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[20/02/1997; High Court (England); First Instance]
S. v. H. (Abduction: Access Rights) [1998] Fam 49, [1997] 3 WLR 1086, [1997] 1 FLR 971, [1997] Fam Law 470

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

20 February 1997

Hale J

In the Matter of S. v. H.

Henry Setright for the father

Richard Scarratt for the mother

HALE J: This case raises a short but fundamental point under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction. It concerns the difference between 'rights of custody' and 'rights of access'. Under Art 12 of the Convention, the remedy for wrongful removal or retention, defined in Art 3 of the Convention in terms of an interference with rights of custody, is the immediate return of the child. Under Art 21, the only remedy for interference with 'rights of access' is to ask the Central Authority to make arrangements for organising or securing the effective exercise of those rights.

The child concerned in this case is a little boy called S, born in Trieste, Italy, on 7 August 1989, so now aged 7. His mother, although a UK national, has lived and worked in Italy since 1974. His father is Italian. They are not married to one another. If they have ever cohabited, it was only for 3 weeks shortly after S was born. In August 1990 a court in Trieste made an order granting custody of S to the mother with access to the father.

In June 1995 the father made an application for custody, and in July 1995 there was a temporary order prohibiting the mother removing the child from Italy. In April 1996, in those proceedings, the court again granted custody to the mother with access to the father, each Sunday and midweek, and for 2 weeks in the summer holidays. This might be reviewed on the advice of the family service, which was asked to report by October 1996. The temporary order prohibiting removal was revoked because there was no reason to believe that the mother could leave Italy and she had denied any intention to do so.

In June 1996, however, the mother came to this country with S, to visit her parents here. The father was told where they were but of course could not enjoy his contact under the order. In

July 1996 the Italian court invited the mother to say when he might do so; she replied that she would be back in September 1996; in August 1996, however, she wrote to say that her return had been delayed for family reasons but that she would be happy if the father visited S here; in September 1996 the court 'invited' the mother to restore the conditions for the effective exercise of the father's right of access.

In October 1996 the father approached the Italian Central Authority. The letter of request submitted by the judge designate to the Central Authority here expressly states that it is pursuant to Art 21 of the Hague Convention, and asks the Central Authority to remove every obstacle to the father's right of access; however, under 'Subject' it refers to the father's application 'for the return to Italy of the child or the assertion of the right of access to the child'. In January 1997 the Italian court granted a declaration recognising the father's right to 'visit and have' his son in terms of the April 1996 order.

Nevertheless, proceedings were begun here for the return of the child to Italy. The question, therefore, is whether the father has 'rights of custody' within the meaning of the Convention. This is in fact a two-part question: first, what rights does the father have under Italian law, and secondly, do those rights amount to rights of custody under the Convention?

There is conflicting written evidence as to Italian law. Article 317 bis of the Italian Civil Code provides as follows:

'A parent who acknowledged his natural child is entitled to authority over him.

If the acknowledgement is made by both parents, the exercise of authority belongs jointly to both if they cohabit. The provisions of Article 316 apply. If the parents do not cohabit the exercise of authority belongs to the parent with whom the child cohabits . . .

The parent who does not exercise authority has the power to watch over the instruction, the education and the living conditions of the minor child.'

Hence the evidence of the mother's Italian lawyer, Roberta Rustia, is that the mother alone has parental authority; that this was confirmed by the court which awarded her custody; the father, therefore, has only the right to supervise the child's education and general well-being; there is no rule that the parent with custody has to ask for the other's consent to move; the only obligation is to inform him of the new address so that he can continue to visit the child and carry out his rights of vigilance.

The evidence of another legal expert, Roberta Ceschini, on behalf of the father states that:

'Under Art 317 bis of the Italian Civil Code a parent who acknowledged his/her natural child is entitled to parental rights over the child. Parental authority within the meaning of Art 316 of the Italian Civil Code, includes several rights and obligations of the parents towards the child. Custody is one of such rights or obligations which is normally to be exercised by both parents jointly.

As a result, both [mother and father] do have parental authority over [the child]. Since [the parents] do not cohabit, the Trieste Juvenile Court is entitled to determine how the parental authority is to be split and exercised, pursuant to Art 317 bis . . .'

She goes on to state that the effect of the custody order was that:

'. . . the minor must cohabit with the mother and the mother is entitled to make ordinary decisions regarding his life. Extraordinary decisions are to be taken jointly by both parents . . . A decision regarding change of residence is to be considered an extraordinary decision.'

It is regrettable, to say the least, that an English court is faced with such a conflict between foreign lawyers on a point of such importance. I bear in mind the observation of Staughton LJ in Re B (A Minor) (Abduction) [1994] 2 FLR 249, 268, that we should resist the temptation to make our own findings as to foreign law and stick to the expert evidence. But where that evidence is in conflict, we have to do the best we can. Bearing in mind, as did Thorpe J (as he then was) in Re M (Abduction: Acquiescence) [1996] 1 FLR 315, that the burden of proving his rights under Italian law lies on the plaintiff father, I have difficulty in accepting that he does have parental authority in this case. The translation of Art 317 bis seems quite clear. Unmarried parents will have parental authority if they cohabit. If they do not, parental authority will lie with the parent with whom the child lives. Furthermore, this father undoubtedly does not have custody. If he does not have parental authority, there is no evidence of an automatic right to insist that the mother does not take the child abroad without his consent. Indeed, the earlier making of a temporary order preventing removal could suggest otherwise.

However, he clearly does have two rights: first, the right to watch over the child's education, instruction and living conditions; and secondly, the right to access, as defined in the order made in April 1996 and reaffirmed in the later orders and declaration. That order, providing as it does for access twice a week, is clearly only compatible with father and child living reasonably close to one another.

Miss Ceschini also refers to Law No 1185 of 21 November 1967, which requires the authorisation of the tutelage judge to remove a natural child of minor age, either temporarily or permanently, from the Italian jurisdiction. Miss Rustia does not comment on this puzzling provision. It appears to have nothing to do with the father's position, but rather to confer powers upon the court. I also wonder whether natural means 'illegitimate' and how this provision sits with the relevant provisions of the Civil Code (which appear to be later) and the position of a person having custody under a court order.

But what is the significance of all this for the purpose of the Convention? The Court of Appeal has made it clear 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 that whether a removal or retention is in breach of rights of custody has to be decided by reference to Convention law as applied in these courts. Hence even if the removal was not prohibited in Italian law, it could still be wrongful under the Convention.

Article 3 of the Convention provides, so far as material:

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

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention . . .

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 provides that for the purposes of the 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.'

The principal English authorities on this question relate to Western Australia; there, unlike the rest of the Commonwealth of Australia now, an unmarried father does not enjoy automatic parental rights or responsibilities; the mother alone has custody and guardianship unless and until a court orders otherwise. In Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442, therefore, it was accepted that the mother's removal of the child from Western Australia was not in breach of the father's rights of custody. After the child had been brought here, a court in Western Australia made orders giving the father custody and guardianship. At that point retaining him here became a breach of the father's rights of custody, but by then the House of Lords found that he had ceased to be habitually resident in Western Australia.

In Re B (A Minor) (Abduction) [1994] 2 FLR 249, however, the parents were again unmarried. The mother had left the child behind to be cared for by the father and the maternal grandmother, but no order had been made. when the grandmother wished to bring the child to this country, minutes of agreement were drawn up, and signed by the mother, giving the parents joint guardianship, the father sole custody and the grandmother permission to bring the child to this country for a limited period, with safeguards to ensure his return. That minute was not approved by the Australian court until after the child had left. Peter Gibson LJ held that the father did not have rights of custody: he had no automatic rights and the agreement was clearly conditional on the court's approval. The majority of the Court of Appeal held otherwise. Waite LJ, at 260, had no difficulty in giving a broad connotation to the word 'custody'. On 261 he went on to say that:

'The difficulty lies in fixing the limits of the concept of "rights". Is it to be confined to . . . established rights . . . or is it capable of being applied . . . to . . . 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?'

The answer, in his judgment, has to depend upon the circumstances of the case. In that particular case, of course, the merits were all with the father, who had been sharing the care of the child with the grandmother for over a year and would certainly have obtained an order along the lines agreed between the parents. The rights he obtained were undoubtedly rights of custody and were only inchoate at the relevant time as a result of the delay in securing the court's approval of the agreement.

On any view, this father's rights are primarily rights of access. There are two possible reasons for considering them rights of custody. The first is that the father had earlier obtained a prohibition against removing the child from Italy. This suggests that he could have done so again, particularly as the prohibition was only revoked because it appeared that the mother could not leave Italy and indeed had expressly excluded her intention of doing so. It was established in the case of Re C (A Minor) (Abduction) [1989] 1 FLR 403, that the right of a joint guardian to give or withhold consent to the removal of the child from the country by the parent with custody (sometimes referred to as a travel restriction) is a 'right of custody' for the purpose of the Convention.

But it is a considerable step to combine the principles in Re B and Re C to arrive at the conclusion that the mere possibility of a parent who has only rights of access succeeding in

an application to prevent the mother taking the child abroad amounts to 'rights of custody' under the Convention. The original prohibition was imposed when custody proceedings were pending: these were concluded by the orders made in April 1996, although the family service was to report in 6 months. The outcome of proceedings in Italy to determine whether or not the mother could bring the child here indefinitely cannot be predicted with any confidence. We have not inquired in any depth into her reasons for wishing to remain here, although her statement suggests that S's distress at seeing his father played a considerable part. That may be why the family service was asked to report by October 1996. The court might then have considered that the father's right of access could be exercised in other ways, for example by holidays in Italy. But all of that is pure speculation.

The second reason for considering this removal wrongful in terms of Art 3 is that the courts of this country have been strenuous in their efforts to construe the Convention 'broadly and in accordance with its purpose' (as Millett LJ said in Re F [1995] Fam 224, 236G, [1995] 2 FLR 31, 41G). The ostensible purposes are set out in the preamble as these:

'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 for their prompt return to the State of their habitual residence, as well as to secure protection for rights of access . . .'

This does, of course, beg the question at issue here, for it refers to 'wrongful' removal and expressly distinguishes return and protection of rights of access. English judges have from time to time gone further. Waite LJ, for example, in Re B [1994] 2 FLR 249, 260G, stated that:

'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 [which does not apply in this case] or a more congenial base [which may do so].'

This is, as Mr Setright on behalf of the father has pointed out, an Italian case in every sense of the word. The mother may be a UK citizen who was born in Kenya, but she has lived and worked in Italy since 1974. She still has a flat there. She was in good employment there and may be able to return. S was born there and lived there all his life until 8 months ago. However stressful for him or his mother, he had a continuing relationship with his father, who was also contributing to his maintenance. Even if she had a right to do so, the mother brought him here without the father's consent in circumstances in which he was most unlikely to agree without a fight. In the days before the Convention introduced a legislative code governing these matters it is argued therefore that the courts here might have considered this a case in which the paramount welfare of the child called for a summary return.

These are all powerful considerations. Yet it is also clear from the preamble and from the provisions of the Convention itself that the Contracting States deliberately intended to draw a distinction between rights of custody and rights of access. The stereotypical picture of a child abduction is the non-custodial parent kidnapping the child from the custodial parent or one of two cohabiting parents disappearing with the child. It must be questioned whether the Contracting States intended the remedy of summary return to apply to a single parent

who has brought the child up alone virtually since birth, who has twice been granted sole custody by the courts in their own country, and who was not prohibited from removing the child at the time when she did so.

If we are to adopt a purposive approach, it must he borne in mind that this is an international treaty in which Contracting States accept reciprocal obligations towards one another. It is therefore relevant to consider the publications of the Permanent Bureau of the Hague Conference on Private International Law. The Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention, at para 9, drew the Central Authorities' attention to the fact that in some States the award of custody to one parent did not necessarily mean that the other parent had been deprived of all rights of custody within the meaning of the Convention, and expressed the view, in para 10, that the return of a child taken by a parent with custody but in breach of a specific travel restriction was in accordance with the spirit of the Convention. The report of the second Special Commission in 1993, at p 28, suggests that there was no support for the view that a travel restriction was merely a 'modality' attached to a right of custody. There is, therefore, evidence of international support for the approach of the UK courts in cases where such a restriction exists.

This case is nowhere near as strong, as there was no specific travel restriction, and the evidence presented by the father has not satisfied me that he has a general right to prevent removal. There is evidence that the tutelage court must be consulted before removal. Article 3 applies to rights of custody attributable to courts and institutions as well as to people. Thus the general travel restriction imposed upon wards of court amounted to a right of custody in Re J (Abduction: Ward of Court) [1989] Fam 85, sub nom Re J (A Minor) (Abduction) [1990] 1 FLR 276. But there is no evidence as to the relationship of this provision with the provisions of the Civil Code. The father has only shown that his rights under the Code were rights of access albeit incompatible with the child living in another country. The facts are therefore different from those of the leading case on assistance with rights of access under Art 21, Re G (A Minor) (Enforcement of Access Abroad) [1993] Fam 216, sub nom Re G (A Minor) (Hague Convention: Access) [1993] 1 FLR 669 in which the Ontario court had allowed the mother to choose whether to live in England or Ontario and had regulated contact on that basis.

Nevertheless, I find it impossible to conclude that the removal of this child to this country was in breach of rights of custody. This case seems to me to fall on the other side of the line which must have been intended, given the clear distinction drawn in the Convention between rights of custody and rights of access. The remedy of summary return seems Draconian indeed in such a case, where the contracting parties deliberately intended that rights of access should be protected in a different way. It may even lead to absurd results. What, for example, would the conclusion be if the father had taken the law into his own hands and removed the child from the mother here? That would undoubtedly have been in breach of her rights of custody and so the question would have been whether or not they had become habitually resident here before he did so. If I am right that he did not have parental authority, the child's habitual residence would change if the mother's did so.

The explanatory report to the Convention by Elisa Perez-Vera (see Hague Conference on Private International Law, Actes et Documents de la Quatorzieme Session 6 au 25 Octobre 1980, Tome III, Child Abduction, at pp 444-445) makes essentially the same point:

'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

removals which it is sought to prevent . . . 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.'

This case is just that. I therefore conclude that there has not been a wrongful removal or retention in terms of Art 3 of the Convention.

If there had been, I would consider this a situation in which the court should be rather less reluctant to make a finding under Art 13, that the return of the child will place him in an intolerable situation, than is usually the case. To oblige a child and custodial parent to return to a country which they may have left for very good reasons, merely so that the non-custodial parent could exercise his right of access, could indeed be intolerable for the child. In this case, however, although the mother sought to raise a defence under Art 13, based partly upon the adverse reaction of the child to seeing his father and partly upon the reduced circumstances in which they would find themselves in Italy, this was not seriously pursued before me. The mother and child had lived there for so long, that although it might be hard to return, it might be difficult to conclude that it would be intolerable. In the event, however, I do not consider it necessary to decide the point.

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