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[03/1/1992; Court of Appeal (England); Appellate Court]
Re N. (Child Abduction: Habitual Residence) [1993] 2 FLR 124, [1993] Fam Law 452

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

3 December 1992

Balcombe, Mann, Leggatt LJJ

In the Matter of N.

Henry Setright for the father

Robin Spon-Smith for the mother

BALCOMBE LJ: This is an appeal by the father of a 5-year-old girl, B, from an order made by Rattee J on 28 October 1992 whereby, on a preliminary point, he dismissed an application for the return of B to Sweden under the Hague Convention on the Civil Aspects of International Child Abduction 1980.

The father and mother are both Swedish, but they were never married to each other. They met in Sweden in August 1986 and started living together in December of that year. B was born in Sweden on 20 September 1987. The father and the mother parted in August 1989. B lived principally with the mother, but spent substantial periods with the father. We are told (although for present purposes it is not a necessary finding) that the parents had joint custody of B under Swedish law.

In early 1991 the mother started to live with an Englishman, who was then living and working in Sweden. She travelled with this man, and left with the father for about 6 weeks. She has subsequently alleged that during this period the father sexually abused B.

These allegations came to the surface in October 1991 when the father became concerned at the standard of care given to B, informed the social services of his concern, and told the mother that he would be applying for custody of B, an application which he duly made in November 1991.

The Swedish police and social services investigated the allegations of sexual abuse, but found no evidence to justify any action against the father. The social services told the mother to restart B's access to the father, which she had curtailed after the allegations of sexual abuse. In fact the mother moved with B to a different part of Sweden and has denied the father all access to B since December 1991. On 21 March 1992 the mother married the Englishman. The father's application for custody came before the District Court of Eskilstuna, in Sweden,

on 14 and 15 April 1992, when that court gave interim custody of B to the mother with access to the father. An English translation of the order is in our bundle, and I read from p 37:

'The district court rules until such time as the judgment gains legal force or another decree is issued

THAT [the mother] shall have the custody of the daughter B, . . . and that [the father] shall have the right of access to the daughter, every other weekend -- Saturday and Sunday during the daytime -- alternatively in Eskilstuna and in Gothenburg in the presence of a contact person supplied by the social services in Eskilstuna and Gothenburg and at times that are determined in consultation with these persons.'

There was then a subsequent direction to the social welfare board to investigate the question of custody and the right of access with special consideration being given as to whether the opinion of a child psychiatrist was required. The order concluded:

'The investigations should be concluded and reported to the district court at the latest by 13 July 1992.' Although it does not form part of the order as drawn up, the mother said in her affidavit which is at p 28 of our bundle:

'On the hearing on 14 April 1992 I indicated to the judge that I would like to take a holiday with my new husband whom I had married on 21 March 1992 in order to meet his parents. [The father] refused to give me permission to take B out of the country but the judge ordered that I should be allowed.

20. We came to England on 2 May 1992. Some time around that date I became pregnant and also very sick and unable to travel. Initially we were supposed to be in England for 2 weeks and had return tickets. As I could not travel it was necessary to stay longer. We stayed with [my husband's] parents until the end of August 1992; my Swedish lawyer had the address and telephone number.'

On 17 June 1992 the father had a fresh application before the district court in Eskilstuna challenging the previous decision of 15 April 1992. That challenge was refused. At the same time it was provided that he could appeal against the decision of the district court. The mother did not attend that hearing but was represented and she said in her affidavit:

'I offered [the father], through my Swedish lawyer, 10 consecutive days of visiting access during July 1992 when we would be back in Sweden. He accepted and asked for more.'

The father exercised his right of appeal to the Court of Appeal in Sweden. The appeal was heard on 22 July 1992. The mother did not attend the hearing but was again represented. The Court of Appeal gave interim custody of B to the father. I quote from the English translation of the order at p 16 of our bundle:

'From the investigation in the case it appears that [the father] is the one of the parents which at present seems to have the best qualifications to make good home conditions for B. Furthermore it appears that [the mother] during a relatively long time has been in a place unknown to [the father] without taking sufficient measures in order to inform him where she and B were staying. [The mother] has thereby made it impossible for [the father] to exercise the right of intercourse with the daughter. In the light hereof it appears to be the best for B that [the father] is provisionally entrusted with the custody of her. The suspicions of [the father's] sexual excesses against the daughter stated by [the mother] does not lead to another

judgment taking into consideration that a preliminary hearing hereabout has been laid down after a relatively short time.'

The mother's reaction to that order of the Court of Appeal is described by her in her affidavit as follows (p 29 of the bundle): '23. [The father] also appealed further to the High Court and the appeal was heard on 22 July 1992. My Swedish lawyer said it was not necessary to give 10 days' visiting access because [the father] had appealed. However we were planning to return to Sweden. It was not necessary for either the parties or the lawyers to attend the appeal which was decided on the papers. In any event I was medically unfit to travel to Sweden and had provided my Swedish lawyer with a medical report to that effect.

24. The appeal was allowed and he was granted interim custody of B. I had previously said that I would return in July 1992 to await the final hearing and [the father] could have 10 consecutive days' visiting access with B to make up for any time he had missed while I had been in England.

25. There is no appeal against the decision made on 22 July 1992. I felt that I could not hand B over to [the father]: it would not be safe and in no way in her interests to do so. Accordingly I decided to stay in England.

26. I feel that I cannot return B to Sweden to be placed in the custody of her father. When I came here it was not to escape the Swedish law. We had return tickets. Although they ran out we have made no application for immigration status for myself or B as [my husband's] dependants.'

The father, through his Swedish lawyer, then initiated a request for assistance under the Hague Convention. I refer to the formal request at pp 13 and 14 of our bundle. It is headed 'Ministry of Foreign Affairs. Application for Assistance under the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children'. Then comes 'Identity of Child and Parents'. Set out under heading 3, 'Factual or Legal Grounds Justifying the Request', is:

'Decision of Svea Court of Appeal dated 1992-07-22 . . . that [the father] shall have the custody of B.'

Then under heading 4, 'Civil Proceedings in Progress':

'The main session is to take place in Eskilstuna, probably later this autumn.'

Heading 6, 'Time, Place, Date and Circumstances of the Removal or Retention':

'[The mother] had the custody of B when she went to England in May 1992. 10 August 1992 she declared that she refuses to let B move to [the father] in spite of the decision of Svea Court of Appeal.'

Under para 7, which is headed 'Child is to be returned to', it says 'child's father', and then:

'Proposed arrangements for the return of the child:

[The father] is prepared to fly to England to bring his daughter back to Sweden.'

That request was communicated to the Lord Chancellor's Department, the Lord Chancellor having the functions of the Central Authority under the Hague Convention -- see s 3(1) of the Child Abduction and Custody Act 1985. The Lord Chancellor's Department then appointed solicitors to act for the father and they on his behalf issued an originating

summons in the High Court, that being the appropriate procedure under Part VI of the Family Proceedings Rules 1991. Again I refer in the bundle to the form of the originating summons under which the grounds of this application are stated as being:

'(1) The child B was brought to England while in the custody of the defendant in May 1992. There is an order of the Svea Court of Appeal made on 22 July 1992 which order gives interim legal and physical custody of the said child to the plaintiff father. The defendant mother has refused to return the said child to the custody of the plaintiff despite knowledge of the order made by the Svea Court of Appeal.

(2) Accordingly this is a wrongful retention of the said child under Art 3 of the Hague Convention on the Civil Aspects of Child Abduction. Sweden entered into the Convention on 1 June 1989 and therefore, the case falls within the Convention.

(3) Prior to the child's wrongful retention in England, she was habitually resident in Sweden.'

Interlocutory proceedings were then necessary to locate the mother in England, and she was found staying in bed and breakfast accommodation in Hampshire on 2 October 1992. There was a directions hearing before Ward J on 14 October 1992, and he adjourned the matter for hearing on 27 October 1992. That dealing came on before Rattee J.

At that hearing a preliminary point was taken, namely what was B's habitual residence immediately before the mother retained her in England after the order of the Swedish Court of Appeal of 22 July 1992? The relevance of this is due to Art 3 of the Hague Convention to which I now refer, it being set out in Sch 1 to the Child Abduction and Custody Act 1985. Article 3 provides:

'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; and

(b) . . .

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 12 is as follows:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'

I now refer to the decision of the House of Lords in the well-known case of Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442 and in particular to the speech of Lord Brandon of Oakbrook at pp 578F and 454B respectively. He says:

'The first point is that the expression "habitually resident", as used in Art 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, this situation with regard to habitual residence will necessarily be the same as hers.'

J in that case was a very young child.

In the light of the mother's evidence that until she learned of the decision of the Court of Appeal in Sweden she had intended to return to Sweden with B and that her prolonged stay in England until then had been because of her ill-health, I should have thought there was little room for doubt that the mother, and B, were on 22 July 1992 and indeed until 7 August 1992 when she learned of the order made by the Court of Appeal in Sweden habitually resident in Sweden. Until then their residence in England was only intended to be temporary.

However, the father has always believed that the mother did not intend to return when she left Sweden with B on 2 May 1992. He says in his affidavit at para 15 (bundle p 67):

'In respect to para 26 I do not believe that the defendant had any intention of returning to Sweden. It is clear from her affidavit that her husband has closed down his company in Sweden and they have stored up their furniture in Gothenburg. Clearly she was not telling the truth when she told the court in Eskilstuna that she was going to England merely for the purposes of meeting his parents.'

To this the mother replied in a further affidavit (p 97 of our bundle) to which I refer. It is headed 'Para 15' by reference to the father's affidavit, and she says:

'I always intended to return to Sweden after the holiday and we had return tickets. Our furniture was in storage in Gothenburg because our flat was a company let and part of [my husband's] contract. The company for which he was working went bankrupt and therefore it seemed a natural break for a holiday. We intended to look for another fiat upon our return. Closing down [my husband's] company has involved his not being there to obtain contracts.'

That particular affidavit by the mother concludes on p 99 of our bundle with the following paragraphs:

'18. I feel that it would not be in B's best interest to uproot her now to live with her father pending the final hearing in Sweden. I am unable to travel due to my condition and refer to the medical report of my doctor.

19. I feel that B should remain with me here pending the final hearing in Sweden.'

I now refer to the judgment of Rattee J, and I start at p 9H of the transcript:

'The father submits by his counsel that, notwithstanding his assertion, in effect that the mother was not habitually resident in Sweden after she came to England because she had no intention of returning there, I should grant his application under the Hague Convention because, says he, on the mother's evidence of her intention she was habitually resident in Sweden, at least until after the appellate court in Sweden made the custody order in favour of the father.

In my judgment, the father cannot be allowed to adopt that stance in this court. It seems to me that it amounts to this. The father asserts in his evidence on oath that the mother, he believes, was and is lying when she asserts an intention to return to Sweden after coming to this country on 2 May 1992. That assertion by the father is factually inconsistent, in my judgment, for the reasons I have explained with a contention that the mother remained habitually resident in Sweden at any time after 2 May 1992 when she came to England. The father says that the mother in her evidence as to her intentions is lying but seeks to obtain from this court an order which can only properly be made on the assumption that his, the father's, assertion that the mother is lying is untrue and that what he has described as the mother's lies are the truth. When I suggested some difficulty in this position to Mr Setright, counsel appearing on behalf of the father, he quite properly took instructions from his client through an interpreter (his client being present in court) and I was told that the effect of those instructions was that the father adhered to the view expressed in his affidavit in the passage which I have read. He adhered, namely, to the assertion that he did not believe that the mother ever intended when she came to England to return to Sweden.

In my judgment, as I have said, it is not open to the father in this litigation -- any more than it is open to any party in any litigation -- to seek an order based on a state of facts denied by him in his own case. Accordingly, in my judgment, it would be quite inappropriate for me to accede to the father's application under the 1985 Act because, in essence, to do so would involve deciding that circumstances existed to satisfy the test in Art 3, of the Convention, which is a prerequisite to the success of the father s application, when the father's own evidence denies the existence of those circumstances. Accordingly I think it is impossible, for me properly to make any order on the originating summons.'

In fact the judge dismissed the originating summons.

In my judgment this manifests a total misconception of the function of the court in applications such as this. Under Art 12 of the Hague Convention the court is bound to order the return of a child who has been wrongfully removed or retained in the terms of Art 3 unless one of the exceptions under Art 13 is established. The fact that the assistance of the court is invoked by the procedure contained in Part VI of the Family Proceedings Rules 1991 does not make this ordinary adversarial litigation between the father and the mother as the judge seems to have thought. Not merely is there a statutory duty to apply the Convention if the necessary facts are present, but in applying the Convention the court is concerned with the interests of the child in question and of abducted children generally.

Mr Spon-Smith for the mother has made a valiant attempt to uphold the judge's decision on this preliminary point. In his skeleton argument he makes as his first point:

'1. The respondent [mother] adopts the reasoning of the learned judge.'

For the reasons I have already endeavoured to give, I do not accept that reasoning. Then the skeleton goes on:

'Alternatively [the mother] contends as follows.

2. The application was brought by the appellant [father]. The legal and evidential burden of establishing the applicability of the Hague Convention rests on the father.'

Then I go straight to para 9:

'Applications under the Hague Convention constitute inter partes, adversarial (not inquisitorial) proceedings. If the evidence adduced on behalf of an applicant does not make out a prima facie case the respondent's evidence does not fall to be considered and the application must fail.'

In my judgment that is also wrong. This is not either adversarial or inquisitorial litigation. The litigation is sui generis. In my judgment the evidence of the mother, which is wholly consistent with the surrounding circumstances (for examples the return tickets and the offer of access in Sweden), and which is, as it turns out, against her own interests on this point, is clear. Until she changed her mind in August 1992 she was not intending to stay permanently in this country and she and B remained habitually resident in Sweden. The fact that the father may not have believed her is neither here nor there. Indeed, I would add that the probability is that both are speaking the truth in that the father genuinely believed that the mother had come here with the intention of staying here and the mother, speaking on oath as she was, was telling the truth as she saw it.

Accordingly I would allow this appeal, discharge that part of the judge's order of 28 October 1992 whereby he dismissed the originating summons, and remit the case to another judge of the Family Division for an early hearing on the issue which the mother seeks to raise, namely whether there are grounds under Art 13 of the Hague Convention which would entitle the court to refuse an order for the immediate return of B and, if so, whether the court should in the exercise of its discretion refuse to order her immediate return to Sweden. I would, if so requested, also be minded to include in our order a declaration that B was habitually resident in Sweden immediately before her wrongful retention by her mother in this country.

MANN LJ: I agree, and add some words of my own because we are differing from the judge.

The UK and Sweden are contracting States under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The provisions of that Convention, as set out in Sch 1 to the Child Abduction and Custody Act 1985, have the force of law in the UK. Amongst the provisions which are set out are Arts 3 and 12 which my Lord has read. Article 12 imposes an obligation upon the judicial authorities of a contracting State, which in England means the High Court, to order the return of a child forthwith where that child has been wrongfully retained in terms of Art 3.

The obligation imposed on the court under Art 12 makes it necessary in any case where a Convention application is made for the High Court to determine whether or not a retention, as here alleged, is a retention in terms of Art 3. That necessitates an inquiry as to whether or not the terms of Art 3 are met. One of those terms is as to whether the right of custody which is asserted to have been breached arose under the law of the State in which the child was habitually resident immediately prior to the retention. The inquiry into habitual residence must be made by the court by reference to the evidence before it. The judge's treatment of the matter has been recited by my Lord. I also regard the judge's treatment as betraying a self-misdirection. The misdirection fails to appreciate that there is an obligation upon the court imposed by Art 12 in the circumstances to which it is applicable and that accordingly and consequentially there is an obligation to determine, amongst other things, habitual

residence upon the evidence before the court. In making that determination I regard rules relating to the onus of proof as inapposite. Their mischievous propensity is amply demonstrated by the circumstances of this case.

Upon the evidence as a whole, as my Lord has observed, there is only one possible conclusion as to the habitual residence of the child B at the material time. Upon the respondent's approach, the result would be as achieved by the judge, and would involve a breach of the UK's treaty obligations and of the duty imposed upon the courts by the domestic statute.

For those reasons, as well as those given by my Lord, I also would allow his appeal.

LEGGATT LJ: Since it is for the reasons given by my brethren that in my judgment the judge came to a palpably wrong conclusion, I shall refrain from adding anything of my own save to say that for the reasons given by my Lord I agree that the order should go which he has proposed.

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