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[25/03/1998; High Court (England); First Instance]
Re B. (Child Abduction: Unmarried Father) [1999] Fam 1, [1998] 2 FLR 146, [1998] Fam Law 452

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Court of Justice

25 March 1998

Hale J

In the Matter of B.

Ian Karsten QC and Debbie Taylor for the fathers

Michael Nicholls as amicus curiae

Anthony Kirk for Mrs B; Mrs W did not appear

HALE J:

The question

In these two cases, heard together for convenience, two unmarried fathers seek declarations under Art 15 of the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention), as set out in Sch 1 to the Child Abduction and Custody Act 1985, that the removal of their children from England and Wales was wrongful within the meaning of Art 3 of that convention. The children were taken abroad by their mothers who alone had parental responsibility for them under English law. Neither father had parental responsibility at that time, nor was there any court order in force prohibiting the removal of the children from England and Wales, nor was their removal a criminal offence under the Child Abduction Act 1984 or any other legislation. Nevertheless it is argued that it was in breach of rights of custody held by the fathers or, in one case, the court.

The relevant articles of the Hague Convention

Article 3 of the Hague Convention is as follows:

'The removal or the retention of a child is to be considered wrongful when

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 5 is as follows:

'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 15 is as follows:

'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.'

The relevant facts

The W case concerns two children, A, born on 26 February 1993, and K, born on 30 October 1994. Their parents lived together from April 1992 until September 1995. After the separation, the children stayed with their mother, who began living with and then married her present husband in April 1996. In March 1996 the children's father applied to the local family proceedings court for parental responsibility and contact orders. In September 1996 he also applied for a residence order.

His applications were listed for final hearing on 12 February 1997 but the parents reached an agreement. The father agreed to withdraw his application for a residence order. The mother agreed to limited defined interim contact with a court welfare officer's report and review in six months' time. A final hearing of the father's applications for contact and parental responsibility was set for 15 September 1997, when both parties were directed to attend, and a directions hearing on 8 September. Soon after the February hearing the parties met and agreed that the children should see their father for a whole day every weekend. This continued throughout the summer. The court welfare officer's report is dated 1 September. It recommended that the agreed contact continue and that the father have parental responsibility.

The mother failed to attend either the directions or the final hearing. At the hearing on 15 September the magistrates made a parental responsibility order but by then it was too late. The mother and her husband, with the children, had flown to Australia on 5 September. The flights had been booked in August and her solicitors knew of their plans in July. Although the family have only six month visas and tickets to return in March 1998 all the indications are that they intend to emigrate if they can. The mother has been served with these proceedings and has consulted solicitors in Australia but she has taken no steps to participate in the case.

The B case concerns a little girl, N, born on 19 October 1995. Her parents lived together from November 1990 until January 1997, according to the mother, or June 1997, according to the father. They certainly had a major disagreement, to which the police were called, on 4 January 1997, as a result of which the mother left with the child on 6 January. On her case she never returned. She was rehoused by the local authority in April.

Meanwhile, on 8 January 1997 the father obtained an ex parte order prohibiting the mother from removing the child from the jurisdiction. At the first inter partes hearing on 15 January both parents were prohibited from doing so. However at a conciliation appointment on 18 February 1997 they agreed that there would be a residence order in favour of the mother and an order for reasonable contact with the father. The prohibited steps orders were discharged.

There is a dispute about how much the father saw of his daughter after that. In September the mother went to visit her family in Ireland. Her father had had a stroke. The father knew all about this. After she returned, both agree that there was another incident in mid-October, which was reported to the police. Soon afterwards the mother went back to Ireland with the child and told the father from there that she did not intend to return.

The relevant provisions of English law

The starting point is the Children Act 1989. The key concept in that Act and elsewhere is parental responsibility. This replaced earlier concepts of parental guardianship and parental rights and duties. Section 3(1) provides that

'. . ."parental responsibility"' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.'

Section 2(1) provides that where a child's father and mother are married to one another at the time of his birth (which is given an extended meaning by s 2(3)), they shall each have parental responsibility for the child. Where they were not so married, however, s 2(2) provides that the mother shall have parental responsibility but that the father shall not do so unless he acquires it in accordance with the provisions of the Act. This is a reference to s 4, under which an unmarried father may acquire parental responsibility either by court order or by an agreement with the mother which is made in the prescribed form and recorded with the Principal Registry of the Family Division.

The 1989 Act further provides, in s 10(4), that irrespective of parental responsibility unmarried fathers have full access to the courts to apply for orders about their children's upbringing. Under s 8(1), these include an order that the child is to live with him, or have contact with him, or about some particular aspect of the child's upbringing such as his schooling or medical treatment, or an order prohibiting the mother, or indeed anyone else, taking a particular step in relation to the child, such as removing him from the jurisdiction.

The importance of parental responsibility in this context is reinforced by the provisions of s 1 of the 1984 Act. Section 1(1) makes it an offence for a parent to take or send a child out of the United Kingdom 'without the appropriate consent'. Section 1(3) defines this as the consent of the child's mother, of the parental responsibility. She therefore had the consent of every person with parental responsibility. Mr Michael Nicholls, as amicus curiae, did suggest that where there is no one else with parental responsibility s 13(1) requires that the leave of the court be obtained instead. However, that is not what the section says.

There are numerous points upon which the Act draws a distinction between 'parents' and 'persons [including parents] with parental responsibility'. If Parliament had intended that anyone with the benefit of a residence order who wanted to take a child abroad for more than a month had to obtain the consent of every 'parent' irrespective of parental responsibility, or else seek leave of the court, it would have said so. For what it is worth, Appendix 3 to the Family Proceedings Rules 1991, SI 1991/1247 provides only for persons with parental responsibility to be made respondents to or even notified of applications under s 13 (1). It is not difficult to imagine cases in which the delay, cost and stress involved in trying to trace an absent parent in order to make such an application would be quite unjustifiable either in the child's or in the public interest. Wisely, therefore, although obliged to associate himself with Mr Nicholls' argument, Mr Ian Karsten QC, who appears for both fathers, does not press it.

Furthermore, unless the child is a ward of court, there is no general provision in English law prohibiting the removal of a child who is the subject of pending proceedings before a court. This contrasts with the law in some other jurisdictions: for example, in Australia, s 65Z of the Family Law 1975 makes it an offence for any party to pending proceedings about the future of a child to take that child abroad without the consent of all the other parties to the proceedings or a court order made since the proceedings began.

It is clear, therefore, that at the time when each of these children was removed from England and Wales, there was nothing in English domestic law preventing them from doing so.

Rights of custody under the convention

However, that is not the end of the matter. According to the conclusion of the second meeting of the Special Commission to discuss the operation of the convention in 1993

'The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression "rights of custody", for example, does not coincide with any particular concept of custody in domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.'

This same principle was expressed by Lord Donaldson MR in Re C (A Minor) (Abduction) [1989] 1 FLR 403, 412-413:

'We are necessarily concerned with Australian law because we are bidden by Article 3 to decide whether the removal of the child was in breach of "rights of custody" attributed to the father either jointly or alone under that law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of "rights of custody". Equally, it

matters not in the least whether those rights would be regarded as rights of custody under English law if they fall within the definition.'

Similar observations are made in other cases, perhaps most notably in the present context Re F (A Minor) (Child Abduction: Rights of Custody Abroad) [1995] Fam 224, sub nom Re F (Child Abduction: Risk if Returned) [1995] 2 FLR 31.

Those cases also make plain that ultimately it is for the judicial or administrative authorities in the state addressed to determine whether or not the removal was wrongful in convention terms. Hence if either of these applications is transmitted to Australia or to the Republic of Ireland it will be for the courts there to decide whether the legal position in English law is such as to render the removal of any of these children wrongful in convention terms.

However, under Art 15 the authorities of the state of the child's habitual residence can be asked for 'a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention'. Hence, although these are outgoing cases, I should draw on the jurisprudence of the English courts in incoming cases, in determining whether these were wrongful removals under English Convention law (see Re P (Abduction: Declaration) [1995] 1 FLR 831).

Re C involved married parents who had agreed a consent order making them joint guardians, but giving the mother custody, and providing that neither husband nor wife was to remove the child from Australia without the consent of the other, Lord Donaldson MR went on to say that the expression 'rights of custody' as defined in the convention (at 413B)

'. . .includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence". This right may . . . as in this case, be a divided right - insofar as the child is to reside in Australia, the right being that of the mother; but, insofar as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court.'

Hence in this country, convention rights of custody have long been held to include the right to veto the removal of the child from his country of habitual residence. This is so even if that person has no right to the care of the person of the child, so that the right of veto is in support of a right of access rather than a right of custody. There is some awkwardness in fitting this approach into the scheme of the Hague Convention as a whole: for example, under Art 13, the authorities in the requested state are not bound to order the return of the child if 'the person, institution or other body having the care of the person of the child . . . had consented to or subsequently acquiesced in the removal or retention' (my emphasis). The words emphasised are not obviously apt to describe the consent or acquiescence of a person with a bare right of veto. I note that the Supreme Court of Canada has twice expressed doubts as to whether, once a final custody order has been made, a right of veto which merely protects another person's rights of access would amount to 'rights of custody' (see Thomson v Thomson (1994) 119 DLR (4th) 253 (para 67), DS v VW and JS and Rodrigue Blais [1996] 2 SCR 108).

Nevertheless, Mr Nicholls (from the office of the Official Solicitor where the Central Authority for England and Wales under the convention is situated) whose researches and arguments as amicus curiae have been most illuminating, recalls that at the third conference to discuss the operation of the convention, the Re C approach was commonly held amongst contracting states.

In this country, by virtue of s 1 of the 1984 Act, parental responsibility brings with it a right of veto, even if there is no court order in force prohibiting removal. Hence if either of these fathers had parental responsibility, they would also have had 'rights of custody'. But they did not.

The reasoning in Re C and other cases about the right of veto still falls within what Mr Nicholls describes as the 'narrow view' of the definition of rights of custody in Art 5(a) (quoted earlier): this is that 'shall include' means 'must include' the right to determine the child's place of residence. However, the phrase 'shall include' is equally capable of meaning 'includes'. This is confirmed by the equivalent French text, which reads simply 'le "droit de garde" comprend'. Furthermore, the words 'shall include' must equally apply to the reference to 'rights relating to the care of the person of the child': if it had been mandatory to include these, it would not have been permissible to extend the concept to a bare right to veto travel abroad possessed by people who have no rights relating to the care of the child. But on what basis is it permissible to go beyond that so-called 'narrow' approach?

In Re F (A Minor) (Child Abduction: Rights of Custody Abroad) [1995] Fam 224, sub nom Re F (Child Abduction: Risk if Returned) [1995] 2 FLR 31 in the Court of Appeal established that the removal of a child may be in breach of 'rights of custody' even if it was not in fact contrary to any provision of the domestic law of the country from which the child was removed. However, this concerned married parents, who both had equal and separate rights of custody under Colorado law. As in English law, each could act independently of the other, but unlike English law there was no prohibition on one removing the child either from the state or from the United States of America. The mother had obtained a temporary order for care and control which was due to expire the day after she left the country secretly with the child. The Court of Appeal held that the father still had his separate and equal 'rights of custody' and that by removing the child the mother had frustrated and rendered them nugatory.

However, the position of unmarried fathers who do not have parental responsibility or legal rights of custody is quite different. The House of Lords' decision in Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442 concerned the position of an unmarried father under the law of Western Australia. This was then, and remains, very similar to his position in English law. The facts of Re J were a good deal stronger than the facts of the cases before me, as the mother and father were living together in their jointly owned home at the time when the mother left with the child. Nevertheless, neither the Court of Appeal nor the House of Lords had any difficulty in concluding that the father did not have rights of custody for the purpose of the convention. Lord Brandon of Oakwood said this at 577 and 453 respectively:

'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 where J should reside.'

This holding is, as Mr Karsten has admitted with his usual candour and charm, 'a problem' for these fathers. It is an interesting question in the law of precedent whether it is in fact determinative of the questions now before me: there is no doubt that it is part of the ratio decidendi of the case. Mr Nicholls argued that the decision in Re J was not binding on a puisne judge because it was concerned with the law of Western Australia and not with English law. I have difficulty in accepting that. The question before the House was whether the rights given to the father by the law of Western Australia were rights of custody in convention terms. The question before me is whether the rights given to these fathers by the law of England and Wales are rights of custody in convention terms. The rights given by the applicable domestic law in each case were for all practical purposes identical.

Inchoate rights

That is still not the end of the matter. Re J has been distinguished in two later cases. These have undoubtedly taken the concept of 'rights of custody' beyond the legal right either to care for the child or to determine his place of residence. Significantly, however, they both involved people who had actually been responsible for looking after the child for some time.

The first is Re B (A Minor) (Abduction) [1994] 2 FLR 249, a majority decision of the Court of Appeal. This too concerned the position of an unmarried father under the law of Western Australia. The mother had left the child in Australia in the shared care of the father and maternal grandmother. When the grandmother wished to bring the child on holiday to this country a minute of order was agreed giving the father joint guardianship and sole custody and the grandmother leave to bring the child to this country for a defined period. Elaborate safeguards to secure the child's return to Australia were included. However a copy of the minute with the mother's signature was not received in Australia until after the grandmother and child had left for this country and the minute was not approved by the court until some time later, just after the mother had initiated wardship proceedings here.

Waite LJ stated at 260 that:

'The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with [the objective of the Convention]. In most cases, that will involve giving the term the widest sense possible.'

After discussing the concept of custody he went on, at 261, to discuss the concept of rights:

'Is it to be confined to what lawyers would instantly recognize as established rights that is those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?'

He concluded that it depended on the circumstances of each case and must be a question for the courts of the requested (rather than the requesting) state. He envisaged a scale at the top end of which was 'a relative or friend who has assumed the role of a substitute parent in place of a legal custodian'. He appears, at 262, to have distinguished the facts from Re J on the basis that the father's consent had been obtained by a deceit which was cruel both to the father and to the child, who would suffer if his expectation of returning to the only country he had ever known and 'the only parent who had given him continuous and consistent care' was destroyed. He continued at 262B:

'Nor is there any principle to be deduced from the decision in that case which would require the father in the present case to be treated, notwithstanding his very different circumstances, as a party who had been merely been exercising what Lord Brandon described as "de facto custody".'

Peter Gibson LJ gave a dissenting judgment, which is all the stronger for his obvious regret in reaching the conclusion that he did. He did so on the basis of the decision in the House of Lords in Re J that 'the rights in question must be more than de facto rights'. As the father had no legal rights until the agreement had been approved by the court he had no rights of custody under the convention. I must confess to having the same difficulty as he did in reconciling the majority decision with that in Re J even though I recognise that the merits in Re B were all on the father's side.

Re B was applied by Cazalet J in Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702. This was an application by the maternal grandparents for the return to Germany of a German child who had lived there all her life. Since August 1995 she had been living with her maternal grandparents, at first with her mother, but the mother had left them in October 1995. In October 1996 the grandparents issued proceedings for custody in the German court but these had not been served on the mother. In December 1996 the mother brought the child to this country. Days later the German court made an order provisionally withdrawing parental custody from the mother and giving it to the grandmother.

Cazalet J distinguished Re J on the basis that for over a year:

'the grandparents, and particularly the grandmother, were caring for the child, with the mother, apart from short periods of contact, playing no part in such care and being off the scene. However, in Re J it was the mother who, when living with the father, had primary care of the child and she continued to have that care when she came to the United Kingdom.'

He considered that Waite LJ in Re B :

'was clearly basing his finding that rights of custody existed on a consideration of the extent of the actual privileges enjoyed and duties carried out by the particular parent. He held that it was a question of fact in each case.'

Applying this to the facts of Re O, the grandparents had joint custodial rights.

Mr Karsten acknowledges that the facts of the cases before me are very different from those in Re B and Re O. Those cases were a good example of the courts doing their utmost to protect children from being taken away from their primary carers, the classic case of abduction in the public mind. In the two cases before me, the mothers were and had always been the children's primary carers. They had not abandoned the care of their children to the fathers or to anyone else. These fathers were not even living in the same households as the children at the time when they were removed.

However, in the W case, there is one important similarity with Re B and Re O. The father was on the point of acquiring parental responsibility. His application had been thoroughly investigated and was due to be adjudicated upon in a few days' time. The welfare officer had recommended that it be granted. The court did indeed grant it at the hearing on 15 September. To that extent the situation meets the concept of 'rights . . . which . . . a court would nevertheless be likely to uphold in the interests of the child concerned'. However, unlike the Re B and Re O cases, the father was not 'carrying out duties and enjoying privileges of a custodial or parental character' other than his contact with the child. Given the difficulty of

reconciling Re B and Re O with Re J in any event, I ask myself whether the policy of the convention indicates that the concept of inchoate rights should be extended to include this situation.

The policy of the convention

In Re B (A Minor) (Abduction) [1994] 2 FLR 249, 260 Waite LJ described the purposes of the convention like this:

'The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base.'

In Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594, 598, on the other hand, Swinton Thomas LJ said:

'It is important, in my view, in a case such as this, to have in the forefront of one's mind that the object of the convention is to ensure the speedy return, without lengthy proceedings or inquiries, of children who have been wrongfully removed from the person having the care of them.'

In Re S (Custody: Habitual Residence) [1998] 1 FLR 122, at 130-131, Lord Slynn of Hadley cites several extracts from the Explanatory Report on the Convention by Professor Perez-Vera, Reporter to the First Commission of the Hague Convention, in particular:

'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" (para 16.'

This is not, however, the same as saying that every child who is removed from his country of habitual residence without the consent of both of his parents or the leave of the competent local authorities is to be summarily returned. The obligations of the contracting states are quite clearly linked to the juridical as well as the factual situation. The preamble states:

'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 to this effect . . .'

Thus a deliberate distinction is drawn between rights of custody and rights of access (see also S v H (Abduction: Access Rights) [1997] 1 FLR 971. Rights of custody are protected under Art 12 by the remedy of speedy return to the country where the children were habitually resident before they were removed. Rights of access are protected under Art 21 by remedies to organize and secure their effective exercise in the country where the children are now living. Unfortunately this is not always very effective. For example, the automatic legal aid which is available to applicants for the return of children wrongfully removed is not available to applicants for assistance in enforcing their rights of access.

Nevertheless, as has already been seen, 'rights of custody' can sometimes encompass rights which are principally designed to protect the applicant's access to the child rather than his custody or care of the child in the usual sense. Research into the use of the Hague Convention in 1996 (see N Lowe and A Perry International Child Abduction - The English Experience) shows that the majority of abducting parents are in fact the primary carers of the children abducted. The other parent may still secure the return of the child, either because there has not yet been any determination by a court of where the children are to live or because he has the right to veto the child's removal to another country. As Professor Perez-Vera says, at para 19:

'. . . 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.'

However, where no rights exist ex lege or where they have already been determined, the distinction between rights of custody and rights of access was undoubtedly intended to have meaning. Professor Perez-Vera, at para 65, explains it thus:

'Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removal which it is sought to prevent.

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrates that decisions concerning the custody of children must always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.' (My emphasis.)

Mr Nicholls has drawn my attention to the Vienna Convention on the Law of Treaties which came into force on 27 January 1980. Article 31(1) requires that-

'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

Article 31(3)(b) also requires that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' be taken into account.

There appears to be a consensus among most contracting states which would stretch 'rights of custody' to include a right to veto leaving the country but there is no evidence before me of a consensus taking it further than that. To do so would (as was pointed out in the two Canadian cases referred to earlier) entail serious inroads into those rights of custody which it was the principal object of the convention to protect. It could lead to considerable confusion and uncertainty, for example if a person claiming such wider rights was tempted to snatch a child back, even though the person who had taken the child away was perfectly entitled to do so.

There is therefore nothing in the concepts, structure and policy of the convention to suggest that the position of either of these fathers in English law should be regarded as giving them 'rights of custody' for the purpose of the convention.

Rights in the court

There is, however, another argument which is particularly applicable to the W case. This is that removing these children was in breach of rights of custody attributable to the family proceedings court by virtue of the pending proceedings before it. This concept obviously applies when children are made wards of court, for the court becomes their guardian and has control over every aspect of their lives (see Re J (Abduction: Ward of Court) [1989] Fam 85, sub nom Re J. (A Minor) (Abduction) [1990[1 FLR 276. The mother cannot then change the habitual residence of a ward without leave of the court (see Re B-M (Wardship: Jurisdiction) [1993] 1 FLR 979).

However, in Re B v B (Child Abduction: Custody Rights([1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238, in the Court of Appeal, it was applied to a court in Ontario where there were pending proceedings relating to the custody of the child. The judge had given directions for the substantive hearing and had made interim orders giving custody to the mother with access to the father. The mother left the next day. Sir Stephen Brown P held, at 38C and 243A respectively:

'It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence.'

(It so happens that the Supreme Court of Canada took the same view in very similar circumstances in the incoming case of Thomson v Thomson, referred to earlier.) In B v B, of course, there were full blown custody proceedings on foot in which the court had already made orders. In the case before me, this argument is a little difficult to reconcile with a recent decision of the Court of Appeal in Re B (Abduction) (Rights of Custody) [1998] 2 FLR 594.

This concerned an unmarried father without parental responsibility who was separated from the mother but having regular contact with the child when she was taken to Italy by her mother. Shortly before she left the father had issued an application for a parental responsibility order. It is not clear whether or not that application had been served but certainly no other steps had been taken in the proceedings. The father applied ex parte for a declaration that the removal was wrongful (and also, it appears, for the summary return of the child). Wall J refused his application and the Court of Appeal refused leave to appeal. The main basis appears to be that it was not a suitable case for an ex parte order or declaration: the facts of the case on the merits should be investigated first. In the course of his judgment Swinton Thomas LJ had little difficulty in rejecting the argument that the father's contact with his child gave him 'rights of custody'. As far as the rights of the court were concerned, at 600F, he quoted these words from the judgment of Leggatt LJ in B v B at 42 and 274F respectively:

'Having made what is no more than an interim custody order, the Ontario court, in my judgment, retained what Article 5(a) of the Hague Convention calls "the right to determine the child's place of residence".'

Swinton Thomas LJ went on thus, at 600G:

'That sentence seems to me to encapsulate the ratio decidendi in Re NB, namely that as an interim custody order had been made, so rights of custody remain in the court. That case must be the high watermark of any submission of this nature and the basis of the decision was that the court had made an interim custody order.'

Mr Karsten argues that Leggatt LJ was relying, not on the fact that an order had been made, but that it was only an interim order, so that the court retained the right to decide on the child's place of residence. Thus, in the W case the court retained the right to decide upon the children's future: indeed s 10(1)(b) of the 1989 Act would have allowed it to go beyond the applications for contact and parental responsibility and deal with residence as well. The W case is also very different from Re B because the court had been actively seized of the application for a long time, there had been previous hearings in which substantive orders were made, and the case was on the point of coming to a conclusion. The order of 12 February 1997 directed both parties to attend the hearing fixed for 15 September 1997.

I am greatly attracted to the proposition that, where the court is actively seised of proceedings to determine rights of custody, removal of the child from the jurisdiction without leave of the court while those proceedings remain pending is a breach of the rights of custody attributable to the court. It is even questionable whether the consent of the other party would prevent this. After all, an application under the 1989 Act may be withdrawn only with leave of the court (see r 4.5(1) of the 1991 rules, r 5(1) of the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395). In practice, however, a consensual removal is unlikely to lead to proceedings under the convention.

Of course hard cases make bad law. But the behaviour of the mother in the W case was calculated to frustrate the process of the court. Having resisted the father's contact with the children for some time, she privately agreed to a much more liberal regime than she had been prepared to concede at court. There is evidence from the father, which she has not challenged in these proceedings, that she had tried to persuade him to withdraw his application for a parental responsibility order. The idea of moving to Australia was under active investigation for much of the time between February and September but no hint of this was given to the father, the court welfare officer or the court. Had there been, the father would undoubtedly have applied for and almost certainly obtained a prohibited steps order to prevent them leaving. By the time they did leave, the father's case for a parental responsibility order was a strong one.

On the other hand, the court could have prohibited removal had it been asked or thought fit to do so and it did not. Parliament might, perhaps in the 1984 Act or in the 1989 Act or in the Family Law Act 1986, have introduced an automatic ban on removal from the jurisdiction equivalent to that which arises immediately when children become wards of court. There may have been good reasons why it did not do so: for example, it would be controversial if any such ban were to prevent the parties returning the child to the country where he was habitually resident.

In this case, however, there is no doubt that the W children were habitually resident in England and Wales before their removal to Australia. As already seen, the purpose of the convention is to secure that children are returned so that the merits of decisions concerning their custody can be determined in the courts of the country where they are habitually resident. There is something particularly repugnant about a litigant seeking to frustrate the processes of the law in this way. This emboldens me to conclude that the removal of

the W children was wrongful within the meaning of the convention because it was in breach of rights of custody attributable to the court.

The B case is quite different. The father had never applied for parental responsibility. The first, ex parte, order on 8 January 1997 contained an absolute prohibition on the mother from removing the child from the jurisdiction. The second, inter partes, order on 15 January 1997 prohibited either parent from removing the child without the written consent of both parents. The third, and final order, discharged both of these. The proceedings between the parents had been concluded and a final determination of the mother's custody rights had been made. The mother remained solely responsible for the care and upbringing of her child and there was nothing in English law preventing her taking the child abroad or even changing her habitual residence should she choose to do so.

Rights under an agreement

Mr Karsten argues that there was nevertheless an agreement between the parties in the B case that the mother would not take the child out of the jurisdiction except for short periods. The father's evidence is that the mother promised that she would not take N to Ireland and that is why he agreed to the prohibited steps order being discharged. The mother's evidence is that she told the court that she wanted to go back to Ireland for holidays. At that time she had no plans to return to live there. It was after this that she was given her own local authority accommodation. It was only in October that her plans changed because of her father's stroke and the father's behaviour towards her.

Mr Karsten points out that under Art 3 rights of custody can arise 'by reason of an agreement having legal effect under the law of [the State of the child's habitual residence]'. The French text refers to 'un accord en vigueur'. Professor Perez-Vera's report explains, at para 70, that having 'legal effect' (etre en vigueur) was substituted for the earlier phrase having 'the force of law' (avoir force de loi):

'As regards the definition of agreement which has "legal effect" in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities.'

I find it quite impossible to spell out of the known facts and affidavit evidence any such 'agreement' as is contended for by Mr Karsten. No undertakings were given to the court and no agreements were recited in the order. There is no correspondence or other evidence to support it other than the affidavits in these proceedings. In those affidavits, the father gives one explanation for the discharge of the prohibited steps orders and the mother gives another. This made it very difficult for Mr Karsten to spell out the precise terms of the agreement. I cannot therefore find as a fact that any such agreement existed.

Even if I had done so, I would have had difficulty in bringing it even within the wide definition given by Professor Perez-Vera. The common law does not permit parents to surrender their parental responsibilities (and see also s 2(9) of the 1989 Act), nor does it recognise or enforce private agreements about the upbringing of children. It regards such agreements as contrary to public policy (see Barnardo v McHugh [1891] AC 388, [1891-4] All ER Rep 825, see also A v C [1985] FLR 445). It cannot be suggested, therefore, that any such agreement could be enforced. But neither does it provide a basis for presenting a legal claim to the competent authorities. The father could at any time have applied for parental responsibility or prohibited steps orders: his basis for doing so would have been his relationship to the child rather than any alleged agreement with the mother. Of course, had they earlier made a parental responsibility agreement under s 4 of the 1989 Act, that would have been an excellent example of rights of custody arising from an agreement having legal effect in our law.

Hence I cannot find any justification in the B case for attributing rights of custody either to the father or to the court. It follows that the removal of N was not wrongful within the meaning of Art 3 of the convention. That does not mean that the father is without remedy. It is no part of the current case to decide whether or not N has become habitually resident in Ireland. Her mother's plans may still be fluid. She has taken part in these proceedings at very short notice and there may be scope for further agreement. In any event, the father's rights of access will be enforceable either in the courts of this country or under the Hague or European Conventions in Ireland.

Provisional conclusions

On the basis of English domestic and convention law, and of the policy and structure of the convention itself, I provisionally conclude: (1) that the removal of the children in the W case was wrongful within the meaning of Art 3 of the convention; but (2) that the removal of the child in the B case was not.

These conclusions have the practical advantage of making it comparatively easy to advise unmarried parents where they stand. Prima facie, removing a child who is habitually resident here will be wrongful under the convention if: (a) the father has parental responsibility either by agreement or court order; or (b) there is a court order in force prohibiting it; or (c) there are relevant proceedings pending in a court in England and Wales.

Relevant proceedings would obviously include proceedings for residence, parental responsibility or to prohibit removal of the child, as these are 'rights of custody' under the convention. It may be that they should extend to any proceedings for an order relating to the child, but that does not arise in the present case. Similarly, proceedings will obviously be pending for this purpose if interim orders have been made and directions given for a final hearing. In the light of Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594, however, it is doubtful whether the mere issue of the proceedings is sufficient. They should probably have been served and it is possible that some action by the court is needed to invest it with rights of custody. This could be making interim orders or it could be giving directions for the future conduct of the case. Even if these questions have yet to be answered, there is less scope for uncertainty than there would be if the position depended upon the actual relationship between father and child. This may well be the subject of just the kind of factual dispute between the parties which it would be wrong to resolve in proceedings under the convention. Following Re B (A Minor) (Abduction) [1994] 2 FLR 249, there is, however, one factual situation which should be included:

(d) where the father is currently the primary carer for the child, at least if the mother has delegated such care to him.

However, counsel have urged me to go further than is warranted by the current state of English and convention law, taking account of broader considerations of legal and social policy, including in particular the United Kingdom's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms. I therefore ask myself whether such considerations should lead to a revision of these conclusions.

The general policy of the law

Mr Karsten argues that the court should take the widest possible approach to the concept of 'rights of custody' because there are good policy reasons to give the children of unmarried parents the same protection as those of married parents. We are not here concerned with reluctant parents, whom the law has not yet found an effective means of obliging to take an interest in their children's lives. We are here concerned with children whose fathers want to take an interest in them. If their parents had been married to one another their mothers would have had to seek leave to take them abroad to live no matter how worthless and irresponsible their fathers might have been. Why should these children not be in the same position?

The policy of the law in this and many other countries is to remove all forms of discrimination between the children of married and unmarried parents. Since the Family Law Reform Act 1987 English law has given the children of unmarried parents the same relationship with both their parents and with members of both sides of their family as any other child. The arguments for this are obvious. It is not their fault that their parents failed to marry. They did not ask to be born. They have a right to be regarded as full members of their parents' families on both sides. They also have a right to the same care, protection and support from their parents as any other child.

However, the law has not so far given unmarried fathers exactly the same rights as married, although it enables them to acquire these and otherwise to seek orders or be involved in proceedings about their children's lives. Court orders enabling an unmarried mother and father to share full parental responsibility for their child in the same way that married parents do were first introduced into English law by the 1987 Act. Agreements to do so were introduced by the 1989 Act.

The reasons are fully explained in the policy documents which led to the present law. Both the 1987 and 1989 Acts followed reports from the Law Commission (Law Com No 118, Report on Illegitimacy, 1982, Law Com No 157, Illegitimacy (Second Report) 1987, and Law Com No 172, Report on Guardianship and Custody, 1988). The arguments for and against the automatic sharing of parental responsibility by all

parents irrespective of marital status had been thoroughly canvassed (see Law Com No 74, Illegitimacy, 1979) and after extensive consultation the present compromise was reached. Further Parliamentary endorsement of that approach can be found in s 3(1) of the Children (Scotland) Act 1995: it may be significant that the Act departed from the recommendations of the Scottish Law Commission (Scot Law Com No 135, Report on Family Law, para 2.50) on this point.

The time may well come when Parliament will reconsider this approach. The Lord Chancellor's Department has just issued a consultation paper on the subject (1. Court Procedures for the Determination of Paternity 2. The Law on Parental Responsibility for Unmarried Fathers, Consultation Paper, March 1998). This draws attention to one of the main reasons for the present law: the very wide variety of situations in which these children may be born. Another reason is that the parents have not undertaken the same responsibilities towards one another that married parents have. (Indeed, in certain proceedings between cohabitants or former cohabitants, Parliament has recently required the courts, in s 41(2) of the 1996 Act, to have regard to the fact that they have not given each other the commitment involved in marriage.) Single parents looking after their children have perforce to take a greater degree of responsibility for their own and their children's future than they would if they had a legal right to rely to some extent on the other parent. It cannot automatically be assumed that constraints upon them in the exercise of those responsibilities are in the child's best interests although of course there are cases in which this will be so.

These are essentially policy issues. I mention them, not in order to express an opinion, but to illustrate the difficulty of addressing them adequately in a context such as this. There are real dangers in attempting to conduct debates about social policy through the medium of the courts. They are for resolution through the democratic rather than judicial process. Ultimately it is the function of Parliament to lay down the law and of the courts to interpret and apply it. For the time being, however, the position is clear: Parliament did not intend that unmarried fathers should be in exactly the same position in relation to their children as married fathers.

The European Convention on Human Rights

Nevertheless, if the law were ambiguous it would be my duty to construe it in accordance with the United Kingdom's treaty obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). Mr Nicholls has submitted that these removals were wrongful because they breached either the fathers' or the children's right to family life protected by Art 8 of the convention. In the light of the relevant jurisprudence of the European Court of Human Rights, the argument must be that English law, in permitting such removal to take place, is failing in its positive obligation to secure that respect for their family life to which they are entitled under the convention.

Article 8 of the convention provides as follows:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Article 8(1) must be applicable to the current situation. The European Court of Human Rights explained the concept of 'family life' most recently in X, Y and Z v UK [1997] 2 FLR 892, 900A:

'36. The court recalls that the notion of "family life" in Article 8 is not confined solely to families based on marriage and may encompass other de facto relationships (see the Marckx v. Belgium (1979) 2 EHRR 330, para 31, Keegan v. Ireland ((1994) 18 EHRR 342, para 44 and Kroon and Others v. The Netherlands (1994) 17 EHRR 263, para 30). When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see, for example, the above-mentioned Kroon and Others judgment, loc. cit.) . . .'

The case of Kroon v The Netherlands (1994) 17 EHRR 263 concerned an unmarried father in a long-standing stable relationship with the mother which had resulted in four children, although they had never

cohabited. Keegan v Ireland [1994] 18 EHRR 342 involved an unmarried father who had separated from the mother before their child was born. However, the parents had lived together for two years before that, the conception had been a deliberate decision and they had planned to marry. Accordingly, 'from the moment of the child's birth there existed between the applicant and the child a bond amounting to family life' (para 45). The fathers in the cases before me had a much closer bond with their children, having lived with them and their mothers for some time.

In considering whether or not there had been a breach of Art 8, the court has described its general approach thus (for example, in the Keegan case (para 49), or the X, Y and Z case (para 41)):

'49. The court recalls that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation . . .'

The positive obligations involved in this context were first set out in Marckx v Belgium (1979) 2 EHRR 330 (para 31) (and repeated, inter alia, in the Keegan case (para 50)):

'31. This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2.'

That passage has frequently been drawn upon in later judgments, sometimes with modifications: for example in the Kroon case (para 32), it was said that

'where the existence of a family tie with a child has been established the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family.' (My emphasis.)

The Marckx case concerned the failure of Belgian law to provide mechanisms for recognising the relationship between the child, her unmarried mother and her maternal family. The discrimination between the children of married and unmarried parents could only be totally eliminated by adoption.

To similar effect is Johnston v Ireland (1986) 9 EHRR 203. Because of the lack of any divorce law in Ireland, a cohabiting couple were unable to marry and their daughter was illegitimate. The European Court of Human Rights decided that the lack of a divorce law in Ireland was not a breach of Art 8. However there were considerable differences in treatment between legitimate and illegitimate children and no means of eliminating or reducing these. Hence -

'notwithstanding the wide margin of appreciation enjoyed by Ireland in this area, the absence of an appropriate legal regime reflecting the [daughter's] natural family ties amounts to a failure to respect her family life'

and indeed that of her parents (see para 70).

The Irish law described at that time was in many respects similar to our own law before the major reforms introduced in the 1987 Act. Our law now gives full recognition to the child's relationship with his family, and their obligations towards him, from the moment of birth. The child is automatically entitled to be supported by both parents and to participate in an inheritance or other disposition from each side of the family. The law no longer distinguishes automatically between natural relationships traced through or outside marriage (see s 1(1) of the 1987 Act).

The question is whether our law is required automatically to afford completely equal parental responsibility and authority to the parents or whether the opportunities of developing their relationship

given to the father by English law are a sufficient safeguard of their family life, having regard to that wide margin of appreciation which is recognised in this context (see particularly the Johnston case (at para 55)). The cases so far do not indicate that contracting states are required to do this, as long as there are sufficient opportunities of developing the relationship between father and child. They all concern laws which are undoubtedly more defective than ours now is in this respect.

The Keegan case concerned the Irish adoption process, which allowed the secret placement of the child for adoption without the father's knowledge or consent. This was found to be an interference with his right to respect for family life (see para 51). Hence the European Court of Human Rights found (at para 52) that it was 'not necessary to examine whether Article 8 imposed a positive obligation on Ireland to confer an automatic but defeasible right to guardianship on natural fathers'.

The Kroon case concerned a child born in a stable relationship while the mother was still married to another man. Under Dutch law it was impossible to obtain recognition of the real father's paternity unless the mother's husband denied it and he had disappeared long ago. The court's view was that the available solutions of step-parent adoption, which would require them to marry, or joint custody, which would leave the child a member of the husband's family, were not acceptable (para 40):

'. . . "respect" for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefitting anyone.'

Hence 'even having regard to the margin of appreciation left to the State' it had not secured to the applicant the 'respect' for their family life to which they were entitled.

Our law gives each of these fathers two ways of acquiring parental responsibility for their children. In the W case the father had set one of these in motion and the mother had actively frustrated it. I note that in Hokkanen v Finland [1996] 1 FLR 289 (which concerned a married father's attempts to recover the daughter he had left temporarily with the maternal grandparents after the mother's death) the court was not sympathetic to a legal system which had permitted the grandparents to defy the father's rights for many years. In the B case, the father had not even applied for this.

Our law also gives them the right to seek orders about any aspect of their children's upbringing, including an order prohibiting the removal of the child from the country. In the B case, the father could have asked in February for an order prohibiting the mother from leaving the country for longer than a certain period or from seeking to change the child's habitual residence. He knew how to take swift action and could have done so in October. Had he done so, the Hokkanen case demonstrates that the courts would have been justified in balancing his interests against those of the others involved, in particular the child.

In my judgment, therefore, there has been no breach of Art 8. It might, however, be argued that the differentiation between the legal position of mothers and fathers, or between married and unmarried fathers, amounts to discrimination for the purpose of Art 14. The court declined to answer that question in the Marckx case.

Article 14 requires that-

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

The concept of discrimination was explained in the Marckx case (para 33) and repeated thus in Rasmussen v Denmark (1984) 7 EHRR 371 (para 38):

'For the purpose of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".'

The Rasmussen case raised a similar issue to that under discussion here. The mother's former husband wished to challenge the paternity of one of the children. He was outside the statutory time limit prescribed by Danish law for bringing paternity proceedings. This limit did not apply to mothers. This was a difference in treatment for the purpose of Art 14. However the European Court of Human Rights held that it was not discriminatory. It pointed to the state's margin of appreciation, one of the factors in which may

be the existence or non-existence of common ground between the laws of the contracting states. On examination, it was found that the position of the mother and of the husband were regulated in different ways in most contracting states. It also took into account that the Danish law was based on recommendations made after a careful study of the problem by a specialist committee and subsequently modified in the light of developments in society.

No case has yet held that all differences between mothers and fathers, or between married and unmarried fathers, are contrary to the convention. As stated earlier there is at least some policy basis for suggesting that some differentiation between them has an objective and reasonable justification. I notice from the recent consultation paper from the Lord Chancellor's Department (para 62) that 'The Government's view is that the current law . . . complies with Articles 8 and 14 of the Convention'. If I took a different view I would not hesitate to say so, but for the reasons already explained I do not.

There may come a time when the Parliament of this country, having considered the policy matters further, decides to eliminate those differences. Or there may come a time when so many of the contracting states to the convention decide to do so that the currently wide margin of appreciation allowed in this area narrows so far as to oblige us to do so. But in my view that time has not yet come.

Conclusion

Hence, the wider considerations debated in this case do not alter the provisional conclusions reached earlier on the basis of the existing domestic law and the policy of the Hague Convention. There will be the declaration sought in the W case but not in the B case.

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