

THE HIGH COURT

Record No. 2017/20 HLC

FAMILY LAW

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.J.

APPLICANT

AND

S.O.

RESPONDENT

Judgment of Ms. Justice Ni Raifeartaigh delivered on the 16th January 2018**Nature of the Case**

1. This is a case in which the applicant, the father of two children, seeks a declaration pursuant to article 3 of the Hague Convention on the Civil Aspects of International Child Abduction that the children were wrongfully removed from Poland by the respondent, their mother, in February 2017, together with an order pursuant to article 12 of the Convention for their return to Poland. The key issues raised relate to the habitual residence of the children at the time of their removal from Poland, and the children's objections to returning to Poland.

Relevant facts/chronology

2. The parties, who are both Polish nationals, entered into a relationship when they were teenagers. Their eldest child, a boy named W, was born in Poland on the 3rd November, 2006. At that time, the mother was 18 years of age. The applicant father, the respondent mother and the child, W, moved to Ireland shortly after the child's birth. Their second child, a girl named G, was born on the 16th July, 2009 and holds an Irish passport. The parents never married, but the applicant was appointed guardian of the children by a District Court order dated the 29th October, 2014 pursuant to Section 6A of the Guardianship of Infants Act, 1964, as amended.

3. They lived in Ireland thereafter until the applicant took the children to Poland in July 2016. Accordingly, W lived in Ireland for the first ten years of his life, and G for all of her life, until they went to Poland, where they spent approximately 6 months before returning to Ireland. It is clear that until July 2016, the habitual residence of the children was Ireland. A key question for the court is whether the habitual residence of the children changed between July 2016 and February 2017, being the period when they lived in Poland.

4. The evidence of the parties was received by the court in the form of sworn affidavits. The procedure is a summary procedure and there was no oral evidence. The respondent mother said that while they lived together in Ireland, the applicant was emotionally and physically abusive to her. She says that she had little English and was at home with the children, but that the applicant did not allow her to have a key to their home and controlled the children's allowance that she received. She describes an incident in April 2014 during which she was assaulted by the applicant and suffered a broken finger. She exhibited contemporaneous medical notes which state that she had told the doctors at the time that she was assaulted by her boyfriend, was pushed backwards and landed on her left ring finger, and was punched to the head. It is clear that she received medical treatment for an injury to her finger at that time. She says that after this incident, she left the family home with the children and went to live in a refuge for two months. She exhibits a letter from an Irish refuge, which confirms that she came to them for admission on the 11th April, 2014 and had given an account of the above assault to them also. The mother also exhibits a letter from an Irish domestic violence information resource centre, which confirms that she first made contact with them on the 22nd April 2014 for support in relation to issues of domestic abuse, and that she had reported to them that she had been the subject of financial abuse, emotional manipulation, social isolation and physical abuse. The letter indicates that she secured crisis accommodation in a refuge in April 2014, went to court to obtain certain court orders, and ultimately found private rented accommodation and secured employment. Another exhibit was a District Court maintenance order dated the 19th June, 2014. The applicant denies all allegations of abuse and says he does not accept that there was any justifiable reason why she should have attended refuge.

5. The respondent mother says that from the 28th June, 2014 onwards, she was living with the two children in rented accommodation in Ireland and working as a cleaner. They were living in this manner, away from the respondent, for a period of two years. The applicant does not make clear whether or not he accepts that they were living separately in Ireland during this time; at times, he appears to give the impression that they were living together during this period. He disputes that she worked during her time in Ireland.

6. There is a conflict of evidence as to what happened next. It is undisputed that the respondent took the children to Poland in July 2016. However, the mother's reasons for doing so and her intentions at that time are disputed by the applicant father. She says that, having suffered injuries in a car accident on the 21st May 2016, she went back to Poland with the children to stay with her mother to recuperate, on a temporary basis, but that it was always her intention to return to Ireland. She says that her recovery took longer than expected, and so she enrolled the children in a Polish school in September 2016. She exhibited a letter from a cleaning company, dated the 24th July, 2017, which says that she is currently an employee and that since May 2017 she was absent from work through injury. Some medical notes were exhibited in relation to her medical complaints, but it was not clear precisely what these were or what had caused them. The mother says that the applicant also moved back to Poland in August (or September) 2016 and that he exercised access to the children every second weekend, but she says that their main place of residence was with her in her mother's

home. She says that the children did not settle well in Poland and that she informed the applicant that she intended on returning to Ireland from an early stage as they were not settling and she was not receiving any financial assistance or social welfare in Poland. She says that he was not happy with this and entered her mother's house and stole her passport as well as the children's passports from the house, which she reported to the local police.

7. The applicant in his affidavit says; "we resided in Ireland from late 2006: However, when we returned to Poland in July 2016 it was our intention to permanently reside there..." Thus, he says nothing about their living apart while in Ireland, and gives the impression that the decision to return to Poland was a joint decision. At a later point in his affidavit, he says that "we resided together until our return to Poland in August 2016". He says that while they were in Poland, the children resided primarily with him at his parent's home, and that their mother exercised access every second weekend. He says that she indicated she wanted to return to Ireland, and he then went to a Polish court seeking an order to restrain her from doing so. He exhibited a court order dated 18 November, 2016 directing her to remain in Poland. This order indicates that a family court in Poland heard from both the applicant and respondent in those proceedings and that the applicant had indicated that she had told him she intended to leave the country, and that she also told the court that she intends to return to Ireland. Apparently, she told the court that she would not leave Poland during the proceedings. The applicant also disputes that her injuries suffered in the car accident were the reason for her return to Poland.

8. The respondent alleges that on the 30th January 2017, her son W was assaulted by his father during an access visit and that this precipitated her return to Ireland. A medical report (Polish) is exhibited which indicates that W was admitted to a night time and holiday duty paediatric clinic on that date. It appears that the clinic had been told at that time that the father had assaulted the boy, and more specifically that his father had kicked him in the area of the right lumbar spine and as a result he faltered and struck his head against the wall. The physical findings were that he had "two linear scratches on the skin of the right cheek" and a 5 cm suggillation on the "right shank". The respondent denies that he assaulted his son and maintains that "the scratches to W's right cheek were caused when he was struck on the face by our family cat". He makes no mention of the bruise on the child's leg (which is what I presume is meant by the word 'shank').

9. On the 5th February, 2017, the respondent came to Ireland with the two children, travelling on European identity cards, because the applicant had taken the passports. She says that she stayed temporarily with friends and then secured accommodation and permanent school places for the children, who are currently in 2nd and 4th class in primary school.

10. On the 19th March, 2017, there was an incident during which the applicant came with his brother to where she and the children were living, and there was, according to the respondent, an attempted abduction of the children. The Gardaí Síochána were called. A Garda document dated the 30 August, 2017 confirms that directions had been received from the Director of Public Prosecutions to initiate a prosecution against the applicant's brother for common assault and public order incidents, and continues "No prosecution can be taken against [the applicant] as he resides outside the jurisdiction". This in my view implies that the applicant might well also have been prosecuted were he residing within Ireland. A letter from a doctor indicates that the respondent mother went to him on the 21st March 2017, and that she told him that she was assaulted on 19th March 2017 and had been kept overnight at Cork University hospital for observation, as had been the children. The respondent denies that he attempted to forcibly remove the children and says that he simply visited to enquire after the children.

11. The applicant father exhibits a report from the W's Irish school dated the 28th June, 2016, in which the child's school progress in the school before they left for Poland is discussed. It is made clear that the child has certain difficulties, such as ADHD and possible dyslexia. This report was procured before they went to Poland. The last line of the report says that the child "was" a great member of their class and that it "was" a pleasure to work with him. Counsel for the father lays emphasis on this wording to argue that it suggests there was already a plan that the children would leave the Irish school at that stage, which contradicts the mother's suggestion that the plan to put them in a Polish school developed only later, after her arrival in Poland. In a further affidavit, the respondent mother says that she had not requested this report and that it was obtained by the applicant. She also exhibits a report from the school currently attended by the children, which indicates that W has access to a special needs assistant in his current school situation, who assists him with his significant expressive and receptive language difficulties. It appears that G also attends the support teacher for extra help with literacy and numeracy.

12. On the 21st March, 2017, the respondent obtained a protection order from the District Court.

13. The Special Summons in this case issued on the 28th July 2017.

The first issue: whether there was a change of habitual residence from Ireland to Poland

14. The question of a child's habitual residence is highly fact-specific. This has been confirmed by the CJEU in a number of important cases, including *A v. Finland* (Case C-527/07) [2009] E.C.R. I-02805, *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. I-14309, in particular at paragraph 56, and *C v. M.* (Case C-376/14 PPU), 9th October, 2014 (paragraphs 50-57), as well as by the leading Irish authorities, including *D.E. v. E.B.* [2014] IECA 104 and *K.W. v. P.W.* [2016] IECA 360. As the present case involves an EU country, the provisions of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility apply, and it is necessary for the applicant to establish that the children's habitual residence was Poland at the time of their removal. This arises in a context in which the parties lived in Ireland from 2006 to 2016, and were in Poland for only six months (July 2016-Feb 2017).

15. The children spent the greatest part of their young lives in Ireland before they ever went to Poland. W was born in 2006 and was brought to Ireland by his parents shortly after his birth, where he remained until 2016. G was born in Ireland in 2009. They went to Poland in July 2016 and returned to Ireland in February 2017. Clearly, they have spent much more time in Ireland than in Poland. The question is whether there was a change of habitual residence from Ireland to Poland prior to February 2017 by reason of the circumstance in which they came to be in Poland and/or events while there

16. . The burden of proof to establish that the habitual residence was Poland falls upon the applicant. Accordingly, the court must be satisfied on the balance of probabilities that the evidence demonstrates that there was a change of habitual residence from Ireland to Poland during the period July 2016-Feb 2017.

17. It is never easy to determine the matter of habitual residence, which is highly fact-based inquiry, on the basis of the evidence in a summary proceeding, in which the evidence is by way of affidavit only. I accept the submission of counsel on behalf of the applicant father that the evidence was rather thin in supporting the mother's contention that she moved to Poland to recuperate at her mother's home from injuries received in a road traffic accident, particularly the medical evidence as to the precise injuries received in the accident. However, having examined the applicant's version of events from start to finish carefully, I do not find his evidence reliable, and I take into account the documents exhibited by the mother with regard to her contemporaneous accounts to various parties and bodies of assault by the applicant. He sought to gloss over (at best) their living arrangements in Ireland prior to departure

for Poland, implying that they were living together while in fact it seems clear that the respondent had gone to a women's refuge, and subsequently worked and lived independently of him in rented accommodation for almost two years. The applicant also glossed over or denied, in a manner which in my view was not credible, various allegations, such as the attempted abduction of the children in March 2017, which has led to criminal charges being brought against his brother who was with him at the time. Similarly, I find implausible his response to the alleged assault of his son W in January 2017, in respect of which he claims that the family cat had inflicted the injuries. Accordingly, I find it difficult to place much weight on the applicant's version of events insofar as he says that he and the respondent decided together to travel to Poland in the summer of 2016 and that there was a joint decision to live there on a long-term basis. Bearing in mind that the burden of proof rests upon him with regard to establishing that the place of the children's habitual residence was Poland at the relevant time, I am not satisfied by the evidence before me that this was the case and accordingly, in my view, there was no wrongful removal within the meaning of article 3 of the Convention.

18. I will deal with the second issue for completeness, lest I am incorrect in relation to the first issue of habitual residence.

The second issue: the children's objections to returning to Poland

19. The Court is mindful of the guidance given by the Irish courts as to how this issue should be addressed in such cases as *C.A. v. C.A.* [2010] 2 IR 162 and *A.U. v. T.N.U.* [2011] 3 IR 683. The court must examine (i) whether the objections have been "made out"; (ii) the age and maturity of the child expressing the views; and (iii) whether in all the circumstances it is appropriate to exercise the discretion in favour of return or non-return, having regard to such matters as the policy considerations underlying the Convention, the strength of the child's objections and the extent to which the objections are authentically her own, and the long-term best interests of the child.

20. On the first issue, as to whether the children have in fact objected to returning to Poland, it is clear that each of them has done so. W said he wanted to stay in Ireland and has friends here, that he loves school here, and is involved in sports. He said it was much safer here. He said he did not like Polish schools or Poland and would not feel safe with his father, that he felt afraid of him. He said that he was bullied in the Polish school. He said that he was "open" to seeing his father, but only in Ireland. G said she was happier in Ireland, that there was nothing she liked about Poland and would not wish to return, and stated clearly that she did not wish to go back to Poland to be with her father.

21. As to the maturity of W, he was 11 years old at the time of the interview and was described by the child psychologist, Dr. O'Connor, as a "consistent, pragmatic, bright young boy whose answers to questions were immediate and clear". Dr. O'Connor said that he had the maturity to declare and present his preferences confidently. Dr. O'Connor very fairly also said that he did not have the maturity, as with any child of his age, to fully understand the long-term implications of such statements of preference, but that he was "candid and honest". He also said that the opinions of W would "inevitably have been affected by his mother".

22. Dr. O'Connor thought that G was mature enough to state her preferences for uncomplicated reasons and that her maturity was appropriate to her age. Again, she would not understand the long-term consequences of her stated preferences, and obviously, because she was younger than W, she would understand them less so than him.

23. Dr. O'Connor also said that the children's "fear of their father was clear".

24. In my view, the children's views in this case should be given considerable weight, particularly those of W, who is 11 years old. I accept that the fact of their living with their mother for the last six months may inevitably have had some influence upon them, but one of the things that comes across clearly from Dr. O'Connor's report is that they are afraid of their father, which is consistent with the accounts of violence by the respondent and documentary evidence seen by the Court. This fear seems to me more likely to have been caused by their direct experiences of their father rather than any thoughts that may have been planted in their minds by their mother, as can happen in some cases. Further, both children spent the vast preponderance of their lives in Ireland before going to Poland, and their six-month stay there was, at least for W, not a happy one in terms of schooling. In contrast, W is well integrated in his Irish school, is obtaining special educational assistance for his particular difficulties, has friends here and plays sport. This would also explain why he is genuinely happier in this jurisdiction. The children's own wishes/objections seem to me to point in the same direction as their best interests and seem also to be a product of their own authentic experiences. In those circumstances, it seems to me that this is a situation where the better course would be for this Court to exercise its discretion not to return the children to Poland, even if (contrary to my first conclusion) there was a wrongful removal of them from Poland to Ireland.

25. For completeness, I should perhaps say that while the defence of "grave risk" under article 13 of the Convention was argued, I would find that it had not been made out in the circumstances, not because I disbelieve the allegations of assault alleged against the applicant father, but because it seems to me that the threshold for establishing this defence has been placed at a higher level by the authorities on this defence than merely showing that assaults have taken place by the applicant parent.

26. I refuse the reliefs sought for the reasons set out above.