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[09/05/1996; Supreme Administrative Court of Sweden, Regeringsrätten);
Superior Appellate Court]

J. v. J., Case No. 7505-1995, 9 May 1996, Supreme Administrative Court of Sweden

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JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT

Case No. 7505-1995

pronounced in Stockholm on 9 May 1996

APPELLANT A.F.J.. National identity number ***

Representative and counsel in accordance with the Legal Aid Act: Advokat Suzanne Johanson, Norrlandsgatan 18, 11143 Stockholm

RESPONDENT T.J., Virginia, USA

Represented by: Advokat Claes Renstrom, Advokat Fredric Renstrom Eriksbergsgatan 1 A, 11430 Stockholm

DECISION AGAINST WHICH APPEAL IS MADE

Judgment of the Stockholm Administrative Court of Appeal of 19 December 1995 in case number 9141-1995 (Enclosure)

THE ISSUE

The return of a child in accordance with the Act concerning Recognition and Enforcement of Foreign Decisions relating to Custody, etc. and concerning the Return of Children (1080:14).

BACKGROUND

A.J. and T.J. were married in 1986. Their daughter, A. was born on 11 November 1987. A.J. who is employed by the Swedish Ministry for Foreign Affairs, and T.J., who is employed by the US Department of State, were residing in Switzerland at that time. In 1990. A.J. was posted to the Swedish Consulate in New York, and T.J. was posted in Washington. T.J. lived in Virginia. A. lived alternately with her mother and her father.

On 11 February 1992, a US court granted a divorce petition which dissolved the marriage between A.J. and T.J., and confirmed an agreement reached by them under which they were to have joint custody of A. A. was to be with her mother for 28 weeks of the year and with her father for the remaining 24 weeks for periods of two weeks at a time, and the mother was entitled to move to Sweden with A. after 1 July 1993. A. was to stay with her father for a year every third year. Shortly before A.J.'s and A.'s departure for Sweden in July 1993, T.J. instituted an action against A.J. in a US court concerning amendment of the agreement. This

action resulted in a new agreement arrived at by the parties on 15 November 1993 and ratified by a court in Virginia on 28 December of the same year, under which A., who was to continue to be in the custody of both parents, was to stay with her parents as follows:

1993-20 August 1995, with her mother

21 August 1995 - 20 August 1997, with her father

21 August 1997 - 20 August 1999, with her mother

21 August 1999 - 20 August 2000, with her father

21 August 2000 - 20 August 2002, with her mother

21 August 2002 - 20 August 2003, with her father

21 August 2003 - 20 August 2005, with her mother

In addition, the agreement also contained provision for extensive access rights, for the parent with whom A. was not staying. Furthermore, in accordance with the agreement reached by the parties, the decision of the court also stated as follows:

"It is adjudged, ordered and decreed that this Court hereby expressly finds that it has continuing and exclusive jurisdiction to decide all matters relating to the care and custody of the minor child, A.; and the Petitioner's residence in the Commonwealth of Virginia, United States of America, and not Sweden, shall constitute the place of residence for the purpose of all adjudications of custody and visitation of the said minor child; and that the Courts of Sweden as well as all other courts anywhere in the world shall not acquire jurisdiction over the custody of said child by reason of the Respondent's residence in the Country of Sweden, or other parties' residence anywhere else.

It is the intent of the parties that the Commonwealth of Virginia shall be the only forum for the adjudication of custody or visitation matters involving the child A., now or in the future; that the parties will provide such further assurances or stipulations of their counsel as may be necessary to give full force and effect to the provisions contained herein, giving the Commonwealth of Virginia the sole and exclusive jurisdiction.

It is further ordered that neither party shall seek modification of this Order without prior leave of this Court and Notice to the other party."

As regards the Hague Convention, the agreement contained the following:

"The parties hereby stipulate, agree, submit to, and acknowledge their intention to be bound by the terms and conditions of the Hague Convention on the civil aspects of international child abduction. The International Child Abduction Remedies Act (Final Act, 14th Sess. of the Hague Conference, 1980)."

On 19 July, 1995, T.J. submitted an application to the County Administrative Court requiring the return of A. to him, in accordance with the Act concerning Recognition and Enforcement of Foreign Decisions relating to Custody, etc. and concerning the Return of Children (1988:14) (The Enforcement Act).

PETITIONS, ETC,

A.J. petitions that the Supreme Administrative Court amends the judgment of the Administrative Court of Appeal by prescribing that enforcement may not take place and that there be a stay of execution on the Administrative Court of Appeal's Judgment. If the Supreme Administrative Court of Appeal should find that A. is not habitually resident in Sweden, A.J. petitions that the Supreme Administrative Court prescribes that a child-psychiatric investigation be undertaken, prior to pronouncement of a judgment, in order to ascertain whether enforcement would mean that A.'s mental health would be seriously harmed. Finally, A.J. petitions to be released from liability to compensate T.J.'s legal costs in connection with the County Administrative Court and the Administrative Court of Appeal hearings. In support of here case, in addition to what she has cited in the lower courts, A.J. cites, inter alia, the following. The agreement ratified by the US court does not affect the child's habitual residence, since it merely stipulates that questions of custody and access are to be raised in the place where the father is habitually resident. The child's habitual residence is not affected in any way by the US judgment, which is confined to the question of jurisdiction. The US court has not made an assessment of the child's best interests. It would be disgraceful if it were found that the child was not considered to have habitual residence with the parent who has had de facto care of the child for two years.

T.J. petitions that the Supreme Administrative Court rejects A.J.'s petition for amendment, and also the petition regarding a child-psychiatric report. For his part, T.J. petitions for compensation for his costs in the Supreme Administrative Court. In support of his case he cites, inter alia, the following. The parties were fully aware that the Hague Convention was applicable to their agreement and were in complete agreement that the actual custody of A. was to be transferred to the father as per 20 August, 1995. The one-year rule stated in Section 12, subsection one of the Enforcement Act must be considered to commence as from 20 August 1995.

On 21 December 1995, the Supreme Administrative Court prescribed that the judgment of the Administrative Court of Appeal regarding the return of A. should not be enforced until further notice.

REASONS FOR THE SUPREME ADMINISTRATIVE COURT'S RULING

The question in this case concerns whether A.J.'s retention of A. in Sweden after 20 August 1995 is unlawful in the sense of the Enforcement Act.

In RA 1095 ref. 99, the Supreme Administrative Court has considered in detail the question of when removal or retention of a child is to be considered to be unlawful in the sense of the Enforcement Act.

The provisions of the Enforcement Act regarding the return of children are based on the Convention adopted by the Hague Conference on the Civil Aspects of International Child Abduction (Hague Convention) in 1980. One of the overall aims of the Convention is to protect children from the harmful effects of being uprooted from their habitual surroundings. In order to satisfy this objective, the Convention includes provisions which make it possible for a child which has been unlawfully taken from one convention state to another to be rapidly returned to the former state. thus restoring the status quo. The Convention has been incorporated into Swedish law by including provisions in the Enforcement Act which are intended to reflect the Convention. The provisions which are of primary significance in this case are contained in Section 11 of the Enforcement Act - the closest equivalents in the Hague Convention are Article 3 and Article 12, first paragraph.

Under Section 11 of the Enforcement Act, a child which has been taken to Sweden unlawfully or is unlawfully detained in Sweden shall, following an application, be

transferred to the country from which the child is withheld if the child was habitually resident immediately prior to the removal or detention in a state which has acceded to the Hague Convention. Under Section 11, second paragraph, removal or detention is unlawful if the removal or detention contravenes the right to take care of the child held by the person responsible for custody or by another person in the state in which the child was habitually resident immediately prior to removal or detention. If this right was also exercised at the time when the child was removed or detained, or would have been exercised at such a time if removal or detention had not taken place.

The Act presumes that both the question of who had custody at the time of removal or detention and the question of whether removal was unlawful are determined in accordance with the provisions which applied in the state in which the child was habitually residing at the time of removal (Section 11, second paragraph, and the special explanation of this Section in Bill 1988/89:8, page 40). In addition, it may be considered that the provisions imply that detention of a child in Sweden is not unlawful under the Act if the child was habitually resident in Sweden immediately prior to detention. Thus the definition of habitual residence ("hemvist") is of decisive importance in applying the provisions of the Enforcement Act concerning return.

The concept of habitual residence is not defined in the Enforcement Act, but reference is made in the preamble (Bill. pp 36 and 40) to statements concerning the concept of habitual residence made in connection with the incorporation of a definition of the concept of habitual residence in 1973 in Chapter 7, Section 2, of the Act concerning Certain International Legal Circumstances concerning Marriage and Guardianship (1904:26. pl). According to this definition, a person who is resident in a given state may be considered to have habitual residence in this state if residence must be considered constant in view of the duration of the period concerned and other circumstances (see Bill 1973; 158. p 78 et seq).

However, in interpreting the habitual residence concept in the Enforcement Act, it should be particularly taken into account that this Act is an example of legislation governed by international treaty. In interpreting the concept of habitual residence in the Act, special attention should therefore be paid to the terminology employed in the Hague Convention, and its aims. The term "habitual residence", which corresponds to "hemvist" is not defined in the Hague Convention either. In general, it may be said that consideration of the question of habitual residence under the Convention is primarily a matter of making an overall assessment of circumstances which may be observed objectively such as the length of sojourn, existing social ties, and other (missing words) or occupational nature which may indicate a more permanent attachment to one country or the other. In the case of a small child, the habitual residence of person who has custody, and other family and social aspects, must be the decisive factors (see RA 1995 ref. 99).

As mentioned above, A. lived in Switzerland with her parents for the first year of her life. In 1990, A.J. lived in New York and T.J., in Virginia. A. lived alternately with the parties until July 1993, when she moved to Sweden with her mother. According to the agreement between A.J. and T.J. which has been ratified by the court in Virginia, the parties are to have joint custody of A. and share A.'s de facto care until she reaches the age of 18. Under the agreement. A.J was responsible for A.'s de facto care until 20 August 1995. The parties were subsequently to be responsible for such care on an alternate basis in accordance with a schedule under which A. was to stay with her mother for a total of eight years, and for four years with her father. At times when one party had de facto care of A., the other party was entitled to extensive access to her. A. is a citizen of both the United States and Sweden.

Thus, A. has been staying in Sweden with her mother since 21 August 1995, against her father's will. The Supreme Administrative Court must now consider whether or not the circumstance which apply in this case mean that A. may be regarded as habitually resident in Sweden on 20 August 1995. It must be taken into account that A. had been staying in Sweden with her mother for more than two years when the question of return became relevant. Her mother is habitually resident in Sweden. According to the facts which have emerged in this case, A. has adjusted to circumstances in the place where she is living. In addition, in accordance with the agreement cited in the case and confirmed by the court in Virginia, A. is to spend a total of eight years in Sweden until she reaches the age of 18, as compared with four years in the United States. In the light of what has been stated, the Supreme Administrative Court finds that A. was habitually resident in Sweden on 20 August 1995. The extracts from the agreement ratified by the court in Virginia presented above do not give grounds for an alternative assessment.

This means that the retention of A. in August 1995 was not unlawful in the sense indicated in Section 11, second paragraph, of the Enforcement Act. Hence there are no prerequisites for the return of A. to the United States under the Enforcement Act. Thus A.J's plea must be approved in essential aspects.

As a result, there are no grounds for further action regarding A.J.'s petition for a child-psychiatric report concerning A. As regards the legal costs, A.J. released from liability to compensate T.J. for legal costs in the lower courts. This question must be considered in accordance with the provisions contained in Section 21 of the Enforcement Act and Chapter 21. Section 13, first paragraph. of the Code relating to Parents, Guardians and Children. Under these provisions, the Court may, in accordance with what is reasonable, institute that one party must pay the other party's costs. In making an overall assessment of the facts which have emerged in this case, the Supreme Administrative Court finds that it would not appear to be reasonable for either of the parties to be made liable for the other party's legal costs. This applies to the parties costs both in the lower courts and in the Supreme Administrative Court.

As legal representative and counsel under the Legal Aid Act for A.J., Advokat Suzanne Johanson has requested payment of SEK 21,939 for 23 hours work. Primarily in view of Susanne Johanson's familiarity with the case, after representing A.J. in both the County Administrative Court and the Administrative Court of Appeal, the Supreme Administrative Court sets the payment for work performed in the Supreme Administrative Court at SEK 14,310, for what may reasonably be considered to be 15 hours work.

RULING BY THE SUPREME ADMINISTRATIVE COURT

In amending the judgment of the Administrative Court of Appeal, the Supreme Administrative Court annuls the judgment of the County Administrative Court regarding the return of A.J. under the Act concerning Recognition and Enforcement of Foreign Decisions relating to Custody, etc. and concerning the Return of Children (1989:14).

Thus, the Supreme Administrative Court annuls the Judgment of the County Administrative Court and the Administrative Court of Appeal, releasing A.J. from liability to pay T.J.'s legal costs in both courts.

The Supreme Administrative Court rules that, under the Legal Aid Act, payment of SEK 14,310 is to be made to Suzanne Johanson for her services in the Supreme Administrative Court. Neither party is made liable to pay the other party's costs in the Supreme Administrative Court.

(signed) (signed)

Stig Brink Lars Tottie

(signed) (signed)

Ulla Wadell Stig von Bahr

(signed) (signed)

Arne Baekkevold Margareta Larsson

Clerk of the Supreme

Administrative Court

Dept: III

Reported on 27 March 1996

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