Decision

DISTRICT COURT OF THE HAGUE

Full Court

Date of Decision: 22 February 2018

International child abduction

Decision on the application filed on 2 January 2018 by:

[applicant],
the father,
residing in Australia,
legal counsel: M. Groenleer, LL.M, practising in The Hague.

The respondents are identified as:

[respondent],
the mother,
residing in [city], Germany,
currently residing in [city],
legal counsel: previously T.M. Coppes, LL.M,
currently E. J. Kim-Meijer, LL.M, practising in The Hague;

The Foundation Salvation Army, Child Protection and Juvenile Rehabilitation,
(hereinafter referred to as: Salvation Army),
entrusted with the provisional custody of the minor.

The course of the proceedings
In its decision of 16 January 2018 this Court entrusted the Salvation Army, a foundation within the meaning of Article 1(1) of the Dutch Youth Care Act, with the provisional custody of the minor:
- [name], born in [city], Germany, on [date of birth],
from 16 January 2018 until the time that a possible return order is enforced, and conferred on the Salvation Army the power to exercise all rights over the person and assets of [the minor], on the condition that [the minor] would not be placed into care except with the prior consent of the Youth Court Judge. Any other decision on the **return application** was stayed.

The Court has taken note again of the file documents, currently including:
- the letter of 31 January 2018 and appendices from the mother;
- the letter of 6 February 2018 and appendices from the father, containing an amended and additional application;
- the letter of 7 February 2018 and appendices 23 to 28 from the father;
- the statement of defence of 7 February 2018 and additional statement of defence and appendices from the mother.

On 8 February 2018 the hearing was resumed before the full court. Those present at the hearing were: the parties, assisted by their respective legal counsel. Also present were Ms [name], Dutch into English interpreter for the father, and Mr [name], Dutch into English interpreter for the mother. Also present was Ms [name], representing the Salvation Army. The legal counsel of both parties submitted written pleading notes.

Application and Defence
In his amended application, filed by letter of 6 February 2018, the father now requests the Court:

-and to the extent possible by an immediately enforceable judgment-

I. to order the immediate return of his minor daughter [the minor](Australia), or on a date to be determined by the Court, thereby ordering the mother to return [the minor] to (Australia), or, if the mother fails to return [the minor] to (Australia) to hand [the minor] over to the father together with her Australian and German passports, to enable the father to return [the minor] to (Australia) himself;

II. to order the mother to pay to the father the costs referred to in Article 13(5) of the Dutch International Child Abduction Implementation Act (hereinafter referred to as: the Implementation Act) and to order that the costs of [the minor]'s return be borne by the mother.

The mother put up a defence against the father's application, which will be discussed below, and requested that the father be ordered to pay to the mother the amount of €9,583.80 in relation to the costs incurred by her.

Assessment
The Court upholds all its findings and rulings in its earlier decision, to the extent that these matters are not considered and decided otherwise in this decision.

The father's application is based upon the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (hereinafter referred to as: the Convention). Both the Netherlands and Australia are parties to this Convention. The Convention -to the extent relevant here- aims to secure the prompt return of children wrongfully removed to or retained in a Contracting State. In doing so, the Convention aims to restore, as quickly as possible, the *status quo ante* existing prior to a child's abduction or retention. It is thought that the harmful effects for the child may be limited by a quick restoration of the *status quo ante* existing prior to a child's abduction or retention.

Jurisdiction
The mother has argued that [the minor]'s habitual residence is in Germany and therefore the Dutch court lacks jurisdiction to hear the return application.

The Court considers that pursuant to Article 12(1) of the Convention, the prompt return of a child shall be ordered by the judicial authority of the Contracting State "where the child is". The Court establishes that [the minor]'s actual place of residence at the time the application was filed, and shortly before that, was in the Netherlands and thus the Court considers that it has jurisdiction to hear the return application.

Wrongful removal or retention within the meaning of Article 3 of the Convention

The removal or the retention of a child is considered to be wrongful within the meaning of the Convention where it is in breach of rights of custody under the law of the State in which the child was habitually resident immediately before the removal or retention and at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention (Article 3 of the Convention).

Habitual residence
The dispute is about where [the minor] has her habitual residence. The Court considers that the concept of 'habitual residence' is a factual one and is therefore to be determined by the facts and circumstances of the particular case. Put briefly, it is the place with which the child had the most ties immediately prior to his/her removal or retention. The factors that play a role in determining the child's habitual residence, in addition to the child's physical presence in a Member State, are in particular the circumstances from which it can be inferred that this presence is not temporary or accidental and that the child's residence indicates a certain degree of integration into a social and family environment. Due consideration must, among other things, be given to the duration, regularity, circumstances and reasons for residing in the territory of a Member State, the child's nationality, where and under what circumstances the child goes to school, the child's language skills and his/her family and social ties in that State. In addition, the intention of the parents to settle with the child in another State, and measures taken in this respect, may indicate a change to the habitual residence. The child's age and social and family environment are of major importance in determining the habitual residence too. Usually, the environment of a young child is in fact the family environment and, in this respect, the person(s) with whom the child lives and who is/are actually exercising the custody rights and taking care of the child are determining factors. This is even more so when the child involved is an infant. An infant by definition forms part of the social and family environment of the persons on whom he/she is dependent.

In assessing the application, the Court notes first and foremost that [the minor] was born in Hamburg, Germany, on 5 May 2015, and that she has been acknowledged by the father. The Court establishes that since her birth [the minor] had lived in Germany with her mother, in any case until they joined the father in Australia on 25 November 2015. In the subsequent period [the minor] lived with both of her parents in Australia, that is to say, she resided there, except for some short intervals when [the minor] and her parents went abroad for family visits or a family holiday. The mother's family lives in Guatemala, Germany and the Netherlands. On 13 November 2017 the mother and [the minor] left Australia. On 26 November 2017 the mother informed the father that she would not be returning to Australia. The mother and [the minor] have (mainly) resided in the Netherlands since then.

In view of the above, it has been established that from birth [the minor] had her habitual residence in Germany, where she lived with her mother. The parties' dispute pertains to whether [the minor]'s habitual residence had changed to Australia, prior to her retention in the Netherlands on 27 November 2017.

The father argued that since leaving Germany, [the minor] has had her habitual residence in Australia. Except for two family holidays to Bali and a trip to visit family in Guatemala and the Netherlands in 2016, [the minor] has always lived in Australia since 25 November 2015. The family led a regular life in Australia and the parents cared for [the minor] together. According to the father, it should be noted that he has lived in Australia since 1991 and runs

his own enterprise there. The mother recently had her medical qualifications legalised so that she could take up her profession as an ophthalmologist in Australia. There is no indication whatsoever that the intention was for [the minor] to grow up somewhere other than in Australia. Taking all this into consideration, her habitual residence changed to Australia. The fact that the mother had always kept her German apartment, registrations and insurance, does not, according to the father, alter the fact that she and [the minor] actually resided in Australia. [The minor] only lived in Germany for the first seven months of her life and it follows from the parties' travel schedule, drawn up by the father, that [the minor] has not been to Germany since, except for a vaccination on 1 July 2016 and a one-week holiday from 7 to 14 July 2016, during which, incidentally, she stayed at her aunt's. At the hearing the father also stated that the parties had applied for a residence permit for the mother in as early as 2015. However, due to the hectic nature of everyday life, this was not given priority.

The mother argued that [the minor]'s habitual residence has always been in Germany and that this was also the case after 25 November 2015. According to German law, the mother has sole custody of [the minor], therefore her intention, rather than that of the parties, is the decisive factor in determining [the minor]'s habitual residence. The parties had a turbulent relationship and the mother only went to Australia with [the minor] to find out whether her relationship with the father could still be saved. Incidentally, [the minor] did not reside in Australia for an uninterrupted period of time, but only from 25 November 2015 to 9 May 2016 and from 10 August 2016 to 13 September 2017. It was never the mother's intention to permanently settle with [the minor] in Australia. This is also clear from the fact that she resided in Australia on a tourist visa and kept her apartment in Hamburg, where she and [the minor] are still registered, and from the fact that they both still have health insurance in Germany. During her stay in Australia, the mother and the father underwent relationship counselling several times to improve their relationship, but this proved unsuccesful. In September 2017 the mother concluded that the relationship was over and decided to return to Germany with [the minor] after the family visit.

The Court considers as follows.

The father has submitted the parties' travel schedule, which can be regarded as conclusive, since it has not been disputed by the mother and since she in fact relies on this same schedule, as follows from the advice of Voorts juridische diensten (Voorts Legal Services) of 8 February 2018 (p.9) submitted by the mother. It follows from this travel schedule that [the minor] resided in Australia for 17 months, between 25 November 2015 and 13 September 2017 (approximately 22 months). Her stay in Australia was interrupted by family holidays to Indonesia (from 29 April 2016 to 9 May 2016 and from 24 June 2017 to 8 July 2017) and family visits by the mother and [the minor] to Guatemala (from 9 May 2016 to 26 June 2016), and the Netherlands and Germany (from 27 June 2016 to 10 August 2016), which was also the plan on 13 September 2017 when they left Australia.

The Court finds that the documents submitted and the information provided at the hearing establish that the parties enjoyed a regular family life with [the minor] in Australia. For instance, [the minor] went to a child day care centre two mornings per week and her father worked from home as an entrepreneur, meaning that both parents took joint care of [the minor] on the days she did not go to the day care centre. [the minor] had friends at the day care centre and the family also had contact with the father's relatives living nearby. In

addition, the Court notes that the mother had her medical qualifications legalised during her stay in Guatemala in September/October 2017 so that she could take up her profession as an ophthalmologist in Australia.
The mother has not disputed the fact that she stayed with [the minor] at the father's for a longer period of time and that they cohabited there, but she argued that it was never her intention to permanently settle in Australia with [the minor].

The Court states first and foremost that, according to German law, the mother had sole custody of [the minor] and that from that perspective her intention is the decisive factor in determining [the minor]'s habitual residence. However, the Court is of the opinion that the mother has not adequately objectified her intention to stay only temporarily in Australia. In itself it cannot be ruled out, and it is justifiable, that the mother took a cautious attitude towards her relationship with the father when she set off for Australia and that to be on the safe side she kept her apartment and registrations in Germany. However, there is no indication at all that the mother tried to maintain actual, societal, economic and social and/or family ties with Germany during her stay in Australia. Since the moment they set off to Australia in 2015 until the time of [the minor]'s retention, the mother and [the minor] had only stayed with family in Germany for no more than one week in 2016. It has also transpired that the apartment in Hamburg, which the mother has only been renting since November 2015, is 59m2 and therefore only offers limited space for a parent and a child to live in. This too, cannot lead to the conclusion that the habitual residence of the mother and [the minor] has remained in Germany. Be that as it may, having regard to the duration of their residency in Australia (17 months), which required the mother to reapply for a new visa and presumably made her contemplate her relationship with the father, as well as how she shaped their family life with the father in Australia, the Court is of the opinion that it must be assumed that [the minor] and her mother had their habitual residence in Australia prior to their departure in September 2017. The fact that the mother and [the minor] stayed abroad for a longer period of time in order to visit family, makes no difference in this respect. The same goes for the fact that, according to the mother, she and the father were experiencing relationship problems. The fact that, according to the mother, the parties had undergone relationship counselling on more than one occasion in order to improve their relationship, also indicates that it was the mother's intention to continue living as a family with the father. Moreover, since the mother obtained a new tourist visa on 29 June 2017, valid for 12 months, the Court is of the opinion that it is all the more likely that it was her intention to return to Australia with [the minor] after the family visit.

In view of the duration of the residency in Australia and the parents' behaviour, the Court is of the opinion that the emphasis of [the minor]'s actual, social and family life, and thus her habitual residence, changed from Germany to Australia. Consequently, the matter of who has custody of [the minor] is governed by Australian law. It is not in dispute between the parties that according to Australian law the father has joint custody rights of [the minor] and -as is clear from the foregoing- that he actually exercised those custody rights prior to the retention, which therefore means that the mother needed his prior consent to change [the minor]'s habitual residence. It has neither been argued nor established that the father gave his prior consent for [the minor]'s relocation, nor that he acquiesced in her retention afterwards. Taking all this into consideration, the Court finds that [the minor]'s retention in the Netherlands was in violation of the father's custody rights according to Australian law and has to be considered as wrongful within the meaning of Article 3 of the Convention.

Prompt return within the meaning of Article 12 of the Convention
Pursuant to Article 12(1) of the Convention, the prompt return of a child shall be ordered when a period of less than one year has elapsed from the date of the wrongful removal or retention and the date of filing the return application with the Court.

Since less than one year has elapsed since the date of [the minor]'s removal to the Netherlands and the date of filing the return application, the Court need not assess whether [the minor] is settled in the Netherlands and, in principle, her prompt return shall be ordered, unless any of the grounds for refusal as referred to in Article 13 of the Convention apply.

Ground for refusal pursuant to Article 13(1)(b) of the Convention
The mother argued that the ground for refusal referred to in Article 13(1)(b) of the Convention applies. The Court considers as follows.

Pursuant to Article 13(1)(b) of the Convention, the Court of the requested State is not bound to order the return of the child if the person who opposes the child's return establishes that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The objective and purport of the Convention mean that the ground for refusal must be interpreted narrowly.

The mother claims that during her relationship with the father she was regularly exposed to domestic violence in [the minor]'s presence. According to the mother, if [the minor] were to return to Australia this would place her in an intolerable situation as referred to in Article 13(1)(b) of the Convention pursuant to which the return must be denied.

The father explicitly denied the mother's allegations of domestic violence, stating reasons. The mother failed to adequately substantiate her claims to the contrary. The photographs submitted by the mother cannot serve as evidence in this respect, since it is not clear when they were taken and since the cause of the injuries they show cannot be ascertained. The witness statement submitted by the mother, of a neighbour who heard things but did not see them, is insufficient in this respect. Therefore, the Court is of the opinion that the domestic violence alleged by the mother has not been established. The Court has found no other indications that [the minor]'s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation. Therefore, the mother's invocation of this ground for refusal fails.

As an *obiter dictum* the Court considers that, even had the domestic violence as alleged by the mother been established, this in itself would not be sufficient to conclude that [the minor]'s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation. In general, the Court is cautious not to play down the seriousness of domestic violence and its consequences for both the parents and children involved. However, even if the domestic violence alleged by the mother did take place, it does not follow from this that [the minor]'s possible return to Australia would put her at risk of being in a situation as referred to in Article 13(1)(b) of the Convention. In assessing whether [the minor]'s return would place him/her in an intolerable situation as referred to in Article 13(1)(b) of the Convention, all circumstances must be duly taken into consideration, including whether child protection measures or other adequate arrangements can be made to

ensure that the consequences of domestic violence do not pose a risk to the minor (or no longer pose a risk). In this case -apart from the alleged domestic violence of the father against the mother- no additional facts or circumstances have been raised that would result in the situation referred to above. It has neither been argued nor become evident that there are facts and circumstances that make the consequences of the alleged domestic violence unavoidable upon the mother's and/or [the minor]'s return to Australia. Nor has it been argued or become evident that there is no alternative but to keep [the minor] from returning to Australia in order to avoid the alleged risk of domestic violence. The Court notes that -as was also clear from the mother's contentions and exhibits- Australia has institutions and facilities available for protecting victims of domestic violence. It is also possible to take legal measures to avoid or combat the risk of domestic violence there. It has not been established that the Australian institutions were unable to provide adequate help to the mother and [the minor]; indeed, the file documents show that the mother did not pursue the requests and measures initially taken.

Finally, the Court notes that the non-applicability of Article 11(4) of the Brussels II (bis) Regulation has no bearing on the foregoing.

Conclusion
Since the ground for refusal referred to in Article 13(1)(b) does not apply and since it did not become evident, either, that one of the other grounds for refusal referred to in Article 13 of the Convention applies - the mother did not invoke these either- and since a period of less than one year has elapsed from the date of [the minor]'s wrongful retention and the filing of the application, the immediate return of [the minor] shall be ordered pursuant to Article 12(1) of the Convention.

The father has requested this Court to order the immediate return of [the minor][the minor] to Australia, and more specifically to the parties' place of residence, [ ]. Given that the mother has not put up a defence against the return to this particular place, the Court will order [the minor]'s return to [ ], Australia.

Immediately enforceable Decision
Pursuant to Article 13(5) of the Implementation Act the enforcement of the Court Decision will be suspended once an appeal is lodged against it, unless the Court decides otherwise in the child's best interest, either on request or on its own initiative. The Court considers it desirable for [the minor] to be able to await a decision in a possible appeal in the Netherlands, and shall therefore deny the father's request to declare the decision immediately enforceable. The Court shall order the return on 12 March 2018 at the latest, being the third day after the expiry of the appeal period against this decision.

Costs
The father has requested that the mother be ordered to pay to the father the costs as referred to in Article 13(5) of the Implementation Act, as well as the costs of [the minor]'s return.

Pursuant to Article 26(4) of the Convention and Article 13(5) of the Implementation Act the mother can be ordered to pay the necessary expenses incurred by the father in relation to the abduction and return.
The Court's registration system shows that the father has paid a court registry fee of €291. Any other possible expenses incurred by the father in relation to the return have neither been

specified nor substantiated. Given that the father's application for [the minor]'s return will be granted, the Court shall order the mother to pay to the father the amount of €291.
The father has also requested an order that the cost of [the minor]'s return be borne by the mother. Pursuant to Article 26(4) of the Convention and Article 13(5) of the Implementation Act, this request will be granted.
The Court will refuse the mother's request that the father be ordered to pay the costs of these proceedings, as she is the party judged to be in the wrong.

The foregoing leads to the following decision.

Decision
The Court:

orders the return of the minor:
-[name], born in [city], Germany, on [date of birth],
to [city], Australia, **on 12 March 2018 at the latest**, whereby the mother is to return [the minor] to [city], Australia, and orders that if the mother fails to return [the minor] to [city], Australia, the mother shall hand over [the minor] and the necessary travel documents to the father on 12 March 2018 at the latest, so that the father can himself return [the minor] to [city], Australia;

orders the mother to pay to the father the costs incurred by him in relation to the abduction and return, in the amount of €291 (in words: two hundred and ninety-one euro), and orders that the cost of [the minor]'s return be borne by the mother;

denies all other or further requests.

This decision was issued by A.C. Olland, LL.M, M.P. Verloop, LL.M and I. Zetstra, Judges, who are also Youth Court Judges, assisted by K. Willems, LL.M, court clerk, and pronounced in public on 22 February 2018.

An appeal may be lodged against this Decision, to the extent that it is final, within two weeks after the date of the Decision (Article 13(7) Implementation Act) by submitting a notice of appeal to the Registrar of the Court of Appeal of The Hague.If an appeal is lodged, the hearing before the Court of Appeal will, in principle, take place in the third or fourth week after this Decision.