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[17/02/1993; High Court (ENgland); First Instance]
Re T. and Others (Minors) (Hague Convention: Access) [1993] 2 FLR 617, [1993] Fam Law 566

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

17 February 1993

Bracewell J

In the Matter of T.

Henry Setright and Leonora Klein for the father

David Hershman for the mother

BRACEWELL J: In this case the plaintiff issued an originating summons under Art 21 of the Hague Convention, as incorporated by the Child Abduction and Custody Act 1985, for an order that the defendant do forthwith take all necessary steps to facilitate access in the State of California and in Mexico to the plaintiff by the minors A, B, and C. There was a further application that the minors be returned to the jurisdiction of the Superior Court of the State of California for the purpose of access, pursuant to the provisions of Part 1 of the Child Abduction and Custody Act 1985.

The basis of the application was that the plaintiff is the father and the defendant is the mother. The plaintiff lives outside the jurisdiction in California, and the defendant is now resident with the minors within this jurisdiction. The plaintiff issued the originating summons as the father of the minors, with rights of custody jointly with the defendant, and with rights of access pursuant to an order of the Superior Court of the State of California, County of Los Angeles.

The history of the matter is that the defendant mother was born in England. The plaintiff father was born in Mexico, and in 1985 the mother and father met in the USA. They commenced a relationship and, in August 1986, at a time when the mother was pregnant, she started to cohabit with the father. The child A was born on 21 September 1986, in the USA. B was born on 1 November 1987, in England. After the birth of B the mother returned to the USA, but there were some difficulties in the relationship and subsequently she moved back to England, where C was born on 6 February 1989. However, there was a reconciliation between the parents, and the mother returned to California with the children and cohabited with the father for some time.

On 26 April 1991 the mother again returned to England with the minors, and on 24 October 1991 the father issued the first originating summons under the Hague Convention, alleging wrongful removal of the children from California on or after 18 April 1991, and secondly wrongful retention of the children in England on or before 30 September 1991. The matter came before Hollis J ex parte on 25 October 1991, when the mother was ordered to disclose to the tipstaff the address of the minors.

On 8 November 1991, after an inter parties hearing before Connell J, undertakings were given by the father, (1) to pay for and supply to the mother tickets for the carriage by air of the mother and minors from London to Los Angeles, and (2) to pay for and provide to the mother and the minors upon their

return to California an apartment for their exclusive use, such accommodation to be available to them pending an order of the Californian Family Court.

Upon those undertakings being given and accepted by the court, it was ordered that the mother and minors return to California on an air flight from London to Los Angeles either on Saturday, 15 November 1991, or on a date thereafter nominated by the father on 48 hours' notice; the passports held to the order of the court were to be released to the mother at an airport of departure for the purpose of enforcing the return to California; the father's solicitors were to act as agents for the handover of the passports; in the event of the mother failing to comply with para 1 of the order, the father was at liberty to return the minors to California; and there were various directions about legal aid taxation and costs.

Pursuant to that order, the mother did return with the three children to California, which at that time was their habitual place of residence. On 23 December 1991 the mother obtained a temporary restraining order against the father in the Californian court.

In March 1992 the Superior Court of California determined a contested inter parties hearing, as a result of which various orders were made. The maternity and the paternity of the minors were confirmed; there was an order for joint legal custody of the minors to the mother and the father; the primary responsibility for care, custody and control was granted to the mother, but an order was made for physical care, custody and control to the father during specified periods. The mother was given leave to reside with the minors in England; there were provisions about the father being kept informed as to the minors' progress, and there were detailed orders for contact between the father and the children. There was an order for reasonable contact with the father at any time if he travelled to England, and there was an order for specific contact of 28 days during the summer vacation, the minors to visit the father in Los Angeles but, if the vacation were more than 8 weeks long, there was to be contact for half of the vacation in California, and that regime was to start in the summer vacation, 1992. There was an order for 2 weeks' Christmas vacation with father in California, starting Christmas 1992, but not in respect of C until he attained the age of 5 years.

There was a further provision that when the children visited the father, the father was to be allowed to take the children with him for one week to Mexico to visit his family. There were provisions about child support; the sharing of travel costs; various notices to be given between the parents; and orders allowing telephone contact between father and the children.

The first contact should have taken place during the summer, 1992, but the children did not travel to the USA for that period of contact. The mother alleged that there were difficulties with travel, and no contact has taken place since the mother's return to this jurisdiction.

The mother then issued applications for residence orders under s 8 of the Children Act 1989, in respect of the three children, and the matter came before District Judge Wartnaby on 3 December 1992. He ordered that the three applications be issued and consolidated in the name of the children, and made directions about applications and supporting statements. He ordered that the matter was to be heard by a judge of the Family Division in London.

The matter came before Cazalet J on 9 December 1992. The father was neither present nor represented at that hearing, although the order states on the face that it is not ex parte. Cazalet J made a residence order for the three children in favour of the mother. He ordered that there was to be no direct contact between the father and the minors, except agreed visiting and telephone contact, so that in effect he stayed the USA order, and the children did not in fact visit the USA for the Christmas period.

On 9 December 1992 the Court of Appeal gave judgment in the case of Re G (A Minor) (Hague Convention: Access) [1993] 1 FLR 669. The facts of Re G bear a remarkable similarity to the present case.

On 9 December 1992, on the same day when judgment was delivered in the Court of Appeal, the mother obtained her order from Cazalet J in the Children Act proceedings, which effectively stayed the access ordered by the USA court, and in fact prepared the way for the issue of access to be resolved under the Children Act. I have been informed that Cazalet J was in possession of a draft of the judgment in Re G when he determined the mother's application.

Three days later the father's originating summons in child abduction was issued. No reports of Re G appeared until 26 January 1993.

The decision of Re G is binding upon me. The Court of Appeal in that case held that:

(1) Despite the fact that a child was habitually resident in England and Wales, Art 21 did apply to an application in respect of an access order made in a foreign Convention State. That was the decision of Butler-Sloss LJ, at pp 673-4, and Hoffmann LJ, at pp 677-9.

(2) The effectiveness of Art 21 is not easily determined - that was made clear by Butler-Sloss LJ at p 675 of her judgment. However, it was decided that there is a distinction between the administrative duties of the central authority, namely the Lord Chancellor's department, and the judicial duties of the court. The former complies with its obligations by making appropriate arrangements for the applicant and by providing legal aid and instructing English lawyers. That step exhausts the direct applicability of the Convention.

(3) In a case where the child was habitually resident in England before the breach of access rights occurred, the Convention does not directly affect the jurisdiction of the English court. No private right is conferred by Art 21, and if the Lord Chancellor's department failed to exercise its duties the remedy would lie in judicial review.

It was said (per Butler-Sloss LJ at p 675): 'There are no teeth to be found in Art 21 and its provisions have no part to play in the decision to be made by the judge'. It was made clear that applications should be presented under the Children Act 1989.

(4) If Children Act proceedings were commenced in such circumstances, the existence of a foreign order was, according to Butler-Sloss LJ at p 676, 'of crucial importance and is a factor to be given the greatest possible weight, consistent with the overriding consideration that the welfare of the child is paramount'.

However, the court was not fettered by the Convention, and was to be governed in its deliberations by s 1(1) of the Children Act 1989. A foreign access order is entitled to grave consideration, but the paramount consideration is the welfare of the child.

It follows from the decision in Re G that the Lord Chancellor's department can receive applications properly sent by foreign central authorities for the enforcement of access rights in England. Article 21 applies to those applications, even if the child is habitually resident in England, but the court has no power under the Convention to make any orders.

In order to fulfil its obligations, the Lord Chancellor's department provides the applicant with a suitable lawyer. The issue of enforcement is to be decided under the Children Act 1989.

One of the questions which arises, therefore, is the extent of the role of the Lord Chancellor's department, apart from bringing the matter before the court speedily, because once the originating summons is listed the provisions of Art 21 of the Hague Convention are exhausted.

It has been argued before me that a potential problem arises in respect of concurrent proceedings. If the instant proceedings for an originating summons are properly commenced under the Convention, but the enforcement must be under the Children Act 1989, and if there is a need for proceedings under the Child Abduction and Custody Act 1985, in order to obtain legal aid and the benefit of Art 26 (4), which makes provision for costs and expenses, then it might be argued that it would be expedient to have the two sets of proceedings heard in parallel. However, by r 6.11(4)(a) of the Family Proceedings Rules 1991, an automatic stay is imposed on any other proceedings in respect of a child who is the subject of the Child Abduction and Custody Act 1985.

It was argued by counsel that unless there is agreement between the parties or power in the court to lift the stay, then the child abduction proceedings and other proceedings under the Children Act cannot co-exist. It does appear from research that nevertheless there have been cases in which wardship proceedings have been heard pending child abduction appeals. An example is Re H; Re S (Abduction: Custody Rights) [1991] 2 AC 476, [1991] 2 FLR 262.

However, in any event I do not find there is any problem in respect of concurrent proceedings, in that, on the authority of Re G, the Child Abduction and Custody Act application is exhausted upon presentation to the court, as Hoffmann LJ stated at [1993] 1 FLR 680:

'[The central authority] had provided the plaintiff with legal aid to pursue his claim to enforce his Canadian access rights. In my judgment therefore the provisions of Art 21 were exhausted once the plaintiff got to court. They had no part to play in the decision that had to be made by the judge.'

Butler-Sloss LJ said at p 675 of her judgment:

'The Lord Chancellor's department complies with its obligations under Art 21 by making appropriate arrangements with the applicant by providing legal aid and instructing English lawyers to act on behalf of the applicant. This in effect exhausts the direct applicability of the Convention.'

On those findings, I do not consider that any problem arises about concurrent proceedings. The application by the plaintiff under the Children Act to seek contact orders is the only live application before the court, the central authority having completed its role.

It has further been argued before me that there is a paradox in, on the one hand, the duty of the court to accord grave weight to the foreign order, regarded as of crucial importance, and to be given the greatest possible weight, and on the other hand, the overriding consideration that the welfare of the child is paramount. Counsel have argued that the court cannot meet either the spirit or the intention of the Convention by acting in speedy comity with the orders of other Convention countries if that conflicts with the welfare of the child, which may only be revealed after lengthy investigations and welfare reports.

It has been urged on me that an order of the USA court which provided the very basis for the mother's move with the children to England could be in conflict with the paramountcy of the welfare principle. I do not, however, see that as a difficulty.

Professor Anton, who chaired the Conference which drafted the Convention, wrote at (1981) 30 The International and Comparative Law Quarterly 537 at pp 554-5, and was quoted by Hoffmann LJ at pp 678-9 of his judgment. The professor stated that flexibility was envisaged. The courts are well used to balancing different factors and according appropriate weight to varying considerations. I do not envisage any problems arising from the task laid before any court called upon to determine an application under the Children Act in circumstances such as these, whilst giving appropriate weight to orders of foreign courts.

However, arising out of the decision of Re G, I do find that there are some interesting questions and issues of practice and procedure to be resolved.

In Re G, the Lord Justices did not consider the effect of Art 26(2) of the Convention, pursuant to which a central authority may not require a private applicant to pay any part of the costs of proceedings under the Convention. By a reservation, pursuant to Art 41, under s 11 of the Child Abduction and Custody Act 1985, the Lord Chancellor's department is not bound to assume any costs save through legal aid. The provision of non-means-tested legal aid currently available in child abduction applications does not extend to Children Act applications, and therefore there is the possibility of delay whilst the legal aid application is determined; difficulty in obtaining statements of means from applicants in foreign countries; and many applicants may not be eligible for legal aid by reason of their means, or may be required to pay a contribution.

Hoffmann LJ in his judgment at p 680 said:

'The originating summons was wrong in apparently seeking compliance by the court with a duty imposed by Art 21 upon the central authority. Instead, the application should have been framed as an ordinary application for a contact order under the Children Act 1989. In such an application the Canadian access order is entitled, as Lord Simmonds said in McKee v McKee [1951] AC 352 at p 356, to "grave consideration", but the paramount consideration is the welfare of the child.'

Butler-Sloss LJ, at p 675 of her judgment, said this:

'The appellant father's lawyers applied to the High Court, but were in error in requiring an order to enforce compliance with the Convention. There are no teeth to be found in Art 21 . . . The lawyers should have applied on his behalf for a s 8 order under the Children Act 1989, which is the appropriate way to secure the effective exercise of rights of access.

Proceedings under the Child Abduction and Custody Act are not 'family proceedings' within the definition of the Children Act 1989, s 8(3), and a contact order could not be made in such proceedings. Therefore, separate family proceedings are required under the Children Act if a s 8 order is to be applied for. However, as the law at present extends, there is no automatic right to legal aid free of charge to the applicant for such family proceedings. The contrast is plain between the Civil Legal Aid (General) Regulations 1989, reg 14(9), in respect of the Child Abduction and Custody Act 1985, and on the other hand, reg 14(1), and s 15 of the Legal Aid Act 1988, in respect of the Children Act 1989.

Although legal aid may be extended to cover other proceedings pursuant to the Civil Legal Aid (General) Regulations 1989, regs 51 and 46 -- 'Persons who have sought to give effect to any order or agreement made in the proceedings to which the Certificate relates . . .' - it does not in my judgment extend to allow the present certificate to cover Children Act proceedings.

The question arises whether there is any purpose in the originating summons being issued by the central authority at all. The Court of Appeal, in Re G, said it was in error, and the lawyers should have applied for a s 8 order on behalf of the father.

It has been argued before me that the advantage of the originating summons, even if it has no teeth, is that it brings the matter speedily before the High Court, with automatic legal aid. The plaintiff may well then have to apply for legal aid to issue s 8 proceedings, but the Legal Aid Board will have been alerted to the nature of the proceedings and to the High Court being seized of the matter.

On 17 March 1993 Bracewell J added the following judgment:

BRACEWELL J: Having considered the submissions before me, I am satisfied that it is not correct procedure for the central authority to issue an originating summons in the circumstances of the present case. Since Art 21 confers no jurisdiction on a court to determine matters relating to access or to recognise and enforce foreign access orders, the role of the central authority is limited to one of executive co-operation.

Accordingly, the duty of the central authority on receiving an application to make arrangements for organising or securing the effective exercise of access rights under Art 21 is to make appropriate arrangements to provide English solicitors to act on behalf of the applicant for the purpose of instituting an application under s 8 of the Children Act 1989.

By reason of the international element and the complexity which is usually involved in such proceedings, serious consideration should be given to commencing proceedings in the High Court even if the case does not strictly fall within Practice Direction [1992] 2 FLR 87.

Since April 1992 the Official Solicitor has taken over responsibility on behalf of the Lord Chancellor's department for the Child Abduction Unit. In some cases it may be appropriate to invite the Official Solicitor to consent to act on behalf of the children in the Children Act proceedings where difficult matters arise.

After hearing further arguments Bracewell J added the following:

I have considered whether or not it is appropriate to grant a certificate so that an appeal may be made to the House of Lords, thereby bypassing the Court of Appeal.

I am grateful for the arguments which have been advanced before me but I have decided, in my discretion, that this is not an appropriate case in which to grant such a certificate.

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