

**THE HIGH COURT**

**FAMILY LAW**

**[2012 No. 7 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 COUNCIL REGULATION 2201/2003 AND IN THE MATTER OF N.D. A MINOR**

**BETWEEN**

**R.P.**

**APPLICANT**

**AND**

**S.D.**

**RESPONDENT**

**JUDGMENT of Mr. Justice Michael White delivered on the 6th day of June, 2012**

1. The applicant seeks an order pursuant to Article 12 of the Hague Convention on the civil aspects of international child abduction ("the Convention") as implemented by the Child Abduction and Enforcement of Custody Orders Act 1991, for an order for the return forthwith of the child N.D. to her place of habitual residence in England for the purpose of enforcing the applicant's rights of custody with respect to the said child.
2. The applicant and respondent are parents of N. who was born on the 26th May 2007. The parties are not married to each other. N. has resided with her mother but has had regular contact with her father.
3. N was living with her mother and present partner D.M. in London. England was the habitual residence of the parents and child. On the 4th January, 2012, the respondent moved to Ireland with N.
4. Children's act proceedings were ongoing in the Barnet Civil and Family Court.
5. By order of that court of the 14th December, 2010, it was directed by consent and until further order that the respondent was prohibited from removing N. from the jurisdiction of England and Wales.
6. By order of that court of the 30th June, 2011, a hearing date was fixed for the first available date after 16th January, 2012, and a direction hearing was ordered for dates between 20th and 23rd December, 2012. By that order permission was granted to the respondent to rely on the results of hair strand testing for drugs to be served on the local authority not later than 5th December, 2011.
7. By further order of that court on the 20th December, 2011, a final hearing was ordered to begin on the 1st February, 2012. It was noted that the respondent had failed to comply with the order of 30th June, 2011, in respect of hair strand testing. It was noted by the court that the local authority were considering initiating care proceedings.
8. A report dated 9th January, 2012, was prepared for the court by Ingrid Matroos of the London borough of Barnet social care division.
9. The respondent moved to Ireland in or about the 4th January, 2012 with N. Her present partner D.M. joined her at a later date. The respondent has given birth to another child in Ireland, B. who was born on the 6th February, 2012. D.M. is the father.
10. By order of the English High Court of Justice family division of the 10th January, 2012, it was ordered that the child N. be placed in the care of the applicant, and directed a further hearing of the court within three working days after the applicant's care of the child begins.
11. By further order of that court of the 10th January, 2012, N.D. was made a ward of court and a direction given that she shall reside in the care of the applicant until a further hearing of the court.
12. By further order of that court of the 24th January, 2012, it was ordered that the child be forthwith and no later than 30th January, 2012, be returned to the jurisdiction of England and Wales, and placed into the care and control of the father until further order.
13. By further order of that court on the 31st January, 2012, it was declared that it was in the best interests of the child for the court in England and Wales to continue to exercise jurisdiction and not to transfer the case or any part thereof to the Irish courts save for any steps to effect the return of the child. The applicant on that date gave an undertaking that if N. was returned by the 7th February, 2012, he would not enforce the custody order pending a hearing before the English courts.
14. By letter of the 7th February, 2012, the English central authority on behalf of R.P. the applicant, requested the Irish central authority to seek the return of his daughter N.
15. By special summons issued from the High Court of Ireland on 28th February, proceedings were issued and served on the respondent on the 1st March, 2012, returnable for the 7th March, 2012.

16. By order of the High Court of the 7th March, 2012, it was directed that N. remain in the Irish jurisdiction pending further order, and that the respondent continue to reside in Co. Cavan.

17. Solicitors for the respondent entered and appearance to the special summons on the 20th March, 2012.

18. By notice of motion of the 28th March, 2012, returnable for the 18th April, the respondent sought an order pursuant to Article 11(2) of Council Regulation (EC) 2201/2003 seeking to have the child interviewed by a child psychologist to ensure that the child be given an opportunity to express her views and be heard in the proceedings.

19. In a judgment of the 9th May, 2012, Finlay Geoghegan J. decided not to have the child interviewed stating:-

"I am of the view the child the subject of these proceedings who is not yet five years old, albeit at school, prima facie is not of an age where, as a matter of probability, she is capable of forming her own views in relation to everyday matters of potential relevance to the issues in the proceedings, including the exercise by the Court of any discretion in the proceedings, and hence have concluded that she is of an age where it would be inappropriate to give her an opportunity to be heard pursuant to Article 11(2)."

20. The substantive application was heard by this court on the 27th May, 2012.

21. It was accepted on behalf of the respondent that the habitual residence of all the parties at the date of the removal of the child was England and Wales, and that the child N. had been removed without consent to Ireland in breach of a court order.

22. The respondent relies on Article 13(b) of the convention, that there is a grave risk that her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

23. The respondent in an affidavit sworn on the 28th March, 2012 has made very serious allegations against the applicant stating that she felt compelled to leave England with N. so as to protect and safeguard both herself and N. from the applicant, and that he or his associates will either seriously harm or even try to kill her. She avers that the applicant has an extensive criminal record, that he is involved with a Chinese gang, and that he sells and grows cannabis and sells cocaine and ecstasy. She alleges that he is a violent person, and is not a fit person to care for a child.

24. The applicant in a supplemental affidavit sworn on the 11th May, 2012, refutes the allegations of any alleged violent and dangerous proclivities and gang membership, and states that the respondent is not under any threat of harm or violence from him.

25. He further states that the social care division of Barnet children's services, had concerns about the respondent's misuse of drugs, and ability to care for N.

26. Counsel for the respondent has objected to the consideration of this report by the court on the grounds it contravenes the rule against hearsay evidence, as the respondent has not had the right to cross examine its author Ingrid Matroos

27. The report presents both matters of fact and opinion and has been exhibited in the affidavit of Anke Hartas solicitor for the applicant.

28. One has to examine the report in the context of the nature of the proceedings which are intended to be summary proceedings to determine the return of a child who has been removed from one state to another state which is party to the convention.

29. The court dealing with the request does not normally determine issues of fact, but is not precluded from doing so.

30. The court has been asked by the respondent not to return the child on the grounds set out at Article 13(b) of the convention.

31. The uncontested facts in the case are that family law proceedings were current in England, and this report was prepared in the context of those proceedings. In those proceedings the respondent would have had the opportunity to cross examine Ms. Matroos, but chose instead to remove the child to Ireland in contravention of a court order, and has now made very serious allegations against the applicant.

32. Natural justice would dictate that the court would examine relevant reports from proceedings in another jurisdiction to assess the credibility of the issue now put before this court by the respondent.

33. This court is not deciding any issue of custody or access dealt with in the report, and in the court's view is not breaching the rule against hearsay in reading the report, and using its contents to test the credibility of the respondent's case.

34. Article 13 states:-

"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."

35. The convention thus mandates the court considering the request to take into account information provided by the English Central Authority on the social background of the child, and I consider the report from Ms. Matroos, to be such information.

36. I accept that separately from grave risk the court can examine in an objective manner if the child is being returned to an intolerable situation; however the test is still that approved 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 C.P.C:P.L. v. E.C. [2009]1 I.R. 18 where Fennelly J. stated:-

"The correct approach to the treatment of this issue is very well established in the case-law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless

one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country.

In her judgment in *A.S. v P.S.* [1998] I.R. 244, Denham J, citing from a judgment of Hale J, as she then was, stated at page 261:

'The underlying philosophy of the Convention and the heavy burden required to be proved to meet art. 13(b) was set out in *Re HB (Abduction: Children's Objections)* [1997] 1 F.L.R. 392. Hale J. held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned.'

Denham J. also cited with approval from the judgment of Wall J in *Re. K. (Abduction: Child's Objections)* [1995] 1 F.L.R. 977, where the relationship between courts of the two jurisdictions was explained as follows:

'The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future speedily to be decided in that jurisdiction.'

In *R.K. v J.K.* [2000] 2 I.R. 416, Barron J. cited with approval the following passage from the judgment of the United States Court of Appeals Sixth Circuit in *Friedrick v. Friedrich* (1996) 78F 3d 1060:

'Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.'"

37. The contents of the affidavit of the respondent in respect of the danger posed to her and N is an issue which is appropriate to determine before the English courts. The court notes that the issue is not a concern to the social care division of Barnet children's services. The report has concentrated on issues of concern about the respondent.

38. The fitness or otherwise of either party in respect of custody and access is a matter for the English courts.

39. I do not accept that the respondent has made out a sufficient case that the child's life would be intolerable if returned.

40. The actions of the respondent in removing N from her habitual residence to Ireland, when the parties had never resided here before and whose only connection was through relations and to arbitrarily as a result cease contact with her father has been the cause of these proceedings.

41. I will grant and order to return the child to England in the custody of the respondent and will accept a sworn undertaking from the applicant that he will not enforce his custody order until the English courts have had an opportunity to revisit the matter.