

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
FAMILY DIVISION

2022/CLE/gen/00967

BETWEEN

**IN THE MATTER OF an Application by Tracey Pratt under Section 6 of the
International Child Abduction Act, Chapter 137**

AND

**IN THE MATTER OF the Hague Convention on the Civil Aspects of International
Child Abduction**

BETWEEN

TRACEY PRATT

Plaintiff

v.

ZELLAMAE BAYER

AND

GABOR BAYER

Defendants

RULING

Headnote: FAMILY LAW. CHILD CUSTODY. The case involves an application made pursuant to the International Child Abduction Act, Chapter 137 and the Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”). The Plaintiff’s application seeks a Declaration that the removal of her child by the Defendants was wrongful. The Plaintiff’s application also sought the return of the minor child to the jurisdiction of The Bahamas. Within this judgment the Court addressed and took into consideration the child's age, degree of maturity in considering his views and the possibility of harm if he is returned to the Plaintiff.

Held: The Court found that the child had been wrongfully retained in Hungary. The Court also found that returning the child to the jurisdiction of The Bahamas would not serve his best

interests. His primary attachments and stability were now in Hungary. The child had become deeply entrenched within the culture of Hungary. The child expressed no desire to return to The Bahamas. Therefore, the Court found that the child should remain in the custody of the Defendants in Hungary.

NEWTON J:

INTRODUCTION

1. On the 22nd of June, 2022, the Plaintiff filed an Originating Summons claiming that the child, born on the 22nd day of June, 2009, was habitually resident in Burnt Ground, Long Island. The Plaintiff is the child's mother. His father, is not a party to these proceedings.
2. The Plaintiff's application is pursuant to the International Child Abduction Act, Chapter 137, and the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). The Plaintiff's application seeks a Declaration that the removal of her child by the Defendants was wrongful.
3. The Application is in response to a request made by the Competent Authority of Hungary, to the Competent Authority of The Bahamas (The Ministry of Foreign Affairs) to determine whether the Plaintiff had custodial rights under Bahamian laws when the Defendants retained him. Also to determine whether the Plaintiff was exercising her custodial rights at the time of the retention.
4. The Hungarian Authority required this determination in order to prove to the Hungarian Court that the retention was wrongful under the Bahamian law and therefore the minor child ought to be returned.
5. The Defendants entered a Memorandum of Appearance on the 14th of July 2022, together with a Summons supported by Affidavit, to strike out the Plaintiff's application pursuant to Order 18 Rule 19(1)(a)(b) and (d) of the Rules of the Supreme Court of The Bahamas (now repealed).
6. After hearing submissions, the strike out application was subsequently dismissed and the Court and proceeded to hear the substantive abduction application.

The Convention

The primary purpose of the Hague Convention is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return to the country of habitual residence of children who are wrongfully removed or retained in another country in breach of rights of custody or access.

7. The Bahamas is a signatory to the 1980 Convention and in 1993 enacted *The International Child Abduction Act (1993)* giving effect to the Convention. The Schedule to the Act contains the Articles of the Convention. Eight years later The Bahamas passed *The International Child Abduction Rules (2001)* which sets out the procedures on application for the return of the child.

Central Authority in The Bahamas is the Minister of Foreign Affairs

Contracting States are those countries that are a party to the Convention.

Relevant Authority is a court or tribunal of competent jurisdiction outside The Bahamas.

8. The application under the Convention by a person outside The Bahamas for the return of the child is addressed to the Central Authority (the Minister). The Supreme Court has jurisdiction.
9. Under Article 3 of the Hague Convention the removal or retention of a child is considered wrongful where;
 - a. *it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before its removal or retention ; and*
 - b. *at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention.*
10. Under Article 15 of the Hague Convention, the applicant is required to obtain a declaration that the child was wrongfully removed. It provides that;

“The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practical assist applicants to obtain such a decision or determination.”

The Facts

The child currently resides in Kaposav, Hungary, Europe with the Defendants (this is noted as a fact but will be dealt with later in this judgment). Mrs Bayer is the paternal grandaunt of the child.

He is the biological child of the Plaintiff and her husband and there were no custody proceedings relinquishing custody of him. The Defendants were not granted any custody rights by any Court in this jurisdiction. They were granted a travel document issued by the Island Administrator to travel with the child.

Pursuant to Article 15 of the Hague Convention a decision is required by the Competent Authority of Hungary providing a determination that the retention by the Defendants of the minor in Hungary was wrongful within the meaning of Article 3 of the Convention.

11. The Plaintiff and the child's biological father were married in December 1999 and they have four children. They all lived together in Burnt Ground, Long Island. The Plaintiff and Mr Pratt were divorced in May, 2022.
12. In December 2017, the Defendants took the child with them on vacation to Kaposav, Hungary. Gabor Bayer is a citizen of Hungary, and he is currently living and working there.

The Plaintiff's Case

The Plaintiff stated that from the child was an infant he spent a lot time with the Bayers, on several occasions living with them in Long Island. That they were his paternal grand-aunt and uncle and neighbours. That the child attended primary school in Long Island at the time.

13. The Plaintiff confirmed that in 2016 she gave permission for the child to travel to Hungary with the Defendants and that the child travelled back and forth to Hungary with them.
14. She stated that no one informed her that the child was taken to Hungary in December 2017. She said that without her knowledge or consent the Defendants used the travel documents to obtain custody of the child in Hungary. She claimed that she merely consented to the child travelling with the Bayers for vacation and that he would be returned after the vacation.

15. On several occasions since 2017, she said, the Defendants either separately or jointly have returned to The Bahamas leaving the child in Hungary. She said despite her request to them to return him, they continually retained him in Hungary.
16. She further stated that in 2018 she revoked the consent that she had previously granted. Hoping that it would have effectively revoked the purported guardianship granted by the Island Administrator.
17. She explained that he asked Mrs. Bayer to return her child on several occasions but the child was not returned. She said she did not know what to do, that she had several persons from her community sign a petition asking for the child to return. She also reported it to the police in addition to going on “Facebook” to advise that he was taken from her and illegally retained in Hungary. She said she was later informed that the Defendants had applied to adopt the child but she never consented to the adoption. The adoption proceedings were never completed.

The Defendants Case

18. Mrs. Bayer’s evidence is that she owns a Seafood processing plant in Long Island and that her husband who resides in Hungary operates the business from there. She claimed that the child was living with them in Long Island since he was three years old and that he travelled with her to the United States on numerous occasions since he was four years old.
19. She said that the child accompanied them to the United States in December 2017 when her husband was returning to Hungary. At that time, she said, the child wanted to travel to Hungary with her husband so she allowed him to go.
20. While in Hungary in 2018 they registered him in school and obtained residency status for him there, based on the guardianship issued by the Island Administrator.
21. Mrs Bayer admitted that she has travelled to Hungary on several occasions to visit her husband and the child.
22. The Defendants said the child’s father consented to them retaining the child in Hungary and subsequent to the breakdown of the marriage he consented to the adoption.

23. The Defendants, by their joint Affidavit, claimed that they had applied to adopt the child subsequent to his retention in Hungary.

Issues

24. The issues are:

- a. *Whether the Defendants wrongfully removed the child from The Bahamas and retained him in Hungary?*
- b. *Whether the child should be returned to The Bahamas?*

Wrongful Removal and Retention

25. As previously stated the Plaintiff, seeks a Declaration pursuant to Article 15 of the Hague Convention that the Defendants wrongfully removed and retained the child, from the jurisdiction of The Bahamas. In determining whether the child was wrongfully removed it must first be determined whether the child was an habitual resident of The Bahamas. Once this is determined then it must be ascertained who exercised custody rights over the child.

Habitual Residence

26. Article 15 of the Convention mandates the prompt return of a child who was deemed an "habitual resident" in a contracting state prior to any action that violates custody or access rights. Although, the Convention does not define the term "habitual residence" it is not intended to be a technical term. It should be read in the context of the Convention's purpose- which is to *"discourage unilateral removal of a child from that place in which the child lived when removed or retained, which should generally be understood as the child's ordinary residence."*

Re J. (A Minor) [1990] 2 A.C. 562 at page 578 it was said that *"the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case."*

27. Lord Denning in the case of **Re PG (An Infant) [1965] 1 Ch 568** at page 585-586 explained "ordinary residence" of a child as:

".....so long as the father and mother are living together in the matrimonial home, the child's ordinary residence is the home - and it is still his ordinary residence, even

while he is away at boarding school. It is his base, from whence he goes out and to which he returns.

He went on to explain that when the parents are at variance and living separate and apart and by arrangement the child resides with one of them, then that home is his ordinary residence.

He explained further that “I do not think that a child's ordinary residence can be changed by one parent without the consent of the other. (Emphasis mine).”

28. From the facts, I find that prior to the child being removed from this jurisdiction, he was residing in Long Island as well as he attended the local primary school there, Simms Primary School. Applying this principle to these facts, I find that he was an habitual resident in this jurisdiction.

Custody

29. In determining whether the child was wrongfully removed from the jurisdiction, it must also be determined who possessed legal custody of the child prior to his relocation. Article 3 of the Convention states that:

“The removal or the retention of a child is to be considered wrongful where—

a) it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

...

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

30. According to the evidence, the parents were not divorced until April 2022, several years after the child was taken to Hungary.

31. **The Child Protection Act**, by virtue of **Section 6(1)** places responsibility of a child on his parents, which responsibility includes the right to care of the child. Thus the Plaintiff together with the father exercised joint responsibility over the child and therefore he could not unilaterally consent to the Defendants obtaining custodial rights over the child.

32. The Defendants' evidence is that they obtained permission from both the Plaintiff and the Island Administrator to travel with the child and that they therefore had the lawful right to remove the child from the jurisdiction. However, according to the evidence, although the Defendants received approval for the child to travel with them, this was not meant to amount to an absolute transfer of custodial rights. The travel permission given by the Island Administrator was merely to allow the Defendants to take the child on a vacation to Hungary and return to The Bahamas.
33. The Defendants also argued that they made an application to adopt the child to which his biological father consented but his mother withheld her consent. As previously stated there was no final determination on the adoption application. As such I find that the Defendants only stood as temporary guardians of the child at the time of his removal for the purpose of the *visit* to Hungary
34. Further, it is generally understood that where parents have joint responsibilities neither parent could unilaterally change the habitual residence of an infant. In the case of **Re J. (A Minor) [1990] 2 A.C. 562** at page 572 Lord Donaldson MR stated that "*in the ordinary case of a married couple, in my judgment, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights*".
35. Therefore, considering that the biological parents of the child did not receive the Decree Nisi until 2022, and the child was taken in December 2017, I find that the Defendants lacked legal authority to remove the child from the jurisdiction. The child's biological parents retained joint care and control of him.
36. I do not accept the Defendants' explanation as to how the child came to travel to Hungary. They said that in December 2017 he accompanied the Bayers as far as Miami when Mr Bayer was returning to Hungary and he, a seven year old, requested to go with Mr Bayer and he was allowed to go. I believe, as the Plaintiff explained, the Bayers travelled to Hungary with the child in 2017 and Mrs Bayer returned to reside in The Bahamas leaving Mr Bayer and the child in Hungary. I also believe that it was always their intention to relocate the child to Hungary.

This is evidenced by their conduct. Shortly after the child was taken to Hungary, he was enrolled in school and he obtained residency status. I have considered these factors together with the authorities mentioned. I have also considered the fact that the minor child is deemed to have been an habitual resident of The Bahamas prior to his relocation to Hungary, coupled with the fact that at the time he was removed, the Defendants lacked the legal authority to retain him in Hungary.

According to **Article 3 of the Convention**, that “*The removal or the retention of a child is to be considered wrongful where at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention*”. The rights referred to are parental rights, which at the time were exercised jointly by the Plaintiff and her husband. I find therefore that the child’s retention in Hungary by the Defendants was wrongful within the meaning of Article 3 of the Convention.

Whether the minor child should be returned to The Bahamas

37. Having determined that the retention was wrongful, I must now consider whether to return the child to The Bahamas, his habitual residence prior to his removal.

Article 13 provides an *objection* to the return of the child.

If the party objecting to the return shows that the person from whom the child was taken was;

- (a) *not exercising custody* or had *consented* to or subsequently *acquiesced in the removal* or
- (b) *that if the child is returned there is a grave risk that he will be exposed to physical or that psychological harm.*

The return may also be refused if the child objects and he is at an *age and maturity to consider his views*.

In the case of **Henry v Henry (1994)** the Court of Appeal held that the judge was wrong in not considering the views of a 13 year old boy. It explained that the closer the child is to the “cut-off” age of 16 years the easier it is to find that the child, who is not under some mental disability, has reached an age and degree of maturity to satisfy Article 13.

38. Under **Article 12** if *less than one year* has passed since the date of the wrongful removal, then the *child should be ordered to be returned forthwith*. This is the case as it was found that if more than one year has passed, then the return would be more difficult as there is a likelihood that the child may have settled. Further it states that

even though a year has passed the child may be ordered to be returned unless the *child has settled in his new environment*.

39. According to the evidence the child has been residing in Hungary since December 2017, in determining whether to apply the conditions outlined in Article 3 of the Convention it is necessary to consider the factors set out in **Article 13** regarding whether the return child should be returned.

40. Included in the factors to be considered are; the child's age, his degree of maturity, social background, whether he objects to being returned and the possibility of harm in the child returning.

The Child's Voice

Age & Degree of Maturity of the Child

41. Article 4 of the Convention states that:

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years”. The child was removed when he was 8 years old. The application having been made when he was 13 years old. He is now 14 years old. The child's age serves a critical purpose in assessing his comprehension of the circumstances. Understanding his age provides the Court with insight into his cognitive development. By evaluating his age, the Court is able to determine his understanding of the legal proceedings and his ability to make decisions, and participate in discussions regarding his welfare. This assists the Court in concluding his maturity level.

Under Section 3 of the Child Protection Act the court is also required to consider the *“ascertainable wishes and feelings of the child concerned considered in light of his or her age and understanding”*.

42. During the course of these proceedings I conducted a virtual interview with the child. He was on location at the Office of the Network Judge for Hungary, in Budapest and in the presence of a representative from the Office. I enquired of his current living conditions, his relationship with his biological parents, his current lifestyle in Hungary and his desire to return to The Bahamas. Despite his tender years (14) he demonstrated a level of maturity well beyond his

years. His insightful perspectives, responsible demeanor, and thoughtfulness are admirable. The child consistently exhibited a maturity that is above his age. His spontaneous answers made it clear to me that they were not rehearsed or that he was coached.

43. His answers were clear and succinct. For example, when he was asked to explain what he believed it meant to be adopted, he stated that this meant that ***“two persons who were not his biological parents would now be responsible for taking care of him and his needs”***. He refers to the Defendants as his “mother” and “father” respectively. Further, when asked to elaborate on what he likes about them he stated that he liked his father’s ***“sense of humour and the genuine care he shows towards him”***. He said his father always aspired to make special memories with him- for example on one occasion his father took him to Miami to view the animals at the zoos and the dolphin park. He said that he likes his mother and the love and dedication she showed him. According to the child, she works hard, and despite ***“living outside of Hungary”***, she makes sure to visit every Christmas and Summer, which means a lot to him.
44. He appeared very upset when he spoke of his biological mother, the Plaintiff. He lamented that she did not contact him for his birthday despite the fact that she had his number. Coincidentally his birthday was the day prior to my interview. He is adamant that he does not wish to return to The Bahamas because he ***“loved his Hungarian family and has many friends and cousins”*** there. He refers to his the Defendant’s mother as his grandmother whom he stated that he loved dearly.
45. Having interviewed the minor child I find that despite his young age, he exhibits a remarkable level of maturity well beyond his years. The child has demonstrated a keen understanding of his situation and its implications. His ability to express his thoughts and feelings coherently, coupled with his capacity to engage meaningfully in discussions regarding his welfare, underscores his maturity. As such, I acknowledged the importance of considering the minor child's views and preferences in matters concerning his well-being, recognizing them as valuable insights that contribute to decisions made in his best interest.

Social Background of the Minor

46. Regarding the topic of the minor child’s social background in Hungary, when questioned he stated that he has a very active life. On this point he elaborated by stating that a typical school

day for him begins with waking up at 7:00 am, followed by him attending school which commences at 8:00 am. He explained that his dad drives him to school, where he grabs food from the cafeteria before “diving” into about 5-7 lessons. Following the conclusion of school, he then attends additional lessons with a tutor which his dad selected. Once finished, he then attends Judo practice. Regarding the minor child’s language skills, he stated that he is comfortable speaking and writing Hungarian and has English lessons three times a week.

47. I find that the child appears to be deeply immersed within the culture, language, and broader societal framework of Hungary. Through various aspects of his daily life, including schooling, extracurricular activities, and interactions with peers, it is evident that he has integrated into the fabric of Hungarian society. His proficiency in the Hungarian language is a testament that he has immersed in the culture. I found it astounding that he spoke English with an Hungarian accent. As such, I appreciate that the child has a significant connection to Hungary and considers this to be an important factor in determining whether to return him to The Bahamas.

48. Also of note is Article 12 of the Convention which states that:

“Where a child has been wrongfully removed or retained in terms of Article 3…….. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”

Objections made by the minor child

49. When asked whether he had any objections to returning home, he stated that if he were told that he had to return to The Bahamas, he would feel sad as he had already begun a new life in Hungary. By "new life," he explained that he meant that he has made new friends, settled into school, has extracurricular activities, and grown to enjoy living in Hungary. Lastly, he said that if he had to leave, he would miss everything – his dad, school, friends, and all the experiences that he has had since living in Hungary.

Possibility of Harm

Pursuant to Article 13 (b) of the Convention says the child should not be returned if, *“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”*

50. Having interviewed the child and heard the parties, the evidence does not point to any possibility of harm that may come to him as a result of his return.
51. He explained that the last contact he had with his biological mother occurred about two (2) years ago. When asked if he would visit her if he were made to return to The Bahamas, he firmly expressed that he would not. His wish is for his younger brother to live in Hungary with him.

Conclusion

52. In addition to these factors I consider the fact that the child has “other relatives” in Hungary outside of his father (non-biological) whom he can interact with and rely on. He has cousins and a grandmother (Mr Bayer’s mother) whom he has a good relationship with. In addition to this, when questioned about his relationship with his siblings in The Bahamas and his biological mother, he stated that outside of his youngest brother he does not have a true relationship with his other siblings. Regarding his mother, he stated that he does not have a relationship with his biological mother and does not wish to develop one with her.
53. Therefore, based on the information provided by the child, I find that the child has established deep roots in Hungary and has limited ties remaining to The Bahamas, apart from the Defendants. His life in Hungary encompasses a comprehensive range of activities and relationships, including school, extracurricular activities and friendships. These connections form an integral part of his daily life and contribute significantly to his overall well-being and sense of belonging. Therefore, it can be concluded that the child's primary attachments and commitments are now firmly rooted in Hungary, where he has built a new and fulfilling life. As a result of this, I find that the child should not be uprooted from Hungary and return to The Bahamas. That the paramount consideration is what is in the best interest of the child and I find that it is in his best interest to remain in Hungary in the custody of the Bayers.

54. There shall be no order as to costs.

Dated this 25th June 2024.

DDN  _____