Neutral Citation no. [2007] NICA 50 | *Ref:* **KER7005**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **03/12/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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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/APPELLANT;

-and-

SIR

DEFENDANT/RESPONDENT.

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Before Kerr LCJ, Campbell LJ and Higgins LJ

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KERR LCJ

Introduction

[1] This is an appeal from the decision of Morgan J whereby he ordered 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 about this case which could lead to the identification of the children concerned or any of the parties.

Background

[2] This has been set out with admirable clarity in the judgment of Morgan J and we gratefully adopt his account. 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. 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] 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. Article 12 of the convention provides: -

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

[6] Before Morgan J, the mother opposed 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. Morgan J held that it had not been established that the father had acquiesced in the removal of the children and that part of his decision is not challenged in this appeal.

[7] The appellant sought leave to introduce fresh evidence on the appeal. This consisted of: -

> (a) An affidavit from the mother detailing disturbed behaviour on the part of the children in the

aftermath of the decision of Morgan J. This included taking analgesic tablets, obtaining more tablets after the mother had removed all medication from the house and a somewhat forlorn attempt to run away to avoid being returned to Slovakia;

(b) Medical evidence in the form of reports from the appellant's general practitioner who was consulted by the mother after the behaviour referred to in (a) above;

(c) A police report detailing the search for and the eventual discovery of the children.

[8] After hearing submissions from counsel for the appellant, the respondent and the Official Solicitor, we acceded to the application. A further application that the court should order that the children be interviewed by either the Official Solicitor or some other suitable person was refused by the court. Ms Walsh QC, who appeared for the appellant with Ms McCullough, submitted that the court was obliged to order that the children be interviewed in order to fulfil its obligations under article 11.2 of Council Regulation (EC) No 2201/2003 (Brussels II revised) 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.

[9] As observed during exchanges between the court and counsel, this duty is triggered by the court concluding that such opportunity as has already been had for the children to be heard has not been sufficient to ensure that their views were fully before the court. In the present case, we were entirely satisfied that the children's views had been fully heard. They had been interviewed by a solicitor in the Official Solicitor's office. Her commendably thorough report had fully articulated their views about returning to Slovakia and it had also included an account from the teacher of KR about the progress that the girl had made at school. The reports of the doctor, the police report and the mother's affidavit clearly conveyed a well settled opposition on the part of the children to being returned to Slovakia. We could not conceive of any value in having the children interviewed again merely to reinforce views that had already been emphatically expressed.

The arguments on appeal

[10] For the appellant Ms Walsh submitted that the defence available under article 13b of the Hague Convention had been made out. It provides: -

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> …
>
> (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."

[11] Counsel contended that the evidence that the children had engaged in episodes where they appeared to self harm and where they ran away from home were clear indicators that there was a grave risk that similar events would occur on their return to Slovakia. If such a risk materialised, physical or psychological harm was the inevitable consequence.

[12] By way of alternative, Ms Walsh argued that this court should exercise the discretion conferred by the succeeding sub-paragraph in paragraph 13 and refuse to order the children's return. It provides: -

> "The judicial or administrative authority may also 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."

[13] In advancing that argument, Ms Walsh submitted that this court should disregard the finding of Morgan J that the views of the children are not "authentically their own views" and that the weight to be attached to them should, on that account, be reduced. She suggested that whether the mother had influenced the children's views or not, if they represented the genuinely held views of the children, they should be accorded considerable and appropriate weight.

Conclusions

[14] In *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 at 1154, Ward LJ discussed the requirements of article 13b of the Hague Convention in the following passage: -

> "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."

[15] The rubric 'clear and compelling evidence' is echoed in a number of other authorities in this area, some of which were referred to by Morgan J in his judgment and need not be repeated here. The question for this court is a relatively simple one: is there convincing evidence of a grave risk of physical or psychological harm to the children if they are returned to Slovakia? It is to be noted that not only must the evidence of the risk be clear, but the risk must be shown to be grave.

[16] We are unable to accept Ms Walsh's central proposition on this aspect of the case. This was to the effect that the episodes of attempted self harm and the running away from home unmistakably foreshadow the repetition of similar events if the children are returned to Slovakia. We are satisfied that the children fervently wish to remain here and we are disposed to accept that the episodes that have occurred since the return order was made are manifestations of that wish. Indeed we think it likely that the principal motivating force for these events was the desire of the children to prevent their return to Slovakia but we do not consider that they inevitably herald psychological or physical harm if they are returned there. It is clear that they have a strong bond with their maternal grandparents and there is no reason to suppose that effective support mechanisms will not be in place to deal with the unavoidable upheaval that their return to Slovakia after living for a significant period in Northern Ireland will entail. The evidence which has been adduced, while it speaks eloquently of the desire of the children to remain here, falls conspicuously short of meeting the essential pre-condition contained in article 13 (b).

[17] We consider that the children's desire to remain living here is genuine. This may – to some extent – be the product of manipulation by the mother but we do not believe that this is a factor that should weigh heavily to discount the importance of their views. Both appear to have settled well at school and they appear to have the enviable gift of easy friendship. To be uprooted from the happy environment in which they find themselves at present is bound to bring a sense of foreboding. But children are resilient and with proper support from their families and the social services in Slovakia there is no warrant for pessimism that they will not be able in time to adjust to the change that a return to Slovakia will entail.

[18] We consider that full weight must be given to the children's views. They are of sufficient maturity to hold those views strongly. We do not doubt that they are genuine in their expressed wish to remain here. As the Court of Appeal in *Re T (Abduction: child's objections to return)* [2000] 2 FLR 192 held, the fact that the children's views may have been influenced or even procured by a parent does not justify those views being disregarded if they are genuinely held. Therefore, in reaching the conclusion that we do, we have not discounted their views in any way.

[19] Two significant countervailing factors must be set against the children's views, however, and ultimately, in our judgment, must prevail over them. The first is that, as Morgan J said, the underlying purpose of the convention 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. That underlying purpose and the integrity of the convention itself would be seriously compromised if the refusal to order a return was not confined to the wholly exceptional case. This is not such a case.

[20] The other factor that weighs against making an exception in this case relates to the father's rights under article 8 of ECHR. We consider that his rights will unquestionably be interfered with if we refuse to order the return of his children. We have concluded that none of the matters adumbrated in article 8 (2) applies in this instance and that such an interference cannot therefore be justified. Ms Walsh argued the where there are competing article 8 rights, those of the children must prevail and that is unquestionably correct but we do not consider that there will be an interference with those rights if the children are returned to Slovakia. There is simply no reason to suppose that their right to a family life will be in any way compromised by the circumstance that it must be experienced in the country of their birth.

[21] The appeal must be dismissed and the order of Morgan J affirmed.