S U P R E M E C O U R T D E C I S I O N

Record no. 1(9)
s2011/260

Date of issue
12 April 2011

No.
824

APPELLANT S[redacted], Helsinki, Finland

OPPOSING PARTY A[redacted], Canada

MATTER Return of a child by virtue of the Hague Convention

DECISION APPEALED AGAINST

The decision of the Helsinki Court of Appeal of 22 March 2011 no. 879 appended hereto

INTERIM MEASURE

The Supreme Court had by its decision of 25 March 2011, issued under Chapter 30 section 23 of the Code of Judicial Procedure, ordered that the decision of the Court of Appeal was not to be enforced for the time being.

APPEAL TO THE SURPEME COURT

S[redacted] has in her appeal document demanded that the decision of the Court of Appeal be reversed and that the application for the return of the child be denied and that A[redacted] be made liable to compensate for her legal costs incurred in the matter, both in the Court of Appeal and the Supreme Court, with legal interest. In addition, S[redacted] has demanded that the Supreme Court hold an oral hearing in the matter.

A[redacted] has responded to the appeal and demanded that the appeal be rejected.

DECISION OF THE SUPREME COURT

Decision concerning the consideration of the case

All the facts that are relevant to a decision in the matter are presented in the trial documents. On account of this and of what is stated in the reasons for the decision on the merits of the case, S[redacted]'s request for holding an oral hearing is rejected.

Reasons for the decision on the merits of the case

1. According to section 30 of the Child Custody and Right of Access Act (*Laki lapsen huollosta ja tapaamisoikeudesta* 361/1983), a child living in Finland and wrongfully removed from the State where he or she has habitual residence, or wrongfully not returned to this State, shall be ordered to be returned at once, if the child immediately before the wrongful removal or retention was habitually resident in a State which is a Contracting State in the Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 October 1980 (the Hague Convention).

2. It is undisputed in the case that S[redacted] and A[redacted] had lived together in Canada from year 2003 until July 2008. S[redacted] had in mid-July 2008 travelled alone to Finland, where C was born on 27 September 2008. A[redacted] had also stayed in Finland for a few weeks around the time the child was born. S[redacted] had returned to Canada with the child at the turn of November and December 2008. According to an

extract from the Population Information System, she had lived in Canada from 10 December 2008 onwards. S[redacted] had travelled to Finland with the child on 1 March 2010, and her intention had been to return to Canada either on 31 March or 19 April 2010.

3. It becomes evident in the statements presented by the parties in the Supreme Court that they had, already before the child was born, discussed the option of moving to Finland at some point after the childbirth. According to S[redacted], they had agreed to move to Finland, and the return to Canada after the childbirth was meant to be only temporary. A[redacted] has, for his part, stated that any agreement described by S[redacted] had not been reached, although he admits that relocation to Finland could also in his opinion have taken place at some point in the future.

4. S[redacted] and A[redacted] have on 26 November 2008 made an agreement confirmed *ex officio* by a lawyer of Helsinki Social Services Department. According to the agreement, the child will reside with her mother. No agreement concerning child custody and right of access has been made on this occasion. It becomes evident in the notes taken by the lawyer of the Social Service Department that the duration of the stay in Canada after the return there had also been discussed when drafting the agreement. According to the notes, the mother had wanted to come to live in Finland, whereas the father had wanted to return to Canada "for some time". A[redacted] has in his response stated that he had on the same occasion been asked to sign an agreement stating that the return to Canada would be only temporary, but he had refused to sign the document.

5. The notes taken by the lawyer of the Social Services Department and the fact that an agreement on the child's place of residence has been made as well as the e-mail correspondence between the parents presented as evidence in the case support the conception that S[redacted] had understood that the relocation to Canada at the end of year 2008 was meant to be temporary and that the family would after this temporary intermediate phase move to live permanently in Finland. In the e-mail correspondence, A[redacted] has not explicitly denied the existence of such shared intention, but he has brought up certain changes in the circumstances as well as reasons related to his work and the family's financial situation that are in favour of the family's residence in Canada. When the exact time for moving to Finland has remained open and the mutual understanding between the parents has also in other respects remained unclear, the Supreme Court considers that sufficient contractual grounds for turning down the request for the return of the child have not been presented in the case.

6. The decisive question in the matter is thus whether C's habitual residence had been in Canada or in Finland immediately before S[redacted] failed to return the child to Canada despite A[redacted]'s request to do so.

7. It has been considered in the international legal praxis concerning application of the Hague Convention that the habitual residence of a child may change even after a very short period of living in another state, if the duration of the stay has not been determined at the time of the relocation to the other state (Cameron v. Cameron 1996[1]). Further, it has been considered in the legal praxis that if

[1] Cameron v. Cameron 1996 SC 17, 1996 SLT 306, 1996 SCLR 25, Inner House of the Court of Session Scotland 24.10.1995

a child has after a relocation resided in another state long enough, for example for a year, the child has become habitually resident in that state even if the parents had discussed a possibility of returning to the prior state of habitual residence (Moran v. Moran 1997[2]). Attention has also been paid to whether the parents had an intention to abandon their prior state of habitual residence when they relocated to the other state. If this had not been their intention, then residing in another state for a year or even longer does not necessarily mean that the prior habitual residence would have ceased to be the child's habitual residence (Mozes v. Mozes 2001[3]). If the parents' shared intention concerning the child's place of residence has remained unclear, the matter should be assessed by taking into account the factual circumstances as a whole. However, the child's state of birth has not been a decisive factor in this assessment (Delvoye v. Lee 2002[4]).

8. S[redacted] and A[redacted] had in a manner described in paragraph 2 above lived for a long time in Canada before C was born. They had also had a common apartment in Canada. S[redacted]'s apparent intention had been that the family would after the childbirth move to Finland. The agreement on the residence of the child with the mother may be considered as proof of S[redacted]'s intention. However, it cannot be concluded on the basis of the agreement that consensus would have been reached between S[redacted] and A[redacted] about the family's intention to move to Finland at any specific time. C had, after moving to Canada with her mother at the age of under three months, lived there for more than a year, until S[redacted] had on 1 March 2010 travelled to Finland with the child. It may be concluded based on the facts relating to S[redacted]'s own

[2] Moran v. Moran 1997 SLT 541, Outer House of the Court of Session Scotland 25.08.1995
[3] Mozes v. Mozes 239 F. 3d 1067, United States Court of Appeals for the Ninth Circuit 09.01.2001
[4] Delvoye v. Lee 224 F. Supp. 2d 843, United States District Court for the District of New Jersey 24.09.20

proceedings in connection with the travelling to Finland, for example based on the fact that she had booked return tickets, that her intention had been to stay in Finland only for about a month. A[redacted] has not given his consent to C's staying in Finland. He has filed an application for the return of the child in July 2010 with the local authority in Canada, and the application has been sent to the Ministry of Justice of Finland. The fact that the institution of proceedings relating to the application have been delayed at the Court of Appeal does not prove that A[redacted] has given his consent, because the delay has occurred due to reasons beyond his control.

9. The Supreme Court has come to a conclusion that C's factual place of residence has been in Canada. Thus, her habitual residence in accordance with the Hague Convention had been in Canada at the time when S[redacted] travelled with her to Finland. The retention of the child has thus been wrongful.

10. According to section 34(1)(2) of the Child Custody and Right of Access Act, an application for the return of a child may be turned down, if there is a grave risk that the return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. The grounds for denial referred to in the aforesaid provision shall be interpreted in a manner that does not endanger the realisation of the purpose of the Hague Convention.

11. S[redacted] has not presented any such facts to support the grounds for denial she has invoked that would suggest any possibility of C's mental or physical health being in serious danger in Canada. Therefore, the Supreme Court

considers that no grounds for denial of the application for the return of the child referred to in the aforesaid section of law exist.

12. On the grounds of what is stated above and of the other reasons presented by the Court of Appeal, the Supreme Court concludes that there is no reason to amend the resolution of the decision of the Court of Appeal.

13. The fee to be paid to Attorney X for assisting A[redacted] at the Supreme Court shall be increased by 20 % in accordance with section 8 of the Decree on legal aid fee criteria (*Valtioneuvoston asetus oikeusavun palkkioperusteista* 290/2008), because the Attorney has been obliged to perform her task as especially urgent and partially in a foreign language and because the performance of the task has required special expertise.

Resolution

The resolution of the decision of the Court of Appeal is not amended.

The prohibition against the enforcement of the decision lapses.

For assisting S[redacted] at the Supreme Court, Attorney Y shall be paid from State funds 1,824 euros, based on 19 hours 30 minutes of work required by the case, plus 419.52 euros as value-added tax.

For assisting A[redacted] at the Supreme Court, Attorney X shall be paid from State funds 2,520 euros, based on 21 hours of work required by the case, plus 579.60 euros as value-added tax.

All the parties shall comply with this decision.

THE SUPREME COURT

Mikko Tulokas

Hannu Rajalahti

Jorma Rudanko

Pekka Koponen

Ari Kantor

Samuli Sillanpää