---

http://www.incadat.com/ ref.: HC/E/UKe 110
[09/12/1992; Court of Appeal (England); Appellate Court]
Re G. (A Minor) (Enforcement of Access Abroad) [1993] Fam 216, [1993] 2 WLR 825, [1993] 1 FLR 669

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

9 December 1992

Sir Thomas Bingham MR, Butler-Sloss, Hoffmann LJJ

In the Matter of G.

James Turner for the father

Andrew McFarlane for the mother

BUTLER-SLOSS LJ: This appeal by the appellant father from the decision of Cazalet J on 30 July 1992 raises for consideration a little- used area of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") regarding rights of access of the non-custodial parent.

The father is a Kenyan Asian and the mother is English. They met and married in England in 1985. They set up their first home in Nairobi. But in August 1989 they followed other members of the father's family to Canada and went to live in Ontario. Their daughter G was born in Ontario on 30 October 1989. In September 1990, after an incident involving violence between the parents, the mother left and went to a women's refuge. She made allegations of violence against the father, who was arrested, and G was handed over to her mother. The mother then took G to England without informing the father. On arrival in England she instituted divorce proceedings and obtained an interim custody order and an injunction restraining the father from removing the child from England. The father instituted proceedings under the Convention on the ground that the mother had wrongfully removed G from the State of Ontario. The application came before Hollis J on 20 June 1991, who found that the mother had wrongfully removed G and ordered her immediate return to Ontario. The mother returned with the little girl. On 22 November 1991 in the Ontario Court (Provincial Division) sitting in Toronto, Judge Nevins made a consent order that gave the custody of G to her mother. The mother was given the option to live either in Ontario or in England and there were detailed access arrangements for G with her father in Ontario from 1992 onwards to include three weeks in July/August and two weeks in December/January. At the time of this order she was two years old. The mother has settled in England with G and they are living with the maternal grandparents. The father has had weekly contact by telephone with G and has sent her cards and presents, but since the parting in September 1990 he has seen her infrequently and not at all between December 1991 and the hearing before the judge on 30 July 1992.

In April 1992 the father wrote to the mother giving notice of his intention to exercise his rights of staying access with G in Canada. The mother's solicitors in their reply made it clear that she would not comply with the arrangements for the reasons set out in their letter. In July the father again initiated proceedings under the Convention. The central authority on his behalf made the application, the subject of this appeal, that the father's rights of access be protected and implemented in accordance with the consent order of 19 December 1991.

Cazalet J held that in considering the access provisions in the Convention the court must have regard to the welfare of the child. He gave weight to the consent order made by Judge Nevins but decided that on the facts of this case the welfare of the child required the Canadian order to be deferred for the relationship between G and her father to be re-established. He held that it was premature to send G to Canada at this stage, even with her mother accompanying her. He directed that there should be access in England during the summer holidays and the Christmas holidays and that the child should go to Canada in the summer 1993 for two weeks instead of three.

The father remained in England and stayed with the maternal grandparents in order to exercise the access ordered by the judge. The access was monitored to some extent and the court has received a report from the court welfare officer who supervised on two occasions. The father appeals to this court and asks that the access over Christmas should take place in Canada. Mr Turner for the father accepted that the court has a degree of discretion in the enforcing of the Ontario order, but argued that it was limited to significant and unforeseen changes of circumstance and without such changes the judge in England was obliged to enforce the order of the Canadian court which had been made only seven months or so before. The order he said was by consent and had been hammered out before the judge sitting in the primary jurisdiction (at that time). Not only was it a consent order but the access arrangements formed part of the agreement to allow the mother to bring G to live in England, and without access in Canada the arrangement to allow the child to be brought up in England would not have been likely to have received the blessing of the Canadian judge nor the agreement of the father. It followed therefore, said Mr Turner, that both international comity and justice required the English judge to implement the Canadian order as it stood, since there were no unforeseen changes of circumstance.

Three issues arise. (1) Does the Convenfion apply at all to the application of the father or should he apply for a contact order in accordance with the provisions of section 8 of the Children Act 1989? (2) If the Convention does apply, what is the extent of the discretion of the English judge to consider the welfare of the child on such an access application? (3) Did the judge err in the exercise of his discretion?

Issue 1

The first issue as to whether the Convention applies to the facts of this appeal was not argued to the judge and it appears that the proceedings continued on the assumption that the Convention applied. The issue is, however, fundamental to the question of jurisdiction. Mr Turner has argued to this court that the Convention does apply. It was incorporated into English law by section 1(2) of the Child Abduction and Custody Act 1985, and is substantially set out in Schedule 1. Article 1 of the Convention is not included in Schedule 1 but sets the scene for the philosophy of the Convention:

"(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state, and (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."

Article 3 is the article most used in the Convention, forming as it does the basis for the jurisdiction of the courts of the contracting states to return to the contracting state of the child's habitual residence a child who has been wrongfully removed or retained.

Article 21 is the relevant article under which this application is brought. It provides:

"An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the central authorities of the contracting states in the same way as an application for the return of a child. The central authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The central authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The central authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

Article 7 states:

"Central authorities shall co-operate with each other and promote co-operation among the competent authorities in their respective states to secure the prompt return of children and to achieve the other objects of this Convention . . .

Article 4 governs applications under the Convention:

"The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights."

At the time that the father instituted the first Convention proceedings to return G to Ontario, she was habitually resident in Ontario immediately prior to being wrongfully removed by her mother. After the consent order of the Canadian judge she was permitted to live in England and left the jurisdiction of the Ontario court. Mr Turner accepted and there can be no doubt that she acquired an habitual residence in England during 1992 and well before the hearing in July 1992. Habitual residence of a child is not fixed but may change according to the circumstances of the parent or other principal carer with whom the child lives and who is lawfully exercising rights of custody. It may change within months or even weeks: see in Re F (A Minor) (Child Abduction) [1992] 1 FLR 548. When her mother came to England and was allowed to bring G with her, G's habitual residence changed to that of her mother and consequently she became habitually resident in this jurisdiction before the potential breach of access rights was known. If G were in the future to be wrongfully removed from England an application to the contracting state to which she was taken would be to return her to England as the state in which she was habitually resident before the wrongful removal. Canada would not be the country to which she would be returned. Equally on an application in respect of rights of access the relevant jurisdiction under article 4 is the English court and not the Canadian court. The effect of the order of Judge Nevins is to transfer the primary control by a court over the child from Ontario to England and to put the English court in the driving seat.

The question then arises whether the Convention applies at all when the child is habitually resident in England and the father wishes to enforce an order made by the court of a contracting state other than England. We are grateful to Mr Turner and to the Lord Chancellor's Department for the research carried out by them. It appears that the issue of access has only rarely arisen in the courts of other contracting states and the decisions so far made do not assist us, save that the law applied in several other contracting states appears to have been the internal law of that state. There is no previous decision of this court on this point. The only reported occasion upon which it has been considered in depth is in the

judgment of Waterhouse J in B v B (Minors: Enforcement of Access Abroad) [1988] 1 WLR 526. The Canadian father in that case had an access order from the Ontario court prior to the implementation of the Convention in Ontario, but he argued that article 4 was in wide terms and that the habitual residence of his children in England, being another contracting state, was sufficient to make the Convention operative if a breach of the access order could be shown after implementation in Canada. Waterhouse J said, at p 532:

"This is an attractive alternative line of argument but, in my view, it imputes too broad a scope to the Act of 1985. I am driven back to consideration of object (b) defined in article 1 of the Convention . . . In the light of that object, the reference in article 4 to habitual residence in a contracting state immediately before any breach of access rights occurred must be interpreted as meaning habitual residence in a contracting state in which the access rights relied upon then existed, because (1) it is those rights upon which the application is intended to be based; and (2) the rationale of co-operation in enforcement of the rights is that habitual residence in the contracting state in which they existed was a sufficient foundation for that state's jurisdiction without further argument or inquiry. The alternative wider interpretation relied upon by the father is, in my view, unacceptable because it would give almost limitless operation to legislation enacted for specific limited purposes. It would also lead to arguments about the respective jurisdictions of the courts in Ontario and England in 1986 to make binding orders in respect of the children in order to determine what rights of access, if any, had been breached, whereas an object of the Convention is to avoid or at least to minimise the scope for such arguments."

I was disposed on reading the judgment of Waterhouse J to agree with this interpretation of article 4. The alternative approach opens up considerable difficulties. If the rights of access ordered by another contracting state are to be enforced in the state of habitual residence, one could see a situation where a Canadian order would still apply as the primary order although not only the mother and child but also the father were living in England. Mr Turner's reply was that the aggrieved parent would then have a choice whether to enforce the Canadian order or to apply under the law of the country of both parties, in this case under the provisions of the Children Act 1989. In my view the Convention focuses both upon the co-operation between central authorities and the enforcement of the return of a child wrongfully removed or retained outside the state of the child's habitual residence. I do not consider that the Convention visualised that orders from a state which was not the state of habitual residence would continue to govern the affairs and welfare of a child living permanently elsewhere. I am however persuaded by the judgment of Hoffmann LJ, which I have read in draft, that the construction of article 4 adopted by Waterhouse J in B v B is too narrow. I respectfully agree with and adopt the reasoning of Hoffmann LJ upon which I could not improve.

There have been a number of access decisions made in the High Court by consent. In C v C (Minors) (Child Abduction) [1992] 1 FLR 163 Bracewell J held that the scope of the Convention does not limit the territorial jurisdiction of the English court to make appropriate arrangements for access. In a recent decision of Eastham J, in Re C (A Minor) (unreported), 8 September 1992, he held that article 21 applied but the court is left with a discretion to consider the welfare of the child. He held: "In considering whether or not it is in the best interests of the child for the order to be implemented, the court must pay regard to the decision of the foreign court. It must pay regard to how recently the court has seen fit to make the order, and it must bear in mind that, having regard to the doctrine of comity of nations, unless it is clear that the enforcement of the order is contrary to the welfare of the child, which is the paramount consideration, that the court should respect the order of the court in the requesting jurisdiction."

I agree therefore that article 21 applies to this appeal. It is not entirely easy with the paucity of information about the actual working of article 21 to be clear how it is to be effective. The

approach of the Convention to rights of access is undoubtedly more flexible than the approach to wrongful removal or retention: compare article 21 and article 12.

Dr John Eekelaar in his Explanatory Documentation prepared for the Commonwealth Jurisdictions in February 1981 commented on article 21 in para 2.6. He explained that article 21 allowed a party resident outside the contracting state to present to that state's central authority an application for making arrangements for organising or securing the effective exercise of rights of access. Central authorities are not placed under mandatory duties with respect to such applications other than generally to promote co-operation on these questions, and he went on to say that in practice this can be achieved by passing the matter on to a local lawyer. The lawyer may either negotiate agreement between the parties or institute whatever proceedings may be necessary in the local court on behalf of the party living abroad. An article by AE Anton, "The Hague Convention on International Child Abduction" (1981) 30 ICLQ 537, gives some support to the view of Dr Eekelaar. Professor Anton said that it was obviously uncertain what impact these provisions were likely to have but that article 21 could be seen as promoting a useful degree of co-operation between the contracting states in the resolution of international problems of custody and access which may not be connected with child abduction.

This approach of Dr Eekelaar, with which I entirely agree, draws the distinction between the duties of the central authority and the jursidiction of the court. Article 21 applies at the administrative level to bring the application to the attention of the central authority of the contracting state. On receiving an application the central authority, the Lord Chancellor's Department, complies with its obligation under article 21 by making appropriate arrangements for the applicant and, in this case, by providing for legal aid and instructing English lawyers to act on behalf of the applicant. This in effect exhausts the direct applicability of the Convention. There is no provision in the Child Abduction and Custody Act 1985, which made the Convention part of English law, for enforcing any failure by the Lord Chancellor's Department to carry out its obligations under the Convention. The only remedy of a dissatisfied parent would be to apply for judicial review.

In a case where the child is habitually resident in the contracting state, being England, before the breach, the Convention does not directly affect the jurisdiction of the English court. The appellant father's lawyers applied to the High Court but were in error in requiring an order to enforce compliance with the Convention. There are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the judge. The lawyers should have applied on his behalf for a section 8 order under the Children Act 1989 which is the appropriate way to secure the effective exercise of rights of access.

Issue 2

Mr Turner argued that in a Convention case the exercise of discretion was limited to significant and unforeseen changes of circumstance. The concept of a change in the circumstances of a child is to be found in Schedule 2 to the Act of 1985 which incorporates the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children into English law. Article 11 enforces decisions as to rights of access in the same way as enforcing decisions relating to custody and in each case article 10 allows a court to refuse to recognise or enforce the order on the basis of change of circumstances. Those provisions are not contained within the Hague Convention and their omission appears to be deliberate. The report of the Special Commission (No 110) made by Mile Elisa Perez-Vera on the draft Convention in 1980 considered the European Draft Convention: see paragraph 18 of the report. The report explained that the European Convention would not serve as a basis for the work of the Special Commission and that, on the contrary, it remained devoted to the idea that other approaches to the question of the

international removal of children were possible. The report pointed out that the draft Convention did not deal with the factual problem of the recognition and enforcement of custody decisions. The basis of the Hague Convention was in essence different from the European Convention and equally so in respect of rights of access as rights of custody. There would therefore be no reason to import the suggested restriction into the exercise of a judge's discretion in a right of access case.

Since, in any event, the application to the court is under section 8 of the Children Act 1989, it is governed by the provisions of section 1(1) and the welfare of the child is paramount. I agree therefore with Waterhouse J in B v B [1988] 1 WLR 526 that the exercise of the discretion of the court is not fettered by the Convention. Cazelet J was entirely correct to follow his view in the judgment under appeal.

The existence of an order of the court where the child was then habitually residing is, however, of crucial importance and is a factor to be given the greatest possible weight consistent with the overriding consideration that the welfare of the child is paramount. I agree with Eastham J in In Re C (A Minor), 8 September 1992 in the passage to which I have already referred.

Issue 3

The exercise of the judge's discretion in this case was, in my view, impeccable. He carefully took into account the order of the Ontario court. He recognised its importance and upheld the spirit of the order. All he had done is to defer its implementation for a limited period in the light of the evidence as to the likely effect upon the child of visits to Canada beginning too soon. He considered the probability that a premature start to the Canadian holidays might be a failure and with the child's welfare as the paramount consideration deferred the Canadian part of the access for a limited period. The father would be well advised to reflect upon the consequences of a premature visit to Canada ending in failure. Such failure could have a long-term adverse effect upon the entire future relationship of the father and child to the detriment of both of them.

I would dismiss the appeal.

HOFFMANN LJ: The facts in this appeal have been stated by Butler- Sloss LJ and I gratefully adopt what she has said. I confine my observations to the effect of the Hague Convention on the Civil Aspects of International Child Abduction. The Convention declares in article 1 that it has two objects. The first is to secure the prompt return of children wrongfully removed to or retained in any contracting state. The second is "(b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states." The provisions dealing with rights of access are contained in Chapter IV, which consists of a single article:

"Article 21. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the central authorities of the contracting states in the same way as an application for the return of a child. The central authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The central authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The central authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

The plaintiff's originating summons echoes the language of the opening paragraph of this article by asking for an order that "arrangements be made for organising and securing the

effective exercise of the plaintiff's rights of access pursuant to the order of the Ontario Court (Provisional Division) dated 19 December 1991."

The first question of general importance is whether the Convention has any application to a child such as G, who was habitually resident in Canada at the time when the access order was made but had (with the leave of the Canadian court) become habitually resident in England by the time the mother refused to comply with it. At first I thought that article 4 provided a negative answer to this question. It says that the Convention "shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights." It seemed to me that in this article the "contracting state" must mean the state under whose law the rights of access existed. This was the view of Waterhouse J in B v B (Minors: Enforcement of Access Abroad) [1988] 1 WLR 526. He said, at p 532:

"I am driven back to consideration of object (b) defined in article 1 of the Convention . . . In the light of that object, the reference in article 4 to habitual residence in a contracting state immediately before any breach of access rights occurred must be interpreted as meaning habitual residence in a contracting state in which the access rights relied upon then existed, because (1) it is those rights upon which the application is intended to be based; and (2) the rationale of co-operation in enforcement of the rights is that habitual residence in the contracting state in which they existed was a sufficient foundation for that state's jurisdiction without further argument or inquiry."

If this is right, then the Convention can have no application in this case. The right of access existed under the law of Canada, but the contracting state in which G was habitually resident immediately before the breach of that right was England. On reflection, however, I have come to the conclusion that this construction of article 4 is too narrow. First, it involves reading words into the Convention. G was habitually resident in a contracting state, namely England. The article does not say that it must be the state under which the right of access arose.

Secondly, while it is true that the provisions for the return of children are intended to protect rights of custody under the law of the contracting state in which the child is habitually resident, this is expressly spelled out in article 3. It does not require in addition a narrow interpretation of article 4. Thirdly, rights of access normally have to be enforced in the country in which the child is habitually resident. It is unusual for a breach of access rights to occur when the child is away from home. It follows that, if article 21 did not apply to the enforcement of a foreign access right in the country of the child's habitual residence, it would seldom achieve its object of ensuring that "rights of . . . access under the law of one contracting state are effectively respected in the other contracting states." "Access rights" are defined in article 5 to include "the right to take a child for a limited period of time to a place other than the child's habitual residence." If there is a breach of such an access right, it will almost invariably be incapable of enforcement except in the contracting state in which the child is habitually resident. On the narrow construction of article 4, however, article 21 can apply only to rights existing under the lex fori. This is an odd result in an international Convention. It may be of some assistance to foreign resident parents but has nothing to do with access rights under the law of one state being respected in another.

Fourthly, a restrictive interpretation of article 4 is not needed to prevent the Convention from applying to cases which are purely domestic. The Child Abduction and Custody Act 1985 was passed to give effect to our obligations in international law assumed under the Convention. I see no difficulty in construing article 21 as confined to cases which give effect to the relevant purpose of the Convention, namely to ensure that foreign access rights are respected.

Fifthly, it is not true in the case of access rights that, as Waterhouse J put it in B v B [1988] 1 WLR 526, 532, "the rationale of co-operation in enforcement of the rights is that habitual residence in the contracting state in which they existed was a sufficient foundation for that

state's jurisdiction without further argument or inquiry." It is certainly part of the rationale of the child abduction provisions of the Convention that the foreign custody right should be enforced to the extent of returning the child to the jurisdiction from which it has been abducted without regard to the merits. But this is not true of access rights. As Professor AE Anton, chairman of the conference which drafted the Convention, wrote afterwards in "The Hague Convention on International Child Abduction", 30 ICLQ 537, 55-555:

"The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible. It was felt not only that mandatory rules in the fluid field of access rights would be difficult to devise but, perhaps more importantly, that the effective exercise of access rights depends in the long run more upon the goodwill, or at least the restraint, of the parties than upon the existence of formal rules. Article 21, therefore, establishes open-textured rules for assisting parties to secure the effective exercise of access rights by seeking the intervention of central authorities."

For these reasons I consider that article 21 did apply to the plaintiff's claim to enforce his access rights under Canadian law. But the next question is what effect this should have had upon the question which the judge had to decide. The Convention imposes certain obligations upon the central authority which under article 6 each contracting state has to designate. The duties imposed upon the central authority are of an executive rather than judicial nature and in England the designated central authority is the Lord Chancellor's Department. Other obligations are imposed upon the "judicial authorities" of the contracting state. When the Convention was enacted as part of English law by the Child Abduction and Custody Act 1985, the obligations imposed upon the English judicial authorities created rights in private law, directly enforceable by parents in English courts. But the same is not true of the obligations imposed upon the central authorities. So far as these were enforceable by individuals at all, these created rights in public law for which the appropriate remedy would be judicial review.

So, for example, article 12 provides that, if a child has been wrongfully removed or retained and proceedings are commenced less than a year later before the judicial authority, that authority "shall order the return of the child forthwith." The article confers a right in private law which is directly enforceable in an English court. But article 21 imposes no duties whatever upon the judicial authorities. It says that the central authority is bound "to promote the peaceful enjoyment of access rights." It "shall take steps to remove, as far as possible, all obstacles to the exercise of such rights." It may "initiate or assist in the institution of proceedings with a view to organising or protecting these rights . . ." These provisions create no rights in private law which a parent can directly enforce in respect of a child. They may even be too vague or permissive to create any rights at all. But so far as they do, the rights exist in public law and the remedy for the central authority's failure to comply with its obligations is judicial review.

The Hague Convention is in this respect very different from the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, which was also given effect by the Child Abduction and Custody Act 1985. The latter, as its name indicates, provides for the reciprocal enforcement of custody orders, which are defined to include orders giving rights of access. Article 7 of the European Convention says:

"A decision relating to custody given in a contracting state shall be recognised and, where it is enforceable in the state of origin, made enforceable in every other contracting state."

Rights of access under orders made in another contracting state are thus directly enforceable as a matter of private law. But the Hague Convention did not follow this model. Instead, it left untouched the law of recognition of foreign access orders in the several contracting states and merely provided for executive co-operation in the enforcement of such recognition as the national law allowed.

In this case there is no complaint that the central authority has failed to comply with article 21. It has provided the plaintiff with legal aid to pursue his claim to enforce his Canadian access rights. In my judgment, therefore, the provisions of article 21 were exhausted once the plaintiff got to court. They had no part to play in the decision which had to be made by the judge. The Convention provided no independent source of jurisdiction and the originating summons was wrong in apparently seeking compliance by the court with a duty imposed by article 21 upon the central authority. Instead, the application should have been framed as an ordinary application for a contact order under the Children Act 1989. In such an application, the Canadian access order is entitled, as Lord Simonds said in McKee v McKee [1951] AC 352, 365, to "grave consideration," but the paramount consideration is the welfare of the child.

This was the basis on which Cazalet J dealt with the Canadian order and in my judgment no criticism can be made of the way in which he exercised his discretion. I therefore agreed that the appeal should be dismissed.

SIR THOMAS BINGHAM MR: I also agree that this appeal should be dismissed. If these were ordinary English access proceedings, the order made by Cazalet J would be unappealable. He held that the prospect of establishing an enduring relationship between father and daughter would be enhanced if their rapprochement were more gradual and progressive than originally agreed and ordered. That is a view which is certainly defensible, and in my view right.

But the father, relying on article 21 of the Hague Convention, says these are not ordinary English access proceedings. This raises an important point, since article 21 enjoins international co-operation in enforcing rights of access, and in applying an international Convention municipal courts must strive to give effect to the international consensus on which the Convention is based. The starting point is to inquire whether this child is one to whom this Convention applies. Article 4 provides:

"The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights."

So attention is focused on a moment of time, immediately before the breach of (in this case) access rights. That occurred here when the mother indicated her intention to depart from the strict terms of the Canadian order. By that time the child was habitually resident with her mother in England.

Do those facts bring the child within the Convention? Article 4 provides no wholly unambiguous answer, since both Canada and the United Kingdom are contracting states and the child was habitually resident in a contracting state immediately before the breach. The question is whether article 4 is to be read as if it said: "The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights under the law of that contracting state." This construction is open to the objection that words should not be interpolated in an agreed text unless it is quite clear they reflect the draftsman's intention.

I was at first inclined to think, despite this objection, that that represented the correct construction of the article, as Waterhouse J in effect thought it to be in B v B (Minors: Enforcement of Access Abroad) [1988] 1 WLR 526. I am, however, persuaded on reading the

judgment of Hoffmann LJ that a wider construction is more consistent both with the terms of the Convention and with its overall intention.

It seems plain that article 21 is not intended, like the European Convention, to provide for the mutual recognition and enforcement of access orders, and further that it imposes no direct obligation on judicial authorities. But equally plainly it is intended to have some effect, and I agree that its effect is as described by Butler-Sloss and Hoffmann LJJ.

The judge did not treat the Canadian order as binding, but he did not treat it as by any means irrelevant. He recognised it as an important part of the history that the child was in England pursuant to that order agreed by the father and that the terms of access to the father were agreed by the mother. To ignore that agreement would, without doubt, exacerbate relations between the parents to the detriment of the child. Wisely, the judge did not ignore the agreement. He sought to give effect to it while allowing some postponement of its operation. In that way, as I think, he honoured the spirit of the Convention.

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