Neutral Citation Number: [2010] IEHC 77

THE HIGH COURT

FAMILY LAW

2009 18 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACTS 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 S. Be.

BETWEEN

A. BU.

APPLICANT

AND

J. Be.

RESPONDENT

JUDGMENT of Mr. Justice John Edwards delivered on 12th day of March, 2010

Background Facts

1. The applicant is the father and the respondent is the mother of the child named in the title hereto namely, S. Be.. S. was born in Valmiera, Latvia on 26th October 2004. Accordingly, she is aged five years and four months.

2. The applicant and the respondent were never lawfully married to each other. However, it appears that they were living together as a couple at the time of the child's birth. The applicant is recorded as being the father of the child on the child's birth certificate. Following the child's birth the applicant and the respondent exercised joint custody of her until in or around June 2007 when the respondent moved to Ireland leaving the child with the applicant at 6 Skolas Street, Flat 10, Limbaži District, Aloja, Latvia. The applicant contends, and it does not appear to be denied by the respondent, that the respondent would occasionally return to Latvia and exercise access with the child. Seemingly this took the form of the child going to stay for short periods with the respondent. It appears from an affidavit of the applicant sworn on the 15th of February 2010 that on at least one such occasion the respondent herself was staying with her own parents who live in Salacgriva, Latvia.

3. The applicant contends that in June 2008, the respondent returned to Latvia and, while purportedly exercising access to S. in the manner described, removed her from Latvia and took her to Ireland for a period of three months without the applicant's prior knowledge or consent. She eventually returned the child to the applicant in September 2008.

4. I should digress here for a moment to state that in an unsworn statement of the respondent dated the 15th of December 2009, the respondent refers to court proceedings initiated by her before the Orphans Court of Salacgriva, Latvia in June 2008. According to the respondent the purpose of these proceedings was "to confirm the permanent place of residence of her daughter". In any case she states "that case was dissolved with the peace agreement between Ms. Be. and Mr. Bu.". The court takes it from this that those proceedings were settled. The court has not been told by either party on what terms the proceedings were settled.

5. At any rate in January 2009, the respondent initiated custody proceedings in the District Court of Limbaži, Latvia. In February 2009, the applicant lodged a counterclaim, also seeking custody of the child. Various documents have been exhibited in the parties' respective affidavits indicating the course of these proceedings in Latvia. In particular the court has a letter dated the 24th July 2009, from the Ministry of Justice of the Republic of Latvia addressed to the Department of Justice, Equality and Law Reform setting out the procedural history of the case.

6. It appears that on the 9th March 2009 the matter was listed before the Limbaži District Court for the purposes of a "preparatory sitting". This court is not entirely sure as to what this preparatory sitting involved. It may have been for some case management purpose or it may have been for the purpose of determining a question of interim or interlocutory relief pending a full hearing of the matter. Nothing turns on it in any event because it is clear from the letter of 24th July 2009, from the Ministry of Justice of the Republic of Latvia that what occurred on 9th March 2009 was that the respondent's lawyer requested a postponement or adjournment "*to give a time for Ms. J. Be. until the 27th March 2009, in order to draw up the settlement between the parties where Mr. A. Bu. agreed at the preparatory court sitting*". Although the translation is somewhat ambiguous I do not interpret the passage just quoted (and which I have italicised for emphasis) from the letter of 24th July 2009 from the Ministry of Justice as indicating that the parties had already arrived at some measure of agreement on 9th March 2009. Rather, I am inclined to interpret it as reflecting that the respondent's lawyer applied for an adjournment to enable the parties to engage in settlement talks and that the applicant was agreeable to this.

7. It seems that the adjournment application was made by the respondent's lawyer in her absence. In that regard the solicitor representing the applicant in the present proceedings, Mr Hugh Cunniam, of the Legal Aid Board's North Brunswick St Law Centre, has deposed, in his affidavit of the 25th of May 2009, to his belief (based presumably on his client's instructions) that the respondent returned to Latvia on 12th March 2009. The Court's understanding is that upon the

respondent returning to Latvia on 12th March, 2009, she sought access to S. and the applicant allowed the child to stay with the respondent during her visit. According to the applicant's affidavit, the respondent informed him that the child would be returned to his care within two weeks. However, at the end of the two week period, the applicant was unable to contact the respondent. He duly made inquiries as to her whereabouts and on 26th March 2009 he learned that she had returned to Ireland and had taken the child with her.

8. The respondent vehemently disputes that she removed S. from Latvia without the applicant's consent. In an affidavit sworn by her on 15th December 2009, the respondent contends that the applicant entered into an oral agreement with her on 5th March 2009, to grant custody of the child to her. The applicant vehemently denies that there was any such oral agreement. The respondent contends that she brought the child to Ireland pursuant to the alleged oral agreement and that she was legally entitled to do so. The applicant's contention is that the respondent abducted the child without his consent and removed her from the jurisdiction of Latvia.

9 There is one further detail that requires to be recorded. It appears that when the respondent commenced her custody proceedings she sought a psychological assessment of S. as evidence in support of her case. S. was seen by a psychotherapist, Dr. Dace Tuzika on three occasions between the beginning of January 2009 and the 16th March 2009. It appears that the respondent herself was also interviewed by the psychotherapist who produced a report dated 18th March 2009. Tellingly, however, the psychotherapist did not interview the applicant. At the hearing before me the respondent contended that this was because the applicant had failed to turn up for an appointment or appointments given to him. However, there is no mention of any such failure in the psychotherapist's report which has been exhibited before me. I will be returning to this psychotherapist's report later in this judgment.

10. Subsequent to the removal of the child from Latvia to Ireland by the respondent the applicant made contact with the Central Authority for Latvia, namely the Ministry of Children, Family and Integration Affairs at Zigfrida Annas Meierovica Boulevard 14, Riga, Latvia. The Latvian Central Authority duly wrote to the Irish Central Authority requesting the return of the child under Article 12 of The Hague Convention. The proceedings herein were commenced by Special Summons dated 26th May 2009, and the matter has from time to time appeared in The Hague & Luxembourg Convention list before Ms. Justice Finlay Geoghegan for the purpose of procedural rulings and directions. Among the orders made by Ms Justice Finlay Geoghegan was an order declaring that the child S. is of insufficient age and maturity to have her wishes taken into account. Further, although the respondent was initially represented by the Legal Aid Board's Monaghan Law Centre she dismissed her solicitor and on the 2nd of December 2009 Ms Justice Finlay Geoghegan allowed her solicitor to come off record. The applicant was also granted liberty by Ms Justice Finlay Geoghegan on the same date to obtain an Affidavit of Laws in the matter and the applicant's Solicitor was required to furnish the respondent with a copy of the request being sent to the Latvian lawyer.

11. In response to the applicant's proposal to obtain and file an Affidavit of Laws the respondent attended in person before Ms Justice Finlay Geoghegan on the 16th of December 2009 and sought liberty to file her own unsworn statement, purporting to be an affidavit of laws. Ms Justice Finlay Geoghegan directed that:

> "The Statement of the Respondent filed in Court this day be deemed treated as an Affidavit of Laws and sent to the Applicant's Irish solicitors and the Applicant's Solicitors do furnish an Affidavit of Laws and serve same on the Respondent.
>
> And in the event that the Respondent disputes any aspect of such Affidavit of Laws the Respondent do employ a Latvian lawyer to provide an Affidavit of Laws to be furnished with an English translation to the Solicitor for the Applicant on or before the 21st January 2010 and the evidence of the qualifications of such a lawyer to be provided the Court."

12. The applicant has filed an affidavit of one Dana Rone sworn on 21st December 2009. Ms Rone is a Latvian lawyer who is a member of the Collegium of Sworn Advocates of Latvia and who has been admitted to practice as a sworn Attorney at Law (zvçrinâts advokâts) before the Latvian Courts.

13. The respondent has not in fact indicated that she disputes any aspect of Ms Rone's Affidavit of Laws and has not sought herself to file an Affidavit of Laws sworn by a Latvian lawyer. Accordingly, the Court is prepared to accept the Affidavit of Ms Dana Rone, who the Court is satisfied is a properly credentialed expert on Latvian law, as unchallenged.

The Law

14. By virtue of section 6 of the Child Abduction and Enforcement of Custody Orders Act, 1991 the Convention on the Civil Aspects of International Child Abduction, signed at the Hague on the 25th of October, 1980 (hereinafter called the Hague Convention) has the force of law in the State, and the Court must take judicial notice of it. Moreover, since 01 March 2005 the provisions of the Hague Convention have to be read and applied in conjunction with what is known as the Brussels II Regulation, a directly effective instrument more particularly entitled Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The Issues

15. Having regard to the provisions of the relevant legislation it is necessary for the Court to determine the following issues in the circumstances of this case:

> a. Where was the child S. "habitually resident" at the time of her removal to Ireland by the respondent?
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> b. At the time that the child S. were removed to Ireland by the respondent with whom did "parental responsibility" lie, and what court or courts had jurisdiction in matters of parental responsibility?
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> c. Was the respondent's removal of the child S. to Ireland in breach of "rights of custody" attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the children were habitually resident or did, as the respondent alleges, the applicant consent to the removal of the child S. from

Latvia?

d. If S. was removed to Ireland in breach of the respondent's "rights of custody", were those rights actually being exercised, either jointly or alone at the time of the respondent's removal of S. to Ireland, or would they have been exercised but for the removal?

e. Is there a grave risk that returning S. to Latvia would expose her to physical or psychological harm or otherwise place her in an intolerable situation?

Issue a.

The child's habitual residence?
16. In the case of *P.N. v T.D.* [2008] IEHC 51 I stated the following:

> "In the United Kingdom and elsewhere various tests have been propounded for determining habitual residence. In their work entitled *International Movement of Children, Law, Practice and Procedure,* (Family Law, 2004) Lowe, Everall and Nicholls describe a "dependency test" (paras 4.45 – 4.47); a "parental rights test" (paras 4.48 – 4.49); a "child-centred test" (para 4.50) and a "fact based test" (para 4.51 – 4.56). It recent times the "fact based test" appears to be the most favoured approach, so much so that the authors assert (at page 63):
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> > 'The authority for the fact based test is so eminent, arising as it does from the speeches of the House of Lords in *R v. Barnet London Borough Council, ex parte Shah* [1983] 2 A.C. 309 and the speech of Lord Brandon in *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 A.C. 562, that one could say almost with certainty that the state of English law is that habitual residence is a question of fact.'
>
> The fact based test approach broadly approximates to the approach that the Irish Courts have been adopting, though the latter have eshewed any particular labelling. The Irish approach has been that the determination by the Court of the habitual residence of a child for the purposes of the Hague Convention is a matter of fact to be decided on all relevant evidence. Thus, in *C. M. (a minor) C.M. and O.M. v. Delegación Provincial de Malaga Consejeria de Trabajoe y Asuntos Sociales Junta de Andalucia, A.B. and C.D.* [1991] 2 I.R. 363, McGuinness J stated:
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> > 'Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that "habitual residence" is not a term of art, but a matter of fact, to be decided on the evidence in the particular case. It is generally accepted that where a child is residing in the lawful custody of its parent, its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the same rigid rules of dependency as apply under the law of domicile and the actual facts of the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there.'"

17. I have carefully considered the evidence in the present case and I have concluded that the child S.'s habitual place of residence is in Latvia. The child was born in Latvia to Latvian parents. She lived exclusively in Latvia until June of 2008 when, aged 3 years and 8 months approximately, she was brought to Ireland by her mother and lived here for just three months. In September 2008 she was returned to Latvia to reside there with her father. She was residing in Latvia at the time of her removal to Ireland in March of 2009. Seemingly there was litigation between the parties before the Orphans Court in Salagrica, Latvia in June of 2008 "to confirm the permanent place of residence of [S.]" but that this was apparently settled by agreement between the parties. The exact parameters of the litigation are unclear and the terms of the settlement are unknown. However, notwithstanding this the respondent subsequently filed a custody suit before the District Court of Limbaži to which the applicant subsequently counterclaimed also seeking custody. The initiation of this custody litigation in Latvia, which still remains to be determined, and the circumstances in which it was initiated tends in this Court's view to support the applicant's case that the child must be regarded as an habitual resident of Latvia The mother urges upon the Court that when she brought the child to Ireland both in June 2008 and in March 2009 there was no legal inhibition to her doing so as the parents were exercising joint custody of the child and in any case, she contends, the applicant was consenting. She points to the fact that she has applied for and obtained an Irish PPS number for S. as well as enrolling her in St John's National School, Rathmullen, Drogheda, Co Louth for the 2009-2010 school year. In the Court's view neither of these things assists it in determining the true situation with respect to the child's place of habitual residence. The Court is concerned with where the child was habitually resident at the time of her removal from Latvia. The evidence strongly suggests that that place was Latvia and the Court so finds.

Issue b.

Parental Responsibility?
18. Having regard to the relevant provisions of the Brussels II Regulation I am satisfied that at the time of the respondent's removal of the children to Ireland both the applicant and the respondent were "holders of parental responsibility". I am further satisfied that for the purposes of the Hague Convention they both had "rights of custody".

19. In so far as any dispute or disputes may exist, or have existed at the material time, in relation to rights of custody as between the holders of parental responsibility, it is clear that it is the courts of Latvia, and those courts alone, that have jurisdiction to hear and determine those disputes. This follows, having regard to my finding that the child S. was, at the material time, habitually resident in Latvia and by virtue of Article 8 of the Brussels II Regulation.

Issue c.

Removal in breach of rights of custody or with the applicant's consent?
20. Apart from the say so of the respondent there is not a scintilla of evidence to support the existence of the alleged oral agreement between her and the applicant whereby the applicant is said to have consented to her removal of the child to Ireland. Tellingly there is no mention of any such agreement in the affidavit sworn by her in these proceedings on the 25th of July, 2009. The first time it is mentioned is in the respondent's unsworn statement of the 15th of December, 2009.

21. The Court regards it as inherently unlikely that such an agreement, if it existed, would not have been recorded in writing, particularly in circumstances where both applicant and respondent respectively were claimants and counterclaimants respectively in ongoing litigation over the custody of the child. No written evidence exists. In all the circumstances of the case I am not satisfied that the applicant consented to the child's removal to Ireland as alleged.

22. As there were ongoing proceedings over the custody of the child in Latvia, and the Court having had due regard to the affidavit of laws by Ms Dana Rone, Attorney at Law, the Court is satisfied that the child S. was removed to Ireland by the respondent in breach of the applicant's rights of custody.

Issue d.

Were rights of custody actually being exercised, either jointly or alone, or would they have been exercised but for the removal?
23. The Court is satisfied on the evidence that at the time at which the child S. was removed to Ireland the applicant was actually exercising rights of custody in respect of her. The fact that he had permitted the child to stay with the respondent during what he believed was to be a short stay in Latvia by the respondent is in no way inconsistent with the continued exercise by him of his rights of custody. Moreover, I am satisfied that he would have continued to exercise his rights of custody since then but for the child's removal.

Issue e.

Existence of Grave Risk
24. In her submissions to the Court the respondent strongly urged that the applicant does not really care about the child and that he is only maintaining these proceedings to punish the respondent for not sending home more money by way of child support. Moreover in her affidavit sworn on the 27th of July 2009 the respondent alleges that the applicant is an alcoholic, that he is regularly intoxicated when S. is in his care, that he is verbally abusive to the respondent, that he only allows her to see the child in return for sexual favours. She also says that she is concerned that S. if returned would be exposed to a grave risk of psychological or physical harm. She alleges that the applicant insists on S. sharing his bed and says she is concerned about that.

25. The applicant has filed a replying affidavit vehemently disputing these assertions.

26. The applicant further relies upon the aforementioned psychotherapists report. While the Court would have doubts as to the objectivity of the psychotherapist's assessment in circumstances where the father was never interviewed and there was no ostensible effort to interview him, nevertheless the Court will have regard to this report de bene esse. The Court regards it as significant that while the report speaks at some length about the tensions and stresses in the couple's relationship and the fact that the child seems aware of these there is no mention of the applicant having problems with alcohol, of verbal abuse, or of inappropriate sleeping arrangements. It is hardly credible that if these matters were true that the respondent would have omitted to mention them to the psychotherapist or that the psychotherapist would not have mentioned them in her report.

27. In *N v D* [2008] IEHC 51 I reviewed the jurisprudence in this area and stated:

> "I have found the following cases to be of particular assistance, namely, *In re A (A Minor) (Abduction)* [1988] 1 F.L.R. 365; *C.K. v. C.K.* [1994] 1 I.R. 250; *R.K v. J.K.* [2000] 2 I.R. 416 and *M.S.H. v. L.H.* [2000] 3 I.R. 390.
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> In *C.K. v. C.K.* Denham J., then a judge of the High Court, adopted as reasonable the test propounded by Nourse L.J. in *In re A (A Minor) (Abduction)* [1988] 1 F.L.R. 365 at 372 when he stated:
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> > 'I agree with Mr. Singer, who appears for the father, that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the *eiusdem generis* rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view.'
>
> McGuinness J., giving judgment in the Supreme Court in *M.S.H. v. L. H.* confirmed that the phrase "grave risk" applies to both parts of Article 13(b) and it is not to be read disjunctively. Referring to the quotation from the judgment of Nourse L.J. adopted by Denham J. in *C.K.,* McGuinness J. states (at page 404 of the report):
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> > 'Denham J. states that this is a reasonable test and she adopts it. In that case, of course, Nourse L.J. was discussing the first half of the test - the risk of physical or psychological harm - but nevertheless his emphasis that the risk must be a weighty one and must be substantial and not trivial would apply also to the "intolerable situation" test.'
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> *R.K. v. J K.* is a decision of the Supreme Court. In her judgment in that case Denham J. stated:
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> > 'The grave risk contemplated in the Hague Convention is that of a serious risk. In *Thomson v. Thomson* [1994] 3 S.C.R. 551, La Forest J. of the Supreme Court of Canada stated at p. 596:
> >
> > 'In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause' or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation.'
>
> Thus, whereas any movement of children from one country to another and from one physical home to another is upsetting and may involve some harm, that is not the level of risk anticipated in the Hague Convention.
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> The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the court orders in the requesting country then the policy of the Hague Convention to return children to the country of their habitual residence will be met. Also, the particular children affected by the Hague Convention in a case will have their interest protected.

Giving judgment in the same case, Barron J. stated:

> 'In my view the words "intolerable situation" relate to both physical or psychological harm to which the children must not be exposed as well as to other cases where they might be harmed.
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> *Prima facie* the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state.'

In my opinion the following passage from *Friedrick v. Friedrick* (1996) 78F 3d 1060, sets out the basis upon which the defence of grave risk might succeed. The passage is 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.'"

28. Applying the law as stated I do not consider the child in this case to be at grave risk.

Conclusion

29. In all the circumstances of this case it is appropriate that I make an Order directing the return of the child at the centre of this case, S. Be., to the custody of her father in Latvia.