Neutral Citation no. [2007] NIFam 10 | *Ref:* **MORF5948**

Judgment: approved by the Court for handing down | *Delivered:* **11/10/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF KR AND SR

AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

JR

PLAINTIFF;

-and-

SIR

DEFENDANT.

(Child Abduction: Grave risk of harm, Children's objections)

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MORGAN J

[1] This is an application for the return of the children KR and SR to Slovakia pursuant to article 12 of the Hague Convention by reason of their wrongful removal contrary to article 3 of the convention. Nothing must be reported in this case which could lead to the identification of the children concerned or any of the parties. To that end I have prepared this judgment in an anonymised form.

[2] JR, the father, and SIR, the mother, were married on 6 August 1994. They have two children, KR born on 19 February 1996 and SR born on 19 July 1997. As a result of differences between the parents they separated in 2002. On 6 November 2002 a District Court in Slovakia ordered that the children should reside with their mother. On 28 March 2003 the same court granted the father overnight contact with the children every other weekend. The mother has consistently opposed contact between the children and the father

and an appeal against the contact order was dismissed by the Regional Court on 25 February 2004.

[3] On 17 May 2004 the same District Court ordered the mother not to frustrate the contact which the court had ordered. There were further proceedings before the court in July 2004 and September 2004 as a result of which the court imposed a fine on the mother for non-compliance with the contact order on 14 September 2004. An appeal against that finding was dismissed by the Regional Court on 19 August 2005.

[4] Difficulties in relation to contact continued. In January 2006 there was an incident at a football field when the mother refused to permit the children to have contact with the father. The father swore at her, threatened her and banged a car belonging to her brother. She reported this to the police and he was convicted in respect of it although no penalty was imposed. On 15 May 2006 the District Court once again considered a complaint that the mother frustrated contact between the father and the children and this time imposed a sentence of three months imprisonment suspended for one year. An appeal against that decision to the Regional Court was dismissed on 23 November 2006 although by that time the mother had removed the children from Slovakia and was residing in Northern Ireland. It appears that the father last had direct contact with the children in June 2005.

[5] According to the mother her lawyer advised her in or about July 2006 to move with the children to Northern Ireland. Acting on this advice and after discussion with her family the mother wrote a letter to the father on 24 August 2006 advising him that she and the children were going to Northern Ireland so that she could get work and on 25 August 2006 she and the children boarded a plane for Dublin, thereafter making their way to Northern Ireland. If it is true that the lawyer advised the mother to move the children in this way that would appear to constitute serious professional misconduct on the part of the lawyer.

[6] It is accepted that the children were habitually resident in Slovakia prior to their removal. It is also accepted that proceedings were initiated within one year of the removal. The evidence clearly demonstrates that the father had rights of custody at the time of the removal, that the removal was in breach of those rights and that the father was actually exercising those rights at the material time. The mother opposes the return on the basis that the father acquiesced in the removal and/or that there was a grave risk that the return of the children would expose the children to psychological harm or otherwise place them in an intolerable situation relying on the provisions of article 13 of the convention and/or on the basis that the children themselves do not wish to return to Slovakia and should not be made to do so..

[7] The father received the mother's letter on 27 August 2006. He contacted the local police and the Court. He was not advised by his then solicitor about the Hague Convention. He retained his present solicitor in January 2007 and was advised at that time of his rights in relation to the convention. With the help of that solicitor he then made an application to the Central Authority in Slovakia on 23 February 2007. The Central Authority in Northern Ireland received instructions to make an application in respect of the children on 6 March 2007 and sought to set up a consultation with the plaintiff. It appears that during this period the Slovakian Central Authority changed address and it was 23 April 2007 before contact between the Central Authorities was established again. The Central Authority in Northern Ireland was advised that the plaintiff did not speak English. By 4 May 2007 the Central Authority in Northern Ireland had located an interpreter but it was 31 May 2007 before a consultation could be arranged between the Central Authorities. Counsel's draft affidavit and general inquiries were drafted by 14 June 2007 but it was 29 June 2007 before they could be interpreted in this jurisdiction for dispatch to Slovakia. The Slovakian lawyer replied in a detailed e-mail of 3 July 2007. No translation service could be obtained by the Central Authority in this jurisdiction until late August 2007. Because of the passage of time the originating summons supported by an affidavit from the plaintiff's solicitor was issued on 24 August 2007. The plaintiff's affidavit was finally lodged on 17 September 2007.

[8] Article 7 of the Hague Convention imposes upon Central Authorities a duty to co-operate with each other and promote co-operation amongst the competent authorities to secure a prompt return of children and to achieve the other objects of the convention. Central Authorities must provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child. By article 11 of the convention the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of proceedings the applicant or the Central Authority of the requested State may be required to give reasons for the delay.

[9] These provisions reflect the underlying purpose of the convention which is to ensure that unlawfully removed children are returned to their habitual residence as soon as possible so as to ensure that issues concerning their welfare are quickly and expeditiously addressed. It must follow that there is an obligation on the Central Authority in this jurisdiction to ensure that it has access to translation services which can deal with perfectly foreseeable applications from Europe and elsewhere. It seems clear to me that these services should also be available to other participants in these cases in light of the timescale set out within the convention. I am advised that the Central Authority has initiated discussions with the Legal Services Commission with a view to securing such services and putting in place a

protocol in respect of the time for translation. This case demonstrates the urgent need for such arrangements to be established as soon as possible.

[10] Ms Walsh QC contended that the facts established that the father had acquiesced in the retention of the children in Northern Ireland. She relied in particular on the fact that no steps were taken between 27 August 2006 when the father received the letter advising him that the mother and children had gone to Northern Ireland and January 2007 when he contacted his present solicitor. She pointed out that the father accepted that he had received a letter from the school principal in Northern Ireland indicating that the children were at school in Northern Ireland in or about September 2006. The defendant also alleged that she had sent a postcard to the father with her address in early September 2006. The father denied receiving the postcard and it seems to me an odd thing to do if one is seeking to avoid contact with the father as this mother undoubtedly was.

[11] The test to be applied in determining whether a defendant has established acquiescence was set out by Lord Browne-Wilkinson in Re H (Minors) (Abduction; Acquiescence) [1998] AC 72 at 90.

> "(1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819, 838: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact." (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice

> requires that the wronged parent be held to have acquiesced. "

[12] There is no doubt that the history of the proceedings set out in paragraphs 2, 3 and 4 above shows that the father was determined to pursue and committed to achieving contact with the children up to the time of their departure. The defendant removed the children without notice because in my view she was well aware that the father would have attempted to stop her. It is common case that from January 2007 the father has been actively pursuing the children and in my view the only explanation for the inaction between late August 2006 and January 2007 is that proffered by the father, namely, that he was acting in accordance with his legal advice. I do not consider that there is a credible case that the applicant acquiesced for one moment in the retention of these children in Northern Ireland and I do not consider that this defence is made out.

[13] The next defence on which the mother relies is the contention that there is a grave risk that the return of the children would expose them to physical or psychological harm. This is a stringent burden for the defence to discharge and the policy relating to this exception was considered by Hale LJ in TB v JB (Abduction: Grave Risk of Harm) [2001] 2 FLR 515 at paragraph 39:

> "[39] The policy of the Convention is that disputes about children should be determined in the courts of the country of their habitual residence. Children should not be uprooted and placed beyond their jurisdiction. It is for them to determine where the best interests of the children lie. Article 13(b) is the one exception to this. No requested country can be expected to return children to a situation where they will be at serious risk, but this must not be turned into a substitute for the welfare test, usurping the function of the courts of the home country."

The stringency of the test was set out by Ward LJ in Re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145 at 1154:

> "There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

This was also addressed by Baroness Hale in Re D (Abduction: Rights of Custody) [2006] UKHL 51 at paragraphs 50 and 51:

> "50. Nevertheless, article 13 provides that there are circumstances in which the authorities of the requested state are not bound to order the return of the child. These are (a) where whoever had rights of custody was not actually exercising them at the time or had consented to or later acquiesced in the child's removal or retention; or (b) "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." Article 13 also provides that the judicial or administrative authority may refuse to return the child "if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its [sic] views.
>
> 51. It is obvious, as Professor Pérez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated (*op cit*, para 34). The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all."

[14] The mother's case is that the children have been depressed and anxious about the contact with their father which she says has been forced on them against their wishes. She claims that this caused her to seek psychiatric and psychological treatment in respect of them. She claims that the court in Slovakia did not take proper account of the wishes and feelings of the children. In fact it appears that the court appointed an under tutor to investigate the situation of the children and that the evidence of the under tutor and the teachers at the children's school was that the children looked forward to seeing their father and happily ran into his arms. A social welfare report dated 2 October 2007 recorded that the mother declined to use a

counselling programme and psychological service which was offered in order to address the difficulties between the parents.

[15] The mother did, however, seek out a psychologist and psychiatrist outside the area in which she and the children resided. Although neither has ever spoken to the father at any stage each of these specialists has reported in respect of the children. Their reports appear to proceed on the view of events contended for by the mother namely, that her husband was violent and drank too much as a result of which the children were afraid of him. It is right to say, however, that the children disclosed at interview with the Official Solicitor that they never witnessed any physical violence between their parents. There were undoubtedly heated arguments between the parents connected to contact and the proceedings in January 2006 disclose that the father on occasions was aggressive. The children also claimed that on certain contacts the father had locked them in a room in order to stop them running away. I have to balance the risks associated with that against the apparently independent evidence that up to June 2005 when the father last had contact the children apparently enjoyed the time that they had with their father.

[16] The medical evidence in respect of the children causes concern. Both children have been diagnosed as suffering from post traumatic stress disorder as a result of the stress connected with the contact dispute. In assessing the risk associated with this diagnosis I have to recognise that it is made on the basis of a history which may well be inaccurate. There is evidence within the medical reports themselves that the children have been influenced by their mother to adopt a hostile approach to their father. There was also evidence of this in the interview with the children where they were emphatic that their mother did send a postcard to the father and were adamant that they did not want to write to or phone their father even if they remained in Northern Ireland.

[17] I consider that there is some risk to these children over and beyond the inevitable disruption, uncertainty and anxiety which follows any return in the circumstances. I consider that a significant element of that risk arises from the potential reaction of the mother on her return to Slovakia. It is for the defendant to satisfy me that the risk is grave in the sense that a return would be so inimical to the interests of these children that it would also be contrary to the object of the Hague Convention to require it. The test is stringent and I am not satisfied that it has been reached in this case.

[18] The defendant also invites me to refuse to order the return of the children on the basis that each of them objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of their views. I had directed that the Official Solicitor interview the children and a report setting out their views was filed on 3 October 2007. How a court should appropriately take into account a child's objections

depends on the particular facts of the case but a helpful approach was set out by Ward LJ in Re T (Abduction: Child's Objection to Return) [200] 2 FLR 192 at 204:

> "So a discrete finding as to age and maturity is necessary in order to judge the next question, which is whether it is a appropriate to take account of the child's views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others:
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> (a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is *her* views which have to be judged appropriate.
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> (b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?
>
> (c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?
>
> (d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"

[19] I am satisfied that these children are of an age and maturity where it is appropriate for me to take into account the views of the children. Article 11.2 of Brussels II Revised requires me to ensure that the children are given an opportunity to be heard in those circumstances. As a result of the settled environment which they have enjoyed for a period of approximately 1 year each of them now looks to Northern Ireland as a medium to long term home. Given that they left Slovakia against a background of parental dispute over contact it is perhaps not surprising that they have objections to a return to that environment. They raise specific concerns about their father's commitment to them but these seem at odds with other independent evidence of the enjoyable contacts up to June 2005. They are adamant that they do not wish to see or speak to their father and given the hostility which the mother has exhibited to contact with the father it seems to me highly likely that their views have been encouraged and shaped by the views of their mother upon whom they have been entirely dependent for the last year. If the children are returned I consider that the objections held by them will be heavily influenced by the ability of the parents to resolve the issue as to how the father can play a

meaningful and helpful role in their lives. In Re D at paragraph 53 Baroness Hale records the CAFCASS officer as concluding that the views of the child were "authentically his own". Although I accept that the views expressed by these children are the views presently held by them I could not accept that they are authentically their own views. I consider, therefore, that the weight that I should give to the children's views must be diminished as a result of this finding.

[20] This aspect is related to the last point which I have to consider and that is whether a return would expose the children to an intolerable situation. The mother is going to return with the children. The maternal grandparents are supportive of the mother and the children. The mother has a residence order in her favour and a maintenance order by virtue of the order of November 2002. The terms of the court order containing the suspended sentence does not appear to expose her to an immediate risk of imprisonment and the father has given an undertaking that he will not pursue any action against her in relation to that sentence as a result of past breaches. The mother has maintained contact with the medical specialists retained by her in relation to the children and it seems clear that their services will be available to her in the future if required. These are all reassuring features and point away from the situation being intolerable for the children.

[21] For the reasons set out above I am satisfied that this is a case where a return order should be made in order to uphold the policy of the convention.