

THE HIGH COURT

2010 6915 P

IN THE MATTER OF C.B., A CHILD AND IN THE MATTER OF AN INTENDED APPLICATION PURSUANT TO THE INHERENT JURISDICTION OF THE HIGH COURT AND IN THE MATTER OF COUNCIL REGULATION 2201/203

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

C.B., A MINOR REPRESENTED BY HER SOLICITOR AND NEXT FRIEND, ROSEMARY GANTLY

DEFENDANT

AND

2008 32 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 C.B. (A CHILD)

BETWEEN

YOUTH CARE AGENCY

APPLICANT

AND

V.B.

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered the 27th day of July, 2010

Two sets of proceedings involving the child C.B. have come before the Court. The first in time was commenced by special summons dated 28th August, 2008. In those proceedings, the applicant, the Youth Care Agency, is the child protection service for children in the Netherlands and has the position of guardian of C.B. pursuant to the laws of the Netherlands. The respondent in those proceedings is the mother of the child, C.B. In those proceedings, the applicant seeks an order pursuant to the Hague Convention on Civil Aspects of International Child Abduction (hereafter "the Hague Convention") and Council Regulation 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (hereafter "Council Regulation 2201/2003") providing for the return forthwith of C.B. to the Netherlands. In the more recent proceedings, the Health Service Executive (hereafter "HSE"), the body with statutory responsibility for child protection in this State seeks orders providing for the detention of the applicant child, C.B. in Gleann Alann Special Care Unit as well as a number of ancillary orders.

The matter comes before the Court in these circumstances:

(i) By orders dated 27th August, 2007 and 10th September, 2009, C.B. was placed in the custody of the Youth Care Agency (hereafter "YCA"). The child was first taken into the care of the YCA in 2005. That order was renewed from time to time and more specifically was renewed on 27th August, 2007 on which day it was ordered that she be placed under supervision and placed in a secure custodial placement unit until 5th September, 2008.

On 10th September, 2008, the Amsterdam District Court Civil Sector made an order relieving V.B. from the parental legal custody of C.B. and vested legal custody of C.B. in the YCA.

(ii) In the course of an access visit on 21st July, 2008, the child C.B. was abducted by her mother. In so referring to the events of 21st July, 2008, I acknowledge that C.B. rejects this categorisation and regards the decision to leave the Netherlands as the joint decision of her mother and herself as they wanted a better life together.

(iii) The YCA reacted to the removal of C.B. from its care by reporting the matter to the Amsterdam police and also, in a situation where there was a belief that mother and daughter might have gone to Ireland, notified the relevant authorities in this State and sought their assistance.

(iv) C.B. and V.B. were located at an address in Co. Wexford. Proceedings were commenced in this Court on behalf of the YCA seeking the return of the minor to the Netherlands. The proceedings were personally served on the respondent, V.B., but unfortunately she left Wexford with her daughter and there was a period when both mother and daughter were untraceable. The whereabouts of the mother V.B. are again unknown though she is believed to be in Ireland.

(v) On 24th October, 2008, V.B. and C.B. were both located in Enniscrone, Co. Sligo. The HSE applied for and obtained in the District Court an emergency care order pursuant to the provisions of the Childcare Act 1991. C.B. was placed in foster care but within approximately a week, absconded from her placement. Despite efforts to locate her she was not seen

again until 16th July, 2010.

(vi) On that day An Garda Síochána in the course of a significant operation mounted under the Misuse of Drugs Acts searched under warrant a premises at Clane, Co. Kildare. In the course of the search, a minor was found at the address in question. While the child gave a false name, the gardaí became suspicious that the minor they had come across was in fact C.B. This, indeed, proved to be the case. The gardaí involved in the operation are to be commended highly for connecting the minor located in the course of the drug search with the minor who had been reported missing in the west of Ireland almost two years earlier.

(vii) The circumstances in which C.B. was found gave rise to a strong suspicion that she was in a relationship, indeed an inappropriate relationship, with a 21 year old male in whose company she was when located in the building which was believed to be linked to the drugs trade.

(viii) On the evening of Friday, 13th July, 2010, the HSE applied ex parte for an order providing for the detention of C.B. in a special care facility. I made the orders sought and appointed Mr. Harry Law as guardian ad litem. Mr. Law is, of course, vastly experienced in this whole area of child welfare.

(ix) As is widely known, there is a significant demand for the provision of secure care beds with the result that individuals identified as in need of secure care, often find themselves on a waiting list. In these circumstances, C.B. was placed in the education area of Gleann Alainn as the main area of the Unit was full. A storeroom was converted to provide a makeshift bedroom and a classroom was furnished as a living area and staff were drafted in from other institutions. While the HSE and the Gleann Alainn authorities are to be lauded at the initiative shown in making arrangements for C.B. at short notice, it is the view of her guardian that her living conditions are unacceptable for a prolonged period. This provides a further reason why these proceedings need to be dealt with and concluded as speedily as possible.

(x) One matter of significance has occurred since C.B. was placed in Gleann Alainn. C.B. sought to smuggle out a message addressed to the 21 year old in whose company she was when located via another resident who was going out on mobility but this was frustrated by the Unit's staff who intercepted the note. It appears it expressed affectionate sentiments for this young adult male.

(xi) C.B. has been interviewed by her court appointed guardian on a number of occasions since her placement in Gleann Alainn and he has prepared two reports for the Court. Of note is that he records C.B. very firmly expressed desire that she should not be returned to the Netherlands but should instead be allowed to remain in Ireland. I will be returning to this aspect in greater detail.

From this statement of the factual background, a number of issues emerge:-

- The Netherlands is the habitual residence of C.B. Such time as she has spent in Ireland was all in the context of flight from the Netherlands contrary to the terms of a court order and insofar as she has lived here untraced for some 21 months, she was able to do this only because she absconded from her foster placement and was not found despite being sought for.
- The YCA enjoys rights of custody in respect of C.B. This is provided for by the order of Amsterdam District Court Civil Sector.
- The YCA was exercising its right of custody at the time of the child's wrongful removal from the Netherlands. The YCA has not consented to the wrongful removal nor has it acquiesced in the situation in any way. On the contrary, it has moved with purpose and determination to restore the *status quo ante*.

The relevant provisions of the Hague Convention would appear to be Article 12 and Article 13. Article 12 so far as material 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 provides 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.

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."

At the outset it will be noted that the Hague Convention proceedings (Record No. 2008/32 HLC) were commenced within six weeks of C.B.'s wrongful removal from care and from the Netherlands. It will also be noted that the removal was from the care of the YCA which was actually exercising custody rights at the time and that as I have already stated there is no question of the YCA consenting

or acquiescing to that course of action.

While C.B. has referred to the fact that she was subject to bullying while in care, I am satisfied there is no question of refusing return on the basis that there is a grave risk of physical or psychological harm or of being placed in an intolerable situation. The threshold to be crossed before the usual order providing for a return to the country of habitual residence would not be made is a high one and I do not believe that there has been any serious suggestion it has been met in the present case. Moreover, the limitation on the scope of the provisions of Article 13 must be appreciated. Even if any of the Article 13 provisions do apply then, as Denham J. pointed out in the case of *B.B. v. J.B. (and in the matter of V.B. (a minor and ward of court))* [1998] 1 I.R. 299 at p. 311:-

"It is not that the court will refuse to order the return of the child to its country or jurisdiction of habitual residence. It is not that the court will assume a wardship or similar jurisdiction over the child and consider what order should be made as if the child had never been wrongfully removed or retained. The consequence is only that the court is no longer *bound* to order the return of the child, but has a judicial discretion whether or not to do so, that discretion being exercised in the context of the approach of the convention." (Emphasis in original)

In effect, the only live issue is the need to take account of the child's views. I have already referred to the fact that C.B. was interviewed by Mr. Harry Law, who has reported her views to the Court. While I did not, for one moment, doubt that Mr. Law had fully and accurately conveyed the views of the minor, in a situation where we were dealing with someone who was fifteen years of age, I felt it important to give her every opportunity to put her views and every opportunity to convince me of the merits of those views. Accordingly, I arranged for her to be brought to court and this was done.

On Thursday, 22nd July, 2010, I spoke with her in court in the presence of the representatives of the HSE, YCA and of her guardian. In the course of that conversation, she, in a very clear, determined and articulate manner, expressed her strong desire to remain in Ireland and not be returned to the Netherlands.

It is absolutely clear that C.B. is of an age such that it is appropriate to take account of her views and, as I have indicated, she has very firm views. I would summarise those as follows. She objects, in the strongest possible terms, to her proposed return to the Netherlands, stating that she does not feel that she has a future there. When asked by her guardian how she felt about returning to Amsterdam, C.B. stated, "not good, I don't want to go back because I can't speak Dutch any more and I don't want to see my father any more". C.B. said she was previously placed in a residential unit in Amsterdam where she was subjected to regular bullying by other residents. C.B. also objected to her return on the basis that she would lose contact with her mother. C.B. was not prepared to be specific about her mother's whereabouts, but did say that she had seen her approximately a week earlier.

When asked how she felt about the prospect of returning to Holland, C.B. stated, "it makes me sad and angry if I have to go back to the same place. I'll run away if I have to stay there". She indicated that she would refuse to cooperate with staff in any unit in which she might be placed in respect of all aspects of her care. She stated, "I would refuse to speak Dutch. Anyway, I can't talk Dutch any more. It's been two years". Adding, "I'd be fighting and arguing with staff all the time and my health would go bad". When asked about her wishes and feelings regarding her future, in accordance with the advice and directions of Finlay Geoghegan J., to whom the fact that the minor C.B. had been found was reported, C.B. told her guardian that if she was allowed to remain in Ireland, she would like to go to a High Support Unit with education on the premises or, alternatively, to an open residential unit in the community. She would like to maintain regular contact with her mother wherever she was placed. C.B. said that she wanted to resume her education with a view to studying for her Junior Certificate. Indeed, in court, she held out the prospects of later sitting the Leaving Certificate.

C.B. has not been involved with the educational sector since she went missing from her foster placement in Sligo in October, 2008. She says that she absconded at that time because she had a feeling the authorities would send her back. C.B. told her guardian, "my education is very important. When I'm sixteen, I'd also like to get training for beauty therapy or hairdressing and I'd like to start modelling", adding, "I'd like to improve my English because I don't want to talk Dutch any more".

I should clarify that, when the matter was mentioned to Finlay Geoghegan J., who was the judge who was dealing with the proceedings back in 2008, she recommended that a further interview be conducted with C.B. and suggested a number of headings, namely:

- (i) Does C.B. object to her return to the Netherlands and, if so, on what basis?
- (ii) Are her reasons for objecting independently formed or has she been influenced by other persons?
- (iii) What are C.B.'s wishes and feelings regarding her future care arrangements?
- (iv) Should the court decide to make an order returning C.B. to the Netherlands, how would she like to see her return managed?
- (v) An assessment by the guardian of C.B.'s maturity.

A further interview was conducted by the *Guardian Ad Litem* which addressed specifically the issues identified by Finlay Geoghegan J..

It is clear that what Article 13 does is to require that account be taken of the child's views. There is no question of vesting the decision making power in the child. Quite clearly, the obligation is to take account of the child's views, the obligation is not to give effect to those views.

In this case, there is no doubt that the minor, aged fifteen years, has strong views. However, there are powerful arguments and factors present that militate against those views. There is, first of all, the fact that this is a case where the abduction was of somebody who was, for reasons regarded as adequate by the Dutch courts, in care. I note that papers disclose that V.B. was involved in another abduction situation and received a suspended sentence, and also note that she is apparently at present the subject of a European Arrest Warrant.

There has to be the gravest concerns about the circumstances in which C.B. was located. Since leaving her foster home, when thirteen years of age, she, for the last two years, has had no contact with the educational system. She was encountered by the gardai in the course of a major operation mounted by them under the Misuse of Drugs Acts. The person in whose company she was, when located, cannot be regarded as a suitable companion for a fifteen year old. In the course of one of his reports to the Court, the guardian, while recording that C.B. had said that she and the young man were just friends, expressed scepticism in relation to this.

In a situation where C.B. accepts that she and the man in question were sharing a bedroom and had been for some time, I share that scepticism. Given the attempts by C.B. to make contact with her "friend" while in secure care, one must be very doubtful that her safety and wider interests would be capable of being looked after in a High Support Unit or other residential institution.

Notwithstanding her own strongly held and strongly expressed views, I do not believe that it is in the interests of C.B. that she remain in Ireland at present. I have a discretion to exercise, and in exercising my discretion, I have regard to the approach taken by Sheehan J. in the case of *S.R. v. S.R. (and in the matter of K.R. a minor)* [2008] I.E.H.C. 162 (Unreported, High Court, Sheehan J., 21st May 2008) where he, in turn, referred to the views expressed by Denham J. in the Supreme Court in *B. v. B.* [1998] 1 I.R. 299 and also to the observations of Baroness Hale in the case of *Re M. (Abduction: Rights of Custody)* [2008] 1 A.C. 1288. In that case at para. 42, she had commented as follows:-

"In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter the abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states."

In the present case, I am satisfied that the general policy considerations which apply in cases such as these, and the specific individual best interests of C.B. are entirely in harmony, and that both require that she be returned to the Netherlands, notwithstanding the strength of her own wishes so clearly expressed and, accordingly, I will so order.