Neutral Citation Number: [2009] IEHC 213

THE HIGH COURT

FAMILY LAW

2008 35 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 (EC) NO. 2201/2003, AND

IN THE MATTER OF M. N. (A CHILD)

BETWEEN

M. N.

APPLICANT

AND

R. N.

RESPONDENT

JUDGMENT of Mr. Justice Garrett Sheehan delivered the 1st day of May, 2009

1. The applicant is the father of M.N., the infant the subject matter of these proceedings. He seeks a declaration that the respondent, his former wife and the mother of the child, wrongfully removed the child from the place of his habitual residence in Lithuania, and into the jurisdiction of the Courts of Ireland within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction. He also seeks an order pursuant to Article 12 of the Convention for the return of the child forthwith to Lithuania.

2. The applicant and the respondent were previously married to each other but divorced on foot of a judgment issued by the Klaipeda City County Court in Lithuania on the 15th February, 2008, which said judgment came into force on the 18th March, 2008.

3. The applicant was granted unrestricted communication with his child, subject to advance agreement between the parties. The respondent brought the child to Ireland on the 18th June, 2008, at a time when the applicant was exercising his rights of access and was seeing his child on a regular basis. The respondent brought the child and his elder sister by a previous relationship to stay with her parents who live in Ireland.

4. The respondent had previously spent holiday periods in Ireland with her parents, bringing her children with her. Shortly before leaving Lithuania, the respondent had ceased employment and vacated her apartment.

5. Since arriving in Ireland, the respondent has gained permanent part-time employment and her children are attending school. Her son, M.N. has settled into primary school in Ireland, and also attends a local Lithuanian school on Saturdays.

6. The applicant avers in his affidavit of the 19th November, 2008, that until the 18th July, 2008, he had no contact with the respondent, and had no information regarding the welfare of his son. Nevertheless, he had the respondent's email address but chose not to contact her by that method. The respondent had previously taken the children on holiday to her parents in Ireland, and when the applicant sought the assistance of the Child Protection Services in Lithuania in tracing the whereabouts of his son, M.N., he suggested to that service that the respondent might be in Ireland and also supplied the respondent's email address.

7. The respondent immediately replied to the email contact made with her by the Child Protection Services in Lithuania.

8. Apart from several efforts to contact the respondent on her Lithuanian mobile phone, the applicant did not contact the Protection of Children's Rights Service until the 17th July, 2008. Contact with his son was re-established shortly afterwards. Since then the applicant has had intermittent telephone contact with his son and with the respondent.

9. In opposing the application, the respondent contends that the applicant has acquiesced to the child's remaining in Ireland, that the child objects to being returned to Lithuania and that it is appropriate for the court to take account of his views and further, that to order the return of the child to Lithuania would be to place him in grave risk of being exposed to physical or psychological harm, or to otherwise place him in an intolerable situation.

10. Articles 1, 3, 12 and 13 of the Hague Convention are particularly relevant to this application.

11. Article 1 of the Hague Convention states:-

> "The objects of the present Convention are -
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 3 states:-

"The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 12 states:-

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

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.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

Article 13 states:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

12. The respondent maintains that the applicant's conduct between the 18th June, 2008, the date of removal of the child and the 6th October, 2008, being the date of the issue of the summons in this case, amounts to acquiescence.

13. In particular, the respondent relies on four specific matters to support this contention.

14. In the first place, the respondent relies on a document signed by the applicant on the 9th November, 2008, in which the applicant refers to the respondent's place of habitual residence as being in Ireland. The respondent submits that due to the child's young years, his habitual residence follows that of his mother, and is by consequence, Ireland also.

15. Secondly, the respondent relies on a memorandum of the Klaipeda Town Council Administration, Social Department, Children's Rights Protection Service of the 18th July, 2008. This was the Lithuanian authority that the applicant first approached following his son's removal to Ireland. The particular paragraph that the respondent relies on reads in translation as follows:-

"[The applicant, M.N.] intends to approach the police regarding the announcement about his son's search and also the court regarding the child's abduction. The father did not state any requests in relation to the change of the child's residence. After the child's residence is established he intends to refer to the court in relation to the determination of the order of the specific communication."

16. The respondent maintains that this is contemporaneous evidence of the applicant's subjective intention at the time, merely to obtain a communication order, and clearly demonstrates that the applicant was not then seeking the return of the child.

17. Thirdly, the respondent relies on a letter dated the 6th January, 2009, from R.V., who liaised with both parties following the removal of M.N., the child, to Ireland. R.V. is a senior specialist with the Klaipeda Town Council

Administration, Social Department, Children' Rights Protection Service and she sets out the history of her contact with the parties in this letter. As this contains no evidence regarding the applicant seeking the return of the child but simply refers to his concerns around access, the respondent maintains this is further evidence of subjective acquiescence on the part of the applicant.

18. Finally, the respondent relies on a transcript of a telephone conversation she had with the applicant in early October, 2008.

19. In the course of this telephone conversation with the respondent, the applicant not only inquired about his son's well-being and education but also discussed with the respondent the possibility of coming to Ireland to visit his son, and also raised the possibility of his son travelling to Lithuania to visit him. No decision by either party emerged from this telephone call.

20. The respondent contends that even if none of the above matters sufficiently convinces the court of the applicant's acquiescence, then taken as a whole the words and actions of the applicant led the respondent to believe that he was not seeking the return of the child or at the very least, the court should regard his words and conduct as inconsistent with seeking the return of the child.

21. Counsel for the applicant submitted that in taking immediate steps to locate his son's whereabouts once he could not contact him, and initiating the present proceedings once he became aware of the respondent's intention to remain in Ireland, the applicant could not be said to have acquiesced to his son remaining in Ireland.

The Law on Acquiescence

22. The law in relation to consent and acquiescence is set out in the Supreme Court judgment of Denham J. in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416. In this case, the Supreme Court approved the English House of Lords decision in *Re H. (Abduction: Acquiescence)* [1998] A.C. 72. At p. 429, Denham J. referred to her judgment in *P. v. B. (Child Abduction: Undertakings)* [1994] 3 I.R. 507, in which she upheld the following statement of Waite J. in *W. v. W. (Abduction: Acquiescence)* [1993] 2 F.L.R. 211:-

> "Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return."

23. In the course of her judgment in *F.L. v. C.L.* [2006] I.E.H.C. 66, Finlay Geoghegan J. stated that a failure to object to a removal of children from the jurisdiction of their habitual residence would not amount to a consent to the changing of the children's habitual residence or to them remaining in another jurisdiction for an indefinite period unless there was clear and cogent evidence that the parent in the jurisdiction of the children's habitual residence was aware that the purpose of the removal of the children was to bring the children to the other jurisdiction for an indefinite period, and to effect a long term change in their living arrangements. In addition, the learned judge found that a finding of acquiescence should be made by the court where, having regard to all the relevant circumstances, the court concludes that the wronged parent, either actively or passively, accepted the changed circumstances such that it would be reasonable that he or she be bound by it, and that it would be inconsistent for that parent to rely upon his or her rights under the Hague Convention to have the child or children returned summarily.

24. While there is a degree of ambivalence in the applicant's approach to his son living in Ireland, this ambivalence does not amount to acquiescence. While there was some delay on his part in approaching the Lithuanian authorities, this equally does not constitute acquiescence by the applicant. It is also relevant that when he first approached the Child Protection Services in Lithuania on the 17th July, 2008, he indicated that he intended to approach the court about the child's abduction. It is also relevant that the Klaipeda Child Protection Service was not the Lithuanian authority responsible for assisting in the institution of these proceedings. I attach no significance to the applicant having described the respondent's habitual residence as Ireland. Bearing in mind the judgments of Denham J. and Finlay Geoghegan J., which I have referred to above, I hold that the applicant has not acquiesced or consented to the child remaining in this jurisdiction. In those circumstances, I further hold that the applicant is entitled to a declaration that the respondent wrongfully removed the child from Lithuania on the 18th June, 2008.

25. The respondent further contends that there is a grave risk that the return of the child would expose him to physical or psychological harm, or otherwise place the child in an intolerable situation. In support of this part of her claim, the respondent refers to previous difficulties with the applicant, which he disputes. In her report to the court, Dr. C.G. stated and I quote:-

> "[M.N.] does express positive feelings for his father and has stated that he misses him and would like for him to visit. [M.N.] has stated that he does not have a fear of seeing his father on his own."

26. I am satisfied on the basis of this report that the child's return to Lithuania would not expose him to physical or psychological harm, and I further hold that there is insufficient evidence before me on which to conclude that the return of the child would otherwise place him in an intolerable situation.

27. I now come to the question of the child's objection.

28. In her report, Dr. C.G. stated that the child objects to returning to Lithuania and is clear that a return would mean that he would no longer live with his maternal grandparents. Dr. C.G. also stated that M.N. is capable of forming a view of who he wants to live with, and was able to give clear reasons for his choice. She was also of the opinion that M.N. gave a true account of his own feelings and views, and whilst he was able to acknowledge and understand that a return to Lithuania would upset his mother, this did not unduly influence his own thinking and reasons.

29. With regard to the degree of maturity of the child, M.N., Dr. C.G. stated and I quote:-

> "[M.N.] is a six year old boy and presents with the ability to;
>
> (a) Be clear about his likes and dislikes;
>
> (b) Understand the concept of yesterday, today and tomorrow and the near future, i.e. what will/can happen within the next week or two or what happened in the last week or two;
>
> (c) Express his ideas and feelings about significant events such as Christmas, Easter, birthdays and summer holidays;
>
> (d) Be aware of people's feelings and understands that his actions can impact on how people interact/respond to him;
>
> (e) To think about the world from someone else's perspective;
>
> (f) Express his ideas with ease and self assurance;
>
> (g) Describe experiences and talk about thoughts and feelings;
>
> (h) Show concern for others.
>
> [M.N.] will not have developed the ability at this time to comprehend fully the implications of a non-return to Lithuania, and that it could result in him not seeing his father for long periods of time. However, [M.N] understands that he has not seen his father in a very long time and was able to say that whilst he missed him, it did not make him too sad and he does not remember ever crying about not being able to see him or talk to him.
>
> [M.N.] does express positive feelings for his father and has stated that he misses him and would like for him to visit. [M.N.] has stated that he does not have a fear of seeing his father on his own.
>
> [M.N.] does not understand the concept of having to save money or having to plan a visit or holiday to Ireland, and the idea of his father visiting him on a regular basis is based on the simplistic view that if his father wants to see him all he has to do is pack a suitcase and get on a plane."

30. In considering whether it is appropriate for the court to take into account the views of the child in this case, I not only take into account Dr. C.G.'s findings as outlined above but also bear in mind para. 32 of the judgment of Finlay Geoghegan J., delivered on the 3rd September, 2008, when she gave judgment in this case in relation to the respondent's application for an order that the child be interviewed and assessed for the purpose of these proceedings, and I quote:-

> "On the facts of this application the child is aged six years and appears from the affidavit evidence of the parents to be of a maturity, at least consistent with his chronological age. On those facts, I do not find that *prima facie* he is a child not capable of forming his own views in the sense I have outlined above. It appears to me unavoidable that a judge making such a decision must rely on his or her general experience and common sense. Anyone who has had contact with normal six year olds know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life."

Bearing in mind the above matters, I hold that the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take into account his views.

31. This finding brings me to the weight to be attached to the child's evidence and how I should exercise my discretion in light of that evidence, having already held that there has been a wrongful removal.

32. While it is clearly important to take the objections of the child into account, one has to be careful when considering the views of a young male child who has expressed a preference for his mother. The importance of a father's role in a child's upbringing may not be sufficiently appreciated by a young person, and is something that this Court is obliged to acknowledge. Indeed, this seems to be implicit in Article 24(3) of the Charter of Fundamental Rights of the European Union which states:-

> "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

In light of the above I hold that the child's views in this case cannot be determinative, particularly when one takes into account his young age.

33. The question as to how this Court should exercise its discretion was dealt with by the Supreme Court in the judgment of Denham J. in *B. v. B. (Child Abduction)* [1998] 1 I.R. 299, in the course of which she stated:-

> "This exercise in discretion is a matter of balance in which the court should apply factors relevant under the Hague Convention." (at p. 313)

Denham J. then went on to outline eight factors to be considered in that particular case, the first five of which are relevant to the exercise of discretion in this case. These five matters are:-

1. The habitual residence of the child at the time of removal.

2. The law relevant to custody and access and the issue of comparative suitability of competing jurisdictions.

3. The overall policy of the Hague Convention and its objective to secure protection for rights of access.

4. The object of the Hague Convention to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

5. The circumstances of the child, information relating to the social background of the child, as stated in Article 13 of the Convention.

34. These factors were subsequently echoed in the judgment of Baroness Hale in the case of *Re M. (Abduction: Child's Objections)* [2008] 1 A.C. 1288, where she stated in relation to the exercise of discretion:-

> "In Convention cases, however, there are general policy considerations which may be weighted 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." (at p. 1307)

35. It seems to me that the Lithuanian Court has already considered the issue of the applicant's access, and that that court is the appropriate one to decide further access arrangements. I hold in the light of the judgments I have referred to and my finding in relation to the child's objection, that I should exercise my discretion in favour of the applicant. Accordingly, I direct the return of the child to Lithuania.

Stay

36. I propose to put a stay on this order to enable the mother to bring an application to have the matter of the child's access to his father reviewed by the Lithuanian Court in light of her present circumstances. I direct that a copy of this judgment and a copy of the report of Dr. C.G. be translated into Lithuanian, and that these documents be made available as soon as possible to the respondent to enable her to commence that process in Lithuania.