

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2013 No. 645 J.R.]**

**BETWEEN**

**E. E.**

**APPLICANT**

**AND**

**JUDGE THOMAS E. O'DONNELL**

**RESPONDENT**

**AND**

**J. S.**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 16th day of September 2013**

1. On 31st July, 2013, this Court granted leave to the applicant to issue and serve an application for judicial review seeking to quash the order of His Honour Judge O'Donnell made in L Circuit Court on 19th June, 2013, and by reason of the matters at issue to bring such application returnable for the 4th September, 2013.

2. The application for judicial review was issued and served on the Chief State Solicitor for the respondent and on the solicitor for the notice party. The Chief State Solicitor, by letter of 26th August, 2013, indicated that in accordance with established case law, the respondent would not be participating in the proceedings and that the matter should be determined between the applicant and the notice party.

3. The applicant and notice party were represented by solicitor and counsel at the hearing on 4th September, 2013. No objection was made on behalf of the respondent to the order of *certiorari* sought by the applicant. Notwithstanding this position, the Court must determine whether or not the applicant is entitled to the order of *certiorari* sought. I have concluded that the applicant is entitled to the order of *certiorari* and the following are my reasons for this decision. .

**Background to Circuit Court Order**

4. The applicant ("the Mother") is the mother and the notice party ("the Father") is the father of three children born in 1995, 1996 and 2000, respectively. The Mother is Swedish and the Father is Irish. The Mother and Father lived together with the children for many years. The elder two children were born in Ireland and the youngest, A, born in Sweden. The family spent time in both countries until approximately 2010. In 2009/2010, the Mother and the Father separated. Thereafter, the children appear to have lived primarily with the Father in Ireland and travelled to Sweden to visit the Mother.

5. Proceedings were commenced by the Father in the District Court in Ireland in 2010 seeking relief pursuant to the Guardianship of Infants Act 1964 (as amended) and several interim orders made between that time and 2012 including one in relation to access by the Mother in Sweden in the summer of 2012.

6. In the summer of 2012, the three children travelled to Sweden for the purpose of summer access with the Mother. The two elder children returned to Ireland but the youngest child, A, did not return to Ireland in August 2012, as was required pursuant to the District Court order for access by the Mother and remained in Sweden with his Mother, where he still remains.

7. On 6th September, 2012, the District Court in Ireland made an order in the existing proceedings granting the Father sole custody of the three children. By further order of the District Court of 10th October, 2012, the Mother was refused a stay on the said order. The Mother lodged an appeal to the Circuit Court against these two orders of the District Court. The Circuit appeal was pending before the E Circuit Court in 2013. Such an appeal proceeding includes a full rehearing of the dispute between the parents in relation to the custody of the children pursuant to the Guardianship of Infants Act 1964 (as amended).

8. In the meantime, the Father commenced an application in Sweden pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (25th October, 1980) ("the Hague Convention") and Article 11 of Council Regulation (EC) 2201/2003 of 27th November, 2003, concerning jurisdiction and the recognition of enforcement of judgments in matrimonial matters and the matters of parental responsibility ("the Regulation") for the return of the child A to Ireland by reason of an alleged wrongful retention of the child A in Sweden. The District Court in Sweden on 2nd November, 2012, notwithstanding the admitted wrongful retention, refused the application pursuant to Article 13 of the Hague Convention, by reason of the objections of the child A to returning to Ireland. On 28th November, 2012, the relevant Court of Appeal in Sweden refused leave to appeal the order of non-return.

9. The Swedish Central Authority notified the Irish Central Authority pursuant to Article 11(6) of the Regulation, initially by email of 9th November, 2012, and subsequently by email of 29th January, 2013, of the Swedish Courts' decisions. They also sent to the Central Authority for Ireland documents which included the decisions of the District Court and the Court of Appeal.

10. The Central Authority, in March 2013, notified the Irish High Court of the Swedish Court decisions pursuant, *inter alia*, to O. 133 of the Rules of the Superior Courts and sent to the Principal Registrar of the High Court the documents received. It was then ascertained and confirmation received that the Circuit appeal relating, *inter alia*, to the dispute between the Mother and the Father in relation to the custody of or access to the child A was pending before the E Circuit Court.

11. On 7th March, 2013, the Principal Registrar of the High Court, pursuant to O. 133, r. 11(4) of the Rules of the Superior Courts, in accordance with a direction given by me, sent the documents received from Sweden by the Irish Central Authority to the relevant Court official in the E Circuit Court for the purpose of such documents being put before a judge of the Circuit Court in the Circuit appeal in accordance with Article 11(6) and (7) of the Regulation.

12. The solicitors for the Mother and the solicitors for the Father prepared a joint letter dated 30th July, 2013, exhibited in the grounding affidavit to this application which sets out the agreed facts in relation to hearings which took place in May and June of this year before judges of the Circuit Court in E and L. At the first hearing, the Circuit judge (His Honour Judge Keys) indicated that he proposed to be guided by the judgments of this Court in *A.O'K. v. M.K. (Child Abduction)* [2011] IEHC 82, [2011] 2 I.R. 498, and [2011] IEHC 360 and that the only issue before him was that of custody. At further hearings of the Circuit Court, orders were made and directions given in relation, *inter alia*, to interviews and assessments to be conducted by a child psychologist with the child A in Ireland and Sweden in preparation for the hearing of the Appeal and determination of custody issues relating to child A.

13. It appears from the agreed facts that on 19th June, 2013, counsel for the Mother informed the respondent that the Mother was not willing to permit the child A travel to Ireland for the purpose of an interview and assessment with the proposed child psychologist as had been directed by the Circuit Court. She was willing to permit an assessment take place in Sweden. It then appears counsel for the Father applied for the Mother's appeal of the District Court orders to be struck out. The solicitors' agreed note then records the respondent's decision on the application to strike out in the following terms:

"[The respondent] said that he was not at all satisfied that the Appellant [Mother] is prepared to prosecute the appeal; he had clearly indicated what he had in mind on the last occasion; he was striking out the appeal and affirming the Order of the District Court. He said that the matter should be returned to the High Court as soon as possible to progress the Hague matter and he made a formal Order to remit the file back to the High Court. He refused an application to adjourn the matter peremptory (sic) against the Appellant."

14. The order of the Circuit Court drawn up pursuant to the above decision and which is the subject matter of this application for judicial review is in the following terms:

"Notices of Appeal of Orders made in Proceedings bearing Record Number 2010/00071 of the E District Court on the 6th of September 2012 and the 10th of October 2012 coming on for hearing before the Court this day.

WHEREUPON AND ON READING the pleadings and documents filed herein and on hearing the evidence adduced and what was offered on behalf of the Appellant and the Respondent.

The Court Doth strike out the Appellant's appeals in the matter and affirms the said Orders of E District Court, copies of which are attached to this Order.

Insofar as the Orders of the Swedish Courts in proceedings in relation to A [the child] (born REDACTED) were transmitted to this Court pursuant to Article 11 of Council Regulation (EC) No. 2201/2003 and Order 133 of the Rules of the Superior Courts, this Court returns the said documents to the High Court."

15. It appears from the order drawn and the oral decision given by the respondent that his understanding at the time of the decision was that there was a pending proceeding in the High Court (presumably, in relation to the child A) since he referred to "the Hague matter" and he considered that he had jurisdiction to transmit to the High Court the documents previously transmitted to the Circuit Court for the purpose of such High Court proceedings.

16. The transmission by the Principal Registrar of the High Court of the documents received from Sweden pursuant to Article 11(6) of the Regulation at the direction of the High Court pursuant to O. 133, r.11(4) of the Rules of the Superior Courts to an official of the Circuit Court for consideration in a pending Circuit Court proceeding is an unusual procedure and may have given rise to a misunderstanding by the respondent that there was a subsisting proceeding in the High Court between the parents in relation to child A and that he had jurisdiction to remit back to the High Court such documents for the purpose of proceedings before the High Court. There was, however, no proceeding between the parents in relation to child A in the High Court and, in my judgment, the Circuit Court judge did not have jurisdiction to remit any matter or documents to the High Court.

17. There is also no written judgment in this jurisdiction in relation to how a judge, whether of the High, Circuit or District Court should proceed to hear and determine an existing proceeding under the Guardianship of Infants Act 1964 (as amended) after the receipt of documents pursuant to Article 11(6) of the Regulation relating to a non-return order made by a court of another Member State in relation to a child which is the subject of the proceeding before the Irish Court. Articles 11(8), 40(1)(b) and 42 of the Regulation potentially create new procedural requirements for the reasons set out below. They are considered in greater detail in *A.O'K. v. M.K. (Child Abduction)* [2011] IEHC 82, [2011] 2 I.R. 498, and [2011] IEHC 360 and the judgments of the Court of Justice and English Courts referred to therein. Whilst those judgments relate to proceedings commenced after the making of the non return order they raise many similar issues to those faced by the Circuit Court in relation to the custody dispute concerning child A.

#### **Regulation 2201/2003**

18. The Regulation entered into force on 1st August, 2005, and, being a Regulation, it has direct applicability in Ireland without the necessity of any implementing provisions. It applies in all Member States other than Denmark. "Parental responsibility" as defined by the Regulation includes rights of custody and access. Article 8(1) provides that the courts of a Member State have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time those proceedings are commenced. On the facts herein, it is not in dispute that the child A was habitually resident in Ireland when proceedings were commenced before the Irish District Court in 2010. Article 8(1) is subject to Articles 9, 10 and 12. Only Article 10 is relevant to the facts herein.

19. Article 10 provides for the retention of such jurisdiction by the courts of the Member State of origin (Ireland) where a child is wrongfully removed or retained until the happening of certain specified events. It provides:

#### **"Article 10**

##### **Jurisdiction in cases of child abduction**

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually

resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."

20. On the facts herein, there had been no acquiescence for the purposes of Article 10(a) and none of the conditions specified in Article 10(b) had yet been fulfilled when the matter was before the Circuit Court in May and June, 2013. Accordingly, notwithstanding that the child A was residing in Sweden and had been so residing since the summer of 2012, the Irish courts, in June 2013, retained jurisdiction in relation to the dispute between his parents as to his custody.

21. Article 11 of the Regulation applies to proceedings for the return of a child who has either been wrongfully removed to or retained in a Member State other than the one in which he was habitually resident. It also applies after a Court refuses to return a child to their Member State of habitual residence pursuant to Article 13 of the Hague Convention. Insofar as relevant to this application, it provides:

#### **"Article 11**

##### **Return of the child**

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

. . . .

[Sub-paragraphs 2 to 5 inclusive relate to the hearing of an application for the return of a child and are not relevant to the present issues before the Court].

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

22. Recital (17) of the Regulation explains the scheme of Article 11 in the context of the division of jurisdiction between the courts in the Member State of the original habitual residence of a child and the courts in a Member State to which a child is wrongfully removed or in which he is wrongfully retained:

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without

any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.”

23. The procedures in section 4 of Chapter III referred to in Article 11(8) are those in Article 40(1)(b) and Article 42. These provide:

#### **“Article 40**

##### **Scope**

1. This section shall apply to:

(a) rights of access,

and

(b) the return of a child entailed by a judgment given pursuant to Article 11(8).

#### **Article 42**

##### **Return of the child**

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.”

24. The nature of a decision taken by a Court on an application for the return of a child who has been allegedly wrongfully removed or retained pursuant to the Hague Convention is important to a full understanding of the purpose and scheme of Articles 10 and 11 of the Regulation and the jurisdictions ascribed to the respective courts and procedures to be followed after a decision of non-return. The application for the return of a child pursuant to the Hague Convention is a summary application and once it is established that a child was wrongfully removed from or retained out of his State of habitual residence, the court (unless exceptionally Article 20 applies) is bound to make, in a summary way, an order for return unless a defence pursuant to Article 13 of the Hague Convention is made out. Even where such a defence is made out and the Court decides not to make an order for the return of the child, such decision is only a decision as to whether or not to make a summary order return. It is not a decision on custody. Article 19 of the Hague Convention expressly provides that a decision under the Convention concerning the return of the child “shall not be taken to be a determination on the merits of any custody issue”. Hence, a decision on a return application does not preclude a subsequent hearing and determination on the merits of any continuing custody dispute between the parents or other relevant persons before a court having jurisdiction to hear and determine such disputes at the relevant time. One of the purposes of the Hague Convention is to procure the prompt return of children to the jurisdiction of the courts of their habitual residence so that it is those courts which determine custody disputes in the best interests of the child. Articles 10 and 11(6) to (8) of the Regulation are directed to a custody hearing on the merits which may occur after the making of an order for non-return pursuant to Article 13 of the Hague Convention, as is the current position in relation to child A.

25. The purpose and scheme of Articles 10 and 11(6) to (8) of the Regulation appears threefold:

(i) to prevent a court which makes an order refusing to return a child pursuant to Article 13 of the Hague Convention from immediately assuming jurisdiction in relation to custody or access disputes concerning the child; and

(ii) to give the parties an opportunity of having determined a custody dispute on the merits before the courts in the Member State of the habitual residence of the child prior to the wrongful removal or retention; and

(iii) to create certainty insofar as possible for a child following the determination of the custody dispute by the courts of the Member State of origin, by providing for the making of a return order pursuant to Article 11(8) which, if certified in accordance with Article 42, is automatically enforceable in the Member State where the child is now residing or if the decision does not entail the return of the child, the transfer of jurisdiction in relation to the child to the courts of that Member State pursuant to Article 10(b).

26. On the facts herein, it is not in dispute that the Irish courts continue to have jurisdiction to hear and determine the custody dispute in relation to the child A. Nevertheless, it is necessary for this Court to set out the basis for that jurisdiction to explain its reasons for its conclusion on the question which is central to this application for judicial review, namely, that it is the Circuit Court alone which must now exercise that jurisdiction and that it had no jurisdiction to remit any proceeding relating to the child A to the High Court in June, 2013.

27. Articles 11(6) to (8) of the Regulation are not prescriptive as to which court in Ireland the documents received pursuant to Article 11(6) should be transmitted, either directly or by the Central Authority, or as to which court should determine any continuing custody dispute between the parties in relation to the child A. However, it is of significance that Article 11(7) only imposes an obligation on the Central Authority or a court to notify the parties and invite submissions where a court has not already "been seised by one of the parties". In more familiar terminology, this means that the Central Authority is only obliged to notify the parties and invite submissions where there are no relevant pending proceedings before a court in the country of origin. Articles 11(7), 40(1)(b) and 42 appear to envisage that if there are pending proceedings relating to custody or access of the child in relation to which a non-return order has been made, that the documents received by the Central Authority pursuant to Article 11(6) following the making of the non-return order should be transmitted to the court with seisin of those proceedings and be considered in those proceedings.

28. The European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations, 2005 (S.I. No. 112/2005) were made for the purpose of giving further effect to the Regulation in Ireland but do not contain any provision relevant to the procedures to be followed following the receipt of a non-return order pursuant to Article 11(6) of the Regulation. The Circuit Court Rules (Jurisdiction in Matrimonial Matters and Matters of Parental Responsibility) 2006 (S.I. 143/2006) made for the purposes of the Regulation similarly do not contain any provision relevant to the procedures to be followed following the receipt of a non-return order pursuant to Article 11(6) of the Regulation. The Rules of the Superior Courts (Jurisdiction, Recognition, Enforcement and Service of Proceedings) 2005 (S.I. No. 506/2005) inserted Order 133, rule 11 to the Rules of the Superior Courts which does provide for proceedings and procedures to be followed by the Central Authority and the High and Supreme Courts upon the receipt of documents pursuant to Article 11(6) of the Regulation.

29. Order 133, r.11 sets out a procedure to be followed where the Central Authority receives documents pursuant to Article 11(6) which is consistent with the interpretation of Article 11(7) set out above. Where no proceedings are in being before a court in this State concerning the custody of or access to the child, the Central Authority is obliged to issue an originating notice of motion for the purposes of Article 11(7) of the Regulation (O. 133, r. 11(1)). If, however, proceedings are in being before the High Court or the Supreme Court, then the Central Authority must transmit the documents to the appropriate office of the High Court or the Supreme Court (O. 133, r. 11(3)) and they are then transmitted to the relevant court.

30. On the facts herein, neither of those situations arose. The proceedings in being were before a Circuit Court. In the absence of any provision or rule of court which enables documents to be sent directly by the Central Authority to the relevant Circuit Court a practice has developed whereby the Central Authority sends the documents to the office of the High Court and O. 133, r. 11(4) enables the High Court direct the Registrar transmit the documents to the relevant Circuit Court. O. 133, r. 11(4) provides:

"Where the Court receives documents specified in Article 11(6) of Regulation No. 2201/2003 in respect of an order of non-return pursuant to Article 13 of the Hague Convention made concerning a child who was habitually resident in the State before his or her wrongful removal or retention (whether under sub-rule (3) of this rule or otherwise [emphasis added]), and proceedings are in being before a Court in the State concerning the custody of or access to the child, the Court shall (i) if such proceedings are in being before the High Court or Supreme Court, cause the Registrar to transmit copies of such documents to the parties to those proceedings by registered post or in such other manner as the Court may direct or (ii) if such proceedings are in being before another court in the State, cause the Registrar to transmit such documents to the appropriate office of that court [emphasis added]."

31. It is to be noted that the above rule applies whether documents are received pursuant to O. 133 r. 11 sub-rule (3) or otherwise. Sub-rule (3) relates to the situation where there are proceedings pending before the High Court or the Supreme Court. Sub-rule (4), as it includes "or otherwise" includes the receipt by the High Court of documents from the Central Authority when proceedings are in being before a court in the State other than the High or Supreme Court, i.e. the District or Circuit Court, concerning the custody of or access to a child.

32. On the facts herein, the office of the High Court received the documents from the Central Authority in March, 2013. It was informed and obtained confirmation that there was an appeal pending before the E Circuit Court in relation, *inter alia*, to the child A, which concerned custody of or access to the child. Hence, the Court gave a direction to the Principal Registrar to transmit the documents to the E Circuit Court office pursuant to O. 133, r. 11(4). The direction given by the Court was not, however, given in any pending proceeding concerning the child the subject of the non-return order. The High Court does not have jurisdiction to hear or determine any issue in relation to the child A by reason of the receipt of the Article 11(6) documents from the Central Authority where relevant proceedings are pending before a Circuit Court nor by reason of the direction given for their transmission to the office of the E Circuit Court. The functions of the High Court pursuant to the Regulation and Order 133 r.11 were complete on the transmission of the received documents to the Circuit Court office. Hence, the Circuit Court, on 19th June, 2013, had no jurisdiction to remit any matter to the High Court or transmit documents to it.

33. It appears from the Order of the Circuit Court and the solicitors' agreed note of the oral decision of the respondent that the return to the High Court of "Hague matter" and the remission of the Article 11(6) documents received for the purpose progressing the Hague matter in relation to the child A (for which there was no jurisdiction) formed an integral part of the full Order of 19th June, 2013 including the striking out of the Mother's appeal and affirmation of the District Court Order on custody without any decision on the merits. . It follows in my judgment that the Mother is entitled to an order of *certiorari* quashing the entire of the order made by the respondent on 19th June, 2013.

34. I have also concluded that there should be an order pursuant to O. 84, r. 27(4) of the Rules of the Superior Courts remitting the file of documents received pursuant to Article 11(6) of Regulation 2201/2003 to the Circuit Court with a direction that it hear and determine the appeal pending before the Circuit Court from the orders of the District Court, taking into account in relation to any dispute concerning child A the additional jurisdiction pursuant to Article 11(8) of Regulation 2201/2003, and having regard to the procedural requirements necessitated by the requirements of Article 42 of Regulation 2201/2003 in relation to the certification of any order which may be made by the Circuit Court pursuant to Article 11(8) of Regulation 2201/2003.

35. As this application relates to an Order made in relation to minors I propose making an order pursuant to s.45 of the Courts (Supplemental Provisions) Act 1961 that the proceeding be treated as heard otherwise than in public. The judgment will be published with identifying material relating to the minors deleted.

