THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 220

[Record No: 2018/163]

Finlay Geoghegan J.
Irvine J.
Hogan J.

In the Matter of an Application under the Hague Convention on the Civil Aspects of International Child Abduction

and

In the Matter of the Child Abduction and Enforcement of Custody Orders Act, 1991

Between/

V.R.

Applicant/Respondent

and

C. O'N.

Respondent/Appellant

Judgment of Ms. Justice Finlay Geoghegan delivered on the 2nd day of July, 2018.

1. This appeal is from an order made by the High Court (Ní Raifeartaigh J.) on the 16th April, 2018 upon the application of the mother that her son born in 2008 be returned to the Commonwealth of Australia. The order was made for the reasons set out in a detailed written judgment delivered by Ní Raifeartaigh J. on the 16th April, 2018 *V.R. v. C. O'N.* [2018] IEHC 316. That judgment is already published and this judgment should be read in conjunction with that judgment which sets out in full the background facts, the evidence and issues before the High Court, the applicable legal principles and the High Court judge's findings and conclusions on the application of those principles to the facts herein. This judgment only repeats in summary those matters insofar as is necessary to explain the reasons for the determination of the appeal.

2. It is important to stress at the outset of this judgment, as was done by the High Court judgment, that the child at the centre of these proceedings has a deep and loving relationship with both of his parents. Both parents also clearly have a great love for their child, which is reciprocated. Furthermore the proceedings before the Irish courts are not custody proceedings. The child at all times relevant to this appeal was habitually resident in Australia and it is the Australian courts who have jurisdiction to take decisions as to with whom the child should live long term and the access he is to have with the parent with whom he does not primarily live. In these proceedings the mother simply seeks an order for the summary return of the child for the purpose, *inter alia*. of enabling the Australian courts exercise that jurisdiction.

3. The mother is Australian (and stated to also have British nationality) and the father Irish. The child was born in Ireland. The mother took the child at an early age from Ireland to Australia intending to remain there. The father commenced Hague proceedings before the Australian courts. The mother returned voluntarily to Ireland and there was litigation in the District Court in Ireland which resulted in an order in October, 2010 giving the mother liberty to relocate to Australia with the child. The father did not appeal that order and the mother and child moved to Australia shortly thereafter.

4. The father's Hague proceedings revived in Australia and appear to have converted to family law proceedings relating to the child. The evidence includes orders made by the Australian Family Court culminating in an order of the 11th February, 2015. That order provided that the father and mother retain equal shared parental responsibility; that the child live with the mother and specified in great detail how, when and where the child was to spend time with and communicate with the father in a number of different factual scenarios (including when the father is outside Australia) and for certain ancillary matters. The Australian Court had the benefit of two detailed lengthy reports of a family consultant with the Child Dispute Services of November, 2013 and December, 2014. Those reports are in evidence and were taken into account by the High Court judge. As stated at para. 6 of the judgment the orders made by the Australian Court reflected a view that the role of the father in the son's life was a very significant and important role.

5. The father had not immediately followed the mother and child to Australia in 2010. He did so in 2013 having obtained a visa and stayed by obtaining subsequently a series of visas, some of which he only obtained following an appeal. All of these visas came to an end in January, 2017. At that point he returned to Ireland.

6. In the High Court an issue arose as to whether the father overstayed in Australia on a visa. The High Court judge concluded that it appeared probable on the evidence that the father had always complied with his visa requirements and was never unlawfully in Australia. This finding has not been disputed on appeal.

7. The father applied for an eVisitor visa in September, 2017 which was refused on 2nd November, 2017. He did not appeal the refusal (possibly by reason of the timing to the intended visit). It appears the father intended to visit the child in Australia in October, 2017 and then to bring him on an agreed holiday to Ireland. As the father did not get a visa, he collected the child in Melbourne airport and brought him to Ireland for an agreed holiday period in November, 2017 which was to end on 29th November 2017.

8. The father did not return the child to Australia on 29th November, 2017 nor on any subsequent date. He made clear he did not intend to do so and these proceedings commenced in the High Court on the 15th January, 2018 seeking the return of the child pursuant to the 1980 Hague Convention (the "Convention") as implemented by the Child Abduction and Enforcement of Custody Orders Act, 1991 (the "1991 Act").

9. The High Court, in accord with current practice, made an order that the child be interviewed and assessed by a clinical

psychologist, Dr. Fiona Moane. She interviewed the child on the 10th March and furnished a report to the Court dated the 16th March. The father appears initially to have had difficulty in obtaining legal aid. He subsequently did so. Affidavits were filed and following an adjournment to ensure the father was not disadvantaged in the presentation of his case by reason of his late legal representation the hearing took place on the 11th April, 2018. The evidence was primarily the affidavits, exhibits certain other documents and Dr Moane's report. This court was informed that the father was permitted to give certain explanations orally but the content did not feature in the appeal.

Issues and High Court Judgment

10. The judgment delivered by the High Court on the 16th April, only five days later, is admirable for its detail, clarity and analysis of the relevant authorities and applicable legal principles. As appears the High Court was required to determine the application in accordance with the Convention. It was not in dispute that the child had been habitually resident in Australia prior to coming to Ireland in November, 2017 and was wrongfully retained in Ireland within the meaning of the Convention since the end of November, 2017. In the High Court the father resisted the return order mandated by Art. 12 in reliance upon Art. 13(b) of the Convention in conjunction with Art. 8 of the European Convention on Human Rights in accordance with judgments of the Irish courts and the European Court of Human Rights referred to in the High Court judgment. He also sought to rely upon Art. 20 of the Convention.

11. The mother was the applicant in the High Court. However, once it was established, as was done here, that the child was wrongfully retained in Ireland and proceedings had been commenced within 12 months, the Irish courts are obliged pursuant to Art. 12 of the Convention to make a return order unless the father as respondent establishes pursuant to Art. 13 or Art. 20 that the Court has jurisdiction not to make a return order. Further, and this is of some importance to the consideration of the appeal, the onus was on the father to establish the defences he sought to make out pursuant to Art. 13(b) and Art. 20 of the Hague Convention. The submissions made on behalf of the father in relation to Art. 13(b) are summarised at paras. 17-21 of the High Court judgment. As the judge stated at the core was a submission that there was "a very strong likelihood" that the father would not get a visa to enter Australia in the future with the probable consequence or rupturing the father/son relationship and creating a situation that would be intolerable for the child.

12. In addition, counsel on behalf of the father in the High Court emphasised the best interests of this child which necessitates a continuing relationship with the father and the manner in which that must be factored into the Court's decision on the question of return as set out by the ECtHR in the cases of *Neulinger and Shuruk v Switzerland* (App. No. 41615/07) (2012) 54 EHRR 31 and *X. v. Latvia* (App no. 27853/09) [2013] ECHR 1172. The High Court was also referred to the subsequent decision of ECtHR in *G.S. v. Georgia* [2015] ECHR 2361/13 and also to a number of cases where visa difficulties were relied upon in defence to an order for return.

13. The High Court judge analyses with care the authorities to which she was referred and in particular the above three European decisions at paras. 22-27 and then summarised her conclusion of those authorities:

> *"28. Having regard to the above authorities setting out the general principles, it is clear that in a case where the article 13(b) defence is raised, the various policies underlying article 13(b) of the Hague Convention may be to a degree in conflict with each other. The threshold for establishing a grave risk of an intolerable situation for the child is a high one, but the Court must factor in to an appropriate degree the best interests of the particular child. The decision as to the appropriate balance between the various interests and policies is a nuanced and delicate one which will depend upon the particular facts of each case."*

14. She then considered the authorities in which what she termed the "abducting" parent had visa or other difficulties with regard to re-entering the jurisdiction from which the child was taken and in particular the judgment of the English Court of Appeal in *Re W. (Child Abduction: Intolerable Situation)* [2018] E.W.C.A. Civ 664. Having done so the trial judge set out her conclusions on those authorities and their applicability at para. 35:

> *"It seems to me that the authorities referred to above suggest that it is only in rare circumstances that visa or similar problems on the part of the "abducting" parent are permitted to stand in the way of an order for return in a Hague Convention case. The striking features of the W case, in which return was refused, were that the children were very young (aged 5 and 3), their mother had always been their primary caregiver, and there was a high degree of certainty about the fact that she would not be permitted re-entry to the United States on a visa because she had overstayed by 1 year on a previous occasion. Accordingly, these very young children would have faced the prospect of being separated for an indeterminate period from their primary carer if an order for return were made. The facts of the present case are very different; the respondent father is not the primary carer of the child who is aged 9, and he has never overstayed his visa periods in Australia. The authorities also emphasise that a degree of trust must be placed in the systems within the requesting State to consider and respect the best interests of the children."*

15. On the Art. 20 defence the High Court was referred to the decision of the Supreme Court in *Nottinghamshire County Council v. D. (K.) & B. (K.)* [2013] 4 I.R. 662. Her analysis and consequences for the potential defence on the facts of this application are set out at paras. 36 and 37.

16. The decision of the High Court on the defences advanced by application of the principles to the facts herein is set out at paras. 38-49 inclusive. The High Court judge commences with a consideration of the factual issue as to whether the father had discharged the onus of establishing that it is "highly unlikely" that he will get a visa to enter Australia in the future. She sets out and considers the evidence and reaches her conclusion on the factual issue at the commencement of para. 43 where she states:

> *"Having regard to the history of the respondent's visa applications, and the circumstances in which the most recent visa application (unsupported by the mother) was refused, I do not think that the evidence in this case goes so far as to support a conclusion on the balance of probabilities that it is highly unlikely that he will ever be able to get into Australia in the future to see or collect his son. The authorities referred to above emphasise the need for the court seized of a request under the Hague Convention to place a certain degree of trust in the systems, including the justice system, within the requesting jurisdiction and in particular to trust that the relevant authorities will factor in the children's best interests when deciding on issues such as visas. In this case there is already in existence a detailed Australian court order giving Mr. O'N generous access to the child. I find it difficult to accept on the evidence that, if the situation were properly brought to the attention of both the immigration authorities in Australia and the Australian Family Court dealing with his family, some kind of arrangement could not be arrived at in order to enable him to exercise his rights of access to the child in accordance with an order made by the Australian court itself. Given the importance of the proceedings before me being determined within a suitably swift time-frame, together with the factual matrix underpinning the case, I do not consider it appropriate to adjourn the case to enable the respondent to obtain expert evidence concerning the visa situation."*

17. Notwithstanding the conclusion on the factual issue the High Court judge continues to consider the best interests of the child and, in accordance with the principles which she summarised at para. 28, the appropriate balance to be struck on the facts. She does this in paras. 44-47 incl. and then sets out her conclusion at para. 49:

> *"44. It also seems to me that the potential availability of technology to give Mr. O'N a right of audience in court proceedings in Australia is relevant. I am not persuaded by the suggestion that video-link is an inadequate aid where serious matters such as child custody are in issue. Video- link evidence is often used in matters of extreme gravity in this jurisdiction and even in criminal matters, and I do not accept that it is a form of evidence of such a lesser quality that would create a risk of injustice in the Australian proceedings.*
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> *45. The fact of the matter is that, unlike other parents in some of the authorities referred to above, Mr. O'N has not in any way "burned his bridges" from a visa point of view by overstaying in the past. It appears that his presence in Australia in the past has always been on a lawful basis, and this must be likely to count heavily in his favour in terms of his seeking access to Australia in the future. Further and in any event, he does not necessarily have to enter Australia in order to see the child. The Australian court order envisages out-of- jurisdiction access, and the handover of the child could take place outside of Australia.*
>
> *46. Further, it is a fact in this case that the mother has always been the primary carer of this particular child. To say that is not in any way to deny that the father has a deep and loving relationship with his child. But the fact is that the child has always resided in Australia, or for at least as long as the child can remember. That is where his life is rooted, with his school, his home and his friends. I cannot accept that a return to this entirely normal environment where he would be cared for by his primary care-giver meets the threshold of what is described in article 13(b) as an intolerable situation. Rather, I think that an order for non-return would be more likely create this situation because it would separate him on a long-term basis from his familiar environment and his primary carer.*
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> *47. Finally, I do not think this Court is entitled to make a choice which, in effect, forces the mother to come and live in Ireland. This in my view would be close to stepping into the role of a court deciding the custody dispute itself. Under the Hague Convention, this Court has to be mindful of its limited role. It is simply deciding, on the facts as they currently appear from the evidence presented, whether there has been an unlawful removal or retention (which there clearly has been), and whether one of the limited defences has been made out.*
>
> *…*
>
> *49. Accordingly, having regard to the evidence as a whole, including the evidence regarding the visa issue, and that the child has always lived in Australia with his mother in what appear to be entirely normal circumstances, it seems to me that the defence of article 13(b) has not been established, even taking into account the best interests of the child from the point of view of the close bond he has with his father. Accordingly I am of the view that I should make the order for the return of this child to the jurisdiction of the Commonwealth of Australia."*

18. On Art. 20 her conclusion is stated at para. 48:

> *"48. I should add for completeness that I do not consider that the situation comes anywhere near the threshold required by article 20 of the Convention. I have referred to the Nottinghamshire case above which makes it clear how high the threshold is before article 20 comes into play and nothing has been put before the court to suggest that article 20 applies in the present situation."*

Appeal

19. The father has had the benefit of legal representation by senior and junior counsel and solicitor for the appeal. The Court has had and considered detailed written submissions from both parties. The Court has also had, and considered the entire of the evidence which was before the High Court. Finally, the Court has had the oral submissions made by senior counsel for each party at the hearing.

20. Counsel for the father, correctly in my view, does not submit that the High Court was in error in any way in the identification and analysis of the legal principles applicable to these proceedings. On the central issue in the case, namely the Art. 13(b) defence, the High Court judge succinctly stated the position as appears from the case law of the Irish courts on Art. 13(b) and that of the ECtHR at para. 28 of her judgment already cited.

21. The principal submission made by counsel on behalf of the father was that the High Court erred in under-appreciating the practical impediments or obstacles to the father in exercising any physical access with the child if he were returned to Australia. He submitted that the reports before the Australian courts and the Australian order of February 2015 identify the need for the child to have a continuing relationship with his father and that requires a continuing physical contact. Emphasis was placed upon the absence of any entitlement of the father to be in Australia and the information put before the High Court by the Central Authority of Australia in response to a request made by the Irish central authority for information about future visa applications. It was submitted that there was no evidence that the immigration authorities in Australia were under any duty to take into the account the child's best interests when determining whether or not to grant a visa to the father and if so the type of visa. He sought to rely upon that fact in pursuing an appeal against the rejection by the High Court of a basis for consideration of Art. 20 of the Convention.

22. Counsel for the mother submitted that whilst this is a sad and difficult case that the Court must apply the law. She submitted that the burden of adducing evidence to establish a grave risk that the return of the child would create an intolerable situation for him rested with the father. She submitted that on the evidence adduced in the High Court the trial judge had correctly determined that the father had not established that it would be "highly unlikely" that he would not obtain a visa to enter Australia.

23. In relation to the obligations imposed by the European case law already cited she submitted that the principles were both correctly identified and applied by the trial judge. She referred in particular to para. 47 of the judgment in *G.S. v. Georgia* cited at para. 27 of the High Court judgment where the ECtHR stated:

> *"A harmonious interpretation of the European Convention and the Hague Convention can be achieved, provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the*

parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to ascertain that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention;"

24. Counsel for the mother submitted that this requires the Irish courts to engage meaningfully with the relevant exception to return, in this instance Art. 13(b) and evaluate the potential reliance on it in the light of Art. 8 ECHR which had been done by the High Court judge.

25. She submitted that in accordance with the Hague Convention the question is which jurisdiction gets to decide if the child should continue to live in Australia with the mother or whether it is a time for a change. She submitted that the trial judge had correctly identified the applicable principles and applied them correctly to the facts with the resulting conclusion that it is the Australian courts which should now determine that issue.

Decision

26. This is a sad and difficult case. This is emphasised by the report of Dr. Moane which has been taken into account by the High Court and by this Court. The Court must, however, apply the law which, in my view, both respects the principle that this application is determined in accordance with the best interests of the child considered in accordance with the Hague Convention and the particular facts of the case and respects the family rights of the child, applicant and respondent. It is not in dispute that the child was habitually resident in Australia in November, 2017; that his mother who has shared parental responsibility with his father did not consent to his remaining in Ireland beyond the 29th November and that as a consequence he was wrongfully retained in Ireland by his father since the 29th November, 2017.

27. In those circumstances the Hague Convention as implemented by the 1991 Act in this jurisdiction obliges the Court to make an order for return in proceedings commenced within 12 months, as it is in the best interests of the child and the policy of the Convention that the courts of his habitual residence decide issues of custody and access, unless the respondent establishes that the Court has jurisdiction pursuant to Art. 13 or Art. 20 to refuse to make an order for return.

28. In these proceedings the father only relied upon paragraph (b) of Art. 13 which 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 the 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.

…

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."

29. Article 20 states:

"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

30. As already stated the principles applicable to the Court's consideration of the defence sought to be made out under Art. 13(b) when considered in the context of the Art. 8 rights of the father, the mother and the child are correctly, and if I may so, succinctly set out in the judgment of the trial judge by reference to the case law of the ECtHR and of the courts in this jurisdiction.

31. Where a parent such as the father in the present case seeks to establish that there is grave risk that the return of the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation and that defence is based upon factual contentions then the burden of adducing the evidence necessary to establish, on the balance of probabilities, the factual situation contended for rests upon the person opposing the return of the child.

32. As identified by the High Court judge the relevant potential factual situation contended for herein is that the father is "highly unlikely" to obtain a visa in the future to enter Australia for the purpose of having physical contact with the child in Australia or related matters. The High Court judge considered the evidence before her and reached the conclusion already set out at the commencement of para. 43 of her judgment that the evidence in this case did not go so far as to "support a conclusion on the balance of probabilities that it is highly unlikely that [the father] will ever be able to get to Australia in the future to see or collect his son".

33. Having reconsidered the evidence before the High Court and, in particular, considered carefully the letter from the Australian Central Authority referred to by counsel for the father, my conclusion is that the High Court judge was nonetheless correct on the evidence before the Court in the factual conclusion which she reached, namely, that the evidence did not support the contention that it is "highly unlikely" the father will get a visa to enter Australia to see his son.

34. As already stated the burden of proof was on the father to underscore his contention that it was unlikely that he would get another visa. However the evidence was that in the past he had succeeded on appeal when initially refused, and that the authorities had expressed a view that he had not been in breach of immigration requirements. He did not put in evidence the eVisitor application form for the visa refused in 2017 (which was not appealed). There was no evidence that he had relied upon his access rights to his son in that application.

35. Furthermore, as was noted by the High Court the refusal of the visa in 2017 was made in circumstances where the visa application had been made without the support of the mother. However, in relation to the future, the High Court judge records at para. 38 of her judgment that at the hearing a formal undertaking was given on behalf of the mother to the Court that "she would support a visa application by the father". This Court made further inquiries of counsel for both parties at the appeal hearing as to the terms of the undertaking given as it had not been recorded in the order of the High Court as would sometimes be the position where

undertakings are given to the court which are relevant to an order for return. This is done so that the courts in the State of habitual residence will be aware of a relevant formal undertaking given to the Irish court and may take it into account in any future hearings relating to the child.

36. The Court was referred to three emails received from the mother to her solicitor in this jurisdiction on the 9th April, 2018 which in broad terms indicate agreement by the mother that she would support a visa application for the father for Australia and file any necessary documents in support of such an application. These were the basis of the instruction from the mother to give the undertaking to the Court which was repeated by Counsel on her behalf to this Court. Insofar as the High Court judge observed at para. 43 that she found it "difficult to accept on the evidence that if the situation were properly brought to the attention of both the immigration authorities in Australia and the Australian family court dealing with the family some kind of arrangement could not be arrived at in order to enable [the father] to exercise his rights of access to the child in accordance with an order made by the Australian court itself" I consider she was entitled to do so on the evidence. However, I would add that this was an observation made by the High Court judge as part of additional reasoning and consideration of the overall facts but the essence of her factual conclusion was that there was not evidence before the Court which permitted her to conclude on the balance of probability that it is "highly unlikely" that the father would ever get a visa to enter Australia again.

37. Notwithstanding the factual conclusion reached on the Art. 13(b) grave risk defence contended for the High Court judge continued in accordance with the applicable principles to factor in the best interests of the child and consider the family rights of each of the father and the mother and explain why on the particular facts of this case the necessary balance required an order for return. I am in agreement with her reasoning and conclusion.

38. In relation to Art. 20 of the Convention the High Court judge was in my view correct in her analysis of the Supreme Court decision in *Nottinghamshire* and in the conclusion reached that there was no evidence before the Court which came "anywhere near the threshold required by Art. 20 of the Convention". There was simply no evidential basis which required a detailed consideration under that article.

Conclusions

39. Accordingly, the appeal must be dismissed. The Irish courts are obliged, for the reasons set out, to make an order for return pursuant to Art. 12 of the Hague Convention as implemented in this jurisdiction by the 1991 Act. There is only one additional matter that I consider should be included in the order for return, namely, that it should record and recite the undertaking given by the mother to support any future visa applications by the father connected with contact with his son and file any necessary documents for that purpose. This undertaking was originally proffered to the High Court and repeated before this Court. In addition, whilst the order for return should be an order for return forthwith it may be desirable that by reason of the time which has elapsed from the date of the High Court order there should be one comprehensive order from this Court setting out a precise date for the implementation of the order for return. The Court will hear counsel on a proposed date.

40. Lastly, I wish expressly to concur with the additional comment made by the High Court judge at para. 50 of her judgment where she stated:

> *"I would like to add, without wishing to overstep the boundaries of my role, that it would seem to me that it is in the best interests of this child that the immigration authorities in Australia would look favourably upon the granting of the appropriate visas to enable the father to exercise the rights of access envisaged by the Australian court order, and that it would be disappointing, not to mention detrimental to the welfare of the child, if the father-son relationship were disrupted simply because of immigration/visa barriers. This is an only child, for whom the company of each of his parents is precious."*