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[20/11/1997; High Court of Ireland; First Instance]
A.S. v. E.H. and M.H. (Child Abduction) (Wrongful Removal) [1999] 4 IR 504

HIGH COURT

20 November 1997

In Re ES (A Minor); AS v EH and MH

1996/210SP

GEOGHEGAN J: This case started life as a claim primarily for an Order by the Irish High Court for the recognition and enforcement of an Order made by Mr Justice Wall in the English High Court of Justice Family Division granting to the Plaintiff interim care and control of the minor named in the title and to compel the First named Defendant to return the child to the jurisdiction of the Courts of England and Wales, the child having been taken from England to Ireland. An additional and alternative claim for return was also made pursuant to the provisions of the Luxembourg Convention. This case itself and other concurrent proceedings in the English High Court have had a very long history. At this stage it is sufficient to state that by an Order of this Court made by Mr Justice Budd, the Plaintiff was permitted to amend the special endorsement of claim so as to include a claim for the return of the child pursuant to the Hague Convention. By agreement between the parties, it is this latter aspect of the claim which has been litigated first before me. If this Court now makes an Order for the return of the child, pursuant to the Hague Convention, that is the end of the matter. If on the other hand this Court refuses an Order for the return under the Hague Convention, the case will have to be re-listed for argument as to the Plaintiff's rights, if any, under the Luxembourg Convention.

I have already mentioned that there were concurrent proceedings in England. These proceedings were for custody and wardship as well as for declarations that the removal of the child to Ireland and/or retention of the child in Ireland was wrongful both under the Luxembourg and the Hague Conventions. Various Judges dealt with the case in England at the stage of Interim Orders but ultimately the full case was heard by Mr Lionel Swift, QC, sitting as a Deputy Judge of the English High Court of Justice Family Division. Appeals and Cross Appeals were brought from his decision to the English Court of Appeal and a further Appeal was brought to the House of Lords. I have had the benefit of the very full judgments delivered by Mr Swift, Lady Justice Butler-Sloss in the Court of Appeal and Lord Slynn of Hadley in the House of Lords (Reported as Re S (A minor) [1997] 4 All ER 251). As I understand the position, I can only have regard to those judgments, insofar as they assist me in relation to the questions of law involved. I cannot adopt the findings of fact, however convenient it might be to do so, particularly as very carefully reasoned findings of fact were made by Mr Swift on foot of full oral evidence heard by him over many days. But Ms Whelan, who is Counsel for the Plaintiff, is not necessarily prepared to accept any facts which were either found or conceded in the English Courts. Nevertheless, it has been accepted that I should read all the Affidavits and exhibits filed for whatever purpose and of

course the English judgments are extremely helpful in considering the legal principles involved.

It has been established in a number of cases, particularly in England, that applications under the Hague Convention ought normally be heard on Affidavit only because of the speedy remedy intended to be provided by the Convention. A Judge reading the Affidavits in an application under the Hague Convention should form a view of the facts as a matter of probability even where there may be conflict between the Affidavits. In that sense it is different from almost all other types of proceedings brought on Affidavit evidence. In this case I was asked to hear the oral evidence of the paediatric psychiatrist, Dr Byrne. This application was made to me by the Defendants and was opposed by the Plaintiff but I acceded to it in the circumstances. The purpose of the oral evidence was to set up a defence under Article 13 of the Convention to the effect that grave psychological harm would be caused by an Order for the return of the child. The original involvement of Dr Byrne in the case arose in a somewhat different context and I will be returning to that later on in this judgment. Apart, however, from the evidence of Dr Byrne, the evidence on which I must base my judgment is the evidence before me on Affidavit.

The relevant background facts can be summarised as follows. The child, E, was born in England on the 21 January, 1995 out of lawful wedlock. The mother was Irish and the father was Moroccan. The father had previously been married to a Spanish girl and had two children by that marriage but that marriage had broken up. It seems clear, however, that he remained on reasonably good terms with her and was devoted to the two children. The father commenced a relationship with E's mother in 1990 and they lived together until July 1995. The relationship then more or less broke up but not altogether. It would seem that it broke up to the extent that they were not living together after that under the same roof but there was constant contact and in particular the father, the Plaintiff in these proceedings, had regular contact with his child, E. The mother died unexpectedly on the 10 March, 1996 in London. Between July 1995 and the date of her death, the mother had spent quite a long period living in Ireland but it would seem that it was in the nature of a lengthy stay with her family rather than any permanent change of residence. In the months leading up to her death she was back in England and looking at the evidence as a whole, I am quite satisfied that at the date of the death of the mother, the child's habitual residence was in England. Indeed, this was conceded in the Appeal Courts in England.

After the funeral of the mother, the maternal aunt and maternal grandmother spirited the child away to Ireland without informing the Plaintiff and needless to say without his permission. I agree with the view taken by the English Courts, and for the reasons given in the judgments, that the aunt and the grandmother in doing this were not doing anything unlawful or wrongful in the legal sense, however morally reprehensible it may have been. Somewhat like the legal position in Ireland, a father of an illegitimate child in England has no custody rights unless and until he obtains such rights from a Court. Ms Whelan, despite the concessions made in the English Courts, is not prepared herself to concede in this Court that the removal was not wrongful. She makes the point that the expression "rights of custody" in the Hague Convention may extend to inchoate rights which in a sense a father of a child born out of lawful wedlock could be said to have. While this is an interesting argument, I do not think that it is sound and I accept the view taken by the English Courts. I am assuming therefore that the removal of the child to Ireland by the Defendants was lawful.

The child, E, appears to have been returned to Ireland by the Defendants on the 11 March, 1996 and has been with the First named Defendant ever since. On the 13 March, 1996 an Order was made by Wall J in the English High Court giving interim care and control of the

child to the father. The grandmother was ordered to return the child to the English jurisdiction and there was an undertaking given to bring wardship proceedings which were in fact issued on the 14 March, 1996. Subsequently, the aunt, the First named Defendant in these proceedings, was joined in the English proceedings. On the same day as the Order was obtained from Wall J in London an application was made in the Dublin Circuit Court to Judge McGuinness (as she then was) to have the aunt made a guardian of E and giving the aunt custody and for an Order prohibiting the father from removing the child from Ireland. These Orders were made by the Circuit Court. In the English judgments there is a certain amount of esoteric discussion as to whether a Court Order is deemed to be made at the very beginning of the day in which it is made because the point was taken that apparently Judge McGuinness's Order was made a short time before Wall J's Order in England. I have no reason to doubt that the view taken by the English Courts on this matter is correct but I do not think that it arises. I am satisfied that the operation of the Hague Convention is not and could not be affected by the Order of Judge McGuinness, whether or not it was made before or after the English Order. Mr Durcan however places a much more substantive reliance on Judge McGuinness's Order in connection with his argument about habitual residence and I will be returning to that in due course. The important issue in this case is whether, as and from the time that the Defendants had notification of the English Order, the retention of the child in Ireland was thereafter wrongful and of course if so there is the further issue of whether, having regard to Article 13 of the Convention, this Court ought in fact to make an Order for the return.

Counsel for the Defendants, Mr Durcan, resists an Order for the return of the child on three grounds. These are:-

1. That as and from the time that the grandmother and the aunt took the child away from England and brought him back to Ireland or at the very least as and from the Circuit Court Order, the child had an habitual residence in Ireland or at the very least no longer had an habitual residence in England.

2. The First named Defendant, as appointed guardian under Judge McGuinness's Order, could not be bound to return the child to England having regard to Section 40(2) of the Adoption Act, 1952.

3. That grave psychological harm would be caused by the return and that therefore the Court should exercise a discretion under Article 13 of the Convention and refuse an Order for the return.

At all relevant times the child, E had in my opinion an habitual residence in England. Mr Lionel Swift, QC, the Deputy High Court Judge in England, in the course of his judgment stated the following:-

"I am not prepared to accept that a person with no juristic power over a person of this age can change his habitual residence within a day or two. It is not necessary to consider the position of a child kept by such a person over a significant period of time."

Lord Slynn of Hadley in his speech in the House of Lords had this to say on the same subject:-

"In the Court of Appeal Butler-Sloss LJ with whom the other members of the Court agreed, took the same view as the trial Judge. In considering the appellants' contention that E lost his habitual residence in England either when the appellants took over his de facto care on the 10 March or when they took him to Ireland on the 11 March she said:

'The death of the mother, the sole carer, would not immediately strip the child of his habitual residence acquired from her, at least, while he remained in the same jurisdiction. Once the child has been removed to another jurisdiction, the issue whether the child has obtained a new habitual residence whilst in the care of those who have not obtained an Order or the agreement of others will depend upon the facts. But a clandestine removal of the child on the present facts would not immediately clothe the child with the habitual residence of those removing him to that jurisdiction, although the longer the actual residence of the child in the new jurisdiction without challenge, the more likely the child would acquire the habitual residence of those who have continued to care for the child without opposition. Since, in the present case, the English Court was seized of the case within two days of the removal of the child, it is premature to say that the child lost his habitual residence on leaving England or had acquired a new habitual residence from his de facto carers on arrival in Ireland.'"

I totally agree with those views expressed by Mr Lionel Swift and Lady Justice Butler-Sloss which in turn seem to have had the approval of the House of Lords. But Mr Durcan adds a refinement to the argument. He says that even if the removal of the child by the aunt over to Ireland did not terminate the child's English habitual residence, such termination must necessarily have occurred once Judge McGuinness's Order was made. Mr Durcan argues that as and from the making of that Order the appointed guardian in this jurisdiction was surely entitled to determine the residence of the child. I cannot agree. Quite apart from any consideration of comity of Courts or as to what the position was to be if two conflicting Orders were made in the two jurisdictions, I am satisfied that if Judge McGuinness's Order as such had any effect on residence, it could only be temporary residence and not habitual residence. The Circuit Court Order was a temporary Order until a particular date. The matter then became adjourned on a few occasions until ultimately the Circuit Court proceedings were stayed by the High Court. There is some suggestion that the Order of the High Court staying the Circuit Court proceedings was not valid but I do not think that I need consider that matter in this case nor indeed would it be appropriate for me to do so. Nothing really turns on whether the Order staying the Circuit Court proceedings was valid or not. The essential point is that at all times Judge McGuinness's Orders were temporary Orders and those Orders as such cannot have had the effect of altering the habitual residence. Of course if the aunt for a certain period was looking after the child in her house and with the clear intention of keeping the child with her indefinitely and there was no apparent objection coming from the father, there would come a stage undoubtedly when the English habitual residence would be lost and either at the same time or perhaps at some stage later, an Irish habitual residence would be established. But that is clearly not the case here and in my view the child's habitual residence in England was never lost. The Defendants' first ground of defence therefore fails.

I now turn to the ingenious point raised under the Adoption Act, 1952. It would be extraordinary and highly undesirable if an obscure section in the Adoption Act, 1952 (part of which had already been declared unconstitutional) could in any way affect the operation of the Hague Convention in Ireland which is part of Irish domestic law. Only if a Court was compelled to take that view of the wording of the relevant statutory provision, should it do so. I have no doubt that the Adoption Act cannot be relied on in this case. First of all, I entirely agree with Ms Whelan's submission that the section is dealing only with children who are habitually resident in Ireland. It would never have been contemplated that Section 40 applied to a child merely because the child was in Ireland as distinct from being resident in Ireland. The purpose of the section was to prevent the scandal of children being sent out of the country for adoption without the approval of the relevant parent, guardian or relative. As I have taken the view that the habitual residence of the child remained at all material times England, I consider that Section 40 of the Adoption Act, 1952 has no application. But

even if I am wrong about that, there is nothing in Section 40(2) which would have prevented the First named Defendant as guardian from consenting to the child being sent back to England when she had knowledge of the English Court Order. Mr Durcan's answer to this is that the Oireachtas intended such a guardian to have a discretion and that it cannot have been intended that the guardian would be forced to exercise the discretion only in one way. I cannot accept this argument. It seems to me that the Oireachtas would have assumed that the guardian would exercise the discretion in a proper way and if the guardian was bound under the Hague Convention to obey a call to return the child to another jurisdiction then he must exercise the discretion in favour of consenting to the removal. For both of these reasons therefore I hold that the second ground of defence fails also.

I now turn to the third defence, which is the defence under Article 13 of the Convention. Mr Durcan argues that the oral evidence of Dr Byrne establishes that there is a grave risk that the return of the child would expose the child to psychological harm of a serious nature. If he is right about that, then this Court has a discretion as to whether an Order for the return should be made or not. In considering this defence it is very important to place Dr Byrne's evidence in context. At some stage during the course of the proceedings, which have taken, unfortunately, a long time to come to a hearing, a dispute about access came before Budd J. An independent assessment to be carried out by Dr Byrne was ordered by Budd J. There was considerable delay in setting up the assessment and in finally obtaining a report from Dr Byrne but as I understand it, in the preparation of his report, Dr Byrne was at all material times addressing his mind to the problem of access and not to the issue involved in Article 13 (b) of the Hague Convention. Dr Byrne's report is dated as recently as the 1 October, 1997. His assessment was in turn based on a very extensive schedule of interviews carried out in July 1997. In paragraph 7 of his report under the heading "Psychiatric Opinion", Dr Byrne sets out a number of questions which in his opinion must be addressed. The fourth of those questions is:-

"What would be the effect on (E) of his removal from (MH) so as to live with his father?"

Dr Byrne gives a lengthy answer to that question and I think that it is worth quoting in full but substituting initials for names where appropriate. It reads as follows:-

"At the time of GH's death, E lost his major attachment figure. He had also, by then, spent six months living with his father until Mr S separated from his mother. Subsequent to that separation Mr S had contact with E although the frequency of that contact is unclear. During the six months they lived together it would seem that Mr S was very involved in E's life and so consequently, it is also likely that by the time Mr S separated from GH, E had formed an attachment to Mr S. The majority of infants do form an attachment to their parent figures by the sixth or eighth month of life. Mr S had no physical contact with E between September 1995 and January 1996. He would then seem to have had regular contact between January and March 1996. This contact would have consolidated E's attachment and overall relationship to Mr S. E's removal to Ireland was therefore a major loss for him in that he lost his mother and his father, his two main attachment figures. MH described his extreme anxiety when he first came to live with her and that anxiety lasted over five months. That degree of anxiety is to be expected given the trauma of his losses. He has now formed an attachment to MH. Were he to be removed from her this would, once again, be a traumatic loss. Ms H stated that E becomes distressed after access visits by his father to him overnight. Once again, I would expect that. There is little to be gained for E in removing him from MH. I consider that he would suffer psychological damage from such a removal.

A further question that arises is whether the psychological damage caused to E by his removal from MH would be so severe as to prohibit this. It must be remembered that removal from MH to Mr S would be less traumatic than his removal from GH and Mr S to MH in March 1996. That is because E has an attachment to Mr S, whereas, he did not have an attachment to MH when he was removed into her care. It is my opinion that he would be less traumatised by the move from MH to Mr S than by the move from his mother and father to MH but it would still be a trauma. I do not consider it to be in his best interests, psychologically, to do this. The immediate effect of such a removal from MH to Mr S would be that E would become anxious which he would, in all likelihood, show by wanting to be with his father all the time and be unable to allow his father out of sight. He would also probably become aggressive. However the major effect would be to render him more vulnerable psychologically, long term, to losses in his life and that he would be more prone to depression and anxiety."

I am satisfied that Dr Byrne's oral evidence was not intended to be in conflict with what he had said in his report. His oral evidence must be interpreted in the context of his report. It is true that at one stage in his oral evidence Dr Byrne did seem to suggest that damage would be caused by the removal of the child to the English jurisdiction even for the purpose of custody being determined and not for the purpose of sending the child back into the father's custody. It is perfectly clear, both from his report and from his evidence, that Dr Byrne is understandably concerned about the severance aspect. But in a large number of Hague Convention cases an Order for return could result in some psychological harm. It is a question of degree. It is well established by the authorities that Article 13(b) is intended to cover only serious psychological harm as has been pointed out in other cases this is quite obvious from the addition of the words "or otherwise place the child in an intolerable situation". In my view, the report and the oral evidence of Dr Byrne fall far short of establishing that, as a matter of probability, long term serious psychological damage would be caused to E by merely taking him to England for the purposes of Court proceedings to determine the custody issues. Any danger of even some damage can be largely removed by suitable undertakings. This has consistently been the view of the Supreme Court. I will discuss with Counsel the exact nature of the undertakings but subject to this Court being satisfied with the undertakings as to what is to happen when the child is brought to England, I am satisfied that there is no grave risk that the return would expose E to serious psychological harm and therefore the discretion under Article 13 does not arise. Even if it did arise I would have to seriously consider whether, having regard to all the surrounding circumstances of this case, it might still be appropriate to exercise the discretion in favour of returning E to England for the purposes of the custody issues being determined there but it is not necessary now for me to consider that point.

Accordingly, subject to considering the proposed undertakings, I am satisfied that I ought to make an Order under the Convention for the return of E to England.

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