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[19/02/1999; Supreme Court of Ireland; Superior Appellate Court]
H.I. v. M.G. [1999] 2 IRLM 1; [2000] 1 IR 110

THE SUPREME COURT

Hamilton, C.J.

Denham, J.

Barrington, J.

Keane, J.

Barron, J.

IN THE MATTER OF THE CHILD ABDUCTION AND

ENFORCEMENT OF CUSTODY ORDERS ACT 1991;

AND IN THE MATTER OF H.I. (A MINOR)

BETWEEN

H.I.

Plaintiff/Appellant

AND

M.G.

Defendant/Respondent

JUDGMENT delivered on the 19th day of February 1999, by Keane, J.

Introduction

The factual background to this difficult and unfortunate case, brought under the Hague Convention on the Civil Aspects of International Child Abduction (hereafter "the Convention"), is as follows. The plaintiff and the defendant are Egyptian and British citizens respectively. They met in the United States in July 1989 and lived together in New York from February 1990 until December 1996, when the defendant left the plaintiff.

At the time they met, the plaintiff was carrying on a restaurant business. The defendant was in the United States on a visitor's visa; her home was in Ireland. The plaintiff and defendant entered into a Moslem wedding ceremony on March 5th, 1991, but it is accepted that, under the law of the State of New York, this was not recognised as a valid marriage. They had one

child, HI, the minor named in the title (hereafter "H") who was born on July 13th 1991. The plaintiff is named in H.'s birth certificate as the father and the defendant has acknowledged him to be such. The defendant, from the 19th January 1991 to the 3rd February 1997, when she left the United States, had the status of an illegal alien.

When the relationship between the plaintiff and the defendant broke down in December 1996 and the defendant left the plaintiff, she applied to the Family Court in the County of Nassau, New York on the 31st December for, and was granted, a "temporary order of protection" in respect of the plaintiff, which is the equivalent of a barring order in our jurisdiction, and was also granted interim custody of H.

On the 3rd January 1997, the plaintiff filed a petition in the Family Court. Paragraph 14 stated:-

> **"*That it would be in the best interest of the child to have (visitation) awarded to the Petitioner for the following reasons: Petitioner/Father loves his child and has always maintained a close relationship."***

Paragraph 10 of the petition in the Court form read as follows:-

> ***"(An Order of Filiation) (A Paternity Acknowledgement) was filed by the Court of __ County on ___, docket No. ____ concerning the ____ and the child(ren) who is/are the subject of this proceeding. A true copy is annexed hereto."***

Under this paragraph are the initial "N/A".

The petition ends as follows:-

> **"*Wherefore, Petitioner(s) pray(s) for an order awarding visitation of the child(ren) named herein to the Petitioner(s) and for such further and other relief as the Court may determine."***

On the 7th January, a petition was filed on behalf of the defendant in the Family Court. Paragraph 10 reads:-

> ***"(A paternity acknowledgement) is being filed by the family court of Nassau County on ___, docket No. ___ concerning the Petitioner and Respondent and the child who is the subject of this proceeding. A true copy is annexed hereto."***

Paragraph 12 states that:-

> ***"it would be in the best interest of the child(ren) to have (custody) (visitation) awarded to the Petitioner(s) for the following reasons:-***
>
> ***I MG, mother of child prior to separation, has ... provided the majority of nurturing and physical care since the child needs daily medical attention which I have solely taken care of. My son will continue to have a good life and undisrupted by staying with me."***

The petition ends:-

> ***"Wherefore Petitioner(s) pray(s) for an order awarding custody/visitation of the child named herein to the Petitioner(s) and for such further and other relief as the court may determine."***

The defendant left the United States with H. on the 3rd February 1997 and came to Ireland, without informing the plaintiff. Since her arrival in this jurisdiction, she and H. have been living with her parents and two sisters in Dublin. In the meantime, the proceedings in the New York court had been adjourned. On the 26th February 1997, at a hearing where both parties were represented by their lawyers, it was ordered by consent of all the parties that H. should be produced before the court on the 26th March 1997 and that any foreign police or other applicable authority should be asked to assist in implementing that order.

The circumstances in which the defendant left for this jurisdiction are set out by her as follows in an affidavit sworn by her in these proceedings:-

> ***"I say that I made an initial application to the court on December 30th 1996. I say that, as I was unrepresented, the presiding judge advised me to engage a lawyer. The matter was adjourned to January 9th, 1997. The plaintiff attended. I was represented by a Mr. Mosser through the legal aid system. Prior to that date I had applied for custody and the plaintiff has applied for visitation rights. The judge said that there was no proof of paternity and the matter was adjourned to February 7th. Paternity papers needed to be filed by the plaintiff.***
>
> ***"I say that I firstly consulted a private lawyer in relation to family proceedings who referred me to two specialist immigration lawyers with regard to my position. I say that prior to the next scheduled court date of the 7th February, as a result of advice received from the said immigration lawyers and my own private lawyer, I left the jurisdiction of the United States on the 3rd day of February 1997. I say I did so in circumstances where I was under considerable emotional stress. The relationship with the plaintiff having broken down, my fear (sic) that he would remove the child to Egypt and therefore my fear (sic) that substantial psychological damage at the least could be caused to my child by reason of being separated from me, his mother and of physical harm in that he would be exposed to a less comfortable standard of living and in particular that his medical needs, which are considerable, would not be met by the plaintiff. I say that I regret any discourtesy to the American Court but I acted in the interest of protecting the infant from the dangers I have referred to. I say at the time I departed the jurisdiction there were no proceedings in being to my knowledge taken on behalf of the plaintiff apart from his visitation application. I further say that I was never served with such proceedings. I say that I have no knowledge of any application to court on the 26th day of February 1997. In particular I say that I was not contacted by the lawyers who indicated to the court on that day that they appeared on my behalf nor did I instruct them to consent to any orders on my behalf on that date. U say that I am a stranger as to who occurred in court on that date."***

The advice from an immigration lawyer referred to in that affidavit states:-

> ***"The only way that (the defendant) could legalise her status in the United States would be if her United States citizen child were to petition for her. However, the US citizen child must be at least 21 years old before the child can file such a petition of behalf f his mother.***
>
> ***"Unlike the immigration laws enacted prior to September 1996, the Immigration Act of 1996 mandates a very harsh penalty for overstaying (being out of status).***

> ***"An illegal alien, one who is out of status, (the defendant) has no right to remain in the United States as the mother of a minor (under 21) United States citizen child.***
>
> ***"It is also my understanding that there was never a legal marriage between (the defendant) and the father of [H]. She also has no education or employment background which would enable her to be granted lawful permanent residence status or non-immigrant status.***
>
> ***"Therefore it is my opinion that until such time as (the defendant's) son reaches the age of 21 years and can petition for his mother, there is no way that she would be able to obtain lawful permanent resident status in the United States."***

In her affidavit, the defendant also makes various allegations of misconduct against the plaintiff and similar allegations were made by her father and her sister's partner in affidavits sworn by them in the proceedings. These allegations were vehemently denied by the plaintiff in an affidavit sworn by him in the proceedings. Clearly, however, any conflicts of evidence arising could not be, and were not, resolved by the High Court on affidavit only. In any event, they would be relevant only to an issue arising under Article 13 of the Convention or to a determination by either the court in New York or the courts in this jurisdiction as to the future custody of H. It does not, however, appear to be disputed that H. suffers from partial epilepsy, most probably as a result of a developmental brain disorder.

The plaintiff sent a request to the Department of Equality and Law Reform (as it was then styled), the Central Authority in this jurisdiction of the purposes of the Convention, seeking the assistance of the department in having H. returned to the United States on the 13th March, 1997.

The present proceedings were then issued pursuant to the Child Abduction and Enforcement of Custody Orders Act 1991, (hereafter "the 1991 Act") which gives the Convention the force of law in this jurisdiction. Some difficulty was experienced by the plaintiff's solicitors in effecting service of the proceedings, but ultimately that was done, and the matter came on for hearing in the High Court. On behalf of the defendant, it was argued that the removal of H. had not been in breach of any right of custody of the plaintiff, since he would not have been entitled to such a right at the time of the removal, never having been legally married to the defendant and no declaration of paternity having been made in respect of him. It was further claimed on behalf of the defendant that the return of H. should not be ordered because he would be exposed to "physical or psychological harm" or placed in "an intolerable situation" within the meaning of Article 13 of the Convention.

It was agreed between the parties and accepted by the learned High Court judge that the question as to whether the removal of H. was "wrongful" within the meaning of Article 3 of the Convention should be determined as a preliminary issue. That issue having been resolved in favour of the plaintiff by the trial judge, this appeal was brought from her judgment and order on behalf of the defendant.

While the procedure was one which was, accordingly, acquiesced in by all concerned, I do not think that it was appropriate. Article 1(a) of the Convention states that one of its two objects is:-

> ***"To secure the prompt return of children wrongfully removed to or retained in any contracting State."***

In the present case, the allegedly wrongful removal was effected on the 3rd February 1997. The proceedings were not, however, heard by the High Court until the 28th October 1998. This court cannot, of course, attribute responsibility to anyone for that delay: it is sufficient to say that thereafter it was essential that the proceedings be processed as rapidly as was consistent with their joint resolution. This pointed strongly, in turn, to the desirability of the entire case being dealt with in the High Court at the same time: given the likelihood of an appeal to this court by either party from the determination by the High Court of a novel and important issue which was not the subject of an authoritative decision either in the High Court or this court, the course adopted was capable of producing further delay. Happily, the judgment of the High Court was given with considerable expedition and the appeal to this court was also brought on for hearing within a relatively short time. In cases of this nature, however, I do not think that this procedure should be adopted in the future.

The issue

The preliminary issue which was before the trial judge was whether the removal or the retention of H. was "wrongful" within the meaning of Article 3 as being:-

> ***"In breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention..."***

Evidence on affidavit was given in the High Court by Timothy J. Horgan and Paul O'Dwyer, both of whom were accepted as being lawyers qualified to give evidence as to the relevant law of the State of New York. The trial judge was understandably concerned that, far from indicating any measure of agreement as to what the relevant law was, they disclosed what she described as "a welter of conflict". Mr. Horgan, on behalf of the plaintiff, said that New York law would recognise the agreement of the parties to live as husband and wife and, in a case such as the present where the parties had "a long standing *modus viventi* on custodial decisions affecting the child", legal effect would be given to those arrangements. He concluded that

> ***"It is clear that the father had rights of custody at the time of the departure. The fact that the child is illegitimate and her parents were not wedded in a civil ceremony is irrelevant to the father's right of custody as the natural father... it is equally clear under the laws of the State of New York that those rights are continuing..."***

He also said that in determining the issue of custody, the sole consideration was "what is in the best interest of the child".

Mr. Horgan's statement of the law was vigorously disputed by Mr. O'Dwyer. He said that, without an adjudication of paternity, the New York courts could not award custody or visitation to an unmarried father, since it would violate the principle that a parent may not be deprived of custody by a non-parent, absent a showing of non-fitness. He concluded:-

> ***"...As a matter of practice, a New York State court will not entertain a custody petition filed by an unmarried father unless a paternity petition is filed at the same time, as the court could not grant the relief requested absent an adjudication of paternity..."***
>
> ***"As with petitions for custody, an unmarried father must not only plead, but also prove, that he is the father of a child in order for a court to grant his visitation rights. Again, as a matter of practice, a New York State court will not entertain an***

application for visitation by an unmarried father unless a petition for paternity is filed at the same time, absent a prior adjudication of paternity.

"In New York a right of custody carries with it the right to determine the child's place of residence. Absent any adjudication of paternity and either established visitation or custody rights an unmarried father has no rights whatsoever to determine the child's place of residence."

Mr. O'Dwyer said that there were two statutes in force in New York State dealing with custody issues in relation to children, the Domestic Relations Law and the Family Court Act. The first was concerned in general, although not exclusively, with the dissolution of marriages. The second dealt generally, although again not exclusively, with actions regarding the welfare of children. Section 240.1 of the Domestic Relations Law provides that :-

"In any custody proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage or (2) for a separation or (3) for a divorce, or (4) to obtain by a writ of habeas corpus or by petition in order to show cause, the custody of or a right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child ..." **[Emphasis Added]**

Section 549(a) of the Family Court Act provides that:

"If an order of filiation is made or if a paternity agreement or compromise is approved by the court, in the absence of an order of custody or visitation entered by the supreme court the family court may make an order of custody or visitation, in accordance with [s. 240.1] of the Domestic Relations Law, requiring one parent to permit the other to visit the child or children at stated periods."

Mr. O'Dwyer summarised the legal position as follows:-

"As the plaintiff in this action is not the child's father either as a result of being married to the mother or as a result of an order of filiation having been entered by the family court, the plaintiff lacks standing to exercise any rights of custody or visitation, and has no rights to determine the child's place of residence. Any assertion to the contrary by Mr. Horgan is simply incorrect."

The conclusion of the trial judge on these divergent views of the law was as follows:-

"Having considered the totality of the expert evidence on the applicable law of the State of New York, I cannot be satisfied that the plaintiff has established that, as the natural father of a non-marital child who had not obtained any order in his favour from the court of the habitual residence of the child, the court of the State of New York, he had on 3rd February, 1997 established rights of custody in respect of S.

> ***under that law. Making up my own mind as best I can on the basis of the evidence before me, it seems to me that the correct position is that under the law of the State of New York the mother of a non-marital child has sole right of custody of the child until such time as an order of filiation is made or a paternity agreement or compromise is approved by the court. That paragraph 10 of the plaintiff's petition for visitation and the same paragraph of the defendant's petition for custody filed before the family court of the State of New York so nearly mirrors the wording of section 549(a) of the Family Court Act, as quoted by Mr. O'Dwyer in his second affidavit, strongly suggest that this is the correct interpretation of the evidence. The position appears to be that once paternity is established by a filiation order or by a court approved paternity acknowledgement or agreement, both parents have a prima facie right to custody, gender constituting neither an advantage nor a disadvantage and, where an issue arises between the parents, the entitlement to custody is determined by the court applying the best interests test."***

It was not suggested on behalf of the plaintiff in either the written or oral submissions to this court that these findings by the trial judge were in any way erroneous. It was, however, submitted on his behalf in the High Court and again in this court that, even accepting that the law of the State of New York was as stated in this passage, the removal was nevertheless wrongful as being in breach of what were described as inchoate rights of custody or access to which the plaintiff was entitled at the time of the removal, although not at that time declared by the order of the competent court in New York. That submission was accepted by the trial judge, but she rejected a further submission on behalf of the plaintiff that the removal was also in breach of a right of custody vested in the New York court itself at the time of the removal.

The defendant has appealed from the High Court order. Notice was also given on behalf of the plaintiff that the court would be asked to vary that part of the High Court judgment which found that the removal was not in breach of a right of custody vested in the New York court.

Submissions of the Parties

On behalf of the Defendant, Ms. Clissmann, SC, submitted that the trial judge had erred in law in holding that the removal was in breach of inchoate rights of the plaintiff which, in the words of the judgment,

> ***"would almost inevitably have crystallised into established rights by court approval of the acknowledgement of paternity..."***

She urged that the proposition that the rights of custody referred to in Article 3 of the Convention extended to such "inchoate rights" was not reconcilable with the clear wording of Article 3 and, if accepted, would introduce serious uncertainty into the operation of the Convention. She submitted that the judgment of Waite LJ in Re: B. (a minor) (Abduction) [1994] 2 FLR 249 which had introduced the concept of inchoate rights into the construction of the Convention for the first time in England should not be followed in this jurisdiction and was, in any event, difficult to reconcile with the decision of the House of Lords in Re: J. (A Minor) (Abduction); Custody Rights [1992] AC 562. She also cited in support the decision of Hale J. in Re:W; Re: B [1998] 2 FLR 146 in which the court acknowledged having difficulty in reconciling the majority decision in Re: B with the decision in Re: J.

Ms. Clissman further submitted that the courts in this jurisdiction should adopt the same approach as that of Hale J. in Re: W; Re: B, namely, that the classic case of abduction under the Convention was the removal of children from their primary carer. She submitted that,

on the facts in this case, the defendant was the primary carer and, hence, her action in taking the child to Ireland was not a typical case of abduction which the Convention was intended to prevent. Ms. Clissman further submitted that the High Court judge was correct in law in holding that no right of custody was vested in the New York court, since that court had made no order as to custody, other than one granting temporary custody to the defendant, and had not imposed any restriction on the defendant establishing a residence with H. outside the State of New York. She said that the High Court judge, in this context, had properly attached significance to the fact that the plaintiff's application had not been made to the central authority in the United States. Ms. Clissman referred in this connection to the provisions of Article 15 which enable an applicant to obtain from the authorities of the state of the habitual residence a decision that the removal was wrongful. She submitted that the failure by the plaintiff to operate that provision could only be attributed to an apprehension on his part that such a decision would not have supported his claim in this jurisdiction that the removal was wrongful.

On behalf of the plaintiff, Mr. Durcan, SC submitted that the majority judgments of the English Court of Appeal in Re: B. (a Minor) Abduction), to the effect that Article 3 ought to be interpreted as applying to inchoate rights of custody, should be followed in this jurisdiction. Given that the objective of the Convention was to spare children the adverse effects resulting from their arbitrary removal by one parent from their settled environment to another jurisdiction, the Convention should be given a purposive interpretation and, in particular, the expression "rights of custody" should be construed as widely as possible. He said that it was clear that, unless the expression was to be given a narrow and literal construction, the plaintiff in this case had rights of custody which had been breached by the defendant's actions.

Mr. Durcan further submitted that the judgment of Waite LJ in Re: B. (a Minor) (Abduction) had been approved by the Australian Family Court in K. v. K. (Unreported; judgment delivered 22nd May 1996). The decision of the House of Lords in Re: J. with which, it had been suggested, the majority judgments Re: B. (a Minor) (Abduction) were inconsistent, had been disapproved of by Barron J. in K. v. K. Supreme Court; (unreported; judgments delivered 6th May 1998).

Mr. Durcan further submitted that each case should be decided having regard to its particular circumstances. In the present case, the New York court was actually seized of proceedings in which the defendant was seeking orders as to the custody of the child, the plaintiff had lived with the defendant as her husband for six years and he was the acknowledged father of H. To treat the defendant as not being entitled to any rights of custody, solely because of the absence of the purely formal requirement of a declaration of paternity, would be clearly irreconcilable with the objective of the Convention. He cited, in support the observations of Madame Elise Perez-Vera in the Explanatory Report on The Convention published by the Permanent Bureau of the Conference in The Hague to the effect that Article 3 should be interpreted in a flexible manner, allowing the greatest number of cases to be brought within its scope. He urged that the recognition of an inchoate right of custody in cases such as the present was required in the interests of the children concerned, since any other approach would mean having no regard to the relationship which existed between a child and his or her farther.

Mr. Durcan further submitted that the fact that the plaintiff was seeking no more than visitation rights was not material. Where such rights were granted by a court, it followed that the child in respect of whom they were granted could not be removed from the jurisdiction without the consent of the person to whom they were granted.

Mr. Durcan submitted that the trial judge was in error in concluding that there were no rights of custody vested in the New York court within the meaning of Article 3. Where a court granted a temporary order of custody, as it had done here, it followed logically that it was vested with the power to determine the place of residence of the child and that in itself was a right of custody. Moreover where a court made such an order of interim custody, it was reserving to itself the right to determine the ultimate custody. He cited in support the English decision in B. v. B. [1993] 1 FLR 238; Re: B. Abduction [1997] 2 FLR 593 at p.600; and the decision of the Canadian Supreme Court in Thomson v. Thomson [1994] 3 SCR 551.

The Applicable Law

The preamble to the Convention recites that the signatory states wished:-

> ***"To protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access..."***
>
> **Article 1 of the Convention states that its objects 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."***

The Convention then goes on to establish a mechanism for ensuring the prompt return of children to the state of their habitual residence where they have been wrongfully removed from that state to another contracting state or are wrongfully retained in the other contracting state.

Article 3 sets out the circumstances in which a removal or retention is wrongful as follows:-

"The removal or retention of a child is to be considered wrongful where –

> ***(a) it is in breach of rights of custody attributed to a person, an institution, or any other body, jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and***
>
> ***(b) at the time of removal or retention those rights were actually exercised, jointly or alone, or would have been so exercised but for the removal or retention.***
>
> ***The rights of custody mentioned in subparagraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."***
>
> **Article 5 provide:-**
>
> ***"For the purposes of this Convention –***

> ***(a) 'rights of custody' shall 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."***

It has been pointed out that, since the Convention is an international treaty applying to states with different legal systems, it is desirable that it be construed in the same manner by the courts of the various states who have ratified or acceded to the Convention: see H. & Ors. (Minor) (Abduction: Acquiescence [1997] 2 All ER 225 and the observations of Lynch J. in K. v. K.

However, since the Convention has the force of law in this State solely by virtue of the 1991 Act and not by virtue of its being an international treaty, the first task of the court must be to ascertain the meaning of the Convention, as enacted, in accordance with normal rules of statutory construction and, accordingly, to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. To that general principle there are two qualifications. First, the Convention, being an international treaty to which the State is a party, should, if possible, be given a construction which accords with its expressed objectives and, secondly, the *travaux preparatories* which accompanied its adoption may legitimately be used as an aid to its construction. (See the decision of this court in Bourke v. Attorney General [1972] IR 36.)

The objectives of the Convention, as expressed in the preamble and Article 1, are clear and must be given due weight by the courts where, as here, a difficult question of construction arises. Its adoption was prompted by the increasingly frequent international abduction of children by their parents in an era of fewer border controls and greater mobility. Such abductions were frequently effected by a parent in the hope of obtaining a new decision on custody in another jurisdiction which would be more favourable to the abductor.

To trigger the mechanisms of the Convention, there must have been a wrongful removal of the child from the place where it was habitually resident and for the removal to be wrongful within the meaning of the Convention it must have been in breach of a right of custody as defined in Article 3. The article specified three possible legal origins of a rights of custody: (a) the operation of the law of the state of the habitual residence, (b) a judicial or administrative decision or (c) and agreement having legal effect under the law of the state of the habitual residence. Common to all three is the requirement that the right should have been attributed to the person or body concerned under the law of the state of the habitual residence.

A person may be entitled to such a right of custody, although there is no order of a competent court or legal agreement giving him or her such custody. Thus in the case of married parents in the State of New York, the parents are equally entitled by virtue of the law of the state to the custody of their children. The same, is, of course, the position in Ireland and, one may surmise, in many of the states which are parties to the Convention. Married parents are, accordingly, entitled to the custody of the children without any court order or formal legal agreement to that effect and the removal by one parent of the child or children to another jurisdiction without the consent of the other will clearly constitute a wrongful removal within the meaning of Article 3, unless the rights were not being actually exercised at the time of the removal. (See the decision of the English Court of Appeal in Re: F. (Child Abduction) (Risk if Returned) [1995] 2 FLR 31.).

The language of the concluding paragraph of Article 3 – the use of the words "may" and "in particular" – would suggest that, while emphasis was laid on the three specified sources, it

was not intended to be an exhaustive statement of the legal origin of rights of custody under the law of the state of habitual residence. As Madam Elisa Perez-Vera pointed out:-

> ***"...In this regard, paragraph 2 of Article 3 takes into consideration some – no doubt the most important – of those sources, while emphasising that the list is not exhaustive. This paragraph provides that 'the rights of custody mentioned in subparagraph (a) above may arise in particular', thus underlining the fact that other sorts of rights may exist which are not contained within the text itself... These sources cover a vast judicial area and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration."***
>
> **[Explanatory Report para. 67]**

This may be of particular importance where, as here, there is no right of custody arising by agreement, judicial or administrative order or operation of law, but it is claimed that the removal of the child by a person undeniably entitled to custody was wrongful in the sense that it was calculated to frustrate proceedings in being in the court of the child's habitual residence. Depending on the circumstances of the particular case, it may be that the removal, in such a case, would be a breach of a right of custody vested in the court itself. If, for example, proceedings are actually pending before a court in the state of the habitual residence and an interim order has been made restricting a person entitled to lawful custody from removing the child from its jurisdiction without the consent of another person or of the court, there would be little difficulty in concluding that the child's removal without such consent constituted a "wrongful removal". Clearly, in such a case, the court could reasonably be regarded as having reserved to itself the right to determine where the child should reside until such time as the proceedings were finally disposed of and, having regard to the provisions of Article 5(a) that, in turn, could be regarded as right of custody. Thus, in C. v. C. (A minor): Abduction: Right of Custody Abroad, [1989] 2 All ER 465 (CA), a consent order had been made by an Australian family court directing that the father and mother were to remain joint guardians of the child, that the mother was to have day-to-day custody and that neither parent was to remove the child from Australia without the consent of the other. The mother, having removed the child to England without the father's consent, it was held that this was a wrongful removal. Neill LJ said (at p.472):-

> ***"I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence and this a right of custody within the meaning of Article 3 and 5 of the Convention. I am further satisfied that this conclusion is in accordance with the objects of the Convention..."***

That approach was also adopted by the Supreme Court of Canada in Thompson v. Thompson.

In the present case, it is clear that the plaintiff had no right of custody under the law of New York by operation of law, since he was not entitled to custody unless and until a declaration of paternity was made in respect of him by the New York court. Nor was there any agreement having legal effect under the law of New York between the plaintiff and the defendant giving him such a right. Nor did the order of the New York court do any more than give the defendant interim custody. There was no order at any time requiring the defendant to obtain the consent of the plaintiff or a further order of the court before removing H. from the State of New York. Accordingly, it might at first sight seem that there is an insuperable obstacle to the submission that there were any rights of custody vested in

the plaintiff at the time of the removal under the law of New York. However, as already noted, it was held by the majority of the English Court of Appeal in Re: B. (a Minor) (Abduction) that the concept of "rights" under the Convention was not confined to rights established by law or conferred by a court order, but extended to what were described as the "inchoate rights" of persons carrying out duties and enjoying privileges of a custodial or parental character which were not formally recognised by the law but which a court should uphold, in a particular case, in the interests of the child concerned. Since this case was understandably strongly relied upon on behalf of the plaintiff, it must be considered in some detail.

The facts were as follows. The child, who was six and a half years old at the time of the appeal, was Australian. His parents were not married: his mother was English but had emigrated to Australia in 1982, while the father was Australian born. The relationship broke down and the parents separated in August 1990. The father remained in contact with his son, and when the mother wished to take him, together with her own mother, to Britain in 1990 for a short holiday he contributed a substantial sum to their expenses. Soon after their return to Australia, it became apparent that the mother had become addicted to heroin. The father again gave her a large sum to invest in a home for the son and herself, but she did not apply the money for that purpose and for sometime subsequently lived what was described as "a chaotic existence" as a result of her addiction.

Eventually in April 1992, the mother left Australia and returned to Britain. Her departure was in breach of bail conditions imposed as a result of pending charges for shop lifting. The son was left to be cared for by the maternal grandmother, the father having access at weekends. From February 1993, these roles were reversed.

In the summer of 1993, the grandmother had made a plan to return to Britain for a long holiday and wished to take the son with her. The father was not willing to allow the son to leave Australia for anything longer than a holiday of six months, after which he would return with the grandmother. He insisted, moreover, that the arrangements for the child's return should be established with proper legal formality. As a result, the father and the grandmother attending a meeting with the father's solicitor at which a reasonably elaborate minute was drawn up by the father's solicitor, intended to represent the form of a consent order to be made by the family court of Western Australia (the "FCWA"). It provided *inter alia* for the father to have sole custody of the child and contained detailed provisions to ensure that the child should be returned to the father's custody in Australia, including the deposit of a bond with the father or his solicitor. It was signed by the mother. The father was persuaded by the mother's assurances and the deposit of the bond that they were sincere in their undertaking to return the child to Australia by the agreed date, but that undertaking was not honoured and the mother stayed in the United Kingdom. Understandably, the finding of the trial judge that

> ***"the mother, assisted by her own mother, cruelly deceived the father; and she now seeks to profit by her deceit;"***

was not challenged in the subsequent proceedings under the Convention. The trial judge having ordered the return of the child to Australia, the mother appealed.

One might have expected that the appeal would have turned on the question of whether the minute signed by the mother constituted "an agreement having legal effect under the law of [Western Australia]" within the meaning of Article 3. However, the evidence as to whether it would have that effect was, it would seem, somewhat tentative and unsatisfactory. Waite LJ, with whom Staughton LG agreed, summed up his conclusions as follows:-

"The purposes of The Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression ;rights of custody when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases that will involve giving the term the widest sense possible.

"There is no difficulty about giving a broad connotation to the word 'custody'. Attention was drawn by Lord Donaldson in Re: C to the width of its dictionary meaning and by Sachs LJ in Hewer v. Bryant [1970] 1 QB 357 at p.373 to the diversity of the 'bundle of rights' which it incorporates in legal terminology. The same is no doubt true of the word 'garde', which (in the phrase 'droit de garde') provides for the translation for 'rights of custody' in the French language version of the Convention.

"The difficulty lies in fixing the limits of the concept of "rights". Is it to be confined to what lawyers would instantly recognise as established rights – that is to say those which are propounded by law or conferred by court order: or it capable of being applied in a convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court could nevertheless be likely to uphold in the interests of the child concerned?

"The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising function in the requesting state of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested states to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who had assumed the role of substitute parent in place of the legal custodian."

He went on to point out that the father was the child's primary carer, sharing his upbringing with the maternal grandmother as his secondary carer. He described this as "a settled status" which the absent mother, the only parent with "official" custodial rights had expressly approved, and one which any court, including the FCWA, would be bound to uphold. He, accordingly, was of the view that the removal of the child was in breach of a right of custody within the meaning of Article 3.

Peter Gibson LJ, who described the mother's behaviour as "abhorrent", dissented. Citing the decision of the House of Lords in Re: J. (A Minor) (Abduction: Custody Rights), he said that the rights of custody referred to in Article 3 must be more than *de facto* rights. In the light of the uncertain evidence as to the legal status of the agreement, he concluded that it had not been established that the father had rights of custody within the meaning of the Convention and concluded regretfully that the removal was not wrongful.

In Re: J (A Minor) (Abduction: Custody Rights), the legal status of an unmarried father in the context of Article 3 had also arisen. In that case, the unmarried parents had cohabited in Australia. The mother, who, like the father, had been born in England, brought their son to England with the intention of settling down there permanently, at a stage when the relationship had broken down. There were no proceedings in being at the time of the actual removal, but the father was subsequently granted custody by the Australian court and thereafter made an application under the Convention in England. The trial judge refused the application and this decision was unanimously upheld in the Court of Appeal and the House of Lords. The argument that the removal was wrongful as being in breach of rights of custody was dealt with in summary terms as follows by Lord Donaldson MR in the Court of Appeal:-

> ***"Since Article 3, 4, and 5 of the Convention are solely concerned with the rights of custody, i.e. rights to care, custody, control or guardianship, and with rights of access – the precise terminology does not matter in any of these categories – and since the father had no such rights, for my part, I do not consider that J.'s removal from Australia, reprehensible though it may have been in the way in which the mother achieved it, could constitute a wrongful removal within the meaning of the Convention."***

On the hearing of the further appeal to the House of Lords, counsel withdrew the submission that the removal by the mother was wrongful, but pursued an alternative argument that had also been rejected in the Court of Appeal, i.e. that, following the order of the Australian court, his retention by her was a breach of the father's right of custody. However, although the first limb of the father's case had been abandoned, Lord Brandon dealt with it, again reasonably tersely, as follows: -

> **"*So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J. should reside. It follows, in my opinion that the removal of J. by the mother was not wrongful within the meaning of Article 3 of the Convention."***

This decisions was distinguished in Re: B. (a Minor) (Abduction), apparently on the basis that the latter case was one of "shared parenting" between the father and the maternal grandmother in the complete absence from the country of the custodial parent.

In K v. K Barron J. said of the decision in Re: J.:-

> ***"The potential rights of the natural father in [Re: J.] should have been sufficient to prevent a change in the habitual residence."***

The issue as to whether the removal of the child of unmarried parents in circumstances such as occurred in the present case was wrongful was not, however, under consideration in that case.

The argument advanced in Re: J. to the effect that even if the removal was not wrongful, the retention of the child in England after the Australian court had made an order giving the father custody was "wrongful" was rejected in the House of Lords on the ground that the latter order was made at a stage when the child was no longer habitually resident in Australia. In later cases, however, a somewhat different approach has been taken to what have come to be called "chasing orders", viz., that it was never intended that the Convention should apply in such cases. In Thomson v. Thomson, La Forest J. said that there was nothing in the Convention requiring the recognition of an *ex post facto* custody order of a foreign jurisdiction. He cited in this connection the statement by Madam Perez-Vera in the

Explanatory Report that "retention" essentially consisted in a refusal to return the child after a sojourn abroad where the sojourn has been made with the consent of the rightful custodian of the child's person. Accordingly, on any view, the *habeas corpus* order made by the court of New York in the present case did not, of itself, render either the original removal or the continued retention of the minor wrongful in terms of the Convention.

Having regard to the facts of the present case, the position as to rights of access under the Convention is of importance. It is clear from the wording of the preamble that a distinction was being drawn between rights of custody and rights of access and that is reflected in the different procedures provided for in the body of the Convention for the two situations. Rights of custody are essentially protected under Article 3, whereas the machinery for enabling arrangements to be made for securing the effective of exercise of rights of access appears in Article 21. That was also the view of Madam Perez-Vera in the Explanatory Report in which she said:-

> **"*Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the 14th session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent... A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of the type of right by those who held the other."***

[Explanatory Report pp 444/5]

> **(See also the decision of Hale J. in S. v. H (Abduction: Access Rights) [1997] 1 FLR 971)**

By contrast, in C. v. C. (Minors) (Child Abduction), [1992] 1 FLR 163, a case in which, coincidentally, the habitual residence of the child at the time of the allegedly wrongful removal was also New York, Bracewell J. held that the removal of the child from New York to England was in breach of rights of custody, although the New York court had granted custody to the mother and rights of access only to the father. Some features of that case should, however, be noted: there was evidence from New York lawyers that the order granting access rights to the father impliedly prohibited the mother from removing the children from the court's jurisdiction without the father's consent. Secondly, there is no reference in the judgment to the question dealt with subsequently by Hale J., as to whether the approach adopted is reconcilable with the different procedures prescribed by the Convention in the case of rights of custody and rights of access.

Conclusions

The conduct of the defendant in the present case in taking S. to Ireland without informing the plaintiff or his lawyer cannot be condoned. At the same time, the difficulties with which she was faced when her relationship with the plaintiff broke down should not be underestimated. Whatever course she adopted could bring her into conflict with the law; if she remained in New York, she was liable to be prosecuted and deported as an illegal alien and if she left for Ireland she exposed herself to the danger of proceedings being brought such as the present. It was also understandable that she would have preferred to bring up her child, suffering as he was from some degree of disability, in this country, where she would have the support of her parents and other family members.

The case must ultimately be decided, however, in accordance with law and not with the respective merits of the parties. The issue essentially is as to whether the removal, at the time

it occurred, was in breach of rights of custody attributed to the defendant or any other institution or body under the law of the state of New York.

Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending would, absent any legally excusing circumstances, be wrongful in terms of the Convention. The position would be the same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. In such cases, the removal would be in breach of rights of custody, not attributed to the dispossessed party, but to the court itself, since its right to determine the custody or to prohibit the removal of the child necessarily involved a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state.

It could even be that an order by the court granting a right of access to the dispossessed parent might, by implication, be treated as prohibiting the removal of the child without the consent of the dispossessed parent or a further order of the court. That would fall to be determined in accordance with the law of the state of the habitual residence at the time of the removal. A further question could then arise as to whether, in any event, the appropriate machinery for enforcing the access rights in that case was that under Article 21 rather than Article 3, which is invoked in the present case. Since, however, at the time of the allegedly wrongful removal in the present case, no rights of access had been granted by the court in New York, it is unnecessary to express any concluded view on that question. It is sufficient to say, in the context of the present proceedings, that, giving the Convention the purposive and flexible construction which it should be given, circumstances can arise in which a removal can be "wrongful" within the meaning of Article 3 because it is in breach of rights of custody, not vested in either of the parents but in the court itself.

It is going significantly further to say, however, that there exists, in addition, an undefined hinterland of "inchoate" rights of custody not attributed in any sense by the law of the requesting state to the party asserting them or to the court itself, but regarded by the court of the requested state as being capable of protection under the terms of the Convention. I am satisfied that the decision of the majority of the English Court of Appeal in Re: B. (a Minor) (Abduction) to that effect should not be followed.

In this context, the decision of the Family Division of the English High Court (Cazalet J.) in Re: O. (Child Abduction: Custody Rights) [1997] 2 FLR 702 is illuminating. In that case, the mother had moved from Germany to England with her daughter and partner (who was not the father of the child). After her departure, the child's maternal grandparent, with whom she had lived for some 16 months at a stage when the mother was (in the judge's words) "off the scene", made an application to a court in Germany for interim custody. There had been no order as to custody in their favour at the time of the removal and the only basis for holding that they had "rights of custody" within the meaning of Article 3 was the sixteen months' period during which, with the mother's consent, they had looked after the child, a period which had expired about 10 months before the allegedly wrongful removal. The principles enunciated in Re: B (a Minor) (Abduction) were invoked to support a finding that, even in those circumstances, the grandparents could be said to have "rights of custody" within the meaning of the Convention. It is, with respect, difficult to accept that such a result can have been contemplated by the framers of the Convention.

It is clear from the facts of the present case, and from the various authorities which have been discussed in the course of this judgment, that the rights of unmarried fathers under the Convention present particular difficulties, given the unique relationship of the natural father to his children and the fact that in a number of jurisdictions, including our own, they do not have any automatic rights to custody equivalent to those of married parents. However, the appropriate method of addressing difficulties of that nature which may arise in the operation of conventions on private international law is through the machinery of Special Commissions in The Hague which regularly monitor and review the operation of conventions in the contracting states, rather than by innovative judicial responses to admittedly difficult cases in which upholding the Convention as enacted may give rise to what seems a harsh or inequitable result.

I turn again to the facts of the present case. On the unchallenged findings of the trial judge, the removal of H. was not, at that time, in breach of any right of custody to which the plaintiff was entitled under the law of the state of New York, whether arising by operation of law, judicial or administrative decision or an agreement having legal effect under that law. Nor was it in breach of any right of custody vested in the Family Court in the County of Nassau, New York in proceedings then in being or of any order prohibiting the defendant from removing the child to another jurisdiction, whether in the United States or abroad, without the consent of the plaintiff or under a further order of the court. Nor was it in breach of any such order which might have been implicit in an order actually granting the plaintiff visitation rights.

I am, accordingly, satisfied that the decision of the learned High Court judge that the removal was in breach of rights of custody within the meaning of Article 3 was erroneous. The plaintiff is, of course, entitled to seek an order for custody or access in this jurisdiction pursuant to the provisions of the Guardianship of Infants Act, 1964 or to invoke the machinery of Article 21 in order to secure the effective exercise of the rights of access to which he may be entitled to the child.

I would allow the appeal.

JUDGMENT delivered on the 19th day of February 1999 by

BARRON J. (DISSENTING)

The parties to these proceedings are the parents of H.I. the minor in the title hereof ("H") who was born in New York on the 13th July 1991. They met in New York in July 1989. They lived together there from February 1990 until the events giving rise to these proceedings. They did not marry in accordance with the civil law, but went through a ceremony of marriage in New York on the 5th March 1991 in accordance with the rites of the Moslem faith. Following the birth of H. they remained at the same address with him until the 30th of December 1996. On that date the defendant left the family home with H. She remained in the State of New York until the 3rd February 1997 when she left for this country where she has since remained.

Prior to her leaving the jurisdiction of the State of New York the defendant applied ex parte to the Family Court of the County of Nassau for a protection order – the equivalent of a barring order in this jurisdiction. She obtained this order as well as an order giving her temporary custody of S. until 30th June 1997. On the 3rd January 1997 the plaintiff issued proceedings in the same court seeking visitation rights to H. Before any hearing of the claims

and counterclaims could be held the defendant left the jurisdiction of New York with H. on the 3rd February 1997. Subsequently the order in her favour were discharged on the 25th February 1997 and on the following day an order was made directing the defendant to produce H. before the Court before the 26th March 1997. That order was not complied with.

Proceedings under the Hague Convention were commenced by the plaintiff in this jurisdiction on the 20th March 1997. An affidavit of New York law was sworn on behalf of the defendant to the effect that an unmarried father had no legal rights to custody of his child without a declaration of paternity in his favour. But that once such a declaration had been made an unmarried father had the same rights as a married father.

This legal position was contested by an affidavit of New York law sworn on behalf of the plaintiff deposing to the opinion of the deponent that New York law would give legal effect to the de facto arrangement between the parties for the care of H. arising from their domestic situation.

A second affidavit of law on behalf of the defendant disagreed with this opinion and reiterated that until a declaration of paternity an unmarried father would be treated as a stranger to his child.

The learned trial judge accepted this latter opinion as being the appropriate law of New York. Since no such declaration had been made at the date of the removal, the plaintiff had at that date no rights of custody within the meaning of the Convention. Nevertheless although she found that no rights of custody had vested in the plaintiff she took the view that the inchoate rights of the plaintiff to custody which would almost inevitably have crystallised into established rights by court approval of the acknowledgement of paternity were rights of custody within the meaning of Article 3 of the Hague Convention. In arriving at this conclusion, she was influenced by the facts that the defendant did not contest the plaintiff's paternity and also by the fact that the order of the Family Court on the 26th February 1997 was made in the absence of any declaration of paternity. Accordingly, she held on a preliminary issue that the plaintiff was entitled to raise the Convention and that a full hearing should follow to consider such issues as might be applicable at such hearing.

From this ruling the defendant has appealed to this Court.

The defendant submits that to allow the Convention to apply in the case of persons with inchoate rights is to introduce into the operation of the Convention a degree of uncertainty which is unnecessary and will prevent speedy return and involve lengthy litigation in the requested State. It is submitted on her behalf that the test of the application of the Convention should depend upon the nature of the legal right to the custody of the child at the date of its removal.

The case for the plaintiff is based upon the proposition that inchoate rights are sufficient to bring the Convention into force. In so submitting the plaintiff relied strongly upon *In re B (a minor) (Abduction)* 1994 2 FLR 249, and the manner in which the Convention was construed in that case.

In my view, the facts of this case must be considered in the light of the proper construction of the relevant Articles of the Convention having regard to both the Preamble and to the objects of the Convention as set out in Article 1. The Preamble to the Convention is as follows:

"Firmly convinced that the interest of the children are of paramount importance in matters relating to their custody,

desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to ensure protection for rights of access."

Article 1 of the Convention repeats these matters as follows:

"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 other contracting States."

Other relevant provisions are contained in Articles 3, 4 and 5 which are as follows:

ARTICLE 3

The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

ARTICLE 4

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 sixteen years.

ARTICLE 5

For the purposes of this Convention –

(a) "*Rights of custody*" shall 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;

(b) "*rights of access*" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

In construing the Convention very considerable assistance is to be found in an explanatory report (*"the Report")* by Elisa Perez-Vera dealing with recommendations adopted by the

Fourteenth Session in 1980 leading to the Convention on the Civil Aspects of International Child Abduction.

In re B (a minor) (Abduction) **1994 2 FLR 249, the father was Australian born and the mother had emigrated to Australia from the United Kingdom. The parties had not married. At the date of the proceedings they had one son aged 6 ½ years. The mother had left the father and returned to the United Kingdom. The child remained in Australia where its primary carer was its father with assistance at weekends from the maternal grandmother. The father allowed his son to be brought by his grandmother to the United Kingdom only upon written undertakings by the grandmother and by the mother that his son would be returned at the end of six months. The father had no legal rights under the law of Western Australia without applying to the Court which he had not done. In the event the mother refused to return the child and applied in the United Kingdom to have the child made a Ward of Court. The father then applied under the Convention for the child to be returned to Australia. The High Court made the order sought. This was upheld by the Court of Appeal on appeal to that Court.**

In the Court of Appeal, it was agreed inter alia by counsel that :

"the Convention is to be construed broadly as an international agreement according to its general tenor and purpose, without attributing to any of its terms a specialist meaning which the word or words in question may have acquired under the domestic law of England."

Dealing with this principle Waite LJ said at p. 260:

> ***"The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that would best accord with that objective. In most cases, that would involve giving the term the widest sense possible."***

Then dealing with how to construe those words he said at p. 261:

> ***"The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognise as established rights – that is to say those which are propounded by law or conferred by court order; or is it capable of being applied in a convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, the Court would nevertheless be likely to uphold in the interest of the child concerned?***
>
> ***The answer to that question must, in my judgement, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the***

> ***Convention. At one end of the scale is (for example) a transient co-habitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, if a relative or friend who has assumed the role of a substitute parent in place of the legal custodian."***

In considering this judgment it is important to realise that the House of Lords had previously in the case of *In re J. (a minor) (Abduction: Custody Rights)* 1990 2 AC 562 decided that de facto rights were not sufficient for the purposes of the Convention. And although the majority in *In re B (a minor) (Abduction)* held in favour of inchoate rights the third member of the Court Peter Gibson LJ dissented upon the ground that rights of custody under the Convention must be more than de facto rights, and in doing so he followed *In re J. (a minor) (Abduction: Custody Rights)*.

In the passage from the judgment of Waite LJ which I have cited, it is clear that he regards the Convention as applying not only to persons with actual legal rights under the law of the requesting State, but also to those who would not in the ordinary way have such rights. At the end of the passage he instances classes of such persons who might have greater or lesser entitlement to come within the provisions of the Convention.

I agree with Waite LJ that the right to invoke the Convention should not be limited to those with established legal rights. However, I do not think it necessary to regard "*rights"* as being legally enforceable rights. Waite LJ sought to protect those who were carrying out duties and enjoying privileges of a custodial or parental character which a court would be likely to uphold. He was prepared to uphold such rights on the basis that they would subsequently be given enforceability and that "*rights of custody*" as properly construed include such rights.

He was restrained by the decision in *re J.* from holding in favour of de facto rights. He recognised that persons who would be unlikely without a court order to obtain legal rights might still be entitled to invoke the Convention. But that involves construing "*arise*" as will arise. The Convention requires the present position at the date of removal to be considered, i.e. under what entitlement were rights of custody actually being exercised? This entitlement while dependent upon the law of the requesting State must be an entitlement arising in one of the ways provided for by Article 3. The rights do not have to be legal rights. They must be present rights the basis of which can be recognised by the law of the State of habitual residence.

This is the interpretation placed upon the words "*having legal effect under the law of that State*", in paragraph 70 of the Report where the author says:

> ***"Lastly, custody rights may arise according to Article 3 'by reason of an agreement having legal effect under the law of that State'. In principle. The agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it would have the 'force of law', as stated in the preliminary draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms***

> ***of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities."***

This is an interpretation to be expected. The Convention is an international Convention and as such should be expected to apply in the same way in the same circumstances regardless of which Convention State or States are involved. Nevertheless, there would be no point in returning a child to a State on the basis of a claim arising in circumstances which that State does not recognise.

The reality is that the Convention is not concerned with legal rights under the law of habitual residence but with rights which were actually being exercised and to which the courts of that State would not totally disregard as having no legal effect within that State.

The law of England and Wales accepts that the question is a matter of construction of the Convention. In *S. v. H. (Abduction: Access rights)* 1997 1 FLR 971 at p.974 Hale J. said:

> ***"What is the significance of all this for the purpose of the Convention? The Court of Appeal has made it clear In re F (a minor) (Child Abduction: Rights of Custody Abroad) 1995 FAM 224 that whether a removal or retention is in breach of rights of custody has to be decided by reference to Convention law as applied in these courts. Hence even if the removal was not prohibited in Italian law, it could still be wrongful under the Convention."***

Re B **was followed in *In re O (Child Abduction: Custody Rights)* 1997 2 FLR 702. In that case an application was made by maternal grandparents for a return of the child. The child who was a German national was 4 ½ years old at the date of its removal and had for some time been living with its maternal grandparents who were also German nationals. The mother who was a German national had taken the child to live in England with her and her partner who was a United Kingdom national.**

Cazalet J. held that the grandparents were exercising joint rights of custody with the mother. He followed the decision in *In re B (a minor) (Abduction)* and accepted the test propounded by Waite LJ in that case as being "*whether the individual concerned was exercising functions of a parental or custodial nature without the benefit of any official custodial status."* He did not accept that there was a need for a legal agreement to bring the case within the provisions of Article 3 of the Convention. Dealing with that issue he said at p. 708:

> ***"...it is important, in addition to what I have said, to bear in mind that the word 'may' is used. (in Article 3). The paragraph starts, 'The rights of custody mentioned in subparagraph (a) above may arise ...' Accordingly, rights of custody, in my view, are not confined solely to the specific situations set out in the Article; the Court may step beyond them, as the Court did in In re B."***

This passage does not rely upon any subsequent confirmation or conferring of legally enforceable rights. In my view, it recognises what is at the heart of the Convention which is the actual exercise of appropriate rights. It then also recognises that the agreement or arrangement under which such rights are exercised need not have the force of law only that it should not be prohibited; should not be contrary to law. There is nothing inchoate about such rights. Again, such a construction is appropriate where claimants need not be parents

of the child concerned and are unlikely to be considering strict legal rights. Unless there have been legal proceedings which would be unusual, persons other than the parents would have rights of custody by virtue of informal agreements and almost certainly would not have them protected by legal rights.

Applying these principles, I would regard the plaintiff as coming within the Convention. H. was habitually resident within the State of New York at the time of his removal. His father, his mother and he lived together in circumstances akin to that of a legal family and de facto the care of H.'s person was exercised jointly by the parties. The right to do so on the part of the plaintiff certainly arose through acquiescence or implied agreement between the parties. That arrangement was not contrary to the law of New York. That the type of unilateral action by the mother in cases like the present should come within the Convention is supported by paragraph 71 of the Report where the author says:

> **"*Joint custody is, moreover, not always custody ex lege, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibility inherent in custody rights between both parents. Now, from the Convention standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful and the wrongfulness derived in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations; it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor will the situations in which may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."***

I am however by no means satisfied that under the law of New York, the plaintiff did not exercise those rights as the father of H. Admittedly the rights of a natural father cannot be enforced without a declaration of paternity. Nevertheless it seems clear from the affidavits that from a practical point of view an unmarried father has the same rights before the courts as a married father. The only actual difference is that as well as seeking whatever relief he requires he must also seek a declaration of paternity. This places upon him the burden of proof of such paternity, but there is no suggestion in the affidavits of law that this obligation in any way affects the timing of his remedy.

The need to prove paternity may appear to prevent enforcement of his rights, but in practice it can be seen not to be so. But whichever way it is looked at those rights were always there. The declaration of paternity does not confer those rights on the father as the learned trial judge seems to have found, they exist by reason of the fact of paternity and always existed. The absence of a declaration of paternity affects the enforcement, and then only in a very technical sense, rather than their existence.

It is not the law as it is in Western Australia that an unmarried father has no rights until they are granted by the Court. The argument against is further weakened by the defendant's acknowledgement of the plaintiff's paternity. Further, the affidavit of law avers the priority of the mother's right as being based upon constitutional grounds a parent against a stranger.

But if the matter ever came to court, that ground would immediately be dissolved by the mother's admission.

In any event, a lawful removal under the law of the State of habitual residence must yield to a wrongful removal under the Convention.

While legal rights must be the basis of any claim under the Convention in that the title of the person seeking the return of the child must have its origins in a legal right to custody either actual or derived it is not in my view the appropriate starting point. If the nature of the legal rights upon which an application for return under the Convention is to be founded or if the manner in which they arise is to be determined first, this would create rigidity. Since the Convention deals with situations which by their nature will have indefinite variations, it is more appropriate as each case evolves to determine first what rights were actually being exercised at the date of the removal: and then to decide whether such rights amount to rights of custody within the meaning of that expression as defined by Article 4. Such an approach provides the necessary flexibility. Only then would it be necessary to consider the legal position.

What rights were actually being exercised at the date of removal is a question of fact. Whether they are rights of custody is a question of law and it is in answering this question that courts are likely to find the greatest difficulty. See *S. v. H. (Abduction: access rights)* 1997 1 FLR 971 where Hale J. found on the facts that the rights being exercised by the unmarried father were rights of access and not rights of custody.

In considering what rights are rights of custody it is important to note that the Convention distinguishes between rights of custody – which are enforced by speedy return, and rights of access – which are not so enforced but for which the provision made is to ensure that such rights can be exercised in the place to which the child has been removed (the requested State).

But it is not every right which will affected by removal which must be a right of custody. The definition includes the right to determine the child's place of residence. This implies that where it is necessary to protect the child's place of residence the right being exercised will be a right of custody. Accordingly, it is a question of fact whether the place of residence requires to be protected for the exercise of the rights which it is claimed were actually being exercised. Since the Convention of necessity will give rise to a multitude of cases each with its own facts each must be decided individually.

In the present instance the rights of custody which are claimed are those of a parent who has been taking care of the child jointly with its mother ever since its birth. Those rights are rights of custody within the Convention. They were possessed by or attributed to the plaintiff at the time of the wrongful removal. The real issue in this case is whether those rights arose in a manner acceptable to the final paragraph of Article 3. In my view they did.

It was submitted on behalf of the defendant that since the plaintiff only sought visitation rights in the proceedings before the courts of New York that the Convention does not apply. In answer the plaintiff sought to establish that under the law of New York visitation rights included the right to determine the place of the child's residence. In my view nothing can be decided upon this basis. What happens once the break-up occurs is dependent upon the circumstances which have then arisen. In the present case the defendant sought the protection of the courts of New York and the application of visitation rights was in answer to that application. What he may or may not have sought is immaterial to what rights he may or may not have been exercising at the relevant date.

But in any event, it is not what rights the father is claiming which is material, but in which forum they should be determined. This in turn is governed by what rights were actually being exercised at the date of wrongful removal or which would have been so exercised but for such wrongful removal. In this context, wrongful must mean in breach of the rights then actually being exercised. Whether the removal was justified or not is a matter for the custody court. In the present case, the actual removal from New York took place some six weeks after removal from the home where the parties had been living. It was just as much a removal contrary to the Convention as removal from the home since the rights of custody would have continued to have been exercised otherwise. Admittedly, it is not the norm for the removal to be a two step affair, the result of which in the present case is that at the date of removal from New York the father was prevented from exercising his rights of custody not by that removal, but by the earlier removal from the home. The reality however is that he was prevented from exercising such rights by the conduct of the mother culminating in the removal from the State. Following the removal from the home, justification for leaving and the issues of the custody and access were for the courts of New York and not those of this jurisdiction. This jurisdiction which was actually invoked by the mother in the instant case should not be ousted by the further removal from the State.

It has been submitted on behalf of the plaintiff that since at the date the defendant left the jurisdiction of the courts of New York proceedings were in being under which the place of residence of the child could be determined by the Court that therefore at that date the Court was exercising custody rights within the meaning of the Convention and that it followed that the removal of the child being in breach of these rights of custody was a wrongful removal within the meaning of the Convention. Upon the view which I take of the need for an actual exercise of the rights of custody and in the manner in which those rights may arise, this is a fallback issue to be considered only if the person seeking the return fails on the primary issue, which is not the case here. I do not consider it necessary to deal with this issue fully in the instant case. Nevertheless, one the jurisdiction of a family court is invoked, this must amount to a submission to the full jurisdiction of such court. This involves all aspects of the welfare of the child concerned. In Convention terms, it seems to me that this submission is an acknowledgement that the Court has rights of custody in that it has power to determine the child's place of residence.

Re W.: re B. (Child Abduction: unmarried father) **1998 2 FLR 146, is a case in which Hale J. was dealing with the position of unmarried fathers both in English law and under the Convention. In a very full and comprehensive judgment she indicated that removal by the mother of a child who is habitually resident in the UK will be wrongful under the Hague Convention if:**

> **(a) the father has parental; responsibility either by agreement or court order; or**

(b) there is a court order in force prohibiting it; or

> **(c) there are relevant proceedings pending in a court in England and Wales; or**
>
> **(d) where the father is currently the primary carer for the child, at least if the mother has delegated such care to him.**

She was not prepared to equate the positions of married and unmarried fathers. She recognised that the children had the same rights whether their parents were married or not, but that Parliament had not done the same for the parents and "*did not intend that*

unmarried fathers should be in exactly the same position in relation to their children as married fathers."

This case dealt with two separate and distinct relationships. In neither case was the father living in the same household as his child. Hale J. did refer to paragraph 70 of the Report, but was unable to find the existence of any such agreement as contemplated by that paragraph. In one of the cases, she held that the removal was not wrongful. In the other, she held that it was upon the ground that the father had applied for parental responsibility to be granted. The history of these proceedings was particularly strong in favour of the father and suggested that the mother had deliberately delayed them in order to be able to remove the child before they came on for a final determination. The proceedings had been commenced in March 1976 after which there had been interim orders and interim agreements between the parties. Ultimately the 15th September 1997 was fixed for the making of the final order which did in fact grant parental responsibility – in this jurisdiction custody – to the father. Meanwhile the mother and her partner had left the jurisdiction on the 5th September 1997.

In so holding that the child in that latter case was wrongfully removed, Hale J. clearly accepted that the exercise of custodial rights "*which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interest of the child concerned"* was a Convention matter. The quotation is taken from the passage from the judgment of Waite LJ in *re B.* already cited. This judgment gives further support for the proposition that the paramount consideration is the nature of the rights actually being exercised.

The Oireachtas has also taken the same position in relation to the rights of unmarried fathers, as is apparent as being the position in the United Kingdom. Nevertheless it seems to me that the Convention is more interested in the rights of the children than in the rights of the parents. Our courts in custody matters are well used to the proposition that the decision of the Court is dependent upon the welfare of the children and not upon the rights or wrong of the situation between the parents. In like manner, the proper construction of the Convention should not be based upon the rights of the unmarried father alone when those rights conflict with the rights of the child. In that situation the rights of the child should predominate.

I am quite satisfied that the purpose of the Convention is to protect the interest of the child from harmful effects of an improper removal or retention. There can be no doubt but that to take a child of five from the only home he has ever known in which he has lived with his mother and father and to deprive him both of the security of that home and the presence of his father is a failure to protect the very interest of the child which the Convention is designed to protect. A removal in such circumstances defeats the purpose of the Convention. In my view, unless the Convention is coercive to the contrary, which it is not, it should be construed to apply to that child.

Legal rights should not and cannot be ignored. But when the party entitled to the legal rights enters into an agreement whether by words or conduct whereby the de facto exercise of those rights is passed to another whether solely or jointly with the possessor of the rights so passed arise within the meaning of Article 3 of the Convention.

In those circumstances, the real issue which arises is what rights were exercised and were they passed? That is the present case. There is no need in my view for the further refinement that the person to whom those rights have been passed and by whom they were being exercised was entitled legally to such rights or would at the same time have been entitled to obtain such rights upon a legal footing.

The first question to be determined is, what rights, if any, were actually being exercised by the party seeking the return of the child at the date of its removal. Secondly, did such rights amount to rights of custody within the meaning of that expression as used in the Convention. If the answer to the latter question is no, then the Convention does not apply. If the answer is yes, then further questions follow. Next, were those rights being exercised whether solely or jointly with the consent of the person or persons entitled to the legal right to custody? Consent in this context may exist through acquiescence or any arrangement the purpose of which is and which results in the actual exercise of such rights by another. If so, then the remaining question is whether the de facto situation so created is contrary to the law of habitual residence? The answers to these two questions in the instant case are, Yes and No respectively.

In indicating this approach, I make no comment on whether independently the Convention should be applied because of the existence of the legal proceedings in the State of habitual residence.

On the submission on behalf of the defendant was that inchoate rights are uncertain. For the reasons which I have given there is no reason to consider this submission. There is no need for a legal title under the law of the State of habitual residence provided that the right to custody arises in a manner within the meaning of Article 3. If, which in my view is not the case, legal status can be given subsequently that would create an uncertainty, but not as to what rights would receive such status but as to whether the known rights which were being exercised would be so treated.

Too often in cases of this nature this Court has had to comment of the delay taken in the matter reaching the courts. This case is no exception save perhaps in the sense that the delay here is much longer than usual. It is unfortunate that the mater was dealt with by way of a preliminary point of law in the High Court rather than the entire case being decided. That in itself is calculated to add considerably to the length of time proceedings will take.

The delay in this case will bring this jurisdiction into disrepute. It is in breach of three separate Articles of the Convention. Article 2 is as follows:

> ***"Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."***

Article 11 provides inter alia:

> ***"The judicial or administrative authorities of contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings, the applicant or the central authority of the requested State, on its own initiative or if asked by the central authority of the requesting State, shall have the right to request a statement of the reasons for the delay."***

Article 16 provides:

> ***"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the contracting State to which the child has been removed or in which it***

> ***has been retained shall not decide on the merits of rights of custody until is has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."***

From these provisions it is quite clear that this jurisdiction is in breach of its obligations within the terms of the Convention. Those breaches have serious consequences for S. It is now over two years since he was taken from his home. Yet during the entire of that period no court has had the authority to make a firm order as to his custody. Such uncertainty for such a period of time is to be deplored.

The right contained in Article 11 should not be totally ignored as it has been in the present case. Had the right given by that Article been exercised the delay in the present case could not have taken as long as it has. In this regard it is significant that Cazalet J. *In re O* apologised for the fact that the matter had not reached his court for a period of 2 ½ months.

In the circumstances I would reject this appeal and return the matter to the High Court for a speedy resolution of the Convention issues involved.

JB97
