---

http://www.incadat.com/ ref.: HC/E/IE 391
[26/02/1999; Supreme Court of Ireland; Superior Appellate Court]
P. v. B. (No. 2) (Child Abduction: Delay) [1999] 4 IR 185; [1999] 2 ILRM 401

Supreme Court of Ireland

26 February 1999

P v B

1998/326

DENHAM J: This is an appeal by the Defendant/Appellant (hereinafter referred to as the mother) against the Plaintiff/Respondent (hereinafter referred to as the father) from the order and judgement of the High Court, Laffoy L, of 6 November, 1998. The matter relates to R, a minor and arises on the Child Abduction and Enforcement of Custody Orders Act, 1991 (hereinafter referred to as the Act) which Act gives the force of law in Ireland to the Hague convention on the civil aspects of international child abduction.

R has previously been the subject of an application and order under the Act. That application resulted in a Supreme Court decision P v B (Child Abduction: Undertakings) [1994] 3 IR 507.

R was born in Spain in October, 1991. Her father is Spanish and her mother is Irish. The parties are not married but have lived together in Spain with R.

Previous Case

In December, 1993 a written request for the child's return was received in Ireland from the Central Authority in Spain under the Act. Proceedings under the Act, having been heard and determined in the High Court, were appealed to the Supreme Court. It was held that R had habitual residence in Spain prior to her removal in May, 1993; there had been an unlawful removal of the child by the mother, there was no acquiescence by the father to her removal or retention in Ireland. It was found that the father had been informed immediately of the safe arrival of R and the mother in Ireland; that the father had telephoned the mother on a number of occasions and that she had told him that she "needed time"; the father understood that the mother would return to Spain with R in due course as she had done previously. Undertakings were given by the father and the Supreme Court ordered that R be returned to Spain. The undertakings ensured a secure situation for R, the child remaining in the care of her mother on returning to Spain pending the Spanish Court hearing the case. The issues of custody and access of the child were for the Spanish Court, being the country of the child's habitual residence. That order, to return the child to Spain, was made on the 19 December, 1994, and accordingly R, and the mother returned to Spain on 20 January, 1995. The order included liberty to apply to the Court.

Facts of this case

The pleadings in this application were brought under the title and number of the previous application. The case came before the Court by way of notice of motion. The facts on the return to Spain in January, 1995 as found by Laffoy J were:

"Civil proceedings in relation to custody and access were initiated in the Spanish Courts. It appears that the [mother] had de facto custody of R when they returned to Spain and initially the [father] had access pursuant to an order of the Spanish Court. However, in March, 1996 the [mother] alleged that, while exercising his right of access to R, the [father] had sexually abused R, whereupon the Spanish Court ordered that access by the [father] to R should cease. In July 1996, the [mother] applied to the Spanish Court for leave to bring R to this jurisdiction. On 20 August, 1996 the Spanish Court made an order that R should not leave the national territory of Spain and that the [mother] would commit a crime of serious disobedience to judicial authority if she were to leave the national territory in the company of R.

In October, 1996, the [mother] removed R from Spain and brought her to this jurisdiction. Within days the [mother] took up residence with R, in her parents' home in [the midlands of Ireland]. The [mother] and R continue to live in [the midlands of Ireland], but not in the [mother's] parents' home.

Following the making of the allegations of sexual abuse by the [mother] against the [father], a criminal investigation into the allegations commenced in Spain. . . . This Court was told that following receipt by the Spanish Criminal Court of an independent report from two psychologists in Madrid dated 22 January, 1997 the criminal investigation was archived", which I understand to mean that the file was closed and the investigation by the prosecuting authority, the Fiscal, terminated. This Court was also told that thereupon the [mother] initiated a criminal process in the Spanish Criminal Courts something akin to a private prosecution in this jurisdiction.

. . . in October, 1996 the civil proceedings in Spain in relation to custody and access issues concerning R were in being and . . . there was an extant order of the Spanish Court prohibiting the removal of R from Spanish national territory. Further, it is common case that in October, 1996 a criminal investigation of the [mother's] allegations of sexual abuse against the [father] was ongoing at the behest of the Spanish prosecuting authority, the Fiscal. It is also common case that some form of criminal investigation is still ongoing in relation to the allegations of sexual abuse. Finally a criminal process has commenced in Spain to make the [mother] answerable for her disobedience to the order of 20 August, 1996."

Proceedings

These proceedings come before the Court in a somewhat unusual form. The case does not emanate from either the Spanish or Irish Central Authority. It comes before the Court by Notice of Motion brought by the father, dated 23 June, 1998 returnable for 17 July, 1998 (under the number and reference of the previous application under the Act) in which motion is sought, inter alia,

a. An order directing that the mother do forthwith return R to the jurisdiction of the Courts of Spain pursuant to Article 12 of the Hague Convention; and

b. An order directing that the mother shall be committed to prison for her wilful defiance of the order of the Supreme Court of 19 December, 1994.

The High Court

In the High Court Laffoy J ordered:

"Having considered all of the relevant factors, including the delay in bringing this application, I have come to the conclusion that an order should be made under Article 12 for the return of R to Spain. However, I consider that before the order takes effect, the [mother] should have a reasonable time to get advice from the psychological services of the Midland Health Board in relation to preparing R for the move and addressing any emotional difficulties she may have. I will hear submissions from Counsel on what period would be reasonable in the circumstances."

The Appeal

The mother has appealed against the judgment and order of the High Court on four issues:

1. The delay in the proceedings;

2. The child is now settled in a new environment;

3. Acquiescence by the father in the removal of the child; and

4. To return the child would be a grave risk or place her in an intolerable situation.

The delay in the proceedings

The facts relevant to the delay commence when R was wrongfully removed by the mother from Spain to Ireland in October, 1996. These proceedings were commenced by motion dated 23 June, 1998. Thus the time in issue is that between October, 1996 and June, 1998, 20 months.

In his affidavit the father explained the time taken to commence proceedings on the child's abduction by deposing:

"I say and believe that in or about the month of October, 1996 the [mother] did wrongfully and in breach of the court orders, both of the Irish Supreme Court and of the Spanish Courts remove the said child from the jurisdiction of the Courts of Spain to a place unknown. I say and believe that thereafter exhaustive efforts were made to trace the whereabouts of the [mother].

I say that for almost a year thereafter it was impossible to trace her whereabouts and eventually Interpol traced the whereabouts of the [mother]. To the best of my knowledge and belief the [mother] is residing at [address in the midlands] with the said minor."

The father then set out the reason for the further delay deposing:

". . . since tracing the whereabouts of the said minor it has been necessary for your deponent to take all necessary steps to get together all the documentation and to retain Irish lawyers to act in connection with this action. I say and believe that I have acted and moved with all due expedition in connection with this matter and I am desirous that the said infant should be returned forthwith to the jurisdiction of the Courts of Spain."

In the duration from October, 1996, when the child was wrongfully removed, to 23 June, 1998, when these proceedings were commenced, there are thus two spans of time. The first was that time before Interpol traced the mother and informed the father of her location, the second was between that finding of the mother and the launch of the proceedings.

Of the first time span the mother deposed:

"I say that to the best of my knowledge personally and, from being advised by my parents, in this matter whom I believe, the [father] at no time telephoned my home subsequent to my returning to Ireland. I say that the [father] herein was aware at all times of my parents' address and telephone number, was aware that on the occasion when I previously brought R to this jurisdiction that I resided with my parents, and I say further that the [father] herein in fact visited at and attended at the home of my parents.

I beg to refer to the documents exhibited by the [father] herein. I say that included in the said documents is what appears to me to be a Court document dated 10 January, 1997 and signed by the Magistrate Judge in which it is clearly stated that R at that time could be in the "Republic of Ireland at the home of [the mother's] parents, in Ireland, [address]". I beg to refer to the document dated the 2 May, 1997 and signed by the Police Superintendent in which it was stated that Interpol had communicated that I, this Deponent and R were living [address]. In this regard I finally beg to refer to the further document dated 30 April, 1997, also exhibited by the [father] herein, and which appears to be a copy of a faxed statement from the Interpol office in Madrid to the police in [Spain]. 1 say that this informs the recipient that I together with R, was living at [address]. Accordingly, I say that it is only misleading and untrue of the [father] herein to imply that he did not know where I might have been. Secondly, I say that it is additionally untrue and misleading to suggest that for "almost a year" after October, 1996 it was impossible to trace my whereabouts. Again in order to ensure that there is no confusion herein I can confirm that upon my departure from [Spain] I returned within days to [a midland town] to reside with my parents".

On this first span of time the father further deposed:

"on 5 November, 1996 before the Court of the first instruction . . . in [Spain], Mr Adolfo Lopes De Soria was asked to explain why his client was not there and he indicated that he did not know why his client was not there or where she was by order of the Magistrates dated January, 1997 Interpol became engaged in searching for the infant.

I say that it was on foot of my application and by order of the Spanish Court that Interpol became involved in locating the [mother] and the infant R. I say that although Interpol communicated with the police station of [Spain] on the 30 April, 1997 and notified the Court on the 2 May, 1997 1 did not receive this information until 11 June, 1997."

As to the second span of time the father further explained the situation thus:

". . . from this date [11 June, 1997] until May of 1998, my Spanish lawyer was in the process of accumulating the extensive documentation in respect of what transpired in the Spanish Courts and was instructing my Irish solicitor to take action before this Court [the High Court]."

The case was before the Irish Courts in August 1998, adjourned to October, 1998 and heard by the Learned High Court Judge on 21, 22, 23, 27 and 28 October. The Court reserved judgment which was delivered on 6 November, 1998. From that decision this appeal was brought and heard by the Supreme Court on 18 January, 1999.

The High Court

On the issue of delay the Learned Trial Judge held:

"It is well stated in this jurisdiction that applications under the Hague Convention must be initiated with due expedition and must be processed by this Court with due expedition. However, no limitation period is prescribed in the Hague Convention or in the 1991 Act and by its own terms the Hague Convention envisages a period of more that a year elapsing between the wrongful removal or retention and the commencement of proceedings in the requested State. I reject Mr Corrigan's submission that delay should be treated as a "stand alone" defence to a claim under the Hague Convention. Delay on its own cannot be determinative. However, delay by an applicant is undoubtedly a component of other defences available under the Convention, for instance the defence of the child being settled in its new environment provided for in Article 12 and the defence of subsequent acquiescence provided for in Article 13(a), both of which are relied on by the defendant in this case. Moreover, if delay is established, it is a factor which the Court must have regard to in exercising its discretion whether to return the child to the State of its habitual residence, where such discretion is reposed in the Court under the Hague Convention."

Evidence

The evidence on the issue of delay in the High Court was on affidavit. Thus it was not a situation where the Learned Trial Judge had the opportunity of seeing and hearing witnesses, or observing the manner in which the evidence was given or the demeanour of those giving it: Hay v O'Grady 1 IR 210. The appellate court in considering the evidence is in the same position as the High Court. Consequently, the issue of delay may be fully reviewed.

Mother's wrongdoing

In an application such as this the most important consideration is the child. There is no doubt that the mother wrongfully removed R from Spain. She knew it was wrong. She had done it before and been ordered by the Irish Courts to return to Spain. The Spanish Court had ordered that she not return with R to Ireland. There can be no doubt that the mother has acted wrongfully. If she alone were the issue for the Court there would be no doubt that she should not profit in any way from her wrongdoing.

However, the Hague Convention and the Act are instruments for the benefit of the child. The child's interest is paramount. Consequently, defences to the application of the father, which go to the core of the proceedings or which are specifically mentioned in the Act, may be considered by the Court in spite of the reprehensible behaviour of the mother.

This approach was taken by Butler-Sloss LJ, in Re M (Abduction: psychological harm) [1997] 2 FLR 690, which I adopt, where she stated at page 699:

"The children are habitually resident in Greece. They have been wrongfully retained by their mother for the second time. She is clearly in breach of the Convention. She litigated with the father in Greece and a competent Greek court made the decision that the children should live with the father in Greece and have generous staying contact with the mother in England. By her actions, she has frustrated the purpose of that court order which is a matter which an English court takes very seriously. The judge was very critical of her and took carefully into account her reprehensible behaviour. He was right to do so. The behaviour of the offending parent is of crucial importance and the reliance by a mother on grave risk of psychological harm created by her, if accepted and relied on by the court, would drive a coach and four horses through the Convention.

The conduct of the mother the second time round is equally to be criticised and she cannot improve her position by doing the wrong thing twice. Indeed it makes it worse. Putting to

one side for a moment the very real problems facing the children, the mother's actions require the deepest disapproval of the English Court . . .

The conduct of the abducting parent is, as I have already said, crucial and in most cases determinative. It cannot however exclude the rare case where the court has to look past that conduct to the manifest needs of the child concerned. Article 13 gives the requested State this limited but none the less important opportunity to look at the specific welfare of these children at a time when the application for summary return is made. This is such a rare case. The grave risk to these children of psychological harm if they are directed to return at this stage to Greece is of greater consequence than the importance of the court marking its disapproval of the behaviour of the mother by refusing to allow her to benefit from it."

Consequently, I agree with the Learned High Court Judge and uphold this approach to the case: this is one of the rare cases where the Court has to look past the conduct of the mother to the needs of the child, the welfare of R has priority.

The Law on delay

The Act provides that the Hague Convention shall have the force of law in the State: S 6(1). In the Preamble to the Convention it is stated:

". . . the interests of children are of paramount importance in matters relating to their custody,"

"Desiring to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the State of their habitual residence, the Hague Convention provisions were agreed upon.

In Article I the objects include:

". . . to secure the prompt return of children wrongfully removed . . .

Article 2 states:

"Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."

Article 7 states:

"Central Authorities shall co-operate with each other . . . to secure the prompt return of children . . .

Article 11 states:

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay . . ."

It is clear that the Convention envisages a summary procedure for the prompt return of children wrongfully removed from one jurisdiction to another. The repeated use of words such as "prompt" and "expeditious" make this evident.

In the Explanatory Report by Elisa Perez-Vera on the Convention the importance of expeditious procedures and according priority to abduction cases is stressed in her statement that:

"The importance throughout the Convention of the time factor appears again in this article. Whereas Article 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the first paragraph of this article restates the obligation, this time with regard to the authorities of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

The second paragraph, so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a non-obligatory time limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay . . . In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken."

Of Article 11 Judge Garbolino wrote in International Child Abduction: Guide to Handling Hague Convention Cases in US Courts (hereinafter referred to as the Guide) at p 46-47:

"Clearly the language in this Article anticipates that six weeks is sufficient time for the Court to reach a decision on the petition. A review of the cases indicates that some Courts are well under that mark. Walton v Walton, 925 F Supp 453 (SD Miss 1996) (Court ruled on merits of petition thirty days after petition was filed); In Re Coffield, 96 Ohio App 3d 52 644 NE 2nd 662 (1994) (twenty-one days); Navarro v Bullock, 15 Fain L Rep (BNA) 1576 (Cal Super No 86481 1989) (eight days); Grimer v Grimer, 1993 WL 545261 (D Kan 1993) (seven days); Levesgue v Levesgue, supra, 816 F Supp 662 (D Kan) (nine days); David S v Zamira S, [151 Misc 2d 630], 574 NYS 2d 429 (forty-four days)]."

To enable a speedy process the vehicle of habeas corpus has been used in some Courts. Judge Garbolino describes this in his Guide at p 7-48:

"There is a growing trend to litigate Convention claims by the filing of a petition for writ of habeas corpus. This procedure is familiar to family law practitioners as a remedy to obtain a child who is being illegally held by a parent or other person. Its use in Convention cases is particularly appropriate. In Zaiaczkowski v Zaiaczkowska, 932 F Supp 128 (D Md 1996), the trial court treated father's pro se petition for return of a minor to Poland as a petition for a writ of habeas corpus.

'Unquestionably at the heart of the Convention is prompt action by courts. (citations omitted). This comports with the obvious desideratum that any dispute involving custody of a child be decided quickly so as to minimise the anxiety and unsettlement of the child and to avoid assimilation of the child into strange environs which could lead to subsequent difficulties in separation. (citations omitted). The rules of procedure applicable to ordinary civil cases would seem to be at odds with the Convention [and the Act's] premium on

expedited decision making. In the Court's view, however, there exists a familiar vehicle suitable to these circumstances and that is the writ of habeas corpus.'"

Concern has been expressed previously by this Court at the delay in Convention cases, eg AS v PS (Child Abduction) [1998] IR 244 at 265. Elsewhere this concern has also been expressed. The Report of the Second Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction 33 ILM 225 (1994) states:

"Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody".

The additional time factor arising because of an appeal has also been considered. Some States have introduced special procedures to enable expeditious appellate hearings, although this is not required under the Convention.

In England and Wales there are rules and procedures which are intended to meet the requirement of expedition. This was described by Wall J in Re S (Child Abduction: Delay) [1998] 1 FLR 651, at p 660:

"As has been said many times, proceedings under the Convention are summary. There is, accordingly, a proper emphasis on speed of disposal. In this context the Central Authority for England and Wales and both the High Court and the Court of Appeal have an exemplary record. I propose to give some examples.

The English Central Authority, the Child Abduction Unit ('the Unit'), measures the time from the receipt of a request from a foreign central authority to its allocation by the Unit to a specialist firm of solicitors in hours rather than days. The unit sets itself an 80% target of forwarding incoming cases to solicitors within 24 hours: in fact it invariably achieves a 100% rate.

The average turnaround time between receipt of an incoming application under the Convention and the final order is 6 weeks. For applications which are decided following an appeal from the High Court judge to the Court of Appeal, the average turnaround time is 15 weeks."

In that case there was a significant delay caused by either the father or his German lawyers in the proceedings and an application for an adjournment by the father was refused. Wall J stated that the application to adjourn by the father raised an important issue: ". . . about the manner in which applications under the Convention are conducted in England and Wales, and the need for applicants under the Convention and any lawyers in their native countries to understand that the court expects those who invoke the jurisdiction of the Convention to act with expedition."

Wall J then described the summary proceedings for Hague Convention applications in England, as set out above, and continued at page 661:

"The maximum time permitted for any adjournment of proceedings under the Convention is 21 days -- see the Family Proceedings Rules 1991, R6.10. In the instant case, the originating

summons was issued on 30 June, 1997. On the same day Hale J made an ex parte order securing S's continuing presence at her mother's address. The matter came before me on 10 July, 1997. The mother was ordered to file further evidence by 18 July, 1997 (which she did). The father was ordered to file his evidence in reply no later than 30 July, 1997. He did not do so. His affidavit was not sworn until 11 August, 1997.

On 10 July, 1997 I was told that the case could not be ready until 25 September, 1997. This was more than 12 weeks from the date of the issue of the originating summons, double the average disposal time for an application under the Hague Convention. In order to accommodate the father, therefore, I was persuaded to grant a series of artificial adjournments.

No blame in this case for the delay can be laid at the door of the solicitors allocated by the unit. The failure to give them proper instructions and the failure to attend court must be laid fair and square at the door of the father and his German lawyers.

It must be made clear to parties involved in proceedings under the Convention that in the English High Court cases are dealt with expeditiously. Delay will simply not be permitted. Cases under the Convention are given priority and are regularly inserted into already busy Family Division lists, often to the prejudice of other cases.

Accordingly, if a litigant delays or fails to give his solicitor adequate instructions, he is likely to find that his application to adjourn the hearing date of the originating summons will be refused."

In this decision Wall J considered the issue of delay in relation to the Rules of the English Court, his discretion and the Hague Convention. The rules requiring speedy hearings arise from the objects of the Hague Convention. Thus, even if the rules were not present the Court would have the same power to enforce speedy hearings.

Time is of the essence in cases under the Act: see approach in K(C) v K(C) [1994] 1 JR 260, 269. It is important that both in the State from where a request comes and in the requested State that all parties and professionals address these cases speedily.

I am concerned that there are not as yet Rules of Court in Ireland under the Act to provide a specific, expeditious process for cases under the Hague Convention. However, I am very pleased to learn from Counsel that draft rules have been sent to the Rules Making Committee. It is to be hoped that appropriate Rules will soon be in existence to enable such cases run on a fast track in the Courts.

Delay may have a factor of culpability by a party. Thus In Re N (Minors) (Abduction) [1991] 1 FLR 413 Bracewell J considered the delay of the applicant father stating at p 419:

"Finally, I consider it appropriate to say that even if I had been satisfied under Article 12, which I am not, I would have exercised my discretion in favour of returning the children to the Texas jurisdiction. The reasons why I would have exercised my discretion thus is that, first, this is a plain case of abduction by the mother; secondly, if the proceedings had, in fact, been commenced by 16 October, it would have been a plain case for the return of the children, and it is relevant to consider that the children had been in this country for 2 days over the one-year period before proceedings were commenced; and thirdly, there is a good explanation as to why proceedings were not commenced earlier. There is no culpable delay on the part of the father. It arose solely because of inaccurate advice and the failure of the fax machine at the Lord Chancellor's Department."

The latter point raises the query as to what would have been his view if there was culpable delay? The implication is that it would be a factor against the father.

Analysis

Unfortunately in this case there has been very significant delay in commencing the proceedings under the Act. The delay can be divided into two parts.

First, there was the delay after the mother wrongfully removed the child from Spain and before Interpol informed the Spanish Authorities where the mother and R were. In light of all the circumstances it is inappropriate that the father did not contact, or attempt to contact, or take steps to see if the mother and R were at the mother's parents' house in the midlands of Ireland. Her parents' home was where she had gone to when she previously wrongfully removed R from Spain. She had on other occasions brought R there to visit. That is where she had sought permission to go to with R. It is her family home. She is not wealthy, she has no independent means; the Court had ordered maintenance for her by the father in the previous order. The father was aware of her home address. He knew she visited there before. He knew she had gone there before when she wrongfully removed the child. He himself has visited her home. It is extraordinary that he did not telephone her parents or attempt to do so to inquire of her and R. It is remarkable in the circumstances that Interpol was asked to trace her - that neither the father or his lawyers rang her home in Ireland. In assessing the evidence it is clear that common sense would have suggested that the mother had once again returned to her parents and this could have been confirmed easily and speedily.

Secondly, there was the delay of approximately one year, after the father was informed of Interpol's discovery that the mother had been traced to her parent's house, before these proceedings commenced. The reason given, that his lawyers were preparing documentation, is not appropriate to explain a delay of approximately one year in commencing proceedings under the Hague Convention. It is a totally inadequate reason.

There are important factors in considering the delay in this case. This delay must be viewed in the overall picture of the child's life. She was born in Spain but has spend the following times in Spain and Ireland:

Spain: October, 1991 to May, 1993, ie 19 months

Ireland: May, 1993 to January, 1995, ie 20 months

Spain: January, 1995 to October, 1996 ie 21 months

Ireland: October, 1996 to these proceedings commenced in June, 1998, ie 20 months.

The delay has meant she has spent a critical time in Ireland during her development. The father knew of the Hague Convention. He has been through the process before. Indeed, on his previous application under the Hague Convention the order of the Supreme Court, as well as ordering the return of the child to Spain, granted him liberty to apply. This was not availed of by the father on this occasion.

If a request had been made for R by the father on her wrongful removal in October, 1996 or in November, 1996, it would probably have been processed expeditiously in light of the previous Supreme Court Order. Instead it was 1998 before the proceedings were initiated. The essence of the Convention -- prompt return -- appears impossible to achieve.

The Convention envisages a summary procedure to enable a child to be returned expeditiously to the place of its habitual residence to protect the child from the effects of being abducted across State borders wrongfully. The summary process is possible because of the intended expedition -- as such the welfare of the child is not an issue.

The Hague Convention stresses the necessity for expedition in the requested State. It is the clear policy of the Convention that there be expedition throughout the whole period of the wrongful removal -- not just after the proceedings have commenced in the country of application. This expedition is for the welfare of the child. The expedited process is the grounding upon which a summary procedure, without a hearing on the welfare of the child, is envisaged. However, delay affects the child's position, and that is recognised in Article 12 by reference to a particular aspect of the child's welfare.

Delay is contrary to the Hague Convention. Significant culpable delay by a requesting party is contrary to the fundamental policy of the Convention. Sometimes culpable delay may be a form of acquiescence. However, there may well be circumstances where there is culpable delay and yet no acquiescence. It may well be reasonable to determine in certain circumstances that delay by an applicant is such that the Convention procedures are not applicable.

Settled in a new environment

Article 12 of the Hague Convention imposes a mandatory obligation on the Court stating:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administration authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

The nature of this obligation varies according to the length of time which has elapsed since the child was removed. In this case R was wrongfully removed in October, 1996. The father commenced his notice of motion in June, 1998, 20 months after the wrongful removal. Thus even though the motion was brought within the original proceedings it is 'the proceedings' within the meaning of Article 12 for the purpose of this application. Consequently, this application falls to be determined under the second paragraph of Article 12.

The second paragraph of Article 12 continues an obligation to return the child unless the child is settled in the new environment. It is for the mother to prove that R is settled. The position is described by Elisa Perez-Vera as:

"The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard."

This discretion is also referred to elsewhere. Thus Article 16, states:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of a Contracting State to which the child has been removed or in which it has been retained, shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

Again the Convention is referring to two of its fundamental principles, (a) that hearings under the Convention do not review the merits of custody, and (b) that such proceedings must be brought within reasonable time.

Article 18 also refers to judicial discretion stating:

"The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

While it refers to the discretion to order the return of a child there is also the corollary to this discretion and inherent in the jurisdiction the discretion to refuse to return the child.

Consequently, throughout the Convention there is reference to the discretion left to the national authorities.

On the matter of Article 12 the Learned High Court Judge held:

"In my view, the evidence relied on by Mr Corrigan does not go much further than indicating "mere adjustment to surroundings" by R. It certainly does not indicate that R's current situation vis-a-vis the various factors enumerated by Bracewell J, place, home, school, people, friends, activities and opportunities, has or is likely to have in the future the element of permanence which the word "settled" connotes. For instances, it is clear from the evidence that when the [mother] returned to this jurisdiction in October 1996 with R, they both resided for some period of time with the [mother's] parents. It is also clear that the [mother] and R now live elsewhere in [a Midland town]. However, there is no evidence of the basis on which R and the [mother] occupy their current accommodation, whether they have security of tenure, although not using that term in any technical sense, what sources of support and maintenance are available for R and whether her living environment, as regards place and people, is likely to change in the short or mid term. Under the provision of Article 12 which is under consideration, the onus is on the [mother] to demonstrate that R is now settled in her new environment. In my view, the [mother] has not discharged that onus."

The interpretation of the phrase "settled in its new environment", referred to by the Learned Trial Judge, by Bracewell J in Re N (Minors) (Abduction) [1991] 1 FLR 413 at p 417-418 states:

"The second question which has arisen is: what is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas LJ in Re S did advert to art 12 at p 35 of the judgment and he said:

'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art 18 the court may or may not order such a return'.

He then referred to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in M v M and at first instance in Re S. The phrase 'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings".

I find this to be a very helpful analysis. As too is the description by Garbolino J in the Guide at p 136 where he describes Article 12 and its application in the United States as: "The delay in filing an action for more than one year is only the first prong of the 'delay' defence. Even if it is established that a year or more has passed since the wrongful removal or retention, the second prong of this defence requires that the child must have been 'settled' in his or her new environment. In absence of evidence that the child has become settled, the defence is not established".

Analysis

The first prong of this defence is the delay. As set out earlier in this judgment delay has been established. Further, the nature of the delay has been established. Whereas the reason the delay is important is because of the effect on the child, if a party has been culpable in the delay that may be a factor in balancing the defence too. In this case the delay of the father was inappropriate, especially for the latter part of the duration. This is a factor in the circumstances of this case in determining the matters raised under Article 12 for the inferences it raises as to the comparative homes of R.

The second prong -- whether R, has become settled -- now falls to be determined. R's new environment is in a town in the midlands of Ireland. It is not necessary to determine the meaning of the word 'new' in Article 12 as the position has not changed significantly since those proceedings were commenced.

The relevant facts commence with the length of time which the child has lived in this environment -- without any application for her removal. This has several elements; (a) the physical presence of the child in the town and all its consequences, and (b) the absence of contact from the father requesting her return; (c) the emotional element. The reasonable and logical inference to be drawn from this length of time is that to a child of the tender age of R it would be a most significant length of time and one in which roots would have been put down in the community. In light of the special circumstances of this case strong inferences may be drawn from the delay. These arise because the mother had returned to her family home with R, there was no contact from the father, who had every reason and opportunity to make contact with the mother's family home, for twenty months. However, the burden of proof is higher than that which arise solely by inferences from the delay in this case.

Whereas there is not a very precise picture detailed (perhaps understandable because of the attitudes of the parties) it is more appropriate if there is a fuller picture painted. However, certain facts are before the Court. R is at school. This is of particular importance. If R had

been returned shortly after her wrongful removal she would have commenced school in Spain. The situation now is that she has commenced school in Ireland. This of itself sets down roots and also is of importance because of language considerations.

The Court knows from the evidence in this motion and the previous application that the mother has an extended family in the midland town. This has favourable consequences for R.

There was some evidence relevant to the state of mind of R. While neither the issues of alleged child sexual abuse by the father, or custody and access are matters for the Court, some evidence given by Dr Swann and others is relevant to other matters such as the settled environment and must be considered by the Court. The Learned Trial Judge excluded Dr Alice Swann's report insofar as it relates to evidence of the alleged sexual abuse by the father of R. However, insofar as Dr Swarm could assist the Court in other matters the ruling did not apply. I agree with this approach and find in Dr Swann's report evidence relevant to R being settled in a new environment.

Dr Alice Swann gave evidence of interviewing R and stated of R whom she met on 30 and 31 January, 1997:

". . . Beforehand I was given much detail about the family here. There was much spontaneous talk. She was at ease. She gave very rich detail. She had very good language and play skills. She was totally at ease and it was clear she had a close relationship to those she was speaking about, the extended family as well as her mother."

Dr Swann referred R to the Community Care Psychological Services. The report from the clinical psychologist also addresses, inter alia, the issue of the psychological well being of R in the community and paints a picture of a child whose emotional condition has greatly improved. This is illustrated especially by the interviews with R's teacher which describe a position of great progress over her year in school, addressing both educational and social skills.

I find this to be strong evidence that R is settled in the community, both from the physical and psychological point of view. The Learned Trial Judge erred in not addressing the significance of the evidence of Dr Swann and Ms Burke insofar as it related to the issue of the child being settled in the community. That evidence, together with the mother's and the inferences which in the circumstances of the long delay in this case have arisen, put together, are sufficient to establish that R is settled in her new environment.

That being the case this Court has a discretion as to whether to order her return to Spain. In spite of the opprobrium to be cast upon the mother for wrongfully removing R from Spain in 1996, in the special circumstances of this case, which arise largely because of the inappropriate delay in commencing the proceedings, I am satisfied that the discretion of the Court should be exercised in favour of the child remaining in Ireland in its new settled environment. In light of this decision it is unnecessary to consider the other grounds of appeal. I would allow the appeal.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law