

THE HIGH COURT

Record No: [2015/22HLC]

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 OF 27 NOVEMBER 2003

AND

IN THE MATTER OF M.M.S. (A CHILD)

BETWEEN:

T.S.

APPLICANT

AND

E.S.

RESPONDENT

AND

M.S. AND E.S. Snr.

NOTICE PARTIES

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 4th day of May, 2016.

1. This case concerns an application for the return of a child, M.M.S., born on 28th October, 2001, to the jurisdiction of the England and Wales pursuant to Article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980 (hereinafter referred to as the "Convention"). The application is set out in the special summons dated 12th August, 2015. The paternal grandmother, M.S., was joined as a notice party to the proceedings by order dated 21st October, 2015. The paternal grandfather, E.S. Snr., was joined as a notice party to the proceedings by order dated 4th November, 2015. The applicant mother and respondent father are married to one another although living separately since in or about 2008.

2. The child, M., the subject matter of these proceedings, was born in the jurisdiction of England and Wales and a certified copy of her birth certificate was before the Court. The applicant stated in her affidavit that they moved to Ireland for a period following M.'s birth but that in or about 2008 she returned to England and Wales with her four children.

3. M. is currently residing at the home of her paternal grandparents. The respondent is currently serving an eleven month custodial sentence from 22nd July 2015 in Ireland. It was his intention to reside with the child and his parents upon his release until he found alternative accommodation for himself and M.

4. Mr. Stephen Kealy was ordered on 18th November, 2015, pursuant to Article 11(2) of Council Regulation (EC) No. 2201/2003, to make an assessment of the views of the child, M. Article 11(2) of the Regulation provides 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".

Mr. Kealy conducted two interviews with M. and also met M.'s grandmother. Mr. Kealy described M. as relating in a "co-operative, pleasant and in a vivacious manner" and he stated that M. presents as an "articulate mature 14 year old". M. reported that she is close to her father. She reported not having a good relationship with her mother and that her mother has not attempted to contact her since December 2014. It was reported that M. recognised the importance of attending school in terms of making friends and in terms of giving her opportunities for her future.

5. A concern was raised in the report in relation to her mother's alleged partner. M. reported to Mr. Kealy her allegation that he used inappropriate, sexualised language with her. The child reported telling her mother about what had been said and that her mother had not believed her. M. also spoke about having been encouraged to shoplift by her mother, that she was arrested for shoplifting and that her father came from Ireland to collect her at the police station in England. M. cited further difficulties which she had in the care of her mother in relation to her mother's use of alcohol and being left to care for her younger siblings.

6. It further appears from the report that M. believed her mother had consented to her going to Ireland with her father. M. is clear in her wish and preference to stay living with her grandparents in Ireland. Mr. Kealy indicated in his conclusions that, given the breakdown in the relationship between M. and her mother, a return to England would be challenging and could have serious emotional consequences for M. There is a dispute between the parties as to whether the facts disclosed by the child are true and the applicant

mother has stated clearly that she disagrees with them.

7. The applicant stated in her authorisation to the Central Authority of England and Wales that she was prepared to travel to Ireland to attend Court hearings and to collect the child should her application be successful. Counsel for the applicant stated at hearing that she had expected the applicant to be present but that her attendance was not technically required as these types of cases are on affidavit. The applicant did not attend at the High Court on the date of the hearing. The child, M., was present along with her paternal grandparents, the first and second named notice parties.

8. M. gave evidence to the Court at the hearing of the matter on 11th March, 2016. The Court was satisfied upon the evidence in the report that M. was mature enough and old enough to have given her view to the assessor and for that view to be taken into account. M. reaffirmed her wish to stay in Ireland with her grandparents. She also confirmed that she intends to go to school once she has been offered a place in the local secondary school to which an application has been made.

Summary of the Applicant's Case

9. The applicant mother in these proceedings claims that, pursuant to the laws of England and Wales she enjoys rights of custody in respect of the child, M. She further claims that she was exercising her rights of custody at the time of the child's removal from England and Wales, and she did not consent to the removal. The alleged wrongful removal took place on or about the 12th December, 2014.

10. The applicant further argues that the place of habitual residence of the child was at all material times England and Wales. There was a previous application for the return of a son, E.S. Jnr., born on 16th June, 2003. However, on or about the 13th July, 2015, the applicant notified the UK Central Authority that said son was returned to her care by an uncle. She states in her affidavit that she also has two younger children who continue to reside in her care.

11. The applicant alleged that she went to England in 2008 because of extreme domestic abuse perpetrated against her by the respondent. The applicant further alleged that intermittent violence and abuse from the respondent has continued since her return to England and Wales in 2008.

12. The applicant stated in her affidavit that she and the four children attended a family event in England and Wales on 12th December, 2014. The child who is the subject matter of these proceedings and her brother, E.S. Jnr., disappeared from the event and could not be found. The applicant further stated that a paternal aunt of M. contacted her to inform her that she was taking the children to Ireland.

13. The applicant further alleged that M. is likely to be shoplifting in Ireland with her grandparents. She further raised the issue that M. was not attending school in Ireland despite the fact that she had always gone to school when in the applicant's care. The applicant alleged that she believes M. is being "brainwashed" by her paternal family into saying that she does not wish to return to her care. She further alleged that an arrangement has been put in place by her paternal family for M. to be married.

14. Counsel for the applicant gave legal submissions on the issue of "grave risk". Article 13(b) of the 1980 Hague Convention states that the Court is not bound to order the return of the child if there is a grave risk to the child:-

"Article 13

[...] 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 - [...]

(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".

15. Counsel for the applicant indicated that the Court must consider what can be done to negate or lower the risk if the issues raised by the child were true. She further stated that, normally, the applicant would give evidence to the effect, for example, that until the English courts deal with the case and resolve the fears of the child they will leave the child with another relative for their safety. Counsel for the applicant admitted that she did not have such evidence to give to the Court on this occasion.

16. The Court must decide if there is a "grave risk" based upon the possibility of the issues raised by the child being true. Counsel for the applicant noted that Article 11(4) of the Council Regulation (EC) No. 2201/2003 states that the Court must still order the return of the child even if there is a grave risk so long as "adequate arrangements have been made to secure the protection of the child after his or her return". She set out that it was up to the applicant to prove that such proper arrangements have been put in place pending a further court hearing in England. She further stated that she was not in a position to do so on behalf of her client. The Court does not have to decide whether the facts are proven, it merely has to decide whether the facts raised, if proven, would constitute a "grave risk".

17. This Court is of the view that, while there is discretion under the other defences, in particular, under the child's objection defence, if a grave risk arises and the Court is not satisfied by arrangements under Article 11(4) then the Court cannot order the child's return. From the wording of Article 11(4), if the arrangements have not been put in place the Court may not order the return of the child.

Summary of the Respondent's Case

18. Counsel for the respondent stated that this is a case where the wishes of the child are very clear.

19. The second named notice party, M.'s paternal grandfather, denied all allegations of domestic abuse in his affidavit. He further stated that the applicant's fears that she would be in danger from the respondent and his family are entirely without foundation. However, it may be noted that the applicant responded that the second named notice party could not have had personal knowledge of the domestic violence within her marriage.

20. The second named notice party alleged in his affidavit that the applicant mother began a new relationship and left her children. He told a very different story of the alleged wrongful removal of the child in which the respondent went to England and Wales and discovered that M. was in custody, having been arrested for shoplifting. He stated that M. was released into the custody of the respondent who then brought her and E.S. Jnr. to Ireland. The second named notice party alleges that the applicant was not exercising her rights of custody at the time that the children were brought to Ireland. He accepted that E.S. Jnr. did not settle in Ireland and wanted to go back to England and Wales and so returned to live there.

21. The second named notice party stated in his affidavit that he is happy for M. to continue to live with him if she so wishes and if the Court refuses her return to England and Wales. The second named notice party deposed in his affidavit that M. does not wish to return to England and Wales. He stated that he is concerned for M.'s safety if she were to return to live with the applicant and her alleged partner due to his alleged inappropriate sexual suggestions and advances on M.

22. The respondent, therefore, resisted the return of M. on the basis of M.'s strong and clear wishes to remain in Ireland and on the basis of the "grave risk" that has not been alleviated by "adequate arrangements" by the applicant.

Conclusions

23. Wrongful removal is defined under Article 3 of the Convention:-

"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 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."

24. As this case concerns an application for the return of a child between European Union Member States, the Convention must be interpreted harmoniously with Council Regulation (EC) No. 2201/2003 of 27th November, 2003 on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility (Brussels II bis). Article 2 of the Regulation defines the term "wrongful removal" as follows:-

"the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and

(b) provided that, at the time of the removal or retention, the rights of custody were actually exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."

25. It is accepted that the removal of M. to Ireland was wrongful within the definition of the Convention and the Regulation as the applicant mother had rights of custody, was exercising those rights and did not consent to M. being brought to Ireland. However, the defences of "grave risk" and the objections of the child were raised and will be addressed by the Court.

26. It is not the role of the Court to make a finding of fact as to the allegations and counter-allegations found in the various affidavits. However, Mr. Kealy's report highlighted some key concerns and it is accepted by the Court that if the child were to be returned to the care of her mother in England that would have negative consequences for M. This Court is particularly concerned with the reported lack of support from the mother when the child disclosed certain allegations to her along with the fact that M. has stated that she is afraid of her mother's alleged partner.

27. The Court notes that in similar cases where "grave risk" was raised it would be normal for the mother as applicant in these proceedings to give undertakings to the Court as to what measures she would put in place to protect her child and to prevent a high risk or intolerable situation pending further court hearing in the jurisdiction of England and Wales. For example, in the case of *D.E. v E.B.* [2015] IEHC 180 the defence of grave risk was raised by the respondent and the applicant offered arrangements including providing accommodation for the applicant and the child to his own exclusion, paying maintenance and undertaking that there is no firearm in the accommodation. This Court accepted said arrangements in that case as being adequate to allay the fears of "grave risk" and the decision was upheld by the Court of Appeal.

28. Article 11(4) has not been fulfilled in the absence of the mother attending Court and providing such equivalent undertakings. The Court is satisfied that the child is in a safe place with her grandparents. Article 11(4) of the Council Regulation provides:-

"A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it established that adequate arrangements have been made to secure the protection of the child after his or her return."

29. The Court accepts that it is the express wish of the child to stay in Ireland with her grandparents. Article 13 of the Hague Convention affords the Court a discretion not to return the child if the child objects to being returned and has attained an age of maturity at which it is appropriate to take account of these views. Article 13 provides as follows:-

"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. It is clear from the case law on the child's objection exception that the views of the child are not to be considered determinative of the order that the Court should make. The Supreme Court in *A.U. v T.N.U* (Child Abduction) [2011] IESC 39 considered the proper approach to the exercise by the Court of this discretion. Denham C.J. cited, with approval, the case of *In re M. (Abduction: Rights of Custody)* [2008] 1 A.C. 1288, at p. 1308:-

"[46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in light of Article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are: 'authentically her own' or the product of influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should

only prevail in the most exceptional circumstances.”

31. This Court holds that, while not determinative, the objections of M. to being returned to her mother’s care in England should be taken into consideration. M. is a mature 14 year old girl who clearly voiced her views to the assessor and to the Court that she wished to remain with her grandparents in Ireland. The Court further holds that the level of “grave risk” could not be alleviated given that the applicant mother failed to give any undertaking, in writing or orally, to satisfy the situation.

32. For those reasons, this Court will not return the child, M.M.S., to the jurisdiction of England and Wales.

33. No Order as to costs