

## THE HIGH COURT

[2017/31 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/EC

## AND IN THE MATTER OF J., A CHILD

J.G.

APPLICANT

AND

A.M.

RESPONDENT

**JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 5th day of March, 2018****Background:**

1. This is an application pursuant to article 3 of the Hague Convention for a declaration of wrongful retention of a child and an order pursuant to article 12 for the return of the child to Lithuania.
2. The child, "J", was born on the 27th September, 2016 and is currently 17 months old.
3. The applicant is the child's mother, who is based in Lithuania and the respondent is the child's father, who is based in Ireland.
4. The parents were never married but both were named on the child's birth certificate and both have custody rights under Lithuanian law.
5. J lived with her mother in Lithuania for 9 months, from the time of her birth in July 2017 until she was brought to Ireland. During this time, the respondent visited her twice.
6. J was brought to Ireland on the 6th July, 2017 (when she was 9 months old) and has been living here with her father since that date. She travelled with her paternal grandmother from Lithuania to Ireland. The grandmother travelled with the child to Ireland and then returned to Lithuania.
7. The father lives in Ireland with his partner, her two children from a previous relationship, a child he shares with his current partner, and J, the child the subject matter of these proceedings.
8. The central issue in these proceedings is whether the applicant mother, as a matter of fact, consented to the child coming to Ireland to live on a long-term basis or whether it was only intended to be for a short period of time.

**Evidence Regarding the Nature of the Consent Given:**

9. In the affidavit of the solicitor grounding the application, it states that the applicant wished to visit her sick father in Ukraine and that it was in these circumstances that it was arranged for J to be sent to her respondent father in Ireland. She contends that her consent was only for J to be removed to Ireland for a period of 4-8 weeks. It states that around the 22nd August, 2017, upon her return from Ukraine, she immediately sought the return of the child. She says that this request was refused and that the father threatened her that she should not institute proceedings for the return of the child.
10. J's paternal grandmother swore an affidavit, in which she says that she had a conversation with the applicant mother on the 9th May, 2017. In this conversation the mother said that she was tired of always being responsible for the child, that her movements were restricted and that she herself had stage 3 osteoporosis and did not have the time to go to the hospital because of the baby. The grandmother further avers that the applicant stated that she wanted to "relax and go visit her father who she had not seen for some time." She says that she asked the applicant if she wanted the respondent father to take the baby, to which the applicant replied "yes". She says that she then promised to call the respondent father (her son), which she did once the applicant left. She says that she did not discuss the matter further after this. The applicant obtained a passport for the child and gave certain documents (to which I will refer later) to the grandmother. She says that the applicant told her that the baby was due for vaccination in 3 months. The grandmother says that it was clear that the applicant wanted her son (the respondent father) to raise the child because she herself was struggling to cope.
11. In his affidavit, the respondent father says that following his phone call with his mother he spoke on the phone to J's mother (the applicant) in May 2017 and that it was agreed between them that the child would come and live with him. He says that after the child came to Ireland the applicant made no contact with him until September 2017, when she requested the return of the child. He says that during the interim period the applicant mother made no contact with him inquiring about the welfare of J. He says that he believes that the applicant's motivation for seeking the return of J is financial. He believes that she is in need of the maintenance payments that she had been in receipt of prior to the child coming to Ireland, which are very valuable by Lithuanian standards (€300-€350 equivalent per month). He further denies having made any threats to the applicant mother.
12. In an affidavit sworn by the applicant after the affidavits of the father and the grandmother referred to above, she says that she did not tell the grandmother that she wanted the respondent father to raise the child but rather that the grandmother asked to take J to see her son (the respondent father) as he greatly missed his daughter. She also says that she had a discussion at the end of August with the father about returning the child wherein he said that he would bring the child back to Lithuania when he was going to Belarus in September to attend a wedding. She says that he then decided not to attend the wedding and has since refused to return the child. She then says that he threatened to kill her and that she was frightened of him.
13. There was insufficient time for a replying affidavit to be sworn by the respondent father before the hearing of the proceedings and he gave oral evidence (evidence in chief) on the day of the hearing but only for the purpose of replying to matters raised in the

applicant's affidavit, and he was not cross-examined.

14. In his oral evidence, he said that in the May 2017 telephone conversation, the applicant mother said that she was going to visit her father in Ukraine. He gave evidence that he understood that the father was suffering from osteoporosis and that there were a few references to the mother bringing fruit and vegetables to him. His view was that it was untrue that her reason for going to Ukraine was because her father was sick. He believed that the real reason was to enable her to socialise and engage in recreational activities. He also said that he told her in this initial conversation that he would collect the child when he came over for a wedding in September but that the applicant mother refused. He gave evidence that the applicant mother insisted that he must take charge of the child immediately as she had booked her travel to Ukraine, and that it was as a result of this that they agreed that the grandmother would bring the child to Ireland instead.

15. He was asked what had been agreed in terms of the time-frame for the child staying in Ireland. The respondent father gave contradictory answers to this question. At one point in his evidence, he said that they did not discuss a time-frame. At another point, he said that they agreed that it would be a long-term arrangement and certainly not a 4-8 week time-frame. He also made reference in his evidence to being afraid that the child would be put into care if the applicant mother started making allegations about the child being stolen, and referred to the fact that he was not familiar with the law in Ireland. This does appear to me to be consistent with some kind of discouragement, if not actual threats, being made by the respondent father to the applicant mother regarding the initiation of proceedings. He said that he had visited J twice in Lithuania during the 9 months she lived there.

16. It is common case that J arrived in Ireland with the following documents:

(a) Birth certificate;

(b) Vaccination records; and

(c) A notarised consent form signed by the mother which allowed for the grandmother to travel with the child 'to all foreign countries' up to the child attaining the age of 18.

17. This notarised consent form has been furnished to the court. It is not in dispute that the mother organised to go to the notary to procure the consent form and then furnished it to the grandmother. The respondent placed considerable reliance upon this document as being an indicator of the mother's intention that the child would be with the respondent father on a long-term basis.

18. As a matter of fact, the child would have been or was due her next vaccination at 12 months, that being the end of September 2017.

19. It is common case that the father paid for the airline tickets and that there was a return ticket for the grandmother and a one-way ticket for J.

20. The father obtained a PPS number for J within days of her arrival in Ireland (the letter giving the PPS number from the Irish authority is dated 12th July, 2017). He also registered her with a GP.

21. The father was already living in Ireland and has a separate family unit, as described above.

#### **Commencement of These Proceedings:**

22. The proceedings herein were commenced by special summons dated the 23rd November, 2017, the applicant having submitted her application for the return of the child on the 6th November, 2017.

23. There was some delay in serving the papers on the respondent father. It appears that attempts were made to serve him at an address at which he had lived a number of years previously. There was some dispute at the hearing in relation to this issue. However, no useful inferences can be drawn for present purposes from the evidence on the question of where he lived and what the mother knew about this when she instituted proceedings.

#### **Legal Principles Concerning Consent:**

24. The applicable legal principles concerning consent were set out clearly by Hale J. (as she then was) in *Re K. (Abduction: Consent)* [1997] 2 F.L.R. 212 and applied by the Supreme Court in *SR v. MMR* [2006] IESC 7 as follows:-

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

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

(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."

#### **Decision:**

25. There was no written consent on behalf of the applicant mother to J being brought to live with her respondent father on a long-term basis. Therefore, it is necessary to decide the issue on the basis of inferences from the evidence, including the documents put before the court. It should be noted that it is very difficult to decide issues of fact in circumstances where the evidence is on affidavit only and parties were not cross-examined. The onus and the burden of proof, as set out in the authorities, are very relevant considerations in such a situation. Further, it is a very serious matter to reach the conclusion that the mother of a 9-month old infant, who has lived with her for that entire time, has consented to the child living in a different jurisdiction on a long-term basis. The necessity for clear and cogent evidence in that regard is obvious.

26. The travel document allowing the grandmother to travel with the child, undeniably providing unlimited consent to the child travelling up to the age of 18 with her grandmother, is of relevance. However, it does relate only to travel. It does not seem to me that it can be construed as *necessarily* supporting the view that she had intended for the child to reside on a long-term basis with the respondent father in Ireland. There are two reasonable interpretations that can be drawn from the document. One supports the view that the applicant mother intended for the child to be placed in the care of the respondent father on a long-term basis. The other is that the document was simply to facilitate the child travelling back and forth, not only on this occasion but in the future, in circumstances where the applicant mother was on good terms with the paternal grandmother and had not anticipated that any problem would arise or that the child would be retained.

27. It is a minor point but it is worth noting that under Lithuanian law, as appears from the relevant provisions of the Civil Code (Art. 3.174), the right to bring a child to a foreign country for "permanent residence" can only be done if the parent has received a written consent from the other parent. In this instance, the mother went to a notary but did not procure any such consent, and instead obtained a document providing an unlimited consent to travel. It seems to be that this is a fact which is relevant in terms of drawing inferences as to her intention

28. The respondent father's application for a PPS number of J is not indicative of the applicant mother's intentions. She may not have been aware of his plan to do this. Indeed, she avers to the fact that she was, in fact, not aware of his intention to do so.

29. As regards the mother providing the father with J's birth certificate and vaccination records, it is true that the vaccination due date was not for 3 months which raises questions, considering that the mother contends that she had only agreed for the child to be out of her care for 4-8 weeks. However, it must be borne in mind that these proceedings concern an infant child travelling a considerable distance. It could simply be a precautionary measure to send the vaccination documents with her. The respondent father gave evidence that he asked the mother to supply them and that she complied with this request but that there was no discussion about vaccination itself.

30. A comparison of the affidavit evidence of the grandmother with that of the respondent father demonstrates that there are discrepancies between the two accounts. The grandmother appears to be advancing the proposition that the mother was tired of caring for the child and that this was her reason for sending the child to stay with the respondent father and she makes no reference to the applicant mother's sick father in Ukraine. However, the respondent father agrees with the applicant when she states that her desire to visit her sick father was the reason behind sending the child to Ireland, even though he believes it to be a cover story to hide her true intentions.

31. Additionally, the father gave contradictory evidence regarding the telephone conversation he had with the applicant mother in May 2017 wherein they discussed whether the change of residence was to be long-term or not. In oral evidence, he stated that they did not discuss this at all, that what was discussed was a period of 2-3 months. Following a short period to take instructions, he returned and, through an interpreter, he presented different evidence to the court, namely that they had agreed during this telephone conversation that the child would come to reside with him on a long-term basis. In his affidavit he avers that in the said telephone conversation he asked the applicant mother if it was true that she was requesting that he take the child on a permanent basis, and she said that it was. It is possible that language difficulties could be the cause of these contradictory statements; however, I am not fully convinced that this is so. The respondent did not appear to have any difficulties with comprehension when giving most of his evidence; he has been living in Ireland for many years and had originally chosen to make his affidavit in English.

32. In his affidavit the father says that the applicant mother started seeking the return of the child in September. Thus, whilst she initiated proceedings in November, the period between her alleged giving of permanent consent to J residing with the respondent father and her alleged subsequent change of mind is a short period of only two months (7th July to September), something that I also take into account. Therefore, even on the father's version of events, the mother was looking for the return of the child from September onwards, which is consistent with her assertion that she only consented to the child going to Ireland for a short period.

33. Further, as a matter of fact, it does not seem to be in dispute that the mother did go to Ukraine for a period of approximately two months.

34. Overall, it seems to me that the situation is all rather ambiguous and unsatisfactory. On the basis of the evidence, I am not satisfied on the balance of probabilities that there is clear and cogent evidence of consent having been given to a long-term change of habitual residence for the child on the part of the mother. There are some puzzling aspects to both parties' version of events. However, the burden of proof lies with the respondent to prove consent and I am not satisfied that this burden has been discharged on the basis of the evidence before me.

35. It is even possible that the applicant and respondent were at cross-purposes but, in any event, it is my view that the evidence does not establish that the applicant mother consented to the long-term removal of J from Lithuania to live with her respondent father in Ireland to the standard of proof required.

36. Therefore, in law, the retention of the child amounts to a wrongful retention and the return of the child should be ordered.