Neutral Citation [2016] IEHC 458

**THE HIGH COURT**

**Record No: [2015/18HLC]**

**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 S. (A MINOR)**

**BETWEEN:**

**J.M.**

**APPLICANT**

**AND**

**B.M.**

**RESPONDENT**

**JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 29th day of July, 2016.**

1. This case concerns an application for the return of a child, S., born on 5th February, 2009 to the jurisdiction of the Bolivian Republic of Venezuela 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 22nd July, 2015.

2. The applicant father and respondent mother are not married to one another, nor have they ever been. The child, S., was born in the Bolivian Republic of Venezuela. The applicant and respondent resided together after the child's birth, however, they separated when she was three months old. The parties were unable to agree an access schedule and the applicant brought an application to the appropriate authority in the Bolivian Republic of Venezuela on 28th January, 2011 to regularise his visitation rights, however, no order was finalised nor was any agreement reached in relation to access.

3. On 31st July, 2015, this Court ordered that Dr. Anne Byrne-Lynch, Clinical Psychologist, do interview and assess the child the subject matter of these proceedings pursuant to Article 13 of the Hague Convention. Dr. Byrne-Lynch supplied this Court with a report dated 30th September, 2015. The child was six years old at the time of the assessment and is reported as being bright and articulate. Dr. Byrne-Lynch reported that the child has a clear preference for living in Ireland but would not have a strong objection to living wherever her mother was. The child appeared not to have any knowledge of the applicant.

4. It is the case of the applicant that the respondent removed the child from the jurisdiction of the Bolivian Republic of Venezuela on or about 1st November, 2013 without his consent. The applicant's case is that he had rights of custody under the law of the Bolivian Republic of Venezuela and that he was exercising those rights of custody. He stated that he was fully involved in the care of the child in her early days. He admits he has not had access with the child since January, 2011 as a consequence of the respondent avoiding and obstructing him. It is further averred that the child's place of habitual residence is and has always been the Bolivian Republic of Venezuela. The applicant stated that he sought the assistance of the authorities as soon as was possible when he discovered that the respondent was in Ireland with the child. He further stated that he believes there were delays caused within the administration office for the purposes of forwarding his application.

5. The respondent avers in her affidavit dated 3rd September, 2015 that the child the subject matter of these proceedings is habitually resident in Ireland. She sought asylum in Ireland in March, 2014 on the grounds of being afraid for her life. She further avers that there is civil disobedience and armed confrontations in Venezuela and that it is difficult to get food. On 19th September, 2014 her application for asylum was refused by the Officer of the Refugee Applications Commissioner. She has appealed and is awaiting a hearing before the Refugee Appeals Tribunal. She currently resides with her child in a direct provision centre. The respondent avers that the applicant provided virtually no practical support in relation to the child and he had very limited contact with the child.

6. The respondent further avers that the child was diagnosed with a condition that the respondent herself has, called Von Willebrand Disease and she is receiving treatment here but that such treatment would not be available to her in Venezuela. The respondent stated that the child was enrolled in school in Ireland on 6th May, 2014.

**Summary of legal submissions on behalf of the applicant**

7. Counsel for the applicant set out that the child is habitually resident in the Bolivian Republic of Venezuela and that the wrongful removal of the child occurred on or about 4th November, 2013. It was also stated that the retention of the child in Ireland since 4th November, 2013 was wrongful as it was in breach of the applicant's rights of access and custody. It was asserted that the applicant has automatic rights of custody and access by virtue of being a parent of the child. Proceedings in relation to the custody and access of this child were before the courts of the Bolivian Republic of Venezuela although no final order was made.

8. Counsel for the applicant submitted that the removal and retention of the child was wrongful within the meaning of Article 3 of the Hague Convention:-

> "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."

9. An affidavit of laws was sourced to answer certain questions in relation to the laws of the Bolivian Republic of Venezuela, in particular, in relation to the rights of custody of the applicant. According to the affidavit of laws, dated 8th January, 2015 and cited in the legal submissions on behalf of the applicant, the applicant does have rights of custody under Venezuelan Law. It was submitted that the applicant would have continued to exercise rights of custody but for the removal and retention of the child by the respondent. Counsel for the applicant set out the various facts that point to the applicant's exercise of his rights of custody including that he commenced proceedings in Venezuela in relation to custody and access. Counsel for the applicant relied on various cases including *W. v. W.* [1993] 2 F.L.R. 211 where Lord Brandon stated that the concept of exercising rights of custody must be construed widely. Counsel for the applicant further cited the case of *M.S.H. v. L.H.* [2000] 3 I.R. 390 where the Supreme Court held that a father who was in prison and had very limited access with his children was exercising his rights of custody when he took proceedings in the English courts.

10. Counsel for the applicant further set out the law in relation to habitual residence which clearly states that habitual residence is a matter of fact. It was submitted that the child the subject matter of these proceedings lived all her life in the Bolivian Republic of Venezuela until her removal in November, 2013 and was therefore habitually resident there.

11. It was then submitted that once the applicant makes the prima facie case that there was a wrongful removal or retention then the burden of proof shifts to the respondent to prove any defence that is raised. The defences are set out in Article 13 of the Hague Convention and the defence known as "grave risk" has been raised in this case which is under Article 13(b):-

> "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 – (…)
>
> 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."

12. It was submitted on behalf of the applicant that the law in Ireland in relation to grave risk was clearly stated by Denham J. in the Supreme Court in the case of *A.S. v. P.S.* [1998] 2 I.R. 244 where the test for successfully invoking the defence was stated to be extremely high. It was further submitted that the threshold that needs to be met for the purposes of the grave risk defence was considered by Finlay Geoghegan J. in *P. v. P.* [2012] IEHC 31 who determined that it should "be given a restricted application but that does not mean it should never be applied at all". Counsel for the applicant further cited at p. 44 where Finlay Geoghegan J. approved the observations in *In Re E. (Children) Abduction: Custody Appeal* [2011] UKSC 27 at para. 34:-

> "Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Amongst these, of course, are physical or psychological abuse or neglect of the child herself."

13. Counsel for the applicant further submitted that the respondent has not made out a sustainable claim that the child would be returning to a grave risk of an intolerable situation should she return to the Bolivian Republic of Venezuela. It was submitted that the medical condition suffered by the child was treated in relation to the mother when she resided in the Bolivian Republic of Venezuela. It was further submitted that the living conditions of the mother and child in Ireland are not good as they are living in a direct provision centre.

14. It was accepted that Article 12(2) of the Hague Convention provides that the court has a discretion to refuse to return the child when a year has elapsed between the wrongful removal or retention and the commencement of proceedings where it is demonstrated that the child is well settled. The moment of the wrongful removal or retention is disputed and the applicant submitted that the period of unlawful retention commenced in November, 2014 and proceedings were instituted on 22nd July, 2015 which means it fell within the year and there is a mandatory obligation on the Court to return the child unless one of the defences under Article 13 are established. It was submitted in the alternative that, in light of all the circumstances, the child had not settled as she is attached to her mother and not necessarily to Ireland. It was further submitted that her living situation in Ireland is precarious as the asylum application has been refused and it is the applicant's position that the respondent has no basis for her asylum claim.

**Summary of legal submissions on behalf of the respondent**

15. Counsel for the respondent raised a legal point in relation to the supplemental affidavit of the applicant which was not filed appropriately according to the Rules of the Superior Courts.

16. It was accepted on behalf of the respondent that the child was habitually resident in the Bolivian Republic of Venezuela when she was removed in November, 2013. It was also accepted, on the basis of the affidavit of laws received that the applicant had rights of custody in relation to the child the subject matter of these proceedings. However, it is contested that he was not actually exercising those custody rights for the purposes of a wrongful removal within Article 3 of the Hague Convention. The case of *M.J.T. v. C.C.* [2014] IEHC 196 was cited where Finlay Geoghegan J. held that there was no wrongful removal where the applicant had not had contact with the child for three years prior to the removal. It was submitted on behalf of the respondent that the applicant has made limited efforts to seek contact with the child since shortly after her birth and that he, therefore, was not exercising his rights of custody.

17. It is the respondent's position that the relevant date in terms of a removal is 5th November, 2013 and because the special summons in this case issued on 22nd July, 2015 it is a discretionary case under Article 12 of the Hague Convention. It was submitted that the child is settled in accordance with the principles set down by Fennelly J. in *P.L. v. E.C.* [2008] IESC 19 and according to the report of Dr. Anne Byrne-Lynch that showed a clear preference for Ireland.

18. Counsel for the respondent further argued that there is a grave risk that a return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation in accordance with Article 13(b) of the Hague Convention. Counsel for the respondent cited from the case of *R.K. v. J.K.* [2000] 2 I.R. 416 where Barron J. in turn cited with approval the United States Court of Appeals Sixth Circuit in *Friedrick v. Friedrick* (1996) 78F 3d 1060 as follows:-

> Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist, in only two situations. First there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. This is a very high threshold."

It was submitted in this case that there are shortages of medicine and food in Venezuela in current times such that it would be an intolerable situation reaching the high threshold required. It was submitted that particular relevance should be attributed to the child's medical condition and the limited ability for the services in Venezuela to treat same.

**Conclusions**

19. This Court accepts that a prima facie case for wrongful removal was made out. It was accepted by both parties that the child's place of habitual residence was the Bolivian Republic of Venezuela at the time of the removal in November, 2013. It was further accepted and it is clear from the affidavit of laws that the applicant had rights of custody in relation to the child as her father. This Court holds that, while the contact between father and child may have been limited it was sufficient in accordance with the Supreme Court decision in *M.S.H. v. L.H.* 3 I.R. 390 to be seen as exercising rights of custody as he had some contact with the child and he made applications before the Venezuelan courts for further access.

20. On the issue of asylum, this Court believes that the child abduction proceedings must go ahead and a decision must be made regardless of the status of any appeal of an asylum application in this country. Nothing in this judgment is intended to influence the appeal to the Refugee Appeals Tribunal.

21. It is the opinion of this Court that this case turns on the defence of "grave risk". Evidence was heard on 18th July, 2016 in relation to the potentially intolerable situation for the child were she to be returned to the Bolivian Republic of Venezuela. This evidence made it clear that it would be difficult for this child who has a serious medical condition to gain access to the appropriate medical treatment. The uncontroverted evidence was that one had to queue for food for six hours and that many people travel to other countries in order to buy food.

22. The defence of grave risk is fact specific as was set out by Finlay Geoghegan J. in *P. v. P.* [2012] IEHC 31 when she cited from *In re D.* [2007] 1 A.C. 619 to say that an "intolerable situation" must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". This Court holds that this particular child in her special circumstances should not be expected to tolerate a situation where she may not be able to access medical treatment and where there may be limited access to basic necessities such as food. This Court notes the absence of adequate undertakings on the part of the applicant in order to reassure the Court that the "grave risk" would be mitigated.

23. Therefore, this Court refuses to make an order returning this child to the jurisdiction of the Bolivian Republic of Venezuela.