Supreme Court

KKO:2019:37

Return of a child on the basis of the Hague Convention of 25 October 1980

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The facts of the case and the issue to be decided

The judgment of the Supreme Court concerned the return of a child under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Hague Convention).

A child born in the United Kingdom in 2013 and in the joint custody of her parents had lived with her family first in the United Kingdom, and then for about eight months in Finland. The family had moved to Belgium in May 2016 and had lived there until the end of her father's posting there, when the family had traveled together to Finland on 1 October 2018. According to the child's mother, who had requested the return of the child, it had been her intention to return to Belgium with her child on 22 October 2018. The father, who had objected to the return, claimed that Finland had remained the child's habitual residence even though the family had been temporarily resident in Belgium. According to the father, in any case the child's mother had acquiesced in the return of the child from Belgium to Finland on 1 October 2018.

The question before the Supreme Court of the return of the child required an assessment of the child's place of habitual residence immediately before the alleged date of retention of the child, and whether the child had wrongfully not been returned to her state of residence.

Applicable provisions and case-law of the CJEU

Section 30 of the Child Custody and Right of Access Act (statute number 361/1983) provides, in accordance with Articles 1 and 2 of the Hague Convention, that a child present in Finland who has been wrongfully removed from the state where the child is habitually resident or wrongfully not returned to this state, must be ordered to be returned at once if the child, immediately before the wrongful removal or retention, had been habitually resident in a State party to the Hague Convention.

According to Article 13 (1) (a) of the Hague Convention, the judicial authority is not bound to order the return of a child if, inter alia, the person objecting to the return establishes that the person having the care of the person of the child had consented to or subsequently acquiesced in the removal. Similarly, section 32 (2) of the Child Custody and Right of Access Act provides that removal or retention of a child is not to be deemed wrongful if the person seeking the return had consented to it or had explicitly or implicitly acquiesced in it.

The objective of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the Brussels IIa Regulation) is to enable the court nearest to the child, which best knows his or her situation and level of development, to take the necessary decisions on parental responsibility (judgment of 9 November 2010, Purrucker v Pérez, C-296/10, EUC:2010:665, paragraph 84 and judgment of 15 February 2017, W and V v. X, C-499 / 15, EU:C:2017:118, paragraph 51).

According to the jurisprudence of the Court of the European Union, factors affecting the determination of a child's habitual residence are whether the child's actual place of residence is in any way temporary or intermittent, and whether the residence of the child reflects some degree of integration of the child in a social and family environment. For this purpose, particular consideration shall be paid, in respect of the family's move to and stay on the territory of a member state, to the duration, regularity, conditions and reasons for this move and sojourn, the child's nationality, the place and conditions of attendance at school, whether or not the child can speak the language of the state in question, and the family and social rela-

tionships of the child in that state. It is for the national court to establish the place of the child's habitual residence in the light of the criteria referred to and the overall assessment (judgment 2 April 2009, A, C-523/07, EU:C:2009:225, paragraphs 38-42).

Assessment by the Supreme Court of the place of residence

The parents did not agree on whether the move to Belgium in the spring of 2016 had been intended to be temporary or permanent. The Supreme Court noted that the temporary nature of the residence in itself did not constitute a barrier to the child's state of residence becoming his or her habitual residence. The child was five years old, no longer a baby who would be totally dependent on her parents. Even though the family had formed the child's primary living environment, she had nonetheless attended school the entire time that she had been in Belgium and had had hobbies and some friends in Belgium. The child spoke English as her mother tongue, and had learned Dutch while in Belgium. These facts suggested that the child had had an established social environment in Belgium.

The child had lived for a shorter time in Finland than in Belgium, and before she had arrived in Finland in 2018 she had not spoken Finnish. Although the child and her father were Finnish citizens, the circumstances that have been demonstrated in the case had not shown that before moving to Belgium the child would have had time to develop an established social environment in Finland. It could also not be concluded on the basis of the holidays spent in Finland that the child would have had an established social and family environment in Finland.

Since the family had settled in Belgium for several years and had lived there for about 2,5 years, the Supreme Court held that, as a result of the child's factual established living environment, her habitual residence had become Belgium.

Assessment by the Supreme Court of whether the removal and the refusal to return the child had been wrongful

It had not been asserted in the case that the mother of the child had explicitly consented to the removal of the child to Finland. It is therefore necessary to assess whether the child's mother could otherwise be deemed to have acquiesced in the removal of the child to Finland.

According to the child's mother, it had been she who had in practice arranged the move to Finland. The family no longer had accommodations in Belgium, nor did any family member have property there. The mother had known already during the summer of 2018 about the end of the posting of the father of the child and of the return to Finland. The mother had since then had time to organize her and her child's accommodation and livelihood in Belgium, but no evidence had been submitted that she would have done this. The mother had not worked in Belgium and also otherwise did not have any special ties to Belgium. The Supreme Court held that the actions of the child's mother when departing for Finland had strongly supported the claim of the father of the child that the mother of the child had acquiesced in the permanent removal to Finland, although not willingly so.

The assertion of the child's mother that she had come to Finland with her child only on holiday had been supported only by a text message that she had sent to the child's father just before the flight to Finland. The mother was held to have known of the importance in itself of the child's place of residence and of her own rights as a guardian.

The Supreme Court noted that a guardian has the right to change his or her mind and can withdraw his or her consent before a child is removed from the child's state of residence. However, once the place of residence had changed on the basis of mutual agreement, a guardian can no longer effectively withdraw his or her consent. A claim for return cannot be based on alleged wrongful refusal to return a child if it had not been the intention, when the child had been brought to a state, to return to the state of origin. In such a case, the removal of the child from the state and the refusal to return the child would not violate the rights of the other guardian.

The Supreme Court held that the actions of the mother of the child before the removal had been in clear contradiction with her claim that the family had only been on holiday in Finland. A single text message at the time of departure had not been enough to undermine the presumption, based on the actions and living arrangements connected with the removal, that not even the mother of the child had regarded this as merely a holiday, but had instead tacitly acquiesced in the removal of the child from Belgium and the move to Finland. This was therefore not a wrongful retention of the child. The Supreme Court rejected the claim for the return of the child.

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