HOUSE OF LORDS

Lord Nicholls of Birkenhead Lord Mackay of Clashfern
Lord Steyn
Lord Hope of Craighead Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

IN RE H (A MINOR) (1999)

JUDGMENT: 8 DECEMBER 1999

REASONS: 3 FEBRUARY 2000

LORD NICHOLLS OF BIRKENHEAD

My Lords,

This appeal was dismissed by the House on 14 December 1999, for reasons to be given later. I have now had the advantage of reading in draft the speech of my noble and learned friend Lord Mackay of Clashfern. I agree with the reasons he gives for dismissing this appeal.

LORD MACKAY OF CLASHFERN

My Lords,

This appeal concerns a female child called "H" who was born on 3 April 1992 in the Republic of Ireland. The appellant is the mother of that child and the respondent is her father. The parties both come from the Republic of Ireland and at the time of the birth of H. they were living together there but they never married and they separated in about 1995. After the separation of the parties the respondent had contact with H. with the agreement of the appellant but that contact was irregular, albeit that it included staying contact on a few occasions. There is an unresolved factual dispute as to the reason why that contact was irregular. The problems concerning contact resulted in the respondent initiating proceedings under the Guardianship of Infants Act 1964 (1964, No. 7) in the District Court

of Carrigaline in the Republic of Ireland in respect of his daughter on 14 March 1996. On 11 April 1996 the District Court, by consent, made a custody order in favour of the appellant and made what was expressed to be an interim order until 10 October 1996 granting the respondent access to his daughter every Sunday from 2.00pm to 6.00pm; access to be in the mother's dwelling house with walks in the neighbourhood, with liberty to re-enter by which is meant liberty to apply. Between about May 1996 and May 1997 the respondent was in prison serving a sentence in respect of drugs offences and did not exercise the right of access conferred by the order of 11 April 1996.

After his release from prison there was sporadic access between him and the child and on about 30 March 1998 the father filed an application in the District Court of Carragaline. The application was made in a pro forma document headed "Guardianship of Infants Act 1964 Notice of Application under section 11(1) 11(4) for the Court's Direction" and containing the pre-printed words "For the court's direction regarding the custody of the infant and the right of access thereto of the applicant" following which the respondent's Irish solicitors had added the words "To wit Guardianship and access." In the present proceedings the evidence filed by the respondent has made it clear that the relief he sought from the District Court was in reality to be appointed a guardian of the child and an order specifying the access that he should have to that child, and, indeed, those were the forms of relief eventually granted to him. The respondent's application of 30 March 1998 first came before the District Court on 14 May 1998. Both parties and their lawyers were in attendance and the matter was adjourned, by consent, to 23 July 1998, the parties having reached an agreement that there should be access between the respondent and his daughter during the daytime on each Saturday and Sunday in the meantime. No order appears to have been drawn to reflect this state of affairs, but access took place in accordance with the agreement of the parties until 20 June 1998 when the respondent found the appellant's house to be empty when he attended for an access visit. He was told by the neighbours that the appellant was leaving Ireland, he found the child staying with a friend of the appellant and he reported to the Gardai and to his lawyers his fear that the appellant would remove the child from Ireland. The appellant was in fact in England looking for accommodation between the 18 and 21 June 1998. On 23 June 1998 the appellant left the Republic of Ireland without the knowledge or consent of the respondent and came to live in England with her two children H. and another child born of a different relationship. The respondent believed that the appellant and children were in either the Liverpool or Manchester area, but he had not been informed of their address and there was no direct communication between the parties until May 1999 when such communication was re-established through the good offices of the father of the appellant's other child. In the meantime on 23 July 1998 the District Court of Carrigaline had proceeded to hear the respondent's application, in the absence of the appellant, and had made orders appointing the respondent a guardian of his daughter and granting him access to that child from 10.00am each Saturday until 6.00pm each Sunday. The order of 23 July 1998 bears the same case number as that of 11 April 1996.

Having re-established communication with the appellant the respondent, on 14 June 1999, initiated the present proceedings in the Family Division of the High Court of Justice in England, seeking an order for the return of his daughter to the Republic of Ireland, pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the Child Abduction and Custody Act 1985.

The respondent's application was heard substantively on the 4 and 5 August 1999 by Hughes J. It was the respondent's case that the relevant child had been habitually resident in the Republic of Ireland immediately before her removal to England in June 1998 and that at the time of that removal he and/or the District Court in the Republic of Ireland had "rights of custody," within the meaning of the Hague Convention, that had been breached by the removal. The appellant conceded that the relevant child had been habitually resident

in the Republic of Ireland before her removal to England in June 1998, but denied that either the respondent or the District Court had rights of custody in respect of the child at the time of the removal and, in the alternative, denied that the removal had amounted to a breach of any such rights and, further, denied that the respondent was entitled to rely on any rights that were not his own rights. In the further alternative the appellant put forward other defences that were rejected by Hughes J. and which are not material to the present appeal. Hughes J. rejected the respondent's contention that he, personally, had rights of custody in respect of his daughter at the relevant time and, further, rejected the respondent's contention that the District Court of Carrigaline had rights of custody in respect of the child of the parties at the relevant time. The respondent's application for the return of the child to the Republic of Ireland was, therefore, dismissed, but leave to appeal to the Court of Appeal was granted by Hughes J.

The only issues raised before the Court of Appeal (Morritt, Thorpe and Chadwick L.JJ.) were the contentions of the respondent that the District Court of Carrigaline had been possessed of rights of custody in respect of the child of the parties at the time of her removal from the Republic of Ireland, that the removal had amounted to a breach of such rights and that he was entitled to rely upon the breach of the rights possessed by the District Court. These contentions were disputed by the appellant.

By its judgment of 11 November 1999 the Court of Appeal accepted the contentions of the respondent and allowed the appeal. Accordingly an order was made that the child be returned to the Republic of Ireland forthwith. The appellant appealed to your Lordships' House pursuant to a grant of leave by this House.

The issues before your Lordships on this appeal are:

(i) Whether a court can ever be an "institution or any other body" to which rights of custody may be attributed within the meaning of Article 3 of the Hague Convention, on the Civil Aspects of International Child Abduction (as implemented by the Child Abduction and Custody Act of 1985) and, if so, in what circumstances.

(ii) If such rights of custody may be attributed to a court, whether such rights were in fact to be attributed to the District Court of Carrigaline in the Republic of Ireland, within the meaning of Article 3(*a*) of the said Convention, on the facts of the present case and, if so, whether such rights were actually exercised at the time of removal of the relevant child from the Republic of Ireland or would have been so exercised but for that removal, within the meaning of Article 3(*b*) of the said Convention.

(iii) Whether the removal of the child from the Republic of Ireland by the Petitioner on 23 June 1998 was in breach of any rights that may have been attributable to the said District Court of Carrigaline in respect of that child, within the meaning of Article 3 of the said Convention.

(iv) Whether it is open to a person who has no rights of custody of his own, within the meaning of Article 3 of the said Convention, to rely upon the breach of any rights of custody possessed by a person, institution or body other than himself in proceedings instituted by him under the Child Abduction Act 1985.

I take these issues in order. At first sight it appears strange to attribute to a court rights of custody but I think it is necessary to consider in some detail the provisions of the Hague Convention bearing on this matter in order to determine whether that preliminary view accords with a proper construction of the Convention.

The objects of the 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. Since this is an International Convention to be applied under a variety of systems of law it is right that it should be given a purposive construction in order to make as effective as possible the machinery set up under it. So approaching the matter it appears to me that the phrase in Article 8 "any person, institution or other body claiming that a child has been removed or retained in breach of custody rights" may include a court as an "other body" particularly when one appreciates that the phraseology chosen was deliberately wide. Again the phrase "rights of custody" are said by Article 5 for the purposes of this Convention to include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; many of the matters relating to the care of the person of the child will consist in duties and powers rather than rights in the narrow sense of that word and in particular the power to determine the child's place of residence being itself characterised as a right underlines the width that should be given to the word "rights" in this Convention. While therefore initially sharing the misgivings expressed by Chadwick and Morritt L.JJ. in the present case and by Lord Prosser in *Seroka v. Bellah,* 1995 S.L.T. 204 sitting at first instance in the Court of Session in Scotland I am now of the view that these misgivings should be allayed by these considerations, but the matter does not end there.

The question has arisen in previous cases and I refer first to *C. v. C. (Abduction: Rights of Custody)* [1989] 1 W.L.R. 654. Lord Donaldson of Lymington M.R. said, at p. 663:

> "This is 'the right to determine the child's place of residence.' This right may be in the court, the mother, the father, some caretaking institution, such as the local authority, or it may, as in this case, be a divided right - in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside of Australia, it being a joint right subject always, of course, to the overriding rights of the court."

Although this view was obiter in that case it was founded on in *B v. B. (Abduction: Custody Rights*) [1993] Fam. 32 (C.A.) by Sir Stephen Brown P. p. 38C-D:

> "It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence."

Leggatt L.J. said, at p. 42G-H:

> "Having made what is no more than an interim custody order, the Ontario court, in my judgment, retained what Article 5(*a*) of the Convention calls 'the right to determine the child's place of residence.'"

Scott L.J. agreed with both of these judgments. This was an essential ground of judgment in that case. The matter has also received detailed consideration by the Supreme Court of Canada first in *Thomson v. Thomson* [1994] 3 S.C.R.. 551 in which La Forest J. quoting the passage I have already quoted from Sir Stephen Brown P. said, at p. 588:

> "I am fully in agreement with this statement. It seems to me that when a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child. As I explained in *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388, the Court of Chancery has long exercised wardship over children in need of protection in the exercise of its parens patriae jurisdiction. But I

> see no need to rely on jurisdiction emanating from this doctrine, which has understandably 'puzzled and concerned' other Contracting Parties . . ."

This judgment was a judgment not only of La Forest J. himself but also of Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci JJ. The other two judges sitting, L'Heureux-Dubé and McLachlin JJ., agreed with La Forest J.'s interpretation and application of the Convention to the present case and differed on a matter with which your Lordships are not concerned.

It appears from *In re S. (Abduction: Children: Separate Representation)* [1997] 1 F.L.R 486 that the High Court of New Zealand considered that it had rights of custody in respect of the children who were the subject of that application and was represented before Wall J. when he was considering the subject matter of the application, which does not have relevance to the present appeal. The Supreme Court of the Republic of Ireland took the same view in *H.I. v. M.G*. (unreported) in a judgment delivered on 19 February 1999.

We have not been referred to any contrary decision and the report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction which took place on 17 to 21 March 1997 reported in para. 15 the decision of the Supreme Court of Canada that the removal in that case "breached the custody rights retained by the Scottish court." The absence from that report of any decision to the contrary strongly suggests that there was none, at least up to that time, and none since then has been brought to our attention. In response to a question from my noble and learned friend Lord Steyn counsel for the appellant stated that he could think of no particular practical difficulty in the adoption of this construction of the Convention except the uncertainty that prevailed and is referred to by Thorpe L.J. in the present case as to the circumstances in which the court should be held to have a right of custody.

There are two aspects to this matter. First of all the application to the court must raise matters of custody within the meaning of the Convention and that will require in every case a consideration of the terms of the application. Secondly, a question arises as to the time at which the court acquires such right. It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a court having rights of custody does not contemplate that happening unless there is an application to the court in a particular case raising the issue of the custody of one or more children. The date at which such application confers these rights is a matter which has not been the subject of detailed consideration in relation to the Convention. For the purposes of the Civil Jurisdiction and Judgments Act 1982, Schedule 1, Article 21 and the 1968 Brussels Convention which is scheduled to that Act it has been held that an English court becomes definitively seized of proceedings for the purposes of that Convention on the date of service of the writ at which point it has jurisdiction over the merits of the dispute: *Neste Chemicals S.A. v. D.K. Line S.A. (The Sargasso)* [1994] 3 All E.R. 180 and *Dresser U.K. Ltd. v. Falcongate Freight Management Ltd. (The Duke of Yare)* [1992] Q.B. 502.

In relation to the present Convention while in the wardship jurisdiction the issue of an application made the child who was the subject of the application a ward of court I consider that generally speaking there is much force in using the service of the application as the time which the court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served the jurisdiction has been invoked and unless the proceedings are stayed or some equivalent action has been taken I would treat the court's jurisdiction as being continuously invoked thereafter until the application is disposed of. In the present case no difficulty arises on this issue because at the time when the child was removed from Ireland the court had fixed a date for the

determination of the application as a result of an earlier hearing at which both parties were represented. I would not think it necessary for the court of the jurisdiction to which the child has been removed to consider whether the pending application in the court of the child's habitual residence was in good faith or with merit. These are questions in my judgment for the court of the habitual residence to determine and if any doubt arises on these matters it should be resolved by application to that court.

In the present case the contest is on whether the application for guardianship which was pending at the date of removal constitutes an application involving rights of custody within the meaning of the Hague Convention. The statutory provisions in Ireland have been carefully described by Thorpe and Chadwick L.JJ. and there are full reports from experts to which they also refer. It is clear to my mind that under the law of Ireland once an unmarried father is appointed guardian he and the mother have equal rights in respect of the custody in its wider sense of the child. In particular both have the power of decision in relation to these matters and if they cannot agree the matter must be resolved by the court. In this case the mother had been awarded custody by consent but as Thorpe L.J. said it was implied in the consent as appears from the terms relating to access that the day-to-day care of the child would be exercised at the mother's address given in the application. Once the father had appointment as guardian he had an equal right with the mother to determine where the child should live and in particular whether the child should be removed from the jurisdiction from the courts of Ireland. I do not regard the award of custody by consent in proceedings which were still pending and in which active consideration of an application for guardianship by the father was taking place at the time of the removal as destructive of the court's power to decide the place of the child's residence. In these circumstances I conclude that the District Court of Carrigaline had rights of custody in respect of H. at the time of her removal and that these rights were being exercised by reason of the pending application of her father to be appointed her guardian.

The appellant argued, particularly founding on the opinion of the Court of Appeal delivered by Ward L.J. in *Re V.-B. (Abduction: Custody Rights)* [1999] 2 F.L.R. 192 (CA), that the application of the respondent for guardianship did not confer rights of custody on the Irish court. In that case it was held that a right merely to be consulted on residence, or any other issue, without an associated right to object did not amount to a right relating to the care of the person of the child. While consultation was of considerable importance, it had little legal effect and did not amount to a veto. As the Dutch order left the mother free to decide where the children were to reside, and the father could not object, it followed that the father had no rights of custody. In my opinion the application to the court in this case by the father was for a position which gave him much higher rights in relation to the custody of H. than were possessed by the father in that case. The father in this case once appointed guardian as I have said had the right to decide and if he and the mother could not agree then application required to be made to the court for the ultimate decision.

That disposes of the second and third issues raised in this appeal. It remains to consider only the fourth which is whether a person other than the holder of custody rights which have been breached by a removal is entitled to found on the wrongful removal. I see no reason in terms of the Convention or otherwise why a person who has invoked the jurisdiction of the court as a result of which the court has rights of custody in respect of a child should not be entitled to apply to the courts of the country to which the child has been wrongfully removed for the restoration of the child to the jurisdiction of his or her habitual residence. It would seem to me an unnecessary obstacle to the smooth working of the Convention to hold otherwise. Although I have referred to a situation in which the High Court of New Zealand was represented in an English court I would think it more appropriate in most cases that the application for the restoration of the child should be made by the person whose application to the court conferred on it a right of custody rather than the court itself having to undertake that responsibility.

For these reasons which are substantially the same as those given by the Court of Appeal I consider that this appeal falls to be dismissed and the order of the Court of Appeal affirmed. In view of the urgency of the matter the House on 14 December 1999 dismissed this appeal, for reasons to be given later.

LORD STEYN

My Lords,

I have had the privilege of reading in draft the speech of my noble and learned friend, Lord Mackay of Clashfern. I am in full agreement with the reasons given by Lord Mackay of Clashfern for the dismissal of the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Mackay of Clashfern. I agree with it, and for the reasons which he has given I too am of the opinion that the appeal fell to be dismissed.

LORD HUTTON

My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Mackay of Clashfern.

I agree with it, and for the reasons which he has given, I too would dismiss the appeal.
