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Helsinki Court of Appeal	**Decision**	N:o 879
	Date of issue 22 March 2011	Record number H11/467

Matter	Return of a child by virtue of the Hague Convention
Applicant	Andrew A
Opposing party	Satu B

Application

Andrew A has in his application submitted to the Court of Appeal on 14 February 2011 demanded that the Court of Appeal orders, by virtue of sections 30 and 32 of the Child Custody and Right of Access Act, that his and Satu B's common minor child, C (date of birth: 27 September 2008) be immediately returned to her home in Canada, and that Satu B be rendered liable to compensate for the costs incurred by the return of the child with 3,000 euros.

Andrew A and Satu B had lived together in Canada since 2001. They had joint custody of their daughter C. The daughter was born in Finland, but the habitual residence of the family had all the time been in Canada. Satu B had travelled with the daughter to Finland on 1 March 2010, and they were supposed to return to Canada on 31 March 2010. On that date, Satu B had announced that she is ill and unable to fly due to her illness. It had been agreed that the new return date be 19 April 2010, but the flight had been cancelled due to the ash cloud in the airspace. Thereafter, Satu B had refused to set a new return date, and later she had announced that she is willing to stay permanently in Finland with the child. Andrew A had not given his consent to the child's moving to Finland.

Statement

Satu B has in her statement submitted to the Court of Appeal on 21 February 2011 demanded that the application be dismissed and that Andrew A be made liable to compensate for her legal costs of 3,150.64 euros plus interest. In addition, Satu B has demanded that a main hearing be held in the matter.

The child's habitual residence had all the time been, and was in any case now, in Finland. The time spent in Canada, after the child's birth, had been intended to be temporary. Andrew A and Satu B had agreed to move to Finland already before the child was born. The child had lived more than half of her life in Finland and continuously for the past year. The child had been ordered to reside with her mother by an agreement confirmed by a child welfare officer. Even if the child's habitual residence was considered, against Satu B's conception, to be in Canada, Andrew A would not have exercised his rights of custody. He had, at least implicitly and tacitly, approved of the child's

residence in Finland, and consequently his rights of custody had according to the law of Ontario been suspended for the time being.

Additional statement

Andrew Charles A has on 28 February 2011 submitted a statement to the Court of Appeal requested from him due to Satu B's statement.

Any agreement concerning the child's change of residence from Canada to Finland had not been reached or made. Any changes to the child's country of residence had not been made by the agreement confirmed by the child welfare officer, and the parents still had, despite the agreement, joint custody of their child. Andrew A had rights of custody, and he had also exercised his rights. He had not given even a tacit approval to the child's residence in Finland.

Resolution of the Court of Appeal

The matter concerns the child's habitual residence and whether Andrew A had given his tacit approval to the child's residence in Finland.

In proceedings concerning the return of a child, the question of how the residence of the child should be arranged so that it would be in the best interest of the child is not decided, but the decision only concerns whether the child shall be ordered to be returned to the state in which he or she is habitually resident. The matter can be decided based on the documents presented in the case. Due to this, the request on holding a main hearing at the Court of Appeal is rejected.

According to section 30 of the Child Custody and Right of Access Act, a child living in Finland and wrongfully removed from the State where he or she has habitual residence, or wrongfully not returned to this State, shall be ordered to be returned at once, if the child immediately before the wrongful removal or retention was habitually resident in a State which is a Contracting State in the Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 October 1980 (the Hague Convention).

Canada is a Contracting State in the Hague Convention.

Habitual residence (residence habituelle) has not been precisely defined in the Hague Convention. It has been stated in the Government proposal for amending the Child Custody and Right of Access Act and section 8 of the Act on the recognition and enforcement of a foreign decision on maintenance obligations (Government proposal 60/1993, pp.16-17) that a person is habitually resident in that state in which he or she de facto lives and where his or her principal living environment is. When determining the habitual residence of a person, objectively observable factors shall especially be taken into account. Such factors include the duration and continuity of residence, social connections and other comparable facts relating to the person or his/her profession which indicate that the person has factual bonds to the country where he or she resides.

The habitual residence may change immediately after a person has moved, if a child has left his or her country of habitual residence with the consent of his or her parents and with a settled intention to permanently reside in another country. According to the established interpretation adopted in the international

legal praxis, an existing habitual residence in a country can be lost immediately if the person in question leaves that country with the intention to permanently reside in another country (Dickson v. Dickson 1990 SCLR 692) and correspondingly, a new habitual residence in the new country may be acquired quickly. When applying the Hague Convention, a child's habitual residence is a deciding factor. A place where a child has physically lived for such a period of time that it may from the child's point of view be considered a sufficiently stable residence shall be deemed the child's place of habitual residence. In the case of a young child, who can form no intention of his or her own, the custodians' habitual residence, family connections and other social relationships are to be taken into account in the consideration.

It is undisputed in the case that the child has, before travelling to Finland, been living in Canada since the end of year 2008. The child was in the joint custody of her parents, Andrew A and Satu B, who were married to each other. Andrew A and Satu B had lived together in Canada since 2001, and they had bought a dwelling there in 2005. Further, it is undisputed in the case that Satu B had come to Finland to give birth to the child and had at that time registered herself as a Finnish resident, and once C was born on 27 September 2008, had also registered her as a Finnish resident. It appears in the extract from the Population Information System concerning the child that Finland has been registered as her place of residence between 27 September 2008 and 9 December 2008. The place of residence of the child, as well as that of Satu B, had according to the extracts from the Population Information System been in Canada between 10 December 2008 and 15 February 2010. From 16 February 2010 onwards, Finland has been registered as the country of residence of both of them.

It appears in the documents presented in the case that Andrew A and Satu B had over the years discussed the possibility of moving to Finland or to some other European country. However, when taking into consideration Satu B's return tickets, travel permits granted by Andrew A and the e-mail message sent by Satu B on 29 March 2010, it becomes evident that the intention was that the child would travel back to Canada on 31 March 2010, and when this failed, on 19 April 2010. This proves that any binding agreement on the child's moving to Finland had not been made. Due to this and when taking into account the above mentioned account of the time spent in Canada and Finland, the Court of Appeal considers it to be established in the case that C's habitual residence immediately before the retention on 31 March or 19 April 2010 was in Canada.

According to section 32 of the Child Custody and Right of Access Act, the removal or the retention of a child shall be deemed wrongful, if it is in breach of rights of custody attributed to a person, either jointly or alone, under the law of the State where the child was habitually resident immediately before the removal or retention; and at the time of removal or retention these rights were actually exercised. According to section 32(2) of the said Act, the removal or retention of a child shall not be deemed wrongful, if the holder of the custody rights has given his permission to it or consented thereto either explicitly or implicitly. According to section 33 of the Act, rights of custody mean the right and the obligation to take care of matters relating to the person of the child and, in particular, the right to determine his or her place of residence.

Andrew A and Satu B have had joint custody of the child. Thus, the premise is that Andrew A has had the rights of custody.

Satu B has stated that Andrew A has tacitly or implicitly consented to the child's residence in Finland, because he has not after July 2010 demanded that the child be returned to Canada. Due to this, the father has not had any rights of custody according to the law of Ontario. It appears in the request for the return of the child by the Central Authority of Ontario that Andrew A had in July 2010 submitted an application for the return of the child to the Central Authority, after which the matter has been pending. The fact that Andrew A has not thereafter possibly presented any further demands concerning the child to Satu B does not have any significance in the matter. Thus, it cannot be considered in the case, based on the grounds mentioned by Satu B, that Andrew A would have given his consent, even an implicit one, to the child's residence in Finland. Consequently, Andrew A has de facto had the rights of custody and he has also exercised them.

The retention of the child has thus been wrongful and the child must be returned to the country of her habitual residence, Canada.

According to section 41(2), Andrew A is entitled to receive compensation from Satu B for the costs incurred by the return of the child. The claimed sum is not deemed unreasonable.

Resolution

C is ordered to be immediately returned to the State of Ontario in Canada. Satu B is made liable to compensate for the factual costs incurred by the return of the child for at most 3,000 euros to Andrew A.

For assisting Andrew A at the Court of Appeal, Attorney X will be paid a total of 3.744,90 euros (3,030 euros as attorney's fee, 18 euros as compensation for expenses and 696.90 euros as value-added tax) from State funds in accordance with section 8 of the Decree on legal aid fee criteria.

Rendering Satu B liable to compensate the State for the sums paid to Andrew A's counsel is deemed unreasonable in view of the circumstances having given rise to the proceedings and the significance of the issue to Satu B, and taking all aspects of the case into account. The sums paid to Andrew A's counsel are therefore left to be borne by the State.

Satu B's claim for compensation for the legal costs is rejected.

Sections of law

Child Custody and Right of Access Act, sections 30-33 and 41

Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 October 1980 (the Hague Convention), Articles 3, 5 and 13

Other statements

Under section 43(2) of the Child Custody and Right of Access Act, the decision of the Court of Appeal ordering the return of a child may be enforced at once, even if not yet final.

The Court of Appeal submits the decision to Hyvinkää District Court, which must urgently see to the enforcement of the decision in accordance with section 46 of the Child Custody and Right of Access Act.

Appeal

This decision may be appealed against to the Supreme Court within 14 days from the date of issue of the decision by the Court of Appeal. The time limit referred to in the appeal instructions expires on 5 April 2011.

On behalf of the Helsinki Court of Appeal:

The matter has been decided by:	Monika Kuhlefelt, Senior Judge of the Court of Appeal Tuula Myllykangas, Temporary Judge of the Court of Appeal Åsa Nordlund, Temporary Judge of the Court of Appeal
Referendary:	Thomas Kolster, Assistant Judge

The decision is unanimous.