Neutral Citation Number: [2009] IEHC 104

THE HIGH COURT

FAMILY LAW

2008 41 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 U.G. (A MINOR)

BETWEEN

E.B.

APPLICANT

AND

A.G.

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 4th day of March, 2009

1. The applicant is the father of the child named in the title. The respondent is the stepfather of the child. The mother of the child ("the mother") who, regrettably, died on 8th May, 2008, was married to the respondent. The applicant and the mother were never married.

2. The applicant seeks an order pursuant to Article 12 of the Hague Convention on Child Abduction, as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991, for the return of the child to Latvia being, it is alleged, his place of habitual residence. The applicant contends that the child was wrongfully retained in Ireland and out of his country of habitual residence, Latvia, in breach of the applicant's rights of custody, and contrary to Article 3 of the Convention, on the 15th June, 2008.

3. It is common case that the onus is on the applicant to establish that the child was habitually resident in Latvia immediately prior to 15th June, 2008, and that if he fails to do so, the present application must be dismissed. The respondent denies the child was then habitually resident in Latvia and contends that he was habitually resident in Ireland in June 2008.

4. The majority of the facts relevant to the issue of habitual residence are not in dispute. The child was born in Latvia in 1996. The mother was, and the child and the applicant are, nationals of Latvia. The child lived with his mother and maternal grandparents in Latvia from birth until 2003, and thereafter with his maternal grandmother in Latvia until August 2007. The applicant and the mother had a brief relationship in 1995. The applicant acknowledged that he was the father of the child some years after his birth.

5. The mother came to Ireland in 2003. The child remained in Latvia and visited the mother in Ireland during school holidays. He had access visits with the applicant whilst in Latvia. The child's mother married the respondent in Romania in February 2006. The respondent is a national of Romania who has resided in Ireland since 2000. The mother was diagnosed with cancer in 2006 and returned to Latvia with the respondent for a number of months to receive medical treatment. The mother brought the child to Ireland in August 2007 and he commenced school in Ireland in September 2007. He lived with his mother and the respondent. The mother required further medical treatment in Ireland in October 2007. The respondent's mother came and assisted in looking after the child. The mother of the child, regretfully, died on 8th May, 2008.

6. The child travelled with the respondent to Latvia on 14th May, 2008, for the purpose of the mother's funeral. There are significant disputes as to what was agreed between the applicant and the respondent whilst the child and the respondent were in Latvia between 14th and 28th May, 2008. Those disputes are relevant to other potential issues in proceedings but not necessarily to the issue of habitual residence. I am satisfied, on the affidavits, that the applicant, by 15th May, 2008, had determined that the child should return to live in Latvia though not necessarily when this should happen. At paragraph 8 of his affidavit, he states:

> "I say that I made arrangements for [the child's] life to resume in Latvia including arranging appropriate schooling for him."

This averment is made in response to an averment of the respondent in paragraph 7 of his first affidavit in which he stated:

> "I say that on 15th of May, 2008, the applicant visited this apartment to tell me that it was his intention to assume custody over [the child]."

7. The apartment referred to was an apartment that had been owned by the mother in Latvia in which the respondent and the child were then staying.

8. The applicant then made an application to, what in translation is referred to as, the "City Orphans Court", as the applicant puts it, "to decide all matters pertaining to [the child's] welfare". The applicant has not put before this Court the precise nature of that application nor any documents other than minutes of meetings held between officials of the Court and each of the child and the respondent. There is no decision or order of the Court produced by the applicant or relied upon.

9. The applicant then consented to the child returning to Ireland with the respondent. There is dispute as to the terms of the consent. The applicant contends that he only consented to the child returning to Ireland until 15th June, 2008. He appears to have understood that to be the end of the school year in Ireland, which, in fact, was on 27th June, 2008. Nothing turns on this small difference. The respondent contends that, after much persuasion, the applicant gave his consent and authority for the child to return with him to Ireland and to the child's continued residence in Ireland until adulthood, provided the child wished to live here.

10. The applicant, on 26th May, 2008, executed before a notary in Latvia a document, which appears to have been registered in a Latvian District Court pursuant to the relevant Latvian regulation, giving his consent to the child crossing

> "The borders of the Republic of Latvia when travelling abroad and returning back to his domicile in Latvia accompanied by adults known to me, as well as accompanied by various groups, their authorised individuals/teachers, instructors, leaders of the groups/or independently unattended by any adult person within the period from 26.05.2008 until he reaches lawful age (10.08.2014)".

The document records certain ancillary consents. It is agreed that such consent was necessary for the child to travel out of Latvia with the respondent. The respondent relies upon this in support of his contention that the consent was unlimited in time. The applicant contends that it was a document executed for travel purposes only. As a matter of fact, the document is expressed to last until the child is of full age.

11. The child and the respondent returned to Ireland on 28th May, 2008.

12. The applicant deposes that when the child did not return to Latvia both he and a judge of the Orphans Court "called the respondent to ascertain when [the child] would be returned". It is not stated when this happened.

13. The applicant came to Ireland in September 2008, he states, to bring the child back with him to Latvia. There was a meeting between the applicant, the respondent, the child and others at the Latvian Embassy. The child did not return with the applicant to Latvia. On 23rd September, 2008, the applicant made a request to the Latvian Central Authority for the return of the child pursuant to the Hague Convention. These proceedings were commenced on instructions given through the Irish Central Authority on 22nd October, 2008.

14. In the meantime, the respondent applied to the District Court in Dublin for an order pursuant to s. 8(1) of the Guardianship of Infants Act 1964, that he be appointed a guardian of the child with the applicant. Such order was made on 22nd October, 2008. That order was appealed and on 12th December, 2008, the Circuit Court made no order (the orders of the District Court being thereby vacated). I was informed by counsel that there was no hearing of the appeal on the merits but, rather, the decision was by reason of s.13 of the Act of 1991 as these proceedings commenced on the same day as the hearing in the District Court. Section 13 of the Act of 1991 requires that custody proceedings in relation to a child, the subject of proceedings under the Act of 1991, should be stayed.

Habitual residence

15. Habitual residence is not defined in the Convention or in the Act of 1991. It is well established that this Court must determine whether, as contended by the applicant, the child was habitually resident in Latvia within the meaning of the Convention, in June 2008, in accordance with Irish law. Nevertheless, as stated by Fennelly J. in *P.A.S. v. A.F.S.* [2005] 1 I.L.R.M. 306 at p. 314:

> "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 we should try to follow those decisions."

In *P.A.S. v. A.F.S.*, Fennelly J. emphasized that, by universal accord, the issue of habitual residence is essentially one of fact. He then cited the well-known passage from the judgment of McGuinness J. in *C.M. v. Delegación Provincial de Malaga* [1999] 2 I.R 363 at p.381:

> "Having considered the various authorities opened to me by counsel, it appears 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 that actual facts of the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there."

Fennelly J. then stated at p. 315:

> "This passage, subject to one caveat, seems to me to state correctly the approach that a court should adopt to assessing the issue of habitual residence. The last sentence seems, however, to state too broad a proposition and I will return to it."

Having then considered a number of English authorities in relation to the approach to determination of a child's place of habitual residence, Fennelly J. concluded at p. 317:

> "...that to exclude, in every case, the possibility of a child being habitually resident in a country where it has never physically been is to introduce an unjustified restriction into the open and flexible notion adopted by the convention."

Prior to reaching that conclusion, he had referred to a number of examples relating primarily to young infants, as the child in *P.A.S.* was only approximately four months old at the date of the alleged wrongful removal.

16. I intend approaching the determination of whether, as contended by the applicant, the child was habitually resident in Latvia in June 2008 in accordance with the approach set out by McGuinness J. in *C.M. v. Delegación Provincial de Malaga*, with the exception of the general proposition set out in the final sentence as approved by the Supreme Court in *P.A.S. v. A.F.S.*. For clarity I would add that the applicant must establish the habitual residence of the child in Latvia on the normal standard of proof in civil proceedings, the balance of probabilities.

17. However it must be noted that the factual assessment in this case is quite different to that in *P.A.S. v. A.F.S.* and certain of the authorities referred to therein which concern the acquisition of a habitual residence by a young infant. On the facts of this case it is not in dispute that the child was habitually resident in Latvia until August 2007. Counsel for the applicant does not dispute, correctly

in my view, the contention on the part of the respondent that the child had changed it s habitual residence and acquired a habitual residence in Ireland prior to the death of his mother on 8th May, 2008. The consideration of relevant facts includes that the child on 8th May, 2008,was approximately 12 years old and his habitual residence was then in Ireland. The issue is has the applicant established that subsequent to 8th May 2008 but prior to 15th June 2008 the habitual residence of the child changed to Latvia. On the facts of this case such change can only have occurred if the child ceased to be habitually resident in Ireland.

18. It is not contended that the child automatically ceased to be habitually resident in Ireland on the death of his mother, again, in my view, correctly. In *A.S. v. E.H.* [1999] 4 I.R. 504, the issue was whether a twenty-two month old child whose mother was Irish but had lived in England and whose father, to whom the mother was not married, was Moroccan living I England , lost an admitted habitual residence in England subsequent to the death of the mother. On the mother's death, the maternal aunt and maternal grandmother, who were Irish and habitually resident in Ireland, took over care of the child and shortly thereafter brought him to Ireland.

19. In an application in the High Court under the Hague Convention and Act of 1991 by the father for return to England, the Court had to address the issue of the habitual residence of the child at the date of the alleged wrongful removal. There had been proceedings in England in relation to the same child prior to the Irish proceedings. Geoghegan J. in the High Court at p. 510 expressed agreement with the views, *inter alia*, expressed by Butler-Sloss L.J. in the Court of Appeal in *Re: S. (Abduction: Hague and European Convention)* [1997] 1 F.L.R. 958, (which in turn was approved, on appeal, by the House of Lords: [1998] A.C. 750) on the issue as to whether the child lost his habitual residence in England, either when the appellants took over his *de facto* care or when they took him to Ireland. Butler-Sloss L.J. stated at p. 962:

> "The death of the mother, the sole carer, would not immediately strip the child of his habitual residence acquired from her, at least, while he remained in the same jurisdiction. Once the child has been removed to another jurisdiction, the issue whether the child has obtained a new habitual residence whilst in the care of those who have not obtained an order or the agreement of others will depend upon the facts. But a clandestine removal of the child on the present facts would not immediately clothe the child with the habitual residence of those removing him to that jurisdiction, although the longer the actual residence of the child in the new jurisdiction without challenge, the more likely the child would acquire the habitual residence of those who have continued to care for the child without opposition. Since, in the present case, the English Court was seised of the case within 2 days of the removal of the child, it is premature to say that the child lost his habitual residence on leaving England or had acquired a new habitual residence from his de facto carers on arrival in Ireland."

20. Counsel for the applicant herein submits that following the death of the mother, the applicant became the sole guardian of the child. The mother did not appoint a testamentary guardian. Further, that in accordance with s. 10(2) of the Guardianship of Infants Act 1964 the applicant was entitled to the custody of the child. It is submitted that the applicant, therefore, was the person who could make a unilateral decision as to where the child should thereafter reside. Counsel on his behalf submits that on some date prior to the visit by the applicant to the respondent and the child in the apartment in Latvia on 14th May, 2008, the applicant had determined that the child should return to reside in Latvia. She further submits that the effect of such a decision taken by the applicant, even without it being implemented, and the child returning to reside in Latvia, was to change the habitual residence of the child from Ireland to Latvia. Counsel for the applicant, in making this submission, does not rely upon the fact that the child travelled with the respondent to Latvia for his mother's funeral for approximately two weeks in May 2008. It is not submitted that such visit, of limited duration, had the effect, even in conjunction with the decision made by the applicant, of changing the habitual residence of the child from Ireland to Latvia. For the reasons set out below, in my view, counsel for the applicant was correct not to place any particular reliance upon this visit which was for a specific purpose, of limited duration and not by reason of the decision of the applicant.

Conclusions

21. Applying the above principles and assessing all the relevant facts , I have concluded that the applicant has failed to establish that the habitual residence of the child changed from Ireland to Latvia on some date between 8th May, 2008, and 15th June, 2008, the latter being the date of the alleged wrongful retention. In assessing the claim in the light of all the facts, I must start from the undisputed position that the child was habitually resident in Ireland prior to 8th May, 2008. On the death of his mother he was in the *de facto* care of the respondent. This was, initially, without objection from the applicant. The child travelled with the respondent to Latvia for the specific purpose of his mother's funeral and for a limited period of time. That visit, of itself, it is accepted, did not alter his habitual residence. Counsel for the applicant contends that the effect of the decision of the applicant that the child return to live in Latvia, as the sole person then entitled to determine where the child should live had the effect of altering the habitual residence of the child from Ireland to Latvia even without the child moving from Ireland to reside in Latvia. This proposition appears to me to run contrary to the well established view of the Courts in this jurisdiction, and in England and Wales, that the terms "habitual residence", or "habitually resident", as used in Article 3 of the Convention, are not to be treated as terms of art with some special meaning, but, rather, to be understood according to the ordinary and natural meaning of the two words they contain. (See, for example, *In Re J. (A Minor) (Abduction)* [1990] 2 A.C. 562, *per* Lord Brandon at p. 578). The Court must assess on all the facts whether the habitual residence of the child giving those words their natural and ordinary meaning changed as a result of the applicant's decision. For that purpose it is necessary firstly to consider the nature of the decision.

22. Even on the father's case, the final decision made by him, whilst the child was in Latvia in May 2008, was that the child should return to live in Latvia at the end of the Irish school year. Insofar as there is evidence of an earlier decision there is no evidence as to when the applicant intended that the child return to live in Latvia and if earlier than the end of the Irish school year such decision was varied by the final decision. The applicant, on his case, also decided that the child was permitted to return to Ireland in the care and control of the respondent until at least 15th June, 2008, or the end of the Irish school year. He executed the notarised document to permit the child travel to Ireland. In my view, the child during June 2008 continued to reside in Ireland and attend school in Dublin as he had done prior to May 2008. This residence in Ireland was without objection from the applicant either until 15th June, 2008, or more probably the end of the Irish school year which is stated to have been 27th June, 2008. During this period, the child continued as a matter of fact to be resident in Ireland and by reason of his prior habitual residence also I have concluded to continue to be habitually resident in Ireland. There was no decision that his place of residence should change prior to the end of the Irish school year. There was no change in this period in his place of habitual residence. Without a change in his habitual residence, he cannot have acquired a habitual residence in Latvia.

23. The above conclusion is sufficient to determine the applicant's claim. However in so determining by reference to the decision taken I do not wish to be understood as accepting the submission of Counsel for the applicant that a decision taken by the applicant, as the sole person entitled to determine where the child should live , that the child return to live in Latvia had the effect of changing the child's habitual residence from Ireland to Latvia after the date upon which the decision was intended to come into effect without any change in where the child lived.. Where as on the facts herein the child is 12 and has an acquired habitual residence in Ireland it

does not appear to me that such decision alone changes the habitual residence of the child. Whilst there may be a settled intention by the applicant as sole guardian that the child return to reside in Latvia at a specified date, if the child does not comply with the decision and continues to reside in Ireland after that date, then for so long as he does so it does not appear to me on an assessment of all the facts and giving the words "habitual residence" their natural or ordinary meaning I should conclude that there has been a change in the habitual residence of the child from Ireland to Latvia. There has been no change in the country of residence of the child. He has not ceased to reside in Ireland albeit this factual position may be contrary to the decision taken by the applicant as his sole guardian. Nevertheless it is the factual position and as such essential to the determination of habitual residence.

24. As the applicant has failed to establish that the child was habitually resident in Latvia immediately prior to the date of the alleged wrongful retention, the application under the Hague Convention and Act of 1991 must fail. Accordingly, I dismiss the application.

25. I wish to add two observations. First, the decision to dismiss the applicant's claim is not and should not be seen as a determination by this Court either that the child should continue living in Ireland or that the child should continue living with the respondent. It is simply a decision that the applicant is not entitled to a summary order for the return of the child pursuant to the Hague Convention as the child was not habitually resident in Latvia immediately prior to the alleged wrongful retention.

26. Secondly, it is to be hoped that both the applicant and the respondent, each of whom I am convinced has the best interests of the child at the centre of his concern, will be able to reach agreement in relation to the future care and living arrangements for the child. If not, then any claim by the respondent to have a formal role in the child's life and any dispute between them should be resolved promptly by the appropriate Irish Court. That will be done on the basis of full hearings and a consideration of what is in the best interests of the child and with a jurisdiction which has a flexibility and discretion which is not available to the Court in this application.