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[26/07/1990; House of Lords (England); Superior Appellate Court]
Re J. (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, [1990] 2 All ER 961, [1990] 2 FLR 450, sub nom C. v. S. (A Minor) (Abduction)

The Decision of the House of Lords follows the Decision of the Court of Appeal

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

FAMILY DIVISION

(MR. JUSTICE DOUGLAS BROWN)

Royal Courts of Justice

Thursday 17th May 1990

Before

THE MASTER OF THE ROLLS

(Lord Donaldson)

LORD JUSTICE STAUGHTON

SIR ROGER ORMROD

C.

v.

S.

Mr. I. G. F. KARSTEN Q.C. and LORD MESTON (instructed by Messers. Reynolds Porter Chamberlain) appeared for the Appellant Father.

Mr. A. T. H. KIRKWOOD Q.C and MISS S. J. COOPER (instructed by Messers. Alfred Newton & Co., Stockport, Cheshire) appeared for the Respondent Mother.

Lord Donaldson of Lymington M.R. This appeal raises a new point on the Child Abduction and Custody Act 1985, which was passed in order to implement this country's obligations under an international Convention on the civil aspects of international child abduction. In

this case the countries concerned are the Commonwealth of Australia, which is also a party to this Convention, and this country.

The material facts are not in dispute. Both mother and father were born in England and are United Kingdom citizens. The father emigrated to Australia in 1969 and the mother in 1978. They met and began cohabiting in May 1987, their son J. being born on 6th December 1987. Both father and mother are registered as his parents on J.s' birth certificate and J. had dual nationality.

The relationship between father and mother had its ups and its downs, its separations and its reconciliations. One such separation occurred in January 1989 when the wife (sic) left the jointly owned home, taking J. with her. Both parties then consulted solicitors and the father contemplated making an application for custody, but in the event did not do so. The mother's solicitors in correspondence made it quite clear that any such application, if made, would be strenuously resisted but, on behalf of their client, they offered an olive branch in the form of inviting proposals for access by the father, subject to th father delivering up his passport to the Family Court of Western Australia for safekeeping, the object of that particular exercise being in order to allay any fears on the part of the mother that J. would be removed from Australia by his father. In the light of later events, this fear, if indeed it existed, is somewhat ironic.

In or about May 1989 there was a reconciliation and the parties resumed co-habitation. In January 1990 the mother's parents, who lived in England, flew to Australia to visit her and to see their grandchild. This may well have had an unsettling effect upon the mother but, however that may be, she determined to return to England, taking J. with her. Meanwhile, she took considerable care to ensure that the father was unaware of her intentions. On 21st March the mother, grandmother and J. flew to England, grandfather having returned earlier.

It is quite clear in the context that the mother's intention was to remain with J. in England permanently thereafter. There was no question of it being a temporary visit to the grandparents or anything of that sort.

This is the moment - that is to say in March 1990 - at which it is said that there was a wrongful removal of J. within the meaning of Article 3 of the Convention which is reproduced in Schedule 1 to the 1985 Act.

On or about 26th March the father applied to the Australian courts for custody of J. and other relief, and on 12th April 1990 Mr. Justice Anderson, sitting in the Family Court of Western Australia, made an ex parte order granting sole guardianship and custody of J. to his father. He also gave directions for the service of the order on the mother in England and this was effected shortly afterwards. Finally, by an amendment to his judgment he made a declaration hat the removal of J. from Australia was wrongful.

Once the mother had been served with this order and had failed to give effect to the father's right of guardianship and custody by returning J. to Australia, she was, it is said, guilty of a wrongful retention of J. within the meaning of Article 3 of the Convention.

On 19th April of this year the Australian authorities requested the return of J. pursuant to the provisions of the convention, and an appropriate originating summons was issued. Th matter came before Mr. Justice Douglas Brown in the Family Division of the High Court on 30th April 1990. He concluded that, on the facts of this case, the mother had not been guilty of a wrongful removal or of a wrongful retention of J. within the meaning of the Convention, and the father now appeals.

Let it be said at once that the English courts attach the greatest possible importance to giving very speedy effect to applications under the Convention and to Convention Rights. Accordingly, this appeal has been expedited (and we are considering the matter less than four weeks after the return was requested).

The mischief at which the Convention and the 1985 Act are directed - and it is a very serious mischief - is the wrongful removal of a child from, or its wrongful retention outside, the territorial jurisdiction of the courts of a Convention country. Where this occurs, it is the duty of the courts of any other Convention country where the child may be to order its return. Furthermore, this duty is almost absolute. However the operative word is "wrongful" and this depends in part upon the wording of the Convention as incorporated in the 1985 Act and in part, in this case, upon the law of Western Australia.

Let me turn first to the material articles of the Convention. I start with Article 3, which is in these terms:

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.

Article 4 provides:

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.

Article 5 provides:

For the purposes of this Convention--

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 14 is potentially relevant, as is Article 15. Article 14 provides:

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15 provides:

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 practicable assist applicants to obtain such a decision or determination.

In my judgment, Article 15 and, indeed, Article 14 were intended to assist a court which is asked to order the return of a child to ascertain the law of the other contracting state, in so far as that law is relevant to whether the removal or retention was wrongful within the meaning of Article 3. It cannot, as I see it, have been the intention that the courts of the other contracting state should be asked to determine the issue of the applicability of Article 3 in so far as it turns on the meaning of the Convention itself, because that is something which the courts of both countries are equally able to determine. Indeed, they would be expected to arrive at similar determinations. If, unhappily, this did not occur, the court which is being asked to order the return of the child would be bound to apply its own view of the Convention, particularly where, as here, the Convention only takes effect by virtue of a domestic Act of Parliament.

In this case we have the advantage of the reasons for his judgment which were given by Anderson J. when making his ex parte order on the father's application for custody and guardianship. These reasons cover not only the law of Western Australia in relation to custody, but also, I think, on a fair reading, his view of the applicability of the Convention on the facts as he knew them. The learned judge's views on Western Australian law I, of course, accept unreservedly. The latter are in a slightly different category in that, as I say, I think that we are under an obligation to form our own view, albeit it must be one which takes the fullest possible account of the views which have been expressed by the learned judge.

So I turn to Mr. Justice Anderson's judgment. He refers to a letter from the mother making it quite clear that she is intending to leave Western Australia permanently and in which she said:

"I've no intention of returning to Australia but if you want to live in the UK I won't stop you from seeing the little man. If you decide to stay in Australia I will keep my promise and write about J."

Then he says this:

"It would seem to me that this is very much a case of a child being removed from Australia without the consent of a person who, while not at law up to the present time being entitled to the custody of the child, is nonetheless a person who is the natural father of the child and who has, throughout his life, enjoyed de facto joint custody of the child. I state that the plaintiff is not entitled at law to the custody of the child because in Western Australia, although the plaintiff is registered as the natural father of the child, the Family Court Act provides that the natural mother is at law the guardian and custodian of the child. That is not to say, however, than an order of the court cannot alter that situation."

The learned judge was quite clearly referring to section 35 of the Family Court Act of 1975 of Western Australia, which provides:

"Subject to the Adoption of Children Act 1895 and any order made pursuant to this Division: [which, I take it, means part of the Act] "where the parents of a child who has not

attained the age of 18 years were not married at the time of the birth of the child or subsequently, the mother of the child has the custody and guardianship of the child."

I think he was probably, but not necessarily since I have not seen the whole Act, referring to section 36 when he said that that was the situation which could be altered, because that section begins by saying:

"An application to the Court for an order with respect to the custody or guardianship of, access to, or welfare of, a child may be made by -

(a) either parent; ..."

Reverting to the learned judge's judgment, he went on to say this:

"It seems to me in the circumstances that it would be appropriate to facilitate the exercise by the plaintiff of th rights that he claims that I should make an order granting to him sole guardianship and custody of the child with reasonable access to the defendant.

The orders that I am making are orders that will be sought to be enforced under what is known as the Hague Convention. I look at the opening words of that convention I have no difficulty in following them in this case, and that is:

'The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring 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, have resolved to conclude a convention.'

It is clear, particularly reading the letters that the defendant has written to the plaintiff, that without any warning to the plaintiff this child was removed from the state of his habitual residence. Whether the plaintiff is ultimately the custodian or is merely granted access he would be in a situation with the child living in the United Kingdom and his living in Australia where, it he was granted custody, the child would have to be returned to Australia and where if he is granted access his opportunities for exercising access would be severely limited both in terms of costs and available time."

Then he deals with the question of service and went on to say:

"I declare that the removal of the child from Australia was wrongful, that until further order the plaintiff be granted sole guardianship and custody of the child with reasonable access to the defendant ..."

and then he goes on to deal with questions of service on the mother.

So far as "custody" is concerned, the learned judge was, as I understand him, finding that the father and mother exercised joint custody over J. until the mother removed him to England, but that only the mother had any right to custody, until the order was made vesting that right in the father. That, of course, occurred after J. had arrived in England.

Since Articles 3, 4 and 5 of the Convention are solely concerned with the rights of custody, i.e., rights to care, custody, control or guardianship, and with rights of access - the precise terminology does not matter in any of these categories - and since the father had no such rights, for my part, I do not consider that J.s' removal from Australia, reprehensible though

it may have been in the way in which the mother achieved it, could constitute a wrongful removal within the meaning of the Convention.

That brings me to the other limb of the application which is based upon an alleged wrongful retention of J. Mr. Justice Douglas Brown considered this in the following passage of his judgment:

"So far as wrongful retention is concerned, counsel were not able to refer me to any case where the concept of retention has been considered in any detail. In the case of C. v C., the Court of Appeals, having decided the question of wrongful removal in favour of the father, did not go on to decide what Butler-Sloss L.J. described as the 'difficult' question of wrongful retention. In that case, unlike the instant case, there was a post-removal order by the Australian court for the return of the child. It is a very strange omission from the order of the judge, although he was apparently asked from as far as one can tell the originating the application to grant an injunction, that there was no order ordering the mother to return the children within the jurisdiction. In my view retention in Article 3 means retention after a period of lawful possession, which would usually be access or contract. It does not mean remaining in possession of the child after lawful removal from the jurisdiction without consent, and I agree with the way the matter was put by Balcombe, L.J. in Re E. (a minor) (Abduction) [1989] 1 F.L.R. 135 were, at p. 142, he said this:

'. . . the whole purpose of this Convention . . . it is to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or, having taken the child with the agreement any other party who has custodial rights to another jurisdiction, then wrongfully to retain that child.'

If that approach is right, as I think it is, it avoids artificial assessments as to the date on which retention becomes wrongful."

For my part, I entirely agree with the learned judge that retention after a period of lawful possession - by which I think he was quite plainly addressing his mind to a limited period of possession such as commonly occurs when access rights are exercised or where both parents agree to a child going abroad, perhaps to visit grandparents or something of that sort, but the intention being merely that it should be a temporary visit - is the situation at which this provision is primarily addressed. However, I am bound to say that, if the wording of the Convention has a wider effect and sweeps up other situations, then, as I see it, it would be our duty to give effect to it.

It seems quite clear that the father did obtain rights of custody and of access at the moment when Mr. Justice Anderson made his order on 12th April and, equally clearly in my judgment, those rights have been breached by the mother keeping J. in this country. It is true that there has been no order for return as such, but it must be apparent to the mother that, if she does not return the child, she will at least fail to give the father the rights of access to which he is entitled under the Western Australian court order.

However, retention is only wrongful in terms of the Convention if, to quote Article 3, "it is in breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention". So, if the father is to make good his claim for wrongful retention within the meaning of the convention, he has to show that J. was habitually resident in Western Australia on 12th April or some later date.

That has given rise to considerable discussion and we were urged by Mr. Kersten to accept the view that habitual residence is a question of fact. For my part, I would accept that. There is authority in the case Kapur v Kapur [1984] F.L.R. 922 for the proposition that habitual

residence must have an element of voluntariness and of residence for settled purposes. I would accept that too. I think it is a very interesting question whether J. and his mother could establish habitual residence in this country as at the moment when they arrived in this country in circumstances in which they had every intention of staying here indefinitely and of settling here.

But I do not think, with respect to the argument, that that is the point. The question is: Did J.s' habitual residence in Australia, which certainly existed up to 21st March, continue thereafter? It may take time - I do not say it does - to establish habitual residence, but I cannot see that it takes any time to terminate it. J.s' intentions must, of course, be those of his mother since he is two and a half, and there is no doubt at all in my mind that the mother ceased to be habitually resident in Western Australia from the moment when she left Western Australia bound for England, with the intention of remaining permanently in this country.

It follows, as I see it, that, while her conduct may well be (and I think is) a breach of the father's rights of custody under Western Australian law, the child J. was not habitually resident immediately before his retention. It follows that his retention is not wrongful within the meaning of Article 3 of the Convention.

I am aware that there may be some anxiety as a result of this judgment lest mothers or fathers, where the couples are married, can terminate habitual residence by one parent removing the child from the country of habitual residence.

It must be pointed out that the case with which we are concerned is unusual in that the mother is an unmarried mother and, under the law of Western Australia, the father has no rights whatever until the court gives them to him. But, 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. So that I do not anticipate - in fact, I am sure - that this decision cannot be applied to the ordinary case of the married couple.

The last thing I wish to say is that I regret having to decide the case in this way in the sense that I think that the father has been hard done by on the part of the mother. Nevertheless, we are concerned to apply the Convention in its term and in the way in which I think it was intended to be applied. On that basis I think that this appeal must be dismissed.

LORD JUSTICE STAUGHTON: I agree.

SIR ROGER ORMROD: I agree.

MR KIRKWOOD: My Lord, I think no question of costs arises. My client is assisted. I would ask you to say no order, but a provision in the order for taxation.

LORD MESTON: And also for my client who is legally aided, my Lord.

THE MASTER OF THE ROLLS: And, of course, the usual restrictions on identification apply. It may be that the easiest thing to do is to refer to this as C. v. S..

LORD MESTON; Would your Lordships consider an application for leave to appeal, this being, as your Lordship said, a new point?

THE MASTER OF THE ROLLS: We will certainly consider it. How long do you want us to consider it for?

LORD MESTON: Immediately, my Lord!

THE MASTER OF THE ROLLS: We have considered it. No.

LORD MESTON: I am obliged.

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C.

v.

S.

_____

5 June 1990

Appeal from the Court of Appeal.

The father appealed with leave of the Appeal Committee (Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Goff of Chieveley) granted on 3 July 1990.

The facts are stated in the opinion of Lord Brandon of Oakbrook.

Their Lordships took time for consideration.

Judgment: 26.7.90

HOUSE OF LORDS

IN RE J. (A MINOR)

(ABDUCTION: CUSTODY RIGHTS)

26 July LORD BRIDGE OF HARWICH. My Lords, I have the advantage of reading in draft the speech of my nobel and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons he fives I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, This appeal concerns the interpretation and application to somewhat special facts of the Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct 1980 ("the Convention"). Both Australia and the United Kingdom are parties to the Convention, which was given, with immaterial exceptions, the force of law in the United Kingdom by the Child Abduction and Custody Act of 1985.

The material facts are these. Both the appellant ("the father") and the respondent ("the mother") were born in England and are citizens of the United Kingdom. The father is 38 and the mother 32. In 1969 the father and in 1978 the mother went to live and work in Australia. They met and in May 1987 began living together at a home in Western Australia. They did not marry, then or later. On 6 December 1987 the mother gave birth to a boy whom I shall call "J." Both the mother and the father were registered as J.'s parents and J. has dual Australian and British nationality.

The relationship between the mother and the father, following the birth of J., was not an harmonious one. In 1988 thee was a short separation between them when the mother left the joint home taking J. with her. In about January 1989 there was a second and longer separation when the mother again left the joint home taking J. with her. During this second separation both the mother and the father consulted solicitors. The father was made aware that under the law of Western Australia, since he and the mother were not married, the mother was entitled to the sole custody and guardianship of J., unless he applied to a court and obtained an order to the contrary. The father at one time indicated an intention to make such an application but did not do so. In May 1989 the mother and the father were reconciled and she went back to live with him bringing J. with her.

In January 1990 the mother's parents, who live in Stockport, went out to Australia for a holiday. They stayed with the mother and the father at their jointly owned home in Western Australia. The mother made a decision to leave the father and return to England with J. to live there, initially at any rate at her parents' home. In February 1990 the mother's father returned to England, leaving his wife behind. At the beginning of March 1990 th mother, with financial assistance from her father, bought tickets for herself and J. to travel on the same flight to England as that on which her mother was due to return. She succeeded by various subterfuges in concealing her intention from the father and on 21 March 1990 flew with J. and her mother to England, arriving there on 22 March 1990. It was then, and has remained ever since, the settled intention of the mother not to return to Australia but to make a long-term home for herself and J. in England.

On or about 26 March 1990 the father applied to Supreme Court of Western Australia for the custody of J. and other relief. His application was supported by two affidavits sworn by him. On 3 April 1990 Walsh J. ordered the application to be transferred to the Family Court of Western Australia. On 12 April 1990 Anderson J. in the Family Court heard the application on ex parte basis and made an order giving the father sole guardianship and custody of J. He also gave directions for the service of the order on the mother in England and this was effected shortly afterwards. Finally by an amendment to his order dated 26 April 1990 he made a declaration that the removal of J. from Australia by the mother had been wrongful. It will be necessary to consider later whether this declaration was rightly made.

On 19 April 1990 the Australian authorities requested form th authorities in the United Kingdom the return of J. to Australia pursuant to the provisions of the Convention, and solicitors action for the father made an application to that end in the Family Division of the High Court. On 20 April 1990 the application was heard on an inter partes basis by Douglas Brown J. He concluded that, on the special facts of the case, the mother had not been guilty of a wrongful removal or of a wrongful detention of of J. within the meaning of the Convention and dismissed the application The father appealed and on 17 May 1990 the Court of Appeal (Lord Donaldson of Lymington M.R., Staughton L.J. and Sir Roger Ormrod) dismissed the appeal. The father now brings a further appeal to your Lordship's House with the leave of the House.

The crucial feature of this case is that the mother was not married to the father, either when J. was born or at any time afterwards. In that situation section 35 of the Family Court Act 1975 of Western Australia as added by the Family Court Act Amendment and Acts Repeal Act 1979, section 23, governed the rights of the parties in relation to J. That section provides:

"Subject to the Adoption of Children Act 1986 and any order made pursuant to this Division (i.e. this part of the Act), where the parents op a child who has not attained the age of 18

were not married at the time of the birth of the child, or subsequently, the mother of the child has the custody and guardianship of the child."

The relevant provisions of the Convention are as follows:

"Article 3

"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.

"Article 4

"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. . .

"Article 5

"For the purposes of this Convention - (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

"Article 12

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The mandatory provisions of article 12 are qualified by further provisions in article 13. These qualifications, however, are not relevant to the present case.

The father's case is that the mother's removal of J. from Australia to England, or alternatively her retention of J. in England after such removal, was wrongful within the meaning of article 3 of the Convention. The mother's case is that neither her removal of J. to England, nor her subsequent retention of him there, was wrongful in that sense.

I consider first the question whether the removal of J. from Australia to England by the mother was wrongful within the meaning of article 3 of the Convention. Having regard to the terms of article 3 the removal could only be wrongful if it was in breach of rights of custody attributed to, i.e., possessed by, the father at the time when it took place. It seems to me, however, that since section 35 of the Family Law Act of 1975 of Western Australia gave the mother alone the custody and guardianship of J., and no order of a court to the contrary had been obtained by the father before the removal took place, the father had no custody rights relating to J. of which the removal of J. by the mother could be a breach. It is no doubt true that, while the mother and father were living together with J. in their jointly

owned home in Western Australia, the de facto custody of J. was exercised by them jointly. So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide when J. should reside. It follows, in my opinion, that the removal of J. by the mother was not wrongful within the meaning of article 3 of the Convention. I recognize that Anderson J. thought fit to make a declaration that J. had been wrongfully removed from Australia. I pay to his decision the respect which comity requires, but the courts of the United Kingdom are not bound by it and for the reasons which I have given I do not consider that it was rightly made.

I consider secondly the question whether the retention of J. in England by the mother following his removal was wrongful within the meaning of article 3 of the Convention. Having regard to the terms of article 3 such retention could only be wrongful if, immediately before it took place, it was in breach of rights of custody possessed by the father. In order to decide that question it is necessary to take account of the sequence in time of the relevant events. The first relevant event was the retention of J. by the mother after his arrival in England. That began on 22 March 1990 and continued thereafter. The second relevant event was the order of Anderson J. giving to the father for the first time guardianship and custody of J. That order was made on 12 April 1990, three weeks after the mother's retention of J. began. There may be some doubt whether Anderson J. had jurisdiction to make such an order but I shall assume for present purposes that he had. The result was that it was not until 12 April 1990, or such later date as that on which the order was made known to the mother, that her retention of J. in England first became in breach of the right of custody newly conferred on the father by Anderson J. The question then arises whether, immediately before that breach occurred, J. was habitually resident in Western Australia within the meaning of article 3 of the Convention.

It is not in dispute that, immediately before his removal, J. was habitually resident in Western Australia. It was argued for the father that J. remained habitually resident in Western Australia despite his removal to and retention in England by the mother with the settled intention that he should reside there with her on a long-term basis. It was argued for the mother that, once she reached England with J. on 22 March 1990 and retained him there with the settled intention to which I have just referred, J. ceased to be habitually resident in Western Australia and in particular ceased to be so resident well before the date of the order of Anderson J.

In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident," as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is 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. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in Country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J.'s age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

In the light of these points the question which has to be posed and answered is not whether, immediately before the continued retention of J. because a breach of the father's rights of custody under the order of Anderson J., J. had become habitually resident in England. It is rather whether immediately before that time J. had already ceased to be habitually resident in Western Australia. To that second question it seems to me that, on the special facts of this particular case, only an affirmative answer can sensibly be given. The mother had left Western Australia with a settled intention that neither she nor J. should continue to be habitually resident there. It follows that immediately before 22 March 1990, when the retention of J. in England by the mother began, both she and J. had ceased to be habitually resident in Western Australia. A fortiori they had ceased to be habitually resident there by 12 Apr 1990, the date of the order of Anderson J. The consequence is that the continued retention of J. in England by the mother was never at any time a wrongful retention within the meaning of article 3 of the Convention.

On the basis that neither the removal of J. on the one hand, nor his retention on the other, was wrongful within the meaning of article 3 of the Convention the father's case cannot succeed. It follows that I agree with the decisions of both the courts below and would dismiss the appeal.

LORD ACKNER

My Lords,

For the reasons given in the speech of my noble and learned friend, Lord Brandon of Oakbrook, I would dismiss the appeal.

LORD OLIVER OF AYLMERTON

My Lords,

I have the advantage of reading in draft the speech of my noble and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons he gives I would dismiss the appeal.

LORD JAUNCEY OF TULLICHETTLE

My Lords,

I have had the advantage of reading in draft the speech prepare by noble and learned friend Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives I, too, would dismiss the appeal.

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