Ref. no. I CKN 745/98

DECISION

On 7 October 1998

The Supreme Court, Civil Law Chamber
deliberating in the panel composed of:

Presiding Judge, Supreme Court Judge – A. Górski
Supreme Court Judges: – H. Ciepła
– M. Sychowicz (raporteur)
Recording clerk – B. Rogalska

upon examining at the hearing held on 7 October 1998
of the case brought by W.S.
with the participation of E.S.
regarding the return of a child
following the applicant's cassation
against the decision of the Voivodeship Court in Warsaw
dated 17 April 1998, ref. no. VI Ca 948/97

dismisses the cassation;

adjudicates that E.S. is to pay to W.S. the amount of PLN 100 (one hundred) as reimbursement of the costs of the cassation proceedings.

REASONS

Having heard the application made by W.S. under the Convention on the civil aspects of international child abduction done at The Hague on 25 October 1980 (Journal of

Laws of 1991, No. 120, item 526), in its decision dated 7 March 1997, the District Court for the Capital City of Warsaw ordered minor K.S. to be returned by her mother E.S. to the father W.S. The District Court established that the minor's parents left for Canada in the mid-80s; they got married in 1991; on 31 October 1993 K. was born; the parents and the child have Canadian citizenship; the whole family was living together in Canada; in the Summer of 1996, when the parents and the child were on holiday in Poland, the applicant's wife declared to stay here with the child on a permanent basis; in its judgment dated 18 December 1996, the Canadian court ordered the return of the child to the Ontario province in Canada and adjudicated that in case the child's mother did not want to bring it back, then the applicant would be authorised to return with the child; while staying in Poland, the applicant's wife made it difficult for him to contact his daughter. Under that state of affairs, the District Court found out that the conduct of E.S., who opposed the return of the child to her place of permanent residence, constitutes the retention of the child and since the parental authority is vested, under Article 3 of the Hague Convention, also in the applicant, such retention should be considered unlawful, which justifies the issue of a judgment ordering the return of the child (Article 13 of the Convention).

The Voivodeship Court in Warsaw which heard the case upon the appeal lodged by E.S., a participant in the proceedings, shared the District Court's opinion and in its decision dated 20 May 1997 dismissed the appeal.

Having heard the cassation of the participant in the proceedings, the Supreme Court, in its decision dated 16 October 1997, quashed the Voivodeship Court's decision and referred the case to that court for re-examination. The Supreme Court found out that qualifying E.S.'s conduct as an unlawful retention of a child within the meaning of Article 3 of the Hague Convention was correct and that in the case there are no doubts that formal grounds, as specified in Article 12 of the Convention, necessary for a court to order the return of the child, have been met. The Voivodeship Court's decision was quashed because of the refusal of that Court to take evidence that would serve as a basis for the assessment if there are circumstances, as stipulated in Article 13 of the Convention, that justify the absence of obligation to return a child and the absence of such an assessment.

In the course of re-examining the case, the Voivodeship Court in Warsaw has taken supplementary evidence and, in its decision dated 17 April 1998, dismissed the participant's appeal from the decision of the District Court for the Capital City of Warsaw dated 7 March

1997. Such a decision was taken as a result of establishing – pursuant to the evidence heard in the case and following their assessment – that there are no factors as referred to in Article 13 of the Hague Convention that make it impossible to return the child. In particular, the Voivodeship Court assumed that while the child was residing in Canada, both parents had a custody over her and satisfied her needs correctly; the petitioner did not consent to the retention of the child in Poland; the child, regardless of whether she returns together with her mother or not, is not threatened with any harm; the material and housing situation of the petitioner, his work routine, as well as the fact that also before, when the parents worked, the child was looked after by a babysitter allow for the assumption that the petitioner will be capable, also without his wife's assistance, of satisfying the child's needs.

The last mentioned decision of the Voivodeship Court was appealed in cassation by the participant of the proceedings. The grounds for cassation include: I. violation of the material law – Articles 3, 12, 13 and 20 of the Hague Convention consisting in: a) assumption that the retention of the child by the participant was wrongful, b) not taking into account the recommendations contained in the second part of Article 12 of the Convention, i.e. expiration of the time period and the child's settlement in the new environment as directives supporting the idea of not ordering the return of the child, c) not taking into account the directive resulting from Article 13(b) of the Convention imposing the obligation to determine the risk of the child's return, by way of consulting specialist opinions and d) violating the Act of 15 February 1962 on Polish citizenship (Journal of Laws No. 10, item 49) because of not taking into account the fact that the child had Polish citizenship and II. violating the provisions of the proceedings – Articles 217 and 328 § 2 of the Code of Civil Procedure because of: a) not admitting the evidence from the opinion of the Family Centre for Diagnosis and Consultation (*RODK*) and moreover, not mentioning in the grounds for decision the reason why the court refused the credibility of that evidence, b) omitting the testimony of the witness Barbara T. and c) not allowing the petition of the participant's attorney filed at the hearing held on 14 April 198 with regard to request for admitting further evidence. The appellant requested the quashing of the appealed decision and referring the case to re-examination.

The petitioner requested the dismissal of the cassation.

The Supreme Court noted as follows:

I. 1. The participant in proceedings applied for admitting the evidence from the opinion of the Family Centre for Diagnosis and Consultation (*RODK*) "with regard to the circumstances referred to in Article 13 of the Hague Convention, in particular the grounds stipulated in the second paragraph of that Article" (sheet 258). Although these grounds were crucial for the result of the case, the Voivodeship Court's refusal to admit the evidence taken from the opinion of the Family Centre for Diagnosis and Consultation must not be considered as violation. The circumstances connected with the grounds stipulated in Article 13 of the Convention, objecting to the return of the child have been adequately explained pursuant to other evidence taken in the case (Article 217(2) of the Code of Civil Procedure).

It is not the case, as the appellant states, that Article 13(b) of the Convention contains a directive that "imposes an obligation to determine the risk of return of a child by consulting professional opinions provided by sources appointed for that purpose". Article 13 of the Convention, in its last provision, imposes the necessity to take into account, while assessing the circumstances stipulated in that Article, the information regarding the social situation of the child, provided by the central authority or other relevant authority of the state of the child's permanent stay. Such information from the Canadian authorities have been taken into account in the case.

Contrary to the claimant's position, the initial psychological opinion drafted by dr A.G. and T.G. (sheets 121 -122) did not supported the admitting of evidence based on the opinion of the Family Centre for Diagnosis and Consultation (*RODK*). It is because the conclusion of that opinion is the statement that due to the child's interest it will be possible to address the child's return only when she is capable of taking an informed decision on her leave from Poland. It is understood that because of the child's age, it is impossible to expect that she would take an informed decision soon. Due to the nature of the case, it should be decided quickly. It is required by Article 2 of the Convention, which imposes on the Contracting Parties an obligation to use the available procedures in emergency cases.

2. The evidence based on the deposition of a witness B.T. was adduced by the participant of the proceedings to prove that "the participant did not make it difficult to the petitioner to contact the child and that those contacts also involved the family of the child's father." (sheet 146). That fact did not have a crucial influence on the decision in that case, where, because of the binding character of the interpretation of law made by the Supreme Court in its decision dated 16 October 1997 (see below, item II.1), it was still to be

established if there are grounds stipulated in Article 13 of the Hague Convention justifying the refusal to return the child. Therefore, circumstances that were to be showed by the testimony of a witness B.T., did not need to be proved (Article 227 of the Code of Civil Procedure). So, not taking evidence on the basis of that witness's testimony does not constitute a violation.

3. At the hearing which took place on 14 April 1998, the attorney of the participant of proceedings, apart from renewing the motion for allowing the evidence based on the opinion of the Family Centre for Diagnosis and Consultation (*RODK*), filed a request "for the hearing of a further witness" whom he did not refer to, nor did he provide circumstances in support of which that evidence was adduced and applied for the possibility of providing further evidence within one month (sheet 305 v.). As regards the assessment of not admitting the evidence based on the opinion of the Family Centre for Diagnosis and Consultation (*RODK*) see item 1 above. The fact that the Voivodeship Court has not taken into account the cited motions does not make a violation, either. It is obvious that the court could not hear a witness who had not been indicated. Moreover, applying for a long time limit (of one month) for the purpose of furnishing further evidence in the case, which due to its nature should be heard as soon as possible (see item 1 above), could be considered as actions aiming at prolonging the proceedings. Filing a motion for evidence just for the sake of prolonging the proceedings justifies the decision to not allow such a motion (Article 217(2) of the Code of Civil Procedure).

4. Since the evidence based on the opinion of the Family Centre for Diagnosis and Consultation (*RODK*) was not taken, the Voivodeship Court did not assess and could not assess that evidence. Thus the absence of that assessment in the grounds for the decision subject to appeal does not make a defect of those grounds and does not make a violation of Article 328(2) of the Code of Civil Procedure (in connection with Article 391 of the Code of Civil Procedure).

II. 1. Pursuant to Article 393^{17} of the Code of Civil Procedure, a court to which the case has been referred as a result of hearing the cassation, is obliged to apply the interpretation of law made in that case by the Supreme Court and cassation against the decision passed as a result of re-hearing the case cannot be based on grounds contrary to the interpretation of law as determined in that case by the Supreme Court. Therefore, the appellant's allegations of the violation of Articles 3 and 12 of the Hague Convention may not

result in allowing the cassation. It is because the decision, which is subject to appeal, was passed taking into account the interpretation of the mentioned provisions made by the Supreme Court in its decision dated 16 October 1997, which was passed as a result of cassation against the case.

Because of the alleged violation of Article 12(2) of the Convention that was raised in the cassation, it needs to be added that the fact of the child's accommodation to the new environment that was mentioned in that decision was related, as an argument against the return of the child, to the situation when it has been more than one year that elapsed from the moment of the child's abduction or retention till the moment of receiving the application for the return of the child by a judicial or administrative authority of the Contracting State. In the present case, the application was received before the elapse of that time. In such a situation, the accommodation of a child to its new environment does not make the condition allowing not to return the child, as provided for in Article 12 of the Convention.

2. Contrary to the allegation made in the cassation, the findings of the case provide grounds to assume that there are no conditions, as stipulated in Article 13 of the Hague Convention, in particular those provided for in its item b), that object to the child's return. The provisions of Article 13(b) of the Convention make it possible that a child is not returned if there is "a grave risk" that the child's return would expose it to physical or psychological harm or otherwise place the child in an "intolerable situation". As regards the return of minor K.S. to her father to Canada, there is no such risk. Due to the country to which the child's return has been ordered, as well as due to the living conditions awaiting her and possibilities of providing appropriate care to her, it may not be assumed that a child would find herself in an intolerable situation. It is beyond any doubt that if the child returns to Canada and her mother stays in Poland, the child would be deprived of her mother's care and, in practice, of the influence of the mother on the child's upbringing. Obviously it is not in the child's best interest. However, the child's stay in Poland would exclude the possibility of taking care of her by the father who is permanently resident in Canada. This would also be a situation contrary to the child's interest. Consequently, it may not be assumed that under the provision of Article 13 of the Convention, ordering the return of minor K.S., pursuant to the application, places the child in an intolerable situation within the meaning of that provision.

3. Article 20 of the Hague Convention allows for the refusal to return a child under the provisions of Article 12 of that Convention if the return would not be acceptable under the fundamental principles of the requested state with regard to the protection of human rights and fundamental freedoms. The principles applied by the Polish state do not oppose the return of the child – in case he/she has been abducted or retained – to his/her state of permanent residence, unless in that state, because of the lack of respect for human rights and fundamental freedoms, the interest of a child would be exposed to damage. Canada is a state having high standards for the protection of human rights and fundamental freedoms. As a matter of fact, the cassation formulates no objections in this respect. It connects, as its grounds suggest, the violation of Article 20 of the Convention to the undisputable fact that minor K.S. enjoys Polish nationality (next to the Canadian nationality) and considers it also a violation of the Act of 15 February 1962 on Polish nationality (Dz. U. [*Journal of Laws*] No. 10, item 49). That objection is not justifiable. The Act on Polish nationality contains no prohibition, either explicitly stated, or implicitly resulting from its provisions, to return the child of Polish nationality – in case of its abduction or retaining – to the state of permanent residence. Such a prohibition is also not expressed in any legal provisions binding in Poland. It is just the opposite. Poland, because its binding legal order includes the Hague Convention (cf. the Supreme Court decision dated 16 January 1998, II CKN 855/97 – OSNC 1998, issue 9, item 142), is under an obligation resulting from the Convention, to order the return of a child regardless of her nationality.

In view of the above considerations, the Supreme court dismissed the cassation as having no justified grounds (Article 393^{12} in connection with Article 13(2) of the Code of Civil Procedure) and adjudicated on the costs of the cassation proceedings pursuant to Article 108(1) in connection with Article 13(2) and Article 520(2) of the Code of Civil Procedure.