THE HIGH COURT

FAMILY LAW

[2023] IEHC 150

[2022 No. 16 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 OLIVIA, A MINOR

(CHILD ABDUCTION: CONSENT AND ACQUIESCENCE, EVIDENCE ON AFFIDAVIT, VIEWS OF THE CHILD)

BETWEEN:

W.

APPLICANT

AND

W.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 22nd of March, 2023

1. Introduction

1.1 In June of 2021, the family at the heart of this case travelled to Ireland. Two months later, the Applicant father left for Slovakia. The Respondent mother and the couple's daughter, Olivia, have been here since then. The Applicant asks the Court to

return his daughter, arguing that she should not have remained in Ireland as he did not consent to her moving here. He submits that the Court is obliged to return the child under the Hague Convention on the Civil Aspects of International Child Abduction 1980 and Regulation (EC) No. 2201/2003 (Brussels II bis).

1.2 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most recent information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, summary remedy against those who seek to take the law into their own hands.

1.3 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in contracting states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the resettlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

1.4 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of removal or retention. If he succeeds in establishing these matters, the burden then shifts to the respondent who

must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence.

1.5 Here, the Respondent raises the defence of consent. The question of where the child was habitually resident at the relevant time arises also as, if there was consent, even if it was withdrawn at an early stage, this may still bear on the question of habitual residence. The Respondent also points to the views of the child and asks the Court to exercise its discretion in deciding whether or not to return the child.

2. Evidence and Proofs in a Case on Affidavit

2.1 There is no issue between the parties about various important proofs for the purposes of the Convention. The Applicant has rights of custody and was exercising them at all relevant times. The facts establish that the family came to Ireland together and, even on the Applicant's version of events, they might have been preparing to settle there so there is no question of wrongful removal of a child in this case. Taking the disputes in chronological order, the first to arise is whether or not the Applicant consented to the child coming to Ireland to settle here in June of 2021. This requires an examination not only of the affidavits but of the relevant exhibits.

2.2 The exhibits in a case such as this are crucial. They usually contain material from the parties to the case and from independent others, none of whom is preparing for a court hearing but is setting out views (or revealing them) in texts, emails and various communications at the time of the events in question. An honest witness can be mistaken, an honest witness who wants to achieve a certain result may recall events that most favour that aim, and a witness who is careless with the truth may mislead in order to achieve that aim. Examining exhibits and checking for consistency are the most useful tools for a judge who must reconcile one version of events with another or reject one account in favour of another. Inconsistency may be internal to an affidavit, it may be found when affidavits are compared and it may arise when

exhibits are compared with the affidavit evidence. The evidential value of the exhibits will often outweigh an averment, particularly if the exhibit includes contemporaneous material, created by a third party with no material interest in the outcome of the case or a business document which confirms a date or other material fact in issue. Any objectively verifiable evidence is very persuasive, particularly where the Court relies on the affidavit evidence of the parties, as in cases such as this one.

2.3 In this case, credibility can be assessed more easily than usual. The Applicant has left material out of his instructions to his solicitor in the initial affidavit which was only later included to address matters raised in the Respondent's affidavit in response. He has been demonstrably unreliable. Certain exhibits and internal inconsistencies mean that it is difficult for the Court to believe him in respect of any of the matters in dispute and some of the exhibits contain independent proof of key matters which go to the issues of consent and contradict the Applicant's account.

3. Consent and Habitual Residence

3.1 In *F.L. v. C.L. (Child Abduction)* [2007] 2 IR 630, Finlay Geoghegan J. set out the test for consent:

> *"….The onus is on the [respondent] to establish the consent. The consent need not be in writing. However, the consent must be real, it must be positive, and it must be unequivocal: see Re: K (Abduction: Consent) 1997 2FLR 212 and the judgment of Hale J. at page 217.*
>
> *The consent must be proved on the balance of probabilities and the evidence in support needs to be clear and cogent. It is not necessary in all instances that there be an expressed statement such as 'I consent.' The Court may in an appropriate case infer consent from conduct."*

3.2 The Applicant avers that he did not consent to the family moving to Ireland. However, he also concedes that in June, when they all moved from Slovakia, they did not book return tickets and the move was an open-ended one. The Respondent, on the other hand, avers that this was a move to Ireland to seek employment and with a view to staying here.

3.3 Both confirm that there was a party in Slovakia before they went at which 30 or 40 of their friends attended to wish them well. The Respondent has exhibited messages from a friend who did not get a chance to say goodbye and from her brother, months before the move, which are contemporaneous exchanges about the imminent move with no suggestion that this is a short stay.

3.4 Olivia's school was contacted, and letters are exhibited in that regard: the child's place in the school was suspended for a year in June 2021. The school wrote, at the Applicant's request, to the effect that she discontinued her studies there in 2021 but the most relevant letter was dated 17th June 2021. In that letter, exhibited by the Respondent, the school confirms that it will hold her place for a year. There could be no clearer sign that the family planned to be away for at least that period. The letter was addressed to the Applicant, but he claims not to have received it until August when he returned to Slovakia. In response, the Respondent avers that she saw him receive it on the 18th of June, the day they left. As the exhibits noted above contradict the Applicant's version directly, I prefer the Respondent's account of this event.

3.5 Similarly, the Applicant claims not to have known where the Respondent was living after she left her brother's hometown. But his application to the Central Authority included this address and that application was made by him, so this is probably untrue.

3.6 From his own affidavits, it is clear that the Applicant had willingly brought Olivia to Ireland and decided to leave in August. He avers that he had heated exchanges with the Respondent, after which she refused to let their daughter travel

with him but agreed that she would bring Olivia to Slovakia at the end of August. The Respondent disagrees. She avers that there were no such arguments and no such agreements. Given the support for the Respondent's version of events in contemporaneous messages and in the letter from the school, I am satisfied that the whole family probably intended to move to Ireland, if not permanently, at least for a lengthy period to see if they could find employment and relocate there. If this was done with the intention of staying here, then the child's habitual residence probably changed as early as June, though August is the significant date in these proceedings.

3.7 Parental consent is not the only factor in such a decision, of course, as reiterated in A.K. v U.S., by Murray J:

> "*Hague Convention decisions which considered parental intention to be of pre-eminent importance are no longer good law. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. The purposes or intentions of the parents are only one of the relevant factors*."

3.8 The law in relation to habitual residence is clear in a case such as this: the habitual residence is that of the child, not the parents. On arrival, this family stayed with the Respondent's brother who was already living here, then moved to live near him. The child was enrolled in school here. Finally, and after the Applicant had left Ireland, they settled in a house in a different town nearby but over a county border. This meant that the child changed schools in Ireland at that point. The Applicant points to these factors as suggesting that the family has had an unsettled existence here which mitigates against the child's habitual residence having changed. He relies on her nationality, Slovakian, her mother tongue, Slovakian, and her roots and family connections in Slovakia as mitigating against her having changed habitual residence.

3.9 The problem for the Applicant is that this family moved, together, to Ireland. He cannot unilaterally decide that the child must go back to Slovakia if she has already

become habitually resident here. By the time he left in mid-August, she was living with her family and extended family were nearby, she was enrolled in an Irish school and was speaking English with a view to communicating in this new country. The fact that the Slovakian school had been notified that she would not be back for at least a year is strong evidence that this was not a short holiday and I also rely on this in preferring the Respondent's account that the family had decided to move to Ireland in the hope of finding employment and staying here permanently.

3.10 If further support is needed, at paragraph 20 of his own affidavit the Applicant avers that he did travel to Ireland for a month or two and, if it had worked out, he intended to stay permanently. This is far nearer to the Respondent's position than any other averment, it directly contradicts his averments about this being a short stay and, taken with the child's impression (set out below) it confirms my view as to her habitual residence.

3.11 The habitual residence of a person cannot be in two places and, for the first weeks of this family's stay in Ireland, they cannot have remained habitually resident in Slovakia. The family's friends had gathered to say goodbye to them. The Respondent's description of this event is more persuasive than the Applicant's, who avers that it is customary in his culture to gather for a party when people are going away for a short stay. The Respondent rejects this characterisation of the party and avers that the move was intended as a longer-term plan. The see-saw analogy used by Lord Wilson in *Re B* [2016] UKSC 4, is apt here: one cannot have two countries of habitual residence. As the child puts down roots in one country, she disengages from the former country of habitual residence. Here, the plans for the whole family to move to another country and work there are a significant factual finding in favour of a change of habitual residence even as early as June in this case.

3.12 Finally, and significantly, in replies to the independent assessor who was asked to ascertain the child's views on moving back to Slovakia if the Court had to make such an order, the child revealed that she understood that the family had moved to

Ireland in June of 2021. This confirms my view that she was probably habitually resident in Ireland from that point. She herself understood this to be the case. Olivia is an intelligent child who is over 10 years of age. She was already improving in her English language skills by the time she undertook her first assessment back in August of 2021 and, although it was a low score, it was impressive for a child who had only moved to an English-speaking country weeks before.

3.13 In this case, while parental intention may be only a factor, it is a very important one in this case and appears to have also embraced the child's view of events. As early as June, this family appears to have changed habitual residence and Olivia was habitually resident in Ireland by August of 2021 when the wrongful retention is alleged. One consequence of this was that the Applicant's consent to Olivia remaining in Ireland could no longer be withdrawn unilaterally.

3.14 The habitual residence of the child is a significant finding of fact in these proceedings as it determines the legal basis of the Court's finding, which is that the Applicant has failed to prove that the child was habitually resident in Slovakia in August of 2021. He has not tried to argue that there was an unlawful removal in June but submitted that Olivia remained habitually resident in Slovakia and that the Respondent had to prove that he consented to her remaining in Ireland. The Court sees the chronology differently. The findings of fact dictate the logical findings in terms of the law in this case.

3.15 As the Court has found as a fact that the whole family moved willingly to Ireland for more than a holiday but with a view to settling here, this child had changed her habitual residence by the time the Applicant changed his mind in August and decided to go back to Slovakia. That being the case, the Applicant has not established that the child was still habitually resident in Slovakia in August of 2021. Part of the evidence which helps the Court to this conclusion is the factual finding in respect of consent which was given in the months before the move in June and then withdrawn in August. Indeed, it is perhaps artificial to refer to consent in this context as neither

parent was seeking consent from the other, they appeared to be moving abroad on an agreed basis, with their daughter. By August of 2021, it was a matter for the Applicant to seek the Respondent's consent for any move back to Slovakia but instead he has unsuccessfully relied on the argument that he had not consented to the original move, when the weight of the evidence, and in particular the exhibits, show otherwise.

4. Acquiescence

4.1 While the finding on habitual residence and consent might be sufficient to dispose of the case, the evidence in respect of the acquiescence argument also weighs in favour of the Respondent. The Applicant did nothing from August of 2021 until July of 2022 to ensure his daughter's return. He avers that he applied to a Slovakian court but there is no independent evidence of this, despite the fact that there must be a written application form or some correspondence with that court. His application to this list was made just in time so that it was within the year required by the Hague Convention in order to mandate a summary return if no defence was made out.

4.2 As set out above, the Court must return a child who has been wrongfully retained without the consent of a parent if that parent applies within one year. What is envisaged is a fast application for return and an urgent return order so that children are moved home quickly to the courts where disputes about access and custody can take place. But if the family has moved, as a unit, to another country this rationale does not apply. Further, if the non-consenting parent (leaving aside my finding in relation to this Applicant to consider this argument) then does nothing to vindicate his rights, allowing the child and respondent to think that they have now moved, without objection to another country, he has acquiesced to the child's remaining in another country and it may become unfair to move the child.

4.3 The legal test is set out in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 IR 416, where Denham J cited Lord Browne-Wilkinson's judgment in the House of Lords

in *Re H (Abduction: Acquiescence)* [1998] AC 72. In particular, she relied upon a passage which features the following guidance:

> "*The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent…*
>
> *[but] Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return.*"

4.4 Here, I have already made findings in relation to the dispute about whether there was any agreement by the Respondent to return, permanently, with Olivia. I am satisfied that there was not. What the Applicant has averred is that he trusted the Respondent to return, first in August, then in December. When she did not, he applied for her urgent return in July. There is not a single email, letter or written message of any description to support this assertion or to lend credibility to the averment that there was one date on which Olivia was expected to return.

4.5 There having been no such discussion and no expectation on his part, the Applicant's conduct since August of 2021, when he left and did not return to Ireland, and made no clear request for the return of his child, amounts to acquiescence.

4.6 Even that short description shows the difficulty for this Court in making a return order in this case. There was nothing urgent in the Applicant's conduct and no evidence of urgency. Even if I accepted that there had been an agreement to return the child in August or December (and I do not), it was still the end of June of the following year before he took formal steps, all of which was done without any written warning, even by text or social media, to the mother of this child.

4.7 In his initial application, the grounding affidavit (which could only be completed on his instructions) did not mention that the Applicant had travelled to Ireland in June of 2021; it merely set out that the child was wrongfully retained in

August. This raises a warning signal about the editing of information being given to his own solicitor, and to the Court.

4.8 The Applicant sent messages (Exhibit L, dated 12th April 2022 in the correctly dated Slovakian text) to his daughter indicating that if she came home (meaning to Slovakia), then whenever she wanted to return to Ireland, "*you can go*". This is not consistent with his current application to have a court-ordered return of the child no matter what her views. More fundamentally, it does not mention any agreement that was made about her return. Olivia, as the Applicant now knows, does not want to return to Slovakia (as she has explained to the independent assessor in the case). All of this supports the version of events set out by the Respondent, which is that there was never an agreement to return.

4.9 The Respondent and Olivia have been living happily here since 2021 and there was nothing in the conduct of the Applicant, and nothing that he has shown to this Court, that suggested he was going to apply to the High Court to have Olivia returned to Slovakia. The Respondent, on the other hand, not only avers as to her understanding but points to the Applicant's conduct, or rather, lack of action. She also relies on the text to his daughter, reassuring her that if she "*comes home*", i.e. to him, she can go back to Ireland whenever she wants. In all those circumstances, the Respondent has proven that he probably acquiesced in the decision that she remain in Ireland.

5. Views of the child

5.1 Finally, I am asked to take the views of the child into account. In this case, the terms used by the child are that she would be sad and scared if required to return, even if in the company of her mother. There are details in her interview that are unnecessary to recite but the summary of her replies to the assessor amount to more than a preference for Ireland, in my view. She associates return with her dad and has

a poor relationship with him now, unfortunately. This is partly because of negative comments he makes about the Respondent when he talks to Olivia on the phone.

5.2 Olivia is ten and mature enough that the Court can and does take her views into account. It is a somewhat artificial exercise given my views on consent and habitual residence but, given the urgency of this case and to avoid any renewed hearing of fact, I also record my views on this aspect of the application.

5.3 The child's views are strongly expressed and rooted in fear and sadness. While they are related to mum and dad (attachment to one and current difficulties with the other), this does not mean that the child is associating Ireland entirely with mum. It is clear from the oral evidence given by the assessor that Olivia understands that if she returns, it will be with her mum. She still does not want to go back to Slovakia and this is the sentiment expressed and it is clear.

5.4 That being so, the Court should weigh up the objectives of the Convention, consider the best interests of the child and decide if the other objectives outweigh the child's views in the circumstances. Unusually, the objectives of the Convention (such as adherence to the rule of law and a swift return) have been thwarted by the Applicant's consent in the first instance and inaction in the second instance. Even if this Court is in error in relation to the question of consent, this is no longer a case in which a summary return can be achieved. The child is now in Ireland for over 18 months, doing well at school and speaking much better English.

5.5 This is a case in which, had it been necessary, I would have refused to order return of the child on the basis that her views were not outweighed by other objectives of the Convention, given the particular facts of the case.

6. Conclusion

6.1 The Applicant is not entitled to an order returning the child.