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[28/07/1997; Supreme Court of Ireland; Superior Appellate Court]
B.B. v. J.B. [1998] 1 ILRM 136; sub nom B. v. B. (Child Abduction) [1998] 1 IR 299

THE SUPREME COURT

1996/344

28 July 1997

Denham, Keane, Lynch JJ

BETWEEN: B.B., Plaintiff and J.B., Defendant

DENHAM J: This is an appeal by the plaintiff/appellant BB (hereinafter referred to as the appellant) mother of the child VB against an order of the High Court made on 23 October, 1996 refusing an application to return the child VB to the jurisdiction of the Courts of England and Wales.

The High Court.

An application was brought under the Child Abduction and Enforcement of Custody Orders Act, 1991 which gives the Hague Convention force of law in Ireland. At issue was the removal of the child VB from England to Ireland.

The Learned High Court Judge assessed the evidence, including oral evidence from the appellant and the respondent. There was a dispute on certain matters which he had to resolve. He held that both parties were essentially seeking to tell the truth but that the gloss they put on their evidence was one which may have been brought about by hindsight. He found the facts as follows. The parties had lived together from 1989. They married in 1993 and the child of their marriage VB was born on 19 August, 1994. In 1995 the appellant had an attachment with her next door neighbour and left the matrimonial home for four weeks. Neither party wished the marriage to break up and so they moved to Ireland in November, 1995 to see if they could make the marriage succeed. The appellant is a citizen of England and Wales and the respondent a citizen of Ireland. They lived in County Wexford from November, 1995 to February, 1996, leaving Ireland at the appellant's request. She could not settle in County Wexford and wished to return to urban life in England. They returned to England as a family, the respondent expecting them to continue to try and make a go of the marriage.

Within weeks of their return to England the affair between the appellant and the neighbour reasserted itself. The Learned Trial Judge held that "from then on it was pretty clear that the marriage was doomed". In this situation the respondent indicated that he wanted to bring the child to Ireland.

Habitual Residence.

The Learned Trial Judge had to determine the habitual residence of the child. After reciting the movements of the parties between England and Ireland he held:

"In my view, habitual residence either stayed in England or reverted to England . . . I have no doubt whatsoever that the habitual residence of the parties on 24/25 May, 1996 was England".

There was no appeal against this finding.

Consent.

The issue of consent was the kernel of the High Court action and on this issue the Learned Trial Judge held that the appellant had given consent to the removal of the child from England to Ireland. He came to this determination after hearing the evidence of the parties and considering the documents. He held that the parties had discussed that the respondent would travel to Ireland with the child VB. He considered that the documents further explained the nature of the agreement.

Documents.

The short document stated:

"I give [JB] custody of our daughter [VB] with the understanding that I can have access whenever possible.

Signed Mrs [B]".

The Learned Trial Judge described this as the document giving the respondent custody of the minor VB. A letter written subsequently on the same day by the appellant stated:

"Dear [JB],

I did not want you to leave without me saying these things, I no [sic] at the moment you don't like me very much and I can't say I blame you. I just hope one day you will learn to forgive and forget. We had seven years together and some of these were happy. I still want to remain your friend. After all we have [VB] to consider. I hope you will be happy and meet the right woman for you. I'm sure you will. We all deserve the best things in life. Never let [VB] forget how much I love her. I hope you will let me see her as often as possible. If things don't work out for you in Ireland I hope you will come back and [VB] and let me help you as a friend. I will miss you despite what you think you were still apart of my life.

I'll write of now. All I can say is take care of yourself and [VB]. Let me no [sic] were you and good luck always.

[BB]"

The Learned Trial Judge held:

"So I am left with a situation in which it seems to me that at the time of the break up and the departure of the [respondent] and the child for Ireland, that although the parties were distressed and I accept that they were, they were distressed not so much at the departure but because the departure was necessary. It has been suggested that irrational behaviour and a fear of the [respondent] made the [appellant] agree to this. I do not think that is so. The parties, from their letters, were not hostile to each other. The wife had wanted the marriage to succeed, that is why she came to Ireland in November, 1995. It was obvious by mid 1996 that nothing

was going to save the marriage. She had an infatuation, love, whatever you wish to call it, for her one time next door neighbour . . . She did not want to hurt the [respondent] but she had hurt him. So in my view the parties have discussed that the [respondent] could come to Ireland with [VB] and that the documents really indicate that and what the nature of the agreement in relation to that was".

On the issue of consent by the appellant to the child being moved to Ireland the Learned Trial Judge held:

"I have dealt with the question of consent and my view is that this was given by the [appellant] and that is quite clear from the letter she wrote. What was arranged in my view was that the father was to take his daughter to Ireland where she hoped [he] would meet someone to take her place and she hoped he would let her see [VB] as often as possible. It is said that the [respondent] is in breach of this part of the arrangement because he did not tell her where he was and he did not let her see [VB]. Unfortunately, the solicitor's letter was sent on the 20 June, 1996 and it became pretty clear that whatever had been arranged was being repudiated. It seems to me from then on that the [respondent] was under the threat of these legal proceedings".

Finally, on the application as a whole the finding was:

"In my view there was no wrongful removal. If there is no wrongful removal then it seems to me that the terms of the Convention do not apply. It seems to me thereafter that the application must fail on that ground.

Of course, both parties remain guardians and either is entitled to apply to the Court for [an] order as to custody, access and the like. This order which I make today refusing the application is an order which is based solely on the terms of the Convention as I see them and is in no way a bar to legal proceedings to establish the future care and control of [VB]. I hope that the parties will, if they cannot come to terms in relation to that, will come before the Court to have the matter dealt with on a firm basis, because it is unsatisfactory that the matter should remain as it is at the moment".

Proceedings in England and Wales.

It is clear from the documents before the Court in this case that on 5 August, 1996 the appellant obtained orders ex parte in the High Court, Family Division, in London in relation to VB which ordered that:

1. The minor do continue to remain Ward of this Honourable Court during her minority or until further order.
2. The proposed respondent [JB] do return the minor [VB] to the jurisdiction of this Honourable Court, namely England and Wales under service of the order forthwith.
3. The father [JB] do have leave to apply on 24 hours notice to the mother's solicitors to discharge or vary this order.
4. The matter be transferred to Birmingham District Registry.

Appeal.

The decision of the Learned High Court in Dublin was appealed to this Court and two matters were argued. First, it was submitted on behalf of the appellant that the Learned Trial Judge

erred in holding that there was no wrongful removal of VB from England, that he had erred in holding that the appellant consented to VB's removal. Secondly, that even if the removal had been with consent that the Learned High Court Judge was in error in not exercising a discretion as to whether the child should be returned to England. The Respondent submitted that there was no wrongful removal and that the Learned Trial Judge was correct in holding that there being no wrongful removal that the terms of the Convention do not apply. But he submitted, if the Court were to determine that even though there was no wrongful removal that there was still a discretion in the High Court then the case should be remitted to the High Court to hear evidence and make a decision in exercise of the said discretion.

Wrongful removal

The issue of whether there was a wrongful removal of the child was grounded on the question as to whether the appellant had consented to the removal of the child to Ireland. This Court did not see or hear the witnesses or observe their manner or demeanour in giving evidence. It is clear that the findings of fact were supported by credible evidence. The issue of consent by the appellant insofar as it was an issue of fact determined on evidence and insofar as it arose from inferences from oral evidence binds this Court: *Hay v O'Grady*, [1992] 1 IR 210. On reviewing the evidence and the circumstances I am satisfied that I am bound by the decision of the High Court on the matter of consent. Consequently the first ground of appeals fails.

Discretion.

The second ground, the discretion of the Court in the absence of a wrongful removal, then arises for decision. Three Articles of the Convention are particularly relevant. They state:

"Article 3.

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) 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 a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 12.

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. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return could expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial . . .

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."

These articles must be applied to the facts of this case.

It having been determined that the appellant consented to the removal of the child it was not wrongful pursuant to Article 3. Thus the mandatory Rule in Article 12 that a child wrongfully removed, where less than a year has elapsed from the date of such wrongful removal, does not apply. The sole issue is whether there is a discretion in the Court, when there has been a consent to removal, as to whether the child is returned to the country of its habitual residence.

Article 13 is drafted in a rather convoluted form. However, it does refer to situations where consent has been given. The relevant words are:

". . . the judicial . . . authority of the requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that --

(a) the person . . . having the care of the person of the child . . . had consented to . . . the removal . . .".

Thus, notwithstanding the mandatory and discretionary powers set out in Article 12 relating to a situation where a child has been wrongfully removed, special situations and defences are established in Article 13. One of these relates to the position where there had been consent to the removal.

This Article must be construed so as not to render it nugatory. It must be capable of applying to both parties in an action. I construe it to mean that the judicial authority is not subject to a mandatory rule in relation to the child if the party opposing the return establishes that the persons having care of the child consented to the removal. If this situation arises the judicial authority is not bound to order the return of the child. Yet the Court, being not bound, has a discretion. It is helpful in construing the Article to name the relevant parties in this action in the words of the Article. It would then read:

'notwithstanding the provisions of the preceding Article, the judicial . . . authority of Ireland is not bound to order the return of VB if the respondent who opposes her return establishes that . . . the appellant had consented to the removal.'

The effect of this is that while the Court is not mandated it has a discretion. Such a discretion is in keeping with the Convention because:

- (a) The Convention stresses that the interests of the children are paramount.
- (b) The Convention desires to secure protection for rights of custody and access.
- (c) The objects of the Convention set out in Article I are to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
- (d) In considering the circumstances referred to in Article 13 ie the consent to the removal, the judicial authority 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: See Article 13, final paragraph. Consequently, the social background of the child must be considered.

Thus it is entirely consistent with the Convention that even if there is no wrongful removal -- but that there is removal -- the rights of custody and access in both the Contracting States are effectively respected.

This discretion has been referred to in case law in England. In *Re A (Minors) (Abduction: Acquiescence)* [1992] 2 FLR 14 at p 21 Balcombe LJ (after referring to situations of wrongful removal or retention) stated:

"It will be seen that the scheme of the Convention is that, where a child has been wrongfully removed or retained under Art 3, then, where the proceedings to recover the child are commenced within a period of less than one year from the date of the wrongful removal or retention, the court of the country to which the child has been taken is under an obligation -- there is no discretion -- to order the immediate return of the child. However, if consent to -- which in the context must mean prior consent -- or subsequent acquiescence in the removal or retention of the child by the other parent is established, then, as it was put in argument, the door is unlocked and the court is not then bound to order the return of the child, but has a discretion whether or not to do so".

At p 28 of the same report Lord Donaldson of Lynton MR stated:

"Let me say at once that I unreservedly accept the vital importance of protecting children from the harmful effects of their being wrongfully removed from their country of habitual residence, usually clandestinely and often in circumstances calculated to cause them harm. This is the mischief which the Act and the Convention, which is scheduled to the Act, set out to address. They do so by providing for automatic return in accordance with Art 12 if the issue arises within 12 months of the wrongful removal or retention and, also later, in that case subject to it not having been demonstrated that the child is, by then, settled in its new environment.

All this demonstrates the agreed international response to a wrongful removal. The child must go back and the status quo ante be restored without further ado. That said, the Convention does itself enter a caveat, which is contained in Article 13. Before I consider whether it applies in this case, it is, I think important to emphasise what is the consequence if it does apply. It is not that the Court will refuse to order the return of the child to its country or jurisdiction of habitual residence. It is not that the Court will assume a wardship or similar jurisdiction over the child and consider what order should be made as if the child had never been wrongfully removed or retained. The consequence is only that the Court is no longer bound to order the return of the child, but has a judicial discretion whether or not to do so, that discretion being exercised in the context of the approach of the Convention".

Article 13 was also analysed in *Re C (Abduction: Consent)* [1996] 1 FLR 414 at p 417 where Holman J states:

"The Convention clearly intends that once it has been shown that:

- (i) there has been a removal from or retention away from the State of habitual residence; and
- (ii) that is prima facie in breach of rights of custody, and
- (iii) consent is put in issue, then the onus shifts firmly onto the person or body which opposes the return of the child to prove that the removal or retention was by consent. Further, even if that is proved the Court still has, and must exercise, a discretion".

I agree with the analysis of the Convention in these cases. This approach has also been adopted in Ireland. The discretion under Article 13 of the Hague Convention was exercised by Morris J in *NK v JK*, unreported judgment of the High Court, 25 August, 1994, where, having found that removal of children from the United Kingdom by the father had been with the consent of the mother and that there had been acquiescence to conditions as to access, and accordingly that he was not bound pursuant to Article 12 to order the return of the children to the United Kingdom, being their habitual residence, he held that he had a discretion in the matter. He stated:

"The issue being how I should exercise my discretion, either to order their return to the United Kingdom or alternatively direct that they remain in this jurisdiction".

Counsel for the respondent, Mr Grogan, SC, made reference to the recently reported decision of the English High Court, Family Division, in *Re O (Abduction: Consent and Acquiescence)* 1997 1 FLR 924. Bennett J referred to the analysis of the issue of consent in *Re C (Abduction: Consent)* 1996 1 FLR 414, and to the judgment of Holman J, part of which has been cited in this judgment previously. He stated (at p 940):

"If Holman J in *Re C* is stating a principle that consent must always (my emphasis) come within Article 13(a), then I respectfully disagree with him. On the facts of *Re C*, the matter did fall to be dealt with under Article 13(a)."

The reasoning of Bennett J was:

"In my judgment, whether 'consent' comes within Article 3 or Article 13(a) will depend on the facts of each case. If the 'non-removing' parent asserts or effectively has to concede that on the face of it he gave his consent, but asserts that it is vitiated by deceit or threats or some other vitiating factor, which he must raise in order to establish that his consent was no true consent, then the matter falls to be dealt with under Article 3. If, on the other hand, the very fact of consent is in issue, as it was in *Re C*, then the matter comes within Article 13(a), and the burden falls upon the person who asserts consent to prove it."

I disagree with this analysis and prefer that of Balcombe LJ and Lord Donaldson of Lymington MR. In *Re A (Minors) (Abduction: Acquiescence)* previously quoted. Article 13 is an exception, which is itself for the benefit of children; their welfare is the paramount consideration. The essence of the exceptions is to give judges discretion. Article 13 is not limited by Article 3 or 12. It is an article "notwithstanding" Article 12. It is an article enabling the fundamental concepts of the Convention to be achieved through the discretion of the Courts or administrative authority where relevant.

Also, in this case the "very fact of consent" was in issue so on that ground also I would not apply In Re O. I am satisfied that Article 13 is appropriate and relevant to this case.

Decision.

In this case the child VB was removed from her place of habitual residence, prima facie that is a breach of the rights of custody of the appellant. The respondent raised the matter of consent. The burden shifted to him on that issue. He had to prove the removal was by consent. There was credible evidence, oral evidence as well as documentary, that the consent was real, clear and cogent. The Learned Trial Judge came to a decision which was open to him on the evidence.

However, he then fell into error of law. He still had a discretion under Article 13 of the Convention which he should have exercised. He did not. Consequently, this matter should be remitted to the High Court for it to exercise a discretion as to whether VB should be returned to England. This exercise in discretion is a matter of balance in which the Court should apply factors relevant under the Hague Convention.

Factors.

Factors to be considered include:

(1) The habitual residence of the child at the time of the removal.

(2) The law relevant to her custody and access.

These two first factors raise the issue of the comparative suitability of the competing jurisdictions: whether the decisions as to the best interest of the child should be taken in an English or Irish Court: in light of the Hague Convention.

(3) The overall policy of the Convention and its objective to secure protection for rights of access. In this later regard the fact that the mother of a two year old girl has not had access other than on the the Court hearing of the child is a relevant consideration, though not decisive on its own.

(4) The object of the Convention to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

(5) The circumstances of the child, information relating to the social background of the child, as stated in the final paragraph of Article 13 of the Hague Convention.

(6) The nature of consent of the appellant. Was it consent to the removal of the child from England for some time or in effect a waiver of custody of the child until she was 16? In this regard the circumstances of the making of the consent are relevant.

(7) The litigation in England and the decision of 5 August, 1996 by the English High Court, Family Division, that VB by a Ward of Court, that the respondent return the child to that jurisdiction, and that VB reside with the appellant.

(8) The matter of undertakings, which are settled law in this jurisdiction, especially in relation to very young children.

Conclusion.

I would allow the appeal.

The Learned Trial Judge erred in stating that if there is no wrongful removal that the terms of the Convention do not apply and that the application must fail on this ground. The Court has a discretion under Article 13. The matter should be remitted to the High Court to exercise that discretion. The factors to be considered by the High Court include those recited in this judgment.

There has been a very considerable delay in the hearing of this appeal which is most regrettable. It is not the fault of the parties. However, to aid the Court in listing expeditiously cases arising under the Hague Convention Counsel have a duty, and are requested, to bring all such cases to the attention of the Court at as early a date as possible. This means that an application should be made in this matter immediately by Counsel to the President of the High Court.

KEANE J: The facts of this matter are fully set out in the judgment of Denham J.

In elucidating the complex provisions of the Convention which are under consideration, some assistance can be derived from the travaux preparatoires published by the Hague Conference on Private International Law following the signing of the Convention on the Civil Aspects of International Child Abduction (hereafter "the Convention"). They are to be found in Volume III of the Actes et Documents de la Quatorzieme session published by the Permanent Bureau of the Conference in 1982. (It will be recalled that in *Bourke v Attorney General* [1972] IR 36, O'Dalaigh CJ said that it was "a valid and proper approach" to look at such documents with a view to interpreting legislation based on an international convention.)

Article 12 of the preliminary draft convention adopted by the Special Commission at The Hague was in different terms. It provided that:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person who has removed or retained the child establishes that:

"(a) At the time of the alleged breach the Applicant was not actually exercising the custody rights or acting in good faith;

(b) There is a substantial risk that the return would expose the child to physical and psychological harm or otherwise place the child in an intolerable situation . . ." [Emphasis supplied]

[Vol III, p 168]

It appears from the minutes of the working sessions that a number of the delegates were concerned by the vagueness of the exemption apparently being afforded where the Applicant was not "acting in good faith". The United States, in their comment on this draft, suggested an alternative version, ie

"at the time of the alleged breach the person who removed or retained the child had in effect assumed custody of the child for an unspecified period with the consent or acquiescence of the applicant." [Vol III, pp 242/3]

The comment was made on their behalf that the clause, as drafted, "provides an escape clause of exceedingly broad dimensions".

It was against that background that Article 13(a) in its present form came into being. In the explanatory report by Ms Elisa Perez-Vera which accompanied the text of the Convention as ultimately signed, the following appears at para 113:

"In the first part of this report we commented at length upon the reasons for, the origins and scope of the exceptions contained in the articles concerned, (Articles 13 and 20). We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasise that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion -- and does not impose upon them a duty -- to refuse to return a child in certain circumstances." [Vol III, p 460]

That was also the view taken by the Law Reform Commission in their Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC12 [1985]). The Report says at p 12:

"The exceptions allowed in this article (Article 13) and that in Article 12 relating to children who have settled in a new environment are permissive, not mandatory. Even if the party opposing the return of the child establishes that the case comes within one of these exceptions, the Convention in Article 18 allows that the judicial or administrative authority of the requested State may still be permitted to order that the child be returned."

Article 18 -- which was not cited in the arguments before us and which is not referred to in the English authorities discussed by Denham J -- says

"the provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

The observations of the Law Reform Commission on this matter are of considerable persuasive authority, since the President of the Commission at that time was Mr Justice Walsh, who was also the Irish delegate to the Hague Conference which led to the signing of the Convention.

As the travaux préparatoires, the Report of the Law Reform Commission and Article 18 were not referred to, I would be reluctant to ground my judgment on them in the absence of argument. However, altogether apart from the provisions of Article 18, I think that the inclusion of the words "or had consented to . . . the removal" and the opening words "the judicial . . . authority . . . is not bound to order the return of the child" are consistent, and only consistent, with the vesting in the court of a discretion, even where the removal has been with the consent of the dispossessed parent. I agree with Denham J that the law is correctly stated in the English authorities to which she has referred and that we should not follow the decision suggesting a somewhat different approach in *Re: O* [1997] 1 FLR 924. I also agree with the analysis of the relevant provisions of the Convention contained in the judgment which will be delivered by Lynch J.

I am also satisfied that the finding of fact by the learned High Court judge that the consent was fully and freely given by the Applicant cannot be set aside by this court. I would accordingly agree with the order proposed by Denham J and with her statement of the factors that should be taken into account by the High Court when exercising the discretion.

LYNCH J: I am in agreement with the judgment of the President of the Court Denham J, but I would like to add some observations of my own regarding the apparent conflict between Article 3 and Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction.

I take the example of one parent and one young child living together in England which is the country of habitual residence of the child. The other parent deserted the family five years before and has had no contact whatever since then with the parent or child who have no knowledge of his/her whereabouts.

The parent gets an opportunity of good employment in Ireland and accordingly comes to this State with the child and takes up residence and the employment in this State both of which appear to be on a long term basis. The deserting parent hears of this change of residence by the parent and child and brings proceedings within 12 months under the Convention claiming the return of the child to England.

Article 3 of the Convention 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) 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 subparagraph (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."

In the example which I have taken it is clear that there has been a removal of the child from its country of habitual residence. It is equally clear however that that removal is not wrongful because although it may be in breach of rights of custody of the deserting parent, that parent was not at the time exercising those rights of custody either jointly or alone.

In these circumstances it would appear at first sight that the Convention has no application at all because Chapter I in which Article 3 appears is headed "Scope of the Convention" and Article 1 provides as follows:

"The objects of the present Convention are:

(a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State: and

(b) To ensure that rights of custody and of access under the law of the one Contracting State are effectively respected in other Contracting States."

However if one then turns to Chapter III in which Article 13 appears one finds that it is headed "Return of Children". The first Article in this chapter is Article 8 and it makes no reference to wrongful removal or retention. So far as material it provides:

"Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain --

- (a) Information concerning the identity of the Applicant, of the child and of the person alleged to have removed or retained the child:**
- (b) Where available the date of birth of the child:**
- (c) The grounds on which the Applicant's claim for return of the child is based:**
- (d) All available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be."**

Article 12 which is also in Part III deals with cases of wrongful removal and is peremptory in its terms. It provides:

"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 wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The Judicial or Administrative Authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the Judicial or Administrative Authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

Obviously Article 12 has no application to the example which I have taken because the removal of the child in that case was clearly not wrongful. One then considers Article 13 which provides:

"Notwithstanding the provisions of the preceding Article, the Judicial or Administrative Authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention:

or

(b) 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.

The Judicial or Administrative Authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

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."

The first question which arises on Article 13 is whether or not it applies only as an exception to

Article 12. If that were so then Article 13 would only apply when the removal was wrongful. But this cannot be so, because Article 13 envisages a case where "(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention. "In such a case as in the example which I have given the removal is not wrongful within the meaning of Article 3 or Article 12 and therefore Article 13 must apply to removals or retentions which are not wrongful as well as to those which are. Moreover if Article 13 applied only to cases of wrongful removal or retention paragraph (a) of the Article would be largely self-defeating because if the circumstances mentioned there were to apply in any given case then the removal or retention would in general if not always not be wrongful at all and thus the paragraph could not apply.

Paragraph 13 applies where there is a removal or retention of a child from the State of it's habitual residence in breach of rights of custody whether or not those rights were actually being exercised at the time and therefore whether or not the removal or retention is to be considered wrongful. In deciding that because the removal of the child in this case with which this court is concerned was not wrongful (a decision which the learned trial Judge was entitled to make having found consent) the Convention had no application whatsoever to the case the learned trial Judge was mistaken. Therefore he did not deal with the issue which still remains for decision as to what if anything should be done now pursuant to Article 13 of the Convention. These observations are without reference to Article 18 of the Convention to which Keane J has drawn attention.

For the forgoing reasons as I have already mentioned at the outset of this judgment I agree that the matter should be remitted to the High Court.

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