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Judgment Title: N. -v- N. [hearing a child]

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Judgment by: Finlay Geoghegan J.

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**Neutral Citation Number [2008] IEHC 382
THE HIGH COURT
FAMILY LAW**

2008 35 HLC

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF
CUSTODY ORDERS ACT 1991**

AND

**IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION**

AND

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

AND

IN THE MATTER OF M. N. (A CHILD)

BETWEEN

M. N.

APPLICANT

AND

R. N.

RESPONDENT

**JUDGMENT of Ms Justice Finlay Geoghegan delivered on the 3rd day of
December, 2008**

1. These are proceedings in which the applicant, who is the father of the child, seeks an order, pursuant to Article 12 of the Hague Convention, for the return of the child forthwith to the EU Member State of his habitual residence. The respondent in the proceedings is the mother of the child.

2. This application is by notice of motion brought on behalf of the mother, on 5th November, 2008. The motion seeks orders of the Court, both pursuant to s. 12 of the Child Abduction and Enforcement of Custody Orders Act, 1991, as amended, and s. 47 of the Family Law Act, 1995. No issue arose on the application as to the jurisdiction of the Court to make the orders sought. The sections referred to may not be the appropriate sections, but nothing turns on this.

3. It is common case that the application is brought for the purpose of seeking from the Court an order that the child be interviewed and assessed for the purpose of the proceedings. The application is based upon the obligation imposed on the Court by Article 11(2) of Council Regulation (EC) 2201/2003, which provides:

“When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.”

4. It is, correctly, common case between the parties that, being a provision in an EC Regulation, the obligation imposed thereby is binding upon the Court in hearing these proceedings and the Court has jurisdiction to make the type of order sought pursuant to Article 11(2) if it is warranted on the facts of the application.

5. The disputes in this application relate to the criteria according to which, or manner in which, the Court should determine whether it is “inappropriate having regard to his or her age or degree of maturity” to give a child an opportunity to be heard during the proceedings and whether, on the facts of this application, it is inappropriate.

Factual background

6. The child, the subject matter of the proceedings, was born in October 2002, and so has just recently reached six years of age. The father, mother and the child are all nationals of the other EU Member State. The parents married in 2002 and divorced in March 2008. At the time of the divorce, the Court of the EU Member State ordered that the child reside with the mother and the father have certain access rights.

7. In June 2008 the mother travelled to Ireland with the child. The mother’s parents now live in Ireland. The father claims that the child was wrongfully removed from the jurisdiction of his habitual residence in the other EU Member State and/or is being wrongfully retained in Ireland. There are disputes as to the father’s consent and/or acquiescence to the move to stay in Ireland, which are not relevant to this application.

8. The child has started school in Ireland and is currently in a junior infant’s class. He also attends a school for children of his own nationality on Saturdays.

9. In her affidavit grounding this application, the mother expresses the view that the child is “very able, competent and intelligent”. She also exhibits a letter from the class teacher of the Saturday school in which it is stated that the child carries out his tasks at that school “quickly and easily” and has been getting high marks for his schoolwork. It also states that the school principal and staff have recently decided to transfer the child to a class for older children aged eight to nine years. A letter from the child’s class teacher in his local primary school is also exhibited. That teacher notes that the child “appears to be a very bright boy and displays great enthusiasm in ongoing activities”. She also notes that the child has an aptitude for learning both English and Irish and that he is “coping very well with all aspects of the Junior Infant curriculum”. The father, in his replying affidavit to this application, states that the child is a normal six year old boy and not especially mature for his age.

10. The affidavit of the mother refers to objections of the child to returning to the other EU Member State and the father, in his affidavit, sets out a number of reasons for which the Court should not attach any weight to any such objections as might now be expressed by the child. For reasons which will become apparent, these are not matters which are directly relevant to the issues in dispute in this application.

Legal framework

11. The application for the return of the child is brought pursuant to the Child Abduction and Enforcement of Custody Orders Act, 1991, which is the Act which gives force of law in this jurisdiction to the Hague Convention on the Civil Aspects of International Child Abduction of 1980. The High Court has exclusive jurisdiction to hear and determine such applications (subject to a right of appeal to the

Supreme Court). Order 133 of the Rules of the Superior Courts provides for the application to be made on summary summons in an expedited form of procedure returnable directly to the Court. Applications are heard on affidavit evidence only, except where the Court, in exceptional circumstances, directs or permits oral evidence. Children up to sixteen years of age are subject to the Hague Convention. Neither The Hague Convention nor the Act of 1991 refers expressly to the right of the child to be heard in the proceedings. However, Article 13 of the Convention gives the Court a discretion to refuse to order the return of 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 views".

12. Neither the Act of 1991 nor the Rules of the Superior Courts make any express provision as to how the Court is to assess any alleged objections to return made by a child, or how it should determine whether the child has attained a degree of maturity where it is appropriate to take account of its views. Pursuant to its inherent jurisdiction, the Court has, for some time, in applications under the Act of 1991, made orders for the interview and assessment of a child by an appropriately qualified person, such as a child psychologist, where it was alleged that the child objected to being returned to his or her country of habitual residence. This was done as a matter of discretion and not pursuant to any absolute obligation on the Court.

13. Since the coming into force of Council Regulation (EC) No. 2201/2003, Articles 11(2) to 11(8) thereof also govern an application for the return of a child to an EU Member State.

14. In addition to Article 11(2) set out above, Article 11(3) is of relevance to this application. It provides:

"A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged."

15. Counsel for the father submitted that the obligations imposed on the Court by Article 11(2) must be construed in a manner consistent with the time obligations imposed by Article 11(3).

16. Counsel for the mother submitted that the obligation imposed by Article 11(2) should be construed in such a way as to give effect to the right of the child to be heard, as recognised in Article 12 of the United Nations Conventions on the Rights of the Child, ratified by Ireland on 28th September, 1992. This provides:

"1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

17. The recitals to Regulation 2201/2003 do not expressly refer to Article 12 of the United Nations Convention on the Rights of the Child. However, in relation to hearing the child, they state at paragraph (19):

"The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable."

and further, at paragraph (33):

"This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union."

18. Article 24 of the Charter of Fundamental Rights of the European Union provides:

"1. Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

Conclusion

18. I have had the benefit of very helpful written legal submissions from counsel for the mother and counsel for the father, referring to a number of decisions of the Courts of England and Wales and of this jurisdiction in which the obligation imposed on the Courts by Article 11(2) and the right of the child to be heard in proceedings affecting him or her, have been considered. Having considered those, and the oral submissions made at the hearing of the motion, I have reached the conclusions set out below. Some of those conclusions were not in dispute between the parties but merit restatement to make those matters, which were in dispute, comprehensible.

19. A mandatory positive obligation is placed on a Court by Article 11(2) to provide a child with an opportunity to be heard, subject only to the exception where "this appears inappropriate having regard to his or her age or degree of maturity", see *R. v. R.* [2007] IEHC 423, in which I agreed with similar views expressed by Thorpe LJ., Smith L.J. and Munby J. in the Court of Appeal in England and Wales in *Re. F. (a Child)* [2007] E.W.C.A. Civ. 468. The starting point is that the child should be heard. The Court is only relieved of the obligation where it is established that it would be inappropriate for the reasons stated.

20. In Hague Convention proceedings to which Article 11(2) applies, the issue as to whether or not the Court should give a child an opportunity to be heard is a separate and distinct issue from an issue which may arise subsequently in the proceedings as to the appropriate weight, if any, to be given by the Court to the views expressed by the child in determining any substantive issue in the application for the return of the child.

21. Baroness Hale of Richmond in *Re. D. (Abduction: Rights of Custody)* [2006] U.K.H.L. 51, having referred to Article 11(2) stated, albeit *obiter*, at paragraph 58 of her speech:

"Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a 'defence' under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the

child is, as already stated, not to be confused with giving effect to his views."

22. Insofar as I have stated that hearing the child is not to be confused with determining what weight should be attached to any views expressed, I believe I am saying the same as did Baroness Hale in the final sentence above. A determination as to whether or not to give effect to the child's views is a further subset of determining the weight, if any, to be attached to those views and includes a number of other discretionary factors which may arise under Article 13 of the Hague Convention.

23. In this application, I am only determining whether or not the child should be given an opportunity to be heard. The fact that, on this application, I determine that the child should be heard, does not determine the weight, if any, which may be attached to those views by a judge determining the substantive application for the return of the child.

24. How should the Court determine the age or degree of maturity at which it is not appropriate to give the child an opportunity to be heard? Counsel for the mother may, I believe, strictly speaking be overstating the legal status of Article 12 of the UN Convention on the Rights of the Child in submitting that Article 11(2) should be construed so as to give effect to the rights given to the child by that Article. The recitals to Regulation 2201/2003 do not refer expressly to the UN Convention on the Rights of the Child. Further, whilst Ireland has ratified the Convention, by reason of Article 29.6 of the Constitution, it does not form part of the domestic law as it has not been given the force of law in Ireland by the Oireachtas.

25. Nevertheless, it appears to me that it is permissible to have regard to Article 12 of the UN Convention on the Rights of the Child and that it is of assistance in answering the question I have put, for the following reasons. Recital (33) of Regulation 2201/2003 refers expressly to the Regulation seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the EU Charter of Fundamental Rights. Article 11(2) should be construed so as to give effect to the rights in Article 24. This refers to what appears to be a right of all children to "express their views freely" and then to have those views taken into account "in accordance with their age and maturity". The right to "express views freely" is the right also referred to in Article 12 of the UN Convention on the Rights of the Child. The UN Convention on the Rights of the Child has been acceded to by many (if not all) of the EU Member States and it appears to me probable, having regard to the wording of Article 24 of the EU Charter of Fundamental Rights and Article 12 of the UN Convention on the Rights of the Child, that they intend to guarantee a similar (if not the same) right to children. I am reinforced in that view by the view formed by Baroness Hale in the passage referred to above that the obligation imposed by Article 11(2) is consistent with the United Kingdom's obligations under Article 12 of the UN Convention on the Rights of the Child.

26. Article 12 of the UN Convention on the Rights of the Child, however, expressly identifies the category of children to whom the right is assured. It obliges the States to assure to the child "who is capable of forming his or her own views" the right to express those views freely. Notwithstanding the absence of any similar category identification it appears to me probable that Article 24 is only intended to assure the right to "express their views" to a similar category of children. Such a right assumes that the child has a view which he is to be permitted to express. It is the child's *own* view which Article 24 grants him the right to express and this presupposes that the child is capable of forming his *own* views.

27. Applying Article 11(2) so as to respect the rights granted to a child in Article 24 of the EU Charter of Fundamental Rights (and having regard to the starting point of hearing the child as set out above) I have therefore concluded that the primary consideration of the Court in determining whether or not a child should

be given an opportunity to be heard is whether the child on the evidence appears *prima facie* to be of an age or level of maturity at which he is probably capable of forming his own views. I say *prima facie* for the following reason.

28. I accept the submission made by counsel for the father that the obligation in Article 11(2) should be construed in a manner consistent with the expedition obligations imposed on the Court by Article 11(3). In our procedural system, where there is no mechanism readily available to the Court to obtain an independent professional assessment in a speedy or simple way as to the probable level of maturity of a child and capability, or not, to form his own views without making the type of order now requested, it appears that the Court should form what can only be a *prima facie* view of the capability of the child to form his own views having regard to the age of the child and evidence adduced on affidavit by the parties, whilst recognising the latter may not be objective. If the Court were to seek a separate professional assessment of the maturity and capability of the child to form his own views before determining whether he should be heard this would both lengthen proceedings and make them more costly if it were then decided that the child should be given an opportunity to be heard. The Order to be made on this application will both allow the child to be heard and the Court obtain a professional assessment of the level of maturity of the child which will then assist the Court in deciding the distinct issue as to the weight, if any, to be attached to the views expressed by the child. This approach also appears consistent with the construction of Article 11(2) according to which not hearing the child is an exception to the general obligation.

29. Counsel for the father also submitted that the Court should consider not just whether the child is capable of forming his own views in general or in relation to everyday matters but rather whether he is capable of forming his own view whether he should continue to live in Ireland or return to live in the other EU Member State as this was the issue to be decided in the proceedings. Counsel submitted that a child of six years *prima facie* was incapable of properly forming his own view on such an important issue as in which of two countries he should live as he would not be capable of understanding the full consequences for him of such a decision.

30. It does not appear to me that this submission is correct on the present application for two reasons. First the obligation in Article 11(2) applies where the Court is applying either Article 12 or Article 13 of the Hague Convention. Article 12 is the provision according to which the Court makes the summary order for return. However, in making those orders, the Court will often seek undertakings from the applicant for return (intended normally to be of a temporary nature until the Courts of the jurisdiction of habitual residence are seized of any dispute) for the purpose primarily of seeking to ensure that the return takes place in a manner which is in the best interests of the child. It may well be that views expressed by a child on everyday matters as to the circumstances in which he was living before he came to Ireland, or his wishes as to his future care including what should happen on return, could be taken into account by a Court by seeking appropriate undertakings when making the order for return pursuant to Article 12 of the Hague Convention. In accordance with Article 24 (3) of the EU Charter of Fundamental Rights, the child's best interests must be a primary consideration in the judicial determination.

31. Secondly, this submission appears to confuse the issue as to the weight to be attached to views expressed with the issue as to whether the child should be given an opportunity to be heard and to be relevant to the former. In general, the weight to be attached to views expressed by a six year old as to the country in which he would like to live will be less than that to be attached to the views of say a fifteen year old for, *inter alia*, the reasons submitted by counsel for the father.

32. On the facts of this application, the child is aged six years and appears from the affidavit evidence of the parents to be of a maturity at least consistent with

his chronological age. On those facts, I do not find that *prima facie* he is a child not capable of forming his own views in the sense I have outlined above. It appears to me unavoidable that a judge making such a decision must rely on his or her own general experience and common sense. Anyone who has had contact with normal six year olds know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life.

33. Accordingly, I will make an order in substance, as sought. Counsel and solicitors for the parties are aware of the form of order which the Court normally makes in similar applications in relation to older children. Having regard to the detailed submissions made in this application and the age of the child I have reconsidered the form of order and propose handing down a revised draft form of order and inviting observations of counsel thereon.