Neutral Citation [2015] IEHC 538

THE HIGH COURT

FAMILY LAW

[Record No. 2013/25HLC].

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

AND

IN THE MATTER OF FOREIGN PROCEEDINGS ENTITLED "CASE NO: C30602212, RECORD NUMBER C-6022-12/2 AND ON APPEAL CA-1829-13/3, M.F. PLAINTIFF AND V.M. DEFENDANT FOR THE RETURN OF THE MINORS A.F. AND M.F.

AND

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY ACTING AS THE CENTRAL AUTHORITY

APPLICANT

AND

M.F

AND

V.N

RESPONDENTS

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 21st day of May, 2015.

1. The current application by the first named respondent (hereinafter referred to as the applicant) relates to proceedings pursuant to article 11(7) of E.C. Regulation 2201/2003(hereinafter referred to as the "Regulation"), to determine the custody of two dependent children of the parties (V.N. and M.F.) following a final order of non-return of the aforesaid children issued by the Collegium Court of Civil Jurisdiction of Riga District Court, Latvia, on the 15th February, 2013. The two dependent children of the parties are "A.F." (born in Latvia on the 28th March, 2007.) and "M.F." (born in Ireland on the 4th September, 2009.). "A.F." holds sole Latvian citizenship. "M.F." holds dual Latvian and Irish citizenship.

2. The current application before this Court arises pursuant to article 11(6) and 11(7) of the Regulation, as the Latvian Court was obliged to transmit to Ireland its judgment refusing the aforesaid children's return, together with relevant documents, including the transcript of the evidence. The Irish Central Authority was obliged to offer the parties an opportunity to make submissions on questions regarding the custody of the children. The said Authority, in accordance with Order 133, Rule 11(4) of the Rules of the Superior Courts, 1986, notified the two respondents of the proceedings, and of their right to issue a motion and make submissions to this Court.

3. The originating notice of motion, dated the 15th May, 2013, commenced this process. The applicant's motion issued on the 19th July, 2013, and the respondent's motion issued on the 7th January, 2015.

4. The applicant seeks the return of the dependent children to Ireland, on a temporary basis, for the purposes of a welfare assessment being carried out in this jurisdiction. The purpose of this report would be for a full custody hearing in relation to the dependent children, where the applicant is seeking the permanent return of the dependent children to this jurisdiction. In the event of this Court issuing an order for the interim return of the children, the applicant seeks a period of access with the children so that any welfare assessor would have a holistic appreciation of the applicant's relationship with "A.F." and "M.F."

5. In his affidavit dated the 27th March, 2015, the applicant highlighted that he would not seek full custody of the said children should the respondent return to this jurisdiction with the children.

6. By contrast, the respondent seeks custody with day-to-day care of the children into the future. The respondent does not object to the applicant travelling to Latvia for the purposes of enjoying access with the children. The respondent claims that the children are too young to travel unaccompanied to Ireland for access with the applicant. Moreover, the respondent submits that the applicant is not capable of providing for the day-to-day needs of the children for a prolonged period. Furthermore, the respondent claims that the applicant does not reside in appropriate accommodation to meet their basic needs at present.

7. In regards this application, this Court is required to examine the question of custody of the children pursuant to article 11(7) of the Regulation. Article 11(7) of the Regulation states as follows:

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

8. The respondent accepts that the aforementioned children were habitually resident in this jurisdiction prior to their removal to

Latvia. Therefore, this Court has jurisdiction to determine questions of custody and make interim orders for the return of the children to this jurisdiction for the purposes of effecting a welfare assessment and report.

9. The ambit of this Court's jurisdiction in hearing applications of this nature was discussed in an erudite manner in *A.OK. v. M.K.* [2011] 2 IR 498. On addressing the enforceability of interim orders made pursuant to article 11(7) of the Regulation, Finlay Geoghegan J. referred to the decision of the European Court of Justice in *Povse v. Alpago* (Case C-211/10) [2011] 3 W.L.R. 164. The judgment in *Povse* concerned a reference for a preliminary ruling from an Austrian Court to the European Court of Justice, addressing the enforceability of an order of an Italian Court (who declared that it retained jurisdiction pursuant to article 10 of the Regulation) directing the interim return of the children pursuant to article 11(8) of the Regulation pending a final custody hearing before the Italian Courts. The essence of the dicta of the European Court of Justice in *Povse* was that the courts who are ultimately responsible for determining rights of custody must, as a natural corollary, have the power to determine all interim arrangements and measures, which may include altering the child's place of residence and may necessitate a temporary return of the child. This proposition was elaborated upon by the European Court of Justice where it stated (at pg. 214-215, paras 61-64):

> "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 habitual residence, which might possibly require the return of the child.
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> 62. The objective of the provisions of article 11(8), 40 and 42 of the Regulation, namely, that proceedings be expeditious, are 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 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.
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> 64. One of the fundamental rights of the child is the right, set out in article 24(3) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C364, P1), to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child: see *Deticek v. Sgueglia (Case C-403/09)* [2009] E.C.R. I-12193 para. 54. It is clear that an unlawful removal of the child, following the taking of a unilateral decision by one of the child's parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent; see the *Deticek* case, at para.56."

10. In *A.OK. v. M.K.* [2011] 2 IR 498, Finlay Geoghegan J. held that the Court had jurisdiction to determine the question of custody of the removed children pursuant to article 11(7) of the Regulation. On that conclusion, the Court addressed the ambit of its jurisdiction relating to applications under article 11(7) of the Regulation (at pg. 520, para 54, sub paras. (ii)-(vi):

> "(ii) in determining that substantive issue[i.e. the question of custody of the removed children], the court has the full jurisdiction it would have in accordance with Irish law, pursuant both to 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".

11. There are three pertinent observations that can be drawn from the foregoing dicta of Finlay Geoghegan J. Firstly, the Court, in determining the question of custody of the children pursuant to article 11(7) of the Regulation, maintains full jurisdiction to make interim orders for access and custody. Secondly, the Court, in determining an interlocutory application for an order for a return of a child arising from proceedings pursuant to article 11(7) of the Regulation, must (i) 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, (ii) apply a "welfare test" in the relevant factual and legal context, but avoid conducting a full welfare inquiry of the type which would be done prior to the determination of the substantive custody dispute, and (iii) comply with the minimum procedural requirements of article 42(2) of the Regulation, including giving the child an opportunity to be heard, unless a hearing is considered inappropriate, having regard to the age or degree of maturity of the child. Thirdly, the Court must apply the aforesaid "welfare test" in the context of the prior wrongful retention and its probable/actual consequences for the child and in the legal context of the underling policy objectives of the Hague Convention on Child Abduction 1980 and article 11 of the Regulation (see *A.OK. v. M.K.* [2011] 2 IR 498 pg. 518, para. 48, Finlay Geoghegan J.)

12. In *M.H.A v. A.P.* (Unreported, High Court, Finlay Geoghegan J., 16th December, 2013.) Finlay Geoghegan J. outlined that it was essential for the Court to have the benefit of an assessment by an appropriate expert who was given the opportunity to interview all of the parties to proceedings. The learned judge held that such assessments provide essential insight and guidance as to what is in the best interests of the child (at para.52):

> "52. There is a further relevant consideration to this aspect of the interlocutory application. The Irish High Court is bound,

pursuant to Article 11(7) of the Regulation 2201/2003, for the reasons set out, ultimately, to make a decision on the custody of Alan. If the long-term intention of the Mother is to remain living in Poland, and the father in Ireland, then the Court has the benefit of an assessment made by an appropriate expert, following face-to-face interviews with each of the Mother, the Father and Alan, of the relevant factors which would contribute to a decision as to what is in the best interests of Alan. The one expert should conduct all three interviews and assessments. It is also desirable that such person have the opportunity of observing Alan with each of his parents. In practical terms, such interviews and assessments can only be conducted in Ireland and are essential for the full and proper determination of the custody proceedings".

13. Article 42 of the Regulation deals with orders for the return of a child where the return of the said child has been refused on a previous occasion pursuant to article 13 of the Regulation. However, if an order for the return of the child is made pursuant to article 11(8) of the Regulation, the Court may issue a certificate of enforceability if the regulatory pre-requisites of article 42(2) of the Regulation are satisfied. Article 42(2) of the Regulation provides as follows:

> "2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:
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> (a). the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
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> (b). the parties were given an opportunity to be heard; and
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> (c). the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.
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> In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.
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> The judge of origin shall of his or her own motion issue that certificate using the standard form Annex IV (certificate concerning return of the child(ren))
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> The certificate shall be completed in the language of the judgment".

14. In the instant case, "A.F." had been given an opportunity to be heard in 2012. "M.F." was not interviewed in 2012. On the 11th March, 2015, this Court, of its own motion, directed both of the aforesaid children be interviewed to ensure that the said children were given an opportunity to express their views and be heard in the proceedings. The interviews were directed to be conducted by psychologist, Daina Dziluma in Riga, Latvia. The interviews directed by the Court were never intended to form part of the welfare assessment of the children. Rather, the interviews were ordered by the Court so as to satisfy the requirements of article 42(2)(a) of the Regulation prior to any order for the return of the children.

15. As outlined above, article 42(2) of the Regulation stipulates that if the Court or any other authority takes measures to ensure the protection of the child after its return to the state of habitual residence, the certificate should contain details of the protective measures. Such a stipulation reinforces the aims and objectives of article 11(4) of the Regulation.

16. This case concerns interim applications heard on affidavit evidence. Therefore, this Court shall not engage in resolving conflicting evidence and the counter-allegations of the parties. However, this Court notes that it was uncontested that the respondent applied to the Irish District Court to discharge a safety order against the applicant in November 2010. Moreover, it is also uncontested that the respondent wrote to applicant from Latvia offering him unrestricted holiday access to the children in Ireland.

17. Article 42(2)(c) of the Regulation stipulates that this Court consider the reasons and evidence underlying the order of the Latvian Court prior to certifying an order for the return of the child to this jurisdiction. In the instant case, the Latvian Court refused the return of the children based on the lack of appropriate housing. Counsel for the applicant highlighted that the Latvian Court presumed erroneously that the only accommodation options for the children were the respondent's caravan and/or a crisis shelter. Furthermore, the Latvian Court denied a return of the aforesaid children on alleging the respondent was ineligible for social welfare payments and lacked protection from alleged domestic violence. These reasons seem to be an unsatisfactory basis to ground a refusal for the return of the children under article 13(b) of the Hague Convention on Child Abduction. Ireland is a signatory to the Hague Convention and has appropriate legal procedures and infrastructures that can obviate the components of grave risk envisaged under article 13(b) of the Hague Convention. Moreover, in terms of the present application, the Court was informed that the applicant would, insofar as he can within his power and capability; comply with any undertakings considered necessary by this Court. In addition, counsel for the applicant submitted to this Court that a local County Council has guaranteed emergency accommodation for the children if this Court issues an order for the temporary return of the children.

18. On the 20th August, 2012, a report was prepared by the Dardeze Centre, Riga, Latvia. The report was commissioned to obtain the recommendations of a psychologist as to the most appropriate use of access rights by the parties regarding "A.F.". At the time of the assessment, "A.F." was five years of age. The psychological assessment and subsequent recommendation was to consider assess arrangements in light of "A.F.'s" age and psychological traits. However, in the process of the assessment, the psychologist met with the respondent prior to psychologist's interview with "A.F". The said psychologist took cognisance of very detailed and very serious allegations made by the respondent against the applicant. Although the applicant was in Latvia during the assessment and subsequent court hearing, he was never afforded an opportunity to address or refute these allegations to the assessing psychologist. This arbitrary means of assessment adopted by the aforesaid psychologist seems manifestly unfair, and subverts the underlining ethos and objectives of article 11(5) of the Regulation.

19. In the written decision of the Latvian Appeal Court, it seems like a separate assessment was conducted by the Latvian Orphans Court for the purposes of assessing the children's general welfare rather than assessing the risks associated with an order for their return to Ireland.

20. Following these assessments, this Court ordered a subsequent interview with the children. Again, the respondent was interviewed in advance of the assessor's interview with the children, and the respondent made numerous allegations against the applicant. The assessor interviewed both "A.F." and "M.F." During the assessor's interview with "M.F.", the child claimed that the applicant was violent towards the respondent during their residence in Ireland. It is the view of this Court that "M.F" was coached to make these

allegations or had been misled as to her early infanthood in Ireland. "M.F." left Ireland when she was two and half years of age. Thus, a child of that age would not be in a position to recall the incidents as alleged. Nonetheless, the allegations made by the respondent and "M.F." were recorded in the reports and informed the view of the assessor. In light of these procedural infirmities, this Court is of the view that these assessments are fundamentally flawed.

21. This Court was informed that the respondent insists that she will not return to Ireland under any circumstances even to facilitate interim access and an assessment. Notwithstanding this approach by her, this Court must perform its duties to determine, in the present application, what is in the best interest of "A.F." and "M.F.".

22. The primary concern of this Court in determining whether to make a temporary return of the children, pending the final custody hearing, must be what is in the best interests of "A.F." and "M.F.". In determining this question, this Court must have due regard to article 24(3) of the Charter of Fundamental Rights of the European Union (see *M.H.A v. A.P.* (Unreported, High Court, Finlay Geoghegan J., 16th December, 2013, para.48). Article 24(3) of the Charter of Fundamental Rights of the European Union states as follows:

> "3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests."

23. This Court takes the view that there has been no evidence to the contrary to show that it would not be in the best interests of "A.F." and "M.F." to have a brief period of access with their father. Thus, this Court is of the view that it is in the best interests of the children that they are afforded a period of access with the applicant. Such assess is imperative prior to any assessment of the children in this jurisdiction. This ensures that the children enjoy a period of time with the applicant so that any prospective welfare assessment, conducted in this jurisdiction, is elucidating as to question of custody.

24. Thus, it seems appropriate to direct an assessment of the children pursuant to s.47 of the Family Law Act 1995. This assessment is ordered to assist this Court in determining issues relating to the custody of the children. The Court has been informed that the children are on holiday until the beginning of August. Moreover, the Court was informed that the respondent must give one months notice prior to taking time off work. This Court determines that the appropriate manner of progressing this matter is that the respondent should, forthwith, give notice to her employer of her desire to take one month off work, should she wish to travel to Ireland with the children. In turn, this would mean that the children could come to Ireland in or around Wednesday the 22nd June, 2015, and remain here for a seven week period until in or about the 10th August, 2015. These dates are subject to the identification of economical flights to and from Ireland. This Court directs that the children spend two weeks in the continuous daytime company of the applicant between the hours of 10.00-18.00hrs each day. The applicant's access with the children is to be in the absence of the respondent. This pattern of access should continue throughout the seven weeks, and that the assessment could then commence during the month of July, but not before the expiration of the first two weeks of the seven-week period as envisaged.

25. It is open to the assessor to interview the applicant both on his own and with the children as the assessor sees fit. It is also open to the assessor to interview the respondent and/or without the children should she choose to travel to Ireland with the children. The assessor may be furnished with a full set of pleadings and the submissions of both parties if required.

26. This Court notes that it is quite clear from the affidavits, testimony and submissions in this case that the children require a relationship with their father. The Court will be guided as to the appropriate name for the assessor to be appointed.