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[06/07/1993; High Court of Ireland; First Instance]
W. v. Ireland [1994] ILRM 126; sub nom A.C.W. v. Ireland [1994] 3 IR 232

THE HIGH COURT

6 July 1993

Keane J.

A.C.W. and N.C.W. (suing by her mother and next friend A.C.W.), Plaintiffs, v. Ireland and The Attorney General, Defendants and M.W., Notice Party [1992 No. 5305P]

Counsel: James O'Reilly S.C. (with him Bronagh O'Hanlon) for the plaintiffs; Aindrias O Caoimh for the defendants; Cormac Corrigan for the notice party; Solicitor for the plaintiffs: Thomas W. Enright; Solicitor for the defendants: Chief State Solicitor; Solicitor for the notice party: Pol O'Murchu.

Keane J.The plaintiffs claim that the provisions of The Child Abduction and Enforcement of Custody Orders Act, 1991, ("the Act of 1991") which give effect in our law to the Hague Convention on the Civil Aspects of International Child Abduction, ("the Convention") are invalid having regard to the provisions of the Constitution.

The facts, insofar as they are not in dispute, can be shortly stated. The first plaintiff was married to the notice party on the 23 February, 1989. The first plaintiff is an Irish citizen and the notice party is a citizen of Morocco. There has been one child of the marriage, the second plaintiff. At all material times, the plaintiffs and the notice party were "habitually resident" in the United Kingdom within the meaning of that expression in the Convention.

Unhappy differences arose between the first plaintiff and the notice party and the former removed the second plaintiff to Ireland. She thereupon instituted proceedings under the Guardianship of Infants Act, 1964, claiming an order appointing her the sole guardian of the second plaintiff and entrusting custody of the second plaintiff to her. The notice party shortly afterwards instituted proceedings under the Act of 1991, seeking an order pursuant to article 12 of the Convention returning the second plaintiff to the United Kingdom. Lavan J. by order dated the 21 July, 1992, stayed the proceedings under the Act of 1964 so as to enable the notice party's claim under the Act of 1991 to be determined.

The proceedings under the Act of 1991 came on for hearing before Morris J. on the 7 August, 1992. He concluded that the notice party had established that he was entitled to an order returning the second plaintiff to the United Kingdom under the provisions of the Act of 1991, but imposed a stay on the order so as to enable the first plaintiff to bring proceedings seeking a declaration that the relevant provisions of the Act of 1991 were invalid having regard to the provisions of the Constitution. (Such a declaration could not have been

granted in those proceedings since the Attorney General was not a party thereto.) The first plaintiff thereupon issued the present proceedings, in which the Attorney General and Ireland are defendants and the husband is a notice party, having been added as such by Morris J., on her own behalf and on behalf of the second plaintiff.

The Act of 1991 is presumed to be valid having regard to the provisions of the Constitution until the contrary is shown. The plaintiffs submit that it is invalid on the following grounds:-

(1)

that it fails to protect and vindicate the personal rights of the second plaintiff as an Irish citizen insofar as it deprives her of an adjudication by an Irish court under the Guardianship of Infants Act, 1964, as to custody and access and thereby fails to ensure that her welfare will be secured in breach of Article 40, section 3;

(2)

that it fails to ensure access to the plaintiffs as Irish citizens to the courts established under the Constitution in breach of Article 40, s. 3 and wrongfully ousts the jurisdiction of those courts in breach of Article 34, section 1;

(3)

that it fails to protect the rights of the family as the primary and natural unit of society and the primary and natural educators of the child in breach of Article 41, s. 1 and Article 41, section 1.

I am satisfied that the plaintiffs have failed to establish that the Act of 1991 is invalid having regard to the provisions of the Constitution on any of these grounds.

The material provisions of the Act of 1991 and the Convention can be shortly summarised.

Section 6, sub-s. 1 of the Act of 1991 provides that:-

"Subject to the provisions of this Part, the . . . Convention shall have the force of law in the State and judicial notice shall be taken of it."

The Convention, the English version of which is set out in the First Schedule, recites that:-

"The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect . . ."

Article 1 provides that:-

"The objects of the . . . 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 one Contracting State are effectively respected in the other Contracting States."

Article 3 provides that:-

"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 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. The Convention shall cease to apply when the child attains the age of 16 years."

Article 12 provides that:-

"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.

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."

Article 13 provides 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, 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 the 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."

Article 20 provides that:-

"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Section 7 of the Act of 1991 provides that:-

"(1) For the purposes of this Part and the . . . Convention the [High] Court shall have jurisdiction to hear and determine applications under that Convention.

(2) For the purposes of such applications the expression "the judicial or administrative authority" where it occurs in the . . . Convention shall be construed as referring to the [High] Court unless the context otherwise requires."

In the proceedings before Morris J., he found that the second plaintiff had been wrongfully removed from the United Kingdom in the terms of article 3. He was also satisfied that the first plaintiff had not established a "grave risk" that the consequences envisaged in art. 13 (b) would follow if an order for the return of the second plaintiff to the United Kingdom were made, but required certain undertakings by the notice party, including an undertaking that he would lodge with his solicitor his passport (in which the second plaintiff was included) to be held by the solicitor pending the outcome of proceedings which it was contemplated would be instituted in the courts of the United Kingdom.

I shall deal first with the submission on behalf of the plaintiffs that the provisions of the Act of 1991 are invalid having regard to the provisions of Article 40, s. 3, sub-s. 1 of the Constitution whereby:-

"The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

The Convention, and the Act of 1991 which gives it the force of law in the State, it is said, violates this Article in precluding the Irish courts from determining questions of custody and access under the Guardianship of Infants Act, 1964. Section 3 of that Act provides that in any application to the court ". . .the court . . . shall regard the welfare of the infant as the first and paramount consideration."

The rights of children under Article 40, s. 3, sub-s. 1 were defined by O'Higgins C.J. in *G. v. An Bord Uchtala* [1980] IR 32 at p. 56 as follows:-

". . . the right to be fed and to live, to be reared and educated, to have the opportunity of

working and of realising his or her full personality and dignity as a human being."

The Convention was entered into by the signatory states in the interests of children and in order to protect them from the harmful effects of their wrongful removal from the states of their habitual residence. Article 13 expressly empowers the relevant authority (in Ireland the High Court) to refrain from ordering the return of the child where there is a grave risk of exposing the child to physical or psychological harm or otherwise placing the child in an intolerable situation. By so providing, the framers of the Convention were allowing a significant margin of discretion to the authorities of the requested state, which enables those authorities to refuse to order the return of the child where it might not be in the child's interests so to do. That provision of itself presents serious obstacles to the argument on behalf of the first plaintiff that the implementation of the Convention in this state necessarily violates the personal rights of the child, but the matter is put beyond doubt, in my opinion, by the provisions of article 20.

It is clear that the reference in article 20 to "the fundamental principles of the requested State" must refer, in the context of this state, to the provisions of the Constitution. Articles 40 to 44 inclusive of the Constitution appear under the heading "Fundamental Rights" and define, either expressly or by implication, rights of the citizen which cannot be modified or abridged by any of the organs of government except to the extent permitted by the Constitution itself. These provisions reflect an acknowledgment by the Constitution that there are rights regarded as of such importance in a democratic society such as Ireland as to warrant recognition in this manner by the fundamental law of society, in our case the Constitution. At the international level, rights of this nature are declared in documents such as the European Convention on Human Rights and Fundamental Freedoms, to which Ireland is a party.

It may not be a coincidence that the wording of article 20 echoes the title of the European Convention, since in the case of some of the signatory states the provisions of that convention form part of the domestic law of the state. That is not so in the case of Ireland but it is unnecessary for me to reach any conclusion as to whether the court would be entitled to have regard to the provisions of the Convention in a case where art. 20 was invoked. It is sufficient to say that in our case the "human rights and fundamental freedoms" which are to be protected if that article is invoked include those set out, expressly or by implication, in Articles 40 to 44 of the Constitution. Had Morris J. been satisfied that those fundamental principles would be infringed by the return of the child, I have no reason to doubt that he would have refused to make the order sought.

I am, accordingly, satisfied that the personal rights of children under Article 40, s. 3, sub-s. 1 of the Constitution are fully protected and vindicated by the provisions of the Convention. It can indeed be said that, in the case of children who are Irish citizens and are wrongfully removed from the jurisdiction of the Irish courts, it affords them an additional machinery for the protection and vindication of their constitutional rights which was not hitherto available.

It was also submitted that the Convention violated the constitutional guarantee of fair procedures implicity in Article 40, s. 3, sub-s. 1 which has been identified by the courts in decisions such as *The State (Healy) v. Donoghue* [1976] IR 325. Again, however, this submission fails to have regard to the power vested in the court to refuse the return of children where to do so would infringe their fundamental human rights, which unquestionably include the right to have issues such as custody and access determined in accordance with fair procedures.

I am fortified in the views just expressed by the decision in *C.K. v. C.K.* (Unreported, High Court, Denham J., 27 November, 1992). In that case, Denham J. rejected a submission that the terms of art. 20 of the Convention imposed upon the Irish courts an obligation to hold an enquiry into the welfare of the children. The following passage in that judgment is of relevance to the issues which have arisen in this case:-

"[The defendant] has not made the case that the procedures in Australia would not be adequate. He has argued that there must be an enquiry here as to the children's welfare. The only implication one can draw from this argument is that the Australian court would not adequately inquire into the welfare principle. The defendant has not made this case overtly and it is not for this court to accept such a case by implication.

The 1991 Act introduces a new procedure. The cases on the Guardianship of Infants Act and the Adoption Acts are of limited relevance to the new procedure. The 1991 Act is presumed constitutional. There is no evidence in this case which establishes a breach of a constitutional right of the children. Article 13 and Article 20 enable such matters to be raised in the procedure under the Act. The defendant thus has the opportunity to raise them. If, on their being raised, there is evidence of a breach of a fundamental or constitutional principle then the children would and could not be returned to Australia. The court has not had evidence of a human right or a fundamental freedom or a constitutional right of the children which would be breached by the return of the children to New South Wales in Australia. The court has no evidence that custody proceedings in New South Wales would breach a constitutional right of the children."

The constitutionality of the Act of 1991 and the Convention was not in issue in that case. Implicit, however, in the passage I have cited is a recognition by Denham J. that art. 20, if invoked by a party to proceedings under the Convention, affords adequate protection to the constitutional rights of the children concerned. With that view I respectfully and unreservedly agree.

The next ground advanced was that the Convention failed to ensure access to the plaintiffs as Irish citizens to the courts established under the Constitution in breach of Article 40, s. 3 and wrongfully ousted the jurisdiction of those courts in breach of Article 34, section 1. It is undoubtedly the case that where the High Court is satisfied that the child who is the subject matter of the application was habitually resident in a contracting state, from which it was wrongfully removed within the terms of art. 3 to this State, it must order the return of the child forthwith, unless it considers that, having regard to the provisions of either arts. 13 or 20 such an order should not be made. It follows that, in such cases, the jurisdiction of the Irish courts under the Guardianship of Infants Act, 1964, and any other relevant laws is ousted in favour of the jurisdiction of the competent authorities in the other state. This is entirely in accordance with the underlying policy of the convention, succinctly summarised in an English decision of *P. v. P. (Minors) Child Abduction* [1992] 1 FLR 155 at p. 158 as follows:-

"The whole jurisdiction under the Convention is, by its nature and purpose, peremptory. Its underlying assumption is that the courts of all its signatory countries are equally capable of ensuring a fair hearing to the parties, and a skilled and humane evaluation of the issues of child welfare involved. Its underlying purpose is to ensure stability for children, by putting a brisk end to the efforts of parents to have their children's future decided where they want and when they want, by removing them from their country of residence to another jurisdiction chosen arbitrarily by the absconding parent."

It is a necessary part of that scheme that the jurisdiction of one country should be ousted in

favour of the jurisdiction of another. That is a common feature of conventions of this nature and is in accordance with well established principles of private international law.

Article 29, s. 3 of the Constitution provides that:-

"Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

This provision would seem, at a first reading, to be confined in its operation to principles of public international law. That would appear to be confirmed by the observation of Maguire C.J. in *In re O Laighleis* [1960] IR 93 at p. 124 that:-

"[Sections] 1 and 3 of Article 29 . . . clearly refer to relations between states and confer no rights on individuals . . ."

A similar view was taken by a divisional court of the High Court (Davitt P., Teevan and Henchy JJ.) in *The State (Sumers Jennings) v. Furlong* [1966] IR 183 where Henchy J. also pointed out that the Irish version used the expression *ina dtreior* of which a more accurate translation would be "as a guide". However, these authorities go no further, I think, than saying that an international convention or treaty is of no effect in our domestic law unless it has been given the force of law by the Oireachtas. The Constitution, in other words, makes it clear that Ireland subscribes to the dualist theory of international law.

As to private international law, the principles laid down or accepted by Irish courts were preserved as part of our domestic law by Article 50 insofar as they were consistent with the Constitution. Clearly, the rules of private international law differ from one jurisdiction to another and it might seem again at first sight as though they were given no additional force in our law by Article 29, section 3. It is true that in *Saorstat and Continental Steamship Co. v. de las Morenas* [1945] IR 291 O'Byrne J., speaking for the Supreme Court, treated the rule that a sovereign state or its rulers cannot be impleaded in an Irish court as one of the principles of international law referred to in Article 29, section 3. But although that rule is dealt with in the leading text books on private international law, it is noteworthy that Lord MacMillan in the leading English case of *Compania Noviera Vascongado v. SS Cristina* [1938] A.C. 485, (cited by Byrne J. in *Saorstat and Continental Steamship Co. v. de las Morenas*) appears to have regarded it as part of public international law. Again when Walsh J. in *Byrne v. Ireland* [1972] IR 241 referred to the rules as to diplomatic immunity being recognised by Article 29, s. 3, it seems likely that he was treating them as part of public international law.

But it must also be borne in mind that the differences that exist between the private international law rules of states have given rise to injustice and inconvenience and that one of the principal objectives of the Hague Conference on Private International Law, by which the Convention now under consideration was framed, was to eliminate such injustice and inconvenience to the greatest extent possible. This led to the adoption of conventions under which the signatory states agreed rules for determining which courts should have jurisdiction in cases involving a foreign element. Giving effect in legislation to the provisions of such conventions is clearly in accordance with Ireland's acceptance of the generally recognised principles of international law and in harmony with one of the aims of the Constitution, as stated in the Preamble, to establish concord with other nations. I am satisfied that the fact that the jurisdiction of the Irish courts is on occasions ousted in favour of the jurisdiction of a foreign court by virtue of such conventions does not of itself lead to the consequence that such conventions and the legislation giving effect to them are invalid having regard to the provisions of the Constitution. Moreover, apart from any

considerations flowing from Article 29, s. 3, I am in any event satisfied that the Oireachtas were entitled to give effect in domestic law to a convention which conferred jurisdiction in cases with an international dimension to foreign courts with the object of protecting the interests of children in this and other countries.

The next ground relied on was that Act of 1991 and the Convention violated Article 41, s. 1 and Article 42, s. 1 of the Constitution in that it denied the first plaintiff her right as a parent to invoke the protection of the Irish courts in respect of the welfare of her child. The provisions of arts. 13 and 20 of the Convention however, as I have already found, make it clear that the High Court can ensure, in cases where the constitutional rights of parents or children might be endangered by the child being returned to the foreign jurisdiction, that those rights are fully protected by refusing, if that is appropriate, to order the return. That ground of challenge also, accordingly, fails.

Reference was made in the course of argument to a number of decisions of the High Court in which it was held that the Irish courts should enquire into the welfare of children before ordering their return to foreign jurisdictions from which they had been removed by one of the parents. However, these cases - *J.W. v. M.W.* [1978] ILRM 119; *D.A.D. v. P.J.D.* (Unreported, High Court, Blayney J., 7 February, 1986); and *L.R. v. D.R.* (Unreported, High Court, Costello J., 2 April, 1992) - were not affected by the provisions of the Act of 1991 and the Convention and while the principles laid down would doubtless continue to apply to cases in which the removal of the children was from states which are not parties to the Convention, they are not relevant to a case such as the present arising under the Convention.

It was also submitted that I should have regard in construing the provisions of the Act of 1991 and the Convention to statements made during the debates on the Bill in the Dail by the minister responsible for introducing the measure. In this context, counsel relied on the decision of Costello J. in *Wavin Pipes Ltd. v. Hepworth Iron Co. Ltd.* [1982] FSR 32 in which he held that the court could in defined circumstances have regard to its parliamentary history in order to ascertain the intention of the legislature in enacting a particular measure. It was pointed out that a similar view had been taken more recently by the House of Lords in *Pepper v. Hart* [1993] A.C. 593. It was said in *Pepper v. Hart* that the power of the courts to refer to parliamentary debates should only be invoked where the relevant provisions are obscure or ambiguous or, if interpreted in a particular manner, might create an absurdity.

The question does not arise, however, in the present case, for two reasons. In the first place, the relevant provisions are contained in the Convention, to which no reservation was entered by the Executive at the time of ratification. What was said in the Dail or Seanad is of no assistance in ascertaining the intention of the framers of the Convention: that can only be determined, should the necessity arise, by reference to the *travaux preparatoires* of the Hague Conference which adopted the Convention, in accordance with the approach adopted by the Supreme Court in *Bourke v. Attorney General* [1972] IR 36. In the second place, there is no obscurity, ambiguity or potential absurdity in the relevant provisions which would justify the court having recourse to what was said in the Oireachtas in order to ascertain the legislative intention.

Finally, I should refer to the alternative claim in the pleadings for a declaration that the Convention should be construed as affecting procedural law only as distinct from substantive law. I am solely concerned in these proceedings with the claim that the Act of 1991 and the convention are invalid having regard to the provisions of the Constitution. Any other issues which arose were solely for determination by Morris J. in the proceedings heard by him.

The claim in the plenary summons will, accordingly, be dismissed.

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