

THE HIGH COURT

FAMILY LAW

Record No: [2016/9HLC]

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 ASPECT OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF COUNCIL REGULATION (EC) NUMBER 2201/2003

AND

IN THE MATTER OF D.A.P AND A.P. (MINORS)

BETWEEN:

L.C.R.

APPLICANT

AND

L.P.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 13th day of July, 2016.

1. This case concerns an application for the return of two children, D.A. born 10th May, 2007 and A. born 1st April, 2014 to the jurisdiction of Romania pursuant to Article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980. The application is set out in the special summons dated 5th April, 2016. Romania is subject both to the Hague Convention and Council Regulation 2201/2003.
2. Both children were born in Romania. The applicant father and respondent mother were never married to one another. Although the children lived with their mother in a city which was a significant distance from their father, it is not disputed in this case that he exercised his rights of custody by way of regular access.
3. It is accepted by the applicant father that he gave a consent for the mother to travel with the children to Ireland to visit her mother and sister at some point during the period between 2nd June, 2014 and 2nd June, 2015. However, it should be noted that, as part of this agreement, the respondent had undertaken to give the applicant the precise dates of travel.
4. There was a dispute in the affidavits as to the date that the children were brought by the respondent mother to this jurisdiction. She says that they left in or around February, 2015 while he says that they left in or around April, 2015.
5. Although both wrongful removal and wrongful retention are pleaded, it is the view of the Court that it can be taken that there was a wrongful retention of the children within this jurisdiction after 2nd June, 2015.
6. This Court ordered on 13th April, 2016 that Skype access occur between the applicant father and the children once a week pending further order of the Court.
7. This Court ordered on 11th May, 2016 that an assessment be carried out pursuant to Article 11(2) of Regulation (EC) 2201/2003 by Ms. Anne O'Connell, Consultant Clinical Psychologist, of the child D. and that a report be produced ensuring that the child is given the opportunity to express her views. The younger child, A. who is only two years old was considered to be too young for such an assessment.
8. This case was heard by this Court on 4th July, 2016.

The views of the child

9. Ms. Anne O'Connell, Consultant Clinical Psychologist provided a report to this Court based upon an assessment of the child D. conducted on 14th June, 2016.

10. D. reports that when she lived in Romania she saw her father regularly. It is recorded that she was scared of her father and that she believed that he was always fighting with her mother both physically and verbally. She feels that her father doesn't care about her and that he does not listen to her concerns. D. is recorded as stating that she has no happy memories of her father. D. shows a clear preference for her life in Ireland including her school here and living with her mother, sister and maternal grandmother. While D. is recorded as saying that she loves her father she does not want to spend time with him, particularly without her mother being present.

11. Ms. Anne O'Connell assessed D. as being in the high range of intellectual functioning for her age and that her emotional

development is also above expected levels. It was Ms. O'Connell's view that D. is capable of forming her own views and making decisions based on memories, feelings and future options. Ms. O'Connell was very concerned about D.'s significant emotional response when talking about her father and believes that D. would benefit from professional psychotherapeutic input.

Summary of legal submissions on behalf of the applicant

12. It is the applicant's case that the respondent left Romania with the children in late April, 2015 on foot of a declaration allowing them to travel to Ireland between 2nd June, 2014 and 2nd June, 2015. Therefore, it is submitted that proceedings issued within one year of the departure of the children and the expiration of the permission and return is mandatory under Article 12 of the Convention:-

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

13. It was submitted on behalf of the applicant that he exercised his custody rights sufficiently for the purposes of the Convention. Counsel for the applicant cited the case of *B. v. C.* [2015] IEHC 548 as a case where there had been no access between the child and the father for two years due to criminal proceedings however, McDermott J. concluded that although direct access had not occurred, the father's engagement in ongoing litigation concerning the child was sufficient in a consideration of the adequacy of the exercise of custody rights in that case.

14. Counsel for the applicant further addressed the "wishes of the child" defence which is a separate and stand alone defence under Article 13 of the Convention. Counsel for the applicant cited the central case of *C.A. v. C.A.* [2009] IEHC 460 in which Finlay Geoghegan J. set out the approach the court should adopt:-

"Counsel for both parties were in agreement that the proper approach of this court is what has been termed the three stage approach to a consideration of a child's objections."

Finlay Geoghegan J. went on to cite with approval the approach of Potter P. in *Re M. (Abduction: Child's Objections)* [2007] EWCA Civ 260 at paragraph 60:-

"Where a child's objections are raised by way of defence, there are of course three stages in the court's 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 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."

It was submitted that, in applying this approach, Finlay Geoghegan J. found that the children objected and that it was appropriate to take their objections into account, however, in the final analysis, the court concluded that the Convention aims meant that it should order the return of the children anyway.

15. Counsel for the applicant distinguished this case from *C.A.* in relation to the issue of putting a stay on any order for return pending determination by the court in the place of habitual residence. It was submitted that placing such a stay in child abduction proceedings was a very exceptional jurisdiction particular to the facts of the *C.A.* case and that the default position would be to order a return forthwith.

16. Counsel for the applicant further cited the case of *A.U. v. T.N.U. (Child Abduction)* [2011] IESC 39 where Denham C.J. indicated that the discretion at the third stage of this approach should be exercised having regard to the totality of the evidence.

17. It is accepted by counsel for the applicant that the child raised some concerns regarding her relationship with her father and this was recorded by Ms. Anne O'Connell in her report. It is also accepted that the child has a preference for continuing to live in Ireland and she objects to a return to Romania. It is further accepted that the child displays an emotional development above expected levels and therefore consideration may be given to her objections. Counsel for the applicant further stated to the Court that while it is important to give consideration to the views of the child these views cannot become determinative.

18. However, it is submitted that there are various considerations which the Court should take into account if exercising its discretion on whether or not to order a return. It is submitted that the overall aims of the Convention and the Regulation which include the principle that a child should be returned to their place of habitual residence, the principle of proximity and the principle that international child abduction should not be sanctioned should be taken into account. The manner of the removal of the children, which was entirely unilateral without informing the applicant, should also be considered.

19. It is submitted on behalf of the applicant that the level which is required in order to deny the application for a return is extremely high and it has not been reached. Counsel for the applicant cited the English High Court case of *M.R. v. H.S.* [2015] EWHC 234 (Fam) where Theis LJ. declined the return of the child in the context of serious sustained intimidation by the father which extended to a failure to abide by a barring order. It is submitted on behalf of the applicant that this further indicates the degree of seriousness required before a court can refuse to return the child and this is not shown on the facts of this case. Counsel for the applicant further stated in oral submissions that Romania, as both a Contracting State to the Convention and an EU Member State, is presumed under the doctrine of comity to conduct a full welfare assessment of the children and make decisions which are in the best interests of the children. Counsel for the applicant further distinguished this case from the recent decision of this Court in *B.F. v. E.R.* [2016] IEHC 358 in which this Court refused to return a fourteen and a half year old child to his mother in circumstances where the relationship between them had entirely broken down. In this case the children are considerably younger and there is no suggestion that they would go into the full time care of the applicant father.

20. Counsel for the applicant noted in oral submissions that the Court must also ask itself what he referred to as the "*Neulinger* question" which is whether the Article 8 European Convention on Human Rights family rights and best interests of this particular child can override the general best interests principle that children should be returned to their place of habitual residence (*Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07).

21. Counsel for the applicant also indicated to the Court in oral submissions that the applicant would be willing to make certain financial undertakings in order to aid in the return of the children and the respondent to Romania until an application can be made before the Romanian courts.

Summary of legal submissions on behalf of the respondent

22. The respondent does not dispute that the children were habitually resident in Romania or that the applicant father had rights of custody. The respondent does, however, dispute that the applicant was actually exercising the rights of custody at the time of the alleged wrongful removal. Counsel for the respondent set out Article 3 of the Hague Convention in his submissions as follows:-

“The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Counsel for the respondent submits that for several years prior to her travelling to Ireland with the children the applicant exercised limited access. However, upon the hearing of these proceedings, counsel for the respondent stated that they were not advancing the line of defence that the applicant was not sufficiently exercising his custodial rights for the purpose of Article 3.

23. Counsel for the respondent also stated by way of oral submissions that the respondent asserts that she left Romania with the children in February 2015 although it is accepted that the end date of the permission, 2nd June, 2015 was within the one year period by which proceedings were issued and therefore the mandatory terms of Article 12 apply to this case.

24. The respondent further asserts that the child clearly wishes to stay in Ireland and it is submitted on behalf of the applicant that the Court should exercise its discretion in this regard and decline to return the children to Romania. Counsel for the respondent accepted that the onus is on the respondent to establish a “wishes of the child” defence under Article 13. The child D. who is now 9 years old was interviewed by Ms. Anne O’Connell for the purposes of compiling a report. It is submitted on behalf of the respondent that the child made it clear that she wishes to remain in Ireland living with her sister, her mother and her grandmother. It was further submitted that the report raises concerns about the relationship between the child and the applicant father and that she may be fearful of him.

25. It was submitted, in accordance with the *C.A. v. C.A.* [2009] IEHC 460 approach, that the child’s objection is made out, that she is of an age and degree of maturity that those views should be taken into account, noting the child’s particular emotional maturity as described by Ms. Anne O’Connell. It is then up to the discretion of the Court as to whether it will direct the return of the children to Romania taking account of all the facts in the case. Counsel for the respondent further indicated that the child’s views must be taken into account and that this is an increasingly important factor both in terms of national constitutional law and international law.

26. Counsel for the respondent stated in relation to the issue of undertakings that it may take a considerable amount of time before the Romanian courts are able to deal with the issues in this case and that the respondent mother would be entirely financially dependent upon the applicant father if there was an order for the return of the children to Romania.

Conclusions

27. There is no issue in this case but that the children’s place of habitual residence prior to the wrongful retention was within the jurisdiction of Romania.

28. This Court is accepting that there was a wrongful retention within this jurisdiction beyond the 2nd June, 2015 when the permission to travel expired. The applicant father had rights of custody and although there was a considerable distance between himself and the children he did have regular access visits and was therefore exercising his rights to custody. Because the wrongful retention was dated 2nd June, 2015 and proceedings commenced 5th April, 2016 the return is mandatory in nature unless one of the defences under Article 13 is raised.

29. This case has narrowed to the issue of the child’s objection to the return. The relevant part of Article 13 of the Convention provides:-

“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.”

30. This Court will now apply the three stage approach as set out by Finlay Geoghegan J. in *C.A. v. C.A.* [2009] IEHC 460. First, it is the view of this Court that the child D. has made out her objection to a return to Romania. Second, this Court accepts, on the evidence of the report of Ms. O’Connell, that D. is of an age and degree of maturity for her views to be taken into account. It is then left to this Court to decide whether or not to order the return of the children. This Court will, in accordance with the Supreme Court decision in *A.U. v. T.N.U. (Child Abduction)* [2011] IESC 39, exercise its discretion having regard to the totality of the evidence.

31. The Court must also consider what is in the best interests of these children. It is a general principle of the Convention that a child’s best interests are best served by a return to their place of habitual residence where any decision about custody, access and guardianship can be decided. Another principle of general application of the Convention is that international child abduction goes against the best interests of children. Despite these general principles, the European Court of Human Rights established in *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07 that a court must assess the particular child’s best interests in the circumstances of the case.

32. This Court has decided that the best interests of these children favour their return to the place of their habitual residence, having had regard to all of the evidence and legal submissions and having included in its considerations Article 8 of the European Convention on Human Rights.

33. This Court also sought undertakings from the applicant to pay a lump sum of €3,600 for the return of these two young children to Romania and a commitment to continue to pay €1,200 per month to commence on 27th October, 2016 and monthly thereafter until a decision can be made in the Romanian Court in relation to these children.