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[16/05/1997; Full Court of the Family Court of Australia (Adelaide); Appellate Court]
Police Commissioner of South Australia v. Castell (1997) FLC 92-752

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Adelaide

BEFORE: Ellis, Baker and Lindenmayer JJ

HEARD: 21 April 1997

JUDGMENT: 16 May 1997

Appeal No. SA 74 of 1996 No. AD 4861 of 1993

IN THE MATTER OF:

Police Commissioner of South Australia

(Appellant)

-and-

Sharon Betty Castell

(Respondent)

REASONS FOR JUDGMENT

APPEARANCES:

Mr Moss of counsel, (instructed by The Crown Solicitor for the State of South Australia), appeared on behalf of the appellant.

Mr Hogan of counsel, (instructed by Conways, Solicitors), appeared on behalf of the respondent.

JUDGMENT:

Ellis, Baker and Lindenmayer JJ: This is an appeal by the Police Commissioner of South Australia (hereinafter referred to for the sake of convenience as "the Central Authority") against the order of Burton J made on 16 December 1996. On that day, the trial Judge dismissed the application of the Central Authority filed on 16 August 1996 brought on behalf of C.H. (hereinafter referred to for the sake of convenience as "the father") for an order, pursuant to the provisions of the Family Law Child Abduction Convention Regulations (hereinafter referred for the sake of convenience as "the Regulations"), that the father have access to the six children of his marriage to the respondent (hereinafter referred to for the sake of convenience as "the mother").

BACKGROUND

The following material as to the background to the proceedings is taken from the judgment of the trial Judge, as the facts were not challenged at the hearing of the appeal.

Both the father and the mother were born in England, the mother on 23 July 1955 and the father on 14 January 1958. They married in England on 6 February 1982. There are six children of the marriage, the four elder having been born in England. On 13 March 1993, the mother, with the consent of the father, came to Australia with those four children. The two younger children, twins, were born in Australia on 6 July 1993.

On 6 September 1993, the mother made an application to the Family Court of Australia (hereinafter referred to for the sake of convenience as "the Court") for an order that she have the sole guardianship and custody of each of the six children. The father applied for a visitor's visa to enable him to visit Australia, but that application was rejected by the Australian High Commission in England, apparently on the basis of representations made to the Commission by the mother.

On 1 November 1993, an order was made in the Court that, until further order, the mother have the custody of the six children. On 4 March 1994, an order was made whereby the father was restrained from entering upon or remaining in or near any premises occupied by the mother and the children. The father was legally represented in the Court on the occasions on which those orders were made.

On 17 May 1994, the father made application to the Commonwealth Central Authority for assistance in securing the return of the children pursuant to the provisions of the Regulations. The Authority refused to act on his behalf on the ground that there had been no wrongful removal of the children from England.

On 17 June 1994, the father made an application to the Court for an order that he have access to each of the six children for a period of four weeks in each year. Although he was unable to attend Australia, he was represented in the proceedings by an Adelaide legal practitioner. An order was subsequently made that the children be separately represented in those proceedings. However, on 15 August 1995, that application of the father was struck out.

Thereafter, the father made application to the Central Authority for England and Wales for assistance in obtaining access orders in Australia. Following a request from that Central Authority to the Commonwealth Central Authority, proceedings were instituted in the Court by the Central Authority filing the application on 16 August 1996 to which we have already referred. In that application, the Central Authority sought the following orders:-

> **"(a) That C.H. ("the father") have yearly access to the children V, R, M, J, N and S ("the children") during such period as the court deems fit;**
>
> **(b) That the father have indirect access to the children by way of regular telephone calls and exchange of correspondence;**
>
> **(c) In the event that the parties are unable to reach agreement as to the terms of access by the father to the children, the Court order that the children be interviewed by a child psychologist to ascertain their wishes as to contact with their father or the Court direct that a family and child counsellor or welfare officer interview the children and report to the Court on matters relevant to the father's access to the children."**

That application came on for hearing before the trial Judge on 28 November 1996 and judgment was delivered on 16 December 1996.

JUDGMENT OF THE TRIAL JUDGE

After referring to the application of the Central Authority and the orders sought therein, the trial Judge went on to say at page 5 of the Appeal Book:-

> **"I have treated the application as an application for contact pursuant to the amendments to the Family Law Act 1975 contained in the Family Reform Act 1995." ... "The issue before me is whether the Central Authority pursuant to Regulation 25 of the Family Law Child Abduction Convention Regulations (the Regulations) and Article 21 of the Convention on the civil aspects of International Child Abduction (the Convention), may apply to the Family Court for it to hear an initiating application for orders that the husband have contact to the children pursuant to the Family Law Act (1975)."**

He then referred to background material and noted that the application appeared to be unique in that it was conceded that the children, the subject of the application, were habitually resident in Australia and that there were no orders for access existing in either the place of their habitual residence (Australia) or in the other contracting country (England) which was the place of the habitual residence of the father.

The trial Judge referred to the provisions of s.111B (1) of the Family Law Act and then set out the provisions of reg.25 of the Regulations and Article 21 of the Convention on the Civil Aspects of International Child Abduction (hereinafter referred to for the sake of convenience as "the Convention"). He then considered two English authorities, Re T (Minors) (International Child Abduction: Access) (1993) 1 WLR 1461 and Re G (A Minor) (Enforcement of Access Abroad) (1993) 3 All ER 657, to which he had been referred, before concluding:-

> **"However, Regulation 25 is quite different in its scope from Article 21.**
>
> **Unlike Article 21, Regulation 25 does purport to provide the Family Court with jurisdiction to hear an application by the central authority for an order "necessary or appropriate to organise or secure the effective exercise of rights of access to a child in Australia by a person, an institution or another body having rights to the child".**
>
> **The question immediately arises whether the husband in this case has 'rights of access' to the six children or any of them within the meaning of Regulation 25. On the face of it the husband has no right of access. There is no order or law in either of the contracting states giving him a right of contact or access to the children.**
>
> **It is accepted law in Australia that the fact of parenthood does not give rise to a right of access (or contact) see *Brown v Pederson* (1992 FLC 92-271; *B & B* (1993) FLC 92-357 and *N & S* (1996) FLC 92-655 per Fogarty J at 82,707. It was not suggested to me that the husband has any right in England arising out of the Children Act 1989 or any other law."**

He then considered the submission made on behalf of the Central Authority that "organising and securing the effective exercise of access rights includes the right of the Central Authority to institute proceedings for contact" and "to interpret the Regulation [25] to mean that the Central Authority can institute proceedings in the Family Court of Australia to obtain for the husband [the father] orders for contact, where no such orders or rights of access have previously been in existence in either contracting state."

He concluded his consideration of the submissions by saying:-

> **"If Regulation 25 is to be interpreted as widely as sought, ie to enable the Central Authority of the state of a child's habitual residence to institute proceedings in that state on behalf of a resident of another Contracting State for contact orders, where no such contact orders existed in that other Contracting State, then it seems to me that the effect of the Regulation would be going well beyond the obligations cast upon Australia by the Convention and therefore beyond the regulation making power contained in s.111B.**
>
> **The husband has a remedy in his own right to initiate proceedings for contact in the Family Court of Australia, a remedy he has already unsuccessfully pursued previously,**

nevertheless a remedy is available to him. It is not necessary to give an artificial meaning to the words of Regulation 25 to carry into effect Australia's obligations under the Convention. There is no law of England, to be respected in Australia, which requires the jurisdiction sought to be invoked by the Central Authority.

For those reasons I therefore do not accept that the Regulations embodying the Convention give the Central Authority jurisdiction to initiate proceedings in the Family Court for contact in respect of these children.

I have not found it necessary for the purpose of these reasons to consider whether or not these children are children to whom the Convention applies. Article 4 provides the definition of children to whom it does apply.

"Article 4 The Convention shall apply to any child who is habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

It matters not that an application is made in the Contracting State where the children are habitually resident see in *Re G (Supra),,* but the definition requires that there shall be a breach of "an access right" applicable to such children. No breach of an access or contact right pursuant to an order or of any law is alleged in this instance. The Convention may not even apply to these children. In any event, the definition confirms my opinion that Regulation 25 does not provide the Central Authority with the right to seek "rights of access" in an initiating proceeding in the present circumstances.

The Central Authority's application is dismissed."

GROUNDS OF APPEAL

The Grounds of Appeal are:-

"1. The Learned Judge was in error in interpreting the State Central Authority's application as an application for contact pursuant to the Family Law Act.

2. The Learned Judge was in error in failing to conclude that the father has rights of access within the meaning of regulation 25 of the Family Law Child Abduction Regulations (the Regulations) notwithstanding there are no current orders in existence in either contracting state.

3. In the alternative, the Learned Judge was in error in failing to conclude that regulation 25 of the Regulations provides for the seeking or establishment of access orders.

4. The Learned Judge was in error in concluding that there must be a breach of "an access or contact right pursuant to an order or any law" for the operation of the Convention."

At the commencement of the hearing of the appeal, leave was granted to the Central Authority to amend the Notice of Appeal to substitute for the orders sought as set out therein an order that the appeal be allowed, the order of the trial Judge set aside and the application remitted for rehearing before a single Judge of the Court.

FRESH EVIDENCE

At the commencement of the hearing of the appeal, with the consent of the mother, leave was granted to the Central Authority to adduce fresh evidence, being the document of ratification of the Convention by the Government of Australia (Exhibit "A") and extracts from an article on the Implementation of Article 21 of the Hague Convention (Exhibit "B").

THE REGULATIONS

Before dealing with the submissions, it is convenient to refer to certain of the relevant Regulations.

Reg.2(1) defines the meaning in the Regulations of certain expressions therein referred to "unless the contrary intention appears". That Regulation provides that "rights of access" "include the right to take a child for a limited period of time to a place other than the child's habitual residence".

Reg.2(1B) provides:-

> **"Unless the contrary intention appears, an expression that is used in these Regulations and in the Convention has the same meaning in these Regulations as in the Convention."**

Reg.25 provides:-

> **"(1) [Central Authority may apply for order to secure exercise of access rights] A Central Authority may apply to a court for an order that is necessary or appropriate to organise or secure the effective exercise of rights of access to a child in Australia by a person, an institution or another body having rights of access to the child, being: (a) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to: (i) stop, enter and search any vehicle, vessel or aircraft; or (ii) enter and search premises; if the person reasonably believes that: (iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and (iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or (b) any other order that the Central Authority considers to be appropriate to give effect to the Convention.**
>
> **(2) [Application: Form 4] An application must be in accordance with Form 4.**
>
> **(3) [Answer: Form 4A] If an application is made, the respondent may file an answer, or an answer and a cross application, in accordance with Form 4A.**
>
> **(4) [Order appropriate to give effect to the Convention] A court may, in respect of: (a) an application made under subregulation (1); or (b) an answer, or an answer and a cross application, made under subregulation (3); make any order in relation to rights of access to a child that the court considers appropriate to give effect to the Convention.**
>
> **(5) [Reply: Form 4B] If an answer, or an answer and a cross application, is made under subregulation (3), the applicant may file a reply in accordance with Form 4B."**

It also is convenient to refer, at this stage, to the following Articles in the Convention to which we were referred:-

> **Article 1 provides:- "The objects of the present Convention are- (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 States."**

Article 4 provides:-

> **"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."**

Article 7 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- (a) to discover the whereabouts of a child who has been wrongfully removed or retained; (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (d) to exchange, where desirable, information relating to the social background of the child; (e) to provide information of a general character as to the law of their State in connection with the application of the; (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; (g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

Article 21 provides:-

"An application to make arrangements for organizing 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 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."

SUBMISSIONS ON APPEAL

In support of Ground 1, it was submitted that the application of the Central Authority commencing the proceedings was an application for access made pursuant to the provisions of reg.25 of the Regulations and not an application for contact pursuant to the provisions of the Family Law Act. We agree with that submission. Notwithstanding that he indicated that he was treating the application as one for contact pursuant to the Family Law Act, the trial Judge correctly identified, and thereafter addressed, the issue before him in the passage at page 5 of the Appeal Book to which we have already referred.

Thereafter, counsel for the Central Authority made his submissions in a global fashion rather than addressing individual grounds of appeal. The thrust of those submissions was that, on its proper construction, reg.25 is sufficiently wide to enable a Central Authority either to make application to the Court to establish rights of access where no court order for access exists, or to enforce rights of access established in the country from which the child has been removed or in which the child has become habitually resident. It was submitted that such an interpretation accords with Articles 7 and 21 (particularly Article 7(f)) of the Convention, which speak of "organizing and or securing" rights of access.

It was then submitted that, having regard to the observations of Kirby J in De L v. Director-General, NSW Department of Community Services and Anor (1996) FLC 92-706 at pages 83,464 to

83,466, it is appropriate to have recourse, inter alia, to the Official Explanatory Report on the Hague Convention as an aid in interpreting the Convention. Paragraph 126 of that Report, dealing with Article 21, states:-

> **"As we have just pointed out, the article as a whole rests upon co-operation among Central Authorities. A proposal which sought to insert a provision in a new paragraph that both the authorities and the law of the State of the child's habitual residence should have exclusive jurisdiction in questions of access rights, was rejected by a large majority. [See Working Document No 31 (Proposal of the Danish delegation) and P. v. No 13.]. The organizing and securing of the actual exercise of access rights was thus always seen by the Convention as an essential function of the Central Authorities. Understood thus, the first paragraph contains two important points: in the first place, the freedom of individuals to apply to the Central Authority of their choice, and secondly the fact that the purpose of the application to the Central Authority can be either the organization of access rights, i.e. their establishment, or the protection of the exercise of previously determined access rights. Now, recourse to legal proceedings will arise very frequently, especially when the application seeks to organize rights which are merely claimed or when their exercise runs up against opposition from the holder of the rights of custody. With this in view, the article's third paragraph envisages the possibility of Central Authorities initiating or assisting in such proceedings, either directly, or through intermediaries."**

It was submitted that that Report makes it clear that Article 21 contemplates either the establishment of access rights where none previously existed, or the protection of previously determined access rights. It was then argued that as reg.25 uses essentially the same wording as Article 21, "organise or secure", in establishing the jurisdiction of the Court to hear such matters, the word "organise" ought to be given, in interpreting the Regulation, the meaning it has in the Article, that is, to enable the establishment of rights where none previously exists. It was further put that, if that meaning is not given to the word "organise", the word as appearing in the Regulation "has no work to do". Accordingly, it was submitted that the jurisdiction of the Court to make orders for access/contact pursuant to reg.25 does not depend upon the existence of a foreign or domestic order for access/contact, or upon any express or implied legislative provision in the foreign country, here England.

We would contrast paragraph 126 of the Official Explanatory Report on the Hague Convention, to which we were referred, with Explanatory Documentation prepared by Dr. John Eekelaar for the Commonwealth Jurisdictions in February 1981 and the article by A. E-Anton "The Hague Convention on International Child Abduction" (1981) 30 ICLQ 537 referred to by both Butler-Sloss and Hoffmann LJJ in Re G (A Minor) (supra).

Next it was submitted that the phrase "any breach of custody or access rights" appearing in Article 4 must necessarily include, because of the use of the word "rights", a relationship or circumstance other than such as arises out of an existing court order or a right arising under a statute. In the instant case, it was put that that "right" must include the relationship and obligations of parenthood as understood by the Children Act 1989 (UK). Thus, it was put that Article 21 does not merely provide for mutual recognition of foreign access orders.

It was then put that even in cases in which orders have been made in a court of a foreign country, the courts of the country in which an application is made pursuant to Article 21 have not felt themselves bound by the terms of the orders of the foreign court. In support of that submission, we were referred to Gentles and Goldstein (unreported, Family Court of Western Australia, 5 December 1994). Thus, it was put that "[i]f this is the case then the nature of the "rights of access" in the foreign country would seem to be relatively unimportant."

Accordingly, it was submitted that the Convention applies to the children in the instant case because the mother's refusal of access was a breach of a "right" within the terms of Article 4.

It was next submitted that the trial Judge erred in the conclusion that he reached, to which we have already referred, as to the effect of the English authorities, Re T (Minors) (supra) and Re G (A Minor) (supra). Those authorities refer to the distinction to be drawn between the duties of the Central Authority and the jurisdiction of the English courts. In relation to those authorities, the trial Judge said:-

> **"The English cases referred to herein however, make it clear that where no existing order is in force, the role of the Central Authority pursuant to Article 21 is limited to providing assistance to a parent to institute proceedings in his or her own name according to local law by organising legal aid or by referring the party to lawyers in private practice. The obligation cast on the Central Authority is thereby satisfied. The Central Authority pursuant to Article 21 has no recourse to a Court, that right resides personally in the parent seeking to attain rights of access.**
>
> **Regulation 25 purports to invoke the jurisdiction of the Family Court to hear an application by the Central Authority as applicant in its own right. It goes well beyond the limited scope of Article 21. Should the regulation therefore be interpreted to attach the meaning to the words "organise or secure the effective rights of access to a child as though the regulation was as limited in its function as Article 21?"**

It was then put that reg.25 provides jurisdiction to the Court to entertain an application for access/contact, provided the Convention is applicable. For the reasons submitted, the Convention is applicable and it was submitted that the trial Judge ought to have held that reg.25 empowered him to make orders which established access rights where there were no contact orders in existence in England.

On behalf of the mother, it was submitted that the Convention had no application having regard to the facts of this case, that there was no breach of any right of access and that the trial Judge was correct in dismissing the application of the Central Authority.

CONCLUSIONS

In our view, reg.25 differs from Article 21 in a number of material aspects. Unlike Article 21, reg.25 provides that the Central Authority may apply to a Court for an order that is necessary or appropriate to organise or secure the effective exercise of rights of access to child in Australia by a person ... having rights of access to a child in Australia, being an order as set out in either paragraphs (a) or (b) of the Regulations. The Court has jurisdiction, having regard to the provisions of ss.39(5) and 111B of the Family Law Act and reg.25 itself.

In our view, the rights of access referred to in the Regulation are rights already established in another Convention country either by operation of law, or as a consequence of a judicial or administrative decision, or by reason of an appropriate agreement having legal effect (cf, for example, ss.63E and 63F(3) of the Family Law Act). Such an interpretation is, in our view, consistent with the provisions of Article 4 of the Convention that the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

We do not accept the submission of the Central Authority as to the interpretation of the words "breach of custody or access rights" appearing in Article 4, to which we have already referred. Moreover, where there is no existing provision for access/contact of the type to which we have referred, an application cannot be made, as referred to by reg.25, for an order that is necessary or appropriate to organise or secure the effective exercise of rights of access to a child in Australia by a person, institution or other body having rights of access to the child.

In addition, the order for access sought by the Central Authority, in the circumstances of this case, is not an order to which either paragraphs (a) or (b) of reg.25(1) applies. It is not an order that is necessary or appropriate within the framework of the Regulations, as such an order could be

sought by the father under the Family Law Act and is not an order that is appropriate to give effect to the Convention or Australia's obligations under the Convention.

In those circumstances, although an application can be made to the Court pursuant to reg.25 in appropriate circumstances, for orders as set out in the Regulations, that Regulation does not enable the Central Authority to apply to the Court for an order to establish rights of access.

Additionally, in the instant case, no breach of access rights of the type to which we have referred was alleged. Thus, the Convention has no application.

Finally, s.111B of the Family Law Act and the Regulations give effect to Australia's obligations in international law under the Convention. We thus consider it appropriate in construing reg.25 to regard it as confined to cases which give effect to the relevant purpose of the Convention, namely to ensure that foreign access rights are respected. See also the observations of Hoffmann LJ in Re G (A Minor) (supra).

Accordingly, in our view, the application of the Central Authority was correctly dismissed and we would thus dismiss the appeal. The father remains free to institute proceedings in his own name under the Family Law Act for an order that he have contact with each of the children.

COSTS OF THE APPEAL

At the completion of the hearing of the appeal, we heard submissions as to the costs of the appeal.

In the event that the appeal be dismissed, the mother sought an order that the appellant pay her costs assessed in the sum of $4500. It was conceded that the quantum of the costs as sought was reasonable.

The Central Authority opposed the making of that order and relied particularly on the provisions of reg.7 which provides:-

> **"A person who holds office as the Commonwealth Central Authority, who is appointed to act as that Authority or who, being a State Central Authority, exercises the powers and performs the functions of that office shall not be made subject to any order to pay costs in relation to his or her exercising the powers, or performing the functions, of the Commonwealth Central Authority."**

In support of the submission, we were referred to De L and Director-General, NSW Department of Community Services & Anor (unreported, High Court, judgment delivered 9 April 1997). In the majority judgment, their Honours said at page 16:-

> **"... reg 7 cannot immunise either the Commonwealth Central Authority or a State Central Authority with respect to costs in proceedings in which they assert powers or functions outside the scope of the Regulations. The second is that, even if the Regulations extend beyond what is required by the Convention, immunity only extends to that which is "necessary or appropriate to give effect to the Convention".**
>
> **It follows, in our view, that reg 7 does not provide immunity against costs with respect to proceedings or, perhaps, more accurately, that aspect of proceedings in which either the Commonwealth Central Authority or a State Central Authority asserts a meaning or operation of the Regulations which their terms do not bear or which is neither necessary nor appropriate to give effect to the Convention."**

In the light of those observations, we consider that the circumstances in this case justify the making of the order for costs as sought by the mother.

ORDERS

We order:-

1. That the appeal be dismissed.

2. That the appellant pay the costs of the respondent of and incidental to the appeal; such costs to be as agreed, or failing agreement, as taxed.

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