

APPROVED

REDACTED



THE HIGH COURT
FAMILY LAW

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, 1980

AND

IN THE MATTER OF “A” (A MINOR)

[2022] IEHC 688

[2022 HLC 13]

BETWEEN

XYZ

APPLICANT

AND

MMN

RESPONDANT

JUDGMENT of Mr. Justice Tony O’Connor delivered in Court 18, on Monday 28

November 2022 at 3 p.m.

1. This application for an order to return a 3-year-old girl (“A”) to England was commenced by the issue of a special summons at the end of July 2022. I shall minimise the

details of the circumstances giving rise to the application, to ensure compliance with the order of Gearty J. on 28 July 2022 that these proceedings be heard otherwise than in public.

2. A child arrangement order was made in the Family Court sitting in London in October 2020 relating to the residence of “A” in England together with access visits for the respondent. The applicant and the respondent consented to those arrangements.

3. In April 2022 the applicant gave birth to a second child in England and became unwell. The first principal issue for determination by this Court addresses the extent of the applicant’s consent to the relocation of “A” to Ireland by the respondent after the birth of the second child. An order was made on 17 June 2022, by an English court, that “A” be returned on or by 18 June 2022.

The Convention

4. Article 3 of the Convention on the Civil Aspects of International Child Abduction, (“**The Convention**”), as incorporated into Irish law by s. 6 and the first schedule of the Child Abduction and Enforcement of Custody Orders Act 1991 [No.6] provides that retention of a child is wrongful where:

“(a) it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;

and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention” The rights of custody mentioned in sub para (a), which may arise in

particular by operation of law or by reason of a judicial or administrative, or by reason of an agreement having legal effect under the law of that State”.

5. Article 13 of the Convention provides that the requested Court (i.e., this Court) is not bound to return a child if the opposing party (here the respondent) establishes that the applicant:

“(a) ...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 last paragraph of Article 13 provides that this Court “...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”.

Submissions

6. Both parties were represented by counsel and instructed by solicitors. They made concise written and oral submissions and correctly agreed that the onus lies with the respondent to establish on the balance of probabilities with clear and cogent evidence that the applicant has consented to the retention of “A” in Ireland by the respondent. Paragraph 2.2 of the written submissions of the respondent is focused and reads:

“...[t]he respondent does not seek to argue that the applicant consented to “A” s permanent move to Ireland, or to a change of habitual residence. However, it is clear from the exhibits in the affidavits that the applicant consented to the respondent removing “A” from her care, and his taking “A” to Ireland to reside with him. The evidence is that the consent was open ended, and for an unstated period of time.

Contrary to what the applicant alleges, there was no agreement that A would be returned to her as soon as she sought the return.”

7. The submissions for the applicant cited the test in *SR v MMR* [2006] IESC, at para. 6.2, where Denham J. (as she then was) emphasised that the consent relied upon by the respondent must be “unequivocal” (see sub-para (iv)). Counsel for the applicant submitted that the Court should look at the surrounding events and particularly the circumstances (mental illness diagnosis following the birth of the second child) which required a form of respite for the applicant over a short period of time. Further, the interaction with social services as referenced in the affidavits and exhibits should be noted.

Decision.

8. Despite the respondent’s description of the consent to relocation in Ireland, nothing has been advanced to satisfy me on the balance of probabilities that the applicant consented to the relocation of “A” to Ireland on an open-ended basis. The applicant agreed to the relocation of “A” for the purpose of respite during the difficult circumstances following the birth of her second child in April 2022. In other words, the respondent has not adduced such cogent and unequivocal evidence to satisfy me on the balance of probabilities that there was consent for relocation of “A” to Ireland, until the applicant and respondent agreed otherwise. The respondent may believe that this approach was agreed but the conflict between the parties based on the evidence before the Court does not meet the required burden of proof. The surrounding circumstances do not favour the respondent’s suggestion which, with all due respect, appears rather strained upon revision of the material before this Court.

Grave Risk Defence.

9. Counsel for the respondent cited the following excerpt from Finlay Geoghegan J. in *IP v TP (Child Abduction)* [2012] 1 IR 666 in submissions:

“...the defence provided for in Article 13 (b) of the Convention is one which should be given a ‘restricted application’ but that does not mean it should never be allowed at all. The burden of proof normally lies with the person who opposes the child’s return. The standard of proof is the ordinary balance of probabilities. It is for them to adduce the evidence to substantiate the exception...”.

10. At the hearing of this application last Wednesday week, there were multiple exchanges between counsel and the Court about addressing the concerns of the respondent relating to supervision, monitoring, reporting and intervention in the circumstances which the respondent believes to be necessary. Suffice to say that “Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child” (Fennelly J. in *AS v PS (Child Abduction)* [1989] 2 IR 224 at para. 57, p.18). The reasoning of Fennelly J. is clear; there is no basis for a requested court, such as this Court, to embark on an inquiry when the English court (in this case) can “...test the strength and veracity of the allegations...they are capable of protecting the interests of the child”.

11. Little if anything will be achieved by enumerating now the grounds for these concerns of the respondent or how they were addressed and sought to be allayed by the applicant in her affidavit of 30 pages sworn on 8 November 2022 in England which refers to 14 exhibits.

12. The skill and professionalism of the legal teams for the parties have allowed this Court to go as far as it can to address the alleged “grave risks”, alleged by the respondent. During the hearing, I asked counsel for the applicant to take instructions on what could be offered by

the applicant by way of undertakings. Counsel for the respondent told me that the respondent was so concerned that undertakings would not meet the situation, However, counsel agreed to explore with counsel for the applicant how to progress matters in the manner which I sought to convey in the exchanges.

13. Since the hearing last Wednesday week, the applicant has offered to give the following undertakings:

- (1) To comply and assist with the re-opening of custody and access proceedings brought before the courts of England and Wales by the respondent in respect of the custody, access to and welfare of “A”.
- (2) Within seven days of the order of this Court for the return of “A” to England and the care of the applicant:
 - (i) to notify same to the relevant health authorities in England, including but not limited to the NHS, Home First, the practices of the general practitioners and the police service which have provided care and assistance and could continue to provide care and assistance to “A”;
 - (ii) to notify each of those services and individuals of the name, address and contact details of the respondent as a point of contact, such that the respondent will be notified by those authorities and services of anything which may have a bearing on the health, welfare and development of “A”;
 - (iii) to apply to the English courts for consent to release any police reports which exist in respect of call-outs to the residence of the applicant and that of “A” since the birth of “A”;

- (iv) to notify “A” s current and future education providers for the purpose of having the respondent listed as the father of “A” so that he will be notified at the same time as the applicant is notified and in the same manner, whether by phone, text, post, email or otherwise, as to events and/or developments concerning the health, welfare and development of “A”;
- (v) to within 14 days of “A” s return to England and into the applicant’s care, register “A” with a certified child psychologist in England.

14. Having considered the obligations and limited powers of this Court in an application like this, I will make an order for the return of “A” to the care of the applicant in England within 7 days on such further terms which the parties may agree. In default, I give either party liberty to apply upon 48 hours’ notice to the other side by email from their respective solicitors to the solicitors for the other party and to this Court for those terms of return to be determined by this Court. The order of this Court will note the undertakings outlined above which will remain until an English court makes a further parental responsibility order for “A”. Thereafter, the undertakings will lapse in deference and in recognition of the jurisdiction of the English courts.

15. These proceedings should be listed in the Hague List to be called over on Thursday the 15th of December 2022 with liberty to either of the parties in the meantime to apply to this Court for the purpose of giving effect to this judgment and order.

16. As is customary, there will be no order as to costs.

Solicitors for the applicant: - Legal Aid Board, Law Centre (Smithfield)

Solicitors for the respondent: - Law Centre (Wicklow)

Counsel for the applicant: - Alex Finn

Counsel for the respondent: - Ann Kelly