THE HIGH COURT

Record No. 2018/18 HLC

IN THE MATTER OF ARTICLE 11(6) OF COUNCIL REGULATION (EC) 2201/2003

AND IN THE MATTER OF FOREIGN PROCEEDINGS ENTITLED:

D.M.M.

Applicant

AND

O.P.M.

Respondent

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 5th day of March, 2019

Nature of the Case

1. This matter came before the Court in the context of a non-return order made by the Athens Court of Appeal on 1st September, 2017 pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The order was made in respect of a child who is now 7 years of age. The child was habitually resident in Ireland prior to what was found to be a wrongful removal to Greece. The present proceedings concern the interpretation and application of certain provisions of Article 11 of Council Regulation (EC) No. 2201/2003 ("the Regulation") and, more specifically, whether the father of the child is out of time in seeking to make submissions to the Court under the procedure laid out in Article 11(6) -(8), which provides for a three-month time limit from the time of notification to him of certain matters. Precisely what needs to be served upon a person in the position of the father in these proceedings is the focus of this ruling.

Relevant Chronology

Proceedings in Greece

2. The child was removed from Ireland and brought to Greece by his mother, Ms. O.P.M., on or about 7th May, 2013. The father then brought an application seeking an interlocutory injunction before the Athens Single-Member Court of First Instance, which was heard on 27th September, 2013. On 8th January, 2014, judgment was delivered and the Athens Single-Member Court of First Instance awarded temporary custody of the child to the mother. It would appear that the respondent father was only provided with a copy of the non-translated judgment by his then solicitors on 21st June, 2015.

3. The father, D.M.M., instituted proceedings before the Athens Single-Member Court of First Instance pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (hereinafter referred to as "the Hague Convention"). Those proceedings appear to have commenced in April or May 2015. That court heard the case and ultimately made an order for non-return pursuant to Article 13(b) of the Convention. This outcome was notified to the Irish Central Authority by email from a representative of the Greek Central Authority dated 24th June, 2015. On 17th August, 2015, the Irish Central Authority was provided with a certified copy of Judgment No. 4963 dated 9th June, 2015 of the Greek Court. The Irish Central Authority was then furnished on 18th December, 2015 with a copy of a report from Social Services in both the Greek and English languages which had been before the Athens Court.

4. Meanwhile, the father filed an appeal to the Athens Court of Appeal on 1st July, 2015. He also made an application to the Athens Single-Member Court of First Instance for interim access to his child on 21st October, 2015. A judgment regarding access was delivered on 1st December, 2015 by the Athens Single-Member Court of First-Instance and a copy of the judgment (Judgment No. 9745/2015) was emailed by the Greek Central Authority to the Irish Central Authority on 30th July, 2016.

5. The father's appeal against the order for non-return was heard on 27th April, 2017. On 1st September, 2017, the Court of Appeal of Athens delivered Decision No. 4133/2017 which dismissed the father's appeal to have the child returned to Ireland and upheld the order for non-return made by the Athens Court of First Instance. A copy of this decision was provided to the Irish Central Authority, in Greek, by email dated 8th November, 2017. A translated copy was subsequently received by the Irish Authority on 14th November, 2017.

Steps taken in Ireland

6. A representative of the Irish Authority wrote to the Greek Central Authority by email dated 16th February, 2018 seeking the mother's address in Greece. A reply was received on 20th February, 2018 which provided two alternative addresses.

7. In cases such as this, the Minister for Justice initiates the proceedings and, if and when the parties are served and come into the proceedings, the Minister then withdraws from the proceedings and the proceedings continue on an *inter partes* basis. The originating notice of motion for the within proceedings was issued and an *ex-parte* application was brought before the Court on 16th July, 2018 seeking directions as to the method of notification to the mother and father of the child, and inviting them to make submissions to the Court pursuant to Article 11(7) of the Regulation. The Court gave directions as to service on that date.

8. Both respondents were served by the respective means ordered by the Court and service was effected on the 9th August, 2018. Counsel on behalf of the Minister submitted that this was the date from which the three-month period started to run in respect of each of the parent's opportunity to make submissions to the Court in accordance with Article 11(6) of the Regulation. Counsel on behalf of the father submitted that time did not start to run because there was incomplete service of documents i.e. not all documents required by the Regulation were served on that date.

9. On 8th November, 2018, one day before the three-month period expired, the Irish Central Authority received a letter from an Irish solicitor, stating that Mr. D.M.M had applied for legal aid and was seeking consent to an extension of the three-month period to make submissions while his legal aid application was being processed. The Irish Central Authority replied by letter dated 20th November, 2018, explaining that their instructions were neither to consent nor object to an adjournment at the next appearance date of 10th December, 2018. When the matter came before the Court on 10th December, 2018, there was no appearance on or on behalf of Mr. D.M.M. Following correspondence, on the 14th January, 2018 the father was represented in Court by a legal aid solicitor and counsel. The Court gave directions for the hearing of argument in relation to the issue of whether the three-month deadline for submissions

under Article 11 had expired three months after the 9th August, 2018.

Article 11 of the Council Regulation (EC) 2201/2003

10. Article 11(6) of the Regulation provides: -

> "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."

11. Article 11(7) of the Regulation provides: -

> "Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized 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."

12. Article 11(8) of the Regulation provides: -

> "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."

13. Article 11 of the Regulation has been considered by Irish Courts and it is clear that, unlike an application under Article 12 of the Hague Convention where the issue is the narrower one of return or non-return in light of the principles and exceptions set out under that regime, the task of the Court under the architecture envisaged by Article 11(6) -(8) is, if the parties wish to make submissions, the task of examining the issue of custody in its fullest sense. In *A.O.K. v. M.K.* [2011] 2 IR 498, Finlay Geoghegan J. outlined the powers of an Irish Court in the Article 11(6) -(8) procedure:

> "30. The common starting point is that pursuant to Articles 8, 10 and 11(6)-(8) of the Regulation, the Court, in "examining the question of custody", is conducting a full hearing in relation to the custody dispute between the parents. In doing so, the Court is exercising its full jurisdiction pursuant, in particular, to s. 11 of the Guardianship of Infants Act 1964, in that it is determining a question affecting the welfare of the child and it has a general jurisdiction to make such order "as it thinks proper". The Court is directed by s. 3 of the Act of 1964, to regard the welfare of the Child as "the first and paramount consideration". Welfare is defined in s. 2 of the Act as comprising "the religious, moral, intellectual, physical and social welfare of the child". This requires the court to consider the welfare of the Child in the widest sense and consider the entire picture presented by the evidence before it. See, *inter alia*, Walsh J. in *O.S v. O.S.* [1976] 110 ILTR at 57, and Flood J. in *E.M v. A.M.* (Unreported, High Court, 16th June, 1992)."

14. And more specifically at page 520, para 54, sub paras. (ii)-(vi) of the same judgment:

> "(ii) in determining that substantive issue [i.e. the question of custody under article 11(6)-(8) of the removed children], the court has the full jurisdiction it would have in accordance with Irish law, pursuant to both its inherent jurisdiction and the Guardianship of Infants Act 1964, as amended;
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> (iii) the exercise of its jurisdiction, including in relation to any interlocutory application, must be informed by the provisions of Council Regulation (E.C.) No. 2201/2003 and, in particular, articles 11 and 42 and the Hague Convention on Child Abduction 1980;
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> (iv) its jurisdiction includes the power to make, on an interlocutory application, an order for the return of the child to Ireland. In determining any such application, the court will apply a welfare test in the relevant factual and legal context, but will not conduct a full welfare inquiry of the type which would be done prior to the determination of the substantive custody dispute;
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> (v) in determining any interlocutory application for the return of the child, the court must comply with the minimum procedural requirements of article 42(2), including giving the child an opportunity to be heard, unless a hearing is considered inappropriate, having regard to her age or degree of maturity; and
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> (vi) the court retains its full jurisdiction to make interim orders for access and custody"

15. In *R.P. v. A.S.* [2012] IEHC 267, which related to a decision of non-return by the Irish courts in relation to a removal from Slovakia, Finlay Geoghegan J. indicated the powers of the court from which the child was originally habitually resident prior to the removal upon a decision of non-return pursuant to Article 13 by the other court at paras 31 and 32:

> "31. Article 11(6) to (8) of Regulation 2201/2003 expressly permits the [court of origin] to now examine and decide any custody dispute if either party so requires…
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> 32. In accordance with the foregoing provisions, this Court is now obliged to transmit to the relevant [court of origin] or the Central Authority for the [origin jurisdiction] the documents referred to in Article 11(6). The [court of origin] retain[s] jurisdiction to make decisions in relation to the care and custody of the child and can do so taking into account the full welfare considerations as to what is in the best interests of the child. The mother, in her last affidavit, has indicated that she has commenced maintenance proceedings before a District Court in the [origin jurisdiction], and she understands that such Court is also empowered at the same time to determine issues on custody and parental rights. Once the details of that Court are made available, this Court will arrange for the relevant documents to be transmitted to this Court. Any judgment of the [court of origin] which requires the return of the child to the [origin jurisdiction] will be enforceable in Ireland in accordance with section 4 of Chapter III of the Regulation in accordance with Article 11(8)."

16. In *EE v. Judge Thomas E. O'Donnell* [2013] IEHC 418, Finlay Geoghegan J. outlined the purpose of the Article 11(6)-(8) procedure at para 24:

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

17. The Article 11(6)-(8) procedure has also been the subject of ECJ consideration. For example, in *Povse v. Alpago (Case C-211/10)* [2011] 3 W.L.R. 164, the court emphasised the broad scope of the powers of the 'court of origin'(which in the present case is Ireland) which include the power to make interim orders for return:

> "61. Further, as the European Commission has correctly observed, the court which is ultimately responsible for determining rights of custody must have the power to determine all the interim arrangements and measures, including fixing the child's place of residence, which might possibly require the return of the child.
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> 62. The objective of the provisions of Articles 11(8), 40 and 42 of the regulation, namely, that proceedings be expeditious, and the priority given to the jurisdiction of the court of origin are scarcely compatible with an interpretation according to which a judgment ordering return must be preceded by a final judgment on rights of custody. Such an interpretation would constitute a constraint which might compel the court with jurisdiction to take a decision on rights of custody when it had neither all the information and all the material needed for that purpose, nor the time required to make an objective and dispassionate assessment.
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> 63. As regards the argument that such an interpretation might lead to the child being moved needlessly, if the court with jurisdiction were ultimately to award custody to the parent residing in the Member State of removal, it must be stated that the importance of delivering a court judgment on the final custody of the child that is fair and soundly based, the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages which such moving might entail."

Submissions on behalf of the father and the Minister

18. In essence, the submission of counsel for the father was to the effect that the phrase "a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court" in Article 11(6) of the Regulation meant that the three-month period had not started to run in the present case from the 9th August, 2018 because all the necessary documents had not been furnished to the father. In particular, no transcript of any of the Greek hearings had been furnished, nor was any information about the evidence in the case. This, it was submitted, should be available in order for the Court to conduct a full hearing on the merits as to custody of the child. He submitted that there might, in due course, be a need for examination and cross-examination of the parents on factual issues, and that evidence given previously in the Greek proceedings could be of relevance in testing the accuracy and credibility of witnesses. It was submitted that the phrase "relevant documents" in Article 11(6) must connote an objective standard of relevance, and that it had to be interpreted in the context of the purpose of the ultimate hearing of the Court, which would be a full custody hearing as described in the authorities. Counsel also relied upon the most recent decision in the *Hampshire County Council* case, namely the decision of the Court of Appeal on the 28th November 2018 ([2018] IECA 365), where it was held that while the time limits under the Regulation (in a different context) were strict, time had not run in that case from service of a court order because the supporting documentation had not been furnished to the potential appellees.

19. Counsel for the Minister drew the Court's attention to the Practice Guide for the application of the new Brussels II Regulation (Brussels, 2005) which provides at pages 44-45:

> "Which documents shall be transmitted and in which language?
>
> Article 11(6) provides that the court which has issued the decision on non-return shall transmit a copy of the decision and of the "relevant documents, in particular a transcript of the hearings before the court". It is for the judge who has taken the decision to decide which documents are relevant. To this end, the judge shall give a fair representation of the most import elements highlighting the factors influencing the decision. In general, this would include the documents on which the judge has based his or her decision, including e/g. any reports drawn up by the social welfare authorities concerning the situation of the child. The other court must receive the documents within one month from the decision." (emphasis added)

20. Counsel submitted that this was a useful aid to interpreting the provisions and suggested that the standard for evaluating what documents should be transmitted in this context was the subjective one described in the Guidelines. It was submitted that the Greek Court of Appeal decision, together with the social work report, constituted the relevant evidence in the present case; that time did start to run on the 9th August 2018 when the father was served with these documents; and that he had failed to make submissions or initiate proceedings within the three-month period and was therefore out of time. Counsel relied upon the *Hampshire* decisions collectively for the proposition that the time limits under the Regulation are strict and that they do not allow for any extension of time.

21. In reply to the submission that the view of the Greek judge as to what was relevant was the standard by which the documents should be evaluated, counsel for the father replied that there was no indication in the papers before the Court that any judge in Greece had considered the issue of what papers should be sent to Ireland.

Decision

22. In my view, counsel are correct in suggesting that the focus of attention should be on the phrase within Article 11 (6) which refers to "a copy of the court order on non-return, and of the relevant documents, in particular a transcript of the hearings before the court…".

23. As far as I am aware, there is no direct authority on the meaning of this phrase and it falls to me to interpret it in the context of the overall purpose and architecture of the particular procedure provided for in Article 11(6)-(8) of the Regulation. This is an unusual mechanism, which has been extensively analysed in previous authorities. As regards the purpose of this mechanism, I do not think it is necessary to re-state in detail what has already been comprehensively described by Finlay Geoghegan J. in the authorities set out above, and it is sufficient to say, in broad terms, that the purpose of the procedure is to ensure that the court from which the child was originally wrongfully taken (the 'court of origin', in this case Ireland) is given the opportunity to make a final determination on the issue of custody where at least one of the parents so requests within the appropriate time-frame, even where the other court (in this case, the Greek court) has already made an order for non-return pursuant to Article 13 of the Convention. Therefore, it is correct for counsel for the father to say that the ultimate hearing would be one involving a full dispute on the custody issue, with potential examination and cross-examination of witnesses.

24. However, there are other considerations, additional to the purpose of the procedure, which I believe should be taken into account when considering the issue which falls for me to determine. The particular aspect of the procedure under consideration in this ruling on Article 11(6) is what could be described as a beginning-point in the process envisaged under Article 11(6)-(8); the Greek authority (in this case) notifies the Irish authority that a decision on non-return has been made and furnishes documents which are then transmitted to each of the parents with an invitation to make submissions. If submissions are made by the parents (or indeed by one of them, and usually, for obvious reasons, that is the parent who was the losing parent in the non-Irish jurisdiction), this triggers full custody proceedings in Ireland. The step of transmitting papers and requesting submissions is the beginning of a process rather than necessarily a once-and-for-all transmission of papers for the purpose of the ultimate custody hearing by the Irish court. It may be that, upon notification of their right to make submissions, neither of the parents wishes to have a hearing before the Irish court and the matter will go no further. Alternatively, it may be that one of the parents does wish to have a full custody hearing in the Irish court; in such circumstances, I would envisage that requests could be made to the Greek authority for further documents if they were deemed to be necessary. This would have to be evaluated on a case-by-case basis once the proceedings are up and running, as it were. However, to seek a full and comprehensive set of documents in all cases at the very outset could be very onerous and seems to me unlikely to be required by the provisions of the Regulation. For example, I have seen papers transmitted to Ireland pursuant to Article 11(6) where there had been up to seven hearings (including determinations at first instance, appeals and re-hearings) in the country whose courts had decided upon a no-return order; the documentation in such cases must be very extensive and it would seem disproportionate for the Authority in that country to have to gather all the documentation for transmission at the very outset of the process.

25. Another important consideration is the following one. A fundamental principle of the international child abduction regime (both under the Hague Convention and the Regulation) is that matters should be addressed with as much speed as is possible and compatible with appropriate procedures. Again, if a comprehensive set of documents had to be gathered in every case before the parents were even told of the Article 11(6)-(8) process and invited to make submissions, I fear that the element of speed would be considerably at risk. Indeed, in my experience to date, the notification process to the Irish authorities is not at all swift despite the use of the word "immediately" and the one-month time limit referred to in Article 11(6). In point of fact, it may be noted that in the present case, the notification from Greece to Ireland was well beyond the one-month time limit provided for under Article 11(6).

26. Therefore, while I am somewhat sympathetic to the argument on behalf of the father in the present case that the phrase "relevant documents" in Article 11(6) must mean either all the documents necessary to conduct the ultimate hearing of the case, or at least more documents than were in fact furnished in the present case, I am persuaded, by reason of the other considerations to which I have referred, that the submission on behalf of the father must be rejected. In my view, the correct interpretation of the phrase "a copy of the court order on non-return and of the relevant documents…" is something more minimal, along of lines of "such documents as are necessary to an understanding of the decision of the court concerned". The Court, for that purpose, must in my view be the final and authoritative decision on non-return in the other jurisdiction. In this case, the ultimate decision on non-return was that of the Athens Court of Appeal. Insofar as Article 11(7) refers to a transcript, this must be, in my view, implicitly subject to the words 'if any'; and here there was apparently no transcription of the appellate court proceedings. What was furnished to the Irish authority was the judgment of the Greek Court of Appeal and an extensive social work report and, in my view, these documents made it clear what the basis of the decision was and provided sufficient information to enable the father to decide whether or not he wished to request the Irish court to examine the issue of custody.

27. I do not think the various decisions in the *Hampshire County Council* case suggest a contrary conclusion (*Hampshire County Council v. C.E., N.E*, *Child and Family Agency, Attorney General*, Joined Cases C-325/18 PPU and C-375/18 PPU, [2018] IECA 154, [2018] IECA 157 and most recently, [2018] IECA 365,). That was a case with an unusual history, in which an English local authority obtained an *ex parte* order from the High Court for the recognition and enforcement (pursuant to a different section of the same Regulation) of an order of an English court in respect of children who were, at that time, in the interim custody of the Child and Family Agency, on foot of which the children were returned from Ireland to England. They were returned to England on the same date of the making of the *ex parte* order and before the parents were even made aware of the order. This deprived the parents of the opportunity to request the Court of Appeal to place a stay on the execution of the order pending appeal. The Court of Appeal referred questions to the Court of Justice of the European Union ("CJEU"), which were answered, and the matter returned in due course to the Court of Appeal. The CJEU had ruled *inter alia* that the time for appeal within Article 33(5) of the Regulation (a one-month period) must be interpreted to mean that the period for lodging an appeal laid down in the provision could not be extended. Arguments had been predicated upon the assumption that the appeal had been lodged *outside* the relevant period. When the case came back before the Court of Appeal, the applicants reformulated their argument to argue that the appeal had been lodged *within* time because they had been served only with the orders and not the underlying documentation such as the grounding affidavit, exhibits and so on. The Court of Appeal granted liberty to argue this new ground of appeal and ultimately ruled in their favour. However, unlike the present case, this decision was made by the Court of Appeal in a context where the parents had not participated in the original decision because it was made *ex parte* (it may be noted that the Court described them as having been "blind-sided as to the actual basis for the decision and the precise factors which were considered in its procurement"), and where what was in issue was a substantive and final decision of a court (the High Court). Accordingly, the Court of Appeal, in its consideration of what documents should be served before time started to run pursuant to Article 33(5), took into account the jurisprudence requiring that a decision-maker must give reasons under domestic and European law, and decided that the mere service of the order served upon the parents on the 22nd

September 2017 had not provided them with sufficient information to enable them to consider whether they may have grounds to challenge the decision. In contrast, the present situation is one involving a starting-point rather than an end-point in proceedings and does not involve an appeal from a decision of a court; there would, if the case were to proceed, be other opportunities to procure the materials necessary for the full custody hearing in due course. Further, even if the individual is entitled to the benefit of the analysis employed in the *Hampshire* case, namely that he/she is entitled to know the reasons for the decision of the (in this case) Greek court, this information was in fact furnished to Mr. D.M.M by means of service on him of the judgment of the Greek appellate court together with the social services report, not to mention that he actually had participated in the Greek proceedings.

28. In conclusion, in my view the father Mr. D.M.M. was furnished with the relevant documents on the 9th August 2018, and the deadline for submissions expired three months later. He had not made submissions nor served any motion within that deadline and is therefore outside the time limit envisaged by Article 11(6) the Regulation for bringing the matter before the Irish High Court.