Neutral Citation [2016] IEHC 739

THE HIGH COURT

Record No: [2016/30HLC]

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

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF COUNCIL REGULATION 2201/2003

AND

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

BETWEEN:

M.N.

APPLICANT

AND

A.N.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 20th day of December, 2016

1. This case concerns an application for the return of the child, M. to the jurisdiction of the Republic of Poland 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 issued 19th October, 2016. The Republic of Poland is subject to both the Hague Convention and Council Regulation 2201/2003. This case was heard on 20th December, 2016. The respondent chose not to be legally represented, although she was deemed eligible for legal aid upon payment of a contribution of €500.

2. The applicant father and respondent mother were married to each other on 24th January, 2009. The child was born in the Republic of Poland. The respondent has two other children who are not the children of the applicant and they are not subject to any Hague Convention proceedings.

3. On 16th November, 2016, this Court ordered that Mr. Michael Mullally, Clinical Psychologist, do interview and assess the child, the subject matter of these proceedings pursuant to Article 11(2) of Council Regulation 2201/2003 in order to give an opportunity for the voice of this child to be heard. The child attended at the office of Mr. Mullally on 22nd November, 2016 along with an interpreter and Mr. Mullally provided a report to the Court dated 30th November, 2016.

4. It was submitted on behalf of the applicant that the Hague Convention on the Civil Aspects of International Child Abduction is intended to prevent "the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child" as cited from the Perez-Vera Explanatory Report. It is the applicant's position that the child was wrongfully retained beyond the two week holiday to Ireland that was consented to by the applicant. The circumstances outlined by the applicant are that he brought the respondent and the children to the airport on 17th June, 2016 for a two week holiday in Ireland and the respondent failed to return to Poland after that two week period.

5. Article 3 of the Hague Convention sets out the definition of wrongful retention 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."

6. It is accepted by the respondent that the child, the subject matter of these proceedings, was habitually resident in the Republic of Poland prior to the wrongful retention. It was submitted on behalf of the applicant that a child's place of habitual residence cannot be changed unilaterally by one of the parents. Counsel for the applicant relied upon the judgment of Finlay Geoghegan J. in the case of *A.K. v. A.J.* [2012] IEHC 234 where she stated at para. 37:-

> "in general, one parent cannot unilaterally change the habitual residence of a child. It requires at minimum the acquiescence of the other parent or a court order to the change in place of residence."

7. The applicant is named on the birth certificate of the child as the father. According to Polish law, in particular the Family and Guardianship Code of 25th February 1964, the father has rights of custody. The applicant asserts that he was exercising his rights of custody as the child the subject matter of these proceedings was living with him and the respondent in the family home in Poland prior to the wrongful retention. The respondent acknowledges that the applicant was exercising his rights of custody in relation to the child at the time.

8. Proceedings were issued within one year of the alleged wrongful retention and therefore there is a mandatory obligation on the court to order the return of the child under Article 12 unless a defence under Article 13 is established. The defences under Article 13 of the Convention are as follows:-

> "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."

9. The respondent alleges that the applicant consented to the removal of the child to this jurisdiction. She alleges that he made her leave the family home and told her to look for work in Ireland. The applicant has consistently asserted that he consented only to a two week holiday in Ireland and that he did not consent to the child remaining in Ireland beyond this period. Counsel for the applicant cited the Supreme Court decision of *S.R. v. M.M.R.* [2006] IESC 7 at para. 6.2 which found that the relevant principles in relation to consent are as follows:-

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

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

(iii) the evidence in support of the consent needs to be clear and cogent;

(iv) the consent must be real; it must be positive and it must be unequivocal;

(v) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent."

There is insufficient evidence in this case to prove a clear, cogent and unequivocal consent by the applicant to the retention of the child in this jurisdiction beyond the two week holiday period.

10. The case law on "grave risk" has established that the defence should be strictly construed. The Supreme Court set this out in the case of *A.S. v. P.S.* [1998] I.R. 244 as follows:-

"The law on 'grave risk' is based on Art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Conevntion to return children who have been wrongfully retained ina jurisdiction other than that of their habitual residence.

The exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.

The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

In *A.S. v. P.S.* Denham J. ordered the return of the child to the UK noting that the "sophisticated family law legal system can deal with issues of custody, access and child abuse" and it was submitted on behalf of the applicant that there is a similarly sophisticated system in Poland that should deal with all issues in relation to these children. The respondent has raised the defence of "grave risk". She asserted that the applicant was violent towards her. One incident is accepted by the applicant although he asserted that this incident was brought to the attention of the Polish authorities and he was subject to a "Blue Card" but that same was later discharged and that police and social services were involved. It was submitted on behalf of the applicant that this demonstrated the capacity of the Polish authorities to address any issue of domestic violence. The respondent stated to the Court that there are ongoing proceedings in the Polish Courts and that would be the appropriate forum to deal with the issues between the parties as it is the place of habitual residence of the child the subject matter of these proceedings. Article 8.1 of Council Regulation (EC) 2201/2003 provides that the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time that court is seised.

11. The views of the child have been assessed by Mr. Mullally and have been considered by this Court. The child has not stated any objection to being returned to Poland and did state that he misses his father. The respondent asserted that the child is happy in Ireland although it appears from the report of Mr. Mullally that he was also happy in Poland. Therefore, the defence of the child's objection has not been established in this case. The child was assessed by Mr. Mullally as being of average maturity for his age and he is six years of age.

12. In conclusion, this Court is under an international obligation to return this child to his place of habitual residence which has been accepted is the Republic of Poland. This Court has considered the various potential defences and it is the view of this Court that the standard has not been reached in order to establish a defence under Article 13 such that this Court should exercise its discretion to make an order of non-return. Therefore, this Court orders that this child be returned to his place of habitual residence, said return to take place by the applicant who shall collect the child at 10.00 on the morning of 28th December, 2016 from the address of the respondent as set out in the order.