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[07/01/1999; Juvenile Court of Rome (Italy); First Instance]
R. and R., 7 January 1999, Juvenile Court of Rome (Italy), Nr. 2450/98 E

Unofficial Translation

JUVENILE COURT OF ROME

(decree pursuant to art. 7 Law 15.1.94 n. 64 international child abduction)

The Juvenile Court in Rome, in Chambers, with the following

Judges:

Luigi Fadiga Pesident

Alessandro Sorge Judge

Vittoria D'Agostino Honorary Judge

Giovanni Costanzo Honorary Judge

issued the following

DECREE

In the proceeding taken by the:

Public Prosecutor of the Juvenile Court in Rome

Petition of:

Ministry of Justice, as Central Authority for the Hague Convention of 25th of October 1980 on the Civil Aspects of International Child Abduction, ratified on 15.1.1994 with law n. 64,

Subject-matter:

Declaration of unlawful transfer of the minor L.R., son of N.R. and of P.R. born in London on 5.8.93.

The Court, at the end of the today's hearing in chambers, fixed pursuant to art. 7 of the law 15.1.94 n. 64, where the following persons have been heard:

- the minor's mother Mrs R. with her lawyer, Mr Francesco Mastroianni, of the Court of Rome, who asked for the dismissal of the petition;

- the minor's father Mr R. with his lawyer Mrs Roberta Ceschini, of the Court of Rome, who asked that the transfer be declared unlawful and that an order of immediate return be issued.

- the Public Prosecutor, Mr Roberto Polella, asked that the petition be deemed grounded.

Observes in fact and law

On 19.10.98 the Public Prosecutor, at instance of the Central Authority at the Ministry of Justice, filed a petition in favor of the minor L. for the enforcement of the Hague Convention of 25.10.80. The child was born in London on 5 of August 1993, and is the son of the British citizen N.R. and of his wife P.R., an Italian-British citizen. They married on May 1991 in England, where Mrs R. had been living for many years and where they have always lived. Currently they are separated: Mr R. lives in England and Mrs R. lives in Italy. According to what Mr R. said to the Central Authority, on 23 of May 1998, during a visit to her son, Mrs R. unlawfully abducted him to Italy where the child currently is.

Previously, Mrs. R., on 3rd of June 1998 filed a complaint asking this Court appropriate remedies to protect the child, complaining about Mr. R.'s behavior, which was, according to her, very deleterious for her child. She took the latter to Italy with her husband's consent in September 1997. Mrs R.'s complaint gave rise to the proceeding 1319/98 E, which was adjourned to today's hearing for a possible consolidation of actions.

Pursuant to art. 7 of the law 1994 n. 64 the mother was summoned at today's hearing. The father also appeared and asked to be interrogated. The Court has ordered the consolidation of actions between this proceeding and the above mentioned proceeding Nr. 1319/98.

The spouses have been previously invited by the President to try a settlement, however with no success. When they have been interrogated, they have persisted in telling respectively their versions of the facts. Mrs R. has declared that she permanently left to Italy with the child and with Mr R.'s consent on September 1997, and she accused him of having taken her son away on January 1998, when he retained him in England at the end of Christmas holidays. On the contrary, Mr R. has denied having agreed to a definitive transfer of his son to Italy and said that they had only agreed for a temporary transfer to Italy.

The Court observes that this case must be decided according to the Hague Convention of 25.10.80, implemented in our legal system pursuant to the above mentioned law 15.1.94 n. 64. This means that the Judicial Authority of the requested Country must order the child's return, once it is established that his removal infringed the custody rights allowed by the law of the Country where he usually resided (art. 3 of the Convention).

The fact that the child usually resides in England can be proved by the fact that the child, born in that country, has always lived there with his parents until September 1997. It is true that afterwards he has lived in Italy from September until December of the same year, however such a three month period is too short for establishing a new habitual residence. Then, it is irrelevant the fact - indicated but not substantiated by the defender - that the child and his mother would be resident in SS. Cosma e Damiano, in the province of Latina. In fact, according to the Convention, the expression habitual residence does not indicate the registered residence, but the place where the child usually spends most of his time. This place, center of the child's life, is without any doubt, England, where L. was born and has grown up. In fact, when he arrived in Italy, he did not speak Italian, as indicated in Mrs Minuzzo's psychological report, filed by Mrs R.'s lawyer.

The merits of the case cannot be examined at this hearing. The return order can only be denied in one of the following cases, pursuant to art. 13 of the Convention:

- if the person from whom the child has been taken away did not have the effective parental authority when the removal took place;

- if, because of the return, the child runs the risk of having physical or psychological problems or finds himself in an intolerable situation;
- if the child does not want to come back and he is old enough to provide for his opinion.

None of these three cases corresponds to the present case. In fact L. is just five years old, and he is still too young to assess a situation with impartiality or to make choices.

With respect to point b) of the same article. Mrs R. has given no evidence of Mr R.'s bad behavior, and there is no reason to fear that L.'s return to his father shall create an intolerable situation for the child. It is not possible to accept the request of Mrs R.'s lawyer for a psychological report. It is up to the part to prove that the return is intolerable and the inevitable pain consequent to the parents' separation cannot be used as an means to infringe the Convention.

Moreover, this is neither the case of refusal indicated in letter a) of art. 13. There is no doubt that Mr and Mrs R. are married, and, since the English Family Law (like the Italian one) provides that both parents have the parental authority and they exercise it jointly, on 23 of may 1998 Mr R. effectively exercised the parental authority. Moreover, the documents he has filed show that since 28th of January 1998 the English Court had forbidden the removal of the child from England, an injunction pronounced on 19 March and 20 April and served to Mrs R. on 25.4.98. Mrs R.'s statements about the fact that she did not understand the meaning of that measure are unacceptable. Hence, the petition that Mrs R. filed to this Court on 3.6.98, a few days after she had come back to Italy with her child, have an instrumental nature. In fact, at that time the English Court had already passed three measures, which forbade Mrs R. to take her child out of England.

Mrs R.'s lawyer has declared - but not substantiated - that a proceeding for separation of spouses is pending before the Court of Latina and he has asked for an adjournment of the hearing, while waiting for that judge's decision. The request cannot be accepted, because, according to art. 16 of the Convention, the present proceedings takes precedence.

Hence it is necessary to declare L.'s removal unlawful, and order his return to his usual residence in England, rejecting Mrs. R's petition of 3.6.98.

FOR THE REASONS ABOVE MENTIONED

The Juvenile Court of Rome, rejected every contrary petition, in acceptance of the Public Prosecutor's petition, pursuant to art. 7 of the law 15.1.94 n. 64 and art. 3 and following of the Hague Convention of 25.10.80 on the Civil Effects of International Child Abduction, states that L.R.'s removal to Italy was unlawful and as a consequence the Court orders the child's return to his habitual residence in England, to his father;

This decree is immediately enforceable.

The present decree be communicated to the parties and to the Central Authority for the Hague Convention of 25.10.80 in the Central Office for Juvenile Justice, the Ministry of Justice in Rome.

As decided in Rome, 7th January 1999

The President

Deposited on January 13, 1999

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