APPENDIX A

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[EVID., U.S. Dist. Ct., Case No. 5:22-cv-11091-JEL-KGA, Cunningham v. Burgess, Appx. XIX (i).]
[EVID., U.S. Dist. Ct., Case No. 2:21-cv-00158]

NOT RECOMMENDED FOR PUBLICATION

No. 22-1279

FILED
Nov 7, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE CUNNINGHAM, on behalf of minor child, Plaintiff-Appellant, v. MARIA QUINN, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: NORRIS, MOORE, and GILMAN, Circuit Judges.

George Cunningham, a pro se Michigan prisoner, appeals the district court's sua sponte dismissal, under 28 U.S.C. § 1915(e)(2)(B), of his petition under the Hague Convention for the return of his minor son. Cunningham also moves the court for summary judgment on his petition and to take judicial notice of portions of the transcript from his state criminal trial for forcibly kidnapping his son. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In January 2012, Cunningham left his home in Delaware, Ohio, and moved to Taiwan to start a baked-goods business. In March 2013, Cunningham traveled to the Philippines, where he married Nanette Abao, who is a Filipino citizen. Cunningham and Abao then moved to Malaysia, where their son, Z.C., was born in December 2013. Z.C.'s Malaysian birth certificate identifies his nationality as "Filipino." In June 2014, Abao returned to the Philippines with Z.C. In November 2014, Cunningham, apparently with Abao's consent, traveled with Z.C. to Port Columbus International Airport in Columbus, Ohio, for what Cunningham called "[t]he child's

first time to the U.S. for a visit." At the airport, Ohio law-enforcement agents arrested Cunningham on an outstanding sex-offense warrant involving a 16-year-old girl. Z.C. was separated from Cunningham at that point and placed in foster care.

In March 2017, an Ohio court awarded legal custody of Z.C. to Cunningham's sister and brother-in-law, defendants Maria and Paul Quinn. The Quinns returned with Z.C. to their home in Michigan, apparently with the intention of formally adopting him. In March 2019, Cunningham was charged in Michigan with kidnapping Z.C. from the Quinns. A Michigan jury subsequently convicted Cunningham of first-degree child abuse, armed robbery, first-degree home invasion, unlawful imprisonment, and kidnapping, and the trial court sentenced him to a maximum of 50 years of imprisonment.

In July 2021, Cunningham, while detained at the Chippewa County jail and proceeding pro se and in forma pauperis, filed a petition against the Quinns in the district court under the Hague Convention and the International Child Abduction Remedies Act (ICARA), 22 U.S.C. § 9001, et seq., for the return of Z.C. to Abao in the Philippines. Cunningham argued that Z.C.'s "habitual residence" was the Philippines and that Ohio authorities had "wrongfully removed or retained" Z.C. from his custody at the airport in November 2014. He sought an order compelling Z.C.'s return to the Philippines and for the Quinns to pay all of his legal costs and fees, as well as Z.C.'s travel expenses. Cunningham signed the petition, but Abao did not.

The district court granted Cunningham leave to proceed in forma pauperis and then screened his petition to determine whether it should be dismissed pursuant to § 1915(e)(2). The court concluded that Cunningham failed to state a claim under the Hague Convention and the ICARA for two reasons.

First, the court found that Z.C. was not wrongfully removed from the Philippines because Cunningham brought him to the United States with Abao's consent, and Cunningham failed to allege that Z.C.'s separation from him was in violation of the custodial-rights laws of the Philippines. Instead, the court found, Z.C.'s separation was caused by domestic law enforcement in Ohio and therefore was beyond the scope of the Hague Convention.

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Second, the district court concluded that Cunningham's petition was untimely. In support of that conclusion, the court observed that Article 12 of the Hague Convention provides that if the proceedings are commenced more than one year after the allegedly wrongful removal or retention, a child will not be ordered returned if he has settled into his new environment. And here, the court found that Z.C. came to the United States in 2014, when he was less than one year old, that he was approximately seven or eight years old at the time that Cunningham filed the petition, and that Z.C. "has been here for a lengthy period of time—perhaps eight times the amount of time Z.C. has lived outside the United States." Consequently, the court concluded that "this is not the kind of case that calls for a Convention proceeding. And certainly not for a 'return' to the Philippines to a person (Z.C.'s mother) who has not actually signed the petition herself." The court therefore dismissed Cunningham's petition for failure to state a claim on which relief could be granted.

On appeal, Cunningham argues that the Quinns perpetrated an illegal international adoption of Z.C. and that his petition was timely under the Hague Convention because Z.C. remains in an unsettled environment. Cunningham also filed a motion for summary judgment in which he reiterates his contention that his petition was timely.

We review de novo the district court's dismissal of a complaint pursuant to § 1915(e)(2)(B). *See Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *See id.* at 471 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The ICARA is a codification of the Hague Convention on the Civil Aspects of International Child Abduction. In administering the ICARA, courts are to determine whether the child has been wrongfully removed from his place of habitual residence and are not to determine custody. Hague Convention, Art. 19; 22 U.S.C. § 9001(b)(4). The Hague Convention prohibits the removal of a child, in breach of the rights of custody, from "the State in which the child was habitually resident immediately before the removal." Hague Convention, Art. 3. To obtain relief "[u]nder the ICARA, a petitioner seeking the return of a child under the Hague Convention must prove by a

preponderance of evidence that the child was wrongfully retained or removed from [his] habitual residence." *Ahmed v. Ahmed*, 867 F.3d 682, 686 (6th Cir. 2017).

Here, in dismissing Cunningham's petition for failure to state a claim, the district court made findings that arguably implicate affirmative defenses relating to return of a child under the ICARA and the Hague Convention that are available to the party opposing the petition. *See* Hague Convention, Art. 13; 22 U.S.C. § 9003(e)(2); *cf. Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005) (holding that, even if the parent consented to the removal of the child, the respondent's retention of the child would violate the Hague Convention if such retention breached the terms and conditions of the consent) (collecting cases); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (stating that the defendant has the burden to prove that "the proceeding was commenced more than one year after the removal of the child and the child has become settled in his or her new environment"); *see also Walker v. Walker*, 701 F.3d 1110, 1123 (7th Cir. 2012) (stating that a court has discretion to order the return of the child "even if it finds that the parent opposing the petition has established that one of the [affirmative defenses] applies").

District courts should not sua sponte raise affirmative defenses when screening a complaint under § 1915(e)(2). *Jones v. Bock*, 549 U.S. 199, 216 (2007). And in view of the fact-intensive inquiry involved in adjudicating the Hague Convention's affirmative defenses, we conclude that the district court erred in sua sponte raising them to conclude that Cunningham had failed to state a claim for relief. Moreover, the Ohio court's award of custody of Z.C. to the Quinns did not, as the district court suggested, bar Cunningham's Hague Convention petition. *See* Hague Convention, Art. 17; *Holder v. Holder*, 305 F.3d 854, 865 (9th Cir. 2002).

Nevertheless, we discern a more fundamental defect that mandated the dismissal of Cunningham's petition. *See Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) ("[W]e are free to affirm the judgment on any basis supported by the record."). As we recounted above, Cunningham is serving a lengthy prison sentence for kidnapping Z.C. from the Quinns. He does not seek the return of Z.C. to his custody, which in any case would not be feasible because of his imprisonment and the fact that the Ohio courts have legally terminated his custodial rights to Z.C.

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Cf. Hague Convention, Art. 13(b) (providing that a court may decline to order a return if it would "place the child in an intolerable situation"); *In re Prevot*, 59 F.3d 556, 567 (6th Cir. 1995) (stating that an imprisoned petitioner "could not successfully maintain an ICARA claim" because "the exceptions relating to risk of harm to the children would apply").

Instead, Cunningham petitioned for the return of Z.C. to Abao's custody but, as we have stated, Abao did not sign the petition. Laypersons are prohibited from representing the interests of others in federal court. *See* 28 U.S.C. § 1654; *Olagues v. Timken*, 908 F.3d 200, 203 (6th Cir. 2018) ("[W]e have consistently interpreted § 1654 as prohibiting pro se litigants from trying to assert the rights of others."); *Steelman v. Thomas*, No. 87-6260, 1988 WL 54071, at *1 (6th Cir. May 26, 1988) (holding that § 1654 prohibited a pro se husband from bringing his spouse's claims before the court on appeal). Cunningham therefore was not authorized to seek the return of Z.C. to the Philippines on behalf of Abao.

For the foregoing reasons, we **AFFIRM** the district court's judgment dismissing Cunningham's petition and **DENY** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[EVID., U.S. Dist. Ct., Case 5:22-cv-11091-JEL-KGA, Cunningham v. Burgess, Appx. XIX(i)]

FILED
Nov 7, 2022
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1279

GEORGE CUNNINGHAM, on behalf of minor child,

Plaintiff-Appellant,

v.

MARIA QUINN, et al.,

Defendants-Appellees.

Before: NORRIS, MOORE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GEORGE CUNNINGHAM,

Petitioner,

v.

MARIA QUINN and PAUL QUINN,

Respondents.

_____/

CASE No. 2:21-cv-158

HON. ROBERT J. JONKER

OPINION AND ORDER

INTRODUCTION

This is a Hague Convention proceeding brought by a *pro se* petitioner. Petitioner moves for permission to proceed in this action *in forma pauperis* under 28 U.S.C. § 1915. (ECF No. 2). Petitioner has not filed the motion using the required AO Form 239. Nevertheless, based on the materials submitted, the Court is satisfied that Movant lacks the financial wherewithal to pay the filing fee in this matter and grants Petitioner's motion to proceed *in forma pauperis*. Consequently, this action is subject to judicial screening under 28 U.S.C. § 1915(e)(2)(B)(i)-(ii), which provides that the court "shall dismiss" actions brought *in forma pauperis*, "at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; [or] (ii) fails to state a claim on which relief may be granted." The Court has reviewed the Complaint, the pending motions (ECF Nos. 3 and 5) and the supplements (ECF Nos. 6 and 7). For the reasons set out below, this matter is dismissed.

BACKGROUND

Petitioner, a convicted sex-offender, brings this action purportedly under the Hague Convention to "return" a minor child, Z.C.[1] to the child's mother and brother currently located in the Philippines. Petitioner is Z.C.'s biological father and traveled with Z.C. from Malaysia to Columbus, Ohio on November 13, 2014, when Z.C. was 11 months old. All indications are that Z.C.'s biological mother had no objection to Petitioner's decision to travel to the United States with Z.C. She is not a party to this proceeding. Upon arrival in Ohio, Petitioner and Z.C. were separated.[2] Petitioner says that Z.C.'s mother was unable to obtain a visa to travel to the United States, and that the Ohio courts would not permit other family members to return Z.C. to the Philippines, though Z.C.'s mother has not directly asserted any such thing. Ohio officials placed Z.C. in foster care. Z.C. is currently in the legal custody of his aunt and uncle—the Respondents in this case. Z.C.'s adoption by the Respondents appears to be imminent.

This is at least the third attempt Petitioner has initiated to stymie the adoption. The first, and most alarming, was a March 2019 incident in which Petitioner and another individual allegedly used weapons to kidnap Z.C. Petitioner is currently lodged at the Chippewa County jail awaiting trial on charges tied to those events. While lodged at the jail, Petitioner made his second attempt by filing a purported habeas corpus action on behalf of Z.C. under 28 U.S.C. § 2241. In the petition, Petitioner alleged that the Respondents and Ohio State Court officials violated Z.C.'s constitutional rights by placing Z.C. in the custody of the Respondents. On August 12, 2020, The Honorable Paul Maloney dismissed the habeas petition on Rule 4 screening. *Cunningham v.*

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[1] While Petitioner provides the full name of the minor child, the Court uses the child's initials under Fed. R. Civ. P. 5.2.

[2] Petitioner does not say why but it appears from publicly available documents that there was an Ohio warrant for Petitioner's arrest on charges of various sex crimes. Petitioner ultimately pleaded guilty in 2015 to Ohio crimes of gross sexual imposition. He remains a registered sex offender for this.

Quinn, Case No. 2:20-cv-129, ECF No. 6 (W.D. Mich. August 12, 2020). Undeterred, Petitioner filed this action on July 8, 2021, while still lodged in the jail. He seeks an Order requiring that Z.C. be "returned" to the Philippines, and that the adoption by Respondents be stopped.

DISCUSSION

Dismissal of a Complaint for failure to state a claim on which relief can be granted under § 1915(e)(2) is appropriate where the factual allegations fail to state a plausible basis for relief. *Hill v. Lappin*, 630, F.3d 468, 472 (6th Cir. 2010) (adopting *Iqbal/Twombly* standard). Dismissal of a claim as frivolous is appropriate where a legal theory is "indisputably meritless," or when the theory rests on "fantastic or delusional" factual claims. *Id.* The record in this case clearly reflects that Petitioner has no factual or legal basis for relief under the Hague Convention.

"The Hague Conference on Private International Law adopted the Hague Convention in 1980 '[t]o address the problem of international child abductions during domestic disputes.'" *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014)). The Hague Convention is designed "'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'" *Friedrich v. Friedrich*, 983 F.2d 1396, 1399-1400 (6th Cir. 1993) (quoting the preamble to the Hague Convention). Congress implemented the Hague Convention through the International Child Abduction Remedies Act ("ICARA"), which is codified at 22 U.S.C. § 9001 *et seq.* "The parent seeking return of a child under the Hague Convention must prove by a preponderance of the evidence that the child was 'wrongfully removed . . . within the meaning of the Convention.'" *Taglieri v. Monasky*, 907 F.3d 404, 407 (6th Cir. 2018) (en banc) (quoting 22 U.S.C. § 9001(4)). "Wrongful removal" under the Hague Convention means "taking a child in violation of custodial

rights 'under the law of the State in which the child was habitually resident immediately before the removal.'" *Id.* (quoting Hague Convention art. 3.).

The allegations in Petitioner's pleadings fail to state a plausible claim under the Hague Convention or the ICARA. By his own admission, Petitioner came with Z.C. here to the United States on his own in 2014. Furthermore, the mother knew and did not disapprove. So there was no "wrongful" removal of the child across international borders. True, authorities separated father and son at the airport (in Columbus, Ohio) when they arrived. But Petitioner does not aver that this was due to any violation of custodial rights of the law of the Philippines. Nor could he, based on the representations in his pleadings. Rather, based on the facts recited in the habeas opinion before Judge Maloney, the separation likely occurred because Petitioner was arrested when he arrived in Columbus to face Ohio criminal charges. So the "separation" was imposed by domestic law enforcement on the ground in Ohio. If it was wrongful at all—and Petitioner's later guilty plea to gross sexual imposition demonstrates it was not—that is beyond the scope of the Hague Convention and would be the normal grist for the mill of domestic courts.

Moreover, the hour is late. Petitioner traveled with the child to the United States in 2014 when Z.C. was less than a year old. Z.C. has apparently been in the United States ever since, and would appear to be currently seven or eight years of age. Article 12 of the Hague Convention provides that even if a child has been wrongfully removed, a delay of more than one year in the filing of the application for return may mean the child will not be ordered returned if the child has settled in his or her new environment. *Lozano*, 572 U.S. at 6 (noting that "in some cases, failure to file a petition for return within one year renders the return remedy unavailable."). While Article 12 is not a statute of limitations in the strictest sense, the Court must still consider under Article 12 whether too much time has passed. Particularly when law enforcement and courts in Ohio and Michigan are already involved, and the child has been here for a lengthy period of time—perhaps

eight times the amount of time Z.C. has lived outside the United States—this is not the kind of case that calls for a Convention proceeding. And certainly not for a "return" to the Philippines to a person (Z.C.'s mother) who has not actually signed the petition herself.

CONCLUSION

ACCORDINGLY, IT IS ORDERED

1. Petitioner's Motion for Leave to Proceed IFP (ECF No. 2) is **GRANTED.**
2. Petitioner's Complaint is **DISMISSED** for failure to state a claim under 28 U.S.C. §1915(e)(2)(B)(i)-(ii).
3. Petitioner's Motions for Order (ECF Nos. 3 and 5) are **DISMISSED AS MOOT.**
4. This matter is **CLOSED.** A separate Judgment shall issue.

Dated: July 14, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GEORGE CUNNINGHAM,

Petitioner,

v.

MARIA QUINN and PAUL QUINN,

Respondents.

_____/

CASE No. 2:21-cv-158

HON. ROBERT J. JONKER

JUDGMENT

In accordance with the Opinion and Order entered this day, Judgment is entered in favor of Respondents and against Petitioner dismissing this Hague Convention Proceeding under 28 U.S.C. § 1915(e)(2)(B)(i)-(ii).

Dated: July 14, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

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No. 22-1279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE CUNNINGHAM, on behalf of minor child,

Plaintiff-Appellant,

v.

MARIA QUINN, et al.,

Defendants-Appellees.

ORDER

BEFORE: NORRIS, MOORE, and GILMAN, Circuit Judges.

George Cunningham, a pro se Michigan prisoner, petitions the court for a panel rehearing of our order of November 7, 2022, affirming the district court's judgment sua sponte dismissing his Hague Convention petition. Cunningham also moves the court to order a change of venue in the district court.

Upon consideration, we **DENY** the petition for rehearing because Cunningham has not cited any misapprehension of law or fact that would alter our prior decision. *See* Fed. R. App. P. 40(a)(2). We **DENY** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[APPENDIX C]