

## THE HIGH COURT

2006 No. 36 HLC

**IN THE MATTER OF CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991, AND IN THE MATTER OF THE HAGUE CONVENTION AND THE IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003 AND IN THE MATTER OF K.R. (a minor)**

BETWEEN

S.R.

APPLICANT

AND  
S.R.

RESPONDENT

**Judgment of Mr. Justice Garrett Sheehan delivered on the 21st day of May, 2008****1. Introduction**

1.1 On the 25th October, 2006, the applicant issued a family law summons seeking the return of his daughter K. to Latvia. He claimed that she had been wrongfully removed from the jurisdiction of the courts of the Republic of Latvia in or about December, 2005.

**2. Background**

2.1 The applicant and the respondent were married to each other on the 22nd September, 1990 in Latvia.

2.2 They have two children K. aged ten and M. who is now seventeen years of age. K. the subject of these proceedings was born on 2nd April, 1998.

2.3 The applicant obtained a decree of divorce in Latvia on the 23rd May, 2006, and that court also directed that the applicant have sole custody of the children. The respondent did not oppose the applicant's divorce application and took no part in the proceedings in Latvia.

2.4 The daughter K., who I shall refer to as the minor in the course of this judgment, was removed from the jurisdiction of Latvia to Ireland by the respondent in December, 2005.

2.5 An order for the return of the minor was made by the High Court following a hearing on the 13th December, 2006. The respondent was not present or represented during those proceedings but the court was satisfied that the respondent had been properly served and was aware of the proceedings.

2.6 This order with a penal endorsement was then served on the respondent on the 21st May, 2007.

2.7 When the respondent did not comply with the order for return, enforcement proceedings were commenced.

2.8 The respondent then instructed solicitors and on the 12th December, 2007 the order of the 13th December, 2006, was set aside by Ms. Justice Finlay Geoghegan on the basis that the court had not complied with its duty to hear the child pursuant to Article 11(2) of the Council Regulation E.C. 2201/2003 of the 27 November, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, O.J. L338/1 23.12.2003. This Council Regulation is also referred to as the Brussels II *bis* Regulation.

2.9 In the course of her judgment on the 12th December, 2007, Ms. Justice Finlay Geoghegan stated:-

"...the mother must not now in any rehearing of these proceedings be given an opportunity to raise matters of herself which didn't come before the court in December 2006 to raise or to rely on any matters which have happened subsequent to that date. However it is a separate question as to how the court should now deal with any issue which may arise from hearing the child."

2.10 On the 12th December, 2007, an order was made pursuant to s. 47 of the Family Law Act 1995, that Mr. Edward Hogan, a consultant psychologist, should assess the minor and furnish a report to the court for the purpose of ascertaining the views of the minor. The court set out the parameters within which Mr. Hogan was to conduct the interview and assessment.

2.11 In the course of her replying affidavit the respondent states that she resides at Dooradoyle, County Limerick with her partner, their one year old child, her two children by her marriage to the applicant, her sister, her sister's child and her sister's boyfriend.

2.12 She states that the minor has been attending the Presentation Primary School on a full time basis since September, 2006.

2.13 Mr. Edward Hogan, the consultant psychologist who interviewed the minor and prepared a report for this Court also gave evidence.

2.14 He stated that the minor was a mature child who clearly did not want to return to Latvia. He stated that in the course of his interview with her the minor told him about her friendships at school. She had Irish and eastern European friends and was particularly proud to say that she had African friends as well. She also told Mr. Hogan that she was glad her brother was now living with the family in Ireland. Mr. Hogan also stated that she was proud of her new baby sister. Mr. Hogan expressed concern about the lack of attachment of the minor to her father and expressed the view that if this were not addressed in another forum it would lead to further and perhaps complete separation from him. When asked about the effect on the minor of a forced return to Latvia he stated that this would be a painful and unpleasant experience for her. Mr. Hogan stated that if the mother were to return to Latvia the minor would be disappointed but she would adapt if the environment was right. He stated that the minor was a bright, insightful and robust child, who would not welcome a permanent return to Latvia.

**3. Submissions**

3.1 Both parties agreed that there had been an unlawful abduction and that the matter before this Court turned solely on the objections of the child pursuant to Article 11(2) of Council Regulation E.C. 2201/2003 and Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction. Article 13 of the Hague Convention states:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authority shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

3.2 As the respondent has been precluded from making any possible defences at (a) or (b), the only matter of relevance here is the latter part of Article 13.

3.3 Article 11(2) of Council Regulation EC 2201/2003 states that:-

"When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

3.4 In the course of her submissions on behalf of the applicant, Ms. Whelan stated that her client was prepared to undertake not to exercise his right to immediate custody of the child on her return to Latvia pending any application the respondent might make to the Latvian courts. She stated that the undertaking was offered on a without prejudice basis so that the court might be confident that the Latvian Court would have an opportunity to review the position in the light of events as they have transpired since the order of sole custody was made in favour of the applicant.

3.5 Ms. Whelan submitted that while the respondent was confined to the most narrow interpretation of the defence associated with the views of the child, she accepted that the provisions of Article 11(2) of the Brussels II *bis* Regulation overlapped and complemented the child's wishes provisions of Article 13(2) of the Hague Convention. She further accepted that the so called child's wishes defence constituted a separate ground for not returning a child to her state of habitual residence and that there is no requirement that a defence under the other headings in Article 13 and/or Article 20 of the Hague Convention be made out first as a doorway to an Article 13(2) defence.

3.6 She also submitted that the views of the child must be considered in the light of the overall Convention objectives.

3.7 She further submitted that the court should guard against the inherent risks to the child arising from an approach which makes the views of the child determinative. To allow a child's objections to block the return will make the child the ultimate judge of the objections success or failure and she relied on the judgment of Potter P. at para. 60, in the case of *Re M (Abduction: Child's Objections)* [2007] 2 F.L.R. 72, at p. 87, para. 60:-

"Where a child's objections are raised by way of defence, there are of course three stages in the courts consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that it is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established).

Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return."

3.8 The applicant also relied on *B. v. B. (Child Abduction)* [1998] 1 I.R. 299, in which the Supreme Court set out guidelines as to how a court should exercise its discretion when considering whether or not to return a child where a defence has been made out under Article 13.

3.9 She also relied on the judgment of Ward L. J. in *Re T (Abduction: Child's Objections to Return)* [2000] 2 F.L.R. 192 and in particular that part of the judgment which deals with the factors that have to be placed in the balance.

3.10 On behalf of the respondent Mr Durcan stated that at the heart of his submission was the right of the minor to have her views taken into account. He stated this was a fundamental right and was quite distinct from any defence put forward by a parent in the context of child abduction.

3.11 He further submitted that the court ought to consider the objections of the child in the light of Article 24 of the Charter of Fundamental Rights of the European Union O. J. L 364/1 18.12.2000, which deals with the rights of the child.

3.12 Article 24 reads as follows:-

- "(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- (3) Every child shall have the right to maintain on regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

3.13 He submitted that the principal object of the Convention, namely the summary return of abducted children could not be achieved in this case as the minor had been here for such a lengthy period of time, and he relied in particular on the judgments of Baroness Hale of Richmond in *Re: D.(a Child)(Abduction: Rights of custody)* [2007] 1 A.C. 619 and *In re M* [2007] 3 W.L.E. 975.

3.14 He referred the court to para. 48 of the judgment in *Re D.* where Baroness Hale stated:-

"The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed. That object is negated in a case such as this where the application is not determined by the requested state until the child has been here for more than three years."

3.15 With regard to *In re M.* Mr. Durcan referred the court in particular to those passages which dealt with how the court should approach the exercise of its discretion. He referred to para. 40 of the judgment:-

"On the other hand, I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention".

Baroness Hale goes on to state at para. 43 that:-

"My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large."

#### **4. Decision**

4.1 I hold that the minor in this case is a ten year old girl, mature for her age who objects to returning to Latvia. On the basis of Mr. Hogan's evidence I hold that there are reasonable and coherent grounds why she has come to this view. These include the fact that she has spent most of the last three and a half years of her life in Ireland. She had spent an earlier period living in Ireland with her mother between November 2004, and September 2005. She has made friends in Limerick with Irish children and with children from other countries. Not only is she well into her schooling in Limerick but her seventeen year old brother now lives in the family home along with her new step-sister, her mother's partner, her aunt, her aunt's child and her aunt's boyfriend. They all live together in Limerick in what appears to be a stable family situation. On the face of it, it would appear that the ideal situation for the minor, would be for her to remain in Ireland with every appropriate effort being made to enable her father to re-establish a relationship with her through occasional meetings, either here or in Latvia and with regular telephone access. I take into account her views as those of a mature ten year old. I do not regard them as determinative. In this case the court has had the benefit of hearing an experienced consultant psychologist, not only report her views but also comment on them. He has said that the minor was expressing her own views. I hold that her objection to returning to Latvia is directly related to her wanting to remain in Limerick with her Latvian family and not wanting to return to her father. It is clear that she has good relations with her maternal aunt and grandmother who live in Latvia.

4.2 Mr. Hogan also described the minor as bright, intelligent and robust. I rely on this evidence.

4.3 Accordingly, I hold that the objections to return are made out and I further hold that the age and maturity of the minor are such that it is appropriate for the court to take into account those objections.

4.4 In exercising my discretion in this case I am particularly mindful of the judgment of the Supreme Court in *B. v. B.* and I am also influenced by the opinion of Baroness Hale in *Re M.* at para. 42, where she states:-

"In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states."

4.5 On the basis of Mr. Hogan's evidence and in the light of the above passage and more particularly the judgment in *B. v. B.*, I hold that a properly managed return to Latvia coupled with the father's undertaking not to exercise custody or access pending further review of this case by the Latvian court, would not be so injurious to the child's interest that I ought to exercise my discretion in favour of her stated wishes.

4.6 Accordingly, the applicant succeeds in respect of his claim in the summons at paras. 3 and 5, namely that he is entitled to a declaration that the minor was wrongfully removed from the jurisdiction of the Republic of Latvia within the meaning of Article 3 of the Hague Convention and an order for the return of the minor to the Republic of Latvia.

4.7 I propose to put a stay on this order. The only defence I have taken into account is the child's objection defence. It is not the fault of the minor that this case has been delayed. She is now settled here. I propose to stay this order until such time as the mother and daughter's presence are required in Latvia by the Latvian Court that I am told will review the custody and access arrangements for the minor in light of her present position.

4.8 It is a further condition of the stay that the respondent cooperates with the Latvian authorities in ensuring that there are no delays on her part with regard to this new hearing. It goes without saying that the respondent must be available to receive any correspondence or documentation from the Latvian authorities, either personally or through her solicitors in Limerick.

4.9 As the husband is living in Latvia and the minor is coming to the end of her second school year in Ireland, these review proceedings should be commenced by the applicant.