Irish Case on Hague Convention on Child Abduction

I am grateful to Michelle Smith de Bruin BL for preparing the following report on a recent Irish case on the Hague Convention on the Civil Aspects of International Child Abduction.

In a case (*N. v N.*: High Court, December 3rd, 2008) brought under the Hague Convention on the Civil Aspects of International Child Abduction, Mrs Justice Finlay Geoghegan found that the views of the child, who was aged six, should be heard, while stressing that the weight to be given to such views was a separate matter.

Background

The parents of the child are both citizens of another EU state. They were married in 2002, the year in which the child was born, and divorced in 2008. The court in the other EU state ordered that the child live with the mother and that the father have certain access rights.

The mother moved with the child to Ireland, where the child is now attending school. He also attends classes with children of his own nationality on Saturdays. Both the teacher in this school and in the national school reported that he is bright and enthusiastic and learning both English and Irish. The mother brought a notice of motion that he be heard as part of the proceedings.

The dispute in the application related to the criteria the court should use in deciding whether it is "appropriate having regard to his or her age or degree of maturity" to give the child the opportunity to be heard on the facts of this application.

Outlining the legal background, Mrs Justice Finlay Geoghegan said that Article 13 of the Hague Convention gave the court discretion to refuse the return of a child if the child objected and had reached an age and degree of maturity at which it was appropriate to take account of its views.

Article 12 of the UN Convention on the Rights of the Child, ratified by Ireland,

provided that a child who is capable of forming his or her own views should have the right to express them in all matters concerning the child, and should be given the opportunity to be heard in judicial or administrative proceedings affecting him or her.

Council Regulation (EC) No 2201/2003 also made reference to hearing the child, and also to the Charter of Fundamental Rights of the EU, where Article 24 refers to the rights of the child, including those of expressing their views freely, and having such views taken into account in matters concerning them.

Decision

Following the consideration of written legal submissions, Mrs Justice Finlay Geoghegan said that a mandatory obligation is placed on a court by Article 11 (2) of the Council Regulation 2201/2003 to provide a child with an opportunity to be heard, subject only to the exception of where this appeared inappropriate having regard to his or her age or maturity.

> *"The starting point is that the child should be heard," she said. "The court is only relieved of the obligation where it is established it would be inappropriate for the reasons stated.*

She said that in Hague Convention proceedings this was a separate and distinct issue from the weight the court should give to the views expressed by the child in relation to an application for his or her return.

While the UN Convention on the Rights of the Child had not been made part of Irish domestic law, it had been acceded to by many (if not all) EU member states, and it appeared, having regard to the wording of Article 24 of the EU Charter of Fundamental Rights, that it intended to guarantee a similar right to children as that in the Convention.

This assumed that the child had a view that he or she would be capable of expressing. It is the child's own view which Article 24 of the Charter gave him the right to express, which presupposed that he was capable of forming his own view.

In the Irish procedural system there was no mechanism readily available to the court to obtain an independent professional assessment as to the probable level of maturity of the child. The court should therefore form what could only be a prima

facie view of the capability of the child to form a view. The order to be made on this application would both allow the child to be heard and assist the court in deciding what weight, if any, should be given to his views.

On the facts of this case, the child appears from the affidavit evidence to be of a maturity at least consistent with his chronological age. She said she did not find he was not capable of forming his own views.

A judge must rely on his or her own general experience and common sense. “Anyone who had had contact with normal six-year-olds will know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life,” she said.

Accordingly, she was making the order sought, and would modify the form normally used in relation to older children.

This judgment is available on www.courts.ie