[2020] IEHC 30

THE HIGH COURT

2019 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 COUNCIL REGULATION (EC) 2201/2003
IN THE MATTER OF I.C. (A MINOR)

BETWEEN

Z.C.

APPLICANT

AND

A.G.

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 30 January 2020

INTRODUCTION

1. This judgment is delivered in respect of a procedural issue which has arisen in proceedings alleging the wrongful removal of a child from his place of habitual residence (Poland). Proceedings of this type are colloquially referred to as "child abduction" proceedings. It should be emphasised, however, that the hearing of the proceedings in the present case has not yet concluded. Consequently, this court has not yet made any determination on whether the child has been wrongfully removed.

2. In the event that this court were to find that the child had been wrongfully removed from Poland by his mother, then one of the principal issues to be determined will be whether any of the grounds for resisting an order for the return of the child has been met. These grounds are set out at Article 13 of the Hague Convention. One of the grounds relates to the views of the child himself. The High Court may refuse to order the return of a 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 the case of an alleged wrongful removal from a Member State of the European Union, there is an express obligation on the court to ensure that the child is given the opportunity to be heard during the proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity. (See Council Regulation (EC) No 2201/2003 *("the Brussels II Regulation"*)).

3. The High Court (Ní Raifeartaigh J.) had made an order pursuant to Article 11(2) of the Brussels II Regulation directing that the child be interviewed by a clinical psychologist and a report prepared for the court. This order is dated 1 July 2019. The child was duly interviewed on 18 July 2019, and a written report prepared on 22 July 2019.

4. It had been envisaged that the proceedings would be heard and determined towards the end of September 2019. Unfortunately, the hearing has been significantly delayed for various reasons. The hearing commenced on 13 December 2019, and resumed before me on Friday, 24 January 2020 following an attempted settlement. At the outset of the resumed hearing, counsel on behalf of the mother sought liberty to submit a report which had been prepared on behalf of the mother by a Polish psychologist. I refused that

application for the reasons summarised at paragraph 10 below. I did, however, invite submissions from the parties as to whether an updated report should now be sought from the court-appointed clinical psychologist. This judgment is given in respect of that issue.

PROCEDURAL HISTORY

5. These proceedings concern the legality of the removal of a young boy ("*the child*") from Poland. The child's mother brought the child to Ireland on 8 December 2018, and the child has been residing here since that date. The mother had initially argued that the removal was lawful in circumstances where she asserted that she has the right to determine the child's residence as a result of certain orders made by the Polish courts on 5 November 2018. This interpretation of the court orders is disputed by the child's father.

6. The father made a written request to the Central Authority of Poland that the child be returned to his place of habitual residence, Poland. This request was conveyed to the Central Authority of Ireland by the Central Authority of Poland on 29 May 2019.

7. The application had been listed before the High Court on a number of occasions in June and July 2019.

8. The High Court (Ní Raifeartaigh J.) made an order dated 1 July 2019 directing that the child be interviewed by a clinical psychologist, and a report to the court on the interview be prepared for the purposes of ensuring that the child is given the opportunity to express their views and be heard in the proceedings. The form of the order follows the standard order which is now common in these cases.

9. A report dated 22 July 2019 was submitted to the court. The report's conclusions are stated as follows.

> 10. Conclusion:
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> 10.1 [The child] has settled in the short time that he is in Ireland but stated that he would like to talk to his father. From his account, there is a possibility that his mother has not encouraged contact with his father. Outside of the difficulties in respect of his father's use of alcohol no other reason was voiced as to how his parents separated. No reason was offered as to why he was living in Ireland, other than mentioning that the amount of pollution from factories in Poland. [The child], while having a level of understanding appropriate to a six and half year old, would not be mature enough to understand the nuances of his parent's relationship difficulties. It is a distinct possibility that his understanding of the family narrative is influenced to an extent by those adults with whom he is in regular contact.
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> 10.2 Any negative experiences in his parents relationship, which he may have witnessed is likely to have had an impact on his thinking. He has voiced a wish to speak with his father and this should happen as soon as practicable. It is also important for his self-identity that his biological father continues to play a role in his life regardless of how small that may be. Any narrative from his mother or other important adults in

his life should not undermine the role of his father however marginalised he has become in their thinking."

10. The progress of the proceedings was delayed pending the determination of an application for legal aid on the part of the mother. The legal aid certificate issued towards the end of July 2019, and the case was listed for hearing on 26 September 2019. In the event, however, the matter could not be heard on that date, and it was instead listed for hearing on 18 October 2019. On that occasion, counsel for the mother applied for an adjournment in circumstances where the mother asserted that she had obtained a legal opinion from a Polish lawyer which indicated that she had the right to determine the residence of the child. It was also suggested that the father may have implicitly consented to the removal of the child to Ireland, or, at least, to the mother having the right to determine residence. The legal opinion was in the Polish language and a translation was not available as of 18 October 2019. The adjournment application was resisted by counsel on behalf of the father.

11. In the event, I decided to adjourn the proceedings in circumstances where, if the legal position had been as suggested by the mother, then this would be largely determinative of the question of whether there had been a wrongful removal. The parties undertook to obtain an independent legal opinion from an agreed expert. It took some time for the parties to obtain the independent legal opinion. An affidavit of laws has since been filed on 25 November 2019. The independent legal opinion indicates that the legal position is not as had been suggested on behalf of the mother. I say no more in relation to this matter now, given that the question of whether the removal was unlawful remains to be determined in the proceedings.

12. A new hearing date for the proceedings was fixed for 13 December 2019. The hearing commenced on that date, and the proceedings had been part heard, when the parties indicated to me that terms of settlement had been agreed. The terms of settlement were handed into court, and the mother gave certain undertakings on oath to the court. The intention was that the mother would return the child to Poland not later than 15 January 2020. In the event, this did not occur. The explanation offered by the mother for her non-compliance with her undertaking is that she has recently discovered that she is pregnant, and has been advised not to travel for medical reasons. It seems that the mother has had a history of miscarriages.

13. In light of the non-implementation of the terms of settlement, the father has taken the pragmatic approach that the hearing should be resumed, and a determination—one way or another—made by the court on the merits of the case. This approach has made it unnecessary—for the moment at least—to address the consequences of any non-compliance with the sworn undertakings given to the court on 13 December 2019.

14. The hearing resumed on 24 January 2020. Counsel on behalf of the mother applied at the outset of the hearing to have a psychological report in respect of the child admitted into evidence. I refused this application in circumstances where, first, the report had not been exhibited on affidavit; secondly, the qualifications of the author of the report had

not been stated; and, thirdly, the report seemingly dealt with matters far beyond the question of the child's views in relation to any proposed return to Poland, and, instead, addressed wider family issues. (It should be explained that I did not view the report even on a *de bene esse* basis, and that the shortcomings described above were ones identified to me by counsel for both sides). In any event, it seems preferable that if any further psychological evidence is to be adduced that it should come from a source independent of both parties.

15. I next invited submissions from the parties as to whether, given the lapse of time since the court ordered report had been prepared in July 2019, it would be appropriate that a further report should now be sought. Counsel on behalf of the mother submitted that an up-to-date report should be prepared. Counsel on behalf of the father objected on the basis, primarily, that further time would be lost in seeking and obtaining such a report, and that there was sufficient information in the first report to allow the court to exercise its jurisdiction. Counsel also submitted that much of the delay in the proceedings to date had been as a result of the manner in which the mother had conducted the proceedings.

DISCUSSION

16. It should be reiterated that this judgment is confined to the narrow procedural issue as to whether an order should be made directing that the child be interviewed again by a clinical psychologist and a further report prepared for the court. This judgment makes no findings in respect of the substantive issues arising in the proceedings in circumstances where the hearing has not yet concluded. It may well be that if certain issues were to be decided in favour of the mother, then it might not ultimately be necessary to address the question of whether the child objects to his return.

17. One of the grounds on which a court can refuse to return a child is where 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. This is provided for under Article 13 of the Hague Convention, 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 -
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> 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.
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> 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."

18. In a case, such as the present, involving an alleged wrongful removal from an EU Member State, it is also necessary to comply with Council Regulation (EC) No 2201/2003 ("*the Brussels II Regulation* "). Article 11(2) provides as follows.

> "2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

19. The procedure established by the High Court for ascertaining the views of a child is to make an order directing that a child be interviewed by an independent expert and for that expert to prepare a report on the interview for the court. The matters which are to be addressed in this interview and report are set out in standard form in the order. This order is accompanied by an "information note" which sets out general information for the assistance of an interviewer who may not be familiar with applications made to the High Court under the Hague Convention. As noted earlier, an order in this form was made on 1 July 2019 by the High Court (Ní Raifeartaigh J.), and the child was interviewed on 18 July 2019.

20. Counsel on behalf of the mother drew my attention to the recent judgment of the Supreme Court in *M.S. v. A.R.* [2019] IESC 10. The unanimous judgment of the Supreme Court was delivered by Finlay Geoghegan J. This judgment emphasises that where evidence is put before a trial court that a child objects to being returned, then the judge should immediately consider whether that evidence is sufficient.

> "60. Where, as here, the application for return is from a Member State of the EU, the Court is obliged, pursuant to Article 11 of the Regulation, to give a child an opportunity to be heard during the proceedings, 'unless this appears inappropriate having regard to his or her age or degree of maturity'. Where evidence is put before a trial court that a child objects to return, then the judge should immediately consider whether that evidence is sufficient to enable the court to determine the issue of the child's objections. If not, it should take appropriate steps to enable appropriate evidence be obtained and given to enable the court decide all relevant issues. Such proceedings are not purely *inter partes* adversary proceedings between the parents. The court owes a duty to the children who are the object of the application to hear the children and potentially to take into account their views subject to age and maturity.
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> 61. The court should then consider the issue of child's objections in accordance with the three stage approach identified by Potter P. in the English Court of Appeal in *Re M. (Abduction: Child's Objections)*. The first question, as to whether or not objections

to return are made out, is a question of fact to be determined by a trial judge on all the evidence adduced. The objection to return must, in general, be to the State of habitual residence and not to living with a particular parent. However, in a limited number of factual situations the two questions may be so inexorably linked as to be incapable of separation. The second question, as to whether the age and maturity of the child are such that it is appropriate for a court to take account of his views, is also a question of fact to be determined by the trial judge. The trial judge should make clear findings of fact in relation to the first two questions and, where feasible, also make findings as to the reasons for and bases for the child's objections."

21. Finlay Geoghegan J. returned to this issue towards the end of her judgment as follows.

> "120. I wish to make three additional observations in relation to these proceedings. First, the limited nature of the report of the interview by [the clinical psychologist] with A created difficulties for the consideration by all courts of the child's objections. The current practice in the High Court of meeting the obligations of the Court under Article 11(2) of the Regulation by making an order for relevant children to be interviewed in relation to specific matters and seeking a professional view is a practical way within our procedures of complying with the Article 11 obligation. However, it would appear that [the clinical psychologist] may not have been fully appraised of what was expected of her. It may be desirable that there are some guidance notes available for a child psychologist or other expert who is asked to conduct interviews and express their professional views to the Court in accordance with such orders. It is important that the views of the child are communicated in the words of the child and where possible with quotations. The purpose is to give the child an opportunity to be heard by the Court. It is also important where objections are voiced by a child that those are gently and carefully explored without leading, so as to give the Court a real understanding of the reasons for and bases of the objections. I would also add that where a court receives a report which, in the court's view may not enable it fully assess and make findings in relation to the expressed objections of the child or permit the Court properly exercise its discretion under Article 13 of the Convention, the Court should immediately, obviously giving the parties an opportunity to be heard, decide whether oral evidence should be sought from the person who conducted the interview or whether a further interview with specific matters to be addressed should be ordered."

22. Counsel for the father has made the objection that the delay in the proceedings to date is entirely the fault of the mother. Reference was made to the fact that the hearing scheduled for 18 October 2019 had to be abandoned in circumstances where the mother had—mistakenly as it transpired—asserted that she had a legal opinion which indicated that she had the right to determine the residence of the child. Counsel also emphasises that the child is only seven years of age, and, accordingly, the weight, if any, to be attached to his preference or objection is slight. It is also suggested that the child's views are unlikely to have changed given that the psychological assessment had been carried

out at a time when the child had already been in Ireland for a period of seven months (8 December 2018 to 18 July 2019).

DECISION

23. The principles governing the obligations of a trial judge to ensure that the child is given the opportunity to be heard during child abduction proceedings which seek the return to an EU Member State have been set out authoritatively by the Supreme Court in *M.S. v. A.R.* [2019] IESC 10. On the facts of *M.S. v. A.R.*, the concern that the evidence might not be sufficient had arisen out of what were said to be shortcomings in the original report which had been prepared by the clinical psychologist. In the present case, by contrast, there is no suggestion that the report of 22 July 2019 is in any way insufficient. Rather, the concern is a different one, namely that the views of the child may have changed in the intervening six months since the interview and report of July 2019. The length of time for which the child has been resident in the Irish State has almost doubled since that date, and the child is now seven years of age. Moreover, the mother's pregnancy may have implications for the circumstances in which any return might occur, i.e. there is some doubt as to whether the mother will be able to accompany the child. To date, the medical advice seems to be to the effect that the mother should avoid travelling in the first trimester of the pregnancy. (See the mother's affidavit sworn in January 2020). It remains to be seen whether this medical advice will extend to the second, or even third, trimester.

24. It seems to me that notwithstanding that the cause for the concern as to the sufficiency of the expert evidence before the court is different than that in *M.S. v. A.R*, the same principles apply by analogy. Given the lapse of time and change in circumstances since July 2019, I do not think that it would be safe to rely solely on the psychological assessment report of that date. In the absence of an updated assessment, I cannot be satisfied that the evidence currently before the court is sufficient to enable me to make findings in relation to the expressed objections of the child, so as to allow me to exercise properly the discretion under Article 13 of the Hague Convention.

25. In reaching this conclusion, I have had regard to the careful submissions made by counsel on behalf of the father. It occurs to me that the concerns expressed are matters which more properly arise for consideration at a later point in the well-established three stage test, which has been endorsed again by the Supreme Court at paragraph [61] of its judgment in *M.S. v. A.R*. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that it is appropriate for the court to take account of those objections. Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return.

26. The father's contention that the age and maturity of the child are such that the weight, if any, to be given to the child's views is slight, is an issue which does not arise until stage 2. It is a condition precedent to the performance of the exercise required at stage 2 that the court has sufficient evidence to provide it with a real understanding of the reasons for, and basis of, the objections. This is to be achieved by way of the report of the court-

appointed clinical psychologist or equivalent expert. For the reasons set out above, I am anxious to ensure that the assessment be updated. It may well be that an updated assessment may simply confirm that the views of the child remain as before, but it cannot be assumed that this would be so, given (i) the lapse of time since the date of the first interview and report, and (ii) the change in the mother's circumstances, i.e. her pregnancy and her inability to travel.

27. The father's contention that the delay in the proceedings is attributable to the mother's conduct is a matter to be considered at stage 3. The Supreme Court in *M.S. v. A.R.* has emphasised, by reference to its own judgment in *A.U. v. T.N.U.* [2011] IESC 39; [2011] 3 I.R. 683, that, in exercising its discretion under Article 13, a court must have due regard for the general principles and policies of the Hague Convention. The obligation is set out in detail at paragraphs [58] to [64] of the judgment, and summarised as follows.

> "65. Overall, a court, in exercising its discretion where child's objections are made out under Article 13 of the Convention, must be careful to weigh in the balance the general policy considerations of the Convention which favour return and the individual circumstances of the child who objects to return, in order to determine what is, in the limited sense used, in the best interests of that child at that moment. The weight to be given to the general policies of the Convention which favour return and to the objections to return which were made and to other relevant circumstances of the child may vary with time. As has been said, the further one is from a prompt return, the less weighty the general Convention policies will be. In exercising its discretion, a court must take care that it has regard to the fact that the jurisdiction to refuse return is an exception to the general policy and provisions of the Convention. The discretion must be exercised with care, and in the best interests of the child, but not so as to undermine the general policy objectives of the Convention, including deterrence of abduction.
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> 66. In applications to which the Regulation applies, regard should be had to Articles 11(6) - (8) and the practical consequences of a refusal to return for the resolution of continuing custody disputes."

28. These issues have not yet arisen for consideration in the proceedings before me. At the risk of belabouring the point, this is because this judgment is confined to the narrow procedural issue of whether an updated assessment should be ordered. If and when it becomes necessary to embark upon the consideration mandated under stage 3 of the three stage test, the father will then be entitled to agitate his objections in terms of the conduct of the litigation. I reiterate that this court has reached no concluded view on any of these issues at this point of the proceedings.

CONCLUSION AND FORM OF ORDER

29. Given the lapse of time and change in circumstances since July 2019, I do not think that it would be safe to rely solely on the psychological assessment report of 22 July 2019. In the absence of an updated assessment, I cannot be satisfied that the evidence currently before the court is sufficient to enable me to make findings in relation to the expressed

objections of the child, so as to allow me to exercise properly the discretion under Article 13 of the Hague Convention.

30. I propose to make an order directing that the child be interviewed again, and that a report of this second interview be prepared for the court. The form of this order will be modelled on the standard form of order employed in child abduction proceedings. The court-appointed clinical psychologist is also to be provided with a copy of this judgment, and asked to consider, in particular, the passages from the judgment of the Supreme Court in *M.S. v. A.R*. [2019] IESC 10 cited herein. The fact that the mother is pregnant, and that this may have implications for the circumstances in which the child might be returned to Poland, i.e. the mother may not be able to travel with him, is something which the court-appointed clinical psychologist will have to address with special sensitivity. As explained by the Supreme Court in *M.S. v. A.R.,* the objection to be considered under Article 13 is an objection to return to the State of habitual residence, and not an objection to living with a particular parent. However, in a limited number of factual situations the two questions may be so inexorably linked as to be incapable of separation.

31. In accordance with the standard form of order, the order of 1 July 2019 had directed the clinical psychologist to canvass the views of the child in relation to *inter alia* the following issues.

> "(f) in the event of any objection to returning to live in the jurisdiction of Poland being expressed the child's reasons for the objections; and
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> (g) if the child was to return to live in the jurisdiction of Poland any wishes as to how and when the return would take place;"

32. I will discuss further with counsel whether any modification is required to the form of order so as to provide further guidance to the clinical psychologist as to how the issue of the mother's pregnancy is to be addressed.