THE COURT OF APPEAL

Court of Appeal Record No.: 2024/58
Neutral Citation No.: [2024] IECA 102

Whelan J.
Faherty J.
Binchy J.

IN THE MATTER OF ARTICLE 11(7) OF COUNCIL REGULATION 2201/2003/EC

-AND-

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

- AND -

IN THE MATTER OF D (A MINOR)

-AND-

(CHILD ABDUCTION: RETAINED JURISDICTION FOLLOWING NON-RETURN ORDER, BEST INTERESTS OF THE CHILD)

BETWEEN:

H

APPLICANT

-AND-

I

RESPONDENT

Judgment (*ex tempore*) of Mr. Justice Binchy delivered on the 19th day of April 2024

1. This is a ruling on an application brought by the applicant in these proceedings, H, whereby he seeks an extension of time to appeal a judgment of the High Court (Gearty J.)

delivered on 5th December 2023, and the order subsequently made consequent upon that judgment, on 16th January 2024, which was perfected on 23rd January 2024.

2. As is apparent from the title hereof, the proceedings in the court below were custody proceedings, relating to a child of the parties, D, who was unlawfully removed from this jurisdiction by the respondent in 2018, and brought to Poland. Following upon that removal, the applicant brought an application for the return of the child to this jurisdiction pursuant to Article 12 of the Hague Convention, but in a ruling made by a District Court in Poland, on 6th July 2018, the application was rejected. The applicant appealed that decision, but he was again unsuccessful before the regional court of the relevant Polish area, which gave its ruling on 10th September 2018 upholding the decision of the District Court.

3. The reason for the refusal to make a return order was on the ground that the return of D to this jurisdiction would constitute a grave risk to D, contrary to Article 13(b) of the Hague Convention. The courts in Poland apparently reached this conclusion because of concerns that they identified regarding the treatment or professional interventions that D was receiving in Poland by reason of his diagnosis of Autism Spectrum Disorder. The courts in Poland took the view that it would be a grave risk to return D to Ireland having regard to the treatment that he was receiving with the assistance of his mother, in circumstances where it appears the applicant was sceptical about the diagnosis of Autism at the time. However, it is important to note that in the judgment under appeal, Gearty J. makes it clear that by the time of the hearing in the High Court, the applicant was accepting of the diagnosis of Autism, and so his initial doubts about the diagnosis, and therefore D's need for treatment for the condition, were not an issue of concern for the her.

4. In any case, the reasons for the refusal are of limited relevance in the context of the procedures that follow a refusal order, which at the relevant time were the procedures set out in Articles 11(6) – (8) of Regulation 2201/2003/EC ("Brussels IIR"). Article 11(7) of

Brussels IIR provides for the consideration of the question of custody of the wrongfully removed child by the courts of the child's habitual residence, if such an examination is requested by the relevant Central Authority, in this case the Central Authority in Ireland, within three months of the date of receipt of notification of the non-return order from the court making that order, (in this case the regional court of X in Poland). This exercise is not limited to the parameters of a Hague Convention application and a judge examining the custody issue is entitled to take all relevant matters into account.

5. In this case, the applicant invoked Article 11(7) with a view to obtaining an order for the return of D to this jurisdiction into his sole custody in this jurisdiction. While the Polish court sent its decision promptly to the Central Authority here, there appears to have been considerable delay with the progression of matters thereafter. Eventually however, the applicant issued a motion on 8th October 2020 seeking orders under s. 11 of the Guardianship of Infants Act, 1964 (as amended), directing, *inter alia*, that the applicant should have sole custody of D, and directing the return of D to the State permanently.

6. The application was grounded upon an affidavit of the applicant dated the 3rd September 2020. The applicant also procured two expert reports for the purposes of assisting the court, the first being a report from Mr. Michael Van Aswegen, a Clinical Psychologist practicing in Ireland, who provided a report dated 27th August 2021, and, secondly, a report from a Polish psychologist, Dr. P. dated 22nd July 2023. These reports were largely consistent in their conclusions and indeed Dr.P., who obviously had the benefit of the report of Mr. Van Aswegen, states that her conclusions are in line with those of Mr. Van Aswegen.

7. The application came on for hearing before Gearty J. in the High Court late in 2023 (the exact date is unclear), and she delivered judgment on 5th December 2023. In the course of her judgment, the judge noted that the issue before the court was one of custody, and not whether the child should now be returned under the summary procedure set out in Brussels

IIR. The judge stated, correctly, that the task of the court was to decide, in accordance with the principles set out in the Guardianship of Infants Act, 1964, whether it is in the best interest of D to remain in Poland with the respondent, or to move to be with the applicant in Ireland.

8. The judge noted that both parents are striving each in their own way to help D and to spend as much with as they can with him. She stated that both parents are committed to caring for their son and both have a deep concern for his welfare. However, having considered the evidence before the court, she concluded that the best interests of D are served if he remains in Poland. She arrived at this conclusion having given consideration to the concerns raised by the applicant about D's welfare. These concerns included concerns about his diet, his progress in school, excessive use of his mobile phone and the administration of appropriate therapies in Poland. The judge considered each of these issues in turn having regard to the evidence that she heard from the applicant himself, the evidence of Mr. Van Aswegen – who gave evidence to the court and was cross examined by the respondent – and the written report of Dr. P.

9. Ultimately, the judge concluded that D should remain with the respondent in Poland because, according to both Mr. Van Aswegen and Dr. P., D is receiving the services and treatments that he requires from a multi-disciplinary team in Poland, and it could not be assured that if he returned to this country, the same services – which it is not in dispute D is in need of – would be available to him here, or at least not for some considerable period of time. The crucial paragraph of the judgment is at para. 4.19 wherein the judge states:

> *"[The applicant's] relationship with his son is excellent and nobody doubts that he is a good father who is now more sensitive to D's needs. Equally, the respondent has an excellent relationship with D. Both families love D, and he has siblings in both countries, leaving aside the more extensive family connections in Poland. The*

services available to him in Poland are appropriate. But, if he were to move to Ireland, there is no guarantee that he would be treated by a multi-disciplinary team. This is a significant barrier for the applicant. It is not in his gift to ensure that D will have appropriate treatment in Ireland, but the evidence establishes that D is currently receiving appropriate treatment in Poland."

10. For this reason, the judge concluded, D should continue to reside in Poland with the respondent, but that the access arrangements that were in place at the time should continue.

Application for leave to appeal

11. The order of the High Court was perfected on 23rd January, and that order provided that a stay would be placed on the order for a period of 28 days from the date of perfection of the order, in order to permit of the lodging of an appeal. Accordingly, this would suggest that the appeal was due to be filed by Wednesday 21st February 2024 (since the date of the making of the order is not reckonable).

12. The applicant had, at all times, been represented by the Legal Aid Board. In response to questions from the court during the appeal hearing, the applicant confirmed that he had formed his intention to appeal the decision of the High Court immediately after delivery of the judgment, and that he expressed that wish to his solicitor. However, he was informed by his solicitor that any further representation by the Legal Aid Board for the purposes of an appeal would have to be approved by the Board.

13. In an email of 21st February 2024, Mr. Peadar Browne, Managing Solicitor of the Law and Family Mediation Centre, informed the applicant that the Board had made a decision refusing legal aid for the purposes of an appeal. Mr. Browne attached to his letter three documents, those being the letter refusing legal aid, an opinion of counsel, and a copy draft notice of appeal to the Court of Appeal. The email also informed the applicant that the deadline for the filing of a notice of appeal was Friday 23rd February. As indicated above,

it seems to me the time for the filing of an appeal actually expired on 21st February, but even if I am correct about this, nothing turns on it for the reason that the applicant did not attempt to file an appeal within the time indicated by Mr. Browne.

14. The applicant explained in his affidavit grounding this application that his occupation is that of a plumber, not a law practitioner, and that he would not be able to lodge an appeal within two days. In court today, he also explained that he had made an effort to contact the Court of Appeal Office, but he could not secure an appointment in time.

15. In any event, the applicant eventually filed the application now before the court on 4th March. There were some difficulties with the service of the application on the respondent, but ultimately all papers relevant to the limited application before the court (an application to extend time for the lodging of an appeal) were served upon her, save that she did not receive the draft notice of appeal attached to the application.

16. In his draft notice of appeal, the applicant identifies two grounds:

1. Firstly, he says that the judge wrongly admitted prejudicial evidence or excluded critical evidence, but no particulars are given.
2. Secondly, he claims that there were major errors by legal counsel, in failing to object to inadmissible testimony. This presumably refers to his own counsel in the High Court. Here again, no particulars were provided.

17. The applicant seeks four reliefs in the draft notice. These are:

1. An order appointing him sole guardian and giving him sole custody of D;
2. An order that "*The Irish High Court allow the proceedings to* "*last under the RSC*", and Brussels IIR, and "*that the court seized of a claim or an application will proceed de novo for return of a child pursuant to paragraph 1*". This is somewhat unclear, and no doubt this is due to English not being the applicant's first language;

3. An order requiring travel documents to be delivered and,

4. A declaration that Article 13(b) of the Hague Convention is *ultra vires.*

As I understand it, the applicant also asks the court to hold that there is an inconsistency in the conclusion of the Polish courts that D would be at risk if returned to Ireland, while at the same time permitting him to do so for the purposes of access to the applicant.

18. In general, for a court to extend time for bringing an appeal, the applicant should satisfy the criteria in *Éire Continental v. Clonmel Foods Limited* [1955] 1 IR 170. These are:

(i) That the applicant formed a *bona fide* intention to appeal the relevant decision within the permitted time.

(ii) The existence of something like a mistake and, in that respect, a mistake as to procedure, in particular the mistake of counsel or solicitor as to the meaning of the relevant rule, is insufficient and,

(iii) An arguable ground of appeal.

19. These are not absolute rules as has been emphasised many times but will in the majority of cases inform the exercise of the court's discretion. Some of the more recent authorities place emphasis on the fact that the most important of the criteria is that the appellant demonstrate an arguable ground of appeal and in the absence of that, the others become irrelevant. I will now consider each of the criteria in turn.

20. (i) The formation of an intention to appeal within the permitted time. I am satisfied, beyond any doubt, that the applicant formed the intention to appeal within the permitted time.

21. (ii) The existence of something like a mistake. The applicant places no reliance on any mistake. While it is possible that the last date for the filing of an appeal was earlier than

the date of which the applicant had been notified by Mr. Browne, that error, if error it be, is immaterial, for the reason explained above, i.e. he did not act on the date notified to him by Mr. Browne. Even so, however, I am inclined to consider that in the particular circumstances of this case the court should not insist on this criterion being satisfied, having regard to the fact that the applicant appears to have been informed quite late in the day that he would not receive legal representation and also having regard to the fact that English is not his first language.

22. (iii) The requirement for an arguable ground of appeal. In my view, the applicant has fallen a long way short of meeting this requirement. In his draft notice of appeal, he identifies two grounds. The first of these, relating to the evidence considered, and not considered, by the trial judge is in the most general of terms, and the court could not possibly form any view as to the arguability of this ground without particulars of the same. The second ground relates to the service provided by the applicant's own counsel to him, which could not be a ground of appeal.

23. Furthermore, the applicant seeks a declaration that Article 13(b) of the Hague Convention is "*ultra vires*" in the case. This is clearly not a relief that the court could ever grant, the state being a party to the Hague Convention, and the Supreme Court having previously affirmed the compatibility of the Convention with Bunreacht na hÉireann.

24. I think it is clear beyond any doubt that the applicant has failed to meet the threshold for the granting of leave to appeal. To this, I would add, that the judgment of the High Court is comprehensive and thorough, identifies all of the applicable legal principles, weighs up the affidavit evidence of the appellant and the expert evidence adduced by him, and appears to me to arrive at a conclusion that is consistent with and justifiable on the evidence.

25. For all of the foregoing reasons I would reject this application. In doing so, however, I must stress that this conclusion is not intended to reflect in any way poorly on the applicant,

who has demonstrated himself to be a caring and loving father acting, as he sees it, in the best interest of the child at all times. That this is so is clearly reflected in the judgment of the High Court, the conclusion of which was substantially based upon the likely delays that D would experience in receiving in the State the treatment that the experts agree is essential for his wellbeing, if his return to Ireland were ordered. Nothing in the High Court judgment suggested that the appellant himself represented any kind of risk to the child in question.