Borgarting Court of Appeal - LB-2012-106154

The case concerns a claim for return of a child pursuant to the Child Abduction Act; see the Hague Convention of 25 October 1980.

A was born in the USA in 1971. Among other things, he has a legal education from his home country. He has worked in the American diplomatic service, including as an intelligence officer focusing on national and international security issues. He has worked in the USA and Europe, including Norway.

B was born in Norway in 1977. She has studied mercantile subjects. Beyond working in Norway in the HR sector, she has also worked in England and the USA.

A and B met one another when A was working at the US embassy in Oslo in 2004. They married in Norway in September 2007. In November 2007, they moved to X in the USA, where they took up residence.

A son, C, was born to the parties in the USA on 0.0.2009. C holds dual Norwegian-US nationality.

In the summer of 2010, it was decided that B and C should move from the USA to Norway. B was unhappy in the USA. The parties also agree that there had been difficulties in the relationship between the spouses for a time. However, the move to Norway was not considered to be a relationship breakup. Tickets were ordered for all three individuals to travel from the USA at the beginning of October 2010. A was due to return to the USA alone on 17 October 2010. Prior to departure, B engaged a US removal company. A assisted with the move.

From the summer of 2010 onwards, B looked for a job in Oslo. She also looked for a place to live, as well as a daycare place for C in Oslo as of the autumn of 2010. A investigated the opportunities available to work in Norway. He contacted potential employers without success. He followed these efforts up with a later visit to Norway in November 2010, but did not receive any job offers. In the summer and autumn of 2010, A also applied for jobs in other countries outside the USA, both European and non-European countries, including Australia.

Shortly after their arrival in Oslo on 12 October 2010, the parties visited the tax office to complete the notice of change of address. The parties disagree about what was said during this meeting, but it is clear that a notice of change of address was submitted that both parents had signed and that indicated a change of habitual residence for C. The parties also appear to agree that A added a handwritten comment to the notice of change of address, but disagree about what was written and its significance. The original form has been destroyed and could therefore not be submitted. Based on the notice of change of address, C was registered as habitually resident in Norway, at the address in Oslo at which he lives with his mother.

During the family's stay in Oslo in October 2010, all three individuals stayed in the flat rented by B. A participated in C's daycare induction programme and sought to find a job in Norway; B also continued to look for a job.

After A left Norway on 17 October 2010, the three individuals stayed in contact by email, telephone and Skype. Several emails between A and B from the period after 17 October 2010 have been submitted. The topics included the parties' respective job searches, B's new job, C's daily life and well-being in Oslo, and the relationship between the parties. The parties disagree as to whether these emails shed light on the question of whether A consented to a change in C's habitual residence.

As stated, A also made a visit to Norway in November 2010 during which he resumed his search for a job in Norway. The relationship between the parties was difficult during the visit. Before Christmas 2010, B notified A that, given the circumstances, she and C would not be spending the Christmas holiday 2010 in the USA with A, something the parties had originally intended. The parties appear to agree that the relationship between them had not improved during the course of the autumn.

A submitted a "Complaint for divorce" in the USA on 27 January 2011. A arrived in Oslo in January 2011 and had ordered air travel for himself and his son to the USA on 30 January 2011. B then refused to allow him to take C with him.

B initiated separation and divorce proceedings in Norway. A participated in mediation in Oslo in February 2011. Proceedings concerning parental responsibility, custody and access were also initiated. The proceedings instituted by B in Norway have been suspended pending a legal decision in the present dispute. Nonetheless, interim decisions have been made in both the USA and Norway. A "Court order" from the USA dated 13 June 2012 has ordered the mother to bring the child to the USA for two weeks' access with the father. On 1 June 2012, Oslo District Court handed down a decision granting B sole parental responsibility of C pending a legally binding judgment and imposing temporary regulation of A's access rights.

On 22 December 2011, A submitted a claim for C to be returned from Norway to the USA. The request has been processed by the US central authority responsible for compliance with the obligations in the Hague Convention, and has been forwarded to the Ministry of Justice and Public Security in Norway, which on 6 January 2012 sent the application to Oslo County Court.

A and his father travelled to Norway to visit C at Christmas 2011. However, A was only granted access to C under the supervision of the child welfare service on 4 January 2012. A and his father returned to the USA on 5 January 2012.

Oslo County Court held a two day oral hearing in March 2012.

On 4 April 2012, Oslo County Court issued a ruling containing the following conclusion:

1. The application for the return of C from Norway to the USA under the Hague Convention and the Child Abduction Act is not granted.
2. A shall pay B legal costs of NOK 107,812.6 within two weeks of service of this ruling.

In some doubt, Oslo County Court found that it had not been substantiated that A had consented to a permanent change of habitual residence of his son; see section 11 of the Child Abduction Act. Nevertheless, Oslo Couty Court concluded that the child should not be returned; see the exception provision in section 12, a), of the Child Abduction Act. Oslo County Court also commented on section 12, b), of the Child Abduction Act.

On 16 May 2012, A appealed the ruling to Borgarting Court of Appeal. B has made opposing submissions in a reply dated 21 June 2012. Both parties have expanded on their submissions in subsequent letters and pleadings. All pleadings and enclosures received from the parties have been translated such that they are available in both Norwegian and English.

In her reply, B requested that it be imposed as a condition for admission of the appeal for hearing that A provide security in respect of potential liability for legal costs; see section 20-11 of the Dispute Act.

In a ruling of 5 July 2012, the court of appeal did not grant the request for provision of security.

On 23 July 2012, the court of appeal set a deadline of 10 August 2012 for the submission of any comments regarding the parties' view on the need for an oral hearing in the case.

In the appeal, A requested the appointment of counsel to represent his son. On 5 September 2012, the court of appeal decided that separate counsel should not be appointed for the child.

The same day, the court of appeal decided that the case should be dealt with by written proceedings; see section 29-15(2) of the Dispute Act. A deadline of 13 September 2012 was set for the submission of further evidence.

The deadline was extended until 22 September 2012 on A's application.

B submitted her final pleading on 13 September 2012. A submitted his final pleading on 21 September 2012.

In summary, **the appellant, A,** has made the following submissions:

The appeal concerns factual errors and incorrect application of the law in the decision of Oslo County Court. The ruling has incorrectly assessed the evidence and the ruling incorrectly applies the provisions in the applicable legislation. The ruling constitutes a clear breach of Norway's obligations under the Hague Convention. The ruling also forms part of the human rights violations committed against C and his US family members in Norway.

A never consented to B's travel to Norway in the summer of 2010. A only consented to C's temporary travel to Norway from October to December 2010, subsequently extended into January.

Further, this must be deemed settled by the ruling of Oslo County Court. B has not appealed, and the court of appeal is therefore not permitted to review this. The correct frame and focus the case must be the decision of Oslo County Court not to return C to the USA despite the fact that A did not consent. A has simply asked the court of appeal to confirm and declare that an wrongful retention has occurred within the meaning of the Hague Convention. The appeal concerns the start date applied by Oslo County Court for the purposes of the one-year deadline, see Article 12 of the Hague Convention, and to the assessment conducted by Oslo County Court with respect to a "grave risk" of "physical or mental harm" to C in the USA.

As regards factual errors in the ruling by Oslo County Court, reference has been made, among other things, to the fact that the court failed to question the correctness and credibility of B's testimony. Documentary evidence disproves her testimony. Among other things, it is incorrect that B left her job because the cost of daycare was too high. She left her job before the birth, and C never attended daycare. Further, it is incorrect that A has reported B to the police in both Norway and the USA. The latter is important since it constitutes part of the reasons stated by Oslo County Court for not returning C.

Moreover, it is incorrect that "A's conduct clearly indicates that he already supported habitual residence in Norway at the time of the first trip", as stated by Oslo County Court. This is meaningless, given that, at that time, A had reason to believe that C would be home before Christmas 2010, as had been agreed. Neither B nor A had job opportunities in Norway, and they had not agreed to sell their permanent residence in X. It has also been pointed out that B had not completed tax papers related to habitual residence in the USA as part of the preparations for permanent departure. Neither spouse had undertaken anything to procure a work permit or habitual residence in Norway. Nor was A involved in renting the flat chosen by B in Norway. A would never have consented to his son taking up habitual residence in a foreign country where he could not live with him and where there was no source of income to provide for him.

A had planned to take C back to the USA as of Christmas 2010. This is also apparent from the fact that visits had been planned for his 18-month and 21-month medical checks with his American paediatrician in early 2011.

No weight can be given to A's signature of the notice of change of address in Norway. A was unable to read the language in which the form was written, and he did not understand the purpose of the meeting or the form, nor was he familiar with Norwegian procedures. Oslo County Court's ruling appears biased in its conclusions. As regards the incident at the Norwegian tax office, it is important to emphasise that neither B nor staff at the office were willing to explain to A what the form said. Since B was unwilling to translate for A, he considered it necessary to clarify his interpretation in writing. Unfortunately, the Norwegian office made an incomplete copy, with the consequence that what A had written at the bottom of the page disappeared. The court has incorrectly adopted B's evidence on this point as well. In this connection, A had done the opposite of granting consent. He had recorded on an official document that the stay was only temporary. This must be accepted even though the original document no longer exists. Further, it is incorrect to describe this visit to the tax authorities as a confrontation between A and B.

The court has failed to take all of the evidence into account. The court has stated that A applied for jobs in Norway or countries located close by, but has not mentioned that A had also applied for jobs in the USA and Australia, i.e. not just countries "close to" Norway. The court has only made brief mention of A's mother's illness and death.

Further, the court has drawn incorrect conclusions based on the language used in informal emails between B and A, in ignoring parts of the relevant evidence. In English, the word "move" can have both a temporary and a permanent meaning. The word "flytte" can presumably be used in the same way in Norwegian. Moreover, the court has completely ignored the context in which the word "move" was used. It is clear that reference was being made to a temporary move. Oslo County Court has incorrectly presented the email correspondence between B and A from the autumn of 2010. B did not state in any email that she intended to retain C wrongfully. A's emails refer to decisions made by B for herself, not for her and C. B was not entitled to make decisions for C without his father's consent. Further, during the course of the couple's communications throughout 2010, she never asserted that C would not be returning to the USA in December 2010 or January 2011. In any event, Oslo County Court has given excessive weight to emails with an emotional content

exchanged by spouses who were on the verge of a divorce. These emails were not written with legal precision, and they must therefore be given significantly less weight than a legal document.

A was willing to do almost anything to save the marriage, apart from consenting to C's relocation to Norway on a permanent basis without him.

B never discussed the idea of changing C's habitual residence while the couple was in the USA. The court has also wrongly concluded that only a minimum of B's possessions remain. Her bedroom furniture, dining table and chairs, a desk, a sewing table, plates, pots and some kitchen utensils, training weights, mirrors, some clothes and shoes and other objects, etc. belonging to B remain in X. Some of C's possessions also remain. A provided limited assistance with the move in an attempt to be nice, but did not support her choice. The most important thing for him at that time, however, was to attempt to save the marriage. He also expected the cats to return with C, and therefore saw no problem with their being vaccinated and travelling to Norway.

The court has also erred in concluding that the parties originally agreed that the stay in the USA should be of limited duration and that they should thereafter attempt to find work in Europe. They talked about moving to different countries, but this was more in the nature of dreams about the future. Moreover, conversations of this type cannot be regarded as binding agreements.

The court has incorrectly failed to accept A's evidence. In several places, the court has reached incorrect conclusions based on the fact that A is a lawyer. He had never studied family law or international private law. Before the present case, he had no knowledge of the law relating to child abduction. On the other hand, the court has not granted him the integrity and confidence granted to every Norwegian lawyer. Further, A has been security cleared at a high national level, and is a public official in a position of trust. The court has entirely ignored the fact that he has been subject to close examination by the US authorities with respect to his professional life, private life, finances, integrity and ethics, including regular lie detector tests. Moreover, documentation showing that he has been honoured for his service on behalf of the Police Security Service was also submitted to Oslo County Court.

The court has adopted B's testimony without support in the other evidence in the case. Correspondingly, witness D has no credibility, and she is a close friend and confidant of B.

The Hague Convention and the Child Abduction Act apply to both wrongful removal and wrongful retention. It was not until January 2011 that A understood that C would be wrongfully retained. Up to this point, C had been there with A's consent. A interpreted all of B's messages in 2010 regarding the period after 2011 as relating solely to herself and what she wanted for herself. B only retained C wrongfully after January 2011.

The court's decision to refuse return pursuant to section 12 a of the Child Abduction Act therefore constitutes an incorrect application of the law. Less than one year passed between the time that C was wrongfully retained and A's Hague application. B's subjective view is irrelevant.

The exceptions mentioned in section 12 of the Child Abduction Act must be proven by B, not disproven by A. Oslo County Court has adopted the incorrect legal position in this regard. There are no grounds for Oslo County Court's conclusion under section 12 of the Child Abduction Act. Oslo County Court has also incorrectly applied section 15 of the Child Abduction Act.

Further, it is emphasised that this case does not concern parental responsibility , and must not be dealt with as such. Oslo County Court has also erred in this regard.

Moreover, the court's ruling is contrary to the official interpretation of the Hague Convention as expressed in the authoritative English text and as explained in the Perez-Vera report and prescribed in the Guide to Good Practice. The Perez-Vera report states, logically, that the decisive date with respect to wrongful retention is when the parent holding right of custody first refuses to consent to an extension of a temporary stay. In other words, this cannot be earlier than January 2011, when A demanded C's return to the USA and bought an air ticket for him. The date for submission of the Hague application is within one year of the earliest possible date on which the wrongful retention began. Accordingly, Article 12 of the convention requires the court to order C's immediate return to the USA.

Section 114 of the Perez-Vera report provides that B bears the burden of proving that A consented to C's permanent move to Norway. Even Oslo County Court has not found this to be proven. Accordingly, there is no decisive evidence that supports this claim. On the contrary, there is clear and convincing documentation showing that A did not give such consent. Given that Oslo County Court is in such doubt, Article 13 of the Hague Convention does not apply. C has been wrongfully removed.

B bears the same burden of proof in respect of her reliance on the exception in Article 13 relating to the "risk of harm". B has not submitted any evidence in support of a claim that return to the USA will cause him grave harm. He will live with his biological father, who is capable of providing and caring for him. He will also attend a daycare centre that B has previously selected for him herself. The only thing preventing B from having access to C in the USA is her personal unwillingness to leave Norway. She has not been charged or indicted in the USA. She owns a flat in the USA, and as a person with permanent residence in the country, she has a valid work permit in the USA. Reference is also made to the "Report of the fifth meeting of the special commission on interpretation of the exception in Article 13".

Examples from case law and the legal principles presented by Norway's own central authority also show that a restrictive interpretation of Article 13 is the correct interpretation, and that the abducting parent bears a considerable burden as regards proving that he or she should benefit from an exception. Norway has also clearly stated that cases under the Hague Convention should not be treated as cases concerning parental disputes.

The court has used A's legal expertise against him in stating that he has demonstrated unfounded passivity in the submission of the Hague application. The truth is that he was busy caring for his mother who was terminally ill.

A is a public official and only has an obligation to work 40 hours a week. C's life with A as a single parent would be very similar to his current lifestyle in Norway. No grounds have been given why A should be unable to function as C's primary caregiver. There are no grounds for Oslo County Court's conclusion that B will be unable to return to the USA. The court's repeated disparaging comments about the US economy, daycare centres in the USA, US culture, etc. illustrate the bias that characterises the ruling.

Further, the court has ignored the statements submitted regarding A's documented abilities as a parent. The statement by C's paediatrician, E, established that he participated in the question of C's health on the same basis as the mother. Of even greater relevance is the report by the Norwegian child welfare service relating to A's access to C on 4 January 2012. There is nothing in the report indicated that he is unsuited as a parent. Nor is there anything in the financial situation to indicate that A would be unable to take responsibility for C. During the relationship, it was he who earned an income and covered all costs, including B's travel, telephone bills, etc. After B left, he has covered all of his own living costs as well as costs connected to the property owned by the parties. A has also deposited substantial sums into a joint bank account to ensure that all of C's needs are met. In brief, he has covered all of C's expenses during the time he has been wrongfully removed. A has also brought C many of his toys and clothes during his visits from the USA. Further, A has incurred various travel expenses/hotel expenses in connection with attempts to visit C. A has paid for everything. On the other hand, there are strong indications that B is in financial difficulty. She has overdrawn accounts and subsequently made up the shortfall using funds A had provided for C.

By incorrectly interpreting procedural deadlines, and by expanding the present case to include assessment of questions belonging in a case concerning parental disputes, and by permitting unreasonable and wide ranging interpretation of the exceptions for return, the court has failed to meet its duty to comply with the obligations in the Hague Convention. The court's ruling is contrary to the wording and also undermines the intention and purpose of the convention.

Further, the court's ruling constitutes a violation of C and A's human rights.

It has also been submitted that the proceedings before Oslo County Court involve several procedural errors.

A has subsequently – after all the documents were translated – realised that he suffered a handicap due to incomplete translation. In reading the ruling, he understood that he had received incomplete simultaneous translation of the witness evidence. The original documentation sent by the lawyer was also incomplete. The form from the tax office did not show the comment added at the bottom of the page.

Oslo County Courthas also made a procedural error in failing to familiarise itself with C's view; see section 17 of the Child Abduction Act. This could have been done despite C's young age and limited maturity. Further, observation of C with his father would have been sufficient to counter many of B's allegations regarding the relationship between father and son.

Oslo County Court has also erred in requiring A to answer questions to which he did not know the answer, for example regarding B's job prospects in the USA, as well as his own job prospects in Norway. Correspondingly, he was pressed to answer regarding B's "green card" status, despite the fact that he had no knowledge of this.

The other witnesses were also given opportunity to reply to questions about which they had no basis for knowing anything.

Oslo County Cpurt has also made an incorrect decision on legal costs. Oslo County Court concluded that B had not submitted adequate evidence showing that A had consented to C's habitual residence being in Norway. In concluding that "B has won the case in full", the court has ignored the fact that C's retention in Norway is wrongful under the Hague Convention, even though the court, as shown, had no intention of allowing him to return home. Awarding legal costs to B when A had submitted adequate evidence showing that C had been wrongfully removed is biased.

A's application for return was also well founded. It was accepted by both central authorities. Further, there is a prohibition against shifting expenses onto the applicant; see Article 26 of the Hague Convention. Upholding the court's decision to order the applicant to pay the abductor's legal costs will serve to undermine the intention of the Hague Convention and scare off other legitimate applicants. The decision to impose legal costs on A is improper and should be set aside.

It is also unlawful under the Hague Convention to impose fees for the submission of an appeal; see Article 22 of the Hague Convention.

In the appeal – which has been submitted in English – A has submitted the following statement of claim (translated into Norwegian):

(1) That the court of appeal accept the present appeal for consideration.

(2) That the court of appeal set aside the decision of the lower court of 4 April 2012 with respect to both:
   a. C's return to the USA pursuant to my Hague application and
   b. The imposition of B's legal costs (including legal fees) on me.

(3) That the court of appeal issue an authoritative ruling that clearly states:
   a. Whether B's actions constitute a breach of Article 3 of the Hague Convention and why or why not.
   b. The exact date when any such breach began.
   c. Whether B has met the burden of proof in respect of the exception in Article 13(1)(a) of the Hague Convention and, if so, on what basis.
   d. If the exception in Article 13(1)(a) is applied: the exact date on which I allegedly consented to or failed to object to C's taking up permanent residence in Norway and
   e. Whether B has met the burden of proof in respect of the exception in Article 13(1)(b) of the Hague Convention and, if so, on what basis.

(4) That the court of appeal order the immediate return of C to my physical custody (custody) in the USA and require B and/or the Norwegian police to meet this condition at their own expense within one week.

(5) That the court of appeal order B to pay all my legal expenses, expenses relating to legal representation and administrative expenses in connection with my application under the Hague Convention, the court hearing in March 2012, the present appeal and all other appeal procedures.

(6) If the court of appeal is unable or unwilling to comply with the requirements requested in items (2) to (5) above without a court hearing, I request such an appeal hearing in respect of the present appeal.

(7) If the court of appeal decides to hold an appeal hearing in accordance with item (6) above, I request that C be joined as a co-appellant and that the court of appeal appoint a legal representative for him to represent his human rights interest in the present case.

(8) If the court of appeal is unable or unwilling to meet the claims presented in items (2) to (6) above, I request that the legal hearing in March 2012 be declared a mistrial and that the present case be forwarded to Oslo County Court for consideration of the substance of the case at a new hearing before a different judge.

(9) If the court of appeal decides to forward the present case to Oslo County Court pursuit item (8) above, I further request that C be made a co-claimant in the present case and that the court of appeal or Oslo County Court appoint a legal representative for him to represent his human rights interest in the present case.

In summary, **the respondent, B**, has submitted:

No wrongful removal or retention of C has occurred in the present case. A had given his consent to a permanent relocation of B and C; see section 11(1) of the Child Abduction Act.

In any event, the exceptions in section 12, a) and b), of the Child Abduction Act apply.

B asserts that the specific circumstances have been generally described correctly in the ruling of Oslo County Court. Some details have been incorrectly described, but this relates to points of no particular significance in the case.

It is correct that B did not work after C was born. The court has also correctly concluded that the relationship between the parties was already strained from the time of C's birth, not least due to strained finances. B largely had to provide for them with her savings.

It is not entirely correct, as written by Oslo County Court, that A has reported B for child abduction in Norway and the USA. It is correct that he has reported her in Norway. He has also threatened to report her in the USA. The threat must be taken seriously both because he has reported her in Norway and because he stated to the court that he had not made a final decision on the question of initiating prosecution in the USA. This makes it almost impossible for B to travel to the USA, since she cannot be sure that she will not be met with legal steps that will make it possible for her to care for C in the USA, and make it impossible for her to return to Norway with her son.

The key question is whether the appellant has consented to B and C's permanent relocation from the USA to Norway.

In the summer of 2010, the parties agreed that B should return to Norway with C. The relationship between the parties had been difficult for some time. The agreement was consistent with their original agreement that the stay in the USA should last two years and under no circumstances longer than three years if B disagreed. B made all the arrangements to move to Norway permanently, with A's agreement. A also assisted with various practical tasks connected to the physical move. In practice, B moved all of her belongings and those possessions of C that he would use in future. B also rented an empty flat in Oslo which was to be filled with the removal load. B did not take things which the parties had purchased and owned together, such as bedroom furniture and the dining table and chairs. The removal load filled ¾ of a 20 cubic metre container, and reference is made to the submitted list of objects that were included. The remaining objects were insignificant. The family's cats were also taken along, following a complicated process involving the veterinarian. B and C therefore completed a relocation process that was intended to be permanent, and A contributed to it. This implies clear consent. Oslo County Court has dealt with the matter satisfactorily. However, B considers that the court has arrived at the wrong conclusion in its assessment of the factors. B has submitted that A gave his consent to her and C's permanent relocation to Norway. Reference has also been made to the fact that, on arrival in Norway, A signed a notice of change of address stating that C was now resident in Norway. B does not remember whether an English version of the notice of change of address was presented as well. However, she has pointed out that this is available on-line. She maintains that the content of the form was, in any event, thoroughly explained to A. She remembers that A hesitated before signing the form, and remembers that she became distraught at the thought that he could refuse to sign at this point in time, after the move had been completed. However, he did sign. The added comment to which A has referred cannot be given legal weight.

Further, through his correspondence after B and C had become resident in Norway, A also unambiguously confirmed that a permanent move had been made. Reference is made to the submitted email correspondence between the parties in the period October 2010 to January 2011. Two exhibits are new before the court of appeal: an email of 6 October 2010 and emails from the period 13 December to 22 December 2010. The email correspondence shows that it had been clarified that B and C were to live in Norway, but that it was on the other hand unclear where A was to live.

There is no evidence indicating that the plan was for B and C to return to the USA at Christmas 2010. However, the original plan was that they should make a visit to the USA at Christmas 2010. The planned visit was later deferred until January 2011. After A initiated proceedings against B, however, the visit was not completed because she became afraid of what could happen if they went to the USA.

B considers that the email exchange primarily shows that the permanent move was consented to as early as the summer of 2010. In any event, the email correspondence must constitute a subsequent approval of the

permanent move on which B must be entitled to rely. It is unacceptable for one parent to hold on to a trump card in case the circumstances do not develop as he wishes, for example the relationship between the parties.

As regards section 12, a), of the Child Abduction Act, reference has been made to page 15 onwards of the ruling of Oslo County Court. The deadline must have begun to run as of the summer of 2010, since A was – as stated – fully aware that B was moving permanently. The deadline must in any event have begun to run as of mid-October 2010, as concluded by Oslo County Court.

As regards the criterion "settled in his new environment", reference has been made to Oslo County Court's description of both the factual circumstances and the legal rules.

With respect to section 12, b), of the Child Abduction Act, reference is made to the court's comments on page 17 of the ruling. B has emphasised that A's reference to a 40 hour week does not reflect his actual working hours. A did not participate much in the care of C during the relationship, apart from the initial period of leave. The most important factor, however, is the consideration of C's well-being. Sending C to the USA is highly likely to mean that he will lose his primary caregiver, his mother. He will also lose his other current contacts: daycare centre, friends and B's family. There is no doubt that this will harm C given his current age. A is concerned about his rights, but has demonstrated a deficient ability to understand the needs of his son, which are those of a child aged between two and three years old. The episode on 12 April 2012, when A took C from the daycare centre to a location unknown to his mother without warning, is an example of this. His lack of insight into the need for familiarisation prior to access is also an example of his deficient ability to see his son's needs. It is emphasised that B welcomes access between C and his father, and that this can be implemented in a safe manner. Unfortunately, the current legal proceedings are hindering cooperation between the parents in this regard.

The following statement of claim has been submitted:

1. That Oslo County Court's ruling of 4 April 2012 be affirmed.
2. That B be awarded legal costs.

The comments of the **court of appeal**:

Regarding the processing of the case

Following an overall assessment, the court of appeal has concluded that the case should be decided by written proceedings; see section 29-15(1) of the Dispute Act. As stated, this was also notified to the parties by letter of 5 September 2012.

Oslo County Court held an oral hearing over two days. Following Oslo County Court's ruling, the parties have submitted extensive pleadings commenting on both the factual circumstances and the application of the law in the ruling. The court of appeal does not find that the consideration of a proper and fair hearing indicates that an oral hearing should be held in the appeal case; see section 29-15 of the Dispute Act. The appeal case is deemed to be sufficiently illuminated through the parties' written submissions. Further, the court of appeal cannot see that there is a need for an oral hearing restricted to specific issues.

The court of appeal would also point out that a proper oral hearing would require additional time for both the parties' preparations and practical facilitation. Pursuant to section 16 of the Child Abduction Act, cases concerning return must be heard without delay, see Article 11 of the Hague Convention, which requires the which requires expeditious proceedings. 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 expeditiously.

The court of appeal finds that it has sufficient grounds for ruling on the appeal based on information and documentation submitted by the parties.

A has requested that counsel be appointed for the child and that the child's opinion be heard in the case.

The court of appeal has not found grounds for appointing separate counsel for the child. The decision has been notified to the parties by letter of 5 September 2012.

Nor does the court of appeal find that C should be interviewed in the case.

Pursuant to section 17 of the Child Abduction Act, the court must if possible familiarise itself with the child's views prior to reaching a decision on an application for return under section 11, particularly in light of the child's age and maturity. The provision must be considered in light of Article 13(2) of the Hague Convention, which provides that account may be taken of to the child's views where appropriate in view of the child's age and degree of maturity. The provision must also be read in light of section 31, second paragraph, of the Children Act, which gives children who have reached the age of seven the right to state their views before decisions are taken regarding their personal matters.

The key question in section 11 of the Child Abduction Act is whether A consented to a change of habitual residence for C or whether the consent only related to a temporary stay in Norway. It is unlikely that C has an independent opinion on this. He turned three in August this year and was approximately 14 months old when he came to Norway. With regard to the conditions in section 12 of the Child Abduction Act, the court of appeal also considers that C is too small to give his views significant weight in the case. However, given the result reached by the court of appeal with respect to C's habitual residence, discussion of the exception provisions in section 12 of the Child Abduction Act is not relevant in any event.

The court of appeal's jurisdiction

The court is tasked with reviewing the appeal claims; see section 29-20(1) of the Dispute Act. The appeal concerns a claim for return. The grounds of appeal are stated to be the assessment of evidence, the application of the law and the administrative proceedings. The appellant has submitted that C is resident in the USA and is being wrongfully retained in Norway. He has also submitted that the exception provisions do not apply. The respondent has submitted that C is resident in Norway and is not being retained wrongfully. It has also been submitted that the exception provisions applied in any event. The court of appeal is required to rule on the material facts on which the parties have based their prayers for relief; see section 29-20(3) of the Dispute Act, see also sections 11-2 and 11-4. The court of appeal must thus review the conditions in section 11 of the Child Abduction Act; see the 1980 Hague Convention. The court of appeal's jurisdiction is not restricted by the fact that the respondent has not submitted an independent appeal. A cannot succeed with the submission that some of Oslo County Court's reasons have been settled with binding legal effect.

Section 11 of the Child Abduction Act; see the 1980 Hague Convention

A child who has been wrongfully removed or is being wrongfully retained here in Norway shall be returned immediately if the child was habitually resident in a state that has joined the Hague Convention immediately prior to the removal or retention; see section 11 of the Child Abduction Act. This is also the general rule in the 1980 Hague Convention. USA and Norway are both convention states.

The central question is whether C is being wrongfully retained in Norway, or whether A consented to the change of habitual residence prior to departure from the USA.

The term "*bosted*" [place of residence] in the Child Abduction Act must be understood as being equivalent to "habitual residence" in the Hague Convention. A habitual residence must be considered a permanent place of residence, and thus something other than a temporary stay abroad.

It is undisputed that, until departure to Norway in 2010, C's habitual residence was in the USA. Nor is it disputed that both parents had parental responsibility at that time and in fact exercised parental responsibility of C, or that a change of residence within the meaning of the Hague Convention and the Child Abduction Act required the consent of both parents. A has submitted that he only consented to a temporary absence from the USA and not to a change of habitual residence. For her part, B has submitted that A's consent did not relate to a temporary stay, but to a change of habitual residence.

The court of appeal has concluded that the general requirement is that the other parent must have expressly consented to a change of habitual residence under section 11 of the Child Abduction Act. However, the consent does not have to be expressed in the form of a written agreement; see HR[Surpreme Court ruling]-2001-1101. Consent may be restricted to a temporary stay even if no fixed return date has been agreed.

When the parents disagree as to whether consent has been given for a change of habitual residence, it must be the party asserting that consent has been given that must substantiate this. If no clear written declaration exists, the court must adopt the most likely facts; see also Kvisberg, *Internasjonale barnefordelingssaker, Internasjonal barnebortføring* [International child custody cases, International child abduction], 2009, page 138.

A has not issued any written declaration to clarify the question of habitual residence prior to the move from the USA to Norway, whether in the form of a declaration expressly granting consent to a change of habitual residence or a declaration expressly restricting consent to a temporary stay of the child. The court of appeal thus has to draw conclusions based on the circumstances in general.

A participated in the preparations for the move from the USA, and it is undisputed that he was aware of the size of the removal load that was transported from the USA to Norway. The court of appeal has concluded that a large proportion of B's possessions in the USA were included in the removal load. Reference is made to the submitted list of objects, which covers four pages. The court of appeal has also concluded that the objects for which C would have use for future were included in the removal load. It is undisputed that the removal load amounted to ¾ of a 20 cubic metre container. A was also aware that the removal load would only be arriving in Norway in November 2010; see his email to B of 5 November 2010. A also accepted that the family's cats would complete the vaccination programme with the aim of being taken to Norway. It appears to the court of appeal that A participated actively in a moving process involving the family that concerned not only a stay until Christmas 2010, but had longer-term objectives.

In the appeal, A appears to confirm that the parties – early on during the marriage, and before the summer of 2010 – had discussed various countries as subsequent habitual residences, and that Norway was one of the alternatives. However, he has stated that this was more in the way of dreams about the future. The court of appeal agrees with A that such plans between spouses cannot normally be regarded as binding advance promises. However, the court finds that they are one factor indicating that A accepted a change of habitual residence for his son. In the email correspondence with his spouse in the autumn of 2010, A also expressed that he regarded them as an international family.

A looked for work in Norway and other countries in Europe. In the appeal, it is also emphasised that he applied for work far away from Norway, and reference has been made to the fact that he applied for jobs in Australia and also looked for work in the USA. The court of appeal agrees with A that this shows that he did not necessarily intend to move to Norway. On the other hand, the court of appeal finds that this also shows that he did not necessarily plan to be in the USA to care for C there as of January 2011.

Events occurring after the move can also shed light on the subject matter of A's pre-move consent.

A was present when B and C established themselves in Norway. Among other things, he participated in C's daycare induction programme in Norway. It has not been stated that any reservations were expressed to the daycare centre – or others – as regards how long C was to attend the daycare centre.

Copies of email correspondence between the parties in the autumn of 2010, before the question of the son's habitual residence became a disputed issue between the parties, have been submitted. In the court's view, the correspondence provides clear support for B's claim that, prior to departure from the USA, A had accepted a permanent change of habitual residence for C. The court of appeal finds no support for the view that, in his discussions regarding the future, A distinguished between the mother and child as A has submitted. A knew that B was looking for work in Oslo, and it became clear early on that B had found a job in Oslo. The court of appeal is in no doubt that, in the correspondence, A assumed that B had changed her habitual residence and that her stay in Norway was not of a temporary nature. The parties did not discuss plans for C to be in the USA with A alone. If a proviso in respect of C's permanent return around Christmas 2010 had been expressed as claimed by A, it would have been natural for him at least to have discussed this issue, including the practical arrangements for C's care as of the spring of 2011, how A was to make arrangements as a single father, the application for daycare, etc. However, the court of appeal cannot see any trace of thoughts regarding a future for C alone with his father in the USA in the correspondence exchanged by the parties before the conflict developed. Further, the parties' email correspondence regarding the Christmas celebration in the USA undoubtedly relates to a time-restricted visit by the mother and the child, and provides no grounds in support of the view that A originally consented only to a time-restricted stay in Norway. Moreover, the reason given for the visit to the USA at Christmas 2010 was that C was now seeing his mother's family all the time. On 13 December 2010, A wrote, among other things:

> As for Xmas, it was my clear understanding that C was going to spend it in the US since he had moved to Norway and sees that side of the family all the time now...

There is nothing in what he wrote in his email in the autumn 2010 that indicates that he intended for his son to remain with him alone after Christmas 2010. On the contrary, the parties discussed various possibilities for A to obtain residence in Norway; see the email sent as late as the beginning of January 2011. Reference is also made

to the fact that in the emails written in the autumn of 2010, A used expressions such as "move/moved" to refer to the change of residence of his spouse and the child, without any comment indicating that this was a temporary change of habitual residence.

A has stated that 18-month and 21-month checks by C's paediatrician were planned. However, the court of appeal considers that the scheduling of routine health checks in the USA is of limited significance in the interpretation of the consent given by A. Beyond these medical checks, no other specific plans for C's stay in the USA after January 2011 have been described.

A signed a notice of change of address for C in October 2010 in connection with attendance at the tax office/national population register. A has stated that he did not understand what he was signing. He has also stated that he had submitted written reservations to the national population register at the same time. Before the court of appeal, he denied that these concerned where in Norway his son was to live, and emphasised that he intended to clarify that the move from the USA was temporary. B has submitted that the reservation concerned the home they had rented in Norway and that, in any event, it cannot be of legal significance.

The court of appeal finds it unlikely that A signed an official document without knowing what he was signing. Through his signature, C was registered as habitually resident in Norway in the Norwegian national population register. A thus informed the Norwegian authorities that C had moved to Norway, and it was expressly marked on the form that the change of habitual residence was permanent. Accordingly, A notified the Norwegian authorities of a change in C's habitual residence. The court of appeal has concluded that A added a handwritten comment to the form, but finds it unclear what was commented. The original document containing the wording of the comment was not submitted to the court. The Norwegian Tax Administration has stated that the document has been destroyed. The parties have given differing evidence as to the comment. The court of appeal cannot ignore the possibility, with respect to either party, that the evidence they have now given in this regard is coloured by the subsequent dispute. However, the court of appeal can conclude that the comment A added to the form did not give the tax office reason not to register the change of habitual residence. Accordingly, the court of appeal cannot see that it can be concluded that the comment that was added showed that A's consent to C's stay in Norway only related to a temporary stay.

A has submitted that B did not act in accordance with her claim that her move to Norway was permanent vis-à-vis the US authorities. However, the court of appeal is in no doubt that B moved without time limitation. A was well aware of this. As stated, he had assisted with a sizeable removal load that was only due to arrive in November. He knew of her efforts to find a permanent job in Norway. A also stated to others that she had moved permanently. The court of appeal refers to a message he wrote to F on 6 October 2010, which among other things stated:

> "B and I are coming to Oslo this Friday. I will be there for a week, and she plans to stay for good."

Accordingly, B's actions vis-à-vis the US authorities in connection with the moving process are of lesser significance to the question the court of appeal has to decide: whether A's consent to his son C's move was time restricted and only applied until January 2011.

Both parties have submitted emails from friends in the USA intended to illustrate how they viewed the move.

B has submitted a copy of an email of 30 November 2010 from Jodi Blecker to A and B stating, among other things:

> B - I miss you and C and am sad you have moved so far away, but very happy for you that you will be closer to your family. Congrats on the new job. Hope it is going well.

A has submitted several statements by friends, sent to A in email form, expressing that C's stay in Norway was only intended to be temporary. The submitted statements were prepared in 2012. Blecker also wrote an email to A on 16 March 2012 commenting on her 2010 email. This states, among other things:

> ...the "you" I was refering to was B individually. It was not B and C.

The court of appeal considers that the submitted statements by the parties' friends are of limited significance to the question of what A's consent concerned. This applies particularly to statements prepared long after departure and after the move had become the subject of dispute before the court. Further, the possibility cannot be ignored that the view expressed by the parties' friends two years later is coloured by the subsequent conflict.

The court of appeal finds no reason to examine the parties' conduct after January 2011. The court of appeal is of the view that the parties' conduct after the dispute had materialised sheds a limited light on the content of A's consent prior to departure.

Following an overall individual assessment, the court of appeal has found it to be proven that – at the time B, A and C left the USA in October 2010 – A had expressly consented to a change of C's habitual residence within the meaning of the convention and the Child Abduction Act. The court of appeal has given significant weight to the email correspondence exchanged between the parties that autumn, and in particular A's emails. In the opinion of the court of appeal, this correspondence shows that, prior to departure, A accepted a change of habitual residence for C. The assistance provided by A during the move, his job search in Norway and other countries, and the notice of change of address submitted in Norway also support this. A's comment on the notice of change of address cannot lead to a different result. Accordingly, A cannot succeed with the submission that he had only consented to a temporary stay by C in Norway.

Accordingly, C's habitual residence changed through the move to Norway on October 2010.

A cannot withdraw his consent to a change of habitual residence after such habitual residence has been established, even though the relationship between him and B was altered by the dissolution of the marriage. A further change of habitual residence would require B's consent; see Kvisberg, *Internasjonale barnefordelingssaker, Internasjonal barnebortføring* [International child custody cases, International child abduction], 2009, page 477.

C has therefore not been wrongfully retained in Norway, and section 11 of the Child Abduction Act and the Hague Convention do not provide grounds for ordering B to return C to the USA.

As is apparent, the court of appeal has arrived at the same result as Oslo County Court, albeit on different grounds.

The court of appeal therefore has no reason to discuss the parties' submissions relating to the exception provisions in section 12 of the Child Abduction Act.

The court of appeal therefore rejects this appeal as regards item 1 in the conclusion in the ruling of Oslo County Court.

Legal costs

B has won the case and must be awarded compensation of legal costs from A before the court of appeal in accordance with the general rule in section 20-2(1) of the Dispute Act, see also section 20-2(2). The court of appeal does not find that weighty reasons make it reasonable to make an exception to the general rule; see section 20-2(3) of the Dispute Act.

The court of appeal cannot see that A can succeed with the submission that the Hague Convention does not allow liability for the opposing party's costs to be imposed in cases concerning child abduction.

The respondent has submitted four pleadings in connection with the appeal case, including the reply. The appellant has submitted three pleadings, including the appeal, as well as several emails. The appellant's pleadings and enclosures have been extensive, and the court of appeal has concluded that it has taken time for the respondent to review these. The respondent has not submitted a costs schedule to the court of appeal, and accordingly no more than NOK 15,000 can be awarded in fee costs; see section 20-5(4) of the Dispute Act. The court of appeal finds it clear that the fee costs amount to at least NOK 15,000. This amount is exclusive of value added tax; see HR-2011-2217. Accordingly, the total to be paid is NOK 18,750.

A must therefore play B compensation of NOK 18,750 in respect of legal costs before the court of appeal.

The court of appeal has applied its result in assessing liability for costs before Oslo County Court; see section 20-9(2) of the Dispute Act. In principle, therefore, B must also be awarded costs before the district court pursuant to section 20-2(1) of the Dispute Act; see also section 20-2(2). The court of appeal also sees no weighty reasons relating to the hearing of the case at first instance that make it reasonable to make an exception to the general rule; see section 20-2(3) of the Dispute Act.

Oslo County Court awarded NOK 107,812.50 including value added tax by way of full compensation. This was consistent with what was claimed. As stated, a two-day hearing took place before Oslo County Court. The court of appeal has concluded that the costs were necessary; see section 20-5(1) of the Dispute Act.

The appeal against the ruling of Oslo County Court is thus rejected in its entirety.

The ruling is unanimous.

Conclusion

1. *The appeal is rejected.*
2. *A shall pay B NOK 18,750 – eighteen thousand seven hundred and fifty kroner – in legal costs before the court of appeal within two weeks of the pronouncement of this ruling.*