



Borgarting Court of Appeal - LB-2007-127164

The case concerns return pursuant to the Child Abduction Act and the Hague Convention on the Civil Aspects of International Child Abduction.

A (subsequently referred to as the “mother”) and B (subsequently referred to as the “father”) married in 1994. They had a son, C, on 12 September 2001. The parties’ last shared residence was in X, England. On 5 June 2007, A, who is a Norwegian national, travelled to Norway with C. They have stayed here in Norway since then. On 18 June 2007, A filed proceedings against her husband with Follo District Court claiming divorce and custody for her son. At the same time, an application was submitted for interim orders providing for separation, a restraining order, and custody, and that A should not have access to his son.

Through the central authorities in England and Wales and Norway, B has applied to have C returned pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. On 13 July, the case was forwarded to Follo District Court for consideration.

The district court held an oral hearing on 20 July 2007, and on 23 July 2007 issued a ruling containing the following conclusion:

1. The application to return C, born on 0.0.2001, to England is granted.
2. The enforcement officer in Nesodden shall undertake enforcement.

Reference is made to the account provided by the district court in the ruling for the detailed facts of the case.

The district court found it to be undisputed that it was contrary to the Child Abduction Act and the Hague Convention to take C to Norway. The general rule is that the child must be returned immediately in such situations. The district court concluded that the strict conditions for making an exception from the general rule were not met because it did not find that there was a serious risk that the boy would suffer psychological harm in the event of return. The court could not see that there was any risk that the boy would suffer physical harm.

A has appealed the ruling to Borgarting Court of Appeal in time. The following primary submissions have been made in the interlocutory appeal:

The district court has erred in concluding that return is not clearly unfavourable to the child and that there is no serious risk that returning him will cause him physical or psychological harm or otherwise put him in an intolerable situation. The district court has not seen clearly enough that the father’s application for return has the motive of forcing the mother to move back. The father is a violent offender who wants his victim back under his control. The district court has wrongly expressed the hope that the legal dispute will have a subduing effect on the father. In the mother’s view, the father will, on the contrary, “completely lose control” following a legal victory.

The mother is dismayed at the district court’s ruling. She clearly fears living near the father of the child. Her fear will clearly be unfavourable to the child.

An oral hearing has been requested in connection with the interlocutory appeal, and witness evidence has been offered from persons in Norway, England and Spain, as well as documentation from a family counselling centre in England. The child should be interviewed and an expert should be appointed.

Reference is made to the legal decisions at Supreme Court Reports (Rt.) 1993-881 and Supreme Court Reports (Rt.) 2000-175, where return was refused.

A has submitted the following statement of claim:

1. That the application for the return of C, born on 0.0.2001, not be granted.
2. That A be awarded legal costs.

The notice of appeal has been presented to B via the central authorities. In a reply, he has submitted, in summary:

Due to previous problems with alcohol, he has not touched a drop for the past five years. He has control over and is responsible for his own actions.

The relationship between the spouses was poor for several months prior to the abduction. He now knows that his spouse made plans as far back as April to leave him and take their son abroad. He understood that she was planning something, and finally shouted loudly at her in frustration. Anyone would have done the same.

He has never lifted a hand against his son. They have a very good relationship and he was happy at home and with regard to school, his father's family, friends and activities. It must have been a shock to C to be torn away from this. C is not at any risk from his father.

A has definitely not been violent on multiple occasions, and disputes the mother's descriptions of episodes. He has only committed one act of violence – five years ago.

The opposing party clearly now wants a divorce. This can be discussed in England, where C has his habitual residence. The father is able to care for the family. When C returns to his life, there will be time for the parties to discuss their disagreements.

B has listed four persons in England who may be contacted as witnesses on his behalf, and has pointed out that the mother's witnesses are from several years ago and not from X, which has been in the family's habitual residence for the past three years.

Follo District Court has given the interlocutory appeal suspensive effect.

The **court of appeal** would comment:

The parties agree that, in principle, the mother's travel to Nor —way with C in June of this year constitutes an wrongful removal pursuant to section 11(2) of the Child Abduction Act; see Article 3 of the Hague Convention. The general rule in such cases is that the Norwegian authorities must order the child to be returned immediately; see section 11(1) of the act and Article 12 of the convention. The question before the court of appeal is whether an exception should be made in the present case pursuant to the rules in section 12(b) of the act; see Article 13(1)(b) of the convention. Pursuant to these rules, return may be refused when there is a grave risk that return will expose the child to physical or psychological harm or otherwise put it in an intolerable situation.

The court of appeal has not found that special reasons apply that indicate that an oral hearing should be held in connection with the interlocutory appeal; see section 403 of the Civil Procedure Act. In this regard, particular weight has been given to the following:

An oral hearing was held before the district court. There, the mother had opportunity to present her view as to the reasons for taking her son to Norway and what she fear will happen in the event of his return to England. The district court has provided a thorough account of its assessments, including the assessments of the mother's credibility and personal characteristics. The mother has not disputed to these assessments. Her objections against the district court primarily relate to its assessment of the father and his personality, and thus what the mother and C risk if they return to the father. For his part, the father has only had opportunity to present his view in writing. Before the court of appeal, he has both submitted a new written statement and offered witnesses, all resident in England.

If an oral hearing is to provide the court of appeal with a more relevant basis for its decision than the available written materials, the hearing must ensure that the parties have largely equal opportunity to present their cases and to counter the opposing party's evidence and submissions. This is difficult to achieve unless the father has a real opportunity either to attend the hearing or to be represented by counsel and, moreover, for his witnesses to be examined in court through the hearing of evidence or distance examination. Based on the available information, the court of appeal has concluded that the father does not have the financial capacity to attend or be represented at a court hearing in Norway.

It is equally important that a proper oral hearing will take time, in terms of both the parties' preparations and the making of practical arrangements, since many persons may potentially be heard. Pursuant to section 16 of the Child Abduction Act, cases concerning return must be processed without delay; see Article 11 of the Hague Convention, which requires the quickest possible processing of cases, preferably so that a decision becomes legally enforceable within six weeks of receipt of the application by the recipient state. The interests of the

child indicate that it should be clarified as quickly as possible where the child should stay while the underlying dispute between the parents is heard. The consideration of the preventive effect of the Hague Convention also indicates that decisions should be made as quickly as possible.

The court of appeal has weighed the time consideration against the prospects of an oral hearing adding new, relevant information to the case. In this assessment, the court of appeal has also given weight to its evaluation of the substance of the case and the degree of certainty regarding the outcome. The conclusion is that no oral hearing should be held.

A has requested the appointment of an expert. The assessment topic in the case is what risks the child faces in the event of return to England. A traditional Norwegian expert report is unlikely to add anything of value to the case with regard to this assessment. It is highly doubtful whether the court of appeal can successfully commission an expert investigation in England that provides decisive additional information in the form of prognoses as to what will happen after return. The time aspect also strongly indicates that no expert should be appointed.

A has requested that C should be interviewed in the case. Pursuant to section 17 of the act, the court must familiarise itself with the child's view unless this is impossible, particularly in light of the child's age and maturity. The provision must be considered in light of both Article 13, second paragraph, of the convention – which provides that account may be taken of the child's opinion when the child's age and degree of maturity make this natural – and section 31, second paragraph, of the Children Act, which entitles children who have reached the age of seven to state their opinion before decisions affecting their personal circumstances are made. Page 54 of Ministry of Justice circular G136/91 (G-1991-136) relating to the Council of Europe Convention and the Hague Convention on child abduction lays down a guideline seven-year limit for when children should comment pursuant to section 17 of the Child Abduction Act.

C turns six on 12 September 2007 and, like the district court, the court of appeal finds that he should not be interviewed in the case.

The court of appeal finds that it has adequate grounds for ruling on the interlocutory appeal based on the information that is already available.

As stated above, return may only be refused in a case like the present when there is a grave risk that return will expose the child to physical or psychological harm or otherwise put it in an intolerable situation. The fact that this is a very narrow exception provision is clear from the requirement that the risk must be grave and that it must relate to harm or an intolerable [Norwegian: *uholdbar*] situation for the child. The term *uholdbar* is a translation of the English term “intolerable”. The potential harm must arise in relation to the child, although harm to the child's next-of-kin may also entail a risk of the child being harmed psychologically.

The district court has emphasised that return will not necessarily mean return of C to his father's custody. The court of appeal would emphasise that the intention behind return under the convention is to re-establish the situation that existed prior to the wrongful removal. As the district court has touched on, an agreement or an English court decision may provide that the mother should have temporary custody. When assessing the risk of harm in connection with return, account must be taken of the fact that it is possible to have the question of custody, etc. while the dispute is ongoing assessed by a competent authority at the place where the child had its habitual residence. This is consistent with the overarching aim of both the Hague Convention and the Child Abduction Act, namely that disputes relating to custody and access should be dealt with by the authorities where the child had its habitual residence.

The mother has submitted that there is a risk that C may be physically harmed by his father. This has not been substantiated other than by characterisation of the father as a “violent offender”. The submissions made about the father's conduct concern his actions toward the mother and the fact that C has witnessed these. The court of appeal agrees with the district court that there cannot be deemed to be any risk that the father will harm C physically.

As regards the risk that the father will harm the mother – physically or psychologically – and thereby harm C psychologically, the parties have given very different accounts of the relationship between them while they lived together and of various events and episodes. The mother has submitted a Spanish criminal ruling in which the father was fined EUR 360 in September 2003 for injuring the mother, and has offered witness evidence to shed light on the father's conduct at that time, when the parties were resident in Lanzarote. The father claims that this is the only instance of violence.

In its decision, the district court has adopted the mother's description of the facts. In his reply to the appeal, the father has disputed the mother's description in several respects. The court of appeal does not find it necessary to rule on which versions appear the most likely, since the court – like the district court – does not find that the mother's description details a grave risk that C will be harmed by being returned. The court of appeal generally supports the district court's assessments, but has no opinion on whether the father will react sensibly or unreasonably if judgment is given in his favour.

It should be noted that the interlocutory appeal contains some new information, including copies of text messages from the father to the mother following the wrongful removal and brief details of the evidence to be given by the listed witnesses. The court of appeal cannot see that this information sheds new light on the question of grave harm.

None of the submissions have substantiated that C will otherwise be put in an intolerable situation. Whether C settles in Norway is irrelevant since he has not been in the country for more than one year; see section 12(a) of the Child Abduction Act and Article 12 of the convention.

The question of the best future care alternative for C is irrelevant to the question of return. The question of return is, however, a question of where C should be while his future care is determined, and therefore also which country's authorities should make this decision.

The district court's ruling will therefore be affirmed.

The ruling is unanimous

Conclusion:

The district court's ruling is affirmed.