

THE HIGH COURT

FAMILY LAW

Record No: [2016/10HLC]

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 ASPECT OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF O.F. AND M.F. AND H.F. (MINORS)

BETWEEN:

B.F.

APPLICANT

AND

S.C.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 13th day of July, 2016.

1. This case concerns an application for the return of three children, O. born on 6th May, 2003, H. born on 7th June, 2007, and M. born on 26th May, 2006 to the jurisdiction of England and Wales pursuant to Article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980. The application is set out in the special summons dated 9th May, 2016.
2. The applicant father and respondent mother were married to one another on 4th July, 2009 and divorced on 26th March, 2014. The three children were born in the jurisdiction of England and Wales.
3. The applicant father enjoys rights of custody in respect of the said children pursuant to the laws of England and Wales. The courts of England and Wales were seised of proceedings concerning the children where the applicant father is seeking primary care of the children and the English Court had made orders in relation to the children. In particular, in an order dated 17th September, 2015 the respondent mother was prohibited from moving the children's school or residence. The respondent moved the children in or around February, 2016 without telling the applicant father or the court. District Judge Pilling of the English Family Law Court made an order dated 2nd March, 2016 directing the respondent to facilitate contact with the applicant and prohibiting her from changing the children's residence. District Judge Pilling further noted in that order that the mother's contempt of court would need to be considered on the next occasion. On 1st April, 2016, the respondent mother failed to attend court in England. The case was adjourned to 5th April, 2016 for a committal hearing. On that date the court in England was informed that the respondent had taken the children to Ireland on 2nd April, 2016 and she was ordered by that court to return them forthwith. Therefore, it is clear that the courts of England and Wales therefore have rights of custody in respect of the children.
4. The applicant father was exercising his rights of custody at the time of the children's removal from the jurisdiction of England and Wales and he did not consent to their removal. The applicant had weekend and holiday access with the children prior to their removal from the jurisdiction. Equally, the courts of England and Wales did not consent to their removal.
5. It is the applicant's case that the respondent mother removed the children from the jurisdiction of England and Wales on or about 2nd April, 2016 without the knowledge of the applicant father or the courts with jurisdiction in respect of their welfare.
6. It was alleged in the affidavit filed on behalf of the applicant, dated 10th May, 2016, that the respondent deliberately attempted to hide the whereabouts of the children from the applicant and the authorities. It was further alleged that she changed their names and dyed their hair. This appears to be based upon information from the Irish school in which the two girls were enrolled. The applicant father raised concerns about the respondent's mental health and that she is being abusive to the children.
7. This Court made an interim order on 11th May, 2016 restraining the respondent mother from removing the children from the jurisdiction of this Court or from the address at which they were residing in Ireland. On 1st June, 2016, this Court ordered pursuant to Article 11(2) of Regulation (EC) 2201/2003 that Ms. Anne O'Connell, Consultant Clinical Psychologist, interview the three children and provide a report to the Court ensuring that the children are given the opportunity to express their views and be heard in these proceedings.
8. The respondent mother filed a replying affidavit dated 3rd June, 2016 in which she states that the children are objecting to being returned to the jurisdiction of England and Wales. She alleged in the affidavit that the applicant was controlling and violent. She suggested that the applicant uses the court processes as a means of dictating her behaviour without adequate regard to the welfare of the children.
9. She stated that it was upon the children's insistence that she remained in Ireland after what had been planned to be a holiday here. She stated that the children have settled well in Ireland. She accepted that she had changed her own first and second name by deed poll, taking the surname of her fiancé. She stated that the children chose to change their first and second names also and this

was done by deed poll prior to their departure from England. She further accepted that she dyed her daughters' hair but that this was according to their own stated wishes. The respondent mother stated that she felt bound by the wishes of her children.

10. The respondent exhibited a CAFCASS report dated 4th December, 2015 that was conducted in the context of the family law proceedings before the English courts. The opinion of the CAFCASS officer was that the children should remain in the primary care of their mother but continue to spend time with their father on alternative weekends. She noted that any further moves would not be in the children's best interests and they should remain in their school. She noted that the children were old enough and bright enough to articulate their wishes and feelings.

11. This Court made a further order dated 8th June, 2016 directing Skype access between the children and their father and directing face to face access every second weekend to occur in Ireland pending the hearing of this case.

Views of the children

12. In the within proceedings, Ms. Anne O'Connell, Consultant Clinical Psychologist, assessed the three children on 20th June, 2016 and filed written reports with the Court.

13. Ms. O'Connell set out that O., who is now 13 years old, is within the average range of intellectual ability and is a little emotionally immature. O. was described as having been living with his mother in England and seeing his father regularly. He found school difficult because of the various moves. He reports that his parents fought often. He did have some good memories of his father. It is recorded that he says he asked to stay in Ireland as being away from his father would make his mother happier. He prefers school in Ireland although if allowed to remain here, he would be repeating the year. He also prefers his home set up and the feeling of calm in Ireland. His main objection to returning to England is in relation to his father's attitude towards his mother. He wants to see his mother happy. He reported that he changed his name because his mother married her partner in secret and he chose his new first name because they were "making a fresh start". He did not enjoy his Skype access with his father and stated that his father was angry during the conversation.

14. Ms. O'Connell stated that she could see no evidence of overt coercion or influence but she believes that he is keen to keep his mother happy. She further stated that she believes that O. is at risk of emotional instability, due to symptoms of post traumatic stress disorder related to events witnessed and fear of his current relatively calm living situation being disrupted again. She noted that he is likely to need professional monitoring.

15. Ms. O'Connell reported that M., who is now 10 years old, stated that her father used to beat her mother and left scars on her face. Ms. O'Connell noted that M. was tearful when speaking about this. M. shows a clear preference for her school in Ireland although, if allowed to remain here she would also be repeating the year. She stated that she didn't want to talk to her father via Skype and complained that all he talks about is working hard at school. She stated that she decided to change her name when her mother changed her own name. M. further stated that she was the one who asked her mother if they could live in Ireland. M. objects to returning to England because of the proximity to her father and the unhappy memories of time spent there. M. stated that she finds life less stressful in Ireland. M. wants to stay in Ireland because her mother is happier here.

16. Ms. O'Connell noted that M. presents as a pleasant girl who is clear about her statements and ideas. She is in the average range of intellectual ability with elements of emotional immaturity. Ms. O'Connell noted that M. seems to see her change of identity as a badge of solidarity with her mother. Ms. O'Connell stated that she could see no evidence of overt coercion or influence but M. and her siblings are in agreement and they are keen to keep their mother happy. Ms. O'Connell noted that M. is at some risk of emotional instability due to sadness and fear of her home being disrupted again and she is likely to need professional monitoring.

17. Ms. O'Connell recorded that H., who is now 9 years old, also recalls her parents always fighting when they lived in England. H. complained that her father was always telling the children to do more school work. H. stated that she doesn't like her father's partner. She recalled being bullied in her various schools in England. She also stated that it was herself and her siblings that asked to stay in Ireland after a holiday. She prefers her school in Ireland although, if allowed to remain here she would be repeating the year. She stated that she found her father to be quite angry during their Skype access. She reports that she does not want to speak or spend time with her father. H. objects to returning to England because that would mean spending time with her father.

18. Ms. O'Connell identified that H. is in the average range of intelligence for her age although there is some emotional immaturity. Ms. O'Connell noted that H. has been implicitly influenced by her mother although she found no evidence of coaching or coercion. Ms. O'Connell noted that H. hesitated about which name she should use. Ms. O'Connell also stated that H. shows evidence of underlying anxiety and may well need the support of professionals.

Summary of Legal Submissions on behalf of the Applicant

19. Counsel for the applicant provided the Court with written legal submissions dated 30th June, 2016. Counsel for the applicant first outlined the facts of the case in her submissions. She identified the actions of the respondent in changing the children's names and dyeing her daughters' hair as an effort to avoid detection. Counsel for the applicant addressed the two defences raised by the respondent in her affidavit base on;

- The objections of the children to returning to the jurisdiction of England and Wales
- The respondent's contention that the children are well settled in this jurisdiction.

20. It was submitted that Article 12 of the Hague Convention contains an obligation to return any child who has been wrongfully removed forthwith. There is a discretion at paragraph two of Article 12:-

"The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

It was submitted that this discretion arises only when a child has been in the new environment for more than a year. The children in this case were in Ireland for little more than one month prior to the commencement of the proceedings and therefore it was submitted that the defence of settlement is therefore not open to the respondent.

21. It is accepted on behalf of the applicant that the proper approach in cases where the child's objections are raised as a defence has been set out by Finaly Geoghegan J. in the case of *CA v. CA* [2010] 2 IR 162:-

"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."

Finlay Geoghegan J. went on to cite with approval the approach of Potter P. in *Re M. (Abduction: Child's Objections)* [2007] EWCA Civ 260 at paragraph 60:-

"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 it 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."

22. The children in this case are 13, 10 and 9 years of age and therefore it is accepted on behalf of the applicant that they are of the age where their objections would normally be taken into account. However, it was submitted that the element of immaturity identified by Ms. Anne O'Connell means that the Court should not automatically assume that their views ought to be taken into account. It was further submitted that taking the children's views into account does not mean that those views must hold sway or are determinative.

23. It was submitted that once the discretion arises the Court must balance various factors in exercising that discretion. Finlay Geoghegan J. cited the House of Lords case of *M (Abduction: Rights of Custody)* [2007] UK HL 55 as follows:-

"In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states."

24. Counsel for the applicant distinguished this case from the case of *AU v. TNU* [2011] 3 IR 683 where a refusal to return two children was upheld by the Supreme Court although the factors identified by Birmingham J. were cited as follows:-

"The factors that I identify as relevant are that the applicant does not have custody rights, that the parents 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. 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."

25. Counsel for the applicant further cited the case of *Youth Care Agency v. VB and others* [2010] IEHC 322 where Birmingham J stated:-

"It is clear that what Article 13 does is to require that account to be taken of the child's views. There is no question of vesting the decision making power in the child. Quite clearly, the obligation is to take account of the child's views, the obligation is not to give effect to those views."

26. Counsel for the applicant set out a variety of factors that should be taken into account in this case:

- The aims of the Convention to deter abductions and ensure the prompt return of children to their habitual residence
- Upholding the comity of Courts and the principle that the Courts of a child's habitual residence are best placed to decide his or her long term welfare
- The necessity to respect and give effect to orders of the Court of the child's habitual residence
- The extent to which the child's views have been influenced by the abducting parent
- The strength of the child's obligations, and the reasons for them, namely whether those reasons are cogent, understandable and well thought out
- The importance of maintaining the child's relationship with both of his or her parents and other family members
- The extent to which the child's objections coincide with what might be considered in his or her best interests
- The extent to which the Courts in Ireland can protect the child's interests, having regard to the fact that Courts of his or her habitual residence are seized of such issues
- The length of time that elapsed between the abduction and the commencement of proceedings
- The level of involvement of the left behind parent in the lives of the children prior to the abduction
- The behaviour of the respondent prior to the abduction, at the time of the abduction and thereafter

27. Counsel for the applicant identified the fact that Council Regulation (EC) 2201/2003 has a particular relevance in this case as the Courts of England and Wales are seized of the issues concerning parental responsibility of these children and various orders have been made by the English Courts. It was submitted on behalf of the applicant that Articles 8 and 10 of the Regulation make it clear that the Courts of England and Wales are the only courts that can deal with the question of the children's long term care and Article 19 of the Regulation precludes the Irish Court from making any parental responsibility decision:-

"2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before the Courts of different Member States, the Court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the Court first seized is established."

3. Where the jurisdiction of the Court first seized is established the Court second seized shall decline jurisdiction in favour of that Court."

It was submitted that if the courts of Member States were to ignore each other's orders, the principles, and indeed the effectiveness, of the Regulation would be lost.

28. Counsel for the applicant set out that Article 8 of the European Convention on Human Rights has been invoked on a number of occasions by the left behind parent in Hague Convention cases as well as the abducting parent. Article 8 provides:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by the public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

29. The applicant cited the two cases of *Neulinger v. Switzerland* (App. No. 41615/07) [2012] 54 EHRR 31 and *X. v. Latvia* (App. No. 27853/09) [2013] 59 EHRR 3. It was submitted that the Grand Chamber found that orders returning children may interfere with a parent's right to family life, however, the right must be balanced against the competing interests of the other parent, the child and public policy. It was submitted that the central point of *Neulinger* and other such cases was that a child's return cannot be ordered automatically or mechanically and that the best interests of the child must be assessed in each individual case. It was submitted on behalf of the applicant that a non return order would actually breach the applicant father and the children's rights under Article 8. It was submitted that the case of *Raban v. Romania* [2011] 1 FLR 1130 established that the *Neulinger* principles were equally applicable where a return order was refused and that the applicant father's Article 8 rights must also be respected.

30. In conclusion, it was submitted that this is not a case that would be suitable for the exceptional jurisdiction of putting a stay on a potential return order. This is because the English Court is seized of substantive jurisdiction and it requires the return of the children forthwith.

31. Counsel for the applicant supplemented her written submissions with oral submissions on 4th July, 2016. Particular emphasis was placed on taking the children's objections in the context of the facts. It was noted that the children appear to want to make their mother happy and that this was a subtle type of influence upon their views. The fact that the respondent mother changed both her first and her last name, attempted to do the same with the children and dyed the girls' hair was described as showing an effort to evade being located. She also emphasised that the children's views should be taken into account but that they are not determinative. It was further indicated on behalf of the applicant that he would be happy to resume paying maintenance upon the return of the children to the jurisdiction of England and Wales and that he would also contribute to the cost of a return.

Summary of Legal Submissions on behalf of the Respondent

32. Counsel for the respondent provided the Court with written legal submissions dated 30th June, 2016. The only defence put forward on behalf of the applicant is that the children themselves object to being returned to England and Wales and that it is in their best interests to remain in Ireland. Counsel for the respondent set out the facts of the case and particularly noted that the story told to the assessor by the children that it was them who decided to live in Ireland corroborated what the respondent said in her affidavit. Counsel for the respondent characterised the children as having expressed an unambiguous and unqualified desire to remain in Ireland.

33. Counsel for the respondent set out Article 13 of the Hague Convention:-

"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."

34. It was further submitted that, in respect of a Member State of the EU, the court must apply Article 11(2) of Council regulation (EC) 2201/2003:-

"When applying Articles 12 and 13 of the 1980 Hague Convention it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

35. Counsel for the respondent set out the approach to the child's objection defence from *CA v. CA* [2010] 2 IR 162 as cited above. It was submitted that the children are all well above the age at which their views should be taken into account. It was submitted that there should be no issue as to the first two limbs being met as the children's objections are made out and they are of an age and degree of maturity for those objections to be taken into account by the Court. This leaves the case in the area of judicial discretion as to whether or not to return the children to the jurisdiction of England and Wales. Counsel for the respondent further cited *AU v. TNU* [2011] 3 IR 683 where, as is noted above, the Supreme Court upheld an order for non return and quoted Denham J. at paragraph 32 of her judgment:-

"The trial judge was entitled to have regard to the children's stability and contentment in determining what policy of the Convention should prevail. The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. this policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual residence. However, also included in the Convention's policy is Article 13 wherein it states that the judicial authority may refuse to return a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views."

It was submitted that the factors in this case are sufficient to give context to and corroborate the objections of the children to returning to England.

36. Counsel for the respondent set out a well reasoned argument that the EU Charter of Fundamental Rights, which was brought into EU law by the Lisbon Treaty, gives the provisions of the European Convention on Human Rights a special status and binds this Court to consider these provisions in this case. Counsel for the applicant then cited the case of *Neulinger v. Switzerland* (App. No. 41615/07) [2012] 54 EHRR 31 which held that the return of a child to Israel would be a disproportionate intrusion on the Article 8 rights of both the mother and the child. The following general principle was cited from paragraph 138 of that judgment:-

"It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention

is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences (see the UNHCR Guidelines, paragraph 52 above). For that reason, those best interests must be assessed in each individual case."

37. It was further submitted that Article 24 of the Charter provides specific rights for children. It was therefore submitted that this Court is required to give consideration to the views of the children and to treat their best interests as a primary consideration.

38. Counsel for the respondent submitted that the children should be subject to as few moves as possible. He accepted that it is likely that proceedings will take place in England regardless of what happens in these proceedings. It was submitted that permitting the children to remain in Ireland by way of an order of non return is the most appropriate means of ensuring that disruption is minimised pending the determination of the English proceedings.

39. Counsel for the respondent made supplementary oral legal submissions on 4th July, 2016. He stated that the fact that there are proceedings in the English courts does not deprive this Court of its discretion to make an order of non return on the basis of the children's objections.

Conclusions

40. This Court wishes to apply the European Court of Human Rights jurisprudence of *Neulinger v. Switzerland* (App. No. 41615/07) [2012] 54 EHRR 31 and *X. v. Latvia* (App. No. 27853/09) [2013] 59 EHRR 3 which clarified that, in order to achieve a harmonious interpretation of the ECHR and the Hague Convention the factors capable of constituting an exception to a child's immediate return in the application of the Hague Convention had to be taken into account by the requested court, which had to issue a decision that was sufficiently reasoned on that point and had to be evaluated in the light of Article 8 of the ECHR.

41. This Court finds that the children were wrongfully removed in accordance with the definition of Article 3 of the Hague Convention as follows:-

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

42. It is clear from the facts of this case that the children were habitually resident within the jurisdiction of England and Wales. There are proceedings live in the courts of England and Wales and orders have been made by that court. The issue of a contempt of court has also been raised by the English Judge dealing with this case. The courts of England and Wales clearly have seisin of this case.

43. As the defence of the children's objections have been raised, this Court applies the three stage test as set out in *CA v. CA*. It is the view of this Court that an objection to return to the jurisdiction of England and Wales has been made out by each of the children. This Court is also satisfied that these children are each mature enough and of an age where it is appropriate to take their view into account. However, looking at all the evidence, this Court exercises its discretion in favour of an order for the return of the children to the jurisdiction of England and Wales.

44. It is the view of this Court that the undertakings agreed to by the applicant will ensure the well being of the children pending this matter being disposed of before the courts of England and Wales. The applicant undertook to pay £2,000 for the purpose of the return of the children and to reinstate the maintenance of £400 per week to be paid every Friday starting on 5th August, 2016 until the courts of England and Wales make any further order in this case.