

THE HIGH COURT

FAMILY LAW

[2017 No. 29 HLC]

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 ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND IN THE MATTER OF EU COUNCIL REGULATION 2201/2003

AND IN THE MATTER OF S. (T.) S., A MINOR

BETWEEN

B.B.

APPLICANT

AND

Z.S.

RESPONDENT

JUDGMENT of Ms. Justice Reynolds delivered on the 30th January, 2018

1. In these proceedings, the applicant seeks the return of the child, S.(T.)S. (born 24th December, 2008, nine years old), to Hungary pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction 1980 (the "Hague Convention"), the Child Abduction and Enforcement of Custody Orders Act 1991, and the matrimonial and parental judgments: jurisdiction, recognition and enforcement Regulation (EC) No. 2201/2003 (the "Brussels II bis"). The respondent brought the child to Ireland in July 2017.

Chronology

2. Both parents in this case are Hungarian nationals. They were never lawfully married to one another but lived together since 1997 until they separated in 2013. Arising out of the relationship, the child, S., was born on 24th December, 2008, in Hungary. Both parties were entered in the Register of Births in Hungary as the child's parents.

3. After the parties separated, the applicant remained the primary carer of the child with liberal access to the respondent.

4. The respondent subsequently married and in June 2016, he moved to this jurisdiction with his wife and has remained here since.

5. Thereafter he enjoyed regular "Skype" access with his daughter. In addition, he enjoyed a two week access visit with her during her Autumn mid-term break in 2016 and similarly during her Easter break in April 2017.

6. The applicant consented to the child visiting the respondent in Ireland for the purposes of a holiday commencing the 10th July, 2017 and concluding on the 31st July, 2017. Prior to the due return date, the respondent informed the applicant that the child would not be returning to Hungary in breach of a written undertaking from the respondent to return the child to Hungary following the holiday.

7. The respondent has refused to return the child to Hungary and has stated his intention to stay in Ireland with the child. Further, the respondent had provided the applicant with an incorrect home address in Ireland.

8. A Request for Return to the Central Authority for Hungary issued on the 8th day of August, 2017 and the respondent has failed to comply with same.

9. It is common case that the child was habitually resident in Hungary prior to July 2017. It is conceded that the applicant herein has formal rights of custody under the laws of Hungary and was at all material times exercising them within the meaning of Article 3 of the Hague Convention.

10. The respondent accepts that the retention of the child within this jurisdiction was wrongful within the meaning of Article 3 of the Convention also.

Proceedings before this Court

11. The special summons in this case issued on 10th October, 2017. On 25th October, 2017, the respondent appeared before the court and provided the usual undertakings pending the hearing of the within proceedings. In addition, the court directed the respondent to facilitate "Skype" access between the applicant and the child. It is clear that difficulties arose in this regard requiring further directions from the court. The hearing proceeded on the 16th January, 2018 wherein both parties were legally represented before the court. No oral evidence was given.

Issues in the Case

12. The key issues arising in this case are as follows:-

(i) whether there is a grave risk that the return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation; and

(ii) whether having regard to the wishes of the child, the court ought to exercise its discretion and refuse to return the child.

13. These issues arise in the context of the Hague Convention and the Brussels II bis Regulation, the relevant provisions of which are set out hereunder.

Relevant Articles of the Hague Convention

14. Article 12 of the Hague Convention provides as follows:-

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the 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."

Article 13 further provides:-

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.
- (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 authorities 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."

The Defences

15. It is clear that Article 13 of the Hague Convention sets out the exceptions to the mandatory obligation to return the child pursuant to Article 12 of the Convention. Article 13 provides the deciding authority with a discretionary power to refuse the return of the child on the basis of the child's objections. This aspect of the Article 13 exception to the mandatory obligation to return the child constitutes "a separate ground" and "the child's views alone are a sufficient basis to refuse to return her" as per the dicta enunciated in *T.M.M. v. M.D.* [2000] 1 I.R. 149.

Views of the Child

16. In *C.A. v. C.A.* [2010] 2 I.R. 162, Finlay Geoghegan J. sets out the applicable test for the Irish courts, adopting a three-stage approach to a consideration of a child's objections:-

"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 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."

17. In *U.A. v. U.T.N.* [2011] IESC 39, the issue of the views of the child was further considered. The Chief Justice, at paras. 27 and 28 of the judgment of the court approved the following passage from the English decision in *Re: M. (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 A.C. 1288:-

"In child objection cases the range of considerations may be even wider than those in 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 in age and a degree of maturity at which it is appropriate to take account of her 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 the 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 ..."

18. The court in *U.A. v. U.T.N.* found it had discretion pursuant to Article 13(b) in having regard to objections of a child. Denham C.J. stated that:-

"courts should not lightly exercise a discretion to refuse to return a child ... since that would risk undermining the effectiveness of the Convention ... the circumstances in which a child will not be returned are exceptional."

The court went on to state that fundamental policy objectives have to be taken into account. The court pointed out "the circumstances in which a child would not be returned are exceptional" and in considering those circumstances the court "should take account of information provided to it from a competent authority concerning the child's social background" and to examine the "extent to which the child's objections 'coincide or are at odds with other considerations'" cited para. 39 *J.W. v. M.R.* [2017] IEHC 67.

19. In the instant case, the child was almost nine years of age when she was interviewed by the court appointed assessor. It is clear that the child's understanding of the English language is very limited and an interpreter was required to facilitate the assessment.

20. In considering the assessor's report, the court is very cognisant of the background history in this case in circumstances where the applicant has at all times been the child's primary carer and has borne the financial responsibility of providing for her needs, with some limited financial assistance from the respondent. It is further clear that the applicant has at all times facilitated and indeed encouraged access with the respondent, both before and after his move to Ireland.

21. The interview with the assessor took place some five months after the child arrived in this jurisdiction. The child reported that after spending the holiday with her father, she did not wish to return to Hungary.

22. In respect of her objections to returning to Hungary, she stated she was unhappy with her living conditions there and had "nothing positive" to say about the applicant or the applicant's partner. The assessor noted that whilst the child was suffering from "psychological upset and emotional conflict within herself", she was nonetheless able "to express her feelings and needs to others". The assessor concluded that the child appeared to "be settled in her new environment" and has "clearly expressed the wish to remain living in Ireland with her father".

23. Further, the child indicated she has no wish to see her mother; nor does she wish her to come to Ireland for access purposes.

24. The assessor concluded that returning to live in Hungary would not be in the child's best interest.

25. The court has very considerable concerns about the assessor's findings, particularly in the absence of any objective evidence of any difficulty in the relationship between the applicant and the child prior to her visit to Ireland in July 2017. There is simply no plausible explanation for the fact that the child, who appears to have been previously content with her life in Hungary with the applicant and where there were no welfare issues in relation to her care, now finds herself in a situation whereby she no longer wishes to have any contact whatsoever with the applicant. Nor is there any mention of the child being effectively isolated in a country where she does not speak the language and where she has been cut off from all her extended family and friends in Hungary. Indeed there appears to have been very little probing during the course of the assessment to establish how it is that the child has come to the position whereby she now has "nothing positive" to say about the applicant. The evidence simply does not stack up. Whilst it is clear that the child is of an age and degree of maturity that the court must take account of her views, the court has very considerable concerns about whether these views are authentically the child's own.

26. In addition, the respondent appears to be supportive of a position whereby the child is effectively alienated from the applicant, in stark contrast to the attitude displayed by the applicant in ensuring that the child had regular contact and access with the respondent, prior to the child's visit to Ireland. Again this is a matter of grave concern to the court where it is clearly in the child's best interests that she enjoys a good relationship with her mother and father.

27. The retention of the child in this jurisdiction has now resulted in considerable parental alienation for the applicant, a position which simply cannot be endorsed by this Court and indeed flies in the face of the overall policy objectives of the Convention as a whole.

28. Clearly it is not the function of this Court to determine custody and access issues in the long term but merely to determine whether the child should be returned within the parameters as set out by the Convention.

Grave Risk

29. Under Article 13(b) of the Convention the judicial or administrative authority of the requested State is not bound to order the return of the child if 'there is a grave risk that his or her return would expose the child to a physical or psychological harm or otherwise place the child in an intolerable situation'.

30. The law relating to grave risk in Ireland is well settled and was clearly stated by Denham J. in the Supreme Court in *A.S. v. P.S.* [1998] 2 I.R. 244 where the test for successfully invoking the defence was stated to be extremely high:-

"The law on "grave risk" is based on Article 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

31. In the within proceedings, the respondent contends that it is not safe for the child to return to reside with the applicant and her partner. In this regard, he refers to previous childcare arrangements for the child which he contends were wholly unsatisfactory and asserts that the applicant failed to heed concerns raised by the child in this regard. Further, the respondent asserts that the applicant's partner has been aggressive and abusive towards the child, albeit that there is no allegation of physical violence.

32. Again the allegations made by the respondent in respect of this issue are unsupported by any objective evidence and in the circumstances, the court can only conclude that same are self serving.

33. Even if the allegations made by the respondent were taken at their height, there is no evidence whatsoever that the court in Hungary would be incapable or unwilling to give the child adequate protection.

34. In the circumstances, the court is not satisfied that the threshold for grave risk has been met in this case

Conclusion

35. In view of the foregoing, the court is not satisfied that this is an appropriate case where the court should exercise its discretion to refuse the return of the child. In making the order for return, the court is satisfied that same is in keeping with the overriding policy considerations of the Convention and in the best welfare interests of the child.

36. I will therefore grant a declaration that the child was wrongfully retained in Ireland within the meaning of Article 3 of the Hague Convention and direct the child should be returned forthwith to Hungary pursuant to Article 12 of the said Convention.