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[06/10/1993; Tribunal de Grand Instance at Abbeville (France); First Instance]
W. c. G., 6 October 1993, Tribunal de Grand Instance at Abbeville (France)

Unofficial Translation

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W. c. G.

TRIBUNAL DE GRAND INSTANCE

ABBEVILLE (Somme)

JUDGMENT OF OCTOBER 6, 1993

No 506/93

PLAINTIFF:

Mr W., born 19 January, 1959 in NEW YORK, unemployed, US citizenship

Represented by the firm of VAN MARIS, DUPONCHELLE and HUCLEUX, barristers of Abbeville.

Assisted by Mr CORNEC, "Advocat Plaidant" Solicitor, Paris

DEFENDANT:

Mrs G., wife of Mr W., born September 4, 1964 at ALLENAY (Somme)

Represented by the firm of FIRMIN, barristers and solicitors of Abbeville.

MEMBERS OF THE TRIBUNAL

During the hearing

President : Mr VELY

1st Judge : Mr LEMESLE

Judge : Miss HAUDIN

Clerk of the Court : Miss BULTEZ

MINISTERE PUBLIC

to whom the case had been communicated, represented by Mr GREVIN, substituting for the Procureur de la Republique

HEARING:

Public hearing 22 September, 1993, after which the tribunal retired to consider the case, in accordance with the law.

JUDGMENT

"Contradictoire" contested, at first instance, announced publicly October 6, 1993 by the first Judge, Mr LEMESLE.

Signed by Judge LEMESLE for the President, and by Miss CROGUENNEC, Clerk of Court.

Procedure:

The recital of the facts, the procedure and the parties claims has been set out in the judgment given on August 26 by the present Tribunal to which reference should be made.

Since that last decision, the following events have taken place:

The Family Court Judge of the Tribunal de Grande Instance at Abbeville was persuaded to order a delay to be in force from 23 September, 1993 until the Tribunal announces its decision in the present case, on the basis of Article 16 of the Hague Convention.

Mrs G. has made a deposition recalling her previous argument and commenting on the testimonies lodged by her, in which she sought to show the abnormal character of Mr W., which put in danger her life and the lives of her children. Concluding that the Convention should not apply and that Mr W.'s claim should be non-suited, she requests that he be required to pay compensation of 10,000 FF, based on Article 700 of the New Code of Civil Procedures.

Mr W. in turn canvassed the evidence in his favour and concluded with an opposing claim. He asks the Tribunal to disallow from the hearing, on the grounds of lateness, the grounds and evidence of his adversary. He stresses that the depositions of articles 14 and 15 of the Civil Code have no bearing on the case, since the Tribunal does not decide the custody of the children in the context of the litigation under consideration, which concerns exclusively the application of the Hague Convention. He maintains that he has acted in a timely manner in this regard. He disputes the probative value of the testimonies of the defendant, which concern only the relationship between the couple, and do not allow consideration as to whether there might exist any danger in the return of the children to New York;

He seeks an order for the return of the children be ordered with provisional execution ("execution provisoire") and asks that Mrs G. be required to pay compensation of 10,000 FF in accordance with articles 700 of the New Code of Civil Procedures and 26 of the Hague Convention;

At the hearing, the Public Minister shared his observations according to which the jurisdiction of this Tribunal is not contestable; that the Hague Convention is a "couperet" (literally "chopper") convention prohibits the Tribunal any power of investigation, that the Convention clearly applies in this particular case, the Tribunal having only to assess the evidence of the defendant pursuant to article 13(b) of the Convention, while at the same time he observed to the Tribunal that if Mr W.'s violence against his children had been real, Mrs G. would not have failed to involve the American judicial authorities and the police, which she did not do;

DISCUSSION:

About the question of communication of the grounds and evidence ("pieces et movens"):

Whereas according to article 15 of the New Code of Civil Procedure: "The parties obliged to let each other know in good time the arguments and evidence on which they are basing their claims, the elements of proof that they are producing and the elements of law which they are invoking, so that each can organize his defense"; that article 132 al. 1 of the New Code of Civil Procedure specifies that the party which presents evidence is obliged to communicate it to every other party in the case;

Whereas the judgment of 26 August 1993 given by the present Tribunal, having referred the matter back for hearing on the 22 September 1993, specified that in the intervening period the parties could exchange their grounds and documents; that no closure order ("ordonnance de cloture") had been established in view of the brief period of time between the two hearings; that the final conclusions submitted by the defendant contained no new grounds beyond those developed during the hearing on August 12, 1993; that, in reply, Mrs G. produced for the first time certain evidence in support of her claims; that it appears throughout that Mr W. was able to make the final submissions, as much to contest the defendant's grounds as to contest the credibility of the evidence.

Whereas, the consequence of the contradiction principle ("le principe de la contradiction") has been respected and applied; that there are grounds to oppose the exclusion of late material.

On the Application of the Hague Convention

Whereas the plaintiff claims that according to the laws of the State of New York, custody of the children is exercised in common by the parents; that it is otherwise established that Mrs G. left to settle in France without the consent of her husband; that by so doing, Mrs G. instigated an illegal abduction of the children in the sense of article 3 of the Hague Convention;

Whereas, further, article 16 of the Hague Convention states that, after having been informed of the illegal abduction of a child or his non-return pursuant to article 3 the judicial or administrative authorities of the contracting country where the child was taken or detained cannot make a custody decision until it has been established that the conditions of the present convention for the return of the child are not met, or until a reasonable period of time has passed without there having been a request for the application of the convention;

Whereas, as a result, the local Family Court Judge, although called upon by Mrs G. before the action undertaken by Mr W. in the present Tribunal, no longer has the authority to decide on provisional measures, including notably the determination of the address of habitual residence of the children, in the context of a non-conciliation order ("ordonnance de non-conciliation"), until the Tribunal has decided on the merits of the action to apply the Convention; and whereas the Family Court Judge has also given a delaying order ("ordonnance de sursis") to be decided in this matter;

Whereas, since the action of Mr W. has, to some extent, priority over the request for divorce for fault initiated by Mrs G., the claim of the latter will be dismissed which aimed to establish the Family Court Judge of this Tribunal was solely competent to decide on the place of habitual residence of the children;

Whereas, according to article 12 of the Convention, when a child has been abducted or detained illegally in the sense of article 3, and less than a year has passed since the abduction or the non-return at the time of the introduction of the filing of the application with the judicial authorities (or the administrative authority) of the contracting state where the child is, the requested authority orders his immediate return;

Whereas in this case the abduction of the children took place January 22, 1993; whereas Mr W. notified Mrs G. by bailiff on August 6, 1993; whereas it is ascertained that although the procedures instigated by Mr W. were slow, they were, nonetheless, within the aforementioned one year delay, whereas his action, therefore, should not be considered tardy in the terms of the convention;

Whereas, in consequence, the application of the Hague convention is appropriate in this case;

Concerning the Return of the Children

Whereas article 13(b) of the Convention states that, the provisions of article 12 notwithstanding, the judicial authority or the administration of the state petitioned is not obliged to order the return of the child when the person opposed to that return establishes that there exists a grave risk that the return of the child would expose him to physical or psychological danger or in any other way place him in an intolerable situation;

Whereas, among the evidence produced by Mrs G. in support of her claims, there stands out the testimony of Mr M., an American citizen, an officer of the US Postal Service, who was a work colleague of the defendant for 4 years and who commuted with her during this time; that Mr M. attests that Mr W. suffered from severe depression, and being out of work for a year, he forced his wife to do the maximum number of hours of overtime to support the needs of the family; whereas according to the witness, Mr W. had on two occasions hit and pushed his wife; whereas he attests to having seen marks of blows and whereas he says that he accompanied Mrs G. to the police station to lay a complaint, for which the receipt was subsequently destroyed by Mr W.; whereas Mr M. also mentions that Mrs G. had confided to him that she feared for her life if she asked for a divorce in the USA;

Whereas, according to the evidence of Mrs L., a French citizen, English teacher, who lived from December 1988 to July 1989 at the home of the W. couple, Mr W. was a problematic (characterial) person, aggressive and violent towards his wife who was thus very afraid of him; that he was extremely possessive about Mrs G. who was not permitted to go out except for the purpose of work; that Mr W. degraded the image of their mother in the eyes of the children and that the children were disturbed by the shouting and arguments;

Whereas Mr G., brother of the defendant, attests that he twice went to the family home in New York to see his sister, that she was effectively imprisoned by her possessive husband; that he confirms having seen Mr W. be extremely physically and verbally violent towards his three children; that his sister "lived over there with fear in her stomach for herself and her three children"; and finally he indicates that he heard Mr W. threaten Mrs G., when last winter she was staying for two weeks with her family in France, to destroy the three children if she did not return immediately, which she did immediately;

Whereas, for his part, Mr W. produced a certain number of statements from neighbours, churchmen, the family doctor, describing Mr W. as an affectionate, attentive father who spent a great deal of time with his children;

Whereas the tenor of the evidence produced by Mr W. concerning his attitude towards his sons was corroborated by a separate interview with the children, which he instigated on August 17, 1993; thus E. and R. notably each stated that their father was "gentil" (kind) with him, spent time with him and played with him, the youngest child J. not being old enough to express himself during the meeting;

Whereas, the evidence in favour of Mr W. is not "antinomique" (paradoxical) with the evidence produced by Mrs G.; whereas it appears from the latter evidence that Mr W. had, towards his wife, an exclusive and aggressive attitude, likely, at any time, to border on relevant symptoms of certain psychological or psychiatric illnesses, which could not, however, be determined, with a thorough knowledge of the cause, because the Tribunal cannot decide in what manner this might be investigated; whereas the evidence of Mr M. and of Mrs L. should be considered probative with respect to Mrs G., being from a third party who had lived for a long period of time in close proximity to the couple.

Whereas if these facts concern primarily the relationship between the couple, (relevant in a case of divorce), then the present Tribunal would not be able to decide (as the plaintiff requests) to what extent they should be disregarded in the present case; whereas, in effect, the pressure exerted by Mr W. on Mrs G. has a direct effect on the children; whereas Mrs L. has indicated that the children were disturbed by the shouting and the arguments; whereas, above all, Mr G. has confirmed his sister's assertion that, during a telephone call, Mr W. had threatened to kill the children if his wife did not return immediately to the USA; whereas it thus appears that the children became hostages in the "death crisis" of the couple and this because of what Mr W. had done; whereas the very real feelings of affection and attention displayed by Mr W. towards his children would not of themselves, constitute a guarantee of the physical and psychological safety of the said children; whereas the threats of Mr W. regarding them should not be overlooked even although they occurred in the context of the domestic dispute; whereas, what cannot be overlooked is the risk, albeit statistically minimal, that the plaintiff, overwhelmed by a sudden and destructive suicidal impulse, would at any particular time, put his threats into effect; whereas, therefore, the physical danger contemplated by article 13(b) of the Convention has, therefore, been proved; whereas, equally and at the same time the psychological danger contemplated by the same text has been proved because it is not in the interest of the children to allow them, at physical risk, to serve as a tool of pressure.

Whereas, consequently, it falls to decide in favour of the grounds raised by the defendant, and to deny Mr W. what he seeks, the return of the children to New York being for them both a physical and a psychological danger;

Whereas, it would be inequitable to let Mrs G. bear expenses not covered by costs; it is ordered that Mr W. pay her compensation of 3,000 FF pursuant to article 700 of the New Code of Civil Procedure.

FOR THESE REASONS:

The exclusion of late evidence and grounds, as raised by the plaintiff, is rejected;

Mr W. is fully entitled to invoke the Hague Convention;

All of Mr W.'s claims as to the application of article 13(b) of the said Convention are dismissed;

Mr W. is ordered to pay compensation of 3,000 FF to Mrs G. pursuant to article 700 of the New Code of Civil Procedure.

Mr W. is ordered to pay costs which will be recovered in accordance with article 699 of the New Code of Civil Procedure.

/s/ Bultez

LE GREFFIER

/s/ Vely

LE PRESIDENT

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