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KKO:2021:93 – The objection of a child in court proceedings regarding the return of the child basis of the Hague Convention

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Background and the issue before the Supreme Court

Two children, 11 and 13½ years of age, had been in the joint custody of their parents and resident in Spain until July 2020. The mother had travelled with the children for a holiday in Finland in July 2020 and thereafter unlawfully failed to return the children to Spain. At that time, the children had declared as their determined wish that they did not want to return to Spain. The stepsister of the children had been undergoing treatment for a serious illness in Finland and was not medically fit to travel. For this reason, the mother had told the children in the summer of 2020 that also the mother was not able to travel to Spain.

In an application filed on 7 July 2021, the father requested a court order for the return of the children to Spain. In its decision, the Court of Appeal had held that the objection that the children had expressed when heard by the social welfare authorities was not an impediment for a return order. Accordingly, the Court of Appeal had issued a court order on the return of the children to Spain.

The issue before the Supreme Court was whether the application for a court order for the return of the children could be rejected on the basis of the children's objection.

Procedural decision regarding the hearing of the children

The Supreme Court held that the hearing of the children by the social welfare authorities had had such shortcomings that the right of the children to be heard in a matter concerning them personally had not been fulfilled. Therefore, there was a reason to hear the children again. The Supreme Court held that the most appropriate venue for a new hearing was the court itself. The children had consented to be heard in this manner.

The Supreme Court heard the children in order to ascertain their views in the matter. The children were heard separately, with only the chair of the judicial panel, the referendary, an expert assistant and an interpreter present in the hearings.

Rules governing the return of a child and the grounds for

Rules governing the return of a child and the grounds for assessment

According to Article 13, paragraph 2, of the Hague Convention on the Civil Aspects of International Child Abduction, a judicial or administrative authority may refuse to order the return of a 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 the child's views.

Section 34(1)(3) of the Finnish Act on Child Custody and Right of Access contains a provision corresponding to that in the Hague Convention, to the effect that an application for the return of a child may be rejected if the court finds that the child objects to being returned and has attained such an age and degree of maturity at which it is appropriate to take his or her views into account.

The Supreme Court cited its own case-law concerning the significance of a child's objection (KKO 2004:76 and KKO 2009:85). In the latter ruling, the Supreme Court had held that the Hague Convention made it possible to give a lot of weight to the opinion expressed by a 15-year-old child and that the various reasons that the child had given for that opinion were not of crucial importance. The Supreme Court had held that it was indeed the purpose of the Hague Convention that when a 15-year-old child objects to being returned, no order on the return of the child should be issued. In the former ruling, KKO 2004:76, the Supreme Court had held that the objections expressed by 9- and 12-year-old children could not be held as an impediment for their being returned. The Supreme Court had held, for the part of the older of the children, that it could not be reliably established that the child's opinion reflected the child's own, properly reasoned and understood will based on adequately mature consideration. For the part of the younger of the children, the Supreme Court had held that the child's capacity for individual consideration and independence of will could not be deemed so developed that crucial importance should be attached to it.

The Supreme Court noted that Article 13, paragraph 2, of the Hague Convention did not specify any grounds for objection that would result in an order for the return of the child not being issued. In addition, the Convention did not establish any age limit that would indicate that the child has attained such age and degree of maturity at which it is appropriate to take account of the child's views; instead, the assessment of these circumstances has been left to be carried out on a case-by-case basis. In the assessment of the requirements for the return of the child and the grounds for rejecting a return application under the Convention, the objectives and purposes of the Convention must be taken duly into account. The Supreme Court noted that for this reason the issue of refusing a return application by reason of the child's objection should be approached with specific care. That being said, a return application should be rejected on the basis of the rule in the Hague Convention in a situation where a child, whose views should be taken into account owing to his or her age and degree of maturity, expresses a considered and reasoned objection to being returned.

Assessment and conclusion by the Supreme Court

The Supreme Court noted that the older of the children was already about 13½ years old, which means that the child's views were as a premise to be taken into account when assessing a possible return order. A departure from this premise regarding a child of this age would require that there be doubts as to the degree of maturity of the child notwithstanding his or her age, or as to whether the opinion is based on his or her own, independent will. In the present case, there were no circumstances that would indicate that the capacity of the older of the children to consider the

circumstances that would indicate that the capacity of the older of the children to consider the issue of being returned did not correspond to his or her age level. It was also noted that the child could be seen to have formed and expressed a genuine opinion, without coercion, persuasion, manipulation, or other improper influences.

The Supreme Court noted that during the hearing the older of the children had objected to being returned with several reasons relating to Spain. It was apparent that the child genuinely objected to the idea of living in Spain and thought of everything relating to Spain as highly negative. Thus, the objection of the older of the children was based on a very serious negative attitude towards the state of residence. It was evident in the hearing that the objection of the child was forceful and long-lasting. The reasons mentioned by the child were not merely at the level of the child rather staying in Finland than returning to Spain, or that the child would rather live with the mother than the father, but the objection was based on more fundamental reasons. The Supreme Court held that the opinion of the older of the children was based on firm consideration and that the child had been able to think about its consequences both over the short and the long term. The older of the children had thus attained an age and degree of maturity that his or her view was to be taken into account.

The Supreme Court held also that in the context of a return order, the children should not be separated unless there are very persuasive reasons for it. It was also in the best interests of the children that they are not separated from their stepsister, with whom they have lived for all their life.

Also the younger of the children had objected to being returned to Spain and that objection had been expressed very firmly. The objection was based on the child's independent opinion and in the hearing the child had shown a degree of maturity that was proportionate to his or her age level. The Supreme Court held that as the younger of the children had the same opinion regarding return as his older sibling, the return of the children was to be assessed with reference to the opinion of the older of the children. Due note was also to be taken of the objective of not separating the children from each other.

Accordingly, the Supreme Court held that the objection of the children was to be taken as a valid reason to reject the return application under section 34(1)(3) of the Finnish Act on Child Custody and Right of Access.

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