Translation from the Finnish:

S U P R E M E C O U R T **D E C I S I O N** **Record no.** 1(10)
S2008/743

Date of issue **No.**

17 November 2008 2499

APPELLANT Homemaker Hanna B, Lappeenranta

ADVERSARY Software developer Daniel A, Scotland, United Kingdom

CASE Return of children by virtue of the Hague Convention

APPEALED DECISION

Decision of Helsinki Court of Appeal of 1 October 2008 No. 2764, appended to this document.

INTERIM ORDER

By its decision of 3 October 2008, the Supreme Court has by virtue of chapter 30 section 23 of the Code of Judicial Procedure ordered that the decision of the Court of Appeal shall not be enforced until further notice, nor shall enforcement be continued.

APPEAL IN THE SUPREME COURT

Hanna B has in her appeal demanded that the decision of the Court of Appeal be overturned and the demand of Daniel A that the children be returned to Scotland be refused. Hanna B has also demanded that an oral hearing for the taking of evidence be held in the case, or that the matter be returned to the Court of Appeal for the purpose of holding the main hearing.

Hanna B has subsequent to the deadline of 20 October 2008 submitted an additional brief, including appendices to the Supreme Court.

Daniel A has responded to the appeal and demanded that it be dismissed.

Daniel A has on 28 October 2008 submitted additional evidence to the Supreme Court.

DECISION OF THE SUPREME COURT

Decision of proceedings

Hanna B has subsequent to the prescribed deadline for appealing submitted to the Supreme Court an additional brief to which she has appended written evidence. Since it may have been rendered probable that Hanna B has not able to refer to the evidence in the Court of Appeal, the Supreme Court will take the additional brief, including appendices, into account by virtue of chapter 30, section 7 and section 18 of the Code of Judicial Procedure.

The Supreme Court will by virtue of chapter 30, section 18 of the Code of Judicial Procedure also take into account the additional evidence of Daniel A submitted to the Supreme Court after the prescribed deadline for responding.

The demand for an oral hearing in the Supreme Court is rejected as manifestly unnecessary.

Decision in the main proceedings

Grounds

Framing of the issue

1. The issue is whether the mutual children of Hanna B and Daniel A, C and D, habitually resided in Scotland on 28 April 2008 when Hanna B travelled with them to Finland, and whether the children must be returned to Scotland.

Applicable provisions

2. According to section 30 of the Child Custody and Right of Access Act, a child living in Finland and wrongfully removed from the state where he or she has his or her habitual residence, or wrongfully not returned to this state, shall be ordered to be returned at once, if he or she immediately before the wrongful removal or failure to return was habitually resident in a state which is a Contracting State to the Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 October 1980 (the Hague Convention). The United Kingdom is a Contracting State to the Hague Convention.

3. Since the issue involves the United Kingdom, the rules of Council Regulation 2201/2003/EC (the Brussels IIa Regulation) of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility shall be applied. The Brussels IIa Regulation likewise requires that the child be returned to his or her original state of habitual residence in the manner prescribed by the Hague Convention.

4. Neither the Hague Convention nor the Brussels IIa Regulation precisely defines the meaning of habitual residence. Habitual residence refers, however, in the Conventions concluded within the sphere of the Hague Conference on International Private Law, to the place where a person actually resides and where his or her main environment is actual located (e.g. HE 60/1993 vp p. 16). Habitual residence in the Brussels IIa Regulation also refers to habitual residence as defined according to the aforementioned international private legal principles. In the overall deliberation concerning determination of the habitual residence, consideration is given, as stated in the Government Bill (HE 60/1993 vp p. 16–17.), above all to facts objectively found such as the duration and continuity of residence, social ties and other similar facts relating to the individual or his or her profession, which are proof of the actual ties to the state in which the individual resides.

5. In legal practice concerning the Hague Convention, it has been deemed that the intention of a person to remain or not to remain in the state of residence may have significance, although this factor may have less weight than the aforementioned factors in the deliberation. Since the issue at hand involves a small child who is not yet able to independently decide the purpose of his or her stay, significance must be given to the habitual residence of the custodians as well to family ties and other social relationships.

6. The concept of habitual residence must at any event be interpreted consistently with the objectives of the Hague Convention and the Brussels IIa Regulation. The main objective of the Hague Convention is to protect the child from harmful effects that arise if one of the child’s custodians removes the child from his or her

familiar and established environment to a foreign state. Hence, after the occurrence of child abduction, the child, by virtue of the provisions of the Convention, must be ordered to be promptly returned to the original state of habitual residence so that the established circumstances of the child can be restored. The Hague Convention begins with the premise that jurisdiction in matters regarding the custody of the child belongs primarily to the authorities of the state in which the child has habitual residence. According to the Brussels IIa Regulation as well, disputes concerning the custody of children are heard in the court of the state where the child is habitually resident.

Contention of the Supreme Court

7. Daniel A has referred to the fact that the family had in October 2007 moved to Scotland with the aim of settling there at least for the time being. Hanna B, for her part, has deemed the issue to have been a holiday necessary for Daniel A's recuperation which, following Daniel A's declaration after three weeks in Scotland that he would no longer be returning to Finland, had lengthened into a six-month stay in Scotland for Hanna B and the children. The reason for this, according to Hanna B, was on one hand that, due to her maternity leave, she had no immediate need to return immediately to Finland, and that she had also considered it possible that Daniel A would change his mind and, on the other, the declaration of Daniel A and his mother that the children could no longer be removed from Scotland without Daniel A's permission.

8. At the time they travelled to Scotland, the family had left in Finland, in their municipality of residence in Lappeenranta, a furnished, approximately 180-square

metre home in, according to the report of Hanna B, a house owned jointly with her sister, where the family had lived at the time they went to Scotland. They have left their ordinary household effects in the apartment, where the personal property and professional literature of Daniel A has also remained. Daniel A had when taking D to the child health clinic at the beginning of 2007 booked an appointment with the clinic doctor for him for the following November. According to the record of the child health clinic centre, the aim of the family was to continue later in the autumn ALVARI family work. Neither spouse had submitted a change-of-address notification when they left Finland although both, as permanent residents in Finland since 2000 and having submitted several change-of-address notifications, were aware of the obligation to do so. Daniel A has afterwards notified the Finnish authorities of the termination of his business operations in January 2008.

9. The family has stayed in Scotland initially with Daniel A's mother. In December 2007, Daniel A concluded a fixed-term lease for his family's home until June 2008. The documents show that Hanna B has already fairly soon after arriving in Scotland announced her intent to return to Finland with the children. Daniel A, for his part, has from time to time been with his sister and in April 2008, before the children travelled to Finland with the children, he has moved to live with his mother.

10. As stated in the decision of the Court of Appeal, the family had, prior to going to Scotland, declared that they considered moving there. This fact suggests joint intent regarding the change of country of residence. Taking into account the facts described in paragraphs 8 and 9 as a whole, the Supreme Court nevertheless deems that based on the account submitted

on the spouses' behaviour, it cannot be concluded that Hanna B also intended to stay even for the time being in Scotland. Hence it remains unclear as to what the spouses' joint intent was when they went to Scotland and during their stay there.

11. The family has lived together in Finland until they went to Scotland. In Finland, the children have been within the sphere of the child health clinic system, and the whole family has received the support of the clinic’s family work in Finland, following which the family had intended to begin ALVARI family work. In Finland, the family have had a furnished home to which Hanna B has returned from Scotland to live with the children.

12. Daniel A has since 20 December 2007 leased furnished accommodation for the family’s home, but he has, in the manner described above in paragraph 9, moved away. The fixed-term lease was made for only six months. In Scotland, the family has not received the same support given by family work in a child health clinic system as in Finland. The family has registered as a permanent client of the local health centre, but registration can be regarded as a natural measure owing to the need to take care of the health of small children and therefore does not have any significance when deliberating the children's ties to Scotland. C began half-day care in Scotland on 24 October 2007, and this has continued initially until 20 November 2007, and again between 8 January and 25 April 2008. The half-day care was not regular, and so his relationship with the staff of the day-care centre and playmates could not have become well established.

13. In assessing the aforementioned ties of the children to their family and to Finland compared to the ties to Scotland, the Supreme Court takes the view that during a period of approximately six months the children have not established any social ties of the kind that could be regarded as having changed their habitual residence from Finland to Scotland. In this deliberation, the Supreme Court has also noted that the children and their mother, even during their stay in Scotland, have also been in close contact with their grandmother and aunt living in Finland, along with certain other relatives.

14. The Supreme Court deems on the grounds stated above that the children's habitual residence has also on 28 April 2008 been in Finland. For this reason, the children cannot be ordered to be returned to Scotland.

Legal costs

15. In assisting their clients, Advocate Y, appointed Legal Counsel for Hanna B and Advocate X, appointed Legal Counsel for Daniel A, have, due to circumstances beyond the control of the attorneys, had to perform the assignment as a matter of urgency as well as partly in English and outside regular working hours. For this reason, the fee for Ms Y and Ms X by virtue of section 8 of the Decree on Legal Aid Fee Criteria is assessed at 20 per cent higher than the normal fee. The Supreme Court has deemed the reasonable number of working hours of Ms Y and Ms X to be 10.

16. Taking into account the circumstances leading to the proceedings, Daniel A's financial position and evaluating the significance of the matter as a whole to Daniel A, ordering him to compensate the state for the

amounts paid from state funds to the Hanna B’s attorney would be unreasonable.

Resolution

The decision of the Court of Appeal is overturned, with the exception of the fees from state funds and compensation for expenses paid to the attorneys. Daniel A’s petition for the return of the children C and D is refused.

Attorney Y shall, by virtue of the Legal Aid Act, be paid 1,200 euros from state funds as a fee for representing Hanna B in the Supreme Court, 12.10 euros in compensation for expenses and 264 euros in value added tax, and Attorney X as a fee for representing Daniel A 1,200 euros and 264 in value added tax.

The amounts paid from state funds to Hanna B's attorney Ms Y will remain the state's loss.

Affirmed with the seal of the Supreme Court and the signature of the referendary.

(L.S.)

Lea Nousiainen

Certified as a true copy on the date of issue of the Supreme Court’s decision.

(signed)
Referendary
Lea Nousiainen

The case was decided by Supreme Court Justices Lehtimaja (dissenting), Kitunen, Aarnio, Häyhä and Jokela (dissenting). The Referendary has been Deputy Chief Secretary Nousiainen.