Translation from the German language

File No.
2 UF 200/19
2 F1701/19 Karlsruhe Local Court

[crest]

Karlsruhe Higher Regional Court

2nd Civil Chamber - Chamber for Family Matters

Order

In the family matter

[redacted] Brooklyn New York, U.S.A.

- Petitioner -

Legal counsel in the proceedings:

Lawyer [redacted]

trial lawyer

vs.

[redacted]

- Respondent and Complainant -

Legal counsel:

Lawyer [redacted]

Further parties involved:

Children:

1) [redacted], born on December XX, 2015

Guardian ad litem: [redacted]

[redacted], born on August XX, 2017 [handwritten]

Guardian ad litem: [redacted]

Jugendamt (Youth Welfare Office):

[redacted]
Ref No.: [redacted]

for the return of a child pursuant to the Hague Child Abduction Convention
concerning: Enforcement

Karlsruhe Higher Regional Court – 2nd Civil Chamber – Chamber for Family Matters – represented by Presiding Higher Regional Court Judge [redacted], Higher Regional Court Judge [redacted] and Local Court Judge [redacted] has decided:

1. The application made by the Respondent for the suspension of the use of direct force for the purposes of enforcement of the return order issued by Karlsruhe Local Court – Family Court – dated 14 November 2019 (2 F1701/19), has been rejected.

2. The costs of the enforcement proceedings shall be borne by the Respondent.

3. The value of the legal advice in the enforcement proceedings is set at EUR 3,000.00.

The reasons for this are:

I.

Karlsruhe Local Court – Family Court – obligated the Respondent in its order dated November 14, 2019 (2 F 1701/19), to return the children [redacted], born on December XX, 2015 and [redacted], born on August XX, 2017 to the U.S. State of Connecticut within two weeks of the order becoming final and binding (see point 1). In the event that she does not comply with this obligation she and any other person with whom the children may be staying shall be obligated to hand them over to the Applicant or a person designated by him, for the purposes of their return to the United States of America (see point 2). The Respondent has been informed that, in the event of a violation of points 1 and 2, she may be ordered to pay a coercive financial penalty of up to 25,000.00 Euros and sentenced to coercive custody of up to six months (point 3). In point 4, enforcement orders were made for the enforcement of the obligation to hand over the children and it was ordered that direct force could be used in enforcing the handover of the children.

In its order dated February 3, 2020, the Chamber rejected the complaint appeal made against this by the Respondent.

On February 7, 2020 the Superior Court in Bridgeport, Connecticut ordered that the children be returned to the Applicant and, by order dated March 4, 2020 ordered the immediate handover of the minor children to the Applicant.

The order issued by the Chamber dated February 3, 2020 was served upon the Respondent's legal counsel on February 10, 2020.

By injunction issued by the Chamber dated March 3, 2020, the Respondent was informed that the order issued by the Local Court had become final and binding and the obligation to return to the children had to be complied with within two weeks of the order taking final and binding effect, i.e. by February 24, 2020 at the latest.

In a letter dated March 17, 2020, the Respondent let it be known that travel to the United States would neither be possible nor reasonable due to situation which had arisen as a result of the COVID 19 pandemic.

By injunction dated March 19, 2020, the Chamber stated that the mother, as a result of the COVID-19 pandemic, could not be requested to leave the country with the children. The assessment as to whether the mother could carry out the return was adjourned until after April 19, 2020.

In a letter dated April 30, 2020, the Applicant requested that the required enforcement measures be initiated.

Upon the application of the Respondent, a request was made to the court bailiff, by way of injunction dated June 2, 2020, to carry out enforcement of the handover between June 12, 2020 and June 23, 2020, after the Applicant had announced that he would be coming to Germany on June 12, 2020, for the purposes of effecting the children’s return.

Enforcement has, to date, been attempted without success, as the Respondent and the children were not to be found at their registered address, nor could they be found at the registered address of their maternal grandmother.

In response to this, the Chamber, by order dated June 15, 2020 to ensure the return of the children under Sec. 15 International Family Law Procedure Act (IFLPA – *IntFamRVG*) by means of an interlocutory order, prohibited the Respondent and any other third party from removing the children from the territory of the Federal Republic of Germany.

In a written submission of the same date, the Respondent testified that the circumstances that led to the ordering of the return by the Family Court, as upheld by the Chamber, had changed to such an extent that a return of the children to the U.S.A. would be manifestly contrary to the children's best interests. According to the testimony, the suspicion first raised at the court of first instance of sexual abuse against the daughter [redacted] was to be regarded as having been confirmed. [Redacted] was said to have been in the treatment of a child psychologist on a weekly basis since February 2020, having displayed behavior problems The child psychologist's report drawn up on March 18, 2020 was said to have unambiguously shown that there had been a case of abuse, and it was thus to be presumed that the transfer of the children to the care of the Applicant would be associated with a grave risk of exposing them to physical or psychological harm. An application was thus being made to have another report issued by a child psychologist in relation to [redacted], especially given that the court in Connecticut did not at any time raise the issue of abuse allegations in its decisions.

The Respondent brings a motion to the court

to have suspended the use of direct force in the enforcement of the return order issued by Karlsruhe Local Court – Family Court, dated November 14, 2019 (2 F 1701/19).

The Applicant brings a motion to the court

to have rejected the application to have suspended the enforcement of the return order/the use of direct force in enforcement of the return order.

He states that the chronology of the Respondent's sexual abuse claims shows that the Respondent has been using such allegations as an instrument to keep the children away from their father. The report submitted by the Respondent, he says, was obviously drawn up as a courtesy or on request. The report dated March 18, 2020, he claims, does not in any way prove that any such abuse actually took place. He states there are significant concerns regarding the psychologist's conclusions. Because, despite the fact, he says, that it has not been clarified whether [redacted] could remember her father or the events in the U.S.A. more than two years earlier, the abuse is presented as being absolute fact, thus giving the impression that it actually happened. The change in the type of abuse alleged to have occurred (previously penetration of the child's vagina, now penetration of the child's mouth with the penis) he says, allow only one conclusion to be drawn; i.e. that the child has been manipulated by the Respondent and her relatives living in Germany to such an extent that this itself would constitute abuse.

For further details as to the testimony entered during the proceedings, please refer to the documents submitted and annexes.

II.

The application for suspension, the submission of which was permissible, has been unsuccessful in this matter.

1. The competence of the Chamber of the Court for the enforcement of the return order arises as per Sec. 44 Subsec. 2 IFLPA, as the Chamber rejected the return of the children ordered by the Family Court in its decision dated February 3, 2020 by refusing the complaint appeal lodged against this order.

2. The preconditions for enforcement are still in place. The order issued by the Family Court dated November 14, 2019, as upheld by the decision of the Chamber dated February 3, 2020 upholding the order issued by the Family Court dated November 14, 2019, constitutes an enforcement order as per Sec. 86 Subsec. 1 No. 1 Act on Proceedings in Family Matters (*FamFG*), which is legally effective and enforceable as pursuant to Sec. 86 Subsec. 2. in conjunction with Sec. 40 Subsec. 1, Sec. 40 Subsec. 2 IFLPA, as there are no further permissible legal remedies to contest the decision of the Chamber dated February 3, 2020. The mother has, contrary to what was ordered by the court, still not returned the children to the United States of America.

3. The conditions under Art. 13 para. 1b of the Hague Child Abduction Convention, according to which the court of the requested State is not bound to order the return the children if the person who opposes the return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, remain unfulfilled.

a) When applying Art. 13 para. 1b of the Convention it is to be noted that the aim of the Convention’s term is to prevent the parties from wrongfully removing children and taking them to a foreign country. This, therefore, is to ensure the decision on custody is made in the child’s former place of habitual residence. The strict rule setting out that only the court originally competent for the matter internationally must decide on custody for the sake of the child’s wellbeing, is in place to ensure that states of affairs themselves brought about by the abduction do not gain predominance (Federal Constitutional Court, Family Law Magazine (*FamRZ*) 1899, 85 margin No.65), the central idea of the Hague Child Abduction Convention is the wellbeing of the child, as stated in the Preamble thereto. For this reason, a fair balance

is to be struck between the interests of the parties involved and to take into account that the wellbeing of the child takes utmost priority (ECHR, judgment dated 21 June 2019, Family Law Magazine 2019, 1239 (1240); judgment dated July 6, 2010, No. 41615/07, Margin No. 134 [Neulinger and Shurk J, Switzerland], *Beck Rechtsprechung* (Beck Jurisprudence), 81381, beck-online, judgment dated July 12, 2011, No. 14737/09 (Sneersone und Kampanelta J. Italy), Family Law Magazine 2011, 1482, judgment dated November 26, 2013, No. 27853/09, margin No. 95, [X Z Latvia], NJOZ 2014, 1825, beck-online).

Accordingly, when the Hague Child Abduction Convention is applied, it is the child's wellbeing that is of utmost significance and it should be considered at every stage of the proceedings, and thus also in the enforcement proceedings; it is for this reason that enforcement measures should not be ordered in the event that they are not compatible with the child's wellbeing. In any case, this applies when the factors decisive in ordering the return and the enforcement measures have occurred (Hamburg Higher Regional Court, order dated June 25, 2014, UF 111/13, *NJW* (*Neue Juristische Wochenschrift* – legal magazine) 2014, 3378, margin No. 20 – citation from juris).

b) In accordance with these criteria, the children should still be returned to the U.S.A. and/or handed back to the Applicant. It is thus not possible for the use of immediate force to be suspended. After the Respondent had outright refused/Since the Respondent outright refuses to allow the return of the children or their surrender to the Applicant, the surrender of the children to the father can only be carried out with the use of direct force.

There (continue to) exist no sufficiently specific indications that the return to the U.S.A. would in any way be associated with a grave risk of physical or psychological harm for the children.

aa) The mother has not shown with a level of detail so as to satisfy the court that the return of the children to the U.S.A. during the current pandemic constitutes an intolerable situation for her. As citizens of the United States, the children and the Respondent are not affected by the travel ban currently in force. In contrast to the situation in March 2020, there are no longer any limitations imposed by authorities relating to the use of hotels for accommodation during the 14-day quarantine period.

bb) It continues to be the case that there are no sufficiently specific indications that the Applicant sexually abused [redacted] in 2017, and, in contrast to the view of the Respondent, such indications did not arise from the statements made by [redacted] when she underwent therapy.

(1) The Chamber, in its order dated February 3, 2020, considered the allegations of sexual abuse having been apparently committed on the daughter [redacted] at length, and came to the following conclusion: “This allegation had already been made by the mother in May 2016 and in late December 2017 in the U.S.A. In both cases, the reported crime was classified as having no basis in fact by the local Child Protection Service (CPS) after it was unable to find any evidence (file pages.: [redacted] and [redacted]). In its report dated April 19, 2018, the Yale Child Study Center, Psychiatric Clinic for Children, found that the relationship of her parents, being fraught with conflict, had led to [redacted] experiencing emotional turmoil owing to repeated verbal, and sometimes physical, arguments between the parents. However, the erratic behavior displayed by [redacted] were not so egregious as to lead to a diagnosis of post-traumatic stress disorder. [The report states] that it is vital for [redacted]’s development that the parents learn to communicate with one another in a safe and productive manner on issues concerning [redacted] and to learn to acknowledge her emotional needs (file pages. [redacted] and [redacted]. The information provided therein makes it clear that the emotional turmoil experienced by [redacted] was not due to any specific act of wrongdoing on the part of the Applicant, but was down the arguments and fights between the parents. In early July 2018, the Superior Court consequently upheld, rightly in our view, the comprehensive Parental Responsibility Agreement, according to which joint rights of custody remained in place and the Applicant was awarded the right to have regular, unaccompanied access to his children. If the allegations of sexual abuse had not been without foundation, this agreement would never have been put in place, nor would it have been upheld by the court.

The fact that [redacted] is said to have first identified the perpetrator as being one “brown daddy” and that this just happened to occur the day before the hearing at the court of first instance, on November 3, 2019, casts doubt on these claims. The Chamber shares the view of the Local Court that it is already highly unlikely that a 2-year-old child at the time of the alleged offense would remember it two years later or be able to report on it coherently. It should be added thatat the session before the Chamber to hear the children, [redacted] was not even able to put events from the recent past in the correct chronological order. For instance, she answered the question as to whether she had been to kindergarten yesterday, which was a Sunday, in the affirmative. The fact that [redacted], being prompted by the witness when asked the question as to whether anyone had touched her in an intimate area or her vagina, is said to have answered: “Yes, ten times”, shows very clearly that her statements are not reliable and cannot be said to stem from her own experience. It is totally unrealistic to expect that a two-year-old child would remember the events to a level of detail that she remembered the number of times the acts were repeated.

(2) The Chamber's view has not changed as relates to this issue. The reports dated February 25, 2020 (file page. [redacted]), March 18, 2020 (file page [redacted]) and May 19, 2020 (file page. [redacted]), drawn up by psychologist [redacted] which were presented by the Respondent are not suitable as evidence of abuse, nor do they show grounds for a reasonable suspicion that such an offense was committed. For this reason, the court has not had a report compiled by an expert.

It is of note that all statements made by [redacted] on this topic were initially made in the environment of the home, supposedly she said this to her grandmother, her aunt, or the Respondent herself, meaning the Court is unable to make any assessment as to how these statements came about. For this reason, the possibility that [redacted] was deliberately asked leading questions to deduce her into making what the psychologist referred to as "important disclosures". For example, the report dated March 18, 2020 states that [redacted] supposedly made the statement "he stuck his penis in my mouth" while she discussed the difference between good, bad and secret touching with the Respondent (see page 1 of the report dated March 18, 2020, file page. [redacted]). Even the claims made in the court of first instance, according to which [redacted] supposedly said she was touched by "brown daddy" in an intimate area, were made after her grandmother asked her specific questions on the issue were posed to her by her grandmother; the grandmother, when asked, had to admit that she asked this specific question the day before the hearing at the court of first instance for the reason that she was afraid she would never see [redacted] again (see notes from the hearing at the Local Court dated November 4, 2019 p. 12, file No. [redacted]).

It is further worthy of consideration that research in the area of legal psychology currently presumes that the suitability of children to provide testimony, i.e. to be able to recall events in their own right and report on them in a lucid manner does not occur until they are at least four years old (see Steffen Lau on "*Aussagetüchtigkeit*" (Ability to Provide Testimony) in "*Handbuch der Rechtspsychologie*" (Handbook of Legal Psychology), Chapter 5 "*Aussagebeurteilung*" (Assessing Witness Testimony), 2008); it would thus appear to be more than probable given the overall circumstances that leading questioning was at play. The psychological reports submitted failed to consider these problems in any way at all.

The procedural context is also worthy of mention. It is noted that the testimony regarding alleged abuse was always made by the Respondent once she had become aware that her previous testimony had not been sufficient to prevent the return [of the children] to the U.S.A. For instance, a written submission from the enforcement proceedings dated June 26, 2020 failed to mention any panic attacks, nor did it mention any statements [redacted] had already made as early as March 17, 2020 and the only mention was of any supposed intolerable

situation was in relation to the ongoing Covid-19 pandemic. Rather, the first time this was raised was in a written submission dated June 15, 2020, after an unsuccessful attempt was made at enforcement on June 13, 2020.

In this context, it would be remiss not to mention that the Respondent did not refer, either during or after the Local Court hearing, nor in relation to the hearing before the Chamber on January 27, 2020 to any erratic behavior, let alone make any sort of detailed testimony. It was not until June 15, 2020 that it was claimed that [redacted] had been under the supervision of a child psychologist since February 2020 due to erratic behavior without any mention of the specific type and extent of the behavior concerned. The fax from the psychologist [redacted], who is responsible for treatment, to the Higher Regional Court dated June 16, 2020, reports [redacted] having ongoing and advancing panic attacks since the court hearing in late January 2020 (file page [redacted]). If such strong erratic behavior had already occurred at this stage, it would have been an obvious course of action to report this in writing at the beginning of the enforcement proceedings so as to prevent enforcement. The written submission dated March 17, 2020 merely stated that it would not be possible nor reasonable for the Respondent to travel to the United States given the situation which had arisen as a result of the COVID 19 pandemic. Additionally it was not apparent, nor, specifically, was it mentioned in the Respondent's testimony that [redacted] displayed any erratic behavior in reaction to having seen the Applicant at the Local Court hearing in November 2019. However, if [redacted] noticeably reacted in such a manner in late January 2020, it is somewhat remarkable that a similar reaction did not occur in November 2019.

cc) The objection on the part of the Respondent – that the Court in the U.S. ordered the immediate surrender of the children to the Applicant ignorant of the allegations of sexual abuse – is without foundation. On the contrary, the letter dated June 17, 2020 submitted by the Respondent from her lawyer in the U.S., makes it clear that the judge issuing the decision in the U.S.A. was aware of such abuse allegations but ordered the surrender nevertheless (file page [redacted]).

III.

The decision on costs is based on Sec. 14 No. 2 IFLPA in conjunction with Sec. 81 Act on Proceedings in Family Matters and Art. 26 para. 4 Hague Child Abduction Convention. It corresponds to the reasonable expectation in proceedings under the Hague Convention and, therefore also applies in this case, that the parent who has acted unlawfully must carry the cost of the proceedings.

The value of the proceedings has been set based on Section 45 Subsection 3 Act on Court Fees in Family Matters (*FamGKG*).

No complaint on points of law can be made, as per Sec. 40 Subsec. 2 sentence 4 ILFPA.

Presiding Judge at the Higher Regional Court	Judge at the Higher Regional Court	Judge at the Local Court

Issuance of the judgment (Sec. 38 Subsec. 3 sentence 3 Act on Proceedings in Family Matters (*FamFG*)):
Delivered to the registry
on June 25, 2020.

Clerk of the registry at the Local Court

issued

[seal]

Clerk of the registry at the Local Court