THE HIGH COURT

FAMILY LAW

[2024] IEHC 141

IN THE MATTER OF ARTICLE 11(7) OF COUNCIL REGULATION 2201/2003/EC

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

AND IN THE MATTER OF Q (A MINOR)

(CHILD ABDUCTION: RETAINED JURISDICTION FOLLOWING NON-RETURN ORDER, BEST INTERESTS OF CHILD)

BETWEEN:

R.W.

APPLICANT

AND

T.W.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 13th of March, 2024

1. Introduction

1.1 The child, whom I will refer to as Q, was brought to Poland by his mother in 2019 where the relevant Court held that he had been wrongfully removed but the defence of grave risk was established. His father asks this Court to overrule the non-return orders made in Poland, bringing Q back to Ireland.

1.2 The best interests of the child are my primary concern. Given his nationality, language, upbringing, special characteristics and family life, Q should remain in Poland and the Court will not override the order of non-return.

1.3 Final orders in future cases under Article 11 will be made within 6 months of first appearing in the list, unless there are exceptional circumstances.

2. <u>Change of Habitual Residence during Proceedings</u>

2.1 There was a preliminary application by the Respondent that the Court should refuse to entertain this case because the child is now habitually resident in Poland. The basis for this argument was that the Applicant has applied to, and responded to, the courts in Poland and it was said that this suggests that he accepts the new habitual residence of Q. This application was refused. Articles 10 and 11(6)-(7) of Regulation 2201/2003/EC ("the Regulation") provide that this Court, in the country which was Q's habitual residence immediately before his removal, retains this special jurisdiction.

2.2 Article 10 of the Regulation provides that this Court retains jurisdiction until Q acquires habitual residence in another Member State and either the parent has acquiesced in return or: "*a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention*." This answers the submission. The provision requires both evidence of acquiescence and a change of habitual residence, unless judgment has been issued by this Court confirming the non-return order.

2.3 The argument that the Applicant acquiesced centred on the fact that he applied to, and replied to, the Polish courts in the course of proceedings there. This Applicant made his submissions in early course when the case was listed by the Central Authority. He has sought Q's return since that time. The Polish applications by the Respondent, who sought sole custody, might have extinguished his custody rights, after the original non-return order. There is no evidence of acquiescence in the accepted meaning of the word, that is, there is no evidence of his having subjectively accepted the situation nor did he act so as to lead the Respondent to believe that he would not object to the child remaining in Poland.

2.4 This preliminary objection was notified to the Applicant days before the hearing in February, 2024. This was very late to raise the issue, and the fact that I have addressed it should not serve as a precedent; the point was not raised in written submissions, lodged the week before the hearing.

3. The Review of a Non-return Order: Article 11

3.1 The mechanism provided in Article 11 has no equivalent in the Hague Convention and allows the courts in the Member State of origin to make a final decision on custody issues. This means that after a non-return order in Poland, the matter remains before the Irish courts if either party promptly applies for this review under the Regulation. The ultimate aim is to ensure

certainty for the child, either by transferring jurisdiction to Poland or by making a final, enforceable order that the child be returned to Ireland.

3.2 The Court makes the decision on custody, based on the best interests of the child. This is not a decision on whether he should now be returned under the summary procedure set out in the Regulation; it is a decision as to which is the better environment for the child. The Court must decide, in accordance with the principles set out in s.31(2) of the Guardianship of Infants Act 1964, as amended, (the "1964 Act"), if it is in the child's best interests to stay in Poland or whether he should be moved to Ireland to ensure that he has a meaningful relationship with the Applicant. In assessing Q's interests, the significant factors which must be taken into account are set out in the 1964 Act and, in this case, include the fact that Q has been in Poland for most of his life, the factual effects of the wrongful removal on him and his relationship with his father, and the ability of the Applicant father to care for him.

3.3 The Article 11 procedure is explored in *Z. v. Z.* [2021] IEHC 20, where Simons J. set out the rationale behind the provision and reviewed the relevant law. As he makes clear, such an application should be treated as urgent. In that case, there were more significant delays both in the initial transmission of documents to the Court from the Central Authority and in setting hearing dates, which had to be vacated due to the COVID-19 global pandemic. Nonetheless, this case is now being decided years after the child

in question returned to Poland and this will, inevitably, inform the decision on his welfare. Bearing in mind the comments from Simons J. in *Z v Z*, and similar comments from Ní Raifeartaigh J. in *D.M.M. v. O.P.M.* [2019] IEHC 238, future cases must be assigned hearing dates within months of first being listed, not years, as has happened here.

4. **Procedural History and Article 11 Delays**

4.1 These proceedings have had a long history in the Court's list. The case first appeared in the list in 2022. Thereafter, there were delays on the Respondent's side followed by difficulties in obtaining a report on the child. The expert assessor appointed in 2023 travelled to Poland that October to prepare a report for the Court. In the meantime, access arrangements were directed but not always adhered to. The case was listed for hearing at the direction of the Court due to the length of time it had remained in the list.

4.2 Delay appears to be a feature of these cases: in a list with otherwise strict time limits regarding applications for the summary return of abducted children, the final review of a non-return order appears less urgent by comparison. The respondent often has little motivation to urge the Court to a hearing as that parent is usually in a strong position, given that a child's best interests include such factors as social and family environment, over which that parent has almost complete control. The applicant in such cases faces the uphill battle of arguing that, despite what is inevitably a long

period in a child's life with the other parent and a court order in another Member State directing that he remain there, an Irish court should be persuaded to override that custody order. If an applicant succeeds, the inevitable effect is to uproot a child again, but considerably later than would be the case after a summary application for return.

4.3 While a return order may be made, the reality of Article 11 cases is that this is rarely done and, that being so, the applicant parent often allows the case to remain in the list as this allows the Irish Court to direct interim access, perhaps on better terms than anticipated in the new habitual residence. Even if access is not as generous as, or is equivalent to, that being provided or proposed in the new habitual residence, the respondent is perceived as having more motivation to abide by Irish court directions as long as there remains a risk of the non-return order being overruled by this Court.

4.4 The reality on the ground is that negotiations are always ongoing in these cases and, on occasion, this Court has noted improved dynamics in the family, as trust is rebuilt. However, that is not the function of the mechanism and allowing time for negotiation, or even mediation, cannot become a default position in this list. This Court will direct hearing dates in comparable cases more promptly in future, given that the nature of the cases appears to encourage a less urgent approach from the parties. As the child's welfare must remain the most important consideration in these cases, it is

not in a child's interests for a case such as this to remain in the list for long periods, with consequent and ongoing uncertainty as to his future.

4.5 I acknowledge that the best result for any child is that his parents reach agreement about his future, but in cases with lengthy histories of conflict, almost inevitable under Article 11, it is rarely in a child's interests to adjourn a final order, hence my conclusion regarding delays in the list, set out above.

4.6 Article 11(7) stipulates that the custody hearing be carried out in accordance with national law. The relevant national law in this jurisdiction is the aforementioned Guardianship of Infants Act 1964, as amended, which provides at section 3:

"[w]here in any proceedings before any court the custody, guardianship or upbringing of an infant … is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

4.7 The policy underlying such a welfare hearing differs from the policy underlying a Hague Convention hearing in fundamental ways. Whereas the purpose of the former is to determine the best interests of the child, the purpose of the latter is "*to achieve restoration of the status quo ante leaving all considerations of welfare and best interests to the courts of the habitual residence of the minor in question*." (*per* Whelan J. in *S.K. v. A.L.* [2019] IECA 177).

4.8 If return is in Q's best interests, that order is made and is, under Articles 11(8) and 42(1) of the Regulation, recognised and enforceable in Poland.

5. The Best Interests of the Child: the Law

5.1 The Court is guided by the detailed criteria set out in Section 31 of the 1964 Act (as inserted by Section 63 of the Children and Family Relationships Act 2015). Each subsection is addressed below. The most relevant facts are as follows: Q is Polish and both of his parents are Polish. His extended family on both sides live in Poland. Q speaks Polish, not English or Irish. The primary language of both parents is Polish, as both needed a translator for the court hearing.

5.2 While meaningful relationships with both parents is the first factor to be considered under s.31 of the 1964 Act, it is the first of a long list. There are other relationships in Q's life, including his mother's family in Poland and, in particular, a grandmother and a sister living with the family in Poland, and relations of the Applicant, also living in Poland, albeit at some distance.

5.3 The views of the child can be ascertained from the detailed report of Dr. Hawkins. It was submitted that the child's views are not ascertainable. I disagree. This expert assessor observed Q's engagement with his parents and took a lengthy history from both parents, leading her to several conclusions, which are set out in the report. These include comments on the child's outlook and responses to the relevant adults. The expert's clear view is that the child has a good relationship with both parents, but that Q's primary attachment is to his mother, the Respondent. This represents Q's

views and is not an objective fact but a subjective one, peculiar to this child. I accept her findings in that regard as they are fully supported in her report.

5.4 The Respondent has always been Q's primary carer, throughout his life. It was argued that the Respondent would travel to Ireland with Q and that the order for return did not only encompass him, but I have no authority to direct the Respondent to travel to Ireland. Of course, it is common sense to suggest that she will not let Q travel alone, but it is also important to recognise the limits of what the Court can do. An important factor in this regard is that the Applicant has made no proposals as to how he might care for the child, should Q be returned. It is his application for custody. It was essentially conceded in oral submissions that the Applicant's dominant concern is his access to the child. While this is an important objective, it undermines the application itself to reduce it to a matter of access, which is a matter for the courts of habitual residence to determine, not this Court.

5.5 Q currently attends special education therapy in Poland. Dr. Hawkins concludes that there is no immediate prospect of comparable care here in Ireland. Therefore, his educational, cultural and linguistic needs are met in Poland and would not be fully met in Ireland, in particular given the therapy he receives, his inability to speak English and the level of English of both parents. The child's spiritual needs are being met, indeed there is a concern about over-stimulation in that regard, but there is no comparable structure for Q in Ireland, or none that was revealed in evidence.

5.6 The assessor confirms that it is premature to diagnose the child as having autism. The Applicant does not believe that he has autism but does not oppose the interventions being made in that regard. He has engaged in training should there be a formal diagnosis. In *H. v I.* [2023] IEHC 700 this Court heard evidence of similar healthcare measures and their availability in Ireland and in Poland, but held that the child should not be returned to Ireland as there was no guarantee of immediate care, aligned with the Polish medical regime. Here, the evidence is that there is no comparable therapeutic regime in Ireland for Q, nor is there a prospect of such care.

6. <u>Violence and Alcohol</u>

6.1 The Respondent alleges in her affidavit that the Applicant has used violence against her but has confirmed to Dr. Hawkins that there was no physical violence in this case. In the relevant Polish court, it was held that she was motivated to remove the child on the basis of violence at the hands of the Applicant and his addiction to alcohol. The Respondent succeeded in establishing the defence of grave risk on this basis, which appears to contradict some of what the mother herself tells the expert in this case.

6.2 It was submitted that what was alleged was psychological abuse and not physical abuse. Protection of the child's psychological wellbeing is a separate issue to that of household violence and there is insufficient evidence to support any finding of physical violence by the Applicant such

as would affect the child in this case. However, I have concluded that a return would place Q's welfare and safety at risk. The assessor's views on the Applicant's use of alcohol are a significant consideration in this case.

6.3 The assessor commented twice in her report on the strong odour of alcohol emanating from the Applicant during her meeting with him when she observed his interactions with his son. She noted that the Applicant was not emotionally present in the room, probably due to the effects of alcohol, despite otherwise strong endorsements of their obvious rapport together.

6.4 The Applicant does not accept the assessor's conclusions in this regard and argues that he was not put on notice that she would make such findings. He refutes both her comment that he smelled of alcohol and her interpretation of his description of his drinking habits. He argues that he only drinks socially once a month.

6.5 The assessor is an independent expert with no ill-will towards the Applicant and there is no reason to dismiss her comments in this regard. She asked about his drinking habits, and he replied that he drinks once a month and occasionally cannot remember how he got to bed: that response is not disputed. What is disputed is her interpretation of the answers. The assessor concluded that he blacks out once a month. Even accepting his clarification that he confines his drinking to once a month, he accepts a regular level of drinking to the point where he has memory loss. This is a matter of concern to me even if the assessor mistakenly thought it was a monthly event.

6.6 It is likely that he drank on the day of this meeting, or drank a sufficient amount the day before, such that the assessor could smell the alcohol still. These two factors combine to persuade me that the Applicant probably has an issue with alcohol abuse. While it may not have arisen before, directly, in respect of his care of Q, it has arisen now. This was a significant feature in the affidavits of the Respondent and it is clear that this was a factor which led to the non-return orders made in Poland. I do not need to make any further findings of fact in this regard in terms of potential risks save that the Applicant was probably unable to abstain from alcohol before this important meeting with Q and has ongoing, if sporadic, drinking bouts.

7. Conclusions

7.1 The Applicant seeks the return of his son to Ireland but Q does not speak the languages spoken here, he has lived in Poland for almost all of his life and Q's primary carer and most of his family reside in Poland. He has special educational therapy there that is not available here. The Applicant has made no proposals for the child's custody, care, development and upbringing here, to use the words of the 1964 Act. These factors weigh heavily against ordering the return of Q to Ireland.

7.2 While the Applicant emphasises the importance of his relationship with his son, which is significant, it is only one of many factors that I must consider,

and every other factor suggests that Q's best interests are served by an order refusing this application for the return of the child.

7.3 One other point was strongly emphasised in submissions; lack of access. While access has not gone smoothly, the Respondent has facilitated sufficient access for the Applicant to retain a good relationship with his son, as confirmed by the assessor who observed their meeting and playing together. This facilitation of access is in Q's interests and should continue.

8. Access and Costs Orders

8.1 In 2019 the Applicant was granted generous access, but access has remained problematic with each party blaming the other for this. The Respondent consented to regular video access last year. While access may not have worked perfectly, the good relationship between them indicates that the Respondent has accommodated access to the extent that Q knows and loves his father, and she has not alienated him from his son.

8.2 It is clear that the bonds between father and son were damaged by the removal of Q to Poland. There is, however, insufficient evidence to find that the Respondent acted directly to sever relations between father and son more recently. While she refused to disclose Q's whereabouts for some time and registered the wrong name on his birth certificate, there is evidence of a more generous approach and better access facilities in recent years.

8.3 Another difficulty faced by the Applicant, as set out above, is that his presentation and answers to the court-appointed expert led her to conclude that he has an unhealthy approach to alcohol. Even a finding short of that, which is that he could not refrain from alcohol pending the important meeting with the expert and his son and that he engages, relatively regularly, in drinking to the point of blacking out, combine to constitute a risk to the welfare of Q, should he be in his father's care.

8.4 As this Court has decided not to order the return of Q to Ireland, the question of access is a matter for the Polish courts. The recommendations of the court-appointed expert cannot be adopted by this Court as my functions are at an end but, until the matter is listed before the Polish court, the current interim order regarding video access remains in place.

8.5 The *in camera* rule will be lifted to allow the file to be forwarded to the relevant Polish courts, including the expert's report, so that lawyers and the judiciary in Poland can consider her recommendations along with the more detailed information about Q which will be available to them.

8.6 I do not propose to make any order as to costs and will hear the parties in relation to the precise form of the final orders.