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[25/03/1999; High Court (England); First Instance]
Re D. (Abduction: Custody Rights) [1999] 2 FLR 626

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

25 March 1999

Sir Stephen Brown P.

In the Matter of re D.

Counsel: Martin O'Dwyer for the father; Henry Setright for the mother

SIR STEPHEN BROWN P: The court has before it an originating summons issued pursuant to the provisions of the Child Abduction and Custody Act 1985 (enacting the Hague Convention) by a father in Zimbabwe who seeks the return to Zimbabwe of his three children whom he alleges have been wrongfully removed from the jurisdiction of Zimbabwe to the UK by his wife, the mother of the children. The children are: A, born on 4 March 1989; R, born on 22 August 1991; and J, born on 5 May 1995.

The mother and father were married in Bulawayo in July 1988 and they have English connections, in particular the mother. The mother's own mother resided throughout in England and sadly has recently died. The parties lived in Zimbabwe, in Bulawayo, and there is no dispute about the fact that Zimbabwe is the 'habitual residence' of all three children in the terms of the Hague Convention. In point of fact, the children were all born in England but that is not a relevant factor for the purposes of the Hague Convention, which is focused, of course, on habitual residence.

The allegation is that in December 1998 the wife took the children by stealth from the matrimonial home and brought them via South Africa to England. She did that in December 1998, arriving in London with the children on 13 December 1998. In fact the marriage had become unhappy and there were divorce proceedings in being. The wife had issued a divorce petition on 5 November 1998 in the High Court in Zimbabwe, seeking the dissolution of the marriage and praying for the custody of the children.

The father in his turn seeks the dissolution of the marriage, which he acknowledges has irretrievably broken down, on the basis of matrimonial allegations which he makes against the wife, and he, too, seeks an order for the custody of the children. Those divorce proceedings are still pending in the High Court in Zimbabwe; that court is seized of them. Because of the relationship between the wife and the husband, the mother and father of

these children, what might be termed interlocutory proceedings had been embarked upon. The wife complained of an assault and she obtained an order which would be equivalent to a 'non-molestation' order in this jurisdiction. The father denies all allegations of assault or ill-treatment and in fact, despite the existence of a 'provisional protection' order, as it is termed, issued by the High Court in Zimbabwe, the wife returned to the matrimonial home in Bulawayo and was indeed living there, so it seems, until 9 December 1998.

On 9 December 1998 it is not in dispute that she took the children without the father's consent or knowledge from the matrimonial home, over the garden wall, as it is stated, with the assistance of a neighbour, and having made prior preparation to go to England this is where she brought them. She had planned it, obtaining a new passport from the British High Commission in Harare, and indeed seeking certain legal advice which persuaded her that she was legally entitled to embark upon the course of action which she in fact followed.

After the mother had taken the children without his knowledge, and in the absence of knowing where they were, the father obtained ex parte an order from the High Court in Zimbabwe restraining the mother from removing the children from the jurisdiction; that was on 11 December 1998. The order was not in fact served on the mother because her whereabouts had not then been ascertained. Nevertheless it was an order which was in being. In fact the wife flew to London apparently on 13 December 1998, having travelled to South Africa beforehand.

The husband did not in fact know where the wife was. She was eventually located at her mother's address in England and, despite her resistance, a process server was able to serve the originating summons upon her, I need not dwell further upon that because both the mother and the father are actually now present in court and the father has had some contact with the children.

The point has been raised by the mother that in law the children had not been unlawfully removed from Zimbabwe within the meaning of Art 3 of the Hague Convention. Article 3 provides that the removal or retention of a child is 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) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for 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 judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

On the plain facts which I have briefly recited, it would appear to be beyond doubt that there was here an unlawful or wrongful removal of the children from Zimbabwe. I say that because it is not disputed that when the children were taken from the matrimonial home by stealth on 9 December 1998, without the husband's knowledge or consent, they were taken from the home where they were then residing with both their parents, who were still married, although there were divorce proceedings pending. They were taken quite deliberately by the mother without her husband's consent out of the jurisdiction of Zimbabwe and brought to this country.

An ingenious submission has been made on behalf of the mother. It has been made on the

basis of an opinion of a professor of law in Zimbabwe, Welshman Ncube, who has sworn an affidavit which has arrived by fax today, dated 24 March 1999, in which the deponent states that he is a professor of family law at the Faculty of Law at the University of Zimbabwe where he specialised in family law, child law and human rights courses; further that he has lectured and written extensively since joining academia in 1984. He is the author, he says, of a book on family law in Zimbabwe and is also an advocate of the High Court of Zimbabwe. In para 5 of his affidavit he states:

'It is my considered opinion that contrary to Timothy Cherry's opinion [Timothy Cherry is an advocate who has given an opinion favourable to the plaintiff father] s 5(1) of the Guardianship of Minors Act [that is a statute of Zimbabwe] . . . is the key provision on which this case turns. For clarity's sake I quote in full that provision:

"Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor child shall have sole custody of that minor until an order regulating the custody of that minor is made under section four of this section or by a superior court . . .' (My emphasis.)

He says that the meaning of this provision is plain:

'As soon as the parents of a minor child commence to live apart the sole custody of the minor child is automatically vested in the mother of the child. Accordingly, even on [the husband's] version of events [the mother] would have acquired, by operation of law, the sole custody of the three children the moment she left the matrimonial home regardless of whether she had left secretly or openly and regardless of whether the children were "smuggled" over the wall to a neighbour's house. The manner of their departure from the matrimonial home is irrelevant. She was entitled to depart therefrom with them because upon separation custody is vested in her.'

That to my mind is a remarkable proposition. If that could be made the justification for taking children from the matrimonial home without the consent of the father, who had been exercising rights of custody and would have been continuing to exercise them unless the children had been removed, it would be a remarkable state of affairs. It would of course completely negative the effect of the Child Abduction and Custody Act 1985.

The Hague Convention was signed and then ratified by Zimbabwe in 1995 and was incorporated by statute, the Child Abduction Act, in 1995 into the law of Zimbabwe. The advocate who has filed an opinion on behalf of the plaintiff father disputes the version of the law which I have quoted from the affidavit of the professor called upon to assist the mother.

I do not of course profess to determine matters of Zimbabwean law. It is quite apparent however that s 5 of the Guardianship of Minors Act, to which reference has been made, is providing for an interim situation where parties have commenced to live apart. I very seriously question as a matter of fact in this case whether the parties had ever 'commenced to live apart'. What had happened was that the mother took the children by stealth from the matrimonial home and from the father's practical joint custody without consent. From that very moment she was in my judgment in prospective breach of Art 3 of the Hague Convention because it was the beginning of her plan to take the children out of the jurisdiction. Counsel for the father has described it as a 'seamless removal'; it was one course of action and it was the vital moment when the abduction took place.

I have no doubt that, despite the ingenious arguments which have been advanced to the court, it was a wrongful removal within the meaning of the Hague Convention. It has to be

remembered that when considering the application of the Hague Convention in this jurisdiction, the court has to deal with references to the Convention as applied by the English courts and in this regard there is authority, in particular the case of *Re F (A Minor) (Child Abduction: Rights of Custody Abroad)* [1995] Fam 224, sub nom *Re (Child Abduction: Risk if Returned)* [1995] 2 FLR 31. The facts were somewhat different but at 229E and 34G respectively, Butler-Sloss LJ cited the provisions of Art 3 of the Hague Convention and continued:

'Article 5 defines rights of custody to include: "rights related to the care of the person of the child and, in particular, the right to determine the child's place of residence . . ."'

And then:

'It is the duty of the court to construe the Convention in a purposive way and to make the Convention work.

It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possesses "rights of custody", to remove the child from the jurisdiction of the child's habitual residence. "Rights of custody" within the Convention are broader than an order of the court and parents have rights in respect of their children without the need to have them declared by the court or defined by court order. These rights under the Convention have been liberally interpreted in English law. Waite LJ said in *Re B (A Minor) (Abduction)* [1994] 2 FLR 249, 260:

"The purposes of the Hague Convention were, in part at least, humanitarian. 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 or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible."

It is significant that the Child Abduction Act in Zimbabwe was passed in 1995. The Guardianship of Minors Act to which reference has been made came into effect at the end of June 1961 and seems to me to have been designed to provide for an interim situation. But there is a further aspect to this particular case. As I have already observed, the father took the step of seeking an order from the High Court in Zimbabwe to restrain the mother from removing the children from the jurisdiction. Although it was not served, the order had been made and was in being. Furthermore, there was still in being the divorce suit of which the court was already seized in which the mother was seeking an order for custody of the children and the father was himself resisting that application and seeking an order in his own right.

There was a further development on 25 January 1999. The High Court in Zimbabwe made a declaration of wrongful removal under Art 15 of the Hague Convention. It is correct to say that that was obtained ex parte and was not made in response to any request from the UK. It is not, of course, binding.

I do not, in coming to my conclusion, rely upon it as concluding the matter. I do not seek to interpret Zimbabwean law. I seek to apply the law relating to the Hague Convention in accordance with the way in which it is applied in this jurisdiction and I have no doubt that this removal was a 'wrongful removal'. I doubt (and I cannot say more than that) very much

the accuracy and appropriateness of the opinion given by the learned professor of law in Zimbabwe in the context of the International Convention.

It must be borne in mind that the Hague Convention is designed to provide a summary procedure in order to return children to the jurisdiction of their habitual residence from which they have been wrongfully removed. The applications under the Hague Convention do not purport to give ground for investigating the rights and wrongs of a marital situation or indeed the examination of the welfare of the children. It is a procedure which can secure the return of children to the appropriate jurisdiction. It is significant in this instance that the question of the children's future is already the subject of proceedings pending in the High Court of Zimbabwe, that is to say the cross-custody applications in the divorce proceedings.

For that reason there is merit, too, in considering the views expressed by Hale J in the case of Re W (Abduction: Father's Rights) [1999] Fam 1, 15 sub nom Re W; Re B (Child Abduction: Unmarried Father) [1998] 2 FLR 146, 160, with the effect I believe that in this case the High Court of Zimbabwe could also be considered to have custody rights relating to the children. I prefer, however, to base my decision upon the fact that there was quite plainly a wrongful removal from the habitual residence of the children. Accordingly, Art 12 has effect and the court is under a mandatory obligation to order the return of the children to Zimbabwe.

No plea is made in opposition to that situation; no matters arise which are capable of bringing into effect the 'provisos' to be found in Art 13; accordingly I have no hesitation in making the order for the return of the children.

Counsel for the father and for the mother have very sensibly and helpfully come to an agreement as to how and in what circumstances that should be effected. The father is prepared to give undertakings which will assist the mother's position on return, for she will accompany the children; these have been recorded and the court will acknowledge and accept those undertakings. Subject to those matters, the order will be made for the return forthwith.

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