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[23/10/1987; High Court (England); First Instance]
B. v. B. (Minors: Enforcement of Access Abroad) [1988] 1 All ER 652

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

23 October 1987

Waterhouse J.

In the Matter of B. v. B.

Counsel: Allan Levy for the father Roger Gray QC and Caroline Harry Thomas for the mother

WATERHOUSE J. In this case I have to consider an application by a Canadian father under art 21 of Sch 1 to the Child Abduction and Custody Act 1985. Following the wording of the article, the originating summons prays for an order 'securing the effective exercise of the father's rights of access under orders dated 10 June 1985, 3 December 1985 and 22 January 1986 made in the Supreme Court of Ontario' to his three children, who now reside with their mother in Essex.

The background to this application is that the father and the mother were married in Toronto on 30 April 1977, the mother being English and having been brought up in this country. The marriage lasted effectively for seven and a half years, until the parties separated in October 1984, and there were three children born during the period of cohabitation, namely E born on 9 August 1978, L born on 25 April 1980 and T born on 3 March 1982. After the separation the children remained in the care of their mother but the father enjoyed regular access to them for about a year, until the end of September 1985. On the mother's petition, a decree nisi was pronounced in the Supreme Court of Ontario on 10 June 1985 and, by a court order made that day, the care, custody and control of the children were committed to the mother with reasonable access to the father. It was ordered also that the mother was to have exclusive possession of the former matrimonial home and of the contents, which were vested in her. The decree was made absolute on 12 September 1985 and shortly afterwards, that is early in October 1985, the mother moved with the children to the United Kingdom, where they have remained ever since.

The mother said that she obtained legal advice before leaving Ontario, which was to the effect that there was no general bar nor any specific injunction prohibiting her from doing so. On learning of her departure with the children the father applied to the Supreme Court of Ontario, inter alia, for an order permitting apprehension of the children for the purpose

of access. The mother was represented at the hearing on 3 December 1985 by an advocate who was without instructions, and the court ordered that the father might apprehend the children and return them to Canada for the purpose of exercising his rights of access. Provision was also made for assistance by a sheriff or the police and for the father to pay the costs of transportation. Finally, the court ordered defined access by him for a fortnight over the Christmas season of 1985 in a period that would not interfere with the children's schooling in England.
The remaining applications of the father were adjourned, and on 22 January 1986, when no one appeared for the mother although there was an affidavit by her before the judge, the order for reasonable access made on 10 June 1985 was varied to provide for six weeks' access by the father annually, two weeks during the English Easter school holiday and four weeks in the summer holiday, on the footing that the father might remove the children to Canada during the periods of access.

Meanwhile, in England, the mother had made the three children wards of court by taking out an originating summons on 3 December 1985. The wardship was confirmed on 30 December 1985 and since then there have been hearings, principally in relation to access in this country, to which it is not necessary for me to refer at this stage.

The present application of the father under the 1985 Act, by a summons dated 12 June 1987, was preceded by a request by the Attorney General for Ontario to the Lord Chancellor's Department for the return of the children to Canada for the purpose of enabling the father to implement or enforce his rights of access there.

By s 3(1)(a) of the 1985 Act the functions of a central authority under the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980 Misc 14 (1981) Cmnd 8281) are to be discharged in England and Wales by the Lord Chancellor. Article 8 of the convention, which is in Sch 1 to the Act, states:

'Any person . . . claiming that a child has been removed or retained 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 . . .'

Article 10 states:

'The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.'

Moreover, subsequent articles of the convention prescribe the manner in which the judicial or administrative authority of the contracting state shall act in response to such a request and the matters relevant to their decision.
Rights of access are dealt with separately in art 21 of the convention but, before reading that article, it is necessary to refer to the material part of art 7, dealing with the functions of central authorities, which provides:

'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 . . . (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access . . .'

Article 21 provides:

'An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as is possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.'

In response to the father's application, it is submitted on behalf of the mother that the provisions of the 1985 Act, including those of the convention enacted in Sch 1, are inapplicable to the present case for three reasons, namely: (1) the Act was not brought into force in respect of Ontario until 1 August 1986, by virtue of the provisions of the Child Abduction and Custody (Parties to Convention) Order 1986, SI 1986/1159 (2) in any event, there was never any wrongful removal or retention of the children by the mother within the meaning of arts 3 and 5 of Sch 1 (3) the children were not habitually resident in a relevant contracting state immediately before any breach of custody or access rights within the meaning of art 4 of Sch 1.
It is, of course, common ground that the 1985 Act was not brought into force in respect of Ontario until 1 August 1986, and s 2 provides as follows:

'(1) For the purposes of the Convention as it has effect under this Part of this Act the Contracting States other than the United Kingdom shall be those for the time being specified by an Order in Council under this section.
(2) An Order in Council under this section shall specify the date of the coming into force of the Convention as between the United Kingdom and any State specified in the Order and, except where the Order otherwise provides, the Convention shall apply as between the United Kingdom and that State only in relation to wrongful removals or retentions occurring on or after that date . . .'

The 1986 order does not contain any relevant exceptions, and wrongful removal or retention is defined in art 3 of Sch 1 to the Act in terms of a breach of rights of custody which, by art 5 (a), is defined as including 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.

On the basis of these provisions, counsel for the mother relies on the fact that the removal in this case occurred in October 1985, over nine months before the Act came into force. Counsel also points out that, at the time when the mother moved to England, she had been correctly advised that there was no provision of Ontario law nor any order of the Ontario court restraining her from doing so (see e g Wright v Wright [1970] 1 OR (2d) 337 and Landry v Landry [1985] RFL (2d) 235). The removal was not wrongful therefore and there has not been any wrongful retention of the children subsequently within the narrow definition of that term in art 3, read with art 5(a), of Sch 1 to the Act.

At first sight this argument appears to be compelling in the light of the express limiting words, in particular of s 2(2) of that Act. On further reflection, however, this interpretation would render ineffective and inoperative those provisions of the convention that are designed to secure co-operation in the enforcement of rights of access to a non-custodial

parent. Thus, for example, if an English custodial parent were now to take a child to Ontario in breach of an order pursuant to r 94(2) of the Matrimonial Causes Rules 1977, SI 1977/344, that would be a wrongful removal of the child within the ordinary meaning of the words but not within the definition in the convention. If the Ontario legislation is in the same terms as the 1985 Act, therefore, and counsel's argument is correct, the non-custodial parent in England could not invoke the convention in order to enforce his or her rights of access, despite the fact that both the United Kingdom and Ontario have been contracting states for over a year. The illustration that I have given is a typical situation in which a non-custodial parent would expect to be able to rely on the convention, but it would be of no assistance and it is difficult to envisage any circumstances in which a mere breach of rights of access on the removal of a child abroad by a custodial parent could be remedied or dealt with under the convention.

Helpful guidance on the interpretation of international conventions when enacted in an English statute was given by Lord Wilberforce in his speech in James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 3 All ER 1048 at 1052, [1978] AC 141 at 152. In that case the convention considered was the Convention on the Contract For the International Carriage of Goods by Road 1956 enacted in the schedule to the Carriage of Goods by Road Act 1965. Lord Wilberforce said:

'The convention of 1956 is in two languages, English and French, each text being equally authentic. The English text alone appears in the schedule to the 1965 Act and is by that Act (s 1) given the force of law. Moreover the contract of carriage seems to have incorporated, contractually, this English text. It might therefore be arguable (though this was not in fact argued), by distinction from a case where the authentic text is, e g, French and the enacted text an English translation, that only the English text ought to be looked at. In my opinion this would be too narrow, a view to take, given the expressed objective of the convention to produce uniformity in all contracting states. I think that the correct approach is to interpret the English text which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent but on broad principles of general acceptation (Stag Line Ltd v Foscolo, Mango & Co Ltd [1932]AC 328 at 350, [1931] All ER Rep 666 at 677, per Lord Macmillan). Moreover, it is perfectly legitimate in my opinion to look for assistance, if assistance is needed, to the French text. This is often put in the form that resort may be had to the foreign text if (and only if) the English text is ambiguous, but I think this states the rule too technically. As Lord Diplock recently said in this House, the inherent flexibility of the English (and, one may add, any) language may make it necessary for the interpreter to have recourse to a variety of aids (Carter v Bradbeer [1975] 3 All ER 158 at 161, [1975] 1 WLR 1204 at 1206). There is no need to impose a preliminary test of ambiguity.'

Adopting what I hope is a similar approach, it is permissible in my judgment to look at the objects of the convention with which I am concerned as an aid to the interpretation of s 2(2) of the 1985 Act. They are set out succinctly in art 1 of the convention, which is not included in Sch 1 to the Act, as follows:

'(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State.'

When that article is considered together with arts 7(f) and 21 in Sch 1, which I have already quoted, it follows in my judgment that s 2(2) of the 1985 Act should not be read as limiting the application of the Act, and thus the convention, to cases where there has been a wrongful

removal or retention of a child, as submitted on behalf of the mother in the present case. Breaches of rights of access are dealt with separately in Sch 1 to the Act and the limitation on the operation of the Act set out in s 2(2) must relate only to cases in which the foundation of the application is the wrongful removal or retention of a child in breach of rights of custody in contrast to a breach of rights of access.

This conclusion leads conveniently to the third wing of the argument on behalf of the mother based on art 4 of Sch 1, the material part of which reads: 'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights . . .' It is submitted for the mother that any relevant breach of the father's access rights must have occurred in October 1985 on the removal of the children to the United Kingdom. Immediately before that breach, if there was a breach, the children were habitually resident in Ontario but that state was not then a contracting state because no Order in Council had been made here (see s 2(1) of the Act). By 1 August 1986 the children were habitually resident in England and were wards of court, subject to the jurisdiction of this court. Moreover, there was no subsequent breach of the father's rights of access on which he can properly rely.

The first point taken on behalf of the father in response to this argument is that the relevant effect of the 1986 Order in Council was merely to identify Ontario and the United Kingdom as contracting states without limiting the operation of the 1985 Act to breaches of access rights that occurred after 1 August 1986. It is submitted, therefore, that it is sufficient for the purposes of enforcement now for the father to show that the children were habitually resident in Ontario before the first breach of his rights of access occurred, when the mother, in effect, denied him reasonable access to the children, as ordered by the Ontario court and agreed between the parents, by removing the children to England.

An alternative submission for the father is that art 4 is in wide terms and does not require him to establish that the children were habitually resident in Ontario immediately before a breach of his rights of access occurred. It is common ground that from 1 August 1986 the children were habitually resident in a contracting state, namely the United Kingdom. Counsel for the father argues that that is sufficient to make the convention operative, provided that a breach of access rights after 1 August 1986 can be shown. Finally, it is said that such a breach did occur in the instant case because the order of the Supreme Court of Ontario made on 22 January 1986 remains operative, despite the English wardship proceedings, and the father was denied four weeks' access in the summer school holiday in 1986 and two weeks' access at Easter 1987, after the 1985 Act had become operative and before the application now before this court was made. In support of this last argument, counsel for the father points to other provisions of the convention enacted in Sch 1 to the Act. In particular, he says that the effect of arts 8 and 21 is that an application to make arrangements for organising or securing the effective exercise of rights of access may be made by any person, institution or other body claiming that there has been a breach of such rights and that it may be made to the central authority of the child's habitual residence, or to the central authority of any other contracting state.

This is an attractive alternative line of argument but, in my view, it imputes too broad a scope to the 1985 Act. I am driven back to consideration of the object defined in art 1(b) of the convention, which I have already recited. In the light of that object, the reference in art 4 to habitual residence in a contracting state immediately before any breach of access rights occurred must be interpreted as meaning habitual residence in a contracting state in which the access rights relied on then existed, because (1) it is those rights on which the application is intended to be based and (2) the rationale of co-operation in enforcement of the rights is that habitual residence in the contracting state in which they existed was a sufficient

foundation for that state's jurisdiction without further argument or inquiry. The alternative wider interpretation relied on by the father is, in my view, unacceptable because it would give almost limitless operation to legislation enacted for specific limited purposes. It would also lead to arguments about the respective jurisdictions of the courts in Ontario and England in 1986 to make binding orders in respect of the children in order to determine what rights of access, if any, had been breached, whereas an object of the convention is to avoid or at least to minimise the scope for such arguments.

In my judgment also, the first argument of the father in relation to art 4 is equally unacceptable. I can find nothing in the Act or in the convention to justify giving it retrospective effect by founding jurisdiction on a breach of access rights that occurred in October 1985. The children were not, in my view, habitually resident in a contracting state immediately before that because no Order in Council in relation to Ontario had then been made. If one were to interpret art 4 in the sense urged on behalf of the father, there would be no time limit to the possible retrospective effect of the Act in relation to rights of access and considerable confustion could ensue, particularly in cases such as that before me in which the minors had been made wards of the English courts before the Act came into operation.

In the light of these conclusions it has been necessary for me, with some regret, to dismiss the father's application. Instead, I have had to consider the question of access by the father in the wardship proceedings, in which it is clear that the first and paramount consideration is the welfare of the minors. I am glad to say, however, that the mother and the authors of various Canadian and English reports before me accept that it is in the best interests of the minors that there should be continuing access by the father, subject to appropriate safeguards, and the only disputes have been about the quantum and organisation of such access. In the event therefore the father has not been significantly prejudiced by his failure to invoke the provisions of the convention successfully. The children are still comparatively young so that there has to be some limitation on their travels at this stage, but it is clear that there should be a period of staying access in Canada each summer. Moreover, the father is prepared to seek a variation by consent of the Ontario court order so that the orders in relation to care and control and access both here and there are likely to be in similar terms.

In those circumstances, on the basis of additional suitable undertakings by the father, I have ordered that there shall be one week's staying access by the father in England during the Easter holiday 1988 and three weeks' staying access in Ontario in the following summer holiday. It is envisaged that the access will follow a similar pattern in succeeding years, subject to favourable reports. These provisions conform broadly with the spirit or intention of the orders made by the Supreme Court of Ontario on 22 January 1986, but the periods are shorter having regard to the ages of the children and the father's present limited holiday entitlement in employment that began after the Ontario orders were made.

In view of my conclusions, I am reluctant to comment further on the scope and operation of the convention in relation to rights of access, but I have been asked to give what guidance I can. The difficulty about the provisions is that they do not impose directly any specific duties on the judicial authority of a contracting state in relation to access and there is no express definition or limitation of the principles on which a court should exercise its discretion. In contrast, where the application is for the return of a child who has been wrongfully removed or retained, the judicial authority is required to observe or act in the light of the provisions of arts 11 to 19 of the convention. In relation to access, the Lord Chancellor, as the central authority for England and Wales, has duly made arrangements for the reception of applications giving assistance to applicants who are non-custodial parents, who may now make application to this court pursuant to the provisions of RSC Ord 90, rr 32 to 47 (see s 10 of the 1985 Act), whether or not the child is already a ward of court or otherwise subject to

the court's jurisdiction. The obligations imposed by arts 7 and 21, however, are imposed on the central authority exclusively and even the provisions of art 7(f) contain the limiting words 'in a proper case'. In the absence of any express reference to the judicial discretion in cases in which there has been a breach of access rights only, I am not persuaded that the general rule laid down in s 1 of the Guardianship of Minors Act 1971, which applies to any proceedings in any court, has been displaced or that the convention was intended to secure the enforcement of rights of access in the same way as rights of custody. This court will always, of course, respect rights of access prescribed by an order of another contracting state in a proper case and seek to give practical effect to such rights, often in a necessarily modified form, if it accords with the minor's welfare to do so but the 1985 Act does not provide new criteria for the exercise of a judge's discretion in the matter.

I will direct that the order should be amended to include a provision committing care and control of all three minors to the mother and I confirm the wardship.

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