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http://www.incadat.com/ ref.: HC/E/AR 487
[05/10/2001; Buenos Aires court of first instance (Argentina); First Instance]
A. v. A., 5 October 2001, Buenos Aires court of first instance

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UNOFFICIAL TRANSLATION*

A.A. and F.A.

RESTITUTION OF SON

Buenos Aires, October 5, 2001 -GZ

COURT FILES AND WHEREAS:

I.

On page 120, the plaintiff has requested that the matter be declared a question in Law. The under signed bore this in mind when conducting the interview with the child.

It would seem that both parties have established their claims based on the "Covenant on Civil Aspects of International Abduction of Minors" adopted on October 25, 1980 at the 14 Conference held in The Hague on the subject of International Private Law, which the Republic of Argentina has embraced by sanctioning Law 23.857, (currently falling under the category of constitutional, as set forth in Art 75, clause 72 of our Constitution), as has the State of Israel. This is how it has been expressly petitioned in the hearing, which appears on page 10.

In light of the fact that an interview was earned out with the child (pages 123/125), I consider that the documentation accompanying the present writ is sufficient to warrant a ruling. given that fundamental alterations to procedures of this nature are not in order, and should be acted upon with the expediency stipulated by the Convention.

Consequently, I hereby declare that this matter should be considered a question of law and shall now rule on the facts raised in the documents submitted.

II.

On page 64, the legal representative of A.A. has solicited the international restitution of her son, S.A., on the grounds that she claims that he is being held illegally by the father of the same, F.A.

The Plaintiff states that the parties, both of Argentinean nationality, contracted marriage in this City on December 17, 1992, and S. was born of this union on December 4, 1994, facts which have been ascertained through the certificates appearing on pages 24/26. Furthermore, in 1997, the entire family group took up residence in Israel, where they proceeded to live their social and business lives.

She affirms that the child has lived a satisfactory and happy life in that country, having adopted Israeli customs, traditions, habits and behavior. He attends school, he has his maternal grandparents and friends close to him and most of his affections are in Israel.

The Plaintiff reports that, in December of the year 2000, Mr. A. returned to Argentina. Previously, on August 1, 2001 authorization had been granted for the minor son to allow him to enter and leave that country until reaching the age of majority. She manifests that said authorization did not, in any manner whatsoever, imply that he had been granted permission to relocate to any country other than that of S.'s habitual residence, which is Israel.

The Plaintiff states that both parties initiated divorce proceedings in that country in March of the year 2001, and on June 12 of the current year, the Rabbinical Tribunal for Jerusalem's jurisdiction, who intervened in the divorce, granted custody of the minor (Z., in the Hebrew language) to his mother.

She claims that on the 10th day of that same month, Mr. A. picked up his son from school, picked up all of the clothing and documentation belonging to the child, and took him via Madrid, to Argentina, entirely without the knowledge of the mother and without the consent of the same, having acted in an illegal manner.

The Plaintiff points out that in the hearing that was held on May 5, 2001 before the Rabbinical Tribunal authorities, both parties had undertaken before the Court not to take the child out of the country. For this reason, the husband was to hand the minor's passport over to the Tribunal, which he did, but he only handed over the Israeli passport and not the Argentinean one. He used the latter to take his son out of Israel.

The Plaintiff filed a written petition, as suggested by the central authority of Israel, to the central authority of Argentina, requesting the application of Law 3.657, for the purpose of bringing about the return of the minor.

Other considerations have been cited and she has requested that Art 13 and 20 of the above mentioned law not be applied. She has offered evidence and establishes her right on Art. 3 and related provisions of Law 23 [illegible] 45, and articles 3, 4, 5, 7, 11, 12, 23 and related provisions of Law 23. [illegible] and petitions the restitution of her son within the shortest possible period of time, including legal costs.

On page 97, further documented evidence has been provided.

III.

On page 109, the Defendant F.A. responds to the claims, recognizing the legal obligations cited, and denies them, claiming that the facts and rights invoked by the Plaintiff have been distorted.

He states that the entire family group was born in Argentina.

That in 1987, the Defendant left for the Stale of Israel, where he remained for more than three years. In that country, in 1989, he met A., and when they decided to get married, they did so in the Republic of Argentina, where their son was also born.

He affirms that, in 1997, his ex-wife convinced him to try their luck in a foreign country, proposing the State of Israel, where the parents of the Plaintiff lived.

He maintains that it was never the couple's intention to remain definitively in that country, and that, when they left Argentina heading to Israel, he did so, not by personal choice, but because A. succeeded in convincing him to support her project.

He claims that, in fact, after the assassination of the Israeli Prime Minister, Yitzjak Rabin, in 1995, an event which shocked the entire world, a progressive deterioration of the socio-economic situation of that country commenced;

That Israeli politics, with regard to thy issue of Palestine began to employ a "hard line" approach, that is, that the channels of diplomatic negotiation disappeared and the use of military force was fostered.

He claims that therein lies the key to the issue of the duties involved in paternal rights, which entail, among other things, looking out for the safety of one's son.

He decided them it was advisable for S. - and for all involved - to desist the project of living together abroad and to return to Argentina.

He states, lastly, that in May of the year 2001, due to the political-military situation in Israel, be agreed with his wife that, should it get worse, be would take it upon himself to move S. to this country. They also agreed that their son should keep his Argentinean passport as well as the travel permission form signed expressly by her. On May 9, both parties even visited the Argentine Consulate in Israel to renew the child's passport.

And, that on May 10, he accompanied his wife to an appointment with a psychoanalyst, due to the fact that she had been very disturbed. On May 11, he returned to Argentina.

On May 24, he became aware that A. and S. had been very disturbed by the violent events in Israel.

On June 8, he traveled to that country, and having witnessed the state of anxiety in which be found S., he immediately took him to Argentina.

The Defendant declares that he lives in this city with his son and that the Plaintiff is entirely aware of this fact, the Plaintiff has been, in communication with the child.

He claims that his wife changed her mind, and that she now invokes an alleged judicial ruling dated June 12, 2001 in which she has apparently been granted temporary custodial rights of the minor.

He does not accept this ruling, claiming that it was issued after his return to Argentina, and therefore he has not had the right to act in his defence.

He points out that the Plaintiff filed for divorce in May of 2001. In response to which the Defendant conceded, but no definitive judgment has been rendered yet nor has the custody of S. been resolved.

The Defendant declares that he never acted in an illicit manner, and he vigorously opposes the restitution of the minor, citing the provisions of Art. 13, clause b of Law 23.857, on the grounds that this would be putting the child's psychological and physical state at serious risk, at least until such time as the high-risk conditions that currently prevail in Israel significantly improve, alleging that this country currently finds itself in art effective and real state of war.

He concludes that the minor has not been separated from his known environment because he was born here and also has friends here, he speaks Spanish fluently and regularly attends the "Escucla Sol" - He therefore requests that the restitution petition be denied and that a visitation schedule be established in favour of the Plaintiff.

IV.

In light of the documentation that has been attached hereto on pages 23, 31/37, 90/92 and 94/97, the present duly complies with the provisions of Art. 6, 24 and 26 of The Hague Convention of 1980.

Art. [illegible] clause a) pertaining to the above was established for the purpose of "guaranteeing the immediate restitution of minors that have been relocated or displaced in an unlawful manner in any of the participating States."

Art. 3 states that the removal or custody shall be considered unlawful:

a) when an infraction occurs that violates custody rights that have been attributed, severally or jointly, to a person, an institution or any other organization, in accordance with current laws of the State in which the minor has taken up habitual residence immediately prior to his removal or retention;

and

b) when this right is effectively exercised, severally or jointly, at the time of removal or retention, or would have been exercised if said removal or retention had not been produced.

Art. 4 further adds that "the Covenant shall apply to all minors that have taken up habitual residence in a participating State immediately prior to the infraction of the custodial or visitation rights."

It should be noted that

"Beginning at the 1891 The Hague Conference, during the 1900 session, the concept of domicile was substituted by that of habitual residence in matters of guardianship, a criteria which has been followed in successive treaties and conventions, among them The Hague Convention of 1980 . .. whereby habitual residence constitutes a sociological point of connection, unlike that of domicile, which is more standard in nature.

It therefore signifies the place where the minor carries out his activities, where he has been established with a certain degree of permanence, the centre of his emotional and daily experiences . . . the expression 'habitual residence' refers to a factual situation that assumes stability and permanence . . . The experts from the countries that intervened in the elaboration of the Covenant chose the habitual residence of the minor for the purpose of attributing jurisdiction to the same, on the grounds that this is a concept that tends to provide greater juridical security in matters of restitution, due to the fact that judges who are from the place in which the minor lives his daily life will be better suited to assess the fundamental questions (cons. C1, CC San Isidro, Room 1, August 31st, 2000, E.D. -191, Resolution No. 50.577, page 122., doctrine and jurisprudence cited therein: idem. Comments on the above-cited Resolution by Stella Maria Biocca: 'The interests of the minor and the fundamental rights of same', pg. 228, paragraph :) published in 'Family Law', Interdisciplinary Journal of Doctrine and Jurisprudence", No. 1 [illegible], Edit. (Abeledo Perrot, 2001).

In accordance with these parameters, I should clarify that there is no doubt that the family traveled to Israel to find new horizons in the year 1997, and that, in 2001, the couple bad in fact separated. That is to say, I consider this place to be the habitual residence of S. who attended the "[illegible] School" (page 49 and 93) and also carried out his daily social and family life there in Israel.

Furthermore, his parents also resided there, and, in fact, the Plaintiff filed for divorce before Jerusalem's Rabbinical Tribunal.

Moreover, the Defendant consented to the above jurisdiction, based on the fact that both parties appeared before this Tribunal on May 6, 2001.

The agreements established in that hearing are illustrative, firstly because the husband designated a representative, witness and messenger, and the parties suspended the divorce proceedings for a period of seven months, subject to the behavior they demonstrated during this time, details of which are given.

Secondly, because they also agreed that a ruling would be made on the subject of a temporary support allowance to be granted in favour of the minor, Z. (S.). Lastly, the husband undertook to hand over the child's passport his wife and both agreed not to remove their son from the country without the express consent of the other parent (page 41). On that date, the Tribunal ordered Mr. A. to pay support to his wife for the minor, commencing on June 5, 2001. (page [number illegible]).

Notwithstanding, the Defendant, without the consent of the other party, removed his son from his place of residence and transferred him to this country on June 10, 2001.

Two days later, the Rabbinical Tribunal of Jerusalem ruled that the minor was to remain in the custody of his mother (pg. 15).

In light of the above, there is no doubt in my mind that S. was removed in an unlawful manner from his place of habitual residence and that the circumstances stipulated in Art:, clause a) and b), second paragraph of the Convention have been produced.

Therefore, I must, in principle, order his immediate restitution to the State of Israel.

V.

However, the father alleges that the minor would be put at serious physical and psychological risk should he be returned (Art. 13, clause b) of the Convention) due to the state of war in which the country finds itself with regard to the Palestinian community, which has intensified over the past few years following the assassination of the Israeli Prime Minister in 1995.

Unfortunately, acts of terrorism due to political, racial and religious intolerance occur all over the world. As the Prosecutor for Minors points out in his judgment on pages 129/131, in the city of Buenos Aires, where S. currently makes his habitual residence, terrorist acts were perpetrated in 1992 and 1994, which, due to their grievous nature, caused outrage around the world.

One must also remember the horrific assassination of Yitzjak Rabin in 1995, as well as countless other bloody events that could specifically be cited.

But this worldwide situation was not an obstacle to the A. couple who, two years later, decided to move to Israel to live. If the husband had considered then that the trip would put the lives of his loved ones at serious risk, he would evidently not have made the trip.

Despite the contradictory arguments given in his response statement, the conduct displayed over the past few years indicates that this real risk did not exist, in other words, I reiterate that he would not have made the trip in 1997, or at the very Least, the family would have returned very quickly.

That country has lived under war-like conditions for many years with its Palestinian neighbors, with alternating periods of relative peace mixed with escalating confrontation. Despite this fact, its inhabitants, who have always lived in this manner, continue to carry out their daily activities, as I have stated, even under these particular circumstances in which the country is experiencing.

In any event, the request filed by the Defendant was formulated before the savage attack that took place in the cities of New York and Washington on September 11, 2001, which cost the lives of thousands of people of diverse ages, sexes, race, religions and nationalities.

This fact has indeed put the entire world in a state of alert, especially countries In the Middle East, and those in which a traditional conflict has existed with the Arab world, such as Israel.

In this country there have been escalating and repeated terrorist acts that have cost the lives of many innocent people. And, although terrorism knows no borders, the reality is that, given the situation today in the world, there is the possibility that, within a short period of tune, the events in Israel could worsen and become a serious threat to the safety of a child that is taken to this country, although this might not occur.

Therefore, although there is no doubt in my mind that the minor should be returned to Israel, where he lived up until a few months ago with his mother, I shall suspend its implementation for two months - until December 5, 2001 on the understanding that, should the situation continue to stabilize, S. must travel immediately to said country.

In light of the above, and in accordance with the legal regulations cited, and the provisions of Art. 3 of the Convention on Children's Rights, having heard the statement of the Prosecutor for Minors, pg 129/131, and that of the Government Attorney, pg. 133/136 [illegible], I hereby

a) Declare the present to be a question in law,

b) Order the restitution of the minor, S.A., in the State of Israel, and defer its execution to December 5, 2001, under the conditions laid out in the clause V., final paragraph.

c) The cost of the this process shall be assumed by the Defendant, who must undertake to pay the expenses that shall be incurred in the transfer of the child back to his place of residence (Art. [illegible] of the Procedural Code, and 25, last paragraph of Law 23.857).

d) I set the fees of the legal representative of the Plaintiff, Dr. Enrique Ignacia Brochard, at $2,000 (two thousand pesos) (Arts. 1, 6, 7, 30, and 33 of Law 21.83 [illegible], amended by Law 24.432), which must be paid within a period of 10 execution.

The parties to be notified with due diligence of the day and time, as well as the representatives of the Public Ministries in their office. P.A.S.

[Signed]

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