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[24/07/1997; House of Lords (England); Superior Appellate Court]
Re S. (A Minor) (Custody: Habitual Residence) [1998] AC 750, [1997] 3 WLR 597, [1998] 1 FLR 122, [1997] Fam Law 782

House of Lords

Lord Goff of Chieveley

Lord Slynn of Hadley

Lord Nolan

Lord Nicholls of Birkenhead

Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE IN THE MATTER OF S. (A MINOR) (1997)

ON 24 JULY 1997

LORD GOFF OF CHIEVELEY

My Lords,

I have had the advantage of reading a draft of the speech of my noble and learned friend, Lord Slynn of Hadley. For the reasons he has given, I would dismiss this appeal.

LORD SLYNN OF HADLEY

My Lords,

This appeal raises three principal questions:

First, whether the English High Court had jurisdiction on 13 March 1996 to make an order giving interim care and control to the father of an infant E. and subsequently to order that E. remain a ward of court;

Second, whether taking E. on 11 March 1996 from England to Ireland and subsequently keeping him there constituted the wrongful removal or retention of a child within the meaning of Article 3 of the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") as given the force of law in the United Kingdom by section 1(2) of and Schedule 1 to the Child Abduction and Custody Act 1985;

Third, whether such taking and keeping of E. constituted an unlawful removal of E. within the meaning of Article 12 of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children ("the European Convention") (as given the force of law in the United Kingdom by section 12 (2) of and Schedule 2 to the Act of 1985) and of section 23 of that Act.

The First Question

E. was born on 21 January 1995. His mother was an Irish national, his father Moroccan. They were not then, or subsequently, married and it is common ground that as an unmarried father, under English law prior to orders of the English court in his favour, the father had no parental rights in respect of E. It is also common ground that prior to her death E.'s habitual residence was that of his mother so that the question is what was the mother's habitual residence at the relevant times.

She had lived in England with the father from 1990 to July 1995 when she obtained from the Willesden County Court an ex parte interim order for the residence of E. and an interim prohibited steps order. From 3 to 16 August 1995, when she returned to England, E. and his mother stayed with her mother (the first appellant in this case) on holiday in Ireland. Thereafter she stayed in England until the 4 September when she returned to Ireland intending to come back to England in January 1996. In fact she went to England alone from 2 to 7 November 1995 when she returned to Ireland; she went to England again with E. on 16 January 1996 and remained there until she was admitted to hospital in London on 4 March and died there from a brain haemorrhage on 10 March 1996.

E.'s father had looked after him for part of the time whilst the mother was in hospital but on 5 March and 6 March the grandmother and another daughter (the second appellant) respectively came to London and helped to look after E.

On 11 March [1996] the two appellants took E. to Ireland where he has lived since. It is at this stage that the maternal family and the father resorted to the courts, they in Ireland, he in England. On the same day, 13 March 1996, the Dublin Circuit Court made an order granting guardianship and care and control of E. to the second appellant, his aunt, and an hour or so later the English High Court made an order granting interim care and control of E. to the father, ordering that the grandmother return E. to the jurisdiction of the English Court. To this end an originating summons to make E. a ward of court, dated 12 March 1996, was issued on 14 March 1996. On 17 April the aunt was joined as a second defendant to the proceedings brought by the father and the wardship was continued.

The High Court's jurisdiction in respect of children so far as relevant is to be found in the Family Law Act 1986. Section 1 of that Act specifies the orders to which Part I applies and includes:

(d) An order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children --

(i) So far as it gives care of a child to any person or provides for contact with, or the education of, a child . .

By section 2(3):

"A court in England and Wales shall not have jurisdiction to make a section 1(1)(d) order unless --

(a) the condition in section 3 of this Act is satisfied, or

(b) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection."

The condition in section 3 of the Act is that on the relevant date the child concerned --

"(a) is habitually resident in England and Wales or,

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom."

Since E. was not present in England and Wales at the time that the order was made by the English High Court the question is whether E. was habitually resident in England and Wales on the relevant date, which, by virtue of section 7 of the Act, is the date when an application is made for an order.

The trial judge, Mr. Lionel Swift Q.C., after a hearing lasting eight days and a careful consideration of the authorities as to what constituted "habitual residence" recorded that there was no dispute that the mother was habitually resident in England until 3 September 1995. He then examined extensive evidence as to the movements of, and the relationship between, the parents in the subsequent period and said:

"I am prepared to accept that during the period between September and December [1995] were it necessary to find it, the mother might have been described as habitually resident in Ireland. She was there as part of her regular order of life for the time being, though whether her stay there was for a settled purpose other than to stay there is debatable. But I am concerned with the position at her death. I conclude that when she returned to England in January she became habitually resident here. If I am wrong about that then certainly by the time she died that was the position. In so finding I bear in mind that it takes time in general to establish a new habitual residence. But when she returned here she was returning to her own home, and was intending as I find to make her home here."

Again after examining in detail the evidence as to the period between January and 10 March 1996 he concluded that at the date of her death the mother was habitually resident in England.

In the Court of Appeal and before your Lordships' House the appellants, though contending that E. and his mother were habitually resident in Ireland between 4 September 1995 and 16 January 1996, accepted, so that it is now common ground, that at the date of her death the mother, and therefore E., were habitually resident in England. It is accordingly unnecessary to examine in detail the evidence upon which this finding of the judge was based.

The critical question is thus whether, since he had left England on 11 March, E. was still habitually resident in England on 13 March when Wall J. made his order in the High Court. Had he become habitually resident in Ireland, or at any rate lost his habitual residence here even if he had not acquired an habitual residence in Ireland?

The learned trial judge found that the appellants intended to take E. to Ireland without the father's knowledge and that they did in fact take E. without the father's consent or knowledge. Indeed it is said that the father was ignored or brushed aside by the mother's family after her death. The judge was prepared to accept that "there may be circumstances in which physical possession or care may determine a child's habitual residence," which is a

question of fact, and that where a parent takes a child away a new habitual residence may be acquired very quickly. But he continued:

"I am not prepared to accept that a person with no juristic power over a person of this age can change his habitual residence within a day or two. It is not necessary to consider the position of a child kept by such a person over a significant period of time."

In the Court of Appeal Butler-Sloss L.J., with whom the other members of the court agreed, took the same view as the trial judge. In considering the appellants' contention that E. lost his habitual residence in England either when the appellants took over his de facto care on 10 March [1996] or when they took him to Ireland on 11 March [1996] she said:

"The death of the mother, the sole carer, would not immediately strip the child of his habitual residence acquired from her, at least, while he remained in the same jurisdiction. Once the child has been removed to another jurisdiction, the issue whether the child has obtained a new habitual residence whilst in the care of those who have not obtained an order or the agreement of others will depend upon the facts. But a clandestine removal of the child on the present facts would not immediately clothe the child with the habitual residence of those removing him to that jurisdiction, although the longer the actual residence of the child in the new jurisdiction without challenge, the more likely the child would acquire the habitual residence of those who have continued to care for the child without opposition. Since, in the present case, the English court was seised of the case within two days of the removal of the child, it is premature to say that the child lost his habitual residence on leaving England or had acquired a new habitual residence from his de facto carers on arrival in Ireland."

She rejected two further contentions of the appellants -- first that a person having care of, but not having parental responsibility for, a child who did what was reasonable for the purpose of safeguarding or promoting the child's welfare pursuant to section 3(5) of the Children Act 1989 was enabled to change the child's habitual residence; and second that, because the Dublin Circuit Court had made an order on an ex parte application giving the custody of E. to his aunt who was made guardian, and prohibiting the father from moving E. from Ireland, first in time, the English court could not make the order which it did make in respect of E.

There were thus concurrent findings of fact by the trial judge and by the Court of Appeal that E. was habitually resident in England at the time of the court order on 13 March. By the fact of being taken out of England by his grandmother and his aunt, who had no parental rights over him, he had not lost his habitual residence in England or acquired an habitual residence in Ireland. It is only in exceptional circumstances that your Lordships' House will reject concurrent findings of fact, particularly where the finding of the trial judge is based on a substantial amount of oral evidence and where the judge's assessment of the truthfulness of the witnesses is crucial to his findings of fact. In the present case I can see no justification for rejecting the concurrent findings of fact even if I had thought that they might possibly be wrong. I consider however that the judge not only came to a conclusion to which he was entitled to come but that he came to the right conclusion, on his primary findings on fact as to the events over the relevant period, that E.'s habitual residence remained in England.

Although it seems to me that the appellants were wrong to take E. away clandestinely without the consent of the father, even without telling the father, and without the consent of the court (as Budd J. put it in the Irish proceedings on the Convention the rule should be "apply, don't fly"), it is fully understandable that, in the distressing circumstances of the

mother's death, the grandmother should wish to have with her the baby who had spent several months at her house in Ireland in the latter part of 1995. This desire, however, and the need for someone to look after the child cannot, in my view, mean that by merely taking E. out of the jurisdiction during a period of two days they had ipso facto brought about a change in his habitual residence. Neither appellant had parental rights over the child, who was too young to form any intention as to his own future residence, and two days with the appellants in Ireland is not sufficient of itself to result in his existing habitual residence being lost and a new one gained. The position is quite different in the case of a mother, with parental rights and on whose habitual residence the child's habitual residence depends. If she leaves one country to go to another with the established intention of settling there permanently her habitual residence and that of the child may change very quickly. Such is not the present case where no parental rights were involved and where E.'s habitual residence did not depend on and automatically change with those of the appellants.

I agree with Butler-Sloss L.J. that the powers conferred by section 3(5) of the Children Act 1989 on a person, who has care of a child but without parental responsibility, to do what is reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare do not include the power to change the child's habitual residence merely by taking him out of the jurisdiction. Whether it was reasonable in all the circumstances of the case to take E. out of the jurisdiction for the purpose of safeguarding or promoting his welfare, quite apart from any question of a change in his habitual residence, does not fall to be decided on the present appeal.

I also agree with Butler-Sloss L.J. that the English court's order was not made without jurisdiction just because a little earlier on the same day the Dublin Circuit Court had given the aunt custody of E. and made her his guardian. Whether or not it is right to regard both orders as taking effect at the beginning of the day upon which they were made, it is clear that, at the time the interim order of care and control was made by the English court, E. was in fact still habitually resident in England. The ex parte orders giving custody to the aunt did not change E.'s habitual residence so as to deprive the English court of jurisdiction.

The appellants contended before the Court of Appeal and before your Lordships that it was in any event inappropriate for Wall J. to have made an order in relation to an alien child who was at the time living in the country of his nationality. In Re P. (G.E.) (An Infant) [1975] Ch. 568 a child was taken by his father away from the mother in England to Israel. The Court of Appeal held that the parens patriae jurisdiction of the English court could be exercised in respect of the child who was ordinarily resident within the jurisdiction, although not present there, when the proceedings were begun. Lord Denning M.R. said, at p. 584:

"The Crown protects every child who has his home here and will protect him in respect of his home. It will not permit anyone to kidnap the child and spirit it out of the realm. Not even its father or mother can be allowed to do so without the consent of the other. The kidnapper cannot escape the jurisdiction of the court by such a stratagem."

In that case, however, the child was stateless whereas here E. was an Irish national. It is submitted by the appellants that that is a crucial distinction and that since allegiance was owed to the Irish Republic and not to the Crown the parens patriae powers could or should not be exercised by the Crown. In In re B.-M. (Wardship: Jurisdiction) [1993] 1 F.L.R. 979 Eastham J. had to consider the case of a child who was a German national. He was taken by his mother out of England where they had been living and where the judge found that they had their habitual residence. The mother was sole custodian of the child. On the application of the father the child was made a ward of court and the father applied for a declaration

under the Hague Convention that the retention by the mother was wrongful. Eastham J. said, at p. 984:

"I have come to the conclusion that the English wardship court does have jurisdiction over an alien child provided England or England and Wales is the habitual residence of the child."

He approved the statement in Lowe and White "Wards of Court" 2nd ed. p. 24 (1986), para. 2-11, that although it was arguable that the decision in In re P. (G.E.) (An Infant) only applies if the minor is stateless:

"It is submitted that the decision is wider than that and extends to any alien minor who can be said to be ordinarily resident in England. Admittedly the court referred to the fact that both father and son held travel documents entitling them to return to England, issued pursuant to the Final Act and Convention relating to the Status of Stateless Persons 1954, but this plus the fact that the parties had only obtained a temporary tourist visa to visit Israel pointed to their being resident in England so that the decision would appear not to be confined to Stateless minors."

But Miss Scotland Q.C. has submitted that Eastham J.'s decision was erroneous.

Whilst it is correct that in In re P. (G.E.) (An Infant) the child in question was stateless, I do not read the statements of principle as to the court's jurisdiction by the three members of the Court of Appeal as being based on, or limited to, that fact. In particular the statement of Lord Denning M.R., at p. 584, already quoted is in general terms. I can see no reason why as a matter of principle the court's jurisdiction should not be available to protect any child who is habitually resident here or within the jurisdiction from being "kidnapped" and "spirited" out of the realm. Whether it is appropriate for that jurisdiction to be exercised will depend on the facts of the case, but in my opinion Eastham J. in In re B.-M. (Wardship: Jurisdiction) was right to hold that the jurisdiction was not limited to stateless children and to approve the view expressed in Lowe and White that this jurisdiction goes beyond the protection of stateless children but "extends to any alien minor who can be said to be ordinarily [habitually] resident in England." I agree with Butler-Sloss L.J. that it is habitual residence and not allegiance or citizenship which is determinative of the court's jurisdiction.

Accordingly, in my opinion, on the findings of the learned trial judge and the Court of Appeal that E. was habitually resident in England at the date of his order, Wall J. had jurisdiction to make the order which he made on 13 March 1996.

The Second Question

As to the second question the trial judge rejected, but the Court of Appeal accepted, that on the facts of the case there had been a breach of Article 3 of the Hague Convention.

By that Article:

"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 referred to may arise, inter alia, by operation of law or by reason of a judicial decision, and, by Article 4, the Convention is to apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. "Rights of custody" are by Article 5 to "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."

A person claiming that a child has been removed or retained in breach of custody rights may apply to the Central Authority of the child's habitual residence, or of any other Contracting State, for assistance in securing the return of the child. Where a child has been wrongfully removed or retained in terms of Article 3 the judicial or administering authority of the Contracting State where the child is shall order the return of the child if, at the date of the commencement of the proceedings before such authority, a period of less than one year has elapsed from the date of the wrongful removal or retention (Article 12). Exceptions to the obligation of the requested State in that Article are contained in Article 13. They are not relevant to this case.

A child must, thus, be returned pursuant to Article 12 if there has been either a wrongful removal or a wrongful retention within the meaning of Article 3. These are separate events occurring on specific occasions and were said in In re H. (Minors) (Abduction: Custody Rights) [1991] 2 A.C. 476 to be mutually exclusive concepts. Lord Brandon of Oakbrook said, at p. 500B:

"For the purposes of the Convention, removal occurs when a child, which has previously been in the State of its habitual residence, is taken away across the frontier of that State; whereas retention occurs where a child, which has previously been for a limited period of time outside the State of its habitual residence, is not returned to that State on the expiry of such limited period."

A.C. 562 at p. 578 Lord Brandon gave guidance as to a number of preliminary points relevant to the application of Article 3.

"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."

The preamble to and Article 1 of the Hague Convention are not set out in the Schedule to the Act but it is useful to recall them. The preamble expresses the desire of the States signing the Convention:

"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."

The objects of the Convention are stated in Article 1 to be:

"(a) To secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) To ensure that rights of custody and access under the law of one contracting State are effectively respected in the other contracting State."

Your Lordships have been referred to a valuable Explanatory report on the Hague Convention by Professor Elisa Perez-Vera, Reporter to the First Commission of the Hague Conference. It is not possible to set out long extracts from that Report, helpful though they are, but I draw attention to a number of points which are made in it. First, the situations envisaged by the Convention are "those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child." (Paragraph 11) Resorting to this expedient "an individual can change the applicable law and obtain a judicial decision favourable to him." (Paragraph 15)

The route adopted by the Convention "will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal." (Paragraph 16) In Paragraph 19 it is said:

". . . the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal: this applies as much to a removal which occurred prior to any decision on custody being taken--in which case the violated custody rights were exercised ex lege--as to a removal in breach of a pre-existing custody decision."

The Convention is not concerned with the law applicable to the custody of children and reference is made to the law of the State of the child's habitual residence "only so as to establish the wrongful nature of the removal." (Paragraph 36)

" . . . the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody." (Paragraph 66)

In paragraph 71 it is said:

"Leaving aside a consideration of those persons who can hold rights of custody . . . it should be stressed now that the intention is to protect all the ways in which custody of children can be exercised."

and:

"The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

The father does not contend, and has not contended, that there was here a wrongful removal when the child was taken out of the jurisdiction on 11 March. In this he was right. It is plain that when the appellants removed E. from London to Ireland the father had no rights of custody over E. by operation or law or by reason of any judicial or administrative decision or by any binding agreement. There was therefore no wrongful removal within the meaning of Article 3.

The appellants say that this in fact was a removal case and not a retention case and if the removal was lawful that is the end of the matter, but alternatively that, if this is to be treated also as a retention case, the retention was equally lawful.

I do not agree that this case is to be treated only as a "removal" case. Even though the two are separate and mutually exclusive both can occur on the facts in relation to the same child at different times. It must, however, be necessary to point specifically to the event which constitutes the removal or the retention. This is necessarily so because of the provision of Article 12 that for an order for the return of the child to be made at the date of commencement of the proceedings, a period of less than one year has elapsed "from the date" of the wrongful removal or retention.

The appellants contend that E. was retained in Dublin on his arrival there from England. That was on 11 March and they say that this was the only relevant date since his continuing retention there is not relevant for the purpose of calculating the period of one year. It follows that since the father had no rights of custody on 11 or 12 March the retention following the removal was no more unlawful than was the removal.

This argument ignores the possibility that the nature of the retention may change and may change with effect from a specific date so as to permit the calculation of one year to be made. That this can happen is in my view plain. Thus a parent or parents having rights of custody may agree that a child shall go on 1 January to stay with a friend abroad for a period of six months. The friend takes the child abroad. That is clearly not a wrongful removal. The friend keeps the child abroad until 30 June: that is clearly not a wrongful retention. On 1 July the friend keeps the child and refuses to return him. The parent's consent has gone and the retention becomes wrongful. The time runs from that date. The flaw in the appellants' argument is that it looks only at the date of retention whereas what has to be considered is the date of wrongful retention: see In re H. (Minors) (Abduction: Custody Rights) [1991] 2 A.C. 476, 499.

This example is only one way in which a lawful retention may become a wrongful retention. The same in my opinion can happen where a parent had no parental rights when a child was removed and initially retained in a way which was not unlawful. If subsequently he acquires such rights and demands the return of the child then the retention may become wrongful.

That in my opinion happened in the present case. On the basis of the finding of the trial judge that on 13 March E. was habitually resident, even if not actually present, in England, when Wall J. made his order giving interim care and control of E. to the father and ordering that E. be returned to the care and control of the father in the jurisdiction of the High Court, the father acquired rights of custody within the meaning of Articles 3 and 5 of the Convention. The retention of E. contrary to that order and to the father's wishes thereupon became wrongful. Since no question of the limitation provision in Article 12 arises it is unnecessary to decide whether the relevant date is the making of that order (13 March) or its service on the appellants (apparently 16 March). It was on any view wrongful within the meaning of the Convention by the later date and was not prevented from being so by virtue of the order of the Dublin Circuit Court on the same day. Such a result is not in any way

inconsistent (as the appellants argue it is) with the decision of your Lordships' House in In re H. (Minors) (Abduction: Custody Rights) (supra) that removal and retention are single events occurring on a specific occasion and mutually exclusive concepts.

The appellants contend, however, that on the basis of the decision of your Lordships' House in In re J. (A Minor) (Abduction: Custody Rights) [1990] 2 A.C. 562 the retention of E. was not wrongful. In that case a mother and child were habitually resident in Western Australia, the mother having sole parental rights over the child. They left Western Australia on 21 March 1990 and arrived in England on 22 March 1990 when it was found that retention of the child began. On 12 April 1990 the court of Western Australia granted sole guardianship and custody of the child to the father and declared that the removal from Australia was wrongful. In your Lordships' House it was held that the removal of the child was not in breach of any custody rights of the father nor was the retention in England during the three weeks before the Western Australia court's order in itself wrongful. The essential difference between that case and the present was, however, that the mother had left Western Australia, as Lord Brandon said, at p. 579:

"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 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 April 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."

The critical difference between In re J. (A Minor) (Abduction: Custody Rights) and the present case is that E. was habitually resident in England at the time of Wall J.'s order. The same difference arose in In re B.-M. (Wardship: Jurisdiction) [1993] 1 F.L.R. 979 where an unmarried mother took her child to Germany on or about 3 September and on 4 September the father obtained a wardship order which was served on the mother on 11 September. It was held by Eastham J. that even if the removal was not unlawful because there was no court order in existence yet the retention was wrongful with effect from 11 September when the mother kept the child out of the jurisdiction and failed to return her in accordance with the orders of the English court, the child having been habitually resident in England at the time the wardship proceedings began.

Because the child's habitual residence at the date of the court's order in the present case remained England I do not consider that the result indicated in the present case is inconsistent with the decision of your Lordships' House in In re J. (A Minor) (Abduction: Custody Rights) (supra); it is consistent with the judgment of Eastham J. in In re B.-M. (Wardship: Jurisdiction) which on this point also was rightly decided.

I consider therefore that the Court of Appeal was right to hold that the retention by the second appellant was wrongful within the meaning of the Hague Convention.

The Third Question

As to the third question the trial judge held that there had not, the Court of Appeal held that there had, been an unlawful removal of E. from the jurisdiction contrary to Article 12 of the European Convention.

The purpose and structure of the European Convention is different from that of the Hague Convention and it does not follow, though it may be, that what constitutes, or does not

constitute, an "unlawful removal" for the Hague Convention, is, or conversely is not, an "unlawful removal" for the European Convention.

As to the purpose, the Member States of the Council of Europe recited that

"the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children . . ."

As to the structure, by Article 7 of the Convention:

"A decision relating to custody given in a Contracting State shall be recognised, and, where it is enforceable in the State of origin, made enforceable in every other Contracting State."

The procedure of applying through the central authority of a Contracting State is prescribed by Articles 4 and 5 of the Convention and expanded in sections 14-22 of the Act of 1985. Recognition and enforcement may be refused in the circumstances specified in Articles 9 and 10 of the Convention including that in Article 10(1)(d):

"If the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child."

By Article 1:

"(c) 'decision relating to custody' means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him.

(d) 'improper removal' means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; 'improper removal' also includes:

(i) the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised:

(ii) a removal which is subsequently declared unlawful within the meaning of Article 12."

By Article 12:

"Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person."

By Section 23(2) of the Act:

"Where in any custody proceedings a court in the United Kingdom makes a decision relating to a child who has been removed from the United Kingdom, the court may also, on an application made by any person for the purposes of Article 12 of the Convention, declare the removal to have been unlawful if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the United Kingdom

without the consent of the person (or, if more than one, all the persons) having the right to determine the child's place of residence under the law of the part of the United Kingdom in which the child was habitually resident."

The appellants accept that where a child is removed from the jurisdiction with the consent of the person having the right to determine the child's place of residence and subsequently to that removal the child is "kept out" of the jurisdiction in contravention of any provision for the child's return the removal will be deemed to have been unlawful. They contend, however, that in section 23 the only person who can make an application or whose consent was relevant was that of E.'s mother and that Article 12 cannot create rights for the person seeking the declaration which were not in being prior to the removal. The father could only be entitled to a declaration under section 12 if he had the right on 11 March 1996 to determine E.'s place of residence and the court had no right to determine (with retrospective effect so as to confer rights on the father) E.'s place of residence prior to the removal.

The trial judge accepted this approach. He said:

"I conclude that for a declaration to be made the child must have been taken out from or sent out or kept out of the United Kingdom without the consent of the person who then had the right to determine the child's place of residence. In my view the removal and retention thereafter is not unlawful within the meaning of Article 12 or Section 23(2) unless at the time it was without the consent of the person having the right to determine the child's place of residence (see F. v. S. (Wardship: Jurisdiction) [1991] 2 F.L.R. 349; not reversed on this point in the Court of Appeal [1993] 2 F.L.R. 686 (C.A))."

The definition in Article 1(d) of the Convention is of "improper removal," a phrase which occurs only in Article 10 whereas in Article 12 the reference is to a declaration of "the removal to be unlawful". The definition, however, includes in (ii) a removal which "is subsequently declared unlawful" and it is clear that an improper removal includes an unlawful removal. By virtue of Article 1(d) a removal is improper in two different situations--first if it is in breach of a decision relating to the child's custody "which has been given." This I understand to mean that the removal of the child across an international frontier was improper at the time it was effected in that it was in breach of an existing decision. Secondly it may also be an "improper removal" if there is a failure to return the child at the end of the period during which the child had been properly or lawfully outside the jurisdiction. This is not described in the Convention as an unlawful or improper "retention" but for the purposes of the Convention it makes retrospectively "the removal" unlawful.

For the purposes of Article 12 there must have been at the time of the child's removal across an international frontier no enforceable decision given in a Contracting State relating to his custody. That was satisfied here as at 11 March 1996. For the Convention to apply to any subsequent decision it must be one "relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person." The decision of Wall J. on the 13 March was a subsequent decision given in a Contracting State relating to the custody of the child. The father was plainly an interested person. But was the decision one "declaring the removal to be unlawful."? On the face of it, that decision does not declare, and for the purposes of its jurisdiction in making the order of care and control and for E.'s return it did not need to declare, that the initial taking of E. to Ireland in itself was unlawful.

The respondent contends that the removal was unlawful since removal of a child out of the jurisdiction is unlawful if there is no consent to the child's removal, even if there is no one who has the right to consent other than the court. I am not satisfied that this is right in the

broad terms in which it is put or that the initial taking to her home of E. by a near relative was necessarily unlawful, even if it was unwise without the consent of the court and even if the lawfulness of E.'s retention in Ireland could be ended by an order giving care and control to the father.

It seems to me, however, that after the making (or at the latest the service) of Wall J.'s order giving care and control to the father the retention of E. in Ireland and the failure to return him to England became unlawful and improper and for the purposes of the Convention constituted an improper removal within the meaning of Article 1(d).

This result is reflected in section 23(2) of the Act of 1985 which I have already quoted. In the present case it is clear that these were custody proceedings relating to a child who had been removed from the United Kingdom and in respect of whom, before the judge, an order was sought pursuant to the European Convention that his removal was improper and unlawful within the meaning of Articles 1 and 12 of the Convention. The court is, by section 23(2), empowered to declare the removal to have been unlawful if it is satisfied that the applicant has an interest in the matter and that

"the child has been . . . kept out of the United Kingdom without the consent of the person . . . having the right to determine the child's place of residence under the law of the part of the United Kingdom in which the child was habitually resident."

The father had such an interest; E. was habitually resident in England before, at and from 13 March 1996; the father from 13 March had the right to determine E.'s place of residence under English law; E. was kept out of the United Kingdom without his father's consent from that date, if not earlier.

It follows in my opinion that section 23(2) is satisfied and that the court is empowered to declare for the purposes of the Convention that E.'s removal was unlawful.

I would, accordingly, uphold the decision of the Court of Appeal that E. was at the relevant time habitually resident in England and declare that E. had been wrongfully retained out of the jurisdiction contrary to Article 3 of the Hague Convention and further declare, for the purposes of section 23(2) of and Articles 1 and 12 of Schedule 2 to the Child Abduction and Custody Act 1985, the removal of E. from the jurisdiction to have been unlawful.

LORD NOLAN

My Lords,

I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given, I too would dismiss this appeal.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given, I too would dismiss this appeal.

LORD HUTTON

My Lords,

I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Slynn of Hadley. For the reasons he has given I too would dismiss this appeal.

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