



Family Court Sends Back Children to Finland under Child Abduction Laws: *Commonwealth Central Authority v. Cavanaugh*

Family Court On Appeal Finds Parties' Children To Be "Habitually Resident" in Finland, With Return Order Granted Under Australia's Child Abduction Convention Regulations

INTRODUCTION

The case of *Commonwealth Central Authority & Cavanaugh* [2015] FamCAFC 233 (11 December 2015) was an appeal brought by the Commonwealth Central Authority against the orders of Deputy Chief Justice Faulks ("trial judge") of the Family Court of Australia.

The trial judge had to determine whether children should be returned to Finland under international child abduction laws. The key question was whether or not the children were habitually resident in Finland. If the children were deemed consistent residents of Finland, then they would need to be returned to Finland, otherwise they could remain in Australia. The trial judge concluded that the children were not habitually resident in Finland and thus were permitted to stay in Australia.

On appeal, however, the Court overturned the trial judge's decision and found that the children were consistent residents in Finland and should be returned to Finland in accordance with the relevant child abduction laws.

BACKGROUND

The mother in this matter was a dual citizen of both Australia and Finland. The father was an Australian citizen. They had three children together between the ages of eight and fourteen. The parties married in 1996 and moved to the United Kingdom where they lived for eight years. In 2002 they moved to Finland for two months and then from November 2002 they lived in Australia. On 16 June 2014 the family travelled to Finland to live for a year. In March 2015, the family briefly returned to Australia for a wedding. Whilst in Australia the mother and father separated. The children stayed with the mother and the father took the children's passports, refusing to let the children return to Finland with their mother.

1. Opposing Applications for Child Recovery and Parental Responsibility of the Children

On 31 March 2015, the father filed an application with the Federal Circuit Court of Australia to have the children placed on the Airport Watch List. Further, on 8 April 2015 the father sought a *recovery order* for the children and had the proceedings transferred to the Family Court of Australia. Meanwhile, on 3 April 2015 the mother filed proceedings in the



Helsinki District Court of Finland to have an order made in her favour for interim sole custody (parental responsibility) of the children.

2. Return of Children to Finland

Having received the mother's application for interim sole custody, the Finnish Authorities made a request on 12 May 2015, to the Commonwealth Central Authority for the children to be returned to Finland. The Commonwealth Central Authority brought proceedings against the father. The matter proceeded to trial for determination.

TRIAL PROCEEDINGS

On 6 July 2015, the trial judge considered whether the children should be returned to Finland under The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Child Abduction Convention"). The Hague Child Abduction Convention is enacted in Australia through the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ("Child Abduction Convention Regulations").

Article 3 of the Hague Child Abduction Convention states:

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
- b) 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 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.

The trial judge considered *regulation 16* of the Child Abduction Convention Regulations. This regulation states that where a *return order* for a child is made, a number of matters need to be considered. These matters include that:

1. the *return order* application was made within 12 months of the child's removal or retention; and
2. the removal or retention of the child was wrongful including that the child:
 - a. was under 16 years of age;
 - b. was habitually resident in a Hague Child Abduction Convention country immediately before removal; and
 - c. the party seeking the return of the child had rights of custody.

In his deliberation, the trial judge focussed on whether the children were habitually resident in Finland. His honour stated at 59 "It seems to me that this was a case where the parents having abandoned their habitual residence in Australia had



not yet acquired a habitual residence anywhere else". The trial judge decided that the parents did not have a settled common intention that their residence in Finland was habitual but indicated this was close to being the case.

The trial judge found that as no habitual residence was found under *regulation 16* of the Child Abduction Convention Regulations the *return order* application could not succeed.

APPELLATE PROCEEDINGS

The Commonwealth Central Authority appealed the trial judge's decision on three grounds, being:

1. the trial judge did not give sufficient weight to *regulation 1A(2)(a)* and *(b)* of the Child Abduction Convention Regulations;
2. the trial judge gave:
 - a. too much weight to the absence of a settled common intention to live in Finland for more than 1 year; and
 - b. too little weight to the settled common intention of the parents to remain in Finland for at least 1 year.
3. the trial judge failed to take into account all of the circumstances of the parents and children's ties to Finland.

The Court considered the trial judge's approach and considered the only issue before the trial judge was whether the children were habitually resident in Finland. If they were, then *regulation 16* of the Child Abduction Convention Regulations would apply and the *return order* for the children to be returned to Finland would succeed, otherwise it must fail.

The Court considered the High Court case of *LK v Director-General Department of Community Services* [2009] HCA 9; (2009) 237 CLR 582 which discussed *habitual residence*. In that case the High Court found that a person may abandon their habitual place of residence without becoming a habitual resident of another place. The Court also found that establishing habitual residence required a broad factual inquiry that takes into account all relevant factors including:

- the settled purpose;
- the actual and intended length of stay in a state;
- the purpose of the stay,
- the strength of the ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and school arrangements, and
- cultural, social and economic integration.

The Court determined that the primary consideration is whether the parents have a shared common intention that the children live in a particular place. After this, a broad-based inquiry of all other relevant circumstances should be made. The Court determined that the regulations favour a determination of habitual residence as opposed to a finding of no habitual residence. Where there is no finding of habitual residence then no child abduction protection exists under the Child Abduction Convention Regulations.

Based on this information, the Court determined the grounds of appeal of the Commonwealth Central Authority as follows:



1. The trial judge gave too much weight to the absence of a settled common intention for the children to live in Finland. The Court considered that the children were in school in Finland, the mother was employed, the parents had established a residence, the children had relatives in Finland and the mother and father were receiving benefits from the central government including health benefits.
2. The trial judge made an error in his determination that a common settled intention to live in Finland for 1 year did not amount to habitual residence. A common intention to reside in a country for less than 12 months can amount to habitual residence.
3. The Court found that there was no evidence that the trial judge ignored the circumstances of the parent's and children's ties to Finland. The trial judge made a thorough investigation.

As the Court found the first two grounds of the Appeal proven, it found that the children were habitually resident in Finland. As such *regulation 16* of the Child Abduction Convention Regulations applied and the *return order* for the children to be returned to Finland was granted.

CONCLUSION

In this case the parents and children left Australia to live in Finland for a year. They returned to Australia after 9 months for a wedding. After the parents separated whilst in Australia, the father then refused to allow the children to return to Finland. The Finnish Authorities requested the children be returned to Finland under the Hague Child Abduction Convention.

The primary determination was under *regulation 16* of the Child Abduction Convention Regulations which requires that children be habitually resident in a country before they can be returned to that country. The primary consideration in answering that question is whether the parents have or had a shared common intention to live in the country. Having considered this, the secondary consideration includes all other relevant matters that show ties to the country of claimed habitual residence. While a finding of no habitual residence can be made, Courts will prefer a finding that habitual residence does exist between member countries to the Hague Child Abduction Convention; otherwise no child abduction protection may be available.

In this appeal, a shared common settled intention of the parents to live in Finland for a year in connection with the ties of the children and parents to Finland was enough to establish that the children were habitually resident in Finland. The children were returned to Finland and further custody matters would have to be determined in accordance with the laws of Finland.