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[17/01/2002; High Court (Family Division) (Northern Ireland); First Instance]
Re A (Abduction: Declaration of Wrongful Removal)

Re A

High Court - Family Division

17 January 2002

Gillen J.

This is an unmarried father's application for a declaration under section 8 of the Child Abduction and Custody Act 1985 that the mother's removal of their child from Northern Ireland, or alternatively her detention outside United Kingdom was wrongful within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention").

The Short Facts

The child concerned is a girl called A born on 14 September 1996 and so is now 5 years of age. Her father came from Northern Ireland and the mother originated from the Republic of Ireland. The child was born in Northern Ireland and was habitually resident within Northern Ireland until some time in the early part of 2001 when the mother appears to have taken the child to Germany.

Unhappy differences had led to the relationship between the mother and father ending when the child was about 3 months old. The father alleges that thereafter he saw his daughter regularly and kept her overnight on numerous occasions. It is his case that the upbringing and care of the child was shared equally. Apparently this arrangement continued until about June 2000 when the mother terminated the contact.

Thereafter there followed a series of court applications and I shall refer to the salient hearings and findings as follows:

a. On 20 July 2000 the father applied to the Family Proceedings Court sitting at Londonderry for a Contact and Parental Responsibility Order.

b. The application was first heard on 22 August 2000. The mother raised objections to the father having contact with A on a number of grounds including allegations that the child was displaying inappropriate behaviour of a sexual nature. The court apparently ordered a welfare report to be obtained and overnight contact was denied thereafter. Daytime contact was permitted during the course of the week.

c. In or about August 2000 contact was again denied by the mother to enable the Social Services in Northern Ireland to carry out investigations of the allegations. The father says that these proved unfounded. Contact resumed from September 2000 onwards.

d. On 17 November 2000 when the case was listed before the Family Proceedings Court sitting in Londonderry, the court granted overnight contact once per week and contact on two days per week between 12.30pm and 8.00pm.

e. The matter returned to the Family Proceedings Court on 22 December 2000 and Christmas contact was agreed after protracted negotiations between the father and mother. As the mother was still refusing to permit any overnight contact, the court fixed the case for a full contest on 14 February 2001 with both parties to file statements in advance of the hearing date. Contact was to continue in the interim.

f. Following further acrimonious exchanges between the mother and father about the nature of the contact, the case was brought forward to the 19 January 2001. On that date the court suspended contact and directed the Foyle Trust to attend the Family Proceedings Court on the 2 February 2001 to furnish an assessment of the situation concerning A. The father alleges that the ability of the Social Services to carry out their assessment was disrupted by the mother making several trips to visit relatives without informing them.

g. Eventually on 23 March 2001, at a hearing at which the mother did not attend, the court ordered that the father should have parental responsibility for the child and in addition ordered that the mother should permit the father contact with the child each Monday, Wednesday and Friday from after nursery school until 4.00pm.

The orders that I have referred to were exhibited before me and are part of the papers in this case.

The father avers that within a week of these orders being granted he became aware through a mutual friend that the mother had left the jurisdiction and had probably gone to Germany to live with a sister. He claims that an attempt was made to serve a Contempt Order on the defendant for breach of the orders mentioned above but this proved impossible to complete because she had left her local address in Northern Ireland and her address in Germany was not known. He alleges in a statement before me:

"After extensive research and contact with several friends I was able to track down the respondent's sister's address in Germany."

On 5 April 2001 a letter was forwarded to the defendant at her German address advising her that she was now in Contempt of the court order and asking for A to be returned. Thereafter the father made contact with the Northern Ireland Court Service to assist him in making an application under the Hague Convention for the return of the child to the United Kingdom.

In consequence of the application, the Northern Ireland Court Service (hereinafter called "the Northern Ireland central authority") has entered into correspondence with the corresponding central authority in Bonn in Germany. Having read that correspondence I have concluded that the Northern Ireland Central Authority set out the issues with conspicuous clarity and with an informed assessment of the law as it applies within Northern Ireland and the United Kingdom on this issue. Inter alia on 23 November 2001 Ms McPolin wrote on behalf of the Northern Ireland Central Authority to Mr Hansen in Bonn, Germany in the following terms:

"You have requested confirmation that a court in the UK has actually endorsed an unmarried father's application for the return of his child. In the case of Re J (Abduction: Declaration of Wrongful Removal) (1999) 2 FLR 653 the parents were unmarried and the mother removed the child to South Africa just prior to Parental Responsibility Order being made in the father's favour. It was held that the lower court was actively seized of the

application for the Parental Responsibility Order and a declaration of Wrongful Removal was granted. The parallels with (the father's) case are obvious and I consider, therefore that (A's) removal from Northern Ireland was wrongful within the meaning of Article 3 of the Convention."

By correspondence dated 30 November 2001, Mr Hansen, on behalf of the Central Authorities in Bonn replied, inter alia:

"In order to start court proceedings and to present this case successfully, I'll have to present a court order or any other legal documents in a (former) similar case in which the court explains/states that unmarried fathers (like the father) in general either have custody or the right to determine the habitual residence of their children. The legal basis (article, code etc) upon which such a decision was/is found ought to be stated/cited just as well.

Furthermore the German court will also need a certification according to Article 15 of the Hague Convention complete with reasons given to the judgment.

Please provide these documents as well as their German translations."

The Law in the United Kingdom

In determining whether the mother's removal of A, or alternatively her detention of her in breach of the order of March 2001, was wrongful within the meaning of Article 3 of the Hague Convention, one must start from the proposition that in Northern Ireland an unmarried father does not automatically share parental responsibility for his child as married father's do. (See Children Order (Northern Ireland) 1995 Article 5(2)). He may acquire it by agreement with the mother or by the court making an order. Acquisition of parental responsibility is governed by Article 7 of the Children (Northern Ireland) Order 1995.

I am satisfied in this case that the father has acquired parental responsibility on foot of the court order of 23 March 2001. Accordingly once he has acquired parental responsibility and thus has custody rights, the mother does commit the offence of child abduction by taking the child out of the country without his consent. (See the Child Abduction Act (1984) section 1 (1), (3)(a)(ii). See also Re J (Abduction: Declaration of Wrongful Removal) (1999) 2 FLR 653 at page 655).

Even if the child had not been within the jurisdiction for up to one year when this order was made on 23 March 2001, as the Northern Ireland Central Authority pointed out in their correspondence of 26 October 2001, the court would still have had jurisdiction to make the Parental Responsibility Order by virtue of Section 41 of the Family Law Act (1986). The relevant extract from section 41 reads:

"41-(1) Where a child who -

(a) has not attained the age of 16 and

(b) is habitually resident in a part of the United Kingdom,

becomes habitually resident outside that part of the United Kingdom in consequence of circumstances of the kind specified in sub-section (2) below:

He shall be treated for the purposes of this part as continuing to be habitually resident in that part of the United Kingdom for the period of one year beginning with the date on which those circumstances arise.

(2) The circumstances referred to in sub-section (1) above exist where the child is removed from or retained outside, or himself leaves or remains outside, the part of the United Kingdom in which he was habitually resident before his change of residence -

(a) without the agreement of the person or all the persons having, under the law of that part of the United Kingdom, the right to determine where he is to reside or

(b) in contravention of an order made by a court in any part of the United Kingdom."

There is absolutely no evidence that this child at the date the order was made was habitually resident in any other part of the world other than the United Kingdom ie Northern Ireland or that he had become habitually resident outside the United Kingdom for more than one year.

For the removal of any doubt, even had this order not been made on 23 March 2001, Re J (Supra) is clear authority for the proposition that though the unmarried father did not have parental responsibility prior to the 23 March 2001, the court was actively seized of proceedings to determine rights of custody and in particular to determine the issue of parental responsibility and contact. Thus had no order been made therefore on 23 March 2001, the court would definitely have assumed rights of custody at a time when the child was clearly present and habitually resident in the jurisdiction ie before the mother took the child to Germany. Accordingly whether the father relies on the order of parental responsibility given to him on 23 March 2001 or on the fact that the court was actively seized of the issue prior to the 23 March 2001 when the child was clearly both present and habitually resident in the jurisdiction as evidenced by the various attendances at court by the mother, the removal of this child to Germany by the mother was clearly wrongful and in breach of rights of custody.

Under Article 15 of the Hague Convention:

"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 or contracting state shall so far as practicable assist applicants to obtain such a decision or determination".

I therefore grant a declaration that the child A has been wrongfully removed from Northern Ireland or has been wrongfully detained outside Northern Ireland within the meaning of Article 3 of the Convention.

In passing I pause to observe that in circumstances such as these recourse to Article 15 need not be automatically sought. Delay has been occasioned in this case as a result of the requirement for an application under Article 15. Under Article 14 of the Convention, the authorities in the state of refuge may avoid the delays often associated with the traditional procedures. Article 14 reads:

"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested state may

take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the state of the habitual residence of the child, without recourse to the specific procedures for the proof that law or for the recognition of foreign decisions which would otherwise be applicable."

It has been clear beyond peradventure in the United Kingdom that removal by the mother of a child who is habitually resident will be wrongful under the Hague Convention if the father has parental responsibility either by agreement or court order (See *Re W: Re B (Child Abduction: Unmarried Father)* (1998) 2 FLR 146). Moreover the principles set out in *Re J (Abduction: Declaration of Wrongful Removal)* (1999) 2 FLR 653) have now been firmly established and remain unchallenged in cases where the court, as in this instance, was actively seized of proceedings to determine rights of custody. Obviously where there is genuine doubt as to the applicable law Article 15 should be invoked - and courts must not exclude this possibility merely because of considerations of time - but equally it seems to me that care should perhaps be exercised to avoid it where the law is palpably clear in a particular jurisdiction and where this has been unequivocally set out by the appropriate central authority. Hence one can avoid the worrying tendency that may have arisen whereby applicants or central authorities have sought a declaration under Article 15 to reinforce an application and in so doing have occasioned delay or have constituted a burden on court time unnecessarily.

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