High Court of Ireland Decisions

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Judgment

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THE HIGH COURT

FAMILY LAW

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY O

AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNAT

AND IN THE MATTER OF COUNCIL REGULATION 2201/2003

IN THE MATTER OF B.L.R. AND V.A.R. (MINORS)

BETWEEN

R.

AND

R.

EX TEMPORE JUDGMENT of Mr. Justice Henry Abbott delivered on the 31st day of July, 2015.

1. This is an application by the applicant, a German national, married to the respondent, a Polish national, Germany. They have two children, B.L.R. aged five and V.A.R. aged three. The complaint in the case is that respondent mother of the two children removed them from Germany to Ireland and kept them at a destina notified through herself and the Irish police authorities to the applicant, where they have remained, subjec accommodation since that time. The onus is on the applicant to prove first that the children had habitual re Germany and there is not much difficulty in determining that because the parties are not seriously contesti residence in Germany on the date of the removal and there has been a legal process in Germany in which children after they had been taken to Ireland in February. The results of these proceedings where that the the first instance; however, she was represented legally in the appeal. This Court would be very reluctant, that the habitual residence of the children was Germany at the date of the removal.

2. The further onus on the applicant is to prove that he had, either solely or jointly with the respondent, pa considered the affidavits I consider that, notwithstanding the frequent and detailed criticism by the respon the applicant and his behaviour, on the respondent's account of matters, amounting to abusive behaviour; on the affidavit evidence, the only conclusion this Court may make is that, at the time of the removal of th respondent, the applicant had parental responsibility, had custody and was exercising his rightful custody r by the respondent. The court is given comfort in that regard by the fact that the German Courts have decid by me, that the applicant had rights of custody and was exercising them, and I ignore, for the time being, fact, awarded him sole custody in Germany. I think it is not relevant to the considerations of this Court wha was done after, the removal of the child, on the 8th of December, and also on the basis that, if the children procedure, to Germany, then the German court will be in a position to consider that aspect again. The ques which should distract this Court at all. In practical terms, both parents had, at the time of the taking of the same.

3. A further question to be answered on a preliminary basis is to decide whether the removal of the childre within the meaning and for the purposes of Article 3 of the Hague Convention. I refer to Article 3 and quot

> "The removal or the retention of a child is to be considered wrongful where:-
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body of the State in which the child was habitually resident immediately before the removal or ret
>
> (b) at the time of removal or retention, those rights were actually exercised either jointly or exercised but for the removal or retention."

4. The remainder of Article 3 is not altogether relevant, except it may relate to the further action of the Ge will not dwell on that aspect. I have described and referred to the reasons why I should not do so. Having relation to habitual residence, the rights of custody and actual exercise of same, I find that, within the defi wrongful removal of the two children, B.L.R. and V.A.R., by the respondent to Ireland and that there was n might have justified same. These matters, while considered and debated very ably by the respondent, who proceedings, did not constitute the foremost aspects of her case.

5. What follows then is to examine the case from the point of view of the Hague Convention and the Bruss the situation arising from a wrongful removal of children from one Member State of the E.U. to the other a respondent has to the application of the applicant for an order pursuant to the Hague Convention and Brus children in these summary proceedings. The first substantial defence upon which the respondent relies is t acquiescence of the applicant in the children remaining in Ireland and she refers throughout her affidavits constitute acquiescence. She has referred the court to a helpful case of the matter *Warren Dean Smith v.*

Court of Appeals of South Africa, case number 112/2010 wherein the jurisprudence, considered by the Eng
Mr Finn B.L., on behalf of the applicant, referred the court to a number of Irish authorities, which again dre
courts which have been very exercised in relation to the analysis of the factual and legal ingredients of the
the context of the Hague Convention.

6. In relation to the examination of that factual matrix, the court has considered all the circumstances of th
having regard to the facts which she set out in great detail in an email of December from the applicant to h
which is the Polish for December which the respondent referred to, in her submissions, as December). The
translate the date but it is accepted fully that it is the 12th of December. She has furnished two copies of t
and a form of a translation but I prefer to read out of the original email. After a number of reflections gene
applicant set out in the first paragraph, the applicant set out his stall so to speak by saying at the end of it

> "Well, two or three possible possibilities/ways I could imagine for our future in the moment…
> summer (earliest from the 1st July)! Up to now still my favourite option.
>
> (a) Would mean that my parents will probably not see their only grandchildren any more bec
> Heubach would be about at least one day (so too much) and because of their health conditio
>
> (b) I would have to give up finally our nice flat and sell everything which I won't be able or c
> bikes and our ski sets (your two brand new cross-country sets included) for example, becaus
> would take my crazy much energy and time to sell our oak furniture, whole kitchen, our bike
> mountain bike probably.
>
> (c) I would quit my job. Then my parents would kill me. Such job with such great conditions
> Today my personal chief told me that there is small chance for break (unpaid holiday) for cer
> without quitting. So I could come back to my workplace in S.I.B. if it wouldn't work out in Ire
> or wellbeing or both our nights in this green island.
>
> (d) Healthcare or condition of B. is not sure yet in Ireland. Maybe we have to pay much own
> treatment, medicine, take credit for operations, et cetera.
>
> (e) Our kids will speak no German in daily life any more which makes Skype chats with my p
>
> (f) In Ireland, is just one season; rain all the time, no real summer and winter, no snow whic
>
> (g) Because of high salary in Ireland, we would be able to raise our live quality, to travel mo
> Germany or Finland or Spain or Poland or…
>
> (h) You could have your dream job as art therapist there and I could try/have to do somethi
> eBay power seller. Maybe we could even afford an old castle or old house without ghosts but
> we could never pay in Germany.

Two, you coming back to Chemnitz (some time next year, maybe summer, earlier or later) after starting yo
> (a) I would keep my nice job which is normally giving all of us enough money for our norma
> expensive countries like Norway, Canada, New Zealand.
>
> (b) After your Ph.D. degree you could have maybe better job offers also in here.
>
> (c) Our kids could go back to their nice *Kita-Spielhaus*, enjoying their friends, familiar enviro
>
> (d) A.O.K. PLUS would give us insurance for free next year hopefully. Health and insurance s
> we have found already nice doctors for everything.
>
> (e) My parents could still see their own grandchildren daily on Skype and talk in German to t
> and we also then after couple therapy where we both learn how to live, respect and love eac

months.

(f) Here we have really four seasons, real summer and normally also snow so we could go sl

(g) We/at least you have still many friends here like V., J., M., T. and me, M. and U..

(h) You could try start off with V. when not finding better job alternative with your new title,

(i) We could still try to go to Iceland in two, three years.

Three, War of Roses. Nobody wants I'm sure.

(a) It's not me or you, just your sisters and mum maybe. Okay, bad joke I know." [sic]

7. The letter continues to refer to matters which are not entirely relevant, referring to the local environmen behind the lovely tiger cats and continues on in a more telling note at the end in the second-last paragraph

> "I am even more tired now and hope that we will find a solution for all of us which will be the treasure. Few more important questions, please answer them as fast as possible; when shou *spielhaus*, before Christmas or in January? Of course I don't want to pay when you don't con don't really want to pay just for these one five days. Two, what about your fitness centre? Di you left Germany? Three, what about *Arbeitsamt* and AOK PLUS insurance? How should I de you need or will probably need next year or is medicine cheaper on your island? I told you th year because of tax file for 2014. Just if we need of course, so please think and send me list will try to sell lots of toys, board games, B's new bike, bike seat for V., your bike, my race bi Christmas gift, you want to have some of your/our boys clothes, shoes, toys? Well, I would r that. Seven, what else you and your sons could need from Germany/our flat?" [sic]

8. That is the letter on which the respondent primarily relies to set up acquiescence. She does rely on the with the children in B. and his concern and a further meeting in B. with teachers of a school in relation to r following the initial indication of acquiescence which the respondent claims arises from this very central em quoted. The court should first ascertain whether this email does indicate the type of clear acquiescence tha jurisprudence in this area. I confirm that I have read the submissions of both the respondent and the appli am making this factual determination having regard to the standard that I gleaned from these various auth reasons why I find that this email, on its own, does not constitute an indication of acquiescence or is not a acquiescence for the following reasons; first, if one takes the first line which I quoted, which is at the end again so to place it in the context of my reason:-

> "Well, two or three possible possibilities/ways I could imagine for our future in the moment."

I take from that initial opening statement an indication by the applicant not to acquiesce in something but such as one would find in relation to the opening up of a negotiation between parties seeking to resolve an be lay people or lawyers. I find that that one sentence to be an indication to the parties to explore possibili settlement, possibly with a view to making further decisions, but certainly it opens up a whole conditional should be construed.

9. Then if I take the statement of "me coming to Ireland next summer or earliest 1st of July" up to "still m options (a)-(h), I find that if there is acquiescence to be found in the letter, it is primarily to be found in th the respondent's interpretation of it. But I am far from convinced from a reading of that option number one statement of an intention at all or if it even means what the writer said, that it was his favourite option. If and read the various ingredients and considerations for the favourite option, there is at least a large degre sarcasm, and reference to an almost fairytale stereotype location in Ireland which is bordering on the dero that as a clear statement of agreement to these so-called aspects which are not accepted as advantages. I is an assertion of an aspect of the option number one but there is an accompanying discount of the aspect

10. For instance, what's put forward as one of the reasons why it's a preferred option, in (e), is probably o the statement: "Our kids will speak no German in daily life any more which makes Skype chats with my pa [sic] How that could be an advantage is beyond me. The next one, "In Ireland, just one season." That is ei may be some element of it in the expressions of all our frustrations with the lack of a distinctive summer b the statement that there is no sun which both himself and B. would miss a lot. That is the qualifying discou benefit in one season, if one has that point of view, one could go through the whole gamut of these reason discounting description of a so-called advantage. I have to conclude that that is, as I said, irony or perhaps

explanation would be to use it as a sort of a subtle means of persuading or lobbying the respondent to cha
under the guise of saying that, at the top of the paragraph, that it was his favourite option. So it is ambigu
wants to make a concession or give a consent.

11. My conclusion in relation to that aspect of option number one is reinforced when I come to what must,
one, be the less favoured option: number two. Without going into the detail, if one goes through the reaso
are straightforward, positive reasons why the respondent and the children could come back to Germany, w
discounts that I can find, and with great positive praise for the options. That provides a contextual, temper
statements and has led me into further firmness in my view that the first options were not concessions. Th
they took them as such.

12. The third option was described as the "War of Roses", such being pure sarcasm and not very helpful. W
the parties, it does put into context, again, the comments in number one where there was a slightly mocki
letter, coupled, I might say, with a general intention to seek that the parties would continue to live togethe
reference to "couples therapy where we both learn how to live and respect and love each other in a much l
That would infer that they were to live together as a couple, not as a separated couple. That is the conclus

13. My view that the letter, so far, did not constitute a consent or a document of acquiescence is reinforced
the few more important questions are asked, one to seven, where the applicant says:-

> "I am even more tired now and hope that we will find the solution for all of us that will be be
> treasure."

That clearly indicates a negotiating mentality rather than a concessionary one: an invitation to negotiate. W
important questions generally, in relation to cancelling the *Kita* places, possibly cancelling the fitness centr
disposal of toy board games and dealing in relation to Christmas gifts. These are questions that could be c
but they alone could not be construed to be in favour of a consent unless there was a clear intention as to
being asked and have them unambiguously referable to a permanent stay and retention of the two children

14. I have considered the further aspects advanced by the respondent in relation to the whole aspect of ac
staying in Ireland and I find that the applicant did have an involvement, seeing the children, albeit subject
Court, which I hold to be an order that was made entirely under the proper jurisdiction insofar as the Brus
protective measures to be taken by courts dealing in matters of parental responsibility, regardless of where
Hague proceedings and under the main proceedings determined in accordance with the alternative tests se
participation and continuing contact with the children in Ireland is something which is to be praised and it w
policy for the court to hold that that level of participation in the children's lives would amount to acquiesce
very destructive of the children's interests in the context of this type of litigation to allow that type of cons
of these cases. I hold, for those reasons, that there was, in fact, no acquiescence.

15. I do not have to consider a change of mind. There was no change of mind after that. The position hard
applicant. Proceedings were commenced in April and there had been demands before that for the return of
taken in relation to the police authorities in Germany, although the applicant does refer to the fact that his
children, were more responsible for that, but there was a very strong countervailing set of actions by the a
children which would contraindicate consent or acquiescence. I do not have to go into the very detailed an
authorities put forward on the basis that I have decided there has been no consent in any conceivable defi
then to the further defence, on which the onus lies on the respondent to prove that there would be a grave
by the Hague Convention, if they were returned.

16. I accept the submissions of the applicant that the standard of grave risk is a high one and the submiss
Finn B.L. deal with the standard involved. I suppose the highest level of proof is presented by the U.S. cas
which I will not detail amongst the parties, and it remains for me to examine whether, in fact, there is a gr
the children to Germany as a result of a summary order of this Court. Again, looking at the height of the re
respondent has drawn the attention of the court to the fact that there was at least one kick given by the ap
had, before the removal to Ireland, a very serious operation for a cancerous brain tumour and had recover
anything that could be condoned in the context of what in Ireland would be called "reasonable chastisemen
defence of reasonable chastisement in relation to corporal punishment of children in the home is very muc
is frowned upon in terms of social activity and I note that there are proposal for its abolition by the presen

stand in the same place as practically every European country in having corporal punishment outlawed. Th
correspondence and affidavit, admitted to a kick, although he seeks to minimise it, but he has not minimis
me in a position where I must or I can ignore it. It is to be deplored that he would have kicked the child.

17. There also is admitted evidence that, from time to time, he would have been guilty of old-fashioned, p
and he admits to having a difference with the applicant in that approach and refers to the activities of his f
relation to that type of corporal punishment which would be mere reaction, corrective reaction, rather than
would be the type of justification which people in Ireland could seek to rely on, but which would not be tole
and Ireland has moved on in the most formal way. Germany has moved on, I accept from looking at the ge
in relation to corporal punishment, both in schools and the home, that corporal punishment is to be frowne
court should give very serious attention to. I do, but nevertheless it has to be considered in the context of
B.L., on behalf of the applicant, that the abuse, such as occurred, was not in the higher end of the scale; it
certainly the kick was grave, and it would be, in itself, a grave risk if it were to be part of a pattern. But he
at all times, a continued involvement with the children by the father, even to the point of involvement in, a
District Court order and that that indicated that the proof of the pudding was in the eating, to use an Irish
there was grave danger, then it was not manifest in the manner in which activities occurred between the fa
removal of the children to Ireland.

18. The narrative of the respondent in relation to this aspect is exemplified by the report of the psychologis
her report of the 23rd of February in relation to consultations between her and the respondent. It says as f

> "Mrs. R., J.S., born on the 29th of June 1985, has been taking advantage of psychological co
> 2014 to the 25th of November 2014, with the aim to seek psychotherapy. The subject of our
> history with family problems, or rather marriage discords, being the burden thereof. In that
> times to be under a lot of strain and fear because of verbal arguments with her husband. Th
> methods of education for children. The patient reported also impulsive outbursts and verbal
> towards other family members, with insults and attacks from his side. The patient also ment
> her son B. with a kick…" [sic]

That word, I think, is described as *fierzein* in German. It is not clear what exactly it means, but it's the ger
his son. The report continues as follows:-

> "Because of his ways of behaviour, he seemed unpredictable and it frightened the patient. N
> about separation and stressed many times that she would like to give that relation a chance
> would have considered their staying together. Based on her further contact, as her son B. att
> impression of good and stable mother-child relationship. The mother was considerate and pr
> conducted our conversation twice in English in order to protect her son from particular types
> family conflict. Should you have any questions, please do not hesitate to contact me." [sic].

My view of that letter is that, if there was a grave risk of danger to the child, it would have been canvassed
isolated incident of the serving of a kick to their son, B.. There is no narrative of any recourse to police aut
workers whatever, to seek redress in relation to dangers to her children and I consider that, while that lette
there was a professional corroboration of a complaint about the kick to B., it does not assist the responden
is that there was no standard reaction, prior to the removal of the child, towards the presence of grave risk
indication of the proceedings, evidenced by photographs of play on the applicant's affidavit, that there had
parents and the children, exemplified, however, by a different parenting approach by the two parents, whic
parenting, in a lot of cases, where the mother is nurturing and protective; sometimes, in the eyes of the hu
the welfare of the children, whereas the husband, in his interaction with them, would be more boisterous a
independent disposition and frame of mind. That type of ongoing difference and negotiation of roles and ou
almost all families in this jurisdiction, although there can be reversal and moderation of roles from the two
however, it is extremely far from reality to say that that type of activity, as described by both parties in the
lack of recourse to anti-child abuse authorities, where police, courts, teachers or anything else, is indicativ
family.

19. Such is very far from presenting a grave risk to the children, but instead is providing them, in its own w
which could be improved by changing habits in the parent, or a separation of the parents, or a separation o
the multitude of services of the German Courts in terms of looking after custody issues and parenting issue
the issue has to be considered in that context.

20. There is no danger, in the event, of the child being returned to Germany, in either B's or V's case, and from the fact that the German Courts have embarked upon a procedure of examining the custody issues. A have given sole custody of the children to the applicant, as a default position, it seems to me, pending retu judgment of the Dresdener Appeal court, that it is envisaged that there be a reconsideration of the matter returning in the context not of a household where there would be two fractious parents, but in the context be afforded the space of having a relationship with both parents without the infringement of the type of da psychologist, Lanenburg.

21. The fact that the psychologist's report noted that, "I had the impression of a good and stable mother-c B. was showing no signs of special disturbance or what might be described as clinginess or showing insecu family presenting grave risk towards his father. These are my conclusions in relation to grave risk. There ar relation to grave risk arising from the transitional arrangements which might arise in the event of an order Germany, insofar as it's always difficult to predict whether they will have some place to stay and the chanc whom allegations of abuse and presentation of grave risk arise. It is of considerable importance, in relation risk, to consider that there is an undertaking given to this Court for the applicant to vacate the apartment free for the respondent to take occupation with their two children pending the determination (which I have the German Court) in relation to custody, access, parenting and counselling if any issues arising. Such dea

22. The respondent has further raised the question of the defence of the children having settled down and residence in Ireland. That is a defence which is only available after the expiration of twelve months from th yet twelve months, it is well within the time, therefore the defence does not formally arise. I do accept tha settling in, such as the approval for domiciliary care allowance, which was recommended by the reviewing monitoring of his tumour operation and indeed the fact that there has been a degree of medical care provi fact of fairly satisfactory school arrangements, or satisfactory school arrangements have been made for B. which I give credit to the respondent for drawing to the attention of the court and it is a very good outcom attended to and that the children were well looked after. I pay tribute to the respondent for taking these st in the face of scarce resources and difficulty in allocating resources in these areas, to have provided for the Nevertheless, I must have regard to the fact that the Convention does not allow the defence to arise unles months. Even then it is a discretionary matter for the court to allow that defence to operate. It would seem existing connection of children to Germany, it would be difficult to exercise the discretion, even after twelv

23. Having considered the matter overall, as I have done, the conclusion I reach is that there is no defence the order for the return of the children made, having established the prior proofs on his side, as I have des children that they would be returned to Germany, in the context of the interests of the child under the Hag This is not a welfare test, but it is a recognition that the structure of the Hague Convention and the Brusse with it, are such that the return of the child is, in general terms and in the interests of all the children, des There are no factors such as the type of outrageous delay, such as occurred in the case of
41615/07 (ECtHR, 6 July 2010) where the delay in the Swiss Courts led the Court of Human Rights to use matter which could frustrate what were, on their face, proper Hague orders made by the Swiss Courts, alb delays. Although the Circuit Court has the *Neulinger* decision as criticised as entirely undermining the Hagu that it does lead us to hearken to the realities of the situation, and the very structure of the Hague Conven defence of the child having settled in his new jurisdiction to which he has been removed after the lapse of intervening factors of a major strategic nature, such as the serious lapse of time would be something the c overall consideration for. It is in that context of an overarching view in relation to having consideration to a impinge on the decision of the court to make it, as it were, a nonsense in the context of reality in the situa court could, on a mental or intellectual basis rationalise its decision, as I hope I have rationalised the decis the jurisprudence of the *Neulinger* decision, criticised though it may be, would indicate to the court that it at the whole vista of decision making and ask, is this what should be done in this case in the interests of th that the Hague Convention system is a very strong and almost automatic system of jurisprudence?

24. I find on that test that, in the interests of the children, no such consideration arises and that, in fact, th to order the return of the children, which the court does in this case, is in the interests of the children.

25. That being so, I will address the claims made. First of all the court will make a declaration that there w Referring to the summons initiating the proceedings, I make orders in respect of some such claims.
do not make yet, but they will have to be produced sometime in the structure of return. So I address that

12 of the Hague Convention for the return of the children, B.L.R. and V.A.R., to their place of habitual resid
Germany for the purpose of enforcing the applicants' rights of custody with respect to the said children. An
respondent wrongfully removed the said children from the jurisdiction of the Federal Republic of Germany,
Hague Convention. I make a declaration that the respondent wrongfully retained the said children from the
meaning of Article 3 of the Hague Convention. I further order that the respondent take all steps and do all
summary return of the children to the jurisdiction of Germany, and I will ask the parties to address the cou
moment, on the particular arrangements that would facilitate that. I note that the applicant has indicated,
that he would come to the airport in Dublin to collect the children, but that is a matter for the court to be a
stay the proceedings of the District Court under the Domestic Violence Act yet, but stay them upon the chi
not want to create any unnecessary applications hither and thither. That is as a matter of efficiency, rather

26. I am not making any order in relation to the children being heard in relation to the matter, but during t
case the court did express a view that perhaps on a factual basis B. might be regarded as having sufficient
stage in relation to the return, and for that purpose admitted, despite Mr Finn's protestations, a report fron
which did show that B. had expressed a preference for staying in Ireland. I accept Mr Finn's view that that
consideration of the views of the child such as might be given any weight, because B. did not express a cle
Germany. In any event, I take comfort in the fact that the German Court of Appeal has indicated that perh
maturity to express a view, and further that he indicated that his views would be taken into consideration i
his return.

27. I am not making any order that the views of the child will be heard on the basis that there has been a
general jurisprudence of the Irish courts, it would not be required but I have decided that, having regard t
and the history of B. as a child who had possibly got the education through talking to his superiors in the r
he would be more articulate than the normal child of his age.

28. Unless I am requested, I am not going to make any order restraining the respondent from removing th
court. I could be addressed upon that but I am very anxious that this Court would not be making orders th
indicates that this was dealt with by way of an undertaking given by the respondent on the 15th April, 201
continue. And similarly with the whereabouts of the children and in terms of informing the Garda Commiss
informed and that information will continue until the children leave the country.

29. In relation to the respondent paying costs and expenses, I do not think that it is appropriate in this cas
favour of the applicant, who is in employment in Germany, and I should have said, during the degree of ris
responsible employment is another factor pointing to the fact that he is not at grave risk or at risk of his m
burnout or his accident. He seems to be back working and he should not be subsidised by the respondent.
without penalising her with costs which the applicant is better able to discharge. Similarly I will not make a
accommodation expenses and I will await the submissions of the parties in relation to costs issue in this ca
children back in the time in which they should be dispatched.