---

http://www.incadat.com/ ref.: HC/E/NZ 304
[20/09/1999; Court of Appeal of New Zealand; Appellate Court]
The Chief Executive of the Department of Courts for R. v. P., 20 September 1999, Court of Appeal of New Zealand

---

In the Court of Appeal of New Zealand

CA 4/99

Between The Chief Executive of the Department for courts for R., Appellant and P., Respondent.

Heard: 22 July 1999

Judgment: 20 September 1999

Keith, Gallen, Paterson JJ.

Counsel: J D Howman for the Appellant; M I Sewell for the Respondent

JUDGMENT OF THE COURT DELIVERED BY KEITH J.

[1] This application for leave to appeal presents questions of law relating to the interpretation and application of the Guardianship Amendment Act 1991 which was enacted to implement in the law of New Zealand the Hague Convention on the Civil Aspects of International Child Abduction.

[2] The Chief Executive of the Department for Courts, acting as the Central Authority for New Zealand under the Convention on behalf of the mother of two children, sought their return to Australia where they had been habitually resident before their father brought them to New Zealand in May 1997. The older child is a boy, born in November 1990, and the younger a girl born in October 1993. The parents were married in 1992. They separated in November 1994 and were divorced on 20 March 1997. The two children were born in Australia and lived there until they came to New Zealand. After their parents' separation the children lived with their mother until December 1996, when the parents arranged for them to live with their father.

[3] The Family Court made an order for the return of the children to Australia, holding, first, that the grounds for return set out in s 12(1) of the 1991 Act were made out and, second, that the father had not established any of the grounds for the discretionary refusal of the order under s 13. Only one of the four requirements of s 12(1) was in dispute in the Family Court. It was accepted that the children were present in New Zealand, that they had been removed from Australia in breach of the mother's rights of custody in respect of them, and that the children were habitually resident in Australia before their removal. The father contended, unsuccessfully, that the mother had not actually been exercising her rights of custody in respect of the children. So far as the grounds for refusal were concerned, the Family Court

held that the father had not made out the ground that the mother had consented to the removal.

[4] The father appealed against the order for return and was successful to the extent that Young J held that the requirement of s 12(1)(c) -- the actual exercise of the rights of custody -- had not been satisfied. He also held however that there remained a discretionary power to make an order for the return of the children to Australia, referring to s 17 of the Act, and he remitted "the matter to the Family Court at Christchurch for the making of such orders as to that Court may appear appropriate in relation to s 13(1) and/or s 17 of the Guardianship Amendment Act 1991".

An application for leave to appeal

[5] The application for leave to appeal is made under s 31B(1)(b) of the Guardianship Act 1968 which provides for second appeals only with the leave of this Court and only on a question of law; see also *S v S* [1999] NZFLR 641. The appeal provision is exiguous, not placing any time limit on the application, which in the present case was filed more than nine months after the High Court judgment although within 28 days of the formal sealing of that judgment, and not conferring any express power of disposition on this Court. These issues, and related ones such as the applicability of the general time limit provisions in the Court of Appeal (Civil) Rules, were not pursued. They might, nevertheless, call for some legislative attention, especially given the emphasis in the Convention on the expeditious handling of applications made under it. Ms Sewell, for the father, the respondent, did not oppose the grant of leave to appeal, accepting that there were important questions of law to be resolved. We accordingly grant leave to appeal, and, for reasons given later, we also grant the father leave to cross-appeal. As will appear, the delay is relevant to the final order we make.

The alleged errors of law

[6] In the course of the argument before us, three alleged errors of law in the High Court judgment were identified. Mr Howman, for the mother, submitted:

(1) That the Judge had misinterpreted ss 12 and 13 and as a result placed too high a standard of proof on the mother in relation to the condition stated in s 12(1)(c); that she be actually exercising rights of custody;

(2) That the Judge had made an error of law in his approach to the mother's rights under that provision; and

(3) That the Judge had made an error of law in considering (a) that he could make an order for return, even although he had held that not all of the provisions of s12(1) were satisfied, and (b) that he could make consequential orders under s 17, possibly leading to the children being returned to Australia.

[7] We consider those three submissions in turn.

Relationship between ss 12 and 13

[8] Sections 12(1) and (2) and 13(1) are as follows:

12. Application to Court for return of child abducted to New Zealand

(1) Where any person claims --

(a) That a child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) ***That at the time of that removal those rights of custody were actually being exercised by that person*** **, or would have been so exercised but for the removal, and**

(d) That the child was habitually resident in that Contracting State immediately before the removal, --

that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.

(2) Subject to section 13 of this Act, where --

(a) An application is made under subsection (1) of this section to a Court; and

(b) The Court is satisfied that the grounds of the application are made out, --

the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.

. . .

13. Grounds for refusal of order for return of child

(1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court --

(a) That the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) That the person by or on whose behalf the application is made --

(i) Was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or

(ii) ***Consented to*** **, or subsequently acquiesced in,** ***the removal*** **; or**

(c) That there is a grave risk that the child's return --

(i) Would expose the child to physical or psychological harm; or

(ii) Would otherwise place the child in an intolerable situation; or

(d) That the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(e) That the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms

We emphasise the two provisions specifically in issue -- the prerequisite to the making of the order (in s 12(1)(c)) and the ground for refusing to make it (in s 13(1)(b)(ii)).

[9] Those provisions of the New Zealand Act are to be related to articles 3, 8 12 and 13 of the Convention:

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.

. . .

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain --

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by --

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date

of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[10] As Young J notes, the provisions of the Convention, like those of the Act, present something of a puzzle since one essential element in establishing the power to return the child is that, at the time of the removal, the rights of custody were actually exercised and yet the very same element (stated negatively) appears as one of the grounds for a discretionary refusal to make the order once the conditions for making the order are found to exist.

[11] As the Judge indicates, the texts can be reconciled by imposing a lesser burden on the applicant in terms of the requirements in s 12 than that imposed on the respondent, who is resident in the jurisdiction where the application is being considered, to establish one of the discretionary grounds for non-return. That reconciliation is assisted by resort to the provisions of the Convention. Articles 3, 8 and 12, it will be observed, do not require the applicant, in express terms, to "establish" the preconditions for the removal order. By contrast article 3 *does* place such an obligation on the respondent who is attempting to persuade the Court that there is a ground for the order for return to be refused. The matter is complicated by the wording of the New Zealand legislation, and in particular by the introduction of the word "satisfied" into s 12(2)(b), a word not included in the related provision of the Convention. Something of the difference nevertheless does appear in the legislation in the contrast between the test in s 12 -- "The Court is satisfied" -- and the apparently stronger wording in s13 -- "any person who opposes the making of the order establishes to the satisfaction of the Court. . . ".

[12] One other difference between the Convention wording and that of the Act was also considered in the High Court. Although it was not of any moment in this Court, there is nevertheless value in mentioning it since it again highlights the point made in *Gross v Boda* [1995] I NZLR 569, 574, that it is unfortunate that in some respects the Act has departed from the wording of the Convention instead of simply adopting it into the law as has been done in other countries. The difference is in s 13(1)(b)(ii) where, by contrast to article 13(a) of the Convention, the word *had* has been omitted before the word *consented* . It is clear from the wording and tenses of both language versions of the Convention that consent as a ground for

refusal relates to the parent's actions *before* the removal while acquiescence relates to the parent's attitude *subsequent* to it.

[13] The Judge's interpretation of- the provisions as indicating that the preconditions to a removal order of s12 are more easily satisfied than are the grounds for refusal in s13 is supported, as he indicates, by the report on the Convention prepared by Professor Eliza Perez-Vera on the Convention. He quoted the following passage, among others, from her report:

. . . several proposals were put forward for the deletion from article 3 of any reference to the actual exercise of custody rights. The reason for this was that its retention could place on the applicant the burden of proving a point which would sometimes be difficult to establish. The situation became even more complicated when account was taken of the fact that article 13, which concerns the possible exceptions to the obligation to order the return of the child, requires the "abductor" this time to prove that the dispossessed party had not actually exercised the custody rights he now claims. Now, it is indeed by considering both provisions together that the true nature of the condition set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provides only some preliminary evidence that he actually took physical care of the child, a fact which will normally be relatively easy to demonstrate. Besides, the informal nature of this requirement is highlighted in article 8 which simply includes, in sub-paragraph c, "the grounds on which the applicant's claim for the child is based", amongst the facts which it requires to be contained in the applications to the Central Authorities.

On the other hand, article 13 of the Convention . . . shows us the real extent of the burden of proof placed on the "abductor"; it is for him to show, if he wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude, that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (ie discharged by the "abductor") if he wishes to prevent the return of the child.

[14] As this Court said last year in another case relating to the Abduction Convention, we should endeavour to interpret the provisions of the Act consistently with the Convention. That follows both from the statement in the Act's long title that it is amending the Guardianship Act "in order to implement the Hague Convention" and from established authority. We noted that there is among the parties to the Convention a growing body of case law and official and other commentary on the provisions of the Convention and that we should if possible interpret the Convention in the same way as others do, in this matter of international concern. In that case too we found Professor Perez-Vera's report helpful in interpreting the Convention; *Dellabarca v Christie* [1999] 2 NZLR 548, 554-555.

[15] It follows that we agree with the way Young J addressed the relationship of the provisions of s 12, establishing the power to make the order for return, to the provisions of s 13, setting out the grounds for refusal of the order. The next question is whether he erred in law when he decided that the mother was not actually exercising her rights of custody in terms of s12(1)(c). It will be recalled that he decided that she had not been. We now turn to that matter.

The actual exercise of the rights of custody

[16] Section 4 of the Act provides as follows:

4. Rights of custody For the purposes of this Part of this Act, the term "rights of custody", in relation to a child, 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, attributed to a person,

institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.

[17] The relevant law in terms of that definition is the Family Law Act of Australia. Section 61C assigns responsibilities to each parent:

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

And s 61B defines "parental responsibility":

In this Part, "parental responsibility", in relation to a child, means, all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

Section 111B(4)(a) may be seen as providing additional confirmation that parents in Australia have "rights of custody" within the meaning of the Committee:

For the purposes of the Convention:

(a) each of the parents of a child should, subject to any order of a court for the time being in force, be regarded as having custody of the child.

[18] No Court order had been made at the time of the removal and accordingly the mother had rights of custody in respect of the children. The issue, to repeat, was whether at that time the rights were "*actually* being exercised" by the mother. The particular right invoked by the mother was the right to determine the children's place of residence.

[19] We set out in full Young J's reasoning on this matter:

The mother's right of custody which was infringed was her right, jointly with the father, to determine the place of residence of the children. The actual content of that right, in the circumstances of this case, was confined to the right to be consulted as to, and to veto, a major change to the place of residence of the children. What constitutes the "actual exercise" of such a right to consultation and of veto is conceptually difficult. Had the issue of removal to New Zealand been raised explicitly with the mother in 1997, I think it is highly likely that she would have objected and, by so objecting, actually exercised her rights of custody. But she cannot rely successfully on her claim that her rights of custody would have been exercised but for the removal because, in such a case, the issue of removal to New Zealand, and thus her right of veto, would not have arisen.

The issue must be dealt with pragmatically but in a way which I trust is in accordance with the spirit of the convention. On my findings of fact the mother had placed the children in the care of the father in circumstances where she left it to the father to decide where the children would live (at least within the environs of Brisbane). She had gone to the United States of America ostensibly for a lengthy stay. She was not exercising, as of May 1997, any form of access. Nor could it be said in any "actual" sense that she was exercising any right to determine the

children's place of residence. The finding of fact I have made as to what was agreed in September 1996, although not carrying the day in relation to whether the removal of the children was wrongful, is of relevance here. My view is that, to a very large extent, the mother had washed her hands of the children, albeit that this was, I think genuinely in her own mind, intended to be of only temporary duration.

In those circumstances I think it would be unreal, as at May 1997, to regard the mother as actually exercising any right of custody within the meaning of the Convention or the Guardianship Amendment Act 1991. Indeed, if she could be treated as actually exercising rights of custody, it is difficult to conceive of any situation where a parent could not invoke the Hague Convention where a custodial parent has removed a child overseas. Recognising as I do that the distinction between custody and access which is embodied in the Convention should not be regarded as hard edged (see for instance *Gross v Boda* [1995] NZFLR 49) the Convention clearly proceeds on the basis that the automatic return regime is not intended to apply to what are truly, within the spirit of the Convention, access rights only.

In the result, I am satisfied that at the time of removal of the children the mother's rights to custody, as that term is defined in the Guardianship Amendment Act 1991, were not being exercised.

[20] With respect, we consider that that passage includes two significant errors of law, one general, the other particular. The errors led directly to the finding that the requirement of s 12 (1)(c) was not satisfied. The particular error is the failure to have any apparent regard to the mother's rights in respect of the place of residence of the children as stated in the law of Australia, the State in which the children were resident: ss 61C and 61B of the Family Law Act of Australia, quoted in para [17]. There is no basis in the material before us on which an argument can be made that the mother had lost that right, given the relatively absolute terms in which it is conferred by Australian law; in particular it is not enough to find on the facts that, "to a very large extent, the mother had washed her hands of the children". By its very nature her right (as part of her "parental responsibility") in respect of the place of residence of the children was continuously available to her and always capable of particular actual exercise if the prospect of a change in residence arose; and, as the Judge held, it is highly likely that she would have exercised her veto over removal to New Zealand had she been asked.

[21] That particular error of law (essentially a failure to take express account of the relevant Australian law) is to be related to the general one: the failure to give effect to the fact that the Convention is concerned with "rights of custody" and not with "custody". A breach of any one of the bundle of distinct rights involved with custody may provide a basis for a finding of wrongful removal. The distinct, precisely recognised, right of custody in issue in this case is of course the mother's right to determine her children's place of residence.

[22] By contrast, the Judge, in the third paragraph of the reasons quoted in para [19], appears to be requiring something which is more in the nature of custody. The right in issue in this case is not to be characterised as only an access right. The need to recognise the Convention definition (rather than national concepts) and especially its precise element in respect of residence has been emphasised by Courts in several jurisdictions, including the English Court of Appeal in *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465 and this Court in *Gross v Boda* [1995] 1 NZLR 569 and *Dellabarca v Christie* [1999] 2 NZLR 548, 551-552 and 554-555.

[23] We accordingly conclude that the Judge erred in law in reaching his finding that the requirement of s12(1)(c) was not satisfied. In addition, we are able on the information before us to find that that requirement was satisfied. As will appear, it does not however follow that an order for the return of the children should be made. Before we consider the appropriate

disposition of the case, we address the third question of law.

The power to make an order for return

[24] The father contended that if the grounds stated in s12 were not made out -- as Young J has held -- there could be no order for return under the Act. That, it was submitted, was also the position under the convention. By contrast to that position the Judge had said that:

Even though the requirements of s 12(1)(c) of the Act have not been satisfied, there remains a discretionary power to make an order for the return of the children to Australia. In this context, I should also refer to s 17(1) which permits the Court, on the refusal of an order under s12(2), to make

Such interim or permanent order with respect to the custody of the child as it thinks fit.

He then stated a "preliminary view" that decisions about the future of the family should be made by the Australian Family Court.

[25] Given our conclusion under the previous heading -- that s 12 is satisfied -- the questions of law arising under this one have become hypothetical. Nevertheless there is value in our recording our view, with which counsel for both parties agreed, (1) that no order can be made under the Act unless each element of s 12(1) is satisfied; and in particular (2) that s17 does not provide a power enabling a removal order to be made. We gave the father leave to cross-appeal on this point.

Conclusion

[26] To repeat, we find that the grounds for the return of the children under s 12 have been established. It does not however follow that the mother is entitled at this stage to an order for the return of the children. It is now 27 months since the children came to New Zealand and 17 months since the facts were last assessed by a Judge. It may well be that one or other of the grounds for refusing the return of the children under s13 could be established. The father in particular should be able to have that matter considered. The present day views of the children, for instance, might be significant.

Result

[27] Accordingly, we allow the mother's appeal and hold that the grounds for a removal order under s12 are established, but remit the proceeding to the Family Court in Christchurch to enable it to determine, if necessary, whether any of the provisions of s13 stating grounds for the refusal of an order are satisfied and, if so, what if any order should be made.

[28] Any question of costs can be the subject of memoranda

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law