(Translation)

HELSINKI COURT OF APPEAL | DECISION | No. 2764

Date of issue
1 October 2008

Docket No.
H 08/2359

MATTER — Return of child pursuant to the Hague Convention

PETITIONER — Daniel A

OPPOSING PARTY — Hanna B

PETITION — **Daniel A** has in a petition submitted to the Court of Appeal on 2 September 2008 requested that the Court of Appeal pursuant to sections 30 and 32 of the Child Custody and Right of Access Act order his and Hanna B's common minor children, C, born on 24 March 2005, and D, born on 10 July 2007, to be immediately returned to Great Britain, Scotland, their State of residence.

The place of residence of the children was in Scotland and they were wrongfully removed from there. According to Scottish law, the children were in the joint custody of Daniel A and Hanna B, who were married to each other, and the guardians decided jointly on matters of importance to the life of the children, such as their place of residence. Hanna B had travelled to Finland together with the children on 28 April 2008. Daniel A not consented to the children moving to Finland, nor had he subsequently acquiesced in it.

The family had moved to Scotland in October 2007 with the intention of settling down there and establishing a new home for the family in Scotland. The place of habitual residence of the children had then changed. Scotland did not have the same population register system as Finland and Daniel A not understood that a notice of change of address had to be filed, but he had informed the tax authorities that he was closing down his business and leaving the country. Daniel and Hanna B had been to St. Andrews to look at several flats and had finally decided to rent a flat there. The family had been registered with the local health-care centre in October 2007 and C had started kindergarten. Since settling in Scotland the [redacted] had availed themselves of health-care and social services offered only to those living in Scotland.

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8.10.2008
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(Translation)

STATEMENTS

**Hanna** B has requested that the petition of Daniel A be denied. In addition, Hanna B has requested that a main hearing be held in the matter.

The actual place of residence of the children had all the time been in Finland. The family's trip to Scotland was originally intended to be a two-week holiday trip, which had then been drawn out. The protracted stay in Scotland and the renting of a furnished flat did not turn the stay into living or change the place of habitual residence of the family to Scotland. In assessing the actual place of habitual residence of the children, both external circumstances and the question of to which country the children have the closest ties should be considered. Hanna B and the children have not at any stage moved to Scotland but had a permanent home in Finland, and no vanload of any kind was at any stage sent to Scotland. Daniel A had left his household effects and considerable debts in Finland. He had only later taken measures to close down his business. A Finnish passport or Social Insurance Institution card was enough to establish the right of care also for a person only visiting Scotland. No notice of change of address was filed with the population register because it was only a question of a holiday trip. C was at a day-care centre which offered flexible service to parents in need of temporary help with the day-care.

There was an obstacle to the return of the children to Scotland. There was a risk that the return of the children would expose them to physical or psychological harm and they would be placed in an intolerable situation. Daniel A had had mental problems for which he had been in psychiatric care and been prescribed long-term mood medication. The children were not to be ordered to be returned to a situation where Daniel A would not actually be able to answer for them. The mental problems of Daniel A were a grave security risk for the children.

**Daniel** A has submitted to the Court of Appeal the statement requested of him in answer to Hanna-B 's reply.

The family had decided to move to Scotland and had also done so and the place of residence of the children had therefore immediately changed. The move was intended to be permanent and they had jointly decided to settle down in Scotland. Hanna B could not alone decide on the children moving to Finland. Hanna B 's allegation about a two-week holiday was not credible. Hanna B and the children had lived in Scotland from October 2007 to the end of April 2008. When moving the family had brought a lot of things along with them. The flat in Scotland had been looked for and rented when the family already was in Scotland. Daniel A had paid municipal tax for the flat. The alleged home in Finland was the flat in Lappeenranta of Hanna B 's family, or at least her mother, in a house where the

family bakery was situated. The family did not have a home of their own in Finland. Rent and other housing costs would have had to be paid for a flat of their own. The family was registered with the local health-care centre as regular clients. The health-care centre was part of the national health care system of Great Britain and its services were free for clients. C was in part-time day care in Scotland, which was paid for. Daniel and Hanna B had already earlier considered moving to Scotland , which Hanna B had admitted and which was also shown by the note of the Child Welfare. Hanna B had in Finland in May 2008 booked a removal service to fetch her things. There had been several boxes of goods and it was a question of a vanload.

Daniel A health was as good as it could be considering the stressful family situation. The circumstances referred to in Article 13(b) of the Hague Convention were traditionally considered to mean, for instance, having to return to a theatre of operations or a corresponding situation, and no such circumstances have been presented because of which the ability of the Scottish authorities to protect a child could not be trusted.

Daniel A has opposed the holding of a main hearing.

ADDITIONAL STATEMENTS

**Daniel** A has submitted an additional statement to the Court of Appeal on 22 September 2008.

A delivery of 15 units of movables, i.e. a vanload, was made by a removal service to Hanna B from Scotland to Finland. The family had moved to Scotland with the intention of moving their place of habitual residence there. In any case, the decision to live permanently in Scotland had been made at the latest when the family established itself in the rented flat and started to acquire things for it. Scotland had become the family's residential environment. The child D had lived longer in Scotland than in Finland.

**Hanna** B has submitted an additional statement to the Court of Appeal on 22 September 2008.

No vanload had been sent from Finland to Scotland and the family had not moved there. The things brought from Scotland to Finland were mostly clothes. Hanna B had also acquired items for her antique collection in Scotland. The manner in which the family left for Scotland and the amount of goods brought along show that the intention was not to stay there permanently. Hanna B and Daniel A had had a flat of their own in Finland even though Hanna B mother's bakery operated in the same building. It was a big detached house with two separate flats. The family's flat was 180 square

metres and consisted of four rooms and a kitchen. The real estate on which the flat was situated was owned jointly by Hanna B and her sister. For that reason Hanna B did not pay rent for the flat.

DECISION OF THE COURT OF APPEAL

Under section 30 of the Child Custody and Right of Access Act, a child living in Finland and wrongfully removed from the State of the child's 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 failure to return 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). Under section 32 of the same Act, the removal of or failure to return 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 failure to return, and these rights were actually exercised at the time of the removal or failure to return. Section 33 of the Act defines rights of custody as the right and obligation to take care of matters relating to the person of the child and, in particular, the right to determine the place of the child's residence.

One of the principal objectives of the Hague Convention is to ensure the prompt return of a child. The return of a child by virtue of the Hague Convention is intended to be a simple and prompt procedure with the sole purpose of deciding whether a child shall be ordered to be returned to his State of residence. In considering the need for the child to be returned, the question of how the custody of the child should be arranged in the best interests of the child does not arise. The Court of Appeal does thus not adopt a position on how the custody should be arranged or what in other contexts may be ordered regarding the custody of the child.

It is indisputable that the place of habitual residence of the child immediately prior to the journey to Finland was in Scotland, which is a Contracting Party to the Hague Convention. The children were in the joint custody of Daniel A and Hanna B who were married to each other, and it is indisputable that Daniel A has actually exercised his custody rights before the removal of the child.

As stated in the Government bill with a proposal for amendment to the Child Custody and Right of Access Act and section 8 of the Act on recognition and implementation of a maintenance decision issued abroad (Government bill 60/1993, pp. 16-17), a person is considered to have his/her place of habitual residence in the state where he lives and where he has his actual life environment. In determining the place of habitual residence, special account is to be taken of the duration and the continuity of the residence and such other facts regarding the person concerned that indicate actual links to the state where the person is living.

[redacted]

(Translation)

The place of habitual residence can change immediately in connection with a move if the child leaves his State of habitual residence with his parents' consent and with the intention of settling down permanently in the other State. According to the interpretation adopted in international case-law the place of habitual residence in a State is lost immediately if the purpose of the move is permanent residence in another State (Dickson v. Dickson 1990 SCLR 692) and correspondingly a new habitual residence can be acquired quickly in the target State. In applying the Hague Convention the decisive factor is the place of habitual residence of the child. The place of habitual residence of a child must be considered to be the place where he has been physically living for a duration of time that can be regarded as adequate for the place of habitual residence to become established from the child's point of view. When the children are as young as in this case, 1 and 3 years old, it is natural to consider their actual life environment to be where their parents' life environment is. There is no minimum period required for acquiring a new habitual residence (Cameron v. Cameron 1996 SC 17). It suffices that the intention has been to remain in the place in question for an appreciable period. There must be a settled intention to move to a certain place and, at the same time abandon the previous place of residence. (Mozes v. Mozes 239 F, 3d 1067). The place of habitual residence is considered to be established in a State when the residence is voluntary and the intention is to continue living there for an appreciable period (Dickson v. Dickson). Permanent settling in a State is not required; an intention to remain in the State for an appreciable period of time is sufficient (Moran v. Moran 1997 SLT 541).

Since there is no written agreement on the intention of the going to Scotland, the intention has to be interpreted on the basis of the parties' behaviour. Hanna B has alleged in her statement that the family had gone to Scotland for a two-week holiday. The whole family had gone together from Finland to Scotland in the autumn of 2007. Hanna B [redacted] had returned to Finland with the children on 28 April 2008.

The written documentation submitted to the Court of Appeal shows that Daniel [redacted] had notified the tax authorities that he was closing down his business and leaving Finland. Daniel A had rented a furnished flat for his family in Scotland and also paid municipal tax for it. Hanna B's home address in Finland as registered in the population register is the same as her mother's. The family was entered in the client register of the local health-care centre in Scotland in October 2007 and C was in part-time day-care in Scotland. Before leaving, the family had announced that they were considering moving to Scotland, which is shown in the records of the child welfare clinic. When returning with the children from Scotland, Hanna B had booked a removal service to deliver goods to Finland. The waybill shows that most of the goods consisted of clothes but that it also included some linen and furniture. This can be explained by the fact that the flat rented in Scotland was furnished. In the light of these circumstances and the

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actions of the parties the Court of Appeal does not find the allegation that the family intended to go to Scotland for a two-week holiday trip credible. Even if the intention was not to remain permanently in Scotland, the Court of Appeal finds that the residence in Scotland was intended to last for the time being and for an appreciable period.

On the above grounds the Court of Appeal holds that the actual life environment of the children has for the time being been Scotland. At the time of the removal of the children, their place of habitual residence has already been established in Scotland where the family has lived since October 2007. The removal of the children from Scotland without the consent of Daniel A was thus wrongful.

According to the Child Custody and Right of Access Act section 34.1.2 and the corresponding Article 13 b of the Hague Convention, the return of a child can be refused if there is a grave risk that it would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

In this case no circumstances have appeared to indicate that the return of the children to their State of habitual residence would expose them to immediate harm as referred to in the above provisions before the settlement of the custody dispute or that they would face a grave risk of violence or negligence.

On the above grounds there is no cause to hold a main hearing in the matter and the children are to be returned to Scotland, their State of habitual residence.

Resolution

C and D are ordered to be immediately returned to Scotland, Great Britain. In implementing the decision, the interest of the children shall be seen to and, where necessary, the Scottish social authorities contacted.

A fee of 3,000 euros, including a raise under the Decree on Legal Aid Criteria section 8, as well as the VAT to the amount of 660 euros shall be paid out of State funds to attorney at law X for assisting Daniel A in the Court of Appeal.

A fee of 2,040 euros, including a raise under the Decree on Legal Aid Criteria section 8, as well as the VAT to the amount of 448,80 euros shall be paid out of State funds to attorney at law Y for assisting Hanna B in the Court of Appeal. The sums shall be borne by the State.

Considering the circumstances leading up to the litigation, Hanna B's economic circumstances and the significance of the matter to Hanna B it would, assessing the matter as a whole, be unreasonable to order Hanna B to compensate the State for the amounts paid to Daniel A's attorney. The amounts paid to Daniel A's attorney shall therefore be borne by the State.

(Translation)

Applied law sections

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

Other statements

By virtue of the Child Custody and Right of Access Act section 43:2 the decision of the Court of Appeal may be enforced at once, even if not yet final.

The Court of Appeal will send its decision to the Lappeenranta District Court which shall urgently see to the enforcement of the decision as provided in the Child Custody and Right of Access Act section 46.

AUKTORISERAD TRANSLATOR VIRALLINEN KÄÄNTÄJÄ
8-10-08
MARIANNE HENDY
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(Translation)

APPEAL

This decision can be appealed against to the Supreme Court.

The time limit for appeal as referred to in the instructions for appeal expires on 9 October 2007.

For Helsinki Court of Appeal:

Copy certified by
(signature)

bureau secretary
on the day of issue of
the decision of the Court of Appeal

The matter was decided by: Monika Kuhlefelt, Senior Judge of the Court of Appeal
Marjatta Möller, Justice at the Court of Appeal
Åsa Nordlund, fixed-term Justice at the Court of Appeal

Prepared by: Hanna Kurtto, junior judge

The decision is unanimous

AUKTORISERAD TRANSLATOR VIRALLINEN KÄÄNTÄJÄ
9.10.08
MARIANNE HENDY
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