# Frostating Court of Appeal - LF-2013-168054

The case concerns an application from a father for return to Portugal of two children, born in 2000 and 2002, after the mother brought the children to Norway in January 2013; cf. the Child Abduction Act section 11, cf.section 12 and the Hague Convention of 25 October 1980.

A and B have two children together, C, born on 0.0.2000, and D, born on 0.0.2002. They are all Portuguese nationals.

The couple divorced on 30 November 2003 pursuant to a legal decision by the family court in Setúbal, Portugal. It was decided that the children should live with their mother and that their father should have regulated access and pay maintenance. Later, in 2005, 2006 and 2009, agreements were entered into and court decisions were made that changed the access and maintenance arrangements.

A moved to X in Norway on 20 January 2013 and brought the children with her.

In March 2013, B submitted the question of custody and parental responsibility to the family court in Setúbal.

On 10 April 2013, B submitted an application to the Portuguese authorities for return of the children. The Portuguese Ministry of Justice sent the application to the central authority in Norway, the Ministry of Justice and Public Security, which forwarded it to Nordmøre District Court on 3 May 2013.

The district court held an oral hearing on 13 June 2013. Psychologist Katarina Eilertsen had been appointed in advance as the spokesperson for the children, and issued a written statement. Following the court hearing, the district court obtained further documentation and information from the Portuguese authorities. On 29 August 2013, the district court issued a ruling containing the following conclusion:

1. A shall return C, born on 0.0.2000, and D, born on 0.0.2002, to Portugal within three weeks of the pronouncement of this ruling.
2. If the return of both children has not occurred by the deadline, A is ordered – for the space of one year – to pay the Treasury a penalty fine of NOK 500 for every day for which return does not occur.
3. A is ordered to pay NOK 30,000 in legal costs to the public authorities within two weeks of the pronouncement of this ruling.

The district court concluded that the father shared parental responsibility when the mother moved to Norway and that he was in fact exercising it at that time, and concluded that a~~n~~ wrongful removal had occurred within the meaning of section 11(2) of the Child Abduction Act. The district court also concluded that there were no reasons to refuse return under section 12.

A appealed the ruling to Frostating Court of Appeal on 20 September 2013. The appeal relates to the assessment of the evidence, the application of the law and the administrative proceedings. B made opposing submissions in a reply of 2 October 2013.

On 9 October 2013, the district court decided that enforcement should be deferred until the appeal had been decided by the court of appeal. The court of appeal finds no reason to reverse this decision.

Neither of the parties has requested an oral hearing, which the court of appeal does not find necessary; see section 29-15 of the Dispute Act.

A has primarily [submitted]:

There is no joint parental responsibility. The district court has decided the issue without clarification of whether documentation exists that confirms the existence of an agreement or decision on parental responsibility as referred to in the 2003 in-court settlement.

B was not exercising parental responsibility at the time the children left the country. He had no contact with the children, and had stated that he was "giving up contact" with them.

As regards the exception provisions in section 12(b) and (c) of the Child Abduction Act, the district court has not considered the factors that must be given weight pursuant to case law. Further, a procedural error has been committed that must be deemed to have been significant: the fact that the court gave the spokesperson a mandate that falls outside the topics that were to be assessed.

As regards the condition in section 12(c), the district court has given insufficient consideration to whether the children objects to being returned. It is not clear how the children's age has been assessed. The maturity of the children has not been evaluated by the spokesperson, and the district court's assessment has been based solely on the deposition of the parties. There are no grounds for concluding that the children's view on return is the result of improper influence. The court has not considered the strength of the children's opinion and what risk setting their opinion aside entails.

Following the ruling, the children expressed great despair at not having been heard, and have reacted strongly. This has been documented by the school and the crisis centre.

As regards the condition in section 12(b), the district court has incorrectly concluded that it has not been substantiated that the children will suffer harm in the event of return. The case has not been sufficiently illuminated because the spokesperson's mandate was framed such that C did not have the opportunity to comment on sexual assaults by his father. The children have long been unwilling to have contact with their father, and are afraid of him. In the event of return to Portugal, the children will be separated from their mother, who has been their primary caregiver for 10 years and with whom they have a strong connection. Irrespective of whether the mother returns to Portugal, return will entail grave risk. The history of the matter shows that the conflict between the parents will continue, and that the children will again be subject to substantial strains.

The conditions in section 12(b) and (c) are met, and an overall assessment of the children's situation indicates that return should be refused.

The legal costs decision should have been made pursuant to chapter 20 of the Dispute Act. If B succeeds, the exception provision in section 20-2(3)(a) and (c) must apply.

If a penalty fine is to be imposed, it must be significantly smaller.

The following statement of claim has been submitted:

1. That the application for return not be granted.
2. That A/the public authorities be awarded legal costs before both the district court and the court of appeal.

B has primarily submitted:

The district court has correctly concluded that the parents share parental responsibility. Reference is made to the amendment of the Portuguese children act in 2008 and the letter from the Portuguese Ministry of Justice of 18 April 2013. There is no agreement or decision that grants parental responsibility to just one of the parents.

B has exercised parental responsibility when he has had opportunity to do so, including by instituting return proceedings.

The district court has interpreted section 12(b) correctly. The requirement must be that return would be clearly unfavourable to the child and that this has been established on a relatively clear balance of probabilities. The district court has correctly concluded that the children will not suffer harm in the event of return. A further consideration is that the district court has not decided anything other than that the mother has a duty to return the children to Portugal. Where they should live and what access arrangements should apply will be determined by the Portuguese family court.

The district court has also interpreted section 12(c) correctly. It has taken the view that the children have clearly stated to the spokesperson that they do not wish to join their father, and the reasons for this, and has concluded that these circumstances cannot prevent return. In assessing the children's view, the district court has given weight to their age and the fact that they have lived with their mother for the last 10 years.

No error has been made in the drafting of the spokesperson's mandate. In any event, any errors cannot be deemed to have affected the district court's assessment.

The new documents which have been submitted contain no material new information.

The legal costs decision of the district court is correct. Chapter 20 of the Dispute Act does not apply.

Consideration has been given to A's financial situation in setting the size of the penalty fine.

The following statement of claim has been submitted:

1. That the appeal be rejected.
2. That B and the public authorities be awarded legal costs before the district court and the court of appeal.

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

The general rule is that children who are wrongfully removed shall be returned to the state of their habitual residence forthwith. This follows from section 11(1) of the Child Abduction Act and Article 12 of the Hague Convention, cf. Article 3. An abduction is wrongful when it is in breach of rights of custody under the law of the state of habitual residence; see section 11(2)(a) of the Child Abduction Act. A further requirement is that custody was in fact exercised or would have been exercised; see paragraph (b).

The Child Abduction Act does not define the term "custody". However, there is no doubt that the Child Abduction Act applies a different, and narrower, definition than the Children Act; see Anne Marie Selvaag, *Barnebortføringssaker for domstolen* [Child abduction cases before the courts], page 29.

Pursuant to Article 5(a) of the Hague Convention, "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". In convention case law, emphasis is often given to the right to determine the child's place of residence. If one of the parents has the right to veto a move of the child abroad, this is regarded as "rights of custody"; see Kvisberg, *Internasjonale barnefordelingssaker. Internasjonal barnebortføring* [International child custody cases, International child abduction], pages 367–368.

The court of appeal must therefore decide whether B had a share in custody immediately before A moved to Norway with the children. The question of whether the move was contrary to B's rights of custody must be decided primarily on the basis of the existing agreements and court decisions.

Before the court of appeal moves on to the individual assessment, it is noted that the Portuguese authorities have not issued a formal declaration that the abduction was wrongful; see section 15(2) of the Child Abduction Act. However, the letter from the Portuguese Ministry of Justice of 18 April 2013 appears to state that the removal is contrary to Article 1906 of the "Civil Code". In any event, the court of appeal is required to conduct an independent assessment of whether or not the abduction was legitimate.

It is clear that the parties entered into an agreement concerning the children in 2003.

Based on what appears to be a settlement, the parties were divorced on 13 November 2003 by a court decision of the family court in Setúbal. The English translation of this court document states, among other things:

> **REGULATION OF THE PARENTAL RESPONSIBILITY**
>
> The parental responsibility regarding the children D and C has already been regulated within the files on the parental responsibility registered under procedure no. 415/03.2TMSTB of the present court section.

Following the oral hearing, the district court deemed it necessary to obtain further documentation from the Portuguese authorities to shed light on the question of whether the parties have a share in custody or whether A has sole custody. Accordingly, the district court requested, in a letter of 14 June 2013, the decision in *procedure no*. 415/03.2TMSTB. No decision has been received. Nor have the parties submitted an agreement concerning what they agreed on in 2003.

It appears undisputed that, in 2003, the parties agreed that A should have custody of the children and that B should have access and pay maintenance. This is expressed in the decision of 13 November 2003. It must be assumed that if the parties had agreed anything specifically on parental responsibility – i.e. that B should not have the right to decide where the children should live, including being unable to refuse permission for them to move abroad – this would have been recorded in writing. It must be assumed that A would in such case have submitted such an agreement to the district court, or in connection with the appeal. The conclusion that no such agreement exists is supported by the fact that the Portuguese authorities have not responded to the district court's clear request in the letter of 14 June 2013.

Following an overall assessment of the evidence, the court of appeal has concluded that no agreement or legal decision exists that grants parental responsibility to A alone.

Moreover, the court of appeal agrees with the district court that decisive weight cannot be given to the birth certificates of the children, the Norwegian translations of which state that "the mother has been given responsibility for the minor". It appears most likely that this relates to custody.

Further, the court of appeal finds that it cannot be decisive in the assessment that A apparently had passports issued for the children without B's involvement. The court of appeal has not received any further information on the process involved in having a passport issued or as to whether it is an unconditional requirement in Portugal that both parents must contribute to this when they have joint parental responsibility.

The court of appeal understands the current state of the law in Portugal to be that Article 1906 of the "Civil Code" of 2008 provides that divorced parents have joint parental responsibility unless an agreement or court decision exists that specifies that one of the parents should have sole parental responsibility. The act cannot be interpreted to mean that the parent with custody has sole parental responsibility.

The court of appeal has therefore concluded that B had shared parental responsibility when A brought the children to Norway.

As regards the requirement for actual exercise of parental responsibility, the convention assumes that the party with parental responsibility also actually exercise it; see Selvaag, op. cit. 31. It is therefore up to the party that has taken the children abroad to prove that the rights have not been exercised. Since, as stated, parental responsibility is interpreted such that it is sufficient to have the right to determine the child's place of residence, parental responsibility is exercised through the submission of an application for return. In this connection, Selvaag states that the condition that parental responsibility must in fact have been exercised is of little practical significance. It is therefore irrelevant whether access was exercised in recent years and that maintenance was allegedly not paid.

By reference to the statement of 18 April 2013 of the Portuguese Ministry of Justice, the court of appeal finds that moving the children to Norway contravenes Portuguese law and thus B's parental responsibility.

Like the district court, the court of appeal has therefore concluded that a wrongful removal has occurred pursuant to section 11 of the Child Abduction Act, and that the conditions for return are met thus far.

Section 12 of the Child Abduction Act provides that return may be refused if circumstances exist as described in paragraphs (a)–(d). Selvaag op. cit., page 33, states that these exception provisions are interpreted very narrowly, and that the courts have a discretionary power to return a child even if the conditions in the provision are met. Further, it is the abducting parent who bears the burden of proving that one of the exceptions is met.

Pursuant to section 12(b), return may be refused if there is a grave risk that the child will suffer physical or psychological harm or that the child will otherwise be put in an intolerable situation. In Supreme Court Reports (Rt.) 1993-881, it was stated that return may not be refused on the basis of a general assessment of what would be in the best interests of the child, and that the requirement must be that return would be clearly unfavourable to the child and that this has been established on a relatively clear balance of probabilities. The court of appeal will discuss the human rights aspects of this below, since stronger emphasis has been given to the interests of the child in recent years.

The district court found that it was not made probable that B had committed sexual assaults on his now adult son from a previous marriage, and referred to the son's testimony. The district court concluded that there was no risk that the children might suffer harm if they were returned.

Based on the statement of the spokesperson, the court of appeal finds it difficult to see that there are grounds for asserting that C did not have opportunity to give an account of assaults by his father, including sexual assaults, even though the spokesperson did not ask exploratory questions. According to the record of the crisis centre in X dated 5 June 2013, which has been submitted in connection with the appeal, C stated that his father touched his penis when he was three years old in connection with a nappy change. The court of appeal cannot see that this information can be interpreted as a statement that sexual assaults have occurred. There are therefore no grounds for concluding that the children are at risk of being sexually assaulted if they are with their father in the future.

However, the court of appeal finds reason to emphasise that the decision to be made in the present case solely concerns whether the children should be returned to Portugal, not which of the parents the children should live

with permanently and whether there should be access. These questions must be settled by the family court in Setúbal in the case instituted by B, which has been suspended pending a decision in the child abduction case.

The court of appeal assumes that the mother will travel back to Portugal if it is decided that a return should occur, thereby re-establishing the previous state of affairs. Even though information indicates that the children did not have a good relationship with their father and that they do not want any contact with him, the court of appeal therefore finds that return will not entail a grave risk of physical and psychological harm.

Moreover, the district court concluded that, under section 12(c), the children's view does not by itself mean that return should be refused. This provision permits account to be taken of the fact that the child objects to being returned and that it has reached an age and degree of maturity that make it natural to take the child's views into account.

The court of appeal finds no reason to doubt that the children, who are currently 11 and 13 years old and must be deemed to have a normal level of maturity, object to being returned. This point of view must primarily be perceived as a desire to live with their mother, and not as an equally intense resistance against having to move back to Portugal. In this regard, it is noted that the children have lived with their mother for the past 10 years and have had limited access with their father in recent years.

The court of appeal also agrees with the district court on this point, and can adopt the conclusion that the exception provisions in section 12(b) and (c) do not provide grounds for refusing return.

The exception provisions in section 12(a) of the Child Abduction Act are inapplicable because the conditions the section imposes for making an exception from the duty to return are not met. However, the exception in section 12(d) [now (e)], which applies in cases where return would be inconsistent with "fundamental principles applicable in Norway relating to the protection of human rights" must be discussed. The relevant provisions are Article 8 of the European Convention on Human Rights (ECHR), which establishes the right to respect for family life, and Article 3(1) of the UN Convention on the Rights of the Child (UNCRC), which establishes that the best interests of the child shall be a "primary consideration" in cases affecting the interests of the child. Both these conventions have been ratified by Norway and been incorporated into Norwegian law, and take precedence in the event of conflict with other Norwegian legislation; see sections 2 and 3 of the Human Rights Act. This means that if return pursuant to the provisions of the Child Abduction Act were to be contrary to Article 8 ECHR or Article 3(1) UNCRC, the latter provisions must be given precedence.

However, the question of legal inconsistency must be evaluated individually. Under both the ECHR and UNCRC, it must be significant that C and D came to Norway as recently as January 2013. There are no grounds for concluding that they have settled in X in such a manner that it would be particularly disadvantageous to them to move back to Portugal along with their mother. In this context, it is also significant that the children's resistance to return must be interpreted more as an expression of the need for proximity to their mother than to Norway. On the other hand, there is reason to assume that contact with the father, which can obviously be best ensured if the family lives in Portugal, will be best for the children – at least from a somewhat longer-term perspective. Nor are there grounds for concluding that the mother's decision to travel to Norway with the children was necessary to protect herself or the boys. In all of these respects, the present case differs from the case Neulinger and Shuruk versus Switzerland, in which the ECtHR, in a grand chamber judgment of 6 July 2010, concluded that Article 8 ECHR would be infringed if the mother were to be required to return to Israel with the child pursuant to the child abduction convention.

The court of appeal has therefore concluded that the return of the children to Portugal, which can be implemented by ordering the mother to return the children to their home country, will be consistent with Article 8 ECHR and Article 3(1) UNCRC, and thus also with section 12(d)[now (e)] of the Child Abduction Act.

The district court's decision relating to the penalty fine has not been challenged other than through A's submission that the sum of NOK 500 per day is too high.

Following an assessment of A's financial situation and the necessity of ensuring that the penalty fine is an adequate enforcement mechanism, the court of appeal considers that the set sum is appropriate.

The appeal is therefore rejected. As a matter of form, it is emphasised that the deadline for return is three weeks from the pronouncement of the court of appeal's ruling.

*Legal costs*

Claims for legal costs in connection with an appellate court's consideration of a child abduction case must be dealt with pursuant to chapter 20 of the Dispute Act; see also section 18(1), third sentence, of the Child Abduction Act and section 3-3, first sentence, of the Enforcement Act, see further Falkanger et al. *Kommentarutgave til tvangsfullbyrdelsesloven* [The Enforcement Act Commentary Edition], page 153.

Given the result arrived at by the court of appeal, B has won the case, see section 20-2(1) of the Dispute Act, and is entitled to full reimbursement of his legal costs from the opposing party. The court of appeal does not find that there are weighty reasons that make it reasonable to exempt A from all or some of her compensatory liability; see the third paragraph.

B's counsel, Advocate Dragsnes, has not submitted a costs schedule. The court of appeal sees no need to obtain such a schedule. B has been granted free legal representation before the district court. This decision also applies to the court of appeal; see section 22, third paragraph, of the Legal Aid Act. Advocate Dragsnes's work has been limited to a review of the appeal and the preparation of a reply. On a discretionary basis, the legal costs awarded to the public authorities are set at NOK 7,000 including value added tax.

The court of appeal finds no need to consider whether the district court should also have decided the question of costs pursuant to chapter 20 of the Dispute Act. In any event, the court of appeal does not find that weighty reasons for exempting A from compensatory liability applied before the district court.

The ruling is unanimous.

*Conclusion*

1. *The appeal is rejected.*
2. *A is ordered to pay legal costs before the court of appeal of NOK 7,000 – seven thousand kroner – to the public authorities within two – 2 – weeks of the pronouncement of this ruling.*