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[20/02/1987; Outer House of the Court of Session (Scotland); First Instance]
Viola v. Viola 1988 SLT 7, 1987 SCLR 529

Outer House of the Court of Session

Applicant: V.V.

and

Respondent: L.V.

Date: 20 Febraury 1987

OPINION OF LORD McCLUSKEY

Act: Brailsford, Stuart & Stuart

Alt: Francis, Drummond & Co.

This is is a petition brought in the name of V.V., a Canadian Citizen. He married L.A. or V., the respondent, at Ottawa, Canada on 16 July 1983. There is one child of the marriage, A.V., who was born in Ottawa on 12 February 1986. It is not in dispute that the child lived with the petitioner and the respondent in Ontario until 10 November 1986 when the respondent flew with the child from Toronto to Scotland. She did so having pre-booked a return flight, the booking being for 3 March 1987. The petitioner presents his application under Section 1 and Schedule 1 of the Child Abduction and Custody Act 1985 and with reference to the relevant Rule of Court, No. 260J.

Mr Brailsford who appeared for the petitioner informed me that his instructions came from the Secretary of State via the Scottish Courts Administration. Section 1 of the Act provides that the provisions of the Convention set out in Schedule 1 to the Act "shall have the force of law in the United Kingdom". Section 3(1)(b) provides that under the Convention the functions of a Central Authority shall be discharged in Scotland by the Secretary of State. Section 4 provides that the Court of Session shall have jurisdiction to entertain applications under the Convention. Schedule 1 to the Act sets forth the relevant terms of the Convention. Article 7 in Chapter 2 of that Schedule lays certain duties and responsibilities upon Central Authorities. They include a duty to take all appropriate measures "(f) to initiate or facilitate the institution of judicial ... proceedings with a view to obtaining the return of a child ...". Articles 8, 9 and 10 contain other provisions in relation to the functions of the Central Authority. Thus it appears that in this case the petition is presented at the instance of the appropriate Central Authority albeit in the name of the petitioner V.V.

I was informed that this was the first case of its kind before a Court in Scotland in which the matters that I had to resolve fell to be decided. I was referred to an opinion of Lord Prosser in the petition of Murray Sinclair Kilgour v Joanne Kilgour in which his Lordship had to decide a question of competency of a petition which bore to be presented under the same Act. However the matter which his Lordship had to decide was not one which arises in the

present case. In Kilgour the point, as I understand it, was whether it was competent to present a petition under the Act when on the facts it appeared that the removal occurred before 1 August 1986 and the wrongful retention also commenced before that date. The significance of the date is that by statutory instrument No. 1048 of 1986 the Act was brought into operation on 1 August 1986. By statutory instrument of No. 1159 of 1986 a number of contracting parties were named for the purposes of Section 2 of the Act. One of those contracting states was Canada. That order also indicates that Ontario is one of the relevant territories. Accordingly there is no doubt that some months before the date when this child, A.V., was removed from Ontario the Act came into force and it applies in relation to Ontario, Canada. The decision in Kilgour is thus not relevant to the matter before me. Nonetheless I would respectfully refer to Lord Prosser's analysis of the relevant provisions. I agree with and adopt his analysis of these provisions so far as relevant to the present case.

It was expressly conceded by Mr Francis on behalf of the respondent that I should approach my decision upon the basis that the removal of the child in the present case was properly to be described as "wrongful" within the meaning of Article 3 of the Convention. He did not challenge the suggestion that there might also be wrongful retention. In my opinion the concession was very properly given, having regard to the terms of the Article 3 and having regard to the facts and circumstances disclosed in the various productions which were lodged along with the petition. In the light of the concession I need not analyse these productions in any detail but it is plain that the petitioner has a right of custody of the kind referred to in Article 3 paragraph A and that that right of custody derives both from the statutory law applicable in Ontario and from the Order of the District Court of Ontario, date 23 January 1987, which is one of the productions.

Article 4 provides that the Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights. Again it was a matter of concession that the child was habitually resident in Ontario, Canada until the flight from Toronto to Scotland in November 1986.

There was no suggestion that the provisions Rule of Court 260J had not been complied with. I am satisfied, in any event, that they have been complied with.

I now turn to the merits of the matter. Article 11 provides inter alia "The judicial or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children". The only further assistance one obtains as to the meaning of "expeditiously" is to be found in the latter part of the same Article which requires a Central Authority or judicial authority to explain the reasons for "the delay" if a decision has not been reached by that authority within six weeks from the date of commencement of the proceedings. I think it is plain that Article 7 requires the Court to decide the matter as soon as it feels that it has before it the material relevant to such a decision. Article 12 provides, "where a child has been wrongfully removed or retained in terms of Article 3 ... the authority concerned shall order the return of the child forthwith". Article 13 qualifies the wording in respect that the Court is not bound to order the return of the child if the person opposing the return establishes any of the matters specified in paragraph (a) or paragraph (b). In the present case it was not contended on behalf of the respondent that any of the matters, referred to in paragraph (a), could be established. Mr Francis, for the respondent, however, founded upon Article 13(b) which describes the matter to be established in these terms, "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". I should also at this stage for the sake of completeness refer to the final part of Article 13 which reads, "In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the

child provided by the Central Authority or other competent authority of the child's habitual residence".

At the commencement of the proceedings this morning, handwritten answers were lodged on behalf of the respondent. Thereafter Mr Francis for the respondent sought a brief adjournment in order to obtain further instructions from his client, who was present in Court; that was granted. Thereafter, when I was satisfied that the true question before me was the question of risk arising under Article 13(b), Mr Francis addressed me in relation to that matter. He made a number of submissions. In the first place he pointed to the last part of Article 13, quoted above, and submitted that the Court had a peremptory duty to take into account "the information relating to the social background of the child provided by the Central Authority ... of the child's habitual residence". I note that there is no such information, other than such information as can be gleaned from the documents lodged by the petitioner in support of the petition itself. No doubt those documents contain information relating to the social background of the child and no doubt those documents are in this instance provided by the Central Authority. However, I would not regard them as being documents of the character of an independent enquiry into the child's social background. In substance, therefore, Mr Francis was asking that I should delay my decision until an opportunity had been afforded to him to obtain from the relevant Central Authority in Ontario a report or other information relating to the social background of the child. I do not consider that I am obliged to do that by Article 13. I think there could well be circumstances in which the Court would decline to make an order in the absence of information of this character if it were thought that such information was likely to be available at an early date, and might assist the Court in deciding the question which it had to decide. However, it appears to be extremely unlikely that any such information exists at present adverse to the petitioner's claim. I consider this to be unlikely because it appears to be highly improbable that the central authority would have asked the Secretary of State to facilitate the present proceedings if the central authority in Ontario had information adverse to the petitioner's claim for the return of the child.

Turning to the terms of Article 13(b), Mr Francis did not suggest that there was before him any evidence on which he could properly assert that there was a grave risk that the return of the child would expose that child to physical harm. What he suggested was that there was at least a prima facie case for saying that if the child were returned to Canada it might be placed in "an intolerable situation" and was, therefore, also the possibility of psychological harm. He then set forth the considerations that in his submission would support such a case. (This submission effectively superseded the answers, except in so far as they amplified one of the points that he made). The considerations he placed before me were as follows. First of all the child would be looked after by the petitioner's father. He is a man aged 57 who is disabled from employment. It was asserted that he suffers from severe headaches and has occasional bouts of blindness. It was also said that he speaks Italian but no English. Thus the child would be returned to a household in which the only language spoken was or might be Italian in a country where Italian was not the official language or one of the official languages. Secondly, it was said that the petitioner himself worked from either 7 am until 3 pm or from 11 am until 5 pm and also worked overtime. Accordingly the petitioner himself would not be available to look after the child in the way a child of that age requires to be looked after. Thirdly, though this was supplementary to the second point, it was not clear that the child's essential needs in relation to feeding and cleanliness could be looked after by any person in the household with experience of these matters. I should note that among the documents placed before me there is an affidavit by the petitioner. Articles 7, 8, 9 and 12 of that affidavit bear upon the same matters. However, there is no way in which I am able at this stage to ascertain the precise circumstances in which the child would be brought up. I do not think that I am entitled to accept one version, for example that in the affidavit, as against

the other, namely that presented to me on behalf of the respondent by Mr Francis. It appears to me that, at this stage, I should consider, in the first place, whether or not proof of the matters which Mr Francis set before me would be sufficient to enable him to establish the existence of a "grave risk" of the kind referred to in Article 13(b). If the circumstances averred were relevant to support a charge of "grave risk" I should then have to consider how the risk might be "established". As to the first of the three considerations referred to above, it appears to me to be quite unstateable to suggest that simply because one grand-parent who might have some part in looking after the child speaks no English the child is therefore exposed to "an intolerable situation". Of course the ill-health of a grand-parent who was to be the sole custodian might well be a relevant matter. But there was no evidence placed before me and no submission that there existed any such evidence to suggest that the arrangements of the kind spoken to by the petitioner in the affidavit would not apply. He refers to his mother as being available to assist in looking after the child and he also refers to the possibility of obtaining other assistance. Mr Francis, even with his client's assistance, could not contradict these assertions in the affidavit. The second matter, relating to the petitioner's hours of work, is a matter of a very general kind. Obviously any working father could face the same claim namely, that the fact of his going to work prevented him from devoting his full time and attention to the care of the child. But again that does not seem to me to be a consideration which points to the existence of "grave risk" of exposure to an intolerable situation, or to psychological harm. The third matter, in relation to the ordinary care of the young child, appears to me to be entirely trivial, especially given the uncontradicted terms of the affidavit. Plainly it would not be difficult to make appropriate arrangements for the care of a child of that age.

In my opinion, even if I were to allow some form of further enquiry, whether by way of proof or by reference to affidavits, in support of the submissions made by Mr Francis there is no reasonable likelihood that any such enquiry would establish the existence of a grave risk of the kind contemplated by Article 13. To put the matter another way I consider that the "prima facie case" advanced by Mr Francis is irrelevant.

In most cases that come before this Court involving a dispute between parents as to custody of a child the over-riding and paramount consideration is the welfare of the child. In this type of case under the 1985 Act the Court is not enjoined to conduct a enquiry into that matter. The matter before this Court is restricted to determining whether or not he party opposing the return of the child establishes the existence of a grave risk of the kind specified. I should add in the same connection that it is plain from the papers before me that a Court of competent jurisdiction in Ontario is already considering the case and has made an interim order granting custody to the petitioner. If the question of the welfare of the child has to be litigated it would appear that that would be the appropriate Court to deal with that matter. No doubt in some circumstances such a matter could be raised before the Court in Scotland in respect of a child who was physically in Scotland; but no attempt has been made by or on behalf of the respondent to raise the matter of custody in a petition for custody or other legal proceedings in Scotland. I therefore consider that my remit in the matter is that defined by the precise terms of Articles 12 and 13.

In the whole circumstances I hold that the child who is the subject of this petition has been wrongfully removed from Ontario, Canada, a contracting state within the meaning of the Convention. I hold that it has not been established that any grave risk of the character contemplated by Article 13 has been established or can be established on the basis of the averments made in the motion roll before me. In these circumstances I consider that I have no option but to order the return of the child forthwith. I shall accordingly make such an order.

As to the form of that order, I raised with parties the possibility that the case might be continued for a few days in order to allow the petitioner to make appropriate arrangements to collect the child or otherwise to have the child returned to Canada. However, on reflection, I have come to be of the view that my order should simply be in terms of Article 12(1) for the return of the child forthwith. In the interlocutor I shall follow the wording of the latter part of the crave of the petition and make the usual provision as to what is to happen in the event of the respondent's failing to deliver up the child forthwith. In response to my raising the question of the form of the order, Mr Brailsford said that he understood that the petitioner is likely to come to Scotland. Indeed that is what the petitioner narrates in Article 6 of the petition. Accordingly, parties will no doubt understand that the order to deliver forthwith, supplemented by granting a warrant to messenger-at-arms and Sheriff Officers should be interpreted as meaning that the respondent must deliver the child to the petitioner as soon as the petitioner arrives in Scotland and is able to arrange for the return of the child to Canada.

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