LOVDATA

Frostating Court of Appeal - LF-2013-53377 - RG-2013-1591

The case concerns child abduction.

B (the mother) and A (the father) met one another in Poland in the autumn of 2004. Shortly afterwards, they moved in together. Their son C was born on 0.0.2008. The parties married on 22 May 2010. There is agreement that they have joint parental responsibility of C.

The father had been living in Norway for several years in connection with his business activities. In June 2008, the whole family travelled to X, where the father had purchased a plot at ---veien 50c. There they moved into a flat which had been built in connection with a garage on the plot. The family lived in this flat when they were in X. The construction of a new house on the property was started in 2010, but was only completed and ready to move into after the relationship broke down.

The family stayed in Norway from the time the family arrived in X in June 2008 until the breakdown of the relationship between the parties in June 2012, interspersed with periods when the family or some members of the family stayed in Poland. There is considerable disagreement between the parties regarding the length of the stays in Norway and Poland, an issue to which the court of appeal will return in greater detail in its comments below.

In 2009, the father founded his own construction firm in X. Both the mother and C were registered as resident in Norway (X) in the Norwegian national population register as of 26 March 2010. The registration date for the father is somewhat later, although the reason for this has not been stated. Child benefit was paid for C monthly as of July 2011 – and the payments have continued since then.

C was summoned to attend an ordinary check at health station Y in X in November 2011. The journal shows that health checks and vaccinations had also been completed in Poland. The parents applied for a daycare place for C on 30 April 2012. A daycare place was granted from August of the same year. Since C was in Poland at that time, the place was only used as of December 2012.

In June 2012, the relationship between the parties broke down. As a result, the mother took C and travelled to her hometown Z in Poland on 22 June.

The parties disagree about the conditions of this stay. The mother claims that she stated that the relationship had ended, and that the father gave his oral agreement that she could take her son to stay in Poland permanently. For his part, the father claims that he understood the trip to be a temporary stay, and that he never gave his consent to his son remaining in Poland with his mother. The court of appeal will also return to this topic in its comments below.

It has been stated to the court of appeal that the father travelled to Poland in September/October, but that he was unable to contact the mother and his son. At the beginning of December, he travelled there again. On Tuesday 4 December 2012, he met the two of them. He then took his son with him without the mother's consent and travelled back to Norway, to the flat at ---veien 50c. They lived there until they moved into the newly built house on the property in August 2013.

On 10 December 2012, the mother applied for the return of her son on the basis that a wrongful child removal had occurred. The case was brought before Nordmøre District Court, which held a hearing in the case on 20 February 2013 that was attended by both parties. On 26 February 2013, Nordmøre District Court pronounced a ruling containing the following conclusion:

1. A shall return C, born on 0.0.2008, to B.
2. If return has not occurred within two – 2 – weeks of the pronouncement of this ruling, B shall be entitled to fetch C to return him to Poland, if necessary with the assistance of the enforcement officer.

The father, represented by Advocate Katharina Angvik Hjelmaas, appealed the decision to Frostating Court of Appeal on 5 March 2013. At the same time, an application was made for the district court's decision to be given suspended effect. The district court ordered such suspended effect on 25 March 2013, a decision that was appealed by the mother. The court of appeal received the case documents along with the mother's reply on 22 March 2013.

During the further case preparations before the court of appeal, Advocate Olav Bowitz gave notice of his appointment as counsel for the mother by letter of 29 May 2013. After consulting both parties, it was decided to hold an oral hearing. In this regard, reference was made to the need for further factual and legal illumination of the issue of the child's habitual residence.

In consultation with the parties, an oral hearing was scheduled for 30 August 2013. Shortly before the court hearing, the mother applied for postponement of the court hearing due to illness. The postponement was granted, and a new court hearing was scheduled for 16 October 2013. Prior to the court hearing, the father submitted an overview of the periods spent in Norway and Poland, along with various enclosures. Both parties gave evidence in this regard. At the end of the court hearing, the mother requested an extended deadline for the submission of further exhibits relating to trips to and from Poland. Advocate Bowitz submitted a pleading accompanied by supplementary materials on 29 October 2013. Thereafter, both lawyers submitted additional supplementary pleadings up until 20 November 2013.

A has primarily submitted:

The parties have lived in X for most of the time since coming to Norway in June 2008. This was where C was resident when his father took him back to Norway in December 2012; see section 11 of the Child Abduction Act.

The father has not wrongfully removed the son, but rather took him back to Norway after the mother wrongfully removed him to Poland. An overview of the stays in Poland and Norway shows that C has spent 1,145 days in Norway and 391 days in Poland, respectively. The overview submitted by the mother shows a different distribution, but this is based on the falsification of certain exhibits – a matter which has been reported to the police.

They have jointly built a house and home at ---veien 50c in X. They have had their residential address there. Further, C has received child benefit since July 2011, and they applied for and were granted a daycare place in 2012. They also have family in X, as A's brother lives there with his family.

The parties have joint parental responsibility of their son. The father's consent is therefore required for a change of the son's habitual residence. He has not given such consent. It also appears improbable that consent has been given to a change of habitual residence without an agreement regarding access.

Accordingly, there has been no change in C's habitual residence. The move back to Norway is therefore not a wrongful removal, but rather a re-establishment of the son's habitual residence prior to departure from Norway on 22 June 2012.

It is clear from the preparatory works to the Hague Convention and the Child Abduction Act that children must be protected against being withdrawn from their accustomed environment. B's decision not to return to Norway is a breach of these conditions.

A has submitted the following statement of claim:

"**In the appeal case**

1. That the application for return not be granted.

In the case concerning the application for suspensive effect

2. That enforcement of the ruling of Nordmøre District Court of 26 February 2013 in case 13-008511TVA-NOMO be deferred until the appeal has been heard by Frostating Court of Appeal.

In both instances

3. That A be awarded legal costs."

B has primarily submitted:

The father has turned the case "on its head". It is the father who has wrongfully removed the child. C's habitual residence was in Poland prior to the removal, as concluded by the district court. He has also been granted a daycare place there.

There is nothing to prevent the father from having his habitual residence in Norway while the child can have his habitual residence in Poland. The difference between the mother and father on this point is obvious.

The father's overview of the number of days in Norway and Poland is incorrect. The overview submitted by the mother shows an entirely different distribution, and it is disputed that she is guilty of falsifying exhibits. It must therefore be appropriate to conclude that the child has spent an approximately equal number of days in Norway and Poland.

The common theme in the submitted materials is that there has been extensive travel between Poland and Norway, in which the child has participated. In any event, the time spent in the two countries is just one of several factors of significance in the habitual residence assessment.

C is a Polish national, and both parents are also Polish nationals. The grandparents on both sides live in Poland, and the child's mother lives in Poland. C spoke only Polish on a day-to-day basis, with both his mother and his father and during his frequent visits to his family in Poland. He did not attend daycare prior to the relationship breakdown, and was almost exclusively with his mother and father in Norway. The child therefore grew up a Polish cultural "bubble" in X where everything was Polish.

Given that the child was just four years and eight months old when it was wrongfully removed from Poland, the child's life has developed in a Polish social, familiar and cultural setting and tradition. This means that "the center of gravity of the child's life" is in Poland.

For the purposes of section 11(2)(a) of the Child Abduction Act, the child must therefore be deemed to have been habitually resident in Poland immediately prior to the wrongful removal. Poland is therefore the child's habitual residence.

B has submitted the following statement of claim:

> "1. That the appeal and the application for suspensive effect not be granted.
>
> 2. That B/the public authorities be awarded legal costs."

The **court of appeal** would comment:

Section 11 of the Child Abduction Act states that wrongfully removed or retained children shall be returned if, "immediately prior to the removal or retention", a child had its habitual residence in a state that is a signatory to the Hague Convention.

In Norwegian law, the term *bosted* [place of residence] equates to the term "habitual residence" in the Hague Convention; see Ministry of Justice circular G-1991-136. The term habitual residence is not defined in the act. However, it has been concluded that the term has an objective aspect and a subjective aspect. The objective aspect is that the person is in fact staying in Norway. The subjective aspect is that the person in question intends to initiate a permanent stay in Norway. In the event of doubt, the question of habitual residence must be settled on the basis of an overall assessment of various factors. Examples of factors which have been given weight in case law include the duration of the stay, the housing situation, working conditions, schooling, child benefit and registration in the national population register; see Kvisberg: *Internasjonale barnefordelingssaker. Internasjonal barnebortføring* [International child custody cases. International child abduction] (2009), page 115.

Children normally have the same habitual residence as their parents. If the parents live in different countries, the child's habitual residence is with the parent with whom the child lives permanently. Even though Norwegian law does not provide for joint custody of children, there is a natural presumption that children have the same habitual residence as their parents; see Kvisberg, page 117, and the references made there to theory and case law.

The key question in the case is whether the child had his habitual residence with his mother in Poland immediately before he was fetched by his father on 4 December 2012.

As stated above, C was born in Poland on 31 March 2008. After just three months, he accompanied his parents to X, where they moved into a flat on the property which the father had purchased.

Based on the submitted evidence, the court of appeal has concluded that they had the intention of becoming resident in Norway when they travelled there. Several factual circumstances substantiate that this was the parties' intention:

- The father had founded his own construction firm in Norway in 2009.
- The parties jointly planned to build a new house on the property. Building work began in 2010.
- The child was registered as resident in X as of 26 March 2010.
- Child benefit was paid for C from July 2011.
- The parents jointly applied for a daycare place in April 2012.

There is no information before the court of appeal that the parents planned a time-limited or temporary stay in Norway prior to the break-up in June 2012. On the contrary, the factual circumstances mentioned above indicated that the stay was permanent and that they wish to become resident in X.

Both parents have strong family ties to Poland, and they visited Poland several times during the period from arrival in Norway in June 2008 until the breakdown of the relationship in June 2012. However, there is significant disagreement about the duration of the parents' and C's stays in the two countries. The father has prepared an overview showing 1,145 days in Norway and 391 days in Poland during this period, whereas the mother's overview for the same period shows 889 days in Norway and 561 days in Poland. This does not include the stay in Poland before the family came to Norway or the period after the relationship breakdown.

The court of appeal does not find it necessary to discuss the details of the evidential assessment relating to the authenticity of exhibits intended to substantiate individual trips to Poland. The court is content to conclude that the period spent in Norway by C prior to the relationship breakdown was of significant total duration in any event. The court of appeal therefore regards the trips to Poland as shorter or longer visits that did not alter the family's habitual residence. The court of appeal also cannot see that C had two places of habitual residence due to the stays in Poland. In such case, the consequence would be that a removal or retention between these two countries would not be regulated by the Hague Convention; see Kvisberg, page 150.

The court of appeal has therefore concluded that C was habitually resident in Norway when his mother took him to Poland on 22 June 2012. The question is therefore whether the trip to Poland and the stay there altered the child's habitual residence.

As already stated, the parties have joint parental responsibility. This means that both parents must consent to a permanent move of the child to another country, even if it is the country in which the child was originally born. Accordingly, the mother was not able to establish a new habitual residence for her son without the father's consent to this.

The circumstances of the relationship breakdown are somewhat unclear. However, the court of appeal finds that it has not been proven that the father consented to the son's becoming permanently resident in Poland with his mother and not returning to X. The fact that the father did not protest when the mother and child left cannot be given weight unless the lack of protest must be interpreted as consent to a change of habitual residence. However, in the court of appeal's view there are no grounds for drawing such a conclusion.

Further, the stay in Poland after June 2012 was not of such a long duration that it may in itself entail an altered habitual residence.

If the mother took the child to Poland with the aim of keeping him there, this represents a wrongful act on her part that could and should have been responded to with an application for return pursuant to the provisions of the Child Abduction Act. However, it must also be concluded that such conduct does not alter the child's habitual residence.

The father has engaged in self-enforcement in taking the child back to Norway. This is censurable, but does not mean that he falls within section 11 of the Child Abduction Act, due to the child's habitual residence immediately before being fetched.

Through her lawyer, the mother has submitted that the child's family and cultural ties are in Poland rather than Norway. It has therefore been submitted that "the center of gravity" of the child's life is in Poland. The court of appeal cannot see that the connection with the home country in the present case can be decisive with respect to the question of the child's habitual residence. C came to Norway with his parents immediately after his birth.

As previously mentioned, he was due to begin attending a Norwegian daycare centre as of August 2012. Integration in a new place of habitual residence will take time, and cannot mean that the habitual residence requirement is only met once such integration is completed. However, the establishment of a connection is a factor in the assessment of whether return following removal should be refused; see section 12(1) of the Child Abduction Act. However, this is not a topic in the present case.

The court of appeal's conclusion is therefore that the application for return should not be granted.

As stated above, the district court ordered deferred enforcement of its decision regarding return – a decision that was appealed by the mother. Given the result arrived at by the court of appeal, there are no reasons to consider this issue.

Legal costs

A has won the case and must therefore in principle be awarded legal costs from the opposing party; see section 20-2(1) and (2) of the Dispute Act. No claim for legal costs was made before the district court.

The court of appeal finds that weighty reasons make it reasonable to exempt B from liability for costs before the court of appeal; see section 20-2(3) of the Dispute Act. In this assessment, emphasis has been given to the fact that the case concerns a difficult topic and involves somewhat unclear facts relating to matters significant to the question of the child's habitual residence. The unclear factual circumstances have necessitated case preparations and the investment of time over and above what is normal in such cases. In the overall assessment, some weight has also be given to the fact that the father's self-enforcement when fetching the child must have been harrowing for the mother, who therefore had a good reason to have the case reviewed.

Accordingly, each of the parties shall cover its own costs before the court of appeal. The interpretation costs shall be covered by the public authorities.

The ruling is unanimous.

Conclusion:

1. *The application for return is not granted.*
2. *Each of the parties shall cover its own costs before the court of appeal.*