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[31/08/1994; High Court (England); First Instance]
Re N. (Child Abduction: Jurisdiction) [1995] Fam 96, [1995] 1 FLR 341, [1995] Fam Law 230

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

31 August 1994

Wilson J

In the Matter of N.

Henry Setright for the mother

WILSON J: This is an application made ex parte by a mother. She has not yet issued proceedings under the Child Abduction and Custody Act 1985: but she proposes to do so and subject to constraints of time she will do so this afternoon; and, if not this afternoon, tomorrow. The proposed defendant to the proceedings is the father. The child concerned is N, who is now some 2 years old.

The father is an Iraqi national. The mother is probably a United States national. After the little boy was born, the parties got married and they remain married. They lived at all material times in California. When their marriage broke down, the boy went with the mother to live at another address in California and the mother issued proceedings for divorce. An agreement was reached which was recorded by stipulation in an order of the Superior Court of California on 9 June 1994. The order provided that the boy should be in the joint custody of both parents; that responsibility for his physical care should lie with the mother; that the father should have visitation rights to him; and that he should not be removed from California without the consent of the parties or the leave of the court.

In the late part of July 1994 the mother handed the boy to the father for what she believed would be a weekend camping trip to Santa Barbara in the State of California. But the father had laid elaborate plans to remove the boy from the State of California and from the United States of America; and he flew with the boy to Iraq, via New York and Jordan, and that is where it is believed that the father and the boy still remain. It was, prima facie, a clear breach of the order by consent of 9 June 1994 and of the rights of custody attributed to the mother under Californian law, that state being clearly the state in which the boy was habitually resident immediately before his removal to Iraq.

When the mother discovered that the father and the boy had gone to Iraq, she quickly moved the Superior Court of California for further relief. It seems that the father's attorney was present at that hearing. The order made on 26 July gave sole physical custody of the boy to the mother and directed his return to her forthwith. A warrant was issued for the father's arrest for violation of the previous order.

The mother and the father have had certain discussions over the telephone, she in the United States and he in Iraq. By the middle of August the father was indicating to her that he might be prepared to come and discuss their differences, both in respect of the boy and otherwise, in a third country, specifically England. This led the mother to inform the American administrative authorities and they

in turn requested the Lord Chancellor's Department to take all possible steps to assist in the return of the boy to the mother's care in America.

Discussions between the parents have fructified into what, on the evidence before me, has become a fairly firm understanding that the parties will meet in London this coming weekend; and the father has indicated that, to that end, he will arrive with the boy in London on the day after tomorrow, namely Friday, 2 September, in order to meet the mother and to discuss their differences. The mother has, accordingly, made plans to come herself to London and she is expected to arrive tomorrow.

Such are the circumstances in which the mother asks this court to exercise what is said to be its jurisdiction under the 1985 Act to make orders which will have the effect of authorising the tipstaff to collect the boy from his father's care - assuming that they do together arrive at Heathrow Airport on Friday - and to restore the boy, in the first instance temporarily, to the care of the mother pending a further analysis by this court of where its duties lie, or alternatively how its powers should be exercised, under the 1985 Act.

Mr Setright, who I believe knows as much as any other member of the Bar about the intricacies of the 1985 Act , has very properly put before me the fact that there is no reported case in which an order has been made under the Act in respect of a child who has not yet been brought within the jurisdiction of England and Wales.

There is no doubt that, had the boy arrived within the last hour at Heathrow Airport, I would have had the power to make the appropriate interim directions under s 5 of the 1985 Act to hold him in this country, in the most advantageous circumstances from his point of view that may be devised, pending an inter partes inquiry as to whether he should be returned to California. Looking at the matter on the basis of common sense, it would seem to be extraordinary if that power were to exist in respect of a boy who has just landed upon these shores but were not to exist in respect of a child whom there was good reason to believe was likely to land upon these shores. And if, in truth, there is no jurisdiction to make orders in the latter case, there would seem to be a likely frustration in a number of such cases of the common intention of the states which signed the Convention on the Civil Aspects of International Child Abduction and imported it into their own laws. And so I look to see whether I am driven by the terminology of the Act to conclude that the interim powers given to me under s 5 cannot be exercised other than in respect of a child already here.

There is certainly nothing in s 5 itself which suggests that limitation. Nor is there any other section in Pt I or Pt III of the Act itself -- Pt II being irrelevant -- which so provides; and it would have been easy for Parliament to have so provided if it had wished to do so.

I look then to the terms of the convention itself, which are set out in Sch 1 to the 1985 Act. I note that under art 7 central authorities are bidden to:

'co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.'

I appreciate that art 7 is addressed to administrative authorities. Nevertheless its terms are such that, in application to this case, it amounts to a mandate to the administrative authorities of California and of England to co-operate to secure the prompt return of this boy. The obligation under art 7 is not, expressly or by implication, limited to the central authorities of the jurisdiction from which the child has been removed and of the jurisdiction where the child then is.

I note art 8, namely that any body:

'claiming that a child has been removed . . . in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.'

The words 'any other' are, in my view, of significance and clearly cover this jurisdiction, notwithstanding that the boy is not now here.

Article 11 provides:

'The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children

. . .'

The terminology is noticeably wide. I consider myself to be under a duty, as the judicial authority of a contracting state, to act expeditiously, as Mr Setright bids me do this afternoon, in proceedings for the return of this child.

I interpret both the language of articles of the convention and of the text of the Act as being deliberately wide in its instruction to this court to co-operate with all other contracting states in making orders which will secure the return of wrongfully taken children; and in this case its duty can be discharged only by making the orders for the boy's initial restoration into his mother's care in England if, as there are substantial grounds for expecting, he does land here with his father during the next few days.

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