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[07/05/1992; Court of Appeal (England); Appellate Court]
B. v. B. (Abduction: Custody Rights) [1993] Fam 32, [1993] 2 All ER 144, [1993] 1 FLR 238, [1993] Fam Law 198



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**COURT OF APPEAL (CIVIL DIVISION)**

**Royal Courts of Justice**

**7 May 1992**

**Sir Stephen Brown, President, Leggatt and Scott LJJ**

**In the Matter of B. v. B.**

**Lord Meston for the Appellant**

**R Warnock for the Respondent**

**SIR STEPHEN BROWN: This is an appeal from a decision of Mr Justice Ewbank of 3rd March of this year. The learned judge had before him an application by a father made under the provisions of the Hague Convention which comprise Schedule 1 to the Child Abduction and Custody Act 1985. The father of the little boy concerned, who is now approaching six and a half years of age, seeks an order of the court in this country that the defendant (the child's mother) shall return the child to the jurisdiction of the court in Ontario, which is in fact presently seized of custody applications relating to the child in the context of divorce proceedings between the father and the mother.**

**The relevant history of the matter may be shortly stated. The mother is English by birth and the father was born in Rhodesia. They married in England in March 1977 but moved to Ontario in Canada in 1981, and both became Canadian citizens. The little boy was born on 28th December 1985. It so happened that at that time, apparently unknown to the mother, the father had formed an association with another woman, and, as a result, had become the father of that other woman's child. That child was born only three months before the child with whom this court is concerned. The mother eventually found out about this relationship, and was outraged by her discovery. The father left the matrimonial home at the end of April 1990. He went to live with his mistress and with the child born of that association.**

**On 2nd May 1990 the mother and father entered into a "interim agreement" pending the institution of divorce proceedings. That provided that the mother should have the care and control of the child and that the father should have liberal access. It also provided that divorce proceedings should be instituted when all the matters in dispute were to be finally settled between the parties in the context of the court proceedings.**

**Subsequently, in the same year, the mother brought the child to England for a visit. She remained in England from August 1990 until November 1990. During those months the matrimonial home was sold. In November 1990 the mother returned to Ontario to live with the little boy at Kingston. The father did not immediately discover that the mother had returned to Canada but he did so in December 1990. The mother by this time had not acted upon the terms of the "settlement", as it had been termed, by which she had undertaken to commence divorce proceedings. So the father petitioned for divorce on 2nd January 1991 in the Ontario court. In the divorce petition he claimed (inter alia) interim and permanent joint custody of, and access to, the child.**

**The father issued a notice of motion seeking interim orders on 18th January 1991, including an application that there should be an order preventing the child's removal from Ontario. On 22nd January 1991 an order was made by consent in the Ontario court which (inter alia) granted to the father liberal and generous access. On l7th May 1991 the mother filed a "counter-petition", seeking custody and also seeking leave to remove the child to England. On 4th June 1991 the mother applied by cross-motion, seeking custody and leave to remove the child to England. That motion was returnable on 27th June 1991. In a supporting affidavit the mother said:**

**"I have no intention of leaving this jurisdiction without an appropriate order of this honourable court."**

**On 27th June 1991 the motion came before Judge Lally in the Ontario court. He adjourned the hearing of the substantive issues, but he ordered that the child "shall not be removed from the jurisdiction in the interim." The adjournment ordered was until 2nd July 1991. On 2nd July 1991 the learned judge gave directions for the substantive hearing, which was to be dealt with by hearing oral evidence. He also ordered that the file should be transferred to Kingston and that meanwhile the wife (who was the respondent to the motion) should be granted interim custody of the child. He ordered that the petitioner husband should be granted interim access to the child, which he defined as every other weekend in Kingston from 10.00 am Saturday to 5.00 pm Saturday and from 12 noon Sunday to 4.00 pm Sunday, commencing l3th July 1991. He made it a requirement that the husband should not exercise such access in the presence of his mistress or her son without further order of the court. However, the order as drawn did not in fact include a specific prohibition against the removal of the child from the jurisdiction as in the order of 27th June 1991.**

**The mother, notwithstanding what she had previously said about not taking the child out of the jurisdiction without an order of the court, nevertheless left Ontario for England on the very next day, 3rd July 1991. She took the child to live in Birkenhead with her parents and she has remained there ever since. On 11th July 1991 Judge Lally, on the ex parte application of the husband, ordered the return of the child. The court has been told that that order has not been formally served upon the mother, but there is no question but that she knows of its existence and its terms. It appears that, following her leaving Ontario, the lawyers who had been acting for her in Ontario were removed from the record.**

**The father quickly sought relief under the provisions of the Hague Convention. On 15th August 1991 his lawyers sent an application to the Attorney General of Ontario. It appears that due to delays in the Attorney General's department the matter was not processed immediately. It was not until 30th January of this year that the Attorney General of Ontario sent a formal request to the Lord Chancellor, who is the central authority in England. However, eventually the matter came before the court and the father's application was heard by Mr Justice Ewbank on 3rd March of this year. The learned judge declined to find that the mother's removal of the child from Ontario was wrongful. On that ground he**

**dismissed the father's application for the return of the child. Further and/or alternatively, the learned judge said that under the provisions of article 13 of the Hague Convention he considered that there was a grave risk that the return of the child would place him in an intolerable situation, and said that on that ground also he would have declined to order the return of the child.**

**The father now appeals to this court. Lord Meston, on his behalf, submits that the learned judge erred in declining to find that the removal of the child by the mother from Ontario was "wrongful". article 3 of the Hague Convention provides:**

**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 5 is also relevant. It provides inter alia:**

**(a) 'rights to 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.**

**The learned judge, having recited the sequence of events to which I have referred, said at page 3 of his judgment:**

**On 27th June the matter came before Mr Justice Lally in the Ontario court and he adjourned the case for a week, I believe because of shortage of time, and meanwhile ordered that Neil was not to be removed from the jurisdiction of the Ontario court in the interim. The matter came before him again on 2nd July. The order recites that an interim order had been made that the child was not to be removed from the Province of Ontario. [The court has been told that the order did not in fact contain that recitation]. On this occasion the Court ordered that the case should be heard at the end of August 1991. The Court ordered that the mother should be granted interim custody of Neil and the Court ordered interim access to Neil to the father; that access to be alternative weekends in Kingston but not in the presence of the husband's mistress or son.**

**The mother, I am told, had explained to the judge that she was packed and ready to go but he said that the matter would have to be dealt with by evidence rather than on motion and the trial would have to take place in August. The mother was far from satisfied with this approach and she was cross during the course of the hearing, I am told, and evidently decided to take the law in her own hands and on 3rd July she came to England with Neil and she has been here ever since.**

**The father says that the removal by her of the child on 3rd July was wrongful and, accordingly, that the Hague Convention applies. The mother says that it was not a wrongful removal and that even if it was, she has a defence under Article 13 in that there is a grave risk that the return of the child would expose him to physical or psychological harm of otherwise place him in an intolerable situation.**

**The learned judge referred to a previous decision of his, Re H [1992] FLR 493, but he said that that was to be distinguished because in that case there was in existence at the time of the**

**removal an order of the court that the child should not be removed from the jurisdiction. Referring to the instant case, the learned judge then said:**

**I am not satisfied, accordingly, despite the affidavit of Miss Heal [a barrister in the Crown Office of the Attorney General in Ontario] that the removal of this child was in breach of the rights of custody attributed to the father -- because, in my judgment, he had no right of custody -- or in the court, because, in my judgment the court had given custody to the mother. Nor do I think that either the father or the court were exercising any rights of custody at the time of the removal.**

**Lord Meston submits that the judge was wrong in this interpretation of the effect of article 3 of the Convention which must be considered in the context of article 5. He says that in this case the father clearly had substantial rights of "access" which could only be exercised in Kingston. Indeed, the learned judge's order of 2nd July had specifically provided for the access being exercised in Kingston on alternate weekends. In addition, Lord Meston submits the court also had "rights of custody" in the context of the Convention, because it had made orders in the course of the cross-motions before it which indicated that it was seized of the matter and that it had not determined either the father's or the mother's substantive applications and had adjourned the hearing of the mother's substantive application for custody and for leave to remove the child from the jurisdiction until a date in August. So, submits Lord Meston, in the case there was, firstly on the part of the father, a "right of custody" in the context of the extended rights which were referred to by Lord Justice Butler-Sloss in her judgment in C v C [1989] 2 All ER 465, [1989] 1 WLR 654. In that case the learned Lord Justice referred to the necessity of reading together with article 3 the terms of article 5 of the Convention. She said the right of custody in the context of the Convention was a wider concept than that which would normally be considered in the domestic context. In this case Lord Meston submits that it was implicit in the order of Judge Lally of 2nd July that the father had a joint interest in and a "right of custody" of the child, inasmuch as he had a right to be consulted and to have his views considered in relation to the determination of the child's place of residence. Lord Meston submits that article 5 supports that interpretation. However, he further submits that the Ontario court was "an institution or other body" within the terms of the Convention which had a right to determine the child's place of residence and that it was in the process of exercising that right by adjouring the matter to a date in August and by giving directions as to how the matter should be dealt with - that is to say, by hearing oral evidence. Accordingly, Lord Meston submits that the mother's removal of the child on 3rd July 1991 was quite plainly unlawful within the meaning of article 3 of the Convention.**

**In support of the judge's finding that the removal was not unlawful, Mr Wamock for the mother submits that the court should apply a strict and restricted interpretation of the term "rights of custody". Since the court had ordered interim custody in favour of the mother (subject to access by the father pending the substantive hearing) there could be no right of custody in any person or body other than the mother. Therefore, he says, she was not in breach of any right vested in the husband, or, indeed, in the court when she removed the child on 3rd July 1991.**

**I find that submission unacceptable. In my view this was the plainest example of an unlawful removal. The mother herself appears to have thought so, for she later stated that she regretted having taken that step at that time. It is suggested that she did not appreciate the legal position, although she was in receipt of legal advice at the time. It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence. I should say that there has never been any issue as**

**to the fact that the child's habitual residence was at all material time in Ontario. Accordingly I am of the view that the learned judge was in error when he decided that the removal of the child was not unlawful.**

**Once an unlawful removal has been established within the meaning of article 3 of the Convention, then the provisions of article 12 come into operation. Article 12 provides:**

**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.**

**In this case the proceedings were commenced in less than one year after the wrongful removal. Accordingly article 12 comes into operation and renders it mandatory for the court to order the return of the child forthwith. However, this is subject to the "proviso" provided in 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) . . .**

**(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 the age and degree of maturity at which it is appropriate to take account of its views.**

**In this case the mother submitted to the learned judge that to order the removal of the child from the United Kingdom back to Canada would expose him to a ave risk of being placed in an intolerable situation. The grounds upon which that submission was was based were recited by the learned judge in his judgment. The are, briefly, that before the mother left Ontario she was difficult circumstances--she would say intolerable circumstances. She had no money from the father; she had to rent a home because the matrimonial home had been sold. She received no support from the father for the child, and had to rely upon charity and from what is called "the food bank" because she did not receive enough money from the welfare services to feed the child.**

**There was evidence in the form of a letter from a friend or neighbour and of another witness, a Miss Lobo, who spoke of the mother's difficulties at this stage. It was submitted to the learned judge, and accepted by him, that, if the mother were to be ordered to return the child to Canada, "it would be an intolerable situation for Neil." He said at page 8A of the judgment:**

**If it was necessary to come to a decision on this aspect, I would have to say that, in my judgment, to go from the grandmother's house where she is at the moment and leaving the job she has in Birkenhead with the Social Services Department, to Canada with no work and no money and living on charity and Food Banks, would be an intolerable situation for Neil. Accordingly, I would refuse the application on that ground also.**

**So this application under the Hague Convention is dismissed.**

**The judge was told that the father had given undertakings (which the learned judge recited in the course of his judgment) that, if the court ordered the child to be returned to Canada, he would not attempt to remove him from the care of the mother without an order of the Canadian court; that he would not support or initiate any contempt of court or criminal proceedings arising from the mother's removal of the child, and would co-operate in having an early hearing of the proceedings in Ontario. He also offered to pay the costs of the return of Neil and pay the mother $200 a month towards his support.**

**The submission made by Lord Meston is that there was no factual basis for a finding that the child would be placed in an intolerable situation if returned to Canada. He submitted that the words of article 13 must be accorded full meaning and effect. Sub-paragraph (b) commences with the words "there is a grave risk that his or her return would place the child . . . in an intolerable situation." This submission was supported by reference to various decisions of the court to the effect that it is a strict test. Further, he cited the recent decision of In re A (Abduction: Custody Rights) [1992] 2 WLR 536, in which the Master of the Rolls considered the context in which the return of a child to the country from which he had been unlawfully removed should be approached.**

**Lord Donaldson MR said at page 550F:**

**In considering the first issue, the court of country B should approach the matter by giving the fullest force to the policy which clearly underlies the Convention and the Act, namely that wrongful removal or retention shall not confer any benefit or advantage on the person (usually a parent) who has committed the wrongful act. It is only if the interests of the child render it appropriate that the courts of country B rather than country A shall determine its future that there can be any exception to an order for its return. This is something quite different from a consideration of whether the best interests of the child will be served by its living in country B rather than country A. That is not the issue unless paragraph (b) of article 13 applies. The issue is whether decisions in the best interests of the child shall be taken by one court rather than another. If, as usually should be the case, the courts of country B decide to return the child to the jurisdiction of the courts of country A, the latter courts will be in no way inhibited from giving permission for the child to return to country B or indeed becoming settled there and so subject to the jurisdiction of the courts of that country. But that will be a matter for the courts of Country A.**

**In the case of C v C [1989] 2 All ER 465, [1989] 1 WLR 654 the Master of the Rolls considered the application of article 13. Towards the end of his judgment at page 664 he said:**

**We have also had to consider article 13, with its reference to 'psychological harm.' I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation' which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate this harm and in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those court in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie, the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country -- Australia in this case -- can resume their normal role in relation to the child.**

**Further, Lord Justice Balcombe in I re A (Abduction: Custody Rights) [1992] 2 WLR 536, considered the degree of intolerability which had to be established in order to bring into operation the provisions of article 13(b). At page 564H Lord Justice Balcombe said:**

**The judge also rejected a submission on behalf of the mother that there was a grave risk that to return the boys to Australia would place them in an intolerable situation. If the judge had accepted that submission that would have unlocked the door to the exercise of his discretion under article 13(b). The argument relied on to support that submission is set out in the judgment in the following passage:**

**The argument there is that on their arrival there is no home and there is no financial support forthcoming from the plaintiff who himself lives on state benefits. That is in contrast to the security that the mother has achieved since her arrival in this jurisdiction. Here she has the support of her parents. She is in a position to sign a lease immediately for the rent of a suitable home. There is a letter from the school showing that the children have apparently settled in well to a Church of England primary school. Therefore it is said that the situation on their return would be intolerable and pointless.**

**The judge rejected this argument:**

**I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently substantial intolerable situation. The fact is that between July and September of this year the whole family was dependent on state benefits. In this jurisdiction equally the mother and children are dependent on state benefits. On their return they would again be entirely dependent on Australian state benefits, but that can hardly be said in itself to constitute an intolerable situation.**

**This submission was revived before us. Nevertheless I am quite clear in my mind that the matters (largely financial) upon which the mother seeks to rely as constituting an intolerable situation in Australia come nowhere near to establishing what the Hague Convention requires by that phrase. In my judgment the judge was entirely right on this point.**

**The other members of the Court of Appeal agreed with Lord Justice Balcombe on that issue.**

**Lord Meston submits that the relevant facts of that case are remarkably comparable to the facts of this case, for the mother's assertion that there would be a grave risk of a intolerable situation for the child largely depends upon the financial circumstances in which she and the child would be placed if they were to be returned to Canada.**

**In this case Mr Justice Ewbank had before him evidence from Susan Kathryn Heal, a barrister and solicitor of the relevant Regional Municipality in the Province of Ontario, who is employed as a Crown Officer in the Crown Office of the Attorney General for the Province of Ontario. Her affidavit is to be found at page 194 of the bundle before this court. In her affidavit Miss Heal set out, pursuant to the provisions of article 8(f) of the Hague Convention, the circumstances which she said would obtain so far as the mother is concerned if she and the child were to be returned to Ontario. First she said that her department**

**is in a position to take steps under a programme arranged between the Canadian government and both Canadian national airlines for the provision of return air transportation to Canada for both the child and an accompanying adult. I will be happy to activate this system if called upon to do so.**

**Then at page 200(iii) she said:**

**With regard to the provision of State benefits, I am advised and do verily believe that Mrs [B] would be eligible for financial assistance under either the Ontario General Welfare Assistance Act (administered by local municipalities) or the Family Benefits Act (administered provincially by the maintenance branch of the Ministry of Community and Social Services).**

**She then set out details of the assistance which she said would be available. This would include the opportunity of subsidized housing and, if this were not to be made available immediately, then additional general welfare or family benefits would be made available to pay for accommodation as necessary. At page 201 she said:**

**All the above sources of financial assistance are of course in addition to the support obligations provided for in Part III of Ontario's Family Law Act.**

**The learned judge did not refer to that evidence in the course of his judgment. However, it seems to me that it was very important evidence. I consider that the judge did not have the material before him on which to find that there was a grave risk that the child would be placed in an intolerable situation if the court were to order his return to Canada. I stress what Lord Justice Balcombe said in Re A, that a very high degree of intolerability must be established in order to bring into operation article 13(b). It seems to me that the facts of this case do not come anywhere near to the level of intolerability which is required when considering the provisions of article 13. It must also be borne in mind that article 13 does not oblige the court to decline to order the return of the child even if grave risk of an intolerable situation is established. It provides a discretion to the judge to consider whether the return is an appropriate order to make in all the circumstances.**

**In the light of the conclusion to which I have come, I do not need to explore further the question of the exercise of the judge's discretion. I am satisfied that the evidence in this case did not entitle the judge to come to the conclusion that there was in fact a grave risk of an intolerable situation for the boy if his return were to be ordered. I wish to say further that it is important when considering applications under the Hague Convention that it should be borne in mind that these are matters which affect the comity of nations. It is a Convention on the civil aspects of international child abduction. Its purpose, as the preamble and article 1 indicate, is to deal summarily with the mischief of taking children from the appropriate jurisdiction in a manner which is considered to be unlawful. In my judgment there is clearly such a case. There is no doubt that the removal of the child by this mother was done precipitately at the very time when the child's future care was already under consideration by the Ontario court. Directions had been given in order to enable a speedy hearing of the merits of the substantive applications. Although it may be distressing to the mother to find that she has now to take the child back nevertheless there is no escape in my judgment from the conclusion that the child's return should be ordered in this case.**

**For these reasons I would allow the appeal and order that the child be returned forthwith to the jurisdiction of the court in Ontario so that that court may continue its consideration of the applications which are currently before it.**

**LEGGATT LJ: Having made what is no more than an interim custody order, the Ontario court, in my judgment, retained what article 5(a) of the Hague Convention call "the right to determine the child's place of residence." Mr Justice Ewbank therefore erred in concluding that Neil's removal from the jurisdiction was not wrongful within the meaning of article 3. Although upon return to Canada for what might prove to be no more than a temporary visit the mother's situation might be unsatisfactory and she might suffer discomfort or perhaps even hardship, there is no evidence that there is a risk, let alone a great one, that the child's**

**return would place him in a situation which is intolerable. The judge's conclusion that there is such a risk was plainly wrong. This is an example of just such an abduction as the Convention was designed to combat. In those circumstances we have no alternative but to adopt the course dictated by the Convention and order Neil's return to Canada forthwith so that the Ontario court may proceed with its consideration of what is best for his welfare.**

**I therefore agree that the appeal should be allowed and that, subject to the undertakings that the husband has offered, an order should go such as the President has proposed.**

**SCOTT LJ: I also agree. I agree with both the judgments that have been given and with the reasons given in those judgments for allowing this appeal.**

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