Borgarting Court of Appeal - LB-2015-76479

The case concerns an application for the return of a child; see section 11 of the Child Abduction Act.

A (the mother) was born on 0.0.1983, while B (the father) was born on 0.0.1981. Both are Polish nationals. Together they have a son, C, born on 0.0.2007. The parties lived together in Poland from the time the child was born until the autumn of 2009. After the relationship broke down, the son remained with the mother, while the father had access rights to him.

In 2012, the mother married a Polish national resident in Norway. She wished to move to Norway with her son, but the father opposed this. The dispute relating to parental responsibility and the right to move with the child from Poland were therefore brought before a Polish court.

By ruling of 11 June 2013, the Wroclaw Fabryczna court in Wroclaw, Poland decided that the mother should "exercise" parental responsibility, while the father "is to have parental responsibility that is restricted to general insight into the child's upbringing and to deciding the child's most important concerns such as education, medical treatment, organisation of leisure time/holidays". The mother's application for permission to move her son to Norway was rejected. The appeal against the rejection decision was dismissed in a ruling of the Wroclaw district court on 20 December of the same year.

Shortly after – on 8 August 2014 – the mother, who was then pregnant by her new husband, requested the court's permission to move to Norway with her son for a period of 10 months. By ruling of 5 September 2014, this application was also rejected. By this time, the mother had already moved to Norway with her son. This occurred in mid-August 2014. On 20 December 2014, she gave birth to a daughter. Since then, C has lived with his little sister, mother and stepfather in Oslo. He joined a reception class at [school] as of 28 August 2014.

On the father's application, the Polish central authority for the purposes of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Hague Convention) submitted a request to the Ministry of Justice and Public Security (the Norwegian central authority) for the return of C from Norway to Poland pursuant to the Hague Convention. The Ministry sent the request to Oslo County Court on 15 December 2014. The received documents show that the father's application is dated 15 September 2014. The mother opposed return in a reply of 26 January 2015.

Following an oral hearing, Oslo County Court pronounced a ruling on 27 March 2014 [correct year should be 2015] that contained the following conclusion:

1. A is ordered to send C, born on 0.0.2007, back to Poland immediately, and no later than 30 April 2015.
2. If the order is not complied with by the deadline, the Enforcement Office at the place where C is staying shall ensure that C is delivered to B in accordance with this ruling.
3. No legal costs are awarded.

Prior to the court hearing, the judge had a conversation with the child. Higher Executive Officer Birgitte Mork and an interpreter were present during the conversation. In a letter from the court dated 16 March 2015, the following was reported to the parties:

> "During the conversation with the undersigned, C stated that there are things that are good about living in Norway and things that are not so good. He likes being with his mother, little sister and "new" dad. C stated that he has friends in Norway and that he plays football. In response to the question of what is not so good, he stated that there is a lot of homework when he attends two schools.

> In reply to a question from the undersigned, C stated that it is good to be with his dad – they go to the football pitch together and visit family. C states that he has friends from daycare and pre-school in Poland. The only negative thing that was mentioned is that C is not particularly fond of going for walks.
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> In response to the question of what C thinks about the possibility that it might be decided that he should move back to Poland, he states that what is good is that he will then be able to be with his dad and that what is not good is that he will not be able to be with his mother and little sister. He states that he would therefore prefer to live in Norway to be with his mother and little sister."

A appealed the ruling to Borgarting Court of Appeal and simultaneously applied for the appeal to be given suspensive effect. On 30 April 2015, Oslo County Court decided to give the appeal suspensive effect.

The mother has appended an expert assessment from Poland dated 27 March 2015 (translated into English) to the appeal, as well as an email of 3 March 2015 from the boy's teacher at [school]. The case is otherwise unchanged since being heard by Oslo County Court.

The appellant, A, has made the following primary submissions:

It was difficult for the mother to make herself understood during the hearing before the district court. She did not have a lawyer. She was still waiting for a reply to her application for free legal aid. She was not granted the same rights as the father. He is a lawyer himself, and was also represented by a lawyer in court. The mother is waiting for a decision in a case concerning parental disputes before a Polish court, in which the question of whether the boy can emigrate to Norway with his family is under consideration.

C has the right to comment on the question of return to Poland. He was not given sufficiently good opportunity to express his view during the conversation with the judge prior to the oral hearing before Oslo County Court. An expert psychologist should have had a conversation with him, not a judge. An expert should be appointed to conduct a new conversation with the child.

The ruling of Oslo County Court does not contain a correct assessment of whether the exception rules in the Child Abduction Act's section 12(b), (c) and the second part of (a) apply. The submitted expert statement of 27 March 2015 by a Polish expert court psychologist must be taken into account in the court of appeal's assessment of whether the exception rules apply; the email from the teacher at [school] must also be given weight.

There is a grave risk that return will cause harm to C; see section 12(b). C has lived with his mother for his whole life. It will undoubtedly be traumatic for him to move from her. He also has emotional ties to his little sister and stepfather.

Return to Poland will be very difficult since the situation in Poland is unresolved. The mother has parental responsibility pursuant to a judgment of 11 June 2013. She has had custody of him. The father has limited parental responsibility, and only has access every second weekend. The mother will continue to live in Norway in any event. The father now lives in [place], where the child has not attended daycare or school, and has no friends. C's emotional state may worsen if he is removed from his safe Norwegian home and relocated to a city in which he has never lived and in which he will be the only child. Moving him to Poland is not in C's best interests.

In any event, he should be permitted to complete the school year at [school]. He should not be moved in the middle of the school year.

C objects to being returned, and has reached an age and degree of maturity that make it appropriate to take his opinion into account; see section 12(c). The child has stated many times that his future is in Norway. He has said to the judge that he wants to be with his mother, sister and stepfather. He has repeated this to his father and to the psychologist in Poland; see the statement of 27 March 2015. He has not said to the psychologist that he wishes to move back to Poland. He states that he wishes to be with his father, but that this is something he can do when he has school holidays. He has also expressed to the teacher at [school] that he wishes to live in Norway, in stating that he wishes to attend Norwegian summer school to learn the Norwegian language and to swim.

The provision in section 12(a), second paragraph, applies. The child has settled in a new environment. C is happy to have friends here, he is an active boy in learning situations and he is pleased to be living here with his mother, sister and stepfather. The expert statement of March this year and the statement of C's teacher also show that this is the case.

The appellant has claimed that the ruling of Oslo County Court should be set aside.

The respondent, B, has made the following primary submissions:

The ruling of Oslo County Court is correct. There is no new information before the court of appeal that indicates a different result.

The school year has almost ended. There is no problem in moving now.

The mother has applied for free legal aid. A restrictive practice is followed with regard to free legal aid for the abducting parent. The mother is familiar with the list of lawyers in child abduction cases. She has received sufficient guidance on her rights. Linguistically, it was not difficult for the mother to make herself understood during the court hearing before Oslo County Court. A court interpreter was present. The judge helped her to clarify her submissions.

Return will not hinder the ongoing legal case in Poland. On the contrary, return will ensure that the legal case proceeds in accordance with the laws of the home country, and in the best interests of the child. It should not be possible to sabotage the ongoing parental dispute in the home country through the mother's removal of the child to another state.

The case must be dealt with quickly. Return should occur as quickly as possible to prevent the child from settling in its new way of life, and to prevent return from becoming a bigger burden for the child than necessary.

The father disagrees with the appointment of a new expert before the court of appeal. It is unnecessary in order to secure a sound factual basis for the ruling in the case; see section 25-2 of the Dispute Act. The circumstances the mother wishes to have clarified by means of a new expert assessment are not relevant to the present case, but rather to the case that is proceeding before the Polish courts. It is before a Polish court that a parental dispute is proceeding. A new expert assessment will lead to further delay.

An expert assessment dated 27 March of this year has been submitted by the appellant. The translation into English is not particularly good, but it is clear that the child has a strong connection with both of his parents, that the mother has difficulties in coordinating the needs of the child with her own, and that permanent residence of the child in Norway will weaken the connection with the father, something that may have undesirable effects.

The assessments in the statement in no way support the view that circumstances as mentioned in section 12(b) exist. It has not been documented that there is a risk that the child may be harmed by being returned to Poland.

The child has been interviewed; see section 17 of the Child Abduction Act. C has had a conversation with the judge prior to the court hearing on 17 March. It was appropriate for the judge to conduct the conversation with the child personally; see section 2.12 of the guidance for judges.

The fact that C has friends in Norway and is doing well at school does not necessarily mean that he will experience academic or social problems in the event of return. On the contrary, this indicates that he is adaptable and talented and has good chances of doing well wherever he lives.

The child has not objected to being returned; see section 12(c). Even though he has said that he would rather live in Norway, it is not given that he objects to being returned. These are two different things. As pointed out in the ruling, the child's view has been influenced by the situation in which he finds himself. This has also been pointed out in the expert statement from Poland.

Paragraph (a) does not apply. The application has not been submitted more than one year after the wrongful removal.

The court of appeal should set a new deadline for the return of the child. Almost five months have passed since the arrival of the return application.

The respondent has submitted the following statement of claim:

1. That the appeal be rejected
2. That A be ordered to send C, born on 0.0.2007, back to Poland immediately, and no later than within seven days of pronouncement of the ruling.

3. If the order is not complied with by the deadline, that the Enforcement Office at the place where C is staying shall ensure that C is delivered to B in accordance with the ruling of Oslo County Court of 27 March 2015.
4. That A shall pay legal costs to B and the public purse.

The court of appeal has concluded that the appeal must be rejected, and would comment:

The court of appeal finds that the appeal can be dealt with by written procedure, since the consideration of a proper and fair trial does not indicate that an oral hearing should be held before the court of appeal; see section 29-15 of the Dispute Act.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction was ratified by Norway 9 January 1989, and has been implemented in Norwegian law through the Child Abduction Act, which was adopted on 8 July 1988 and entered into force on 1 April 1989.

Pursuant to the Hague Convention, the general rule is that children who are wrongfully removed shall be returned to their country of residence immediately. The aim of the convention is to ensure that all convention states apply this rule equally. Return does not constitute a decision in the case concerning parental dispute; rather, it means that the case concerning parental dispute must be decided in the country in which the child was living prior to the removal; see Anne Marie Selvaag, *Barnebortføringssaker for domstolen, En veileder* [Child abduction cases before the courts, A guide], pages 6-7.

Procedural issues

Before the court rules on an application for return, section 17 of the Child Abduction Act requires it to familiarise itself with the views of the child wherever possible, particularly in view of the child’s age and maturity.

The court of appeal understands A to be submitting that the fact that a judge conversed with C constitutes a procedural error – he should have been interviewed by an expert. The court of appeal does not agree with this. Neither the child abduction convention nor the act regulates who should interview the child. Nor is the use of an expert regulated in the act or the convention. The appointment of an expert to conduct the conversation could have caused delay. No circumstances were pointed out that indicated that an expert should conduct the conversation in the case. The judge’s conversation with the boy was conducted in the presence of a court employee and a court interpreter. Nothing emerged during the conversation that indicated that the judge could not conduct it. According to the record, what emerged during the conversation largely corresponds with what the boy has said to the expert in Poland. Accordingly, there is also nothing to indicate that the boy was not given an opportunity to express what he felt. The submission relating to a procedural error on this point therefore cannot succeed.

It is unclear whether A is submitting that a procedural error was committed because she was not represented by counsel before Oslo County Court whereas the respondent was. This submission cannot succeed in any event. As a rule, there is nothing to prevent a party from conducting a case in person while the other party is represented by counsel. A was aware that she could engage a lawyer. Whether she intended to pay for such assistance herself or to obtain free legal aid is irrelevant to the question of whether the oral hearing was properly conducted. An interpreter was in attendance during the hearing. The court record shows that A, because she was conducting her own case, was given guidance by the judge on what would occur during the court hearing and on “relevant questions of a factual, substantive and procedural nature”. She was encouraged to ask the judge questions if a need for further guidance arose.

A is understood to be requesting that the court of appeal appoint an expert to re-interview the child before the court of appeal reach its decision. The respondent opposes the appointment of an expert before the court of appeal.

It is noted that the provisions in section 61 of the Children Act on the appointment of experts do not apply. Any appointment must be made pursuant to section 25-2(1) of the Dispute Act, which states that the court may

appoint an expert at the application of one of the parties or on its own initiative when this is necessary to establish a sound factual basis for the ruling in the case.

In the court of appeal's view, the case has been sufficiently illuminated. C has recently had conversations with both the judge at Oslo County Court and with the expert in Poland. The records of these conversations (in the ruling and the expert statement) create the clear and unambiguous impression that the boy has a connection with both parents. He prefers to live with his mother, but does not object to being returned to Poland. The appointment of an expert before the court of appeal would delay the proceedings and probably not add anything new. The question of what is generally best for the child must be decided in the case concerning parental disputes that is proceeding in Poland.

The question of return

Pursuant to section 11 of the Child Abduction Act, a child abduction is wrongful if it breaches the custody rights of another person in the state from which the child has been removed and custody was in fact being exercised at the time of the removal.

The term "custody" in the Child Abduction Act is not identical to the corresponding term in the Children Act. The key characteristic of the term "custody" in the Hague Convention is the right to decide the child's habitual residence. If a parent can refuse the other parent permission to move abroad with a child, this is usually regarded as a right of custody; see Norsk lovkommentar [Norwegian law commentary], note 9 on section 6 of the Child Abduction Act and note 17 on section 11. The Norwegian act must be interpreted in accordance with convention case law.

In the present case, it must be concluded that the father's limited parental responsibility under Polish law entitled him to refuse the mother permission to move to Norway with the boy. Reference is made to the Polish rulings in which the mother was refused permission to move the child to Norway. Even though his parental responsibility is referred to as "restricted" in the Polish rulings, it must thus be regarded as custody within the meaning of the convention and Norwegian law.

The Court of Appeal agrees with Oslo County Court that there are no grounds for concluding that the father was not exercising parental responsibility. Nor does this appear to be disputed by the appellant. She has not submitted that the removal was legitimate.

In any event, there is no doubt that the removal is wrongful. The general rule is therefore, as stated, that the child must be returned immediately. However, section 12 of the Child Abduction Act establishes exceptions. The provision reads as follows:

§ 12. The return of a child pursuant to section 11 may be refused if:

(a) at the time when the application for return was submitted, at least one year has elapsed since the removal or retention and the child is settled in its new environment

(b) there is a grave risk that returning the child would expose it to physical or psychological harm or otherwise place it in an intolerable situation

(c) the child itself objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views
(d) return is not compatible with fundamental principles in Norway relating to the protection of human rights.

The appeal is invoking the exception roles in paragraphs (b) and (c), and partly (a).

The court of appeal will first consider whether there is a grave risk that return will expose the child to physical or psychological harm; see section 12(b).

An ordinary assessment of what will be in the best interests of the child does not provide grounds for refusing return under this alternative. The Hague Convention is based on the assumption that this assessment must be undertaken in the child's lawful country of residence; see Supreme Court Reports (Rt.) 1997-1879. Refusal pursuant to section 12(b) is conditional on return being clearly unfavourable to the child and on an unfavourable outcome being clearly more likely than not; see Supreme Court Reports (Rt.) 1993-881.

In relation to this question, the ruling of Oslo County Court stated the following, among other things:

> "The court agrees with the defendant that it is unfavourable for the child to move back and forth between Poland and Norway, given the uncertainty this entails for the child. Nor can the court ignore the fact that the child – presumably like most children in the same situation – will have an emotional reaction upon being returned to Poland. However, the court has no grounds for concluding that return will expose the child to psychological or physical harm to the child. It is true that an expert in the case concerning parental disputes stated in 2013 that, if the child were to live with the father in Poland while the mother lives in Norway, this would entail a risk of destabilisation of the child's contact with the mother, and that this is not good for the child. The statement appears to be general in nature, and is also several years old. Further, this conclusion is not supported by any statements from doctors or other parties."

The court of appeal largely supports this view.

Before the court of appeal, the appellant has submitted an expert statement dated 27 March 2015. In it, the following is stated about the child:

> "The minor is a properly developing child and at present does not demonstrate any delays in this respect. He is physically fit, independent with respect to basic self-service. He uses rather abundant vocabulary. Association processes go through efficiently. He has big developmental potential. He demonstrates cognitive curiosity and play-related activity adequate to his age. In the current school year he began education in the 1st grade. He willingly attends classes. At present the child's adaptive process with respect to school is undergoing without any disturbances. He has colleagues who attend the same grade as he does.
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> The conducted assessments make it possible to state that the minor is strongly emotionally connected with both of his parents. He has a need for their participation in his life.
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> In relation with his mother and father the child has needs for love, membership and attention adequate to his age fulfilled.
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> Positive relations connect the boy with the mother's husband and the father's wife. The minor likes and accepts them.
>
> Due to his age and emotional dependence on adults, the boy is not able to independently verify the situation in the reality which surrounds him. Owing to the constant participation of the mother in the child's upbringing, the boy identifies with her attitudes and the way of her judging other people. This also pertains to perceiving his stay abroad. The boy declares acceptance of his stay in Norway. He expresses readiness to come to dad in periods out of school. He would also like to see his dad more often, but he accepts the present state."

The court of appeal cannot see that any of what is quoted above provides grounds for concluding that return would be clearly unfavourable to the child. On the contrary, the assessments of the expert indicate that C is a relatively adaptable and robust child, and is unlikely to be harmed by return. In the view of the court of appeal, the submitted email dated 3 March 2015 from teacher D indicates the same.

Following an overall assessment, the court of appeal finds it clear that the exception in section 12(b) does not apply.

The court of appeal will now assess whether C has objected to being returned; see section 12(c).

In the ruling of Oslo County Court, the content of C's conversation with the judge was evaluated as follows:

> "It is correct that during the conversation with the judge the child stated that – if he has to choose between living in Norway with his mum and little sister on the one hand and living in Poland with his dad while his mum remains in Norway – he would prefer to live in Norway. However, he has not expressly objected to moving back to Poland, and on the contrary appears to have conflicting feelings about having to choose between his mum and his dad in their respective countries. It is natural for the child to prefer to continue living with the person he has lived with permanently almost his whole life. Further, reference is made to the court's comments above regarding whether the mother will continue living in Norway in the event that the child is returned to Poland. In any event, the child's opinion cannot be given decisive weight in this specific instance, given his age and maturity. The child's view may well be influenced by his situation. It is emphasised that this court is not required to decide where it would be best for the child to live; this is to be decided in separate proceedings before the Polish court."

Nor has the child objected to being returned in conversation with the expert in Poland; see the above quote from the expert statement. The fact that the boy has stated that he wishes to live with his mother does not necessarily mean that he objects moving in with his father. He is happy with his mother, and it is therefore natural for him to say that he wants to (continue to) live with her. However, it is clear from the expert assessment that he has a connection with both parents. There is nothing to indicate that he does not wish to visit his father. On the contrary, he stated to the Polish expert that he wanted to see his father more often. He appears to be adaptable and resourceful. He has lived in Poland until nine months ago. The court of appeal therefore finds no grounds for interpreting his statement that he wishes to live with his mother as objection to being returned.

The conditions for making an exception under section 12(c) are therefore not met.

The condition for making an exception under section 12(a) is that the request is submitted at least one year after the abduction. In the present case, the father already applied for return in September 2014 – i.e. very shortly after the mother had moved to Norway. This condition is therefore not met, and whether the child has settled in its new environment is thus of no consequence.

The appeal must therefore be rejected.

Setting of new deadline

A new deadline for return must be set in item 2 of Oslo County Court's ruling. The deadline is set to Friday, 19 June 2015.

Since the court of appeal has set a new deadline for return, it is appropriate to draft a new conclusion.

Legal costs

The father has won the case in full, and must be awarded full reimbursement of his legal costs before the court of appeal pursuant to the general rule in section 20-2(1) and (2) of the Dispute Act. There are no weighty reasons for exempting the mother from some or all of her liability for costs. In the court of appeal's view, she did not have good reason to have the case reviewed by the court of appeal. As the court of appeal understands it, she has not disputed that she took her son out of Poland wrongfully. The exception provisions in section 12 of the Child Abduction Act were considered in the ruling of Oslo County Court. The new documents could not lead to a different result. The court of appeal has not been in doubt.

The legal costs of the respondent are stated to total NOK 18,188 including value added tax. The court of appeal finds the costs to be necessary and reasonable; see section 20-5(1) of the Dispute Act, and accepts them.

There is no reason to amend Oslo County Court's costs decision.

The ruling is unanimous.

Conclusion

1. *A is ordered to send C, born on 0.0.2007, back to Poland immediately, and no later than by 19 June 2015.*
2. *If the order is not complied with by the deadline, the Enforcement Office at the place where C is staying shall ensure that C is delivered to B in accordance with this ruling.*
3. *A shall pay NOK 18,188 – eighteen thousand one hundred and eighty-eight kroner – to B by way of compensation for legal costs within two – 2 – weeks of pronouncement of this ruling.*