

# ECLI:NL:GHDHA:2019:758

Judicial Body	Court of Appeal of The Hague
Date of Decision	3 April 2019
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Case number	200.254.667/01
Formal connections	First instance: ECLI:NL:RBDHA:2019:988 Interlocutory Decision: ECLI:NL:GHDHA:2019:867
Field of Law	Law of Persons and Family Law
Specifics	Appeal Application procedure
Content	Application for return to Spain based upon the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. Is it possible for a child to have his or her habitual residence in multiple states at one time? The Court of Appeal seeks consistency with case law from other Member States and abandons its own case law (Court of Appeal of The Hague, 27 July 2016, ECLI:NL:GHDHA:2016:2502).
References	Rechtspraak.nl

## Decision

### Court of Appeal of The Hague

Civil Law Division

Decision: 3 April 2019

Case number: 200.254.667/01

Application number District Court: FA RK 18-8448

Case number District Court: C/09/563449

[appellant], residing in [father's place of residence], Spain,  
applicant, also respondent in the procedural motion,  
hereinafter referred to as: the father,  
legal counsel J.A.M. Schoenmakers, LL.M, practising in  
Breda,

versus

[respondent], residing at a secret address in the Netherlands,  
respondent, also appellant in the procedural motion, hereinafter  
referred to as: the mother,  
legal counsel: M. Groenleer, LL.M, practising in The Hague.

Pursuant to Article 810 of the Dutch Code of Civil Procedure, the Child Protection Board of the Haaglanden region, location The Hague, hereinafter referred to as: the board, was consulted in these proceedings.

### **THE COURSE OF THE PROCEEDINGS ON APPEAL**

On 15 February 2019, the father lodged an appeal against the decision of the Children's Court judge of the District Court of The Hague of 4 February 2019.

The mother submitted a statement of defence including a procedural motion on 6 March 2019.

The father submitted a statement of defence against the procedural motion on 15 March 2019.

The Court of Appeal also received the following documents:

on the part of the father:

- on 1 March 2019, a file note of that same date and appendices;
- on 15 March 2019, two file notes of that same date and an appendix, namely a letter of the same date and appendices;

on the part of the mother:

- on 27 February 2019, a letter and appendix, namely a file note of 26 February 2019 and appendices;
- on 15 March 2019, a facsimile and a file note, both of the same date, and appendices.

The court hearing took place on 18 March 2019. Those present at the hearing were:

- the father, assisted by his legal counsel;

- the mother, assisted by her legal counsel;
- [representative of the board], on behalf of the board.

Both parties' legal counsel submitted written pleading notes at the hearing.

## **THE COURSE OF THE PROCEEDINGS AT FIRST INSTANCE AND THE ESTABLISHED FACTS**

- For the course of the proceedings and decision at first instance, the Court of Appeal refers to the contested District Court decision.

The District Court decision denied the father's application for the return of [minor 1] and [minor 2], both born in [place of birth], Spain, in 2018 (hereinafter referred to as: the minors), to [father's place of residence], Spain. The costs of the proceedings were also compensated such that each party bore its own costs.

The Court of Appeal will take as its starting point the facts established by the District Court, in so far as they have not been contested on appeal.

The following facts are established:

- the parties got married to each other in [place 1] in 2016;
- they are the parents of the minors and have joint custody of the minors;
- on [date] 2018 the mother left Spain with the minors and travelled to the Netherlands, and has since resided with them in the Netherlands;
- the father, the mother and the minors have Dutch nationality;
- the father did not contact the Dutch Central Authority.

## **ASSESSMENT ON APPEAL**

1. The parties' dispute is about the father's application for the return of the minors to [father's place of residence], Spain.
2. The father requests the Court of Appeal:  
to set aside the contested decision and to order the return of the minors to [father's place of residence], Spain, and to order the mother to pay the costs he incurred in both sets of proceedings (i.e. at first instance and on appeal).
3. The mother put up a defence and requests the Court of Appeal:  
to deny the father's applications and to uphold the contested decision, by denying the father's initiating applications, principally including the amended grounds, alternatively excluding the amended grounds.
4. The father put up a defence and requests the Court of Appeal:  
to deny the mother's requests and to grant the application for the return of the minors to [father's place of residence], Spain.

5. The Court of Appeal finds as follows.

*Submission of procedural documents*

6. The mother's legal counsel objects to the submission of the documents of 15 March 2019 by the father. The Court of Appeal is of the opinion that these documents need to be included in the assessment on appeal. It considers that in this case both the parties and the Court of Appeal have had adequate time to consider them and that, moreover, the information contained in the documents submitted was already known to the parties and the Court of Appeal.

*Habitual residence*

7. The issue in dispute between the parties in the appeal proceedings is about where the minors had their habitual residence on [date] 2018.

8. The father submits the following. In file documents from the divorce proceedings, which have been submitted as evidence in these proceedings, the mother claimed and confirmed that the parties had been living in Spain until [date] 2018. This is therefore a legal acknowledgement/judicial acknowledgement/recognition ad litem within the meaning of Article 154 of the Dutch Code of Civil Procedure. In addition, the father submits that he has not resided in the Netherlands since 2014. Since then, he has only visited the Netherlands to meet his parental access responsibilities in relation to his two children from a previous relationship, for family visits and business meetings. When the parties got to know each other in Spain, he was residing in [father's place of residence]. The parties agreed that once they were married they would reside in [father's place of residence]. The mother acted accordingly. This follows, among other things, from the de-registration of her company from the Chamber of Commerce, and her de-registration from the Municipal Personal Records Database of [municipality] in February 2017, which mentions Spain as her foreign address. In Spain, the mother received mail from [municipality] and the Dutch Tax authorities. The parties have an apartment in [father's place of residence]. The mother's parents also have, or rather had, an apartment in the same complex. Since the end of the father's detention, the parties resided in [father's place of residence], which, among other things, follows from the mother's pre-natal check-ups in Spain during her pregnancy. The parties have had an apartment in [place 2], the Netherlands, since November 2017 but this only serves as a pied-à-terre for the father's short visits to the Netherlands. The parties only used this apartment together for short periods and otherwise mostly stayed in hotels when visiting the Netherlands. The father acknowledges that he is often away from [father's place of residence], for example in [place 3], because of his international business activities.

9. The mother argues, principally, that the minors' habitual residence was in the Netherlands on [date] 2018. There is no legal acknowledgement. Legal acknowledgement only pertains to the proceedings in which it was made. In addition, there is no express and unequivocal acknowledgement, since the mother did not take a stand on the matter of the minors' habitual residence. Moreover, having submitted documents such as airline tickets and messages from the father, the mother argues that the parties did not in fact reside in [father's place of residence]. The fixed centre of the minors' interests and their familial, social and cultural background has always been in the Netherlands. The apartment in [place 2] is the parties' main residence and the apartment in [father's place of residence] is only a holiday home, as was her parent's apartment in [father's place of residence]. In 2018 the parties stayed in Spain for a certain period, purely because the mother was going to give birth. At first, the mother had had her pre-natal examinations in [hospital] in [municipality] and she had applied for maternity care in the Netherlands. She de-registered from the Municipal Personal Records Database of [municipality] at the father's request, because he had had bad experiences with Dutch Youth Care and police. The mother argues alternatively that the minors' habitual residence on [date] 2018 cannot be established, and that consequently the father's return application must

be denied.

10. The Court of Appeal finds as follows.

11. In relation to the father's submission about the mother's legal acknowledgement of the minors' habitual residence, the Court of Appeal considers that the alleged acknowledgement must expressly and, partly in view of the very limited grounds on which the acknowledgement may be revoked, unequivocally pertain to the truthfulness of the submissions (Dutch Supreme Court (*Hoge Raad*) 17 February 2006, ECLI:NL:HR:2006:AU4616). The Court of Appeal is of the opinion that in this case, given that the mother has contested this, stating reasons, there is no express and unequivocal acknowledgement by the mother within the meaning of the ruling referred to above, of the fact that the minors' habitual residence on [date] 2018 was in Spain.

12. In its further assessment of the appeal, the Court of Appeal states first and foremost that the District Court correctly interpreted the conflict of laws concept of habitual residence, as follows from the case law of the CJEU on the application of the Brussels II (bis) Regulation (see, inter alia, the decisions of 28 June 2018, case C-512/17, ECLI:EU:C:2018:513 and 17 October 2018, case C-393/18, ECLI:ECLI:EU:C:2018: 835). According to this case law, a minor's habitual residence has to be determined on the basis of the facts and circumstances of the particular case. In addition to the child's physical presence in a Member State, other factors, such as the duration, regularity, the circumstances and reasons for the stay in the Member State, as well as the intentions of the persons vested with custody rights over the child, must be taken into account from which it can be inferred that this presence is not merely temporary or accidental and that the child's residence indicates a certain degree of integration into a social and familial environment. If very young children are involved, as is the case here, the circumstances of the person(s) with whom the children live and who actually exercise(s) the custody rights and has/have the care of the children on a daily basis are of particular importance in determining the centre of the minor's social life. The absolute minimum requirement for assuming a minor's habitual residence in a Member State is that the minor has been physically present in that Member State. This case law of the CJEU serves as a guideline for interpreting the concept of habitual residence as referred to in the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the Convention).

13. Although the District Court interpreted the concept of habitual residence correctly, the Court of Appeal, unlike the District Court, is of the opinion that a minor cannot have two habitual residences (see the opinion of A-G Cruz Villalón, ECLI:EU:C:2010:738, no. 71, for the CJEU 22 December 2010, case C-497/10, ECLI:EU:C:2010:829, in relation to Article 8 of the Brussels II-(bis) Regulation). It has been argued in international jurisprudence that for the application of the Convention a minor can have more than one habitual residence. However, the majority of the case law in the Member States on the Convention seems to suggest otherwise (see Rhona Schuz, *The Hague Child Abduction Convention: A critical Analysis*, Oxford University Press 2014, p. 205; Paul Beaumont/Peter McEleavy, *The Hague Convention on International Child Abduction*, Oxford University Press 1999, p. 110; and, by way of an example, United States Court of Appeals, 3th Circuit, 26 [date] 2016, No. 15-3350 & 15-3579; *Didon v Castillo*). The Court of Appeal has decided to follow this case law of the other Member States and thus abandons its earlier case law (see Court of Appeal of The Hague, 27 July 2016, ECLI:NL:GHDHA:2016:2502).

14. Based on the file documents and the hearing, the Court of Appeal concludes that the minors' habitual residence can be determined in this case. The situation in which the habitual residence cannot be established does not occur here. The Court of Appeal is of the opinion that, immediately prior to their removal to the Netherlands on [date] 2018, the habitual residence of the minors and their mother was in Spain. The Court of Appeal substantiates this as follows.

15. It has been established that the parties met each other in 2016 in Spain, that at that time the father was renting an apartment there in [father's place of residence] and that the mother was aware of that as well as of the fact that the father leads an international (business) life. The mother took care of the father's two daughters from his previous relationship for a while in the apartment when the father was being detained. It has also been established that the mother's parents lived in Spain, at least this was the case when the parties got to know each other in 2016, and that the mother regularly visited Spain over the years.
16. Although de-registration from and registration in the Municipal Personal Records Database is not, in itself, of decisive significance, the Court of Appeal finds that the alterations to the father's and the mother's records in this case are relevant, taking into account all the circumstances of the case. The mother, for example, de-registered from the Municipal Personal Records Database in the Netherlands, which states 'Spain' as 'Address abroad', on 27 February 2017, when the father was still in detention. She (apparently) informed the Dutch Tax authorities and [municipality] of her address in Spain, and received mail from these authorities at that address (see exhibits 6 and 7 of the father's brief). The Court of Appeal is of the opinion that the mother's explanation given at the hearing of why she de-registered, namely that the father insisted that she should de-register in order to be unreachable by the Dutch justice and Youth Care authorities, is unconvincing. At the hearing, the mother acknowledged that it defies logic to reside in the Netherlands but receive mail from the Dutch authorities in Spain. What is also important is that in the same period the mother terminated her business in the Netherlands and de-registered from the Dutch Chamber of Commerce. In addition, the mother, as well as the father, registered with the Spanish Aliens Police on 21 June 2018, shortly before the mother gave birth, and with the municipality of [father's place of residence] on 29 August 2018, shortly after the mother gave birth.
17. The mother's contention that the parties had had an apartment in [place 2] since November 2017 is, in the Court's opinion, only of limited importance, given that the parties lead an international life, the father's contention that the apartment serves as a pied-à-terre for his short visits to the Netherlands to meet his parental access responsibilities in relation to his two children from a previous relationship, and the fact that the parties only stayed in the apartment for short periods. The mother has insufficiently substantiated her submission that the apartment in [place 2] was the parties' residence and that the apartment in Spain only served as the parties' holiday home.
18. The hospital visits in the Netherlands for the pre-natal examinations the mother claims to have made, are also of limited importance, since it has been established that she visited hospitals in both Spain and the Netherlands. In this respect the Court considers it relevant that the doctor's notes of the two different doctors working in the [hospital] in the Netherlands, which were submitted in the appeal proceedings by the father as exhibits 3 and 10, state: 'lives in Spain, does not know where pregnancy, for the time being here' (note of [date]) and 'Is going to move to Spain and give birth there' (note of [date]). Apparently the mother indicated to these doctors in the Netherlands or gave them the impression that she did not reside in the Netherlands (anymore) or would soon be moving to Spain.
19. The Court of Appeal also takes into account that, in accordance with the joint decision of the mother and the father, the minors were born in Spain, that the mother lived virtually uninterruptedly in the apartment in [father's place of residence] from May 2018 until she left for the Netherlands with the minors on [date] 2018, and that the minors lived in Spain with their mother and father from the day they were born in 2018 until [date] 2018.
20. Although the parties take different views on the father's exact role in the care and upbringing of the minors after they were born in Spain, at the hearing it was established that the father was present when the mother gave birth and afterwards stayed in the apartment in [father's place of residence] with the mother and the minors, where he was, to a varying extent, involved in the care and upbringing of the minors. Consequently, circumstances about the father's whereabouts must also be taken into account in

determining the minors' habitual residence. In this respect the Court of Appeal notes that the father de-registered from the Municipal Personal Records Database in the Netherlands in July 2014 and that he was already renting an apartment in [father's place of residence] in Spain in 2016, when the parties met. Also, the father ran a business in or from Spain, the parties lived together in the apartment in Spain, travelled abroad from there many times, and the two children from the father's previous relationship spent the holidays with their father in Spain. Although the father leads an international life and now also runs his business in or from [place 3], the Court of Appeal concludes that it has been established that the father's home base is Spain. The fact that the father regularly visited (and still visits) the Netherlands to meet his parental access obligations in relation to his two children from a previous relationship, among other things, and the fact that he owns a house in which these children and their mother live, does not affect this conclusion.

21. Finally, the Court considers that the mother's petition for divorce filed in the Netherlands states that the parties moved to Spain in August 2017, that they lived together in Spain until [date] 2018 and that the mother subsequently left for the Netherlands on [date] 2018, which is now her habitual residence. Although no legal acknowledgement by the mother of the parties' habitual residence can be inferred from this (see the Courts discussion of the father's first ground for appeal above), the content of the divorce petition is of importance for determining the minors' habitual residence.
22. In view of the facts and circumstances mentioned above, taken together, the Court concludes that the minors' habitual residence prior to their removal to the Netherlands on [date] 2018 was in Spain.
23. Since it is not in dispute between the parties that the father did not give his consent to the minors' removal to the Netherlands, the father's return application can, in principle, be granted.

*The mother's invocation of Articles 13(1)(b) and 20 of the Convention, Article 11(4) of the Brussels II (bis) Regulation, Article 3 of the International Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights*

24. The mother, citing Article 13(1)(b) of the Convention, argues that there is a grave risk that the minors' return to Spain would expose them to physical or psychological harm or otherwise place them in an intolerable situation. The mother also argues that the return of the minors is contrary to Article 20 of the Convention. In addition, the mother, citing Article 11(4) of the Brussels II (bis) Regulation, is of the opinion that no adequate arrangements have been made in Spain to ensure the protection of the minors after their return. She explains her reliance on the aforementioned articles as follows. The mother does not have a place to live in Spain and she cannot accept the father's offer to stay in his house because the father is not to know the home address of the mother and the minors. The father poses a threat to the minors as well as to the mother, since he has shown a pattern of abuse, also in the minors' presence. In addition, the father moves in criminal circles in Spain. Moreover, no adequate care for the minors can be arranged in Spain. Finally, the mother invokes Article 3 of the International Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights. She explains that it is vital for the minors' psychological and physical well-being to be in a stable environment. As the father moves in criminal circles, the minor's living situation in Spain would be unsettled.

25. The father put up a defence and submitted that he can make various arrangements for the minors and the mother in Spain. At the appeal hearing he explained that he will provide the minors and the mother with a house, a car and a child minder in Spain and that he will contribute towards the costs of living of the mother and the minors. The father disputes that there are any safety risks to the minors and the mother. The father also disputes that he moves in criminal circles.
26. This Court finds that the mother's invocation of the abovementioned articles from the Convention fails. The Court of Appeal substantiates this as follows. The obligation to furnish facts and the burden of proving those facts and circumstances relevant to a ground for refusal are on the party who invokes a ground for refusal (Dutch Supreme Court, 14 July 2000, ECLI:NL:HR:2000:AA6532). Moreover, the grounds for refusal must be interpreted narrowly by the court (Dutch Supreme Court, 1 December 2006, ECLI:NL:HR:2006:AZ1500). Given that the father has contested that any grounds for refusal apply, stating reasons, the mother has failed to adequately substantiate her contention that the return of the minors would pose a grave risk that they will be exposed to physical or psychological harm or otherwise be placed in an intolerable situation. The Court finds that it has not been established that the return of the minors poses a grave risk of physical or psychological harm or lead to an intolerable situation as referred to in Article 13(1)(b) of the Convention. Nor will the minors be separated from their mother as a consequence of their return to Spain. Any of the other circumstances referred to in Article 13(1)(b) that would preclude a return have neither been argued by the mother, nor become evident. The mother's reliance on the other provisions, Article 20 of the Convention, Article 3 of the International Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights, also fails since she has furnished insufficient facts and circumstances to conclude that these conventions preclude the minors' return to Spain. The same applies to the mother's invocation of Article 11(4) of the Brussels II (bis) Regulation. In all of this, the Court of Appeal takes into account the fact that the father has offered, in writing, to make the necessary arrangements when the mother and the minors return to Spain, which he confirmed at the hearing.

#### *Return*

27. The father has requested an order for the immediate return of the minors to [father's place of residence], Spain. Since the mother did not put up a defence against [father's place of residence] as a return location and as it has not become evident in the appeal proceedings that there are any circumstances that mean that the return to [father's place of residence] would not be in the minors' best interest, the Court shall order the minors' return to [father's place of residence], Spain.

#### *Cost of the proceedings*

28. The father has appealed against the compensation of the cost order given at first instance. On appeal he requests that the mother be ordered to pay the costs of the proceedings in both instances. In view of the fact that these proceedings relate to family law, the Court of Appeal will deny the father's request in relation to the costs of the proceedings at first instance and will compensate the costs of the appeal proceedings, in the sense that each party will bear its own costs.
29. The foregoing leads to the following decision.



## **DECISION ON APPEAL**

The Court of Appeal:

sets aside the contested decision in as far as the return application is concerned, and adjudicating afresh in the matter:

orders the return of the minors [minor 1] and [minor 2], both born in [place of birth] (Spain) in 2018, to [father's place of residence], Spain, on 18 April 2019 at the latest, thereby ordering the mother to return the minors to [father's place of residence], Spain, and orders that if the mother fails to return the minors to [father's place of residence], Spain, the mother shall hand over the minors and the necessary valid travel documents to the father on 18 April 2019 at the latest, to enable the father to return the minors himself to [father's place of residence], Spain;

declares that this judgment is immediately enforceable;

compensates the costs of these proceedings such that each party bears its own costs;

upholds the contested decision of the District Court to the extent that it concerns the compensation of the costs of the proceedings;

rejects all or any other applications made on appeal.

This decision was issued by F. Ibili, LL.M, A. Zonneveld, LL.M and O.I.M. Ydema, LL.M, assisted by H.B. Brandwijk, LL.M, court clerk, and pronounced in open court on 3 April 2019.