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[14/09/1999; European Court of Human Rights; Other]
B. v UK [2000] 1 FLR 1

B v UK

European Court of Human Rights

[2000] 1 FLR 1, [2000] 1 FCR 289, [2000] Fam Law 88

14 September 1999

PANEL: Mr J-P Costa (President), Sir Nicolas Bratza, Mr L Loucaides, Mr P Kuris,

Mr W Fuhrmann, Mrs HS Greve, Mr K Traja

COUNSEL: Allan Levy QC and Jeremy Rosenblatt for the applicant.

SOLICITORS: Daniel & Harris for the applicant.

EUROPEAN COURT OF HUMAN RIGHTS:

The facts

The applicant is a British national, born in 1964 and living in London.

He is represented before the Court by Daniel & Harris solicitors practising in London.

A. Particular circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows:

On 18 August 1994 a boy, J, was born to the applicant and Ms CS, an Italian national. The child's parents were not married and separated towards the end of 1994. The applicant maintained regular contact with J but at no time had a parental responsibility order. J lived with and was cared for by CS.

On 17 February 1997 the applicant issued an application for a parental responsibility order in the Willesden County Court. He also requested a contact order, an order prohibiting CS from taking J to Italy and an order that J be known by his correct name.

On 3 March 1997 CS took J to Italy.

On 6 March 1997 the applicant applied to Willesden County Court for a direction that J be returned to the jurisdiction and that the matter be referred to the High Court. On the same date the county court transferred the matter to the High Court.

On 7 March 1997 there was an ex parte hearing before the High Court. The applicant requested the court to grant him parental responsibility. The court observed that his parental rights had not been breached when CS took the child to Italy because the applicant did not have parental responsibility. Even if the court were to grant the applicant parental responsibility at that stage, this would not make the removal of the child unlawful ex post facto.

The applicant also requested the court under s 8 of the Child Abduction and Custody Act 1985 to declare that J had been removed from the jurisdiction in breach of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980, because the applicant's custody rights had not been respected. He submitted in this connection that the notion of 'custody' should be interpreted broadly by reference to Art 8 of the European Convention on Human Rights and Fundamental Freedoms 1950. However, the court considered that the applicant did not have custody within the meaning of Art 3 of the Hague Convention. In particular, the court considered that the applicant did not have any formal rights of custody in English law and the European Convention on Human Rights had not been incorporated into domestic law.

Finally, the applicant sought a declaration of wardship. This would have enabled the applicant to seek an order that J be returned to England and Wales. However, the court declined to make such a declaration on the ground that J had always lived with CS and it was inappropriate at that stage to demand that CS should return with him to England and Wales so that the applicant could visit him. The applicant was treated differently from married fathers because he did not have parental responsibility. The applicant could issue proceedings in wardship or under the Children Act 1989, serve them on the mother and promptly request the appropriate orders. However, the court stressed that, in the circumstances, it would not make any ex parte orders.

The applicant sought leave to appeal. On 24 March 1997 the High Court refused his application. The applicant renewed his application before the Court of Appeal.

On 18 April 1997 the Court of Appeal (Editorial note: see Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594) refused the applicant leave to appeal, reasoning as follows: The purpose of the Hague Convention was to ensure the speedy return, without lengthy proceedings or inquiries, of children who had been wrongfully removed from the person having their care. However, J was not cared for by the applicant. The applicant simply had contact with him. The applicant's case could be also distinguished from cases where wards of court had been removed from the jurisdiction. In one such case the court had ordered the return to the jurisdiction of a child that had been made a ward of court on the day following its removal. Finally, the mere fact that the applicant had instituted proceedings before the English courts had not resulted in those courts acquiring custody powers over J. This could have happened only if the courts had made an interim custody order. As a matter of fact, the precedent relied on by the applicant in this connection concerned a case where the child had been removed by a mother in favour of whom the courts had previously made an interim custody order in contested proceedings. As a result of all the above, the Court of Appeal considered that the applicant's case was not an appropriate one for an ex parte order. However, the applicant had the possibility of making further applications in the context of contested proceedings.

B. Relevant domestic law and practice

Section 2 of the Children Act 1989 provides the following:

'(1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of the birth --

(a) the mother shall have parental responsibility for the child;

(b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act.'

It is within the inherent jurisdiction of the High Court to make children wards of court (wardship jurisdiction). Once a child has been a ward of court, no important step in its life can be taken without the consent of the court.

Section 8 of the Child Abduction and Custody Act 1985 provides the following:

'The High Court or Court of Session may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of Article 3 of the Convention.'

The Hague Convention on the Civil Aspects of International Child Abduction provides the following.

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 15:

'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'

Complaint

The applicant complains under Art 14 taken in conjunction with Art 8 of the Convention that his rights as an unmarried father whose child had been wrongfully removed from the

jurisdiction were not protected in the same manner as the rights of a married father. In particular, he complains that he was not able to obtain an ex parte declaration that his child had been unlawfully removed from England and Wales.

The law

The applicant complains under Art 14 taken in conjunction with Art 8 of the Convention that, because he was not married to the mother of his child, he was not able to obtain an ex parte declaration that his child had been unlawfully removed from England and Wales while a married father would have been.

Article 8 of the Convention provides as follows:

'1. Everyone has the right for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.'

Article 14 of the Convention provides as follows:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

The Court recalls that Art 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Art 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Art 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (Inze v Austria judgment of 28 October 1987, Series A no 126, p 17(36)). For the purposes of Art 14, a difference in treatment is discriminatory if it has no objective or reasonable justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the aims employed and the aim sought to be realised (op cit, p 18(41)).

The Court considers that, since the applicant complains of discrimination in the protection that national law gives to his relationship with his child, the facts of the case fall within the ambit of Art 8 of the Convention.

Although the applicant complains of discrimination between married and unmarried fathers, the Court notes that the domestic courts which examined the applicant's applications did not make reference to the fact that he was not married to the child's mother. They only referred to the fact that the applicant did not have parental responsibility.

It is true that under the Children Act 1989 married fathers have parental responsibility automatically, while unmarried ones need to acquire it in accordance with the provisions of the Act. However, the Court has considered that the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family-based unit (McMichael v UK judgment of 24

February 1995 (Series A no 307-B, p 58(98)). For this reason the Court has held that there exists an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights (above).

As a result, the Court considers that the applicant's complaint of discrimination between married and unmarried fathers does not disclose an appearance of a violation of Art 14 in conjunction with Art 8 of the Convention.

Moreover, insofar as the applicant can be understood to complain about discrimination between fathers with and without parental responsibility, the Court recalls that the applicant was unable to obtain an ex parte declaration that his child had been unlawfully removed from England for the following reasons: first, the courts found that the applicant did not have 'custody' rights over his son within the meaning of Art 3 of the Hague Convention; secondly, the courts considered that it would have been inappropriate, in the circumstances of the case, to make the applicant's son a ward of court without a contested hearing; thirdly, the courts considered that they had not acquired custody rights over the applicant's son by virtue of the mere fact that the applicant had instituted proceedings before them in his respect.

As regards the first reason, the Court recalls that the purpose of the Hague Convention is to ensure the speedy return, without lengthy proceedings or inquiries, of children who had been wrongfully removed from the person having their care. The Court considers that refusing to treat persons, like the applicant, who simply have contact with their child on an equal footing with persons who have the child in their care, such as those with custody, has an objective and reasonable justification. It lies in the different responsibilities involved in the two types of situation.

The second reason why the domestic courts did not make an ex parte declaration was their refusal to make the applicant's son a ward of court without a contested hearing. The Court recalls in this connection that the domestic courts considered it inappropriate to take, without a hearing, a step that would have entailed the return to England of a child that had always lived with his mother just for the father to be able to visit it. Thus, the domestic courts had to balance the need to protect the applicant's short-term interest against the risks involved in making an order that could affect the child's future without the benefit of an adversarial hearing. The reason why the courts refused to protect the applicant's short-term interest without giving the opportunity to the other side to be heard was that the applicant did not have the child in his care. If follows, in the view of the Court, that the difference in treatment between the applicant who could not obtain an ex parte order making his son a ward of court, and a father with parental responsibility who did not need such an order, had an objective and reasonable justification. It lies again in the different responsibilities borne by fathers who have the child in their care and fathers who have not.

The third reason why the domestic courts did not make an ex parte declaration was their refusal to consider that they had custody powers over the child as a result of the proceedings that the applicant had instituted before the removal. The Court recalls in this connection that, according to the High Court, the mere institution of proceedings was not sufficient; the domestic courts should have at least made an interim custody order. The Court finds this convincing. Making an interim custody order involves a certain understanding of the dispute, which the courts could not have acquired merely as a result of the institution of the relevant proceedings by the applicant. As a result, and judging from the domestic courts' reaction to the applicant's wardship application, their refusal to consider that they had custody powers over the child must be related to their reluctance to take, without a hearing

in the presence of both parents, an important decision concerning the child's future just to accommodate the wishes of a father who had simply had contact with it.

In these circumstances, the Court considers that the domestic courts' refusal to interpret the notion of their custody powers so as to place the applicant on an equal footing with a father having parental responsibility, had the same objective and reasonable justification referred to above, namely the different responsibilities born by fathers who have the child in their care and fathers who have not.

In the light of all the above, the Court concludes that the different treatment under domestic law of the applicant and a father with parental responsibility does not disclose an appearance of a violation of Art 14 in conjunction with Art 8 of the Convention.

As a result, the application is manifestly ill-founded within the meaning of Art 35(3) of the Convention and must be declared inadmissible in accordance with Art 35(4) thereof.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Declares the application inadmissible.

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