Neutral Citation Number: [2011] IEHC 268

THE HIGH COURT

2011 5 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION

AND

IN THE MATTER OF A.U. AND A.W.U. (CHILDREN)

BETWEEN

A.U.

APPLICANT

AND

T.N.U

RESPONDENT

JUDGMENT of Mr. Justice Birmingham dated the 13th day of July, 2011

1. This case concerns the alleged wrongful removal of minor children from the jurisdiction of the courts of New York State. The applicant is the father of the children concerned and claims that the respondent, his former wife, wrongfully removed his two sons on the 26th June, 2010. He seeks a declaration of wrongful removal of the minor children from the place of their habitual residence in breach of rights of custody of the State of New York within the meaning of Article 3 of the Hague Convention Act of 1991 (*and the*) childrens' return forthwith to the jurisdiction of the Courts of the State of New York.

Background

2. The applicant married the respondent on 13th November, 2000. They have two minor sons born on 2nd October, 2002 and 19th February, 2004. The marriage soon encountered difficulties and on 6th December, 2005, the respondent left the marital residence with the two children. On 7th December 2005, the New York Family Court granted the respondent a temporary order of custody and a protection order, although the applicant retained access rights to the children. In the same month, the applicant filed divorce proceedings in the Supreme Court of New York and (*these were*) heard together. On 23rd June 2006, the respondent brought a cross motion seeking a suspension of access between the applicant and the children pending an investigation by the Administration of Children Services.

3. The applicant was convicted of a felony in summer 2006, and absconded to Nigeria in August of that year while awaiting sentence. He was not present therefore, to participate in the hearing of the family law proceedings which were heard on 1st June, 2007. On 19th December 2007, the respondent was granted a decree of divorce and was awarded sole physical and legal custody of the children. It was also ordered that the applicant should not have access rights to the children.

4. The applicant returned to the U.S. in or about February 2009 when he was apprehended and incarcerated for a number of months. The offence involved was one of assault with intent to cause physical injury to a police officer in 2009; he filed a motion to vacate or to modify the divorce judgment. During these proceedings, the applicant for a period enjoyed supervised visits with the children, however, on or about 5th January 2010, a court appointed forensic and therapeutic services agency which had been asked to observe the weekly interaction between the applicant and his children and to report to the court, advised against any further supervised access unless the applicant first submitted to a therapeutic process.

5. On 21st January 2010, the court denied the applicant's motion in its entirety. The applicant lodged an appeal against this decision but the Appellate Division of the New York Supreme Court rejected the appeal on 23rd November 2010 and affirmed the original order.

6. Counsel on behalf of the applicant has asserted that Mr. U. filed proceedings on 6th May, 2010 seeking to modify orders previously granted and seeking full custody of the children. It was stated that those proceedings were made returnable before the court on 18th June, 2010 and that the respondent attended with her legal representatives.

7. On 26th June 2010, the respondent removed the children from New York without the consent of the applicant. They initially travelled to Estonia, the respondent's country of origin, before arriving in this jurisdiction later in the year. The respondent and therefore the children, have family ties to this jurisdiction in that the respondent's sister is married and living here. On 27th October, 2010 and 22nd November 2010, the Supreme Court of the State of New York, a first instance court, ordered that the legal custody of the two children was (*be*) transferred to the applicant due to the failure of the respondent to appear in that court on three scheduled dates. (*This*) caused a request for the enforcement of custody rights and return of the infants to be made to the Central Authority for the U.S. under the terms of the Hague Convention.

The submissions of the parties

8. The applicant submits that by virtue of the application filed in the courts of the State of New York on 6th May, 2010, those courts were seised of "rights of custody" within the meaning of the Hague Convention by 18th June, 2010, at the latest, as this was the first return date at which the respondent appeared. In this regard, the applicant referred to the case of *G.T. v. K.A.O.* [2008] 3 I.R. 567, where it was found that a court had rights of custody with regard to the minor children who are at the centre of that case. The

applicant claimed that the removal was a frustration of the custody rights of the State of New York. The applicant submitted that the removal of the children on 26th June, 2010, by the respondent was therefore, wrongful as proceedings were in being at the time of the removal (see *H.L. v. M.G.* [2000] 1 I.R. 110).

9. The applicant submitted that it was for the requested state, (in the instant case, the Irish High Court) to determine whether a person, institution or other body held rights of custody at the date of removal or retention and that the term "rights of custody" must be given an autonomous meaning in accordance with the Hague Convention referring in that context to the case of *Nottinghamshire County Council v. B.* (Unreported, High Court, Finlay Geoghegan J., 26th January 2010).

10. It is the applicant's submission that the required proofs for an order of return have been satisfied. Thus, there was a removal across international frontiers from the place of habitual residence of the children; this removal was in breach of rights of custody which were being exercised at the time; the children are under sixteen years of age and the proceedings were instituted within one year. The applicant submits that in the circumstances where these proofs are satisfied, an order of return is mandatory unless the respondent can establish one of the permitted defences to such an order as are set out in the Convention.

11. Where the proofs are satisfied, the applicant submits that there is a heavy onus on the respondent to establish a defence to an order of return under Article 13 of the Hague Convention (*A.S. v. P.S.* [1998] 2 I.R. 244). Article 13 (B) provides a defence in circumstances where there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. In the circumstances of the case, the applicant contends that the allegations raised by the respondent and the arguments that she makes fall far short of what is required to establish an Article 13 defence. It was submitted that this case does not meet the standard set out in *Friedrich v. Friedrich* (1996) 78F 3d 1060 adopted in this jurisdiction in the case of *R.K. v. R.K.* [2000] 2 I.R. 416. This is not a case of the children being placed in danger by return to a war zone or to famine or disease, nor is this a situation where there is serious abuse or neglect or extraordinary emotional dependence where the courts of the country of habitual residence may be incapable or unwilling to provide the children with adequate protection.

12. Article 13 provides a separate ground for refusal to return on the basis of a child's objection where that child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. The applicant acknowledges that the children have expressed objections to an order of return but say that it has not been established that they are of an age or degree of maturity at which it is appropriate to take their views into account and in any event submit that the views of the child are not synonymous with an obligation to accede to the child's wishes. They refer to the decision of MacMenamin J. in *Z.D. v. K.D.* [2008] 4 I.R. 751 and refer also to the case of *Re T.* (*Abduction; Child's Objections to Return*) [2000] 2 F.L.R. 192. It is said that where a court finds that a child has valid reasons for an objection to being returned that an order to return may be refused but that a refusal of return would apply only in exceptional cases under the Hague Convention.

13. Finally, the applicant submits that even if the stage is reached where the court finds that one of the Article 13 defences has been established, the court retains a discretion as to whether the child should be returned (*B.B. v. J.B.* [1998] I.L.R.M. 136) and submits that in the circumstances of this case, in the light of the policies of the Convention, the court should exercise its discretion by ordering the return of the children even if that stage is reached. The applicant has indicated a willingness to give whatever undertakings are required by the court and it is said that this is a relevant consideration.

14. The respondent accepted that she permitted the removal of the children from New York without the consent of the applicant, however, she denied that in doing so she breached any rights of custody operative at the time within the terms of the Hague Convention. It is submitted that the applicant has failed to adduce sufficient proof that such rights were possessed and exercised by the New York courts. It is pointed out that the expert on New York law (*who*) provided evidence to the court says no such thing.

15. The respondent argues that the expert evidence that was before the court did not support the view that the two post removal decisions made by the New York courts on 27th October and 22nd November, 2010 transferring custody of the children to the applicant, suggest or find that the removal of the children was wrongful.

16. Further, it was submitted that the courts of New York State do not appear to have made any ruling or given any direction to the parties that could be said to have expressly prohibited or qualified the respondent's right to remove the children or otherwise to have restricted the scope of her parental autonomy. Successive decisions granting her sole custody were made on 23rd August 2007, 15th January 2010, and 23rd November 2010. The applicant had not been granted access rights and the affidavit of laws states that decisions to deprive a parent of all rights in relation to a child are made only in exceptional circumstances.

17. The respondent further asserted that to return the children to New York would be to expose them to a grave risk of physical, psychological and emotional harm and would otherwise place them in an intolerable situation, within the terms of Article 13 of the Hague Convention. Therefore, in the event that the court finds that a wrongful removal occurred, the respondent urges that the court should exercise its discretion to refuse to order a return pursuant to Article 13. The respondent accepts that a particularly high threshold of proof applies to this defence under Article 13 (*E.M. v. J.M.* [2003] 3 I.R. 178) but submits that in the circumstances of the case, this threshold has indeed been met by virtue of the significant evidence in relation to the applicant's conduct that has been adduced by the respondent. It was argued that a mandatory return would expose the children to proximity to the applicant, and cause the family to be entangled again in litigation. The respondent submits that the grave risk posed to the children's psychological and emotional welfare would not be removed by short term undertakings of the nature offered by the applicant.

18. Further, the respondent urges that the court should in any event exercise its discretion to refuse to order the return of the children by reason of the objections that they have expressed. They refer to the case of *T.M.M. v. M.D.* [2000] 1 I.R. 149 where the Supreme Court agreed with the approach that had been adopted in England in the case of *S. v. S.* [1993] 1 FAM 242 (C.A.) and had said that where the child is of sufficient age and maturity his or her views, although not determinative of the issue, should be taken into account.

Conclusions

Was the removal of the children wrongful?

19. While the special summons which was issued had referred to the fact at para. 5 that the applicant and respondent were joint holders of rights of custody in regard to the minors, it is conceded, and properly conceded on behalf of the applicant that this was not so. The divorce judgment dated 19th December, 2007 had granted sole physical and legal custody of the children of the marriage to the respondent and had denied the applicant access rights by reason of the motion issued on 6th May, 2010.

20. Having regard to decisions such *H.I. v. M.G. (Child Abduction; Wrongful Removal*) [2000] 1 I.R. 110 and *G.T. v. K.A.O.* [2008] 3 I.R. 567, there can be no doubt that ordinarily the fact that proceedings had been initiated and served designed to vest custody in

the applicant, would mean that the courts of New York State were indeed holding rights of custody. However, the divorce judgment is undoubtedly a complicating factor. Ms. Barbara Schaffer who has provided an affidavit of law has responded to the question "If the order of 19th December, 2007 deprived the applicant of all rights in respect of the children, was the respondent entitled to remove the children from New York State without leave of the court in June 2010?", as follows: "Yes. Unless and until there was an order directing access by the applicant, there was no prohibition against the respondent removing the children from New York State." Then asked if the answer to that question was yes, was the respondent entitled to remove the children from New York State without the consent of the applicant in June 2010. To this question she responded: "Yes, the respondent was entitled to remove the children from New York State without the applicant's consent in June 2010. Had there been a court order establishing the applicant's visitation rights, the consent of the Applicant or a court order granting the Respondent's request to relocate would have been required."

21. Then, when asked did the applicant's motion filed on 6th May confer any rights on the applicant, including but not limited to, a legally enforceable right to prevent the removal of the children from the jurisdiction? Her response was "The commencement of the applicant's Family Court proceedings on May 6th, 2010, did not confer any rights upon the applicant. It did not give him a legally enforceable right of veto on the removal of the children from the jurisdiction. In order to obtain, such relief, the applicant would have needed to obtain an immediate order from the Family Court restricting the applicant from removing the children from the jurisdiction. (See Family Court Act, s. 651)."

22. These responses from Ms. Schaffer are clear and unequivocal and give rise to serious doubts whether the children were wrongfully removed. However, the New York Court always has the authority to modify child custody arrangements. Ms. Schaffer refers to the provisions of the Domestic Relations Act as expressly reserving to the court the right upon application to modify or amend directions made by a New York court relating to the care, custody and support of a child. In these circumstances I have concluded, though not without considerable hesitation, that this was a case where the New York courts held custody rights at least from the return date for the motion on 18th June 2010. Accordingly, I propose to approach this case on the basis that there was a wrongful removal of the children.

Would the return of the children to New York place them at grave risk of physical or psychological harm or otherwise place the children in an intolerable situation?

23. There is no doubt that the threshold to be crossed if this defence is to be made out is a high one. Indeed, this has very properly been specifically conceded by counsel for the respondent. However, while accepting that the threshold is a high one, the respondent says that it is a case where unusually the defence is available. She says that the evidence establishes a pattern of threatening, bullying and aggressive behaviour towards her and the children and towards others. She refers to the fact that the applicant's escalating behaviour forced her to flee the family home with the children and seek refuge in a sanctuary in a refuge for battered women and families and that then with the assistance of the centre she obtained Domestic Violence orders from the New York courts after a hearing. In that regard she points to the fact that the applicant in his former professional life as a lawyer, has since been struck off following his conviction for the felony of assault on a police officer, and was sanctioned in a court in New York for making *ad hominem* attacks on the court and on opposing counsel. She points too, to his troubled relationship with his neighbours which has given rise to litigation in the course of which the presiding judge commented "While his behaviour never resulted in a physical altercation, it appears to be only a matter of time before violence occurs whether Mr. U. is the subject or object of violence, his simmering anger will most certainly be the cause".

24. A number of the matters identified by the respondent are disturbing. In particular I regard it as significant that the Divorce Court awarded custody to the respondent and, in what Ms. Schaffer has described as an unusual order that is made only in exceptional circumstances, denied the applicant access to the children. Particularly disturbing is the fact that when a programme of supervised access was put in place that this had to be discontinued because of the applicant's improper behaviour.

25. Another matter to which I attach significance is the content of communications sent by the applicant to his wife and on some occasions directly to his children. These are extremely unpleasant in tone and entirely lacking in any sensitivity for the vulnerable position in which children find themselves in a situation of an acrimonious marital breakdown. Far from showing any sensitivity, he quite disgracefully seeks to embroil the children in the dispute. The applicant has indicated a willingness to offer undertakings as required. That is welcome, even if the offer is in somewhat vague terms.

26. In a situation where the New York Divorce Court had concluded that the respondent should have custody and had denied the applicant access I believe one could contemplate returning the children to New York only if there were undertakings in satisfactory terms available; not to have any contact whether face to face or by phone, text, post, email or otherwise with the children, pending the determination of the proceedings or specific orders by a court of competent jurisdiction in New York. If such undertakings are forthcoming and if they are honoured then the risks involved in a return can be minimised. It is after all the situation that the children are being returned to the State of New York not to the custody of their father at this stage. Accordingly, this defence is not made out to the required standard.

The views of the children

27. On foot of a court order both children were interviewed by Dr. Ann Byrne Lynch. Both have expressed a clear desire to reside with their mother, in Ireland, if possible. Neither boy wishes to have contact with their father and neither wish to return to New York. Counsel for the applicant has said that Dr. Ann Byrne Lynch has not said expressly that either boy has reached an age when it is appropriate to take account of his views. I cannot accept that interpretation of the report of the clinical psychologist who was appointed by the court to conduct interviews for a particular purpose. Her comment "Both boys are capable of forming their own views and they presented as giving their own views and did not appear to be coached" has to be seen in that context.

28. I think the report can only be interpreted on the basis that she is reporting to the court that the boys, while young, eight and a half years and seven years, have reached an age and degree of maturity which makes it appropriate to take account of their views. Their views are clear. That of course is far from the end of the matter for as MacMenamin J. commented in *Z.D. v. K.D.* [2008] 4 I.R. 751"the views of the child are not synonymous with an obligation to bow to the child's wishes". It is clear that a court's obligation is to take account of the child's views and it is not the obligation of the court to implement those views. I myself have returned a teenager to care in the Netherlands despite her very firm, and very forcefully expressed objections, being convinced that despite the strength of her views the policy of the Convention and the teenager's best interest required her return.

29. In the present case I am satisfied that we are dealing with bright children with clear views and firm views and it is appropriate to take account of them. It seems to me that the views expressed by the children have to be seen in the wider context surrounding the application. The factors that I identify as relevant are that the applicant does not have custody rights, that the parent who brought the children to Ireland had been granted sole custody by a court of competent jurisdiction, that the applicant's behaviour at supervised access visits led to the termination of that regime. Also, highly relevant is that the applicant has spent relatively little time with the children since 2005. He absconded to Nigeria in September 2006 and remained there until February 2009. On his return to the

U.S.A. he served a prison sentence. Access commenced in September 2009 but after seven sessions came to an end because of the applicant's unacceptable behaviour.

30. It seems to me that all of these factors make understandable why the children should be expressing the views that they are and that all of these factors offer a degree of validity to the views.

31. The occasions when the return of children as young as eight and seven would be refused because of their opposition are likely to be quite exceptional but it seems to me that this is such a case. This is a case where having regard to the views of the children when seen in the context to which I have referred, that I believe that I am justified, in the exercise of my discretion, in refusing to return the children to New York. Proceedings before me are not in the nature of welfare proceedings or guardianship proceedings and that the policy of the Convention is that such issues are best considered in the country of childrens' habitual residence. However it is the case that the Convention opens with a statement that the interests of children are of paramount importance in matters relating to their custody. I do not believe that the best interests of these children would be served by overriding their views and returning them to New York and accordingly I am refusing to order their return.