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[26/03/1998; Supreme Court of Ireland; Superior Appellate Court]
A.S. v P.S. (Child Abduction) [1998] 2 IR 244

The Supreme Court

The 26 March 1998

Denham, Keane and Barron JJ.

In Re The Child Abduction and Enforcement of Custody Orders Act, 1991; A.S. v P.S.

Denham J: This is an appeal by the plaintiff against an order of the High Court made on the 20th November, 1997. The plaintiff has sought the return to England and Wales of the two infants v and S. pursuant to the Hague Convention which has been incorporated into Irish law by s. 6 of the Child Abduction and Enforcement of Custody Orders Act, 1991 (hereinafter referred to as the "Act of 1991").

The plaintiff married the defendant in 1990. They have two daughters, V. born in 1988 and S. born in 1991. They resided in England until 1996. In July, 1996, the defendant (mother) took the children to Ireland with the consent of the plaintiff. The marriage was in difficulties at that stage. The defendant and children were driven to the railway station by the plaintiff. The defendant had monthly return tickets with no fixed date of return. On the 3rd August, 1996, the defendant informed the plaintiff that she was staying in Ireland with the children and not returning to England.

Habitual residence

The habitual residence of the infants V and S. is England. They were wrongfully retained in Ireland by the defendant.

Issues on appeal

The issues in the High Court and on this appeal are:-

a. whether there was acquiescence pursuant to art. 13(a) of the Hague Convention by the plaintiff in the retention in Ireland of the two children;

and

b. whether there is grave risk that the return of the children would expose either or both at the very least to psychological harm of a serious nature such that art. 13(b) of the Convention should be invoked.

Well settled

There was an issue in the High Court that the second para. of art. 12, of the Hague Convention applied to defeat the application, as it was submitted that the children were well settled in Ireland. That issue was determined in the High Court correctly. The second para. of art. 12 relates to proceedings under the Act of 1991 which have commenced after the expiration of one year after the wrongful retention. These proceedings commenced within a year of the wrongful retention. Thus the paragraph has no application.

Acquiescence

Acquiescence is a defence for the defendant under art. 13(a) of the Hague Convention which states:-

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

a. the person . . . had . . . subsequently acquiesced in the . . . retention;"

The evidence before the High Court was all on affidavit. There was no oral evidence, so there is no question arising on manner or demeanour of witnesses. As to findings of fact and inferences therefrom this Court is in the same position as the High Court. In July, 1996, the defendant took the two children to Ireland, with the consent of the plaintiff, for a holiday. There was no fixed date of return. She had a one month return ticket. A letter was sent by the defendant indicating she would return. She had left a letter at their home in England saying she would think about their marriage difficulties. Subsequently in a telephone call on the 3rd August, 1996, the defendant told the plaintiff she would not return to England with the children. After that telephone call there were more phone calls and letters. Counsel for the plaintiff submitted that these were for the purpose of reconciling the marriage. I accept that the plaintiff was seeking reconciliation of the marriage.

On the 10th October, 1996, the plaintiff commenced this application under the Hague Convention. Thus the time in which it could be alleged that the plaintiff acquiesced was between the 3rd August, 1996, and the 10th October, 1996, approximately two months.

In that time there was considerable correspondence between the parties and telephone calls. Unfortunately the letters were not dated but it is clear that they were written in the two months after the 3rd August. The plaintiff set out the benefits of the marriage and reconciliation and what he was doing to that end. None of these letters or his approach was inconsistent with seeking the return of the two children to England.

Acquiescence is a legal term which has been considered previously by this Court. In P. v B. [1995] 1 ILRM 201 at p. 207, W. v W. (Child Abduction: Acquiescence) [1993] 2 F.L.R. 211, was quoted and approved. Waite J stated at p.217:-

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

That test was applied in P. v B. to circumstances where a mother returned to Ireland and stated she "needed time". It was understood by the father that she and the child would return to Ibiza in due course. She had been poorly. The inference was she would return. There was no long term acceptance of the state of affairs by the father in Ibiza. The Court held that in the circumstances there was no acquiescence.

That case is a useful precedent. In the two months relevant in this case the plaintiff was using the time to seek to reconcile the marriage and have the defendant and children return to England. There was no acceptance of the state of affairs.

The High Court (Geoghegan J) held that during these two months the plaintiff was seeking reconciliation and restoration of the marriage, not the return of the children, that what galvanised the plaintiff was the defendant's new liaison. He held:-

"It is perhaps a fine point and might be open to argument but on balance I think that the plaintiff has established acquiescence within the meaning of article 13."

The plaintiff appealed against this finding. I would allow the appeal. Applying the test to the facts and the circumstances there was neither active nor passive acquiescence by the plaintiff in the two months from the 3rd August, 1996, to the 10th October, 1996. Nor was there any real acquiescence. It is clear that throughout that time the plaintiff was seeking to reconcile the marriage which would have the effect of restoring the defendant and the children to England, their habitual residence. This was his intent. Also, on a survey of the circumstances, including the letters, viewed objectively, he did not acquiesce in the children remaining in Ireland. Nor did he take any action inconsistent with his later application under the Hague Convention. Consequently I am satisfied that he did not acquiesce in the retention of the children in Ireland. I would allow the appeal on this ground.

Grave risk

The second issue in this appeal is whether there is a grave risk in returning the child or children to England. Article 13 of the Hague Convention states:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, . . . [who] opposes its return establishes that -

. . .

(b) there is 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 learned High Court Judge, after holding that there had been acquiescence by the plaintiff held further:-

"Any doubts I may have about this do not worry me because whatever of the defence of acquiescence, I am absolutely satisfied that the defendant has made out a sufficient case for this court to conclude that 'there is a grave risk' that the return of V. would expose her at the very least to psychological harm to a substantial degree. If I take the view that for this reason an order for the return of V. should be refused, then in my opinion, ipso facto, an order for the return of S. should also be refused. I am entitled to conclude, and I do conclude without hearing any expert evidence on it, that there would be a grave risk that serious psychological damage would be caused to S. if she was separated from V. and even more so if separated from her mother. At any rate I think that a purposive interpretation must be

given to an international convention of this kind and where there are two young children, one of whom has been sexually abused and there is grave risk of returning that child because of her mental associations with that abuse in the place to which she would be returned, the other child should not be returned either. It seems perfectly clear to me that I must make an order for return of both children or neither but it would be all wrong to make an order for the return of one and not the other.

In arriving at the conclusion which I have about V., I have fully taken into account that an order for the return as such would not mean that she was being returned into the custody or even the joint custody of the plaintiff. The plaintiff is willing to give suitable undertakings to the court to vacate the home in England and there would apparently even be an undertaking that the lady who had been his mortgage partner and who lived in the house would also vacate it, pending a custody hearing in the English courts. If an order for return was made therefore and assuming the undertakings were honoured, the defendant and the two children would be returning to the house and occupying it on their own. Having regard however, to the interviews with V. as referred to in the assessment report and the fact that V. is now well settled in Ireland, I think it likely that there would be a strong association of ideas in her mind if she were returned to that house i any form and that there must necessarily be a grave risk of serious psychological harm.

I am bound to say also that I am not altogether satisfied that the defendant has at all time acted in a responsible fashion. Rather like the plaintiff, I have the impression that she was at the material times more concerned about the state of her marriage and her relationship, or the lack of it, than with the welfare of her child whom she knew was abused by the plaintiff. I would have apprehension therefore that she might tolerate and even permit breaches of the undertakings which would be given to the court by the plaintiff. In G(R) v G(B) (Unreported, High Court, Costello J, 12th November, 1992) similar undertakings, as have been offered in this case, were offered and Costello J nevertheless in his discretion refused to return the children in circumstances where he considered there was the grave risk. For the kind of reasons which I have indicated, I am not happy in this case that the undertakings are an answer to the problem. I believe that the grave risk does exist. Of course, notwithstanding the existence of the grave risk, it is still a matter of discretion whether this Court orders the return or not. But in the exercise of that discretion I am satisfied that I ought to refuse the order for return . . .

I want to make it clear that I entirely accept the English and Irish authorities to the effect that it is only in rare circumstances that where there has been a wrongful removal or wrongful retention, an order for the return should not be made. But I am satisfied that this is one of the exceptions."

Grave risk may take many forms. It may be particular to a family or a country. The grave risk in issue in this case is the matter of child sexual abuse of v by the plaintiff. There was evidence before the learned High Court Judge which he accepted, and which I accept, which raises a prima facie case of child sexual abuse of v by the plaintiff. Thus I would not order the return of v to the plaintiff pending full custody proceedings. It must be noted that this is a summary proceeding and the issue while successfully raised has not been finally determined in a full hearing.

Grave risk from person not jurisdiction

There is no evidence that there is a grave risk in returning v to the jurisdiction of England and Wales. The evidence related to a grave risk for V. is the presence of the plaintiff. The

learned trial judge erred in holding that there would be grave risk of psychological harm in returning V. to the family home. The evidence in the case does not sustain such a finding.

Strictly construed

The law on "grave risk" is based on art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.

This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.

The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access.

Undertakings

The fact that I would not order the return of V. to the plaintiff pending full custody proceedings does not determine the matter. That is not the only option. The plaintiff has undertaken to vacate the family home so that the defendant and both children can live there pending the English court's decision on custody etc. Proceedings have been commenced in the High Court, Family Division, in London, case number CP 1907/97 and stand adjourned pending the determination of these proceedings. The courts of justice in England are thus ready to hear the case, with the paramount interest being the welfare of the children. This option must be considered carefully. There has been some relevant case law.

In G(R) v G(B) (Unreported, High Court, Costello J, 12th November, 1992), Costello J stressed that the issues depend on the facts of the case. He held that if the parents in that case were to return to England, even if the father left the family home, there was a grave risk that the mother could be subject to physical harm and that if she was then there was a grave risk that the children would also be subject to physical harm, especially when the father had drink taken. The facts of the case under appeal are entirely different.

In F(P) v F(M) (Unreported, Supreme Court, 13th January, 1993), art. 13(b) was in issue. The mother sought to establish a grave risk that, if the children were returned to Massachusetts, the return would expose them to an intolerable position. The intolerable position evoked in her evidence was that the father (who was the earner of the family) had so managed the financial affairs that the family life had been disrupted by moving nine times from rented accommodation because of failure to pay the rent, that there was total insecurity about the provision of maintenance for the children and family, that there was insufficient money for food for the children on many occasions and that at the same time the father was spending money on luxuries for himself. In addition, her affidavit contained evidence of violence by the father to the mother, sometimes in the presence of the children and limited evidence of violence by the father to one of the children. It was submitted that on this uncontradicted evidence was raised a probability that if the children were returned to Massachusetts that there was, even pending the custody hearing, evidence to show that the children would be placed in an intolerable position. The father adduced no evidence, nor did he make any provision for their return. In the circumstances the Supreme Court dismissed the father's application. Those are not facts or circumstances relevant to this case.

In K(C) v K(C) [1994] 1 IR 250, the issue of "grave risk" was raised. The father argued that to return the children to Australia would be in breach of Article 13 paragraph b. The "grave risk" envisaged was the live-in new partner G.W. of the mother in the home with the children, when they are not yet married, though that was planned. In the High Court the test stated by Nourse LJ., in Re. A. (A Minor) (Abduction) [1988] 1 F.L.R. 365 at p. 372, was adopted. An undertaking was given to the court by the mother that G.W. would not live in the house with the mother and children prior to the custody proceedings. The judgment recited:-

"The plaintiff therefore succeeds in her application and I make an order under Part II of the Act of 1991 for the return forthwith of the two children to the Commonwealth of Australia; the said order to recite the undertaking of the plaintiff that, pending custody proceedings in New South Wales, G.W. will not live in the home of the plaintiff and the two children. This order is to be brought to the attention of the relevant court in Australia and for that purpose a copy of this order is to be furnished to the Central Authority here for the purpose of being sent to the Central Authority in New South Wales, Australia, and in addition a copy of this order to be sent to Mrs Paula Marie McNamara, *, New South Wales, Australia, who is employed by the Department of Community Services which is the Central Authority for New South Wales, and who knows of this application."

An application by the defendant to the Supreme Court for a stay pending appeal was refused.

In England and Wales art. 13(b) has been the subject of litigation also. The underlying philosophy of the Convention and the heavy burden required to be proved to meet art. 13(b) was set out in Re HB (Abduction: Children's Objections) [1997] 1 F.L.R. 392. Hale J held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned. He considered that the children's evidence demonstrated insensitivity and inappropriate chastisement by the stepfather and mother but did not add up to grave risk under article 13(b). In Re. K. (Abduction: Child's Objections) [1995] 1 F.L.R. 977, Wall J held that the court was entitled to have regard to the practical consequences and whether any risk of harm could be reduced or extinguished by undertakings or by reliance on court procedures in the Convention state.

He stated, at p. 987:-

"The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future speedily to be decided in that jurisdiction. However, to come within Article 13 (b) there has to be a grave risk of substantial harm to the children. Furthermore, and crucially in this context, the court is entitled to have regard to the practical consequences of its own order and accordingly any risk of harm can properly be reduced or in some cases extinguished by undertakings or by reliance on court procedures in the Convention State . . .

It follows, in my judgment, that even if the mother in this case were able to establish on the facts that the father has been violent to her and to the children in the past it would still be open to the father to argue that the children should none the less be returned because the

situation to which they are returning was not one in which there was any danger of physical or psychological harm and because the children were to continue to live with their mother until such time as the matter had been ventilated before the American court. Given the protection afforded to the mother and the children by the American court the risk of physical harm on this argument effectively disappears. Any psychological harm to the children would depend on the psychological effect on them of a return in their mother's care to an establishment in the USA where their parents were not living together and from which their father was absent.

On this analysis the mother's case in my judgment comes nowhere near to establishing a case under Art. 13(b).

. . . the USA has a highly developed, highly sophisticated legal system which is more than capable of dealing with issues of (a) domestic violence, whether against the mother or the children, (b) custody, and (c) maintenance."

A similar strict interpretation of art. 13(b) can be seen in the United States of America itself. In International Child Abduction: Guide to Handling Hague Convention Cases in US Courts, by The Hon. James Garbolino (1997) it is stated at p.157:-

"Although the Convention has been in effect in the United States for approximately nine years, no published US cases have yet sustained a "grave risk" defence."

Sexual abuse is a grave risk from which it is necessary to protect a child. The grave risk defence would apply to keep a child from such a situation. The Hon. James Garbolino (referred to previously) at p.164 (footnote 297) sets out the Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction 33 ILM. 225 (1994) Response to question 22, which states:-

"Furthermore, another expert wondered whether this provision might be used in cases where the parent from whom the child has been abducted had subjected the child to sexual abuse. Others pointed out that in such cases the returning State should entrust the requesting State to make a proper pronouncement on the issue of custody. They suggested that in such cases all that was necessary was to ensure that the child is properly protected during the substantive hearing either by allowing him or her to return in the custody of the abducting parent or by placing him or her in the custody of a third party. Id, 33 ILM. 225, 241."

I conclude that this defence is to be construed strictly, that it places a heavy burden on the defendant to establish, that the court may make orders as to the return of the child and may utilise undertakings to protect the child.

Decision

I would not order the return of v to the care of the plaintiff pending a full court hearing on custody and access. If that were the only option for the court the appeal would fail.

However, it is clear that in light of the mandatory nature of the Convention to return the child to the jurisdiction of her habitual residence if there are reasonable options these latter must be considered carefully. The habitual residence of the children is England. There were wrongfully retained in Ireland. The plaintiff did not acquiesce in that retention.

There is no evidence or no adequate evidence to indicate that to return the child v to the home of the family would place her at a grave risk or in an intolerable position. The evidence

relates to the presence of the plaintiff not the home. The attitude of the child, inter alia, is related to music lessons with the plaintiff. Thus there is no evidence to establish that the home of the family in England poses a grave risk or intolerable situation for V.

I agree with the learned trial judge that the defendant has not at all times acted in a responsible fashion. The difference now is that both the courts and other relevant services will be informed of the situation, she will not be on her own. Other persons will have a responsibility for the child too. She has no authority to permit breaches of any undertakings by any party. Should they occur there would be the most severe sanctions, not the least of which would relate to future access to V.

I am not helped by the facts and rationale of G(R) v G(B) (Unreported, High Court, Costello J, 12th November, 1992). The circumstances are entirely different. Nor is F(P) v F(M) (Unreported, Supreme Court, 13th January, 1993) helpful. K(C) v K(C) [1994] 1 IR 250, does illustrate a somewhat similar situation and a use of undertakings. The strong thread through all the case law is the fundamental concept of the Hague Convention that (except in rare cases) the issues of custody and access should be determined in the jurisdiction of the children's habitual residence. Thus if children are abducted or retained across state lines they should be returned to their habitual residence. The exception to this fundamental concept carries a heavy burden, the test is a high one. It is not a case of determining where the custody and access should lie, what is the paramount interest of the child in that regard. It is a question of enforcing the Hague Convention which has at its core the paramount interest of the child that it should not be wrongfully removed or retained across state borders.

I must take account of the practical consequences of an order and the effect of undertakings and of court proceedings in England. Thus an order that the children be returned to the jurisdiction of their habitual residence in the care of the defendant with whom they would live pending an order from the English High Court is an option. In this option the danger to V. does not exist. England has a sophisticated family law legal system which can deal with issues of custody, access and child abuse. Thus V. is protected.

The learned trial judge fell into error in law in determining that there was a grave risk without giving due accord to the practical option of the children living in the family home with the defendant, in the absence of the plaintiff, pending custody hearings. He also erred on the evidence in determining that the English jurisdiction and the family home posed a grave risk. The grave risk in issue is that of the presence of the plaintiff. This can be excluded. As such the learned trial judge wrongly exercised his discretion.

I would order the return of V. and S. to the jurisdiction of their habitual residence on foot of undertakings in court from the plaintiff and the solicitor for the defendant. These would include:-

a. undertakings and lodging of money for their travel and maintenance;

b. undertakings from the plaintiff to vacate the family home in England to enable the defendant and the two children to live there pending and during the custody hearing in London. There is no need for the mortgage partner to vacate the home. The evidence indicates, insofar as it exists, that her mature presence is beneficial to the children;

c. the solicitor for the defendant to undertake the transfer of information to the Central Authority in Ireland and confirmation that it has been received by the High Court, Family Division, in London.

I anticipate that there would be a time fixed for transfer of the information and to enable a planned move for the defendant and the two children. I would hear counsel on this but it may be that the return will be at the end of the current school term.

The High Court proceedings in London state that the children are not known to the social services in the United Kingdom. I would seek undertakings that the papers in these proceedings, especially the affidavit of Siobhan McCarthy, social worker, the medical report, the court ordered report of Dr Helen Cummiskey, and the report of Catherine Maguire, psychologist, be made available to the authorities in the United Kingdom. This information should be transferred via the Irish Central Authority to the Central Authority in the United Kingdom. I would seek undertakings from the solicitor for the defendant as to the transfer of this information and its receipt by the High Court, Family Division which has seisin of the custody proceedings. The Central Authority in England and Wales may inform the other relevant authorities. Other proceedings may be contemplated.

It will be for the High Court in London to determine the issues of custody and access, where the children will live, whether it be in England or Ireland, with whom and how the other parent will have access. I make no finding on those issues. This decision is limited to the summary process under the Hague Convention.

On receipt of appropriate undertakings the appeal would succeed and the order and judgment of the High Court be set aside.

Delay

This Court has previously drawn attention to the necessity to have child abduction cases heard speedily. It is entirely unsatisfactory to have a delay such as exists in this case. It defeats in part the purpose of the Hague Convention. Parties and professionals in these cases have a duty to proceed with expedition. Unfortunately, that did not occur in this case. It is essential that child abduction cases are conducted speedily and that all persons involved, including expert witnesses, act with all due expedition. Proceedings in this case were commenced in October, 1996. It is entirely unsatisfactory that they are concluding in March, 1998.

Order

I would now hear the parties on the form of wording and precise details of the undertakings to be given by the plaintiff and the solicitor for the defendant. I would also hear the arrangements to be made for V. and S. to return to England in the sole care of the defendant, pending an order from the High Court, Family Division, England and Wales.

Keane J: I agree.

Barron J: I agree.

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