own age at school. He was not therefore totally isolated from children of his own age. Indeed, the psychologist reports that he stated that he liked school in the Czech Republic. While, possibly, it might have been more difficult for him to spend time with and play with other children in after school hours in circumstances where he was living with elderly grandparents, there is nothing to suggest that any active steps were taken by his grandparents to prevent him from developing friendships or from spending time with other children, or doing the sort of things that young children typically enjoy. The Court notes that his grandfather used to take him fishing. Moreover, it is entirely likely that, as he grows older and requires less close supervision, the opportunities for pursuing friendships with and having recreation with other children will increase. There is a conflict on the affidavits concerning the amount of time spent with V by his mother and the Court cannot resolve this. However, the Court notes that the mother has now recovered from her illness and that must surely be regarded as a hopeful sign. The Czech courts will ultimately determine where V will reside. Bearing that in mind, it seems to me, that it will make their task immeasurably more difficult if V is retained in Ireland other than for good and sound reasons pending the hearing of those proceedings. The longer he stays here the deeper the roots he will put down. I do not consider that the preference of a nine year-old, albeit one who is mature for that age, and the mere suggestion of a degree of loneliness provides sufficiently good and sound reasons for not returning this child. It would have been preferable if the matter had come before the Court sooner, ideally within six months of the unlawful retention of the child by the father, but the delay in that regard has to be viewed against the background that the mother was in hospital for a number of months and was only discharged in December, 2011. I am satisfied that there has not been any undue delay on her part in all the circumstances of this case.

### **Conclusion**

35. In conclusion, the Court is disposed to make an order returning V to the Czech Republic notwithstanding that V does not wish to return and would prefer to remain with his father in Ireland. The Court does not consider that this is an appropriate case in which to exercise its discretion not to return the child.

36. I will therefore make an Order pursuant to Article 12 of the Hague Convention directing that the child V be returned to the Czech Republic forthwith. I will also grant a Declaration that the respondent has wrongfully retained the child V within the jurisdiction of this State within the meaning of Article 3 of the Hague Convention.

37. I will hear submissions from the parties as to whether any further or other ancillary Orders or Declarations ought to be granted in the circumstances of this case including an order under Article 26 of the Hague Convention in respect of costs and expenses.