

THE HIGH COURT

FAMILY LAW

[2016 No. 37 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION

AND

IN THE MATTER OF COUNCIL REGULATION 2201/2003

AND

IN THE MATTER OF L.K. (A CHILD)

BETWEEN

J.K.

APPLICANT

AND

S.A.L.K.

RESPONDENT

AND

LONDON BOROUGH OF HAVERING

NOTICE PARTY

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

1. This case concerns an application for the return of the child L., born on 7th August, 2014, to the jurisdiction of England and Wales 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 issued on 9th November, 2016. The jurisdiction of England and Wales is subject to both the Hague Convention and Council Regulation (EC) No. 2201/2003.

2. This Court made a number of orders in this case on 23rd November, 2016 when the respondent was present in court. The London Borough of Havering were joined as a notice party to these proceedings. That order noted the undertaking of the respondent not to remove the child from this jurisdiction pending the determination of the case and her undertaking to attend the hearing of this action on 12th December, 2016. A penal endorsement was attached to the order of 23rd November, 2016.

3. The matter came before this Court on 12th December, 2016 along with the linked proceedings under record number 2016/36 HLC. The respondent was not in attendance and the assistance of An Garda Síochána was required to bring her and the child to court.

4. The applicant herein, J.K., is named as the father on the birth certificate of the child, a copy of which is before this Court. The mother of the child is S.A.L.K., the respondent herein. The parents have never been married to one another.

5. The child the subject matter of these proceedings is just two years old and is therefore not of an age or degree of maturity where it would be suitable for her to be interviewed in relation to her views.

6. The applicant alleges that there was a wrongful removal of the child from the jurisdiction of England and Wales on 1st August, 2016 within the definition of Article 3 of the Hague 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.”

It is alleged that the respondent came to this jurisdiction by ferry on 1st August, 2016 with the child the subject matter of these proceedings and another child the subject of the related proceedings.

7. The child, the subject matter of these proceedings, was born in the jurisdiction of England and Wales. It is the contention of the applicant that the child was habitually resident in the jurisdiction of England and Wales at the time of the alleged wrongful removal by virtue of having lived there her entire life and there being no indication of a change in habitual residence. The child is described as having been under the constant supervision of London Borough of Havering Children and Young Persons Services who have been involved with the child since her birth and this involvement remains ongoing. Evidence has been accepted by this Court of the involvement of the social welfare services in the jurisdiction of England and Wales in the life of this child on an ongoing basis. The history of care in this case and the assertion of her habitual residence remain uncontested.

8. Counsel for the applicant outlined that the applicant has been named on the child’s birth certificate as the father of the child and his rights of custody are established by s. 2 and s. 4 of the English Children Act 1989. Counsel for the applicant submits that by virtue of his name on the birth certificate, the applicant has been “registered as the child’s father” for the purposes of the English 1989 Act

and his parental responsibility flows from that.

9. It was submitted that the standard for an applicant to reach to demonstrate that he was exercising his rights of custody is not a high one and he has surpassed it. The applicant's case is that he was exercising those rights through access visits with the child up to the actual day of the wrongful removal. Those access visits were originally for weekend periods but have been curtailed by the respondent. Counsel for the applicant also indicated that he was exercising his rights of custody by participating in the proceedings before the English courts and he cited the case of *B. v. C.* [2015] IEHC 548 as authority for that assertion. The applicant has also been assessed as a suitable foster parent by the English authorities.

10. The respondent was due to attend a hearing in childcare proceedings before East London Family Court concerning the child on the 1st August, 2016 but failed to appear in person. Counsel for the applicant argues that, by virtue of those proceedings, the Courts of England and Wales also have custody rights in relation to this child and have been exercising same. Counsel for the applicant submitted that there is a stronger case here. This case is similar in one respect to *Coventry City Council v. M.S.* [2010] IEHC 303 in that orders regarding rights of custody were made by the Courts of England and Wales after the removal of the children from that jurisdiction. The applicant was an active participant before those courts.

11. Counsel for the notice party also submitted that they have rights of custody in relation to the child and that they were exercising those rights. The case of *In Re W. (Minors) (Abduction: Father's Rights)* [1999] Fam. 1 was relied upon as authority for the principle that courts of a jurisdiction where the child is habitually resident may have rights of custody. Lady Hale was cited at p. 16 as follows:-

"I am greatly attracted to the proposition that, where the court is actively seized of proceedings to determine rights of custody, removal of the child from the jurisdiction without leave of the court while those proceedings remain pending is a breach of the rights of custody attributable to the court ... There is something particularly repugnant about a litigant seeking to frustrate the processes of the law in this way. This emboldens me to conclude that the removal of the W. children was wrongful within the meaning of the Convention because it was in breach of the rights of custody attributable to the court."

An order made by the Family Division of the English High Court dated 1st August, 2016 was also before this Court whereby Mr. Justice Moore ordered that the children be made wards of court, that the respondent return the children (including the child the subject matter of these proceedings) forthwith to England and Wales and placing the children in the care and control of the London Borough of Havering. It is submitted on behalf of the applicant that the respondent was personally served with the English proceedings on 25th July, 2016, that she was an active participant with legal representation in the English courts and cannot be considered to have been unaware of the proceedings.

12. Counsel for the applicant submitted that no defence has been raised under Article 13 of the Convention. The defences under Article 13 are as follows:-

"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."

Although he addressed in submissions the potential for the "grave risk" defence to be raised, it was submitted that the involvement of the English courts and social workers must assuage any concerns in that regard. Counsel for the applicant further asserted that there has been nothing to indicate any consent to the removal from the jurisdiction of England and Wales. It was also submitted that the young age of the child in these proceedings precluded any assessment of her objections.

13. It was further submitted on behalf of the applicant that the within proceedings were issued less than one year from the date of the wrongful removal and therefore a return is mandatory pursuant to Article 12 of the Hague Convention.

14. The respondent was given an opportunity to give evidence and respond in person to the case set out by counsel for the applicant. She did not deny that the child was habitually resident in the jurisdiction of England and Wales. She did not deny that she was aware of the proceedings in the English courts. She alleged that the applicant herein is not the natural father of the child the subject matter of these proceedings. There were extensive allegations about the behaviour of a particular social worker employed by the Notice Party and present in court. The respondent also indicated that she has a support network in Ireland and that she would prefer to remain with her children in Ireland as she feels that would be in their best interests. These are issues for the courts of England and Wales who have jurisdiction regarding the welfare of this child by virtue of her habitual residence there. There is also a closer degree of proximity with the courts of England and Wales and they are better placed to determine the matter.

15. It is the view of this Court that the child the subject matter of these proceedings was and continues to be habitually resident in the jurisdiction of England and Wales. She was born there and the evidence before this Court is that the authorities of England and Wales had ongoing contact with the child there. This Court is satisfied that the applicant has rights of custody under the English legislation due to being named on the birth certificate. This Court is also satisfied that he has been exercising his rights of custody up until the point that he was interrupted from doing so by the respondent bringing the child to Ireland. This Court hereby declares that the child was wrongfully removed from the jurisdiction of England and Wales. This Court is not satisfied that any defence has been raised. Therefore, this Court orders the return of the child the subject of these proceedings to the jurisdiction of England and Wales along with such other orders as may facilitate such a return.