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[19/12/1994; Supreme Court of Ireland; Superior Appellate Court]
P. v. B. (Child Abduction: Undertakings) [1994] 3 IR 507

Supreme Court of Ireland

19 December 1994

Hamilton CJ, Egan, Denham JJ

In the Matter of the Child Abduction and Enforcement of Custody Orders Act 1991 and in the Matter of R (a Minor); P. v. B.

DENHAM J, ((Hamilton CJ and Egan J concurring): This is an appeal by the plaintiff/appellant, hereinafter referred to as the appellant, against the decision of the High Court given on 29 July 1994 refusing to direct the return of the child R to the jurisdiction of the courts of Spain. There is also a cross-appeal by the defendant/respondent, hereinafter referred to as the respondent.

On 19 October 1991 the child R was born in Spain. The appellant, her father, is Spanish and the respondent, her mother, is Irish. They have not married but lived together in Spain for some months before the conception of the child until 28 May 1993, when the child was removed from Spain by the respondent.

In December, 1993 a written request for the child's return was received in Ireland from the central authority in Spain pursuant to the procedure in the Child Abduction and Enforcement of Custody Orders Act 1991 hereinafter referred to as the 1991 Act. On 25 February 1994 a special summons was issued by the appellant and the High Court made interim orders.

In the months of June and July the matter was at hearing before Budd J for four court days. On 8 July 1994 the learned trial judge ordered that the minor R be returned to one of the Balearic Islands on the implementation of the conditions as set out in his judgment.

Determination in High Court

It was held by Budd J that the child had a habitual residence prior to 28 May 1993 on the Balearic Islands, which are part of Spain; that the appellant had custody rights in respect of the child; that there was an unlawful removal of the child; that the appellant did not consent to the child's removal to Ireland; that he did not acquiesce in the child remaining in Ireland.

On the issue as to whether the return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation Budd J held (at pp 47-48):

In the present case I have the evidence of Ms Greally, the psychologist. On the basis of her evidence I do have a real apprehension and anxiety about the mother returning to the

Balearics, as to what effect it may have on the mother's health and welfare, but my apprehension is nowhere near a feeling that there is a grave risk to the child. I am very sympathetic to the mother in this case and have already expressed the view that the right place for her and the child at present is with the grandparents in the midlands of Ireland where the child has started attending playschool. There the child is surrounded by the mother's extended family and where the mother has the back-up of her parents, her father being a caring, honourable and decent person.

Having said all that, if the parties cannot sort out their own differences, it seems to me that, subject to a number of terms and conditions which I will need assistance from counsel to deal with, I would be flying in the face of the whole purpose of the convention if the child was not returned to the court of the country of its habitual residence which, in my opinion, is the proper court to deal with the differences between the child's parents. If I myself were deciding what is best for this child and where it should be, I would have no hesitation whatsoever in finding that it should stay with its maternal grandparents in A. However, I am compelled by the convention and by the law to make an order that the child be returned to Ibiza. Having listened to the mother and having formed a view of her character, in this case, as I expected, I am not going to be faced with the terrible situation where a mother says she will not accompany her child to the other jurisdiction. In this case the mother said that she will return with the child. In saying that, I think that she is acting in the best interests of the child and that she will go to Ibiza with the child, which is, I have no doubt, the right thing to do.

This matter will of course, come before a Spanish court in Ibiza and it will be for the Spanish court to decide where the child should be brought up and what should be done about its maintenance and welfare.

Five conditions were made in the judgment based on the appellant's undertakings:

1. Independent and appropriate accommodation for the mother and child in Ibiza.

2. Appropriate maintenance to be paid into a separate bank account in the mother's name.

3. Maintenance of the child to the age of 18, and health insurance for mother and child.

4. Provision for the child's education.

5. Provision of sufficient and satisfactory funds for mother and child to fly to Ireland twice a year.

The court then adjourned to enable counsel to advise on implementing the decision.

The matter was mentioned several times thereafter in court during the month of July, but it did not crystallize. Despite the judge's initial judgment that the child be returned to Spain on conditions as set out by him, ultimately on 29 July, the learned trial judge made an order in which he refused the application that the child be returned to Spain. The order states: It is ordered that the minor R in the title hereof be returned to Ibiza on the implementation of the conditions as set out in the said judgment

And the matter coming into the list for mention in relation to same on 15, 22, 25 and 28 July 1994 and this day in the presence of the said counsel respectively.

And on reading the letters exchanged between the solicitors for the parties dated 20 July 1994 and 29 July 1994 and on further hearing said counsel respectively.

The court doth refuse the plaintiff's application to return the minor R in the title hereof to Ibiza.

Submissions

On behalf of the appellant it was submitted to this Court:

A.That the High Court failed to give effect to the spirit of the convention in refusing the order; that the habitual residence of the child was conceded to be Spain and that the Spanish courts were therefore the forum to determine issues of custody and access.

B.That the trial court could not hold an inquiry into the particularity of the care of the child in the forum of habitual residence.

C.That the learned trial judge erred in relation to the issue of undertakings and conditions, the convention making no provision expressly to allow conditions to be imposed on the return of a child. That an undertaking should be accepted, conditions imposed, only sparingly, and that in this case the judgment of the High Court in its conditions impinged upon issues of custody and access of the child to an excessive degree -- matters which are for the Spanish court. Further that there was a lack of certainty in the conditions.

On behalf of the respondent there was a cross-appeal that; (a) there was consent by the appellant to the child's removal to Ireland; (b) that there was acquiescence by the appellant to the child remaining in Ireland; and (c) that there was no adequate evidence that there was a wrongful removal of the child under Spanish law.

I will consider the cross-appeal first.

Consent and acquiescence

The appellant formally withdrew the appeal that the learned trial judge had erred in law and on the facts in holding that the conduct of the appellant did not constitute consent within the meaning of article 13 of the Hague Convention.

Counsel submitted that there had been acquiescence by the appellant in that he had subsequently acquiesced in the removal or retention of the child in accordance with article 13 of the Hague Convention. The child was removed from Spain in late May 1993; the appellant knew where the child was; the appellant had legal advice within one week; there was no request to the central authority in Ireland until late December. It was submitted that in the circumstances the appellant had been passively acquiescent.

Under the convention a child wrongfully removed shall be returned promptly. Article 12 of the Hague Convention states:

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, 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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

The above article renders it mandatory for the court to order the return of the child who has been wrongfully removed from its habitual residence on the commencement of proceedings within a year of the wrongful removal. These proceedings were commenced within the year. However, article 13 gives to the court a discretion. It states:

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, institution or other body who opposes its return establishes that --

(a) the person, . . . having the care of the person of the child . . . had consented to or subsequently acquiesced in the removal or retention.

While 'consent' is not an issue in this case, 'acquiescence' is, it being submitted that the learned High Court judge applied the wrong test. The acquiescence referred to in article 13 (a) has been defined in the United Kingdom, which is also a contracting state to the convention. In W v W (Abduction: Acquiescence) [1993] 2 FLR 211 at p 217 Waite J stated in referring to acquiescence:

The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.

This was accepted by Morris J in NK v JK, High Court 1994 No 221 Sp, judgment delivered on 8 July 1994 as a correct statement of the manner in which a court should determine whether or not there has been acquiescence by a parent in any set of circumstances. With this I agree. The test is objective, not subjective, and made on all the circumstances of the case.

These terms of the Hague Convention had also been analysed in In re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 where Lord Donaldson MR stated at p 29: In context, the difference between 'consent' and 'acquiescence' is simply one of timing. Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it. In each case it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent or, as the case may be, acquiescence. Any consent or acquiescence must, of course, be real.

The learned High Court judge in this case found as a fact that the appellant was informed immediately of the safe arrival of the respondent and the child, that the appellant telephoned the respondent a number of times, that the respondent told the appellant that she 'needed time', that the appellant understood that the respondent would return to Ibiza with the child in due course, she had previously returned to Ibiza from Ireland with the child. The learned High Court judge accepted the maternal grandfather's evidence that he brought the respondent back to Ireland because she was poorly and that he assured the appellant that the respondent was only going home to Ireland to recuperate, the inference being that she would in due course return to Ibiza. There was no long term acceptance of a state of affairs.

In all the circumstances of the case and applying the correct test to the evidence, it is clear that there was no acquiescence by the appellant.

Wrongful removal

On the issue as to whether there was adequate evidence that there was a wrongful removal of the child under Spanish law, I am satisfied that there was credible evidence before the High Court on this issue and applying the principles as enunciated in Hay v O'Grady [1992] 1 IR 210; [1992] ILRM 689 -- there are no grounds to interfere with the finding of the learned trial judge.

Consequently on all three grounds submitted I am satisfied that the cross-appeal should be dismissed.

Considering next the first of the appellant's submissions, I find that it also fails.

Spirit of the convention

The state of the child's habitual residence is not in issue -- it is Spain. The spirit of the convention is to protect children from the harmful effects of wrongful removal or retention from, and to return them promptly to, the country of their habitual residence. In this case Spain is the forum to determine the issues of access and custody. The State being a signatory to the Convention on the Civil Aspects of International Child Abduction, and the legislature having enacted the Child Abduction and Enforcement of Custody Orders Act 1991, and on the 1991 Act applying and there being no case concerning any issue of constitutional rights of the child, or the parents, Spain is the forum in which to determine the issues of custody and access.

Inquiry into particularity of custody in Spain

Save as the 1991 Act or the Constitution apply to the facts of a case the learned trial judge may not hold an inquiry into the particularity of custody of the child in the forum of habitual residence. The issues of custody and access, wherever and whatever is to be determined for the child in this case, is for the courts of Spain.

Undertakings

The High Court initially fixed conditions to the return of the child to Spain on foot of undertakings given by the appellant. Mr Durcan SC, for the respondent raised several questions before this Court:

1. Whether the learned trial judge was right to accept undertakings?

2. Whether the undertakings were reasonable?

3. Whether the view that the undertakings were not adequately complied with is such that this Court as a Court of Appeal should interfere?

Law

An undertaking was accepted by the High Court in CK v CK [1994] 1 IR 250 at p 261; [1993] ILRM 534 at p 543 which was a case decided under Part II of the Act implementing the Hague Convention. In RJ v MR [1994] 1 IR 271 this Court, in enforcing the Luxembourg Convention pursuant to Part III of the Act, ordered the return of the minor to England, and a feature of the order was that the mother made solemn undertakings to the Supreme Court. However, in neither case was the matter of undertakings under the 1991 Act in issue.

In other countries who are parties to the Hague Convention undertakings have been accepted by courts.

In In re C (a Minor) (Abduction) [1989] 1 FLR 403 the Court of Appeal in the United Kingdom considered the question of undertakings. Butler-Sloss LJ at p 408 stated: These undertakings are crucial to the welfare of the child who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was three, for all but access periods, his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return.

After undertakings which she required as a prerequisite for the return of the child were given the court ordered the return of the child to Australia.

Similarly in In re G (a Minor) (Abduction) [1989] 2 FLR 475 the Court of Appeal accepted undertakings given by the father, not in any way to influence the court of competent jurisdiction, the Family Court in Australia, but to protect the child from grave risk of psychological harm until an application had been made to that court. Butler-Sloss LJ stated at p 485:

In carrying out the Hague Convention, this Court has the duty under Article 13, as indeed the Australian court would have if a similar application were made to the Family Court, to consider the welfare of the child. The undertakings in this case are designed to protect the child from the grave risk of psychological harm as set out by Thorpe J in his second judgment until, and only until, an application can be made to the Australian court.

I am satisfied that undertakings may be given by a party to proceedings under the 1991 Act and accepted by the court. They are entirely consistent with the 1991 Act and the Hague Convention, they are for the welfare of the child during the transition from one jurisdiction to another. Undertakings may be of particular relevance to very young children.

Undertakings in this situation are compatible with the Act and international law which have as their objectives the desire to protect children internationally from the harmful effects of their wrongful removal from the country of their habitual residence and the establishment of procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access.

Furthermore, undertakings which are for the welfare of the child are in accord with the constitutional protection of the child and its welfare.

Undertakings may also protect a parent in their role and in the exercise of their rights under the Constitution. Consequently I am satisfied that undertakings may be accepted in cases under the 1991 Act. The next issue raised is whether the undertakings in this case are reasonable. The undertakings, given to the High Court, and to this Court by the appellant under oath are:

1. The appellant will pay to the respondent a weekly sum equivalent to £190 by way of maintenance for herself and the child R.

2. The appellant will now lodge five months maintenance in the account opened by him in the respondent's name (Account No 0225.02001837-80). This is in addition to the 160,000 pesetas already lodged therein.

3. The appellant will pay the rent in respect of the apartment in ** pending the selection of suitable alternate accommodation by the respondent. The rent payable to be paid in advance.

4. The respondent may select alternative accommodation of her choice to the amount of 50,000 pesetas a month for rent, that is approximately IR £250 per month.

5. The sum equalling the monthly total of maintenance, and rent when the respondent moves to a new apartment, will be paid by standing order directly to the respondent's bank account. I am satisfied that such undertakings are reasonable in the circumstances of this case to protect the young child on her return from this jurisdiction to the jurisdiction of the Spanish courts. These undertakings are for the benefit of the child who will remain in the care of her mother on returning to Spain from Ireland pending the Spanish court hearing the case. In view of the fact that the child is still of tender years, and has at all times been in the care of the respondent, who has indicated that she will return with the child to Spain, the undertakings ensure a secure situation for the child and mother on their return to Spain. The undertakings do not in any way usurp the jurisdiction of the Spanish courts to determine the questions of custody and access.

Counsel for the respondent submitted that the learned trial judge having established the initial conditions in his judgment on foot of the respondent's undertakings this Court should not interfere with his ultimate order not to return the minor.

The conditions set by the High Court were founded on the undertakings offered by the appellant. I am satisfied that they were for the welfare of the child which required the protection of the respondent. It is appropriate for the court to cover the transitional period until the question of the child's welfare, custody, access and maintenance comes before the Spanish court. Matters covering the child's maintenance to the age of 18; the child's education; and arrangements for bi-annual trips to Ireland, are quintessentially matters for the Spanish court. That court may in fact determine that the child's welfare is best met by living in Ireland with its mother and maternal grandparents. The question of the custody and access of the child are not for this Court at this time -- that is for the Spanish courts -- the country of the child's habitual residence.

I am satisfied that the conditions as to accommodation and maintenance as identified by the learned trial judge are reasonable. However, in addressing the long term education, maintenance of the child, and bi-annual visits by the child to Ireland, the learned trial judge considered matters more appropriately determined in the Spanish courts.

In July 1994 issues such as a car for the respondent, and details as to the type of residence for the respondent and child were debated. The matter was adjourned pending their resolution. In so doing the court with the best of motives, lost sight of the necessity in law to act expeditiously to return the child to the country of its habitual residence. The Hague Convention envisages a summary process to ensure prompt return of a child to its habitual residence after wrongful removal therefrom.

Consequently I am satisfied that the undertakings were appropriate and reasonable in this case. The basic issues of accommodation and maintenance were adequately met in the initial undertakings and the further matters and delay thereafter were such as to give rise to the jurisdiction of this Court on fact and law.

Undertakings when sought and given must be clear and certain. It is essential that the matters be clearly and specifically determined by the court for the parties.

Conclusion

I am satisfied that the appeal should be allowed. While the learned trial judge was right to accept the initial undertakings, which are reasonable, he did not apply the 1991 Act or convention appropriately in seeking to particularise items more correctly matters for the courts of Spain in the first instance, nor did he act with the required expedition in adjourning and contemplating further adjournments, nor was there sufficient certainty.

Consequently, the appellant having given the undertakings to this Court as set out in the judgment herein, I would allow the appeal, and order:

(1) That the appellant through his solicitor, file in this Court by 6 January 1995, documents, and translations if necessary, that show (a) the address of the apartment which had been rented for the respondent and child; (b) that the rent has been paid for a month in advance; (c) that the appellant has lodged five months maintenance (the maintenance being as set out in his first undertaking) in the respondent's account No 0225.02001837-80 -- this is in addition to the 160,000 pesetas already lodged therein.

(2) The above papers being lodged by 6 January 1995 then the respondent and child to return to Spain by 20 January 1995.

(3) Liberty to both parties to apply to this Court.

This judgment, and the undertakings to be specifically brought to the attention of the central authority here, to be transmitted to the central authority in Spain, with the request that it be brought to the attention of the appropriate court in Spain.

In these circumstances I would allow the appeal.
