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[12/04/1995; High Court of New Zealand at Wellington; Appellate Court]
H. v. H. [1995] 12 FRNZ 498

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY AP No 359/94

Between:

K.H of New Zealand, Mother,

Appellant

and

S.H. of the United States

Respondent

Hearing: 12 April 1995

Counsel: Vivienne Ullrich for Appellant

JD Howman and Vicky Hammond for Respondent

Judgment: 12 April 1995

ORAL JUDGMENT OF GREIG J

This is an appeal from the decision of Judge I A Borrin delivered on 20 December 1994 in Hague Convention proceedings. He made an order for the return of the children, acting under the provisions of the Guardianship Amendment Act 1991. The short facts of this matter are not seriously in dispute and I think were, with respect, correctly and briefly summarised by the judge in his decision. They involve two children, a girl who is eight years old and a little boy who will be two in another few days.

The appellant is a New Zealander. The respondent, who was the applicant in the matter, is an Englishman. They met in 1984 and were married in New Zealand in 1986. They lived in Saudi Arabia for some time where the respondent worked. The daughter was born there in 1987. They came to New Zealand in 1989 and stayed until January 1992. They then left and went to California, to Los Angeles. They stayed there. The respondent obtained work. They took up accommodation in a flat. The little boy was born in 1993. The relationship between the parties deteriorated more and more. They did not separate, however, although there was, it seems, a virtual estranged marriage. On 30 March 1994 the appellant, together with the children, left the United States and flew to New Zealand. She and the children have remained here since.

The proceedings were commenced in October 1994. The matter came to a hearing before the District Court Judge on 19 December 1994. He had before him evidence on affidavit from the parties. There was a hearing of oral evidence and both the appellant and the respondent gave evidence and were cross-examined. He came to his conclusion on that evidence and on the material before him after hearing submissions that the prerequisites of the statute were fulfilled and that the defences or challenges raised by the appellant did not succeed. As he was obliged, therefore, he made an order for the return of the children to the United States and to California.

This appeal has been brought in due time, indeed immediately after the decision was pronounced. There have been some further affidavits filed in this matter both by the appellant and by the respondent. In particular the appellant has filed an affidavit today which was sworn on 11 April 1995. That and her earlier affidavit both bring forward some further material which it is said is relevant to the issues before the Court. The last affidavit has only just been filed. It was circulated by facsimile yesterday I think. There has not been any time to respond to it on the part of the respondent. He has not asked for an adjournment, however, because he wishes the matter to be dealt with expeditiously, indeed as is the requirement under the statute.

This appeal is brought pursuant to s 31 of the Guardianship Act and is thus a rehearing. The Court is entitled to rehear all the evidence, to consider new evidence and to come to its own decision. In this case there has been no further oral evidence. The parties have relied upon the transcript in the District Court, the other evidential material there and the additional evidential material filed here. It is, of course, appropriate in a case like this that not only should I have due consideration to the conclusions and the reasonings of the District Court Judge but also to give weight to the advantages that he had in hearing and seeing the witnesses and coming to his conclusions on some of the issues of fact. That is all clear enough and is emphasised in a matter such as this in the decision of the Court of Appeal in B. v B. (1994) 12 FRNZ 89.

It is, I think, important to stress, as has been done already and it is recognised in the submissions that have been made to me, that this is not a case about the custody of the children or their access. It is not for the Court to come to any opinion or judgment as to that nor really to enter into the matters which may be in issue in that. The purpose of the hearing and this appeal is to decide the question under the Act and under the Hague Convention as to whether the prerequisites are made out and whether, in the circumstances, the mandatory provisions should be applied. It is a limited inquiry to see whether an abduction has taken place contrary to the provisions of the Act and then to decide, whereupon it is for the Court of residence to decide the questions of custody. It is recognised that this New Zealand statute adopts the Hague Convention and is to be construed and applied in accordance with the purposes and objects of the Convention itself. It is, I think, convenient and appropriate to quote the objects of the Convention as contained in Article 1, which I do.

" Article 1

The objects of the present Convention are-

a) to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. "

That said it is inevitable, of course, that the care and the concern of the children, particularly young children, should be given some weight, but that can only be in a 4narrow scope. That is to be entered into under the stringent terms of the code that is set out in the statute and not in the wide way to consider whether or not the parents are appropriate care givers or to consider in a general overall way the welfare of the children.

This case and the appeal has been proceeded on a narrow basis on what are, in effect, four separate grounds. It is conceded by the appellant in this Court and, indeed, in the Lower Court, that the children are present in New Zealand, that they were removed from California in breach of the custody rights of their rather, the respondent, and that he was exercising those rights up to the time of the removal. On the prerequisites, then, the remaining one which is in issue is whether the children were in habitual residence at the date when they were removed in March 1994. That is to be decided on the facts of the case. Little assistance can be obtained from other cases which depend upon their own peculiar facts and circumstances. It is clear, and there is ample authority to show that the construction of the phrase "habitual residence" has no particular legal magic. It is to be construed in the ordinary meaning of the words. The essence of "habitual" is customary, constant, continual. The opposite of that is casual, temporary or transient. I think, too, it is important that it is the words that have been used in the Convention than in the Act which are to be construed. I believe there is a clear distinction between that phrase and the phrase "ordinary residence", but more particularly from the concept of the law which has built up round the word "domicile".

An important factor of this case, and one that has been given considerable emphasis on this topic, is that the parents had no legal status to work or to remain on any permanent basis in the United States when they went there or at the time when the children were removed. Both the parents have British and New Zealand passports but not, of course, American passports. It seems that the appellant has a visa which permitted her to enter the United States at will and to remain there as a visitor. It is conceded that during the time they lived there they were no longer lawfully in the country. Once the respondent had started to work and once they just stayed there they were no longer lawfully there. That, it is suggested, adds a particular dimension and disqualified them and the children from qualifying as habitual residents.

I was referred to a number of cases in England on a similar topic although not under the Hague Convention. The case of particular importance in this is R v Barnett London Borough Council ex parte Shah [1983] 2 AC 309. The phrase to be construed was "ordinarily resident". It was a case in which Shah and some others sought to obtain rights to free education in England. They were not entitled lawfully to be in England. They were seeking therefore some advantage or indulgence and this, as you might expect, was refused. Lord Scarman in the House of Lords at p 342 expressed the view in his judgment that "ordinarily resident" required it to be lawful before the person could secure an advantage which could have been obtained if he had acted lawfully. Even there, however, it was acknowledged that income tax is payable even by illegal immigrants. I do not believe that the unlawfulness in this regard of the individual's residence could disqualify them or be a bar at all. This legislation is not to provide any advantage or indulgence to a person but is for the protection of the children who are in a particular place and the protection of the rights of the Court to exercise its jurisdiction there in respect of those who reside.

I was referred to the judgment of Lord Brandon in C v S (minor: abduction: illegitimate child) [1990] 2 All ER 961 at p 965. Reference is there made to settled intention for an appreciable period of time before habitual residence can arise. With respect that seems to re-introduce some of the concepts which provided the complications to the law on domicile

and that, I think, is not to be applied if possible. In any event that was a peculiar case in which there was accepted to be an habitual residence in Western Australia. The question was whether, at the time that an order was made, that habitual residence had ceased. The child in that case had been removed with an intention to take up permanent residence in the United Kingdom. That, then, is a very particular case which is not at all the same as this.

The question then is whether on the facts and the circumstances of this case, having regard to the period and all the other circumstances, these children were in habitual residence in California in March 1994. They had been there for some time. The respondent had undertaken work. They were in accommodation. The respondent had made an application for permanent residence. The boy was born in the United States and was thus by that accident a United States citizen entitled to legal residence permanently there. There could be no unlawfulness in his stay there but, of course, his residence depends, naturally enough, on his own parents.

In spite of employment difficulties and money problems the mother and father stayed in the United States and did not attempt to leave on any basis at all. I have no doubt, in my mind, that there was an habitual residence, a customary, constant, continual residence. Indeed, I think it was coupled with a settled intention to stay there and there was certainly an appreciable period of time during which that residence had continued. It could not be said to be casual, temporary, or transient, even though they were aware of their doubtful status as what we call overstayers. That, however, has to be weighed against the application that had been made to remain.

The next issue in this case is whether there has been acquiescence by the respondent in the removal and the return to New Zealand. The words of that part of s 13, which sets out the grounds for a refusal of an order for return of a child, is that

" (1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court-
...

(b) that the person by or on whose behalf the application is made-...

(ii) Consented to, or subsequently acquiesced in, the removal; ...."

It is not suggested that there was any consent to the removal. What is suggested is that there was a subsequent acquiescence.

The removal was done by a subterfuge, and without any direct knowledge of the respondent, on 30 March 1994. He did not know where the children had gone. He telephoned New Zealand and was enabled, after a day or two, to speak to his wife and to the children. In April he saw a lawyer in Los Angeles to ascertain his rights. He was advised to take proceedings such as these proceedings immediately. He decided to wait and to come to New Zealand. He spoke on a number of occasions on the telephone, particularly to his daughter, and he wrote letters to her. He wrote a letter dated 28 June 1994 to his wife. It accompanied something for the children. I think it was clothing. The letter then goes on:

" Let me reassure you I intend to do nothing that will upset or harm the children any further. I am that responsible. I just cannot bear being apart from them any longer. That is the simple fact of the matter.

So, I am coming to be with them. "

That letter is appended to the affidavit sworn by the appellant on 21 March 1995 in this appeal. It was not before the District Court.

The respondent came to New Zealand. He did not get here until July or August. He spent some three weeks. There was an attempt at conciliation or attendance at conciliation meetings. On 15 August 1994 he wrote to the conciliator for the Family Court expressing the purpose of his visit to New Zealand which was to visit the children and to attempt to persuade his wife and the children to return to California. He expressed his intention to provide air fares and separate accommodation for her and the children in California. There is a reference in that letter to his rights to petition under the Hague Convention. He also notified his disagreement with any custody arrangements made in his absence without his knowledge or consent. That was before the District Court. He returned to the United States and in September he commenced some proceedings and in October these proceedings were commenced to obtain the return of the children.

Like everything in this Act and its application it depends to a great extent on the facts of the case and the view that one has of the matter overall. In Re A.Z. (a minor) [1993] 1 FLR 683 at 691 Sir Donald Nichols VC dealt in some detail with this question of acquiescence. He observed that it is a question of degree as so often the case these matters are. He said, on answering that question:

" ... the court will look at all the circumstances and consider whether the parent has conducted himself in a way that will be inconsistent with him later seeking a summary order for the child's return. "

It is never the case that a parent must act immediately. There must always be time for some consideration. I think it can be appropriate that that might be quite a long period before any steps were taken if it was thought that some conciliation or some other means might be achieved short of this forcible judicial procedure. I now have, of course, some further material before me but I am not persuaded that the judge's decision was wrong. I do not believe that, in the circumstances of this case, the respondent acquiesced subsequently to the removal of the children.

The final matter in issue, again under s 13, is whether, in the words of para (c), that there is a grave risk that the child's return would place the child (the children in this case) in an intolerable situation. It is not suggested, in terms, that the children would be exposed to physical or psychological harm. It is here that one necessarily entrenches on questions which normally arise in custody and access, the stability of the parents, the welfare of the children, are inevitably involved in considering a possibility of grave risk of intolerable situations into which a child may be put. It must be recognised that any action and the enforcement of that under this legislation is inevitably to disrupt the children's life. That was disrupted in the removal and the return must further disrupt their life. That disruption is increased the longer it takes and the more proceedings that are involved. That there is a trauma is almost inevitable.

The risks in this case and the emphasis in this case, and in the intolerable situation, is the assumption that the mother will not or cannot go or stay in the United States. The circumstances of the intolerable situation depend to an extent on new evidence which has been produced in the affidavit filed today. That evidence indicates to me that largely, if not entirely, since the decision in December 1994 the daughter, and to the extent that a child who is not quite two can express these feelings, is fearful of the future, the departure from New Zealand and a return to the United States. That evidence has not been challenged. In the

time it could not be challenged. It depends on a view expressed by the mother but there is, in addition, some expression or view from a schoolteacher. The latter speaks of events this year, that is to say this school year commencing 9 February, although there is some reference in a very general way to the teacher's knowledge of the child in the previous year. This is certainly not new evidence if and to the extent that it applies and refers to events before the last hearing. I am bound to say that it is perhaps not surprising that this kind of material has come forth after the period of time and after what must be an unusual atmosphere in the mother's home.

Intolerable means that something can not be tolerated. It is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated. Human beings, and particularly children, can adjust and re-adjust to various matters, changes in their lives, death and injury, illness and other matters.

I am not satisfied that it can be said that there is a grave risk, that the conditions and a return to the United States would be intolerable. I am moved in that way because I am not at all satisfied that the wife is either unable to go or to stay in the United States. It is not, it seems, a question of money. I say that although the respondent has now withdrawn his undertaking to pay her fare. He has and maintains an undertaking to pay the air fares of the children. It is a question of status and I am satisfied, on what is even now before the Court, that her status is such that she would be able to enter and to remain, even if on some conditional basis, in the United States. The evidence that she has proffered is based on various opinions. They proceed on hypotheses which are not precisely the situation as it now is. The important matter now is that the respondent has a legal status to remain permanently in the United States. With that there is some derivative right to attain status of a similar nature for the daughter. The son of course is entitled to remain in any event. Equally there may be some derivative right in respect of the appellant.

I find it difficult to believe that in the current circumstances of this family with a spouse with permanent residence and one child legally a United States citizen that the mother would not be permitted entry and be allowed to remain.

Finally, Mrs Ullrich has submitted to me that there should be some conditions imposed on any order that might be made to ameliorate the disruption and the difficulties that may arise, that will arise in this matter. I have some doubts about the jurisdiction, the power of the Court to impose conditions. There is nothing certainly in the Act which expresses any right to impose conditions. The tenor, the words indeed of the Act are mandatory. Where the Court is satisfied that the grounds are made out it is obliged to make the order and the order is that the child or children are to be returned forthwith. On the other hand there are provisions for limited conditions in ss 26 and 28 for the issue of warrants and for the making of orders for costs and under s 27 for security for costs. That all seems to imply no authority for the imposition of other conditions. There is, in any event, a difficulty in imposing conditions which relate to another jurisdiction and to events which are to occur there. There have been, in other cases, undertakings given and these have been accepted by the Court and have been used I suppose as a sanction in respect of the execution and the enforcement of the orders made. There are here undertakings given by the husband not to take any steps to commence any criminal proceedings which would institute criminal proceedings against the mother in the United States, to provide support and maintenance in the United States and to pay the cost of air travel for the children. As I have said, he is not now prepared to pay for the wife's air travel. Those, I think, should be accepted and the respondent should be required, as in the Family Court decision, to lodge an undertaking with the Registrar of the Court here in accordance with those undertakings.

In the result, then, the appeal cannot succeed. It is dismissed and the order that was made before will be confirmed and the interim orders are also confirmed.

Mr Howman has asked, in the circumstances of this case, that there should be an order under s 26 of the Act. That permits the Court to make an order to "issue a warrant authorising a member of the Police or any Social Worker or any other person named in the warrant". That would not normally be done, of course, until it was shown that the order was being prevented from being executed. That is not clear at this stage. There is, however, the difficulty here that the Easter vacation is about to commence and it may be difficult to provide otherwise.

In the circumstances, then, I am going to make an order in the terms of s 26 but it is to lie in Court not to be enforced before 19 April 1995. Leave is reserved to either party to apply to the High Court or to the District Court during the vacation or otherwise as may be necessary.

/s/ Greig
