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[09/02/1995; Court of Appeal (England); Appellate Court]
Re P. (Abduction: Declaration) [1995] 1 FLR 831

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

9 February 1995

Butler-Sloss, Millett LJJ, Sir Ralph Gibson

In the Matter of P.

James Holman QC and Henry Setright for the mother

Camden Pratt QC and Charles Kemp for the father

BUTLER-SLOSS LJ: This is an appeal by a mother against a declaration made by Douglas Brown J on 12 December 1994 in response to an application by the father under s 8 of the Child Abduction and Custody Act 1985 and Art 15 of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The application for the declaration was made by the father against the background of an unusual and complicated family history. We dismissed the appeal and directed that the declaration and the judgment of Douglas Brown J be sent to the Central Authority of the USA forthwith. We now give our reasons for dismissing the appeal.

The father is English and the mother is an American citizen. They married in Las Vegas in November 1990 when he was 22 and she was 20. They came to England where the child, a girl E, was born on 28 June 1991. Shortly thereafter the mother attempted to leave with the child and was stopped at the airport. The child was made a ward of court. The mother was given leave in August 1991 by Waite J to take the child to the USA on condition that she returned to England in September 1991. She actually returned 2 weeks later and resumed living with the father. Further orders of High Court judges gave her leave to remove the child but the mother resumed cohabitation with the father and remained with him until July 1992 when she again left with the child. After further court orders and a period which the mother spent with the child in the USA, there was a contested hearing before the President of the Family Division. On 22 October 1992 he ordered that there should be a residence order in favour of the mother with leave to her to remove the child permanently out of the jurisdiction to live in Santa Barbara, California, on her undertaking to return the child to the jurisdiction when called upon to do so. The mother left with E but returned to live with the father in January 1993 and remained with him for nearly 18 months. She became pregnant and they went to Hawaii in January 1994 for the birth of the second child who was placed for adoption. They remained in Hawaii until mid-March 1994 when they went to Egypt for a holiday. They flew back to England and remained together until 6 May 1994

when the mother flew to California where she now is. When the parents left in January 1994, E was left in the care of the paternal grandmother in London. On 16 February 1994 the mother's sister flew over and by a deception including a forged letter said to be signed by the mother, the facts of which are fully set out in the judge's judgment, she removed the child from the grandmother and took her to the USA. The mother and father jointly made an application under the Convention, although the mother now asserts that she was party to the removal of E by the sister.

The application under the Convention remains alive and was processed by the Central Authority in the UK, the Lord Chancellor's Department, as the requesting State and was forwarded to the Central Authority of the requested State, the State Department of the USA in Washington. The law of the requested State with which we are concerned however is the domestic law of California, the territorial unit of the Contracting State: see Art 31 of the Convention. While the joint application was received by the State Department, the office of the Attorney-General in California was consulting the State Department about the position of the mother and child in California where the mother has made a guardianship application relying upon the President's order made in 1992 to demonstrate that there is no merit in the father's claims in respect of the child. It appears that in California at least, the production of the President's order has led to a disinclination on their part to accept the Convention application. No steps so far have been taken either by the State Department or the Attorney-General's office in California to put the Convention application before a Californian court and no court is yet seized of the issue. In order to start the machinery of the Convention moving, the representative of the Official Solicitor's office acting on behalf of the Lord Chancellor's Department suggested that a request should be made to England for the High Court to make a declaration under s 8 of the Child Abduction and Custody Act 1985 and Art 15 of the Hague Convention. In response to that request an application was made by the father which was heard by Douglas Brown J. He made the declaration in the following terms:

'It is declared that pursuant to s 8 of the Child Abduction and Custody Act 1985 that the removal of the minor E . . . from the jurisdiction of England and Wales was wrongful within the meaning of Art 3 of the Convention on the Civil Aspects of International Child Abduction.'

In a careful and comprehensive judgment the judge set out the facts based on the affidavit evidence provided to him. He directed himself as to the correct approach to conflicting affidavit evidence and formed firm conclusions adverse to the mother's case from the inferences which he drew from that evidence. The application for a declaration under s 8 (to which I shall refer in a moment) required him to consider the effect of the subsequent history of this family upon the President's order made in 1992 under the Children Act 1989 and whether the order or any part of it was still effective. A decision as to the continuing validity of the direction to allow the mother to remove E permanently from the jurisdiction to California is crucial to a decision as to the rights of custody, if any, to which the father is now entitled under English law and to determine whether he is entitled to the declaration he seeks.

The judge found on the evidence available to him that the mother had voluntarily resumed cohabitation with the father after the 1992 order. The effect of s 11(5) of the Children Act is to bring a residence order to an end where the parties have subsequently resumed cohabitation. Section 11(5) states:

'Where-

(a) a residence order has been made with respect to a child; and

(b) as a result of the order the child lives, or is to live, with one of two parents who each have parental responsibility for him, the residence order shall cease to have effect if the parents live together for a continuous period of more than six months.'

Both these parents had parental responsibility and the judge found that they had cohabited for over 15 months. Once the residence order ceased to have effect the judge found that the leave to take the child out of the jurisdiction also lapsed and ceased to have effect. The 1992 order was no longer valid. The relevant date for the removal of the child is 16 February 1994. On the evidence before the judge the child had been, according to English law, ordinarily resident in England with both parents from January 1993, if not indeed from birth, until her removal in February 1994. The departure of her parents without her to Hawaii had no effect upon that residence.

Section 8 of the 1985 Act provides the jurisdiction for the English court to make a declaration in a Convention case:

'The High Court or Court of Session may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the United Kingdom, was wrongful within the meaning of Article 3 of the Convention.'

Article 15 of the Hague Convention 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 as far as practicable assist applicants to obtain such a decision or determination.'

In order to comply with the request from the Central Authority for a declaration and to come within the definition in Art 3, the judge made findings as to the habitual residence of the child prior to her removal, the father's rights of custody and the breach of those rights by the mother and declared that the removal was wrongful.

On appeal, Mr Holman QC for the mother raises a question of jurisdiction which was not raised before the judge and is the only point on appeal. He argued that the judge had no jurisdiction, alternatively ought not, to make a decision as to habitual residence of the child within the meaning of the Convention since that issue was exclusively one for the court in California where the child now is. He did not take issue on the other findings of the judge. His primary argument is that the declaration does not fall within the ambit of Art 15. If there is jurisdiction to grant a declaration, inherent in which is a finding of habitual residence, one of the major issues in the proposed Californian proceedings, the English court as a matter of policy ought to decline to deal with the matter which the Convention requires to be decided by the requested State, the USA. He expressed concern that a decision by this court would either embarrass the Californian court seized of the case or the English decision might be over-influential or even conclusive in the eyes of the administrative authorities or the Central Authority without ever being placed before an American court.

He developed a persuasive argument that the request did not comply with Art 15 and ought not to have been entertained. No decision had been made by the judicial or administrative authorities as to the habitual residence of the child which was a precondition of a request under Art 15. This was a request by the Central Authority which was premature and not within the ambit of Art 15.

It is not necessary for the decision in this case to explore whether an application in the present circumstances can or cannot be made under the umbrella of Art 15. I am satisfied that the jurisdiction to comply with the request is to be found in the words of s 8 which clearly contemplates applications for the purpose of Art 15 to be made by any person appearing to the court to have an interest in the matter and not limited to the applicant or to the circumstances within a narrow definition of Art 15.

Swinton Thomas J in Re J (Abduction: Ward of Court) [1989] Fam 85, sub nom Re J (A Minor) (Abduction) [1990] 1 FLR 276 made a declaration that the removal of a ward of court from the jurisdiction was wrongful within the meaning of Art 3 of the Convention. The child had been removed to the USA by the mother without leave of the court. The application was made by the applicant father at the suggestion of the Lord Chancellor's Department as the Central Authority of the UK. The judge found that s 8 was permissive and not restrictive and did not preclude the court from making a declaration at an earlier stage. I agree with the decision arrived at by Swinton Thomas J but disagree with his view that it was based upon the inherent jurisdiction. In my judgment in Re J as in the present case s 8 was the basis for the jurisdiction and the declaration could properly be granted without recourse to the inherent jurisdiction of the High Court.

Should such a declaration be made? Section 8 presupposes that this court will tread the path which will also be trodden by the Californian court and we would not presume to do so unless asked. The purpose of Art 15 goes to the obligation of the State to comply with the request. In a situation falling directly within Art 15 the requested State may have made a firm or provisional finding or made an assumption that the habitual residence is English. In the present appeal the request is at an earlier stage, where the Central Authority of the USA faced with the 1992 English order and a complicated matrimonial history seeks our assistance before placing the application before the judicial authorities. In the interests of comity it is proper for us to assist when called upon to do so. In the general run of cases on such a request made before there is a decision or assumption by the requested State as to where is the habitual residence of the child, it would be preferable for the English court, if the facts permit, to make a declaration upon the assumption that the habitual residence is in England, rather than making a specific finding on an issue still in dispute in the other State. The issue properly to be the concern of the English court under the Convention is whether an applicant parent had rights of custody according to English law at the time of the removal. In order to make a declaration however under s 8 that the removal or retention was wrongful, the English court would also have to make a provisional decision about breach, although that too is a matter within the jurisdiction of the other State. The request for a declaration makes it inevitable that the English court will have to consider, however provisionally, issues which are to be decided in another place, unless the English court always declines to make a declaration which Parliament has given jurisdiction to the court to make. In my view as a question of policy the English court should not debar itself from its power to grant a declaration at the request of another signatory to the Convention. In my view the approach of the Lord Chancellor's Department, or more particularly the Official Solicitor on their behalf, to the problems of English law faced by the Central Authority of the USA in this case was helpful and the advice to seek a declaration sensible. The judge on the application was justified in granting the declaration.

The only question which remains is whether he should have made findings as to habitual residence. On the particular facts of this case with the existence of the 1992 order the judge, on being asked to make a declaration, had no alternative but to grasp the nettle and make his findings on habitual residence. If he did not on the facts of this case, he could not make a declaration nor assist the requested State. A finding of cohabitation and habitual residence of the mother was crucial to the decision as to the present status of the 1992 order and he was not in a position to assume habitual residence as one might on other facts.

I do not however consider that his judgment and its clear conclusions based upon the written evidence available to him will be misunderstood in the USA. That jurisdiction has received a Convention application from the father and will deal with it as appropriate. The judicial or administrative authorities faced with the judgments from the English courts and the declaration will accept as little or as much of them as they choose. We are not trespassing upon their jurisdiction in these judgments. They know, as we know, that the decision whether the removal or retention of this little girl was wrongful within the definition of Arts 3 and 5 and whether Art 12 is to apply is theirs and theirs alone. Douglas Brown J made this point clearly at p 26 of his judgment and I make it again. I have no concern that our judgments will be misunderstood or misapplied in the USA.

MILLETT LJ: The child in this case was born in England in June 1991. The history of her life so far has been related by Butler-Sloss LJ and I need not repeat it. In February 1994 she was removed from this country in unusual circumstances and taken to live with her mother and her maternal grandparents in California. The father applied to the Lord Chancellor's Department for assistance in procuring the return of the child to this country under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction.

The case was investigated by the District Attorney's office for the district of Santa Barbara which reported that the mother claimed to have a custody order of the English court. In due course his office was provided with a copy of an order of the President of the Family Division which had been made in October 1992. That order contained a residence order in favour of the mother and gave her leave to take the child permanently out of the jurisdiction to live with her in California. Not surprisingly, the Attorney-General for California reported to the Lord Chancellor's Department that it appeared to him that the mother's action in bringing the child to California was authorised by that order. Accordingly, he did not think that he could proceed under the Hague Convention as the child had not been wrongfully removed from England or retained in California.

In the course of discussions on the telephone between a representative of the Lord Chancellor's Department and her counterpart in the State Department in Washington, the English official suggested that an application should be made to the English court to determine whether, having regard to the President's order, the removal of the child from this country had been wrongful. Criticism has been made of her for making this suggestion, but in my view the criticism is misplaced. The official in question was doing no more than her duty in helping her counterpart in the USA by suggesting a practical solution to a problem arising from the existence of an order of the English court.

As a result of this discussion, the father applied for a declaration under s 8 of the Child Abduction and Custody Act 1985 ('the 1985 Act') that the removal of the child from the jurisdiction in February 1994 was wrongful within the meaning of Art 3 of the Hague Convention. This depended on whether the President's order of October 1992 was still in force 14 months later despite all that had happened in the meantime. In considering that question, the judge asked himself the following questions:

(1) Was the child habitually resident in England on the date of her removal?

(2) Did the father have rights of custody in respect of the child on that date?

(3) Was he exercising those rights immediately prior to her removal?

(4) Was the child removed in breach of those rights?

The judge also considered whether or not to exercise his discretion to make the declaration sought. He answered all those questions in the affirmative and declared that:

'. . . the removal of the minor . . . from the jurisdiction of England and Wales was wrongful within the meaning of Art 3 of the Convention on the Civil Aspects of International Child Abduction.'

The mother now appeals that order. She does not suggest that it was wrongly made on the evidence before the judge nor, as I understand it, is she unduly concerned by the judge's finding that in the events which happened the President's order had ceased to have effect by February 1994. Her concern is that the concept of wrongful removal under the Convention means removal in breach of rights of custody attributed to a person under the law of the State where the child was habitually resident immediately before the removal; that the judge's declaration necessarily involves a finding that the child was habitually resident in England immediately before her removal; and that although, as she recognises, this will not operate as res judicata, nevertheless it may embarrass her in the Californian courts where she wishes to argue, on fuller evidence than was available in England, that the child was already habitually resident in California at the time of her removal from England in February 1994.

In Re F (unreported) this court held that the construction of expressions in the Convention such as 'rights of custody' and 'breach' is a matter for the courts whose jurisdiction under the Convention has been invoked, that is to say, the courts of the requested State. The only question which falls to be answered by reference to the domestic law of the requesting State is what rights, if any, in relation to his child, and in particular what rights to determine the child's place of residence, were possessed by the deprived parent under the domestic law of that State at the time of the child's removal.

Similar considerations apply to the child's place of residence. The question whether the child was habitually resident in the requesting State within the meaning of Art 3 of the Convention immediately before removal is exclusively a matter for the requested State. If disputed it will have to be resolved by that court on the evidence available to it, and by applying its own understanding of the meaning of 'habitual residence' in the Convention. In determining the question he was asked to decide, the judge in the present case had to decide whether the President's order was still in force. That was a pure question of English domestic law which did not depend on the meaning of any expression in the Convention. If and insofar as it may have required the judge to form a view whether the child was habitually resident in England immediately before her removal, that too was a pure question of English domestic law which did not depend on the Convention.

A declaration that the removal of a child from England was wrongful within the meaning of Art 3 of the Convention presupposes that the child was habitually resident in England within the meaning of the Convention at the time of the removal, but it does not necessarily involve a final determination of that fact. It may be based on a concession, assumption or provisional finding to that effect. Even if it is based on a finding, as it was in the present case,

that finding will depend upon the meaning ascribed to the expression 'habitual residence' in the Convention as a matter of English law.

I do not wish to suggest that the meaning of habitual residence in English domestic law differs in the least from the meaning which an English court would ascribe to that expression in the Convention, or that the courts of England and California would interpret the Convention differently. I am, however, concerned to make the point that when it comes to determining where the child was habitually resident in February 1994 the questions which the courts of England and California will have had to decide are technically different questions. The English court had to decide whether the child was habitually resident in England according to English domestic law (if that was relevant to the continued subsistence of the President's order) or according to the meaning which English law ascribes to that expression in the Convention (if this was otherwise material to the application of Art 3). The Californian court will have to decide whether she was habitually resident in England according to the meaning which Californian law ascribes to that expression in the Convention. I can see no reason why the finding of the judge below should embarrass the Californian court or impede the mother in putting forward her case in that court.

Before us, four questions were raised. I can deal with them quite briefly. I shall take them in turn.

(1) Has the English court jurisdiction to make a declaration of wrongful removal under s 8 of the 1985 Act in the absence of a request from the appropriate judicial or administrative authority of the requested State?

Butler-Sloss LJ has set out the provisions of s 8 of the Act and Art 15 are of the Convention and I need not repeat them. The mother submits that the court cannot grant a declaration under s 8 unless the conditions of Art are satisfied, and in particular unless the application is made at the request of the judicial or administrative authority of the requested State. In my judgment that is not correct. Where the request does not emanate from the appropriate authority of the requested State, the Central Authority of the requesting State is under no obligation to assist the applicant to obtain the declaration. But it is not a precondition of the exercise of the jurisdiction conferred by s 8 of the 1985 Act that the procedure laid down by Art 15 of the Convention has been followed. Section 8 speaks of an application 'for the purposes of Article 15' not of an application 'made in accordance with the provisions of Article 15', and in my view the choice of words is deliberate. The jurisdiction of the English court cannot sensibly be made to depend on an investigation into the status under a foreign system of the authority which initiated the request, and Parliament cannot sensibly have intended that in case of doubt the English court should delay entertaining the application until a letter or further letter of request has been obtained.

In my judgment 'the purposes of Article 15' does not mean 'for the purpose of enabling the Central Authority to satisfy a request made in accordance with Art 15'. It means 'for the purpose of satisfying, either immediately or in due course, the appropriate judicial or administrative authorities of the requested State that the removal was wrongful by the law of the requesting State'. In the present case the application was initiated by the State Department in Washington and there is no evidence that it was made at the request of the judicial or administrative authorities in California; but it was made in order to satisfy them (and the Californian court in due course) that the President's order did not authorise the mother to remove the child from the jurisdiction in February 1994. It does not matter whether its immediate purpose was to persuade the Attorney-General of California to proceed, or whether its purpose was to provide evidence on which the Californian court could act; either would in my view fall within the words of s 8.

In Re J (Abduction: Ward of Court) [1989] Fam 85, sub nom Re J (A Minor) (Abduction) [1990] 1 FLR 276 Swinton Thomas J held that s 8 was an enabling section which did not exclude the inherent jurisdiction of the court. He felt unable to grant the declaration under the section because, in his view, it was not sought 'for the purposes of Article 15'. I do not find it necessary to consider whether that was a correct finding on the facts of that case or whether he did not take too narrow a view of the statutory jurisdiction. The existence of the statutory jurisdiction depends in my view on the purpose for which the declaration is sought and not on the source of the initiating request. If it is sought for a proper purpose it can be granted under s 8; if it is not sought for a proper purpose it should not be granted at all.

(2) Has the English court jurisdiction to grant a declaration under s 8 when it has not yet been agreed or determined by the courts of the requested State that the child was habitually resident in England at the time of the removal?

The jurisdiction conferred by s 8, with its reference to 'the purposes of Article 15', presupposes that the child was habitually resident in England at the time of the removal. But it does not follow that the court must make a finding to that effect. The court may be content to assume it. In a proper case the court can assume the facts on which its own jurisdiction depends.

I would be most unwilling to hold that Art 15 can be invoked by the requested State only once the child's place of habitual residence has been determined. The inconvenience of such a ruling is readily demonstrated by the facts of the present case. The ascertainment of the child's habitual place of residence in February 1994 may involve long and complex investigation. From the point of view of the Californian court, however, the President's order would appear to make such an investigation unnecessary. Either the child was already habitually resident in California, or she was habitually resident in England and was removed to California in the exercise of rights conferred by the order. In either case there was no room for the operation of the Convention. It would be most inconvenient if the Californian court could not ask the English court to determine the effect of the President's order, making any necessary assumptions about the child's place of habitual residence. I would read the words 'the State of the habitual residence of the child' in Art 15 as meaning 'the State of which the child is assumed or alleged to be habitually resident' and not as 'the State of which the child has been found to be habitually resident'.

(3) Should the English court make findings of habitual residence where this is disputed and is likely to be relitigated in the requested State?

I do not think it is possible to lay down any general rule. It will often be sufficient to assume that the child was resident here rather than decide it, and if so this will probably be the better course. Where the declaration is based on an assumption, this will be apparent from the judgment, but in order to prevent misunderstanding it may be advisable to include an appropriate recital in the order. This course was not open to the judge in the present case, since the fate of the President's order and the habitual residence of the child were bound up with each other.

(4) Can this court interfere by including a recital to such effect in the order made below?

In my judgment this court cannot interfere. The inclusion of such a recital would not be correct, since the judge did not base his decision on any assumption. The mother's real complaint is that the judge did make findings of habitual residence. We cannot interfere on that ground because: (1) the appeal is against the order not the judgment; and (2) the mother raised no objection to the judge adopting the course he did. It was open to the

mother to say, 'I do not concede that the child was habitually resident in England at the relevant time but did not contest it in this court'; but she never did.

I agree that the appeal should be dismissed.

SIR RALPH GIBSON: I agree with both judgments.
