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[20/07/1988; Court of Appeal (England); Appellate Court]
Re E. (A Minor) (Abduction) [1989] 1 FLR 135, [1989] Fam Law 105

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

20 July 1988

Balcombe LJ and Anthony Lincoln J

In the Matter of E.

Allan Levy for the father

Jeremy Carey for the mother

BALCOMBE LJ: This is an appeal from an order made by Ewbank J on 24 June 1988 whereby, in proceedings under the Child Abduction and Custody Act 1985, he directed that a child, E, be forthwith returned to Australia, and made certain consequential directions pursuant to that order.

The applicant was made by the mother, who is currently resident in Australia: indeed, she is a native-born Australian. The father, against whom the application was made, was born in this country and his parents still live here; but in November 1980 he emigrated to Australia and met the mother in January 1981. They were married in December 1982. There have been three children of the marriage, the boy, whom this application concerns, who was born on 28 July 1983, and twins, now aged 2, born on 8 April 1986.

The marriage proved to be a chequered one; there was indeed a six-month separation starting in July 1985, even before the twins were born. There have been further separations starting in July 1985, even before the twins were born. There have been further separations, from June 1986 until December 1986, from June 1987 until December 1987 and then again on 25 January 1988, when a separation was started which still continues.

On 2 February 1988 the father, with E, left Australia for England, leaving behind his wife, E's mother and the twins in their home in Australia. There is a conflict of evidence as to the precise arrangement which was made, if indeed an arrangement was made at all, when the father left for England with E. He says that it was an open-ended arrangement; he was coming to England to take E for a holiday to see his parents in England - E's grandparents - and that no specific date was given for his return, although he accepts that it was understood that he would go back with E to Australia at some time, certainly before the year was up. The mother, on the other hand, says that the arrangement was that E should go back with the father after having spent 8 weeks in England; as I have said, there is a conflict on the

facts as to that but, as I say again, the father concedes that it was anticipated that he would in due course return, and indeed the tickets which were purchased were return tickets.

However, not long after his arrival in England, the father decided that he would stay in this country with E; again it does not appear whether that intention was to stay indefinitely, but certainly the decision was not to go back to Australia in the immediate future, and that decision was communicated to the mother who thereupon started proceedings in Australia to the nature of which I must now refer.

The Child Abduction and Custody Act of 1985 was passed in order to give effect to the ratification by this country of the Hague Convention on the Civil Aspects of International Child Abduction. Section 1(2) of that Act provides 'that the provisions of that Convention as set out in Schedule 1 to this Act shall have the force of law in the United Kingdom'. So one turns to Schedule 1 to the 1985 Act to see what are the provisions of the Convention. The Schedule omits the preamble, and Articles 1 and 2 of the Convention, although I am prepared to accept that that preamble and those other Articles may be of assistance, where needed, to assist in the interpretation of those Articles which are set out in the Schedule, although I do not myself consider that any such assistance is needed in this particular case.

Article 3 provides as follows:

'The removal or there retention of a child is to be considered wrongful where

(a) it is in breach of rights of custody attributed to a person, . . . either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal of 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.'

Pausing there, it is common ground in this case that the father and mother had, under the law of South Australia, the State where E was habitually resident, joint rights of custody. Thus, E's removal from South Australia was not, in the circumstances of this case, wrongful, but it is the mother's contention, although resisted by the father, that his retention in the UK in the circumstances to which I have already referred is a wrongful retention. Undoubtedly, if those conditions are fulfilled, the provisions of the Convention apply to E.

Article 7 deals with the role of central authorities. In this country the central authority is the Lord Chancellor's Department; in South Australia it appears to be the office of the Attorney-General of South Australia. The Article provides that those central authorities:

'shall 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. In particular, either directly or through any intermediary, they shall take all appropriate measures'

- and then a number of those measures are set out, of which I need only mention that in paragraph (d): 'to exchange, where desirable, information relating to the social background of the child'.

Article 8 deals with the procedure; the mother in this case claiming that E had been wrongfully retained in breach of her custody rights, applied to the central authority in South Australia and her application contained the information which Article 8 provided it should contain, including the grounds on which her claim for the return of the child was based.

I need not refer to Articles 9, 10 or 11; Article 12 reads:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is,' [in this case the High Court in England and Wales] 'a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'

Finally, I should mention Article 13:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person . . . who opposes its return establishes that . . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

The final paragraph of Article 13 reads:

'In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

I do not need to refer to any more of the provisions of the 1985 Act or of the Hague Convention, but I should refer to some of the provisions of RSC Ord 90 which lay down the procedure in the courts of England and Wales for dealing with applications made under the 1985 Act. After a definition provision in RSC Ord 90 r32, r33 provides:

'Except as otherwise provided by this part, every application under the Hague Convention shall be made by originating summons'

- and the form of that originating summons is set out in Appendix A.

Rule 34 provides as follows:

'The originating summons under which any application is made under the Hague Convention shall state' [a number of matters, including in (d)] 'the interest of the plaintiff in the matter and the grounds of the application.'

Finally I refer to Ord 90, r38, which deals with evidence:

'Notwithstanding Ord 28, r1A the plaintiff on issuing an originating summons under the Hague Convention may lodge affidavit evidence in the principal registry in support of the application and serve a copy of the same on the defendant with the originating summons.'

Then there are provisions for the defendant to be able to lodge affidavit evidence, serving copies of that on the plaintiff; and finally Ord 90, r41 provides:

'Notwithstanding Ord 28, r5, the hearing of the originating summons under which an application under the Hague Convention is made may be adjourned for a period not exceeding twenty-one days at any one time.'

So in my judgment, the statement to the following effect made by Nourse LJ in the case of Re A (A Minor) (Abduction) [1988] 1 FLR 365, is amply justified:

'These and other provisions of the Convention demonstrate that its primary purpose is to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access. Except in certain specified circumstances, the judicial and administrative authorities in the country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise.'

Those comments are amply justified by the provisions of the Convention to which I have referred, and indeed of the rules made in this jurisdiction for giving effect to that Convention.

What happened in this case was as follows. The mother, when she realized that the father was intending to retain E indefinitely in this country, made an application in the Family Court in Australia at Adelaide. In due course, an application was made by the Attorney-General's Department of the State of South Australia, by which time the mother had had a custody order made in her favour by the court of South Australia. It sets out various matters, but the one matter on which the father relies in this court, as he did before Ewbank J, is that in referring to the departure of the father of the child, E, for England in January 1988, she says:

'That the father indicated that he would remain in England for a period not exceeding 8 weeks.'

Then, going on to with the factual legal ground justifying the request, she says:

'[the mother] has been the primary care giver of the said child and save as to a period of 3 weeks in the month of July 1987 has had the full-time care and control of the child since birth. [The mother] by agreement with [the father] was to have the full-time care and control of the said child following the separation on the 25th day of January 1988 and the said child . . . is now only in the presence of [the father] as a result of [the father] failing to adhere to an arrangement made with [the mother].'

Two affidavits were sworn by the mother, one on 10 May 1988, really in support of her application before the Family Court in Australia, and another on 19 May supporting her application for an order made under the Hague Convention, namely, the Child Abduction Act of 1985 in this country. In those affidavits she does not, of course, deal with certain allegations to which I shall have to refer shortly, which were made by the father and witnesses on his behalf against her, because as that time no such allegations had been raised.

The matter came before the court in this country very swiftly and various directions were given. The matter came on for hearing before Ewbank J on 24 June 1988. Some two or three days before that hearing the father swore a lengthy affidavit, and obtained from Australia certain supporting affidavits, into which I do not propose to go in any detail, save to say that they raise quite serious charges against the mother of promiscuity, drug-taking and other matters which suggest, to put it no higher, that the mother is not fit to have charge of the child, E; and the father relies on those matters to support a claim by him, under Article 13 of the Convention, that there is a grave risk that E's return to Australia would place him in an intolerable situation. The Article also refers to exposing the child to physical or psychological harm. Mr Levy candidly accepted that there was no evidence to support any suggestion of the possibility of physical harm; the most that could be suggested by way of inference is psychological harm, but for my part I cannot see that that adds anything to the suggestion which is firmly made, namely that there is a grave risk that his return to

Australia would place E in an intolerable situation because of these allegations of promiscuity, drug-taking and the rest made against the mother.

The judge, in the course of a not very lengthy judgment, but which covered adequately all the points, rejected the father's case. He said that he was not satisfied that Article 13 was made out by the father and that in those circumstances he was obliged to order that the child be returned to Australia forthwith, and he did so order.

From that order the father, with the leave of a single Lord Justice, appeals, and Mr Levy relies on four main matters. He first takes what he admits is really a technical pleading point. He says that the only case raised by the mother, both in her application to the South Australian court and indeed to this court by her originating summons here, was that the arrangement was that the father should bring E to England for a period of 8 weeks and no more, and that he has been retained in breach of that arrangement.

I refer briefly to the originating summons here, was that the arrangement was that the father should bring E to England for a period of 8 weeks and no more, and that he has been retained in breach of that arrangement.

I refer briefly to the originating summons paragraph (e) of which says:

'The grounds of this application are that:

(2) The [parents] separated in January 1988. The said child then lived with the plaintiff until 2 February 1988 when he was brought to England with the plaintiff's agreement for a period of 8 weeks in order to meet his English relatives; but with the intent that at the expiry of the 8 weeks the said child would be returned to the plaintiff in Australia."

It is the father's case that there was no firm agreement relating to 8 weeks although, as I have already said, he accepted that when he left Australia there was this understanding that in due course he would return with E. Mr Levy's point, which he accepts is a technical one, is that since the Convention itself states that the application shall contain the grounds of the application and that Ord 90, r34 also states that the originating summons shall include the grounds of the application, by tying herself to this specific period of 8 weeks and not, as she might have done, including a more general allegation that the child was to come to England for an indefinite period, but that it was agreed that he should in any event be returned to Australia and that the father has now evinced an intention not to return the child to Australia, there is a defect in the proceedings.

Like all technical points, this is unattractive, and in any event it seems to me to be wholly without substance. The purpose of the grounds of the application being included is clearly to enable the father to know what is the complaint that he has to meet. There is no complaint that he ever removed the child wrongfully; the complaint is that he retained the child wrongfully. It certainly makes no difference to the way in which he defends his application whether he has retained the child beyond an 8-week period, beyond a 20-week period or beyond some other period. So far as the originating summons itself is concerned, it seems to me that the provisions of RSC Ord, 2, r1 more than adequately meet any point that could be raised on the inadequacy of the originating summons, and as far as the wording of the Convention itself is concerned - which, like all international Conventions, is to be construed with a purposive construction - it seems to me that there is no possible substance in the point that by tying herself to an 8-week period as the arrangement for the length of the holiday, the mother has thereby in some way disentitled herself from saying that, whether it was 8 weeks or not, the father has now manifested an intention to retain the child wrongfully,

indefinitely in this country, and that this is a case which is properly brought under the 1985 Act. So I reject that ground of appeal.

The next point which Mr Levy raises has, at first blush, perhaps slightly, more substance to it. I have already given the relevant dates of the proceedings. When the matter came before Ewbank J the father and his father, E's paternal grandfather, were present in court and Mr Levy invited the judge to allow them to give oral evidence to supplement the already full affidavit evidence which had been given on behalf of the father. The judge refused that application. This ground of appeal asserts that it was wrong for the judge to refuse that application or, as it is otherwise put, 'he could not properly make any finding not having heard the oral evidence and having before him conflicting affidavit evidence'. It seems to me clear that on an application which is made by originating summons, as this was, there is no right on behalf of the plaintiff to call oral evidence to supplement the affidavit evidence which is his evidence in chief. Mr Carey has referred us to the relevant provisions of the rules, Ord 38 r1, Ord 38 r2(3) and Ord 28, r4(3). Those rules accord with the experience of those of us who sit exercising this type of jurisdiction, that the evidence on applications of this kind, commenced by originating summons, or by originating application in the lower courts, being by affidavit, there is no right on which the party can insist to supplement that evidence by oral evidence. On the other hand, it is clear that the judge has a discretion to allow a deponent, in appropriate circumstances, to supplement his affidavit evidence by oral evidence; and of course there may well be cases in which he may be cross-examined on his affidavit, and then re-examined orally in reply. The case of Re A (above) is a case in which, in proceedings of this type, oral evidence was given; that appears from p369G of the report. But what immediately becomes apparent is that, as it happens, all the parties concerned in that case, the mother and the father, a doctor and a grandfather, were present in court and there was no good reason why the judge should refuse to exercise his discretion to allow oral evidence; indeed, it does not appear from the report that the question ever arose. But in this case the mother was still in Australia with the 2-year-old twins; there was no suggestion that it would have been possible for her to come to this country, that she had been invited to do so, or that funds were being made available for her to do so; the case of the father, based, as I say, upon the promiscuity and drug-taking of the mother and the suggestion that she had left the children alone at night and so on, had only been raised a matter of a day or two before the hearing before the judge, and I can see that the judge may very well have thought that it would be most inappropriate, in the light of the general ambit of this Convention, to hear the oral evidence of the father, and of his father, without having any opportunity to hear oral evidence on the other side. However, it seems to me that I need not go as far as that. Whether or not the judge was to allow oral evidence to be given at the hearing was a matter which was purely within his discretion, and on the well-established principles on which this, and any other appellate, court acts, in deciding whether or not to interfere with a discretion exercised by a judge at first instance, I say that I am completely satisfied that there is no possible ground for attacking the basis upon which the judge exercised his discretion in this case. Indeed, I would go as far as to say that I find it difficult to conceive, in the circumstances of this case, his having exercised his discretion in a different manner. I stress once again that the whole purpose of this Convention is not to deny any hearing to a father in the circumstances of this father; it is to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or, having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child. The purpose of the Convention, and of the Act which embodies it as part of the law of this country, is to ensure that the right should deal with that sort of issue. The right court in this case is the South Australian court and the delay which would have been occasioned had there been an adjournment to enable the mother to give oral evidence, had she so wanted or been so able, could only have worked to the detriment of the child against the whole basis of this Convention.

So not only do I say that the judge's exercise of his discretion could not be interfered with by this court, but in my judgment it was, in the circumstances of this case, a very proper exercise of that discretion.

Mr Levy's third point on behalf of the father depends upon the effect of Article 13. I remind myself again that that Article provides that the judicial authority of the requested State, that is the High Court, is not bound to order the return of the child if the person who opposes his return, the father, establishes that there is a grave risk that his return would place the child in an intolerable situation; that makes it clear that the burden is on the father. That seems to me not only the construction which is the most normal meaning of the words used in Article 13 but is indeed, as Mr Carey, counsel for the mother, submitted, the one which is most favourable to Mr Levy, because he does not have to prove that the return of the child would place him in an intolerable situation, but that there is a grave risk that his return would place him in an intolerable situation.

Admittedly, the judge had before him the affidavit of the father, to which I have referred, making the allegations which I have mentioned; he also had before him four affidavits obtained from neighbours and friends in Australia, which on the face of them, although in some cases they included hearsay evidence, appear to support the case of the father. But as against that and, as I say, apart altogether from the considerations to which I have already referred with regard to the object of the Convention, there was the very significant fact that the father was not saying that the twins, whom he had left with their mother, were exposed to an intolerable situation. The most he said about that, quoting a passage from his affidavit, was this:

'It is true that I am also concerned about the other two children but at the present time I feel that E is most at risk because of his age. The twins at the moment would not know what was going on.'

In my judgment the judge was perfectly entitled to take note of that fact as he did because, as he said:

'It is a fact, however, that the twins are living with the mother and that the court that will deal with the twins if the father wishes to, or perhaps if a local authority takes the same serious view of the mother as the father does, will be the Australian court.'

Then he goes on:

'I am not at all satisfied, on the material I have seen, that it could possibly be said that there is a grave risk that the child would be placed in an intolerable situation by being removed to Australia. Australia is a common law country and the courts have ample powers to protect children. The father can either take proceedings of his own accord which he says he will, or he can alert the appropriate local authority in Australia and the Australian court can make whatever order is required, if any, to protect the children.'

I wholly agree with what the judge said in that passage.

The other matter on this question, namely that of Article 13, is whether or not the father would go back to Australia with E if the court ordered him to be returned there. As to that, the father's own evidence is silent. One can see the dilemma in which he was placed; if he said that in no circumstances would he go back, he might be in difficulty; equally, if he said he would go back with E, if E were ordered to be returned, it might make it more difficult to establish that the return would place E in an intolerable situation. So the judge was denied any kind of evidence on that point and he did not seek to draw any inferences. I mention that

merely because the question whether the 'abducting' parent would return with the child to the country of habitual residence was a material consideration in the case of Re A, to which I have already referred.

The final point upon which Mr Levy relies was the provision of Article 13 which says that:

'In considering the circumstances referred to in this Article, the judicial authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

I do not think that Mr Levy went so far as to assert that the South Australian authorities should have provided in their original statement material relating to the allegations that the father had subsequently made; clearly they could not have done so, because they did not even know of their existence. But Mr Levy did submit that in the light of those allegations the judge should have adjourned the mother's application in order to obtain such information from the central authority, such information being, as I understand it, whether or not the mother's behaviour was such as to put E in an intolerable position if he were returned to Australia.

For the purposes of this appeal I am prepared to assume that that information could relate to the social background of the child within the meaning of that phrase in Article 7(b) and Article 13, although I have the gravest doubts whether it does extend that far, and I see much force in Mr Carey's submission when following up an interjection by Anthony Lincoln J, that it probably does not extend that far having regard to the difficulties that the central authority might have experienced in investigating that kind of allegation. But, as I have said, for the purposes of this appeal I am prepared to assume that it does extend that far. Even if it does, it seems to me that this again was a matter for the discretion of the judge, and again it seems to me that he was fully entitled to say that the object of this Convention and the 1985 Act and the rules made under it is, as I repeat once again from the passage in Nourse J's judgment:

'. . . to provided for a summary return to the country of their habitual residence of children who are wrongfully retained in another country in breach of subsisting rights of custody.'

That must be the approach of the courts in this country.

If the submissions which Mr Levy has so ably made to us on behalf of his client were to be accepted, I believe that it could drive a coach and horses through the provisions of this Convention, since it would be open to any 'abducting' parent to raise allegations under Article 13, and then to use those allegations, whether they were of any substance or not, as a tactic for delaying the hearing by saying that oral evidence must be heard, information must be obtained from the country of the child's habitual residence, and so on. That is precisely what this Convention, and this Act, were intended to void, and in my judgment the courts should be astute to avoid their being used as machinery for delay. In this case the Australian courts are the proper courts in which to investigate the allegations made by the father; if those allegations have substance I have no doubt that the Australian courts will deal with them appropriately.

Accordingly, in my judgment this appeal should be dismissed.

ANTHONY LINCOLN J: I agree. I would only add that there are numerous indications in the Convention itself of the desire of the contracting parties that the return of a child who has been removed from his habitual residence should be prompt. It is permissible to consider the preamble, which refers to the parties' desire to establish procedures to ensure

their prompt return to the State of their habitual residence; and Article 1, which is not incorporated in the law of this country, but which it is permissible to look at, states that:

'the objects of the present Convention are to secure the prompt return of children wrongfully removed to, or retained in, any contracting State'.

Article 2 provides for the use of 'the most expeditious procedures available'.

Finally, in Article 7, which is a power incorporated in the law of England, the central authorities are urged to cooperate with each other 'to secure the prompt return of children'.

In my judgment there is a very heavy burden indeed upon a person alleged to have abducted a child in bringing himself or herself within the provisions of Article 13, and the court should hesitate very long before it grants what is in effect an exemption from the urgency which is a characteristic of this Convention and the Act incorporating it.

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