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[13/06/1991; House of Lords (England); Superior Appellate Court]
Re H.; Re S. (Abduction: Custody Rights) [1991] 2 AC 476, [1991] 3 All ER 230, [1991] 2 FLR 262, [1991] Fam Law 427

IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL

(CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION

Royal Courts of Justice

13 June 1991

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths,

Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle

In the Matter of H.; In the Matter of S.

James Munby QC and Henry Setright for Mrs H and Mrs S

Paul Focke QC and Edward Fitzgerald for Mr H; Mr S in person

Lord Bridge of Harwich: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it for the reasons he gives I would dismiss these appeals.

Lord Brandon of Oakbrook: My Lords, the House has before it two appeals relating to claims by the mothers of children abducted by their fathers from their habitual places of residence in countries abroad and taken to the United Kingdom. In each case the claim was brought under the Child Abduction and Custody Act 1985, by which domestic effect was given to the adherence of the United Kingdom to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (Cmnd 8281). It will be convenient to refer to the cases in which the two appeals arise as In re H and In re S respectively.

The appeal in In re H is from an order of the Court of appeal (Lord Donaldson of Lymington MR, Stuart-Smith LJ and Sir Roger Ormrod) [1991] 2 WLR 62. By that order the Court of Appeal dismissed an appeal by Mrs H from an order of Anthony Lincoln J dated 11 July 1990 dismissing her application for the summary return of her two children, T and J, to the jurisdiction of the Supreme Court of Ontario. The appeal in In re S is a leapfrog appeal from an order of Booth J dated 28 August 1990 by which she dismissed the

application of Mrs S for the summary return of her two children, B and A, to the jurisdiction of the Superior Court of California County of Santa Clara. Both appeals are brought by the leave of the House.

The ground on which the Court of Appeal rejected the claim of Mrs H in In re H was that, having regard to the relative dates of the acts of Mr H relied on and of the coming into force of the Convention between the United Kingdom and Ontario, the Convention did not apply and the court therefore had no jurisdiction to make any order under it. In In re S Booth J rightly held that the essential facts in that case could not be distinguished from those in In re H, that she was bound by the decision of the Court of Appeal in that case, and she therefore had no alternative but to dismiss Mrs S's claim. In these circumstances it is common ground that the two appeals succeed or fail together.

The material facts and the history of the proceedings in or related to In re H are as follows. Both the appellant, Mrs H, and the respondent, Mr H, were born in India. In 1974 they were married in England. In 1976 they emigrated to Canada where they had two children, T now aged 12 and J now aged 11. Those children and Mrs H are Canadian citizens. The marriage was unhappy and in January 1984 Mrs H left Mr H taking the two children with her. On 20 September 1985 the Supreme Court of Ontario made an order granting the custody of both children to Mrs H, with access to Mr H, and restraining both parents from removing the children from the jurisdiction of that court. In early March 1986 Mr H took the children lawfully to a place in Ontario for a week's staying access. The children should have been returned by him to Mrs H on 15 March 1986, but soon after the commencement of the period of access Mr H took the children from Ontario first to England and subsequently to India. In doing so he acted in direct breach of the order of the Supreme Court of Ontario referred to above and therefore unlawfully. The children remained with Mr H in India until about the end of 1988 or beginning of 1989 when he took them again to England. His marriage to Mrs H had by then been dissolved. Mrs H subsequently discovered that the children were in England and took steps under the Convention to have them returned to Ontario. She applied to the Central Authority for Canada designated for the purposes of the Convention, which then made a request to the Lord Chancellor, as the Central Authority similarly designated for England and Wales, for an order that the children be returned to the jurisdiction of the Supreme Court of Ontario pursuant to the Convention. On 22 June 1990 the Lord Chancellor, on behalf of Mrs H and in her name, applied to the Family division of the High Court here for such an order under the Act of 1985. As indicated earlier, that application was dismissed by Anthony Lincoln J on 11 July 1990 and Mrs H's appeal from his decision to the Court of Appeal was dismissed on 27 July 1990. Meanwhile on 11 July 1990 parallel proceedings in wardship were begun by Mr H, as a result of which the children were made wards of court and the interim care and control of them in England was given to Mrs H. On 20 August 1990 the full hearing of the wardship proceedings came before Rattee J, who on 23 August 1990 made an order the main effect of which was to give Mrs H care and control of the children and leave to take them out of the jurisdiction to a new home which she had established with her second husband in Indianapolis, in the State of Indiana, subject to the children remaining wards of court and to Mrs H undertaking to return them to the jurisdiction if called upon to do so. Pursuant to that order the children are presently living with Mrs H and her second husband in Indianapolis.

The material facts and the history of the proceedings in or related to In re S are as follows. The appellant, Mrs S, and the respondent, Mr S, are the parents of two children, B now aged 11 and A now aged eight. Mr and Mrs S and the children were all born in the United States of America and are citizens of that country. The marriage of Mr and Mrs S was unhappy and at some time prior to August 1986 they separated and subsequently the marriage was dissolved. Following the separation proceedings relating to the children were begun in the

Superior Court of California, County of Santa Clara, and by an order of that court dated 8 September 1986 it was provided that after 1 September 1986 Mrs S should have the physical care of the children during the week in school term time and that Mr S should have weekend staying access to them. The order further provided that Mr S should have staying access in the school summer holiday with the express stipulation that the children should not be away from either parent in that period without prior written consent. On 26 June 1987 Mr S took the children for a week's staying access in California pursuant to the order. They were due to be returned to Mrs S on 5 July 1987 but Mr S did not return them and instead took them out of California and in July 1987 to England without Mrs S's knowledge or consent. In so doing he acted in direct breach of the order referred to above and therefore unlawfully. On 10 August 1990 Mrs S discovered that the children were in England and took steps under the Convention to have them returned to the United States of America. She applied to the Central Authority for the United States of America designated for the purposes of the Convention, which then made a request to the Lord Chancellor, as the Central Authority similarly designated for England and Wales, for an order that the children be returned to the State of California. On 21 August 1990 the Lord Chancellor, on behalf of Mrs S and in her name, applied to the Family Division of the High Court here for such an order under the Act of 1985. As indicated earlier, that application was dismissed by Booth J on 28 August 1990.

On that date parallel proceedings in wardship were begun by Mrs S, as a result of which the children were made wards of court and the interim care and control of the children was given to Mr S with access to Mrs S. In October 1990 the full hearing of the wardship proceedings came for hearing by Ward J, who on 19 October 1990 made an order the main effect of which was to give Mrs S as from 30 October 1990 the care and control of the children and leave to take them out of the jurisdiction to her home in the United States of America, subject to the children remaining wards of court and to Mrs S undertaking to return them to the jurisdiction if called upon to do so. Pursuant to that order the children are presently living with Mrs S in the United States of America.

It will be apparent that, as a result of the wardship proceedings in each case, Mrs H and Mrs S have achieved their main object of securing the return of their children to their care in the country in which they have chosen to make their home. That being so, the view might be taken that the present appeals, even if successful, would not serve any further useful purpose for them. To take that view, however, would be to ignore the important fact that, under the orders made in the two wardship proceedings, the children in each case remain wards of the High Court in England, and that both Mrs H and Mrs S are bound by undertakings to return their children to the jurisdiction of that court if called upon to do so. Success in the appeals, if obtained, would mean that the applications made on behalf of and in the names of Mrs H and Mrs S for summary orders for the return of their children under the Act of 1985 should have been allowed and that they were therefore entitled to have the custody of their children untrammelled by the orders made in the wardship proceedings, which would then have to be discharged. It is in this respect that the present appeals, if successful, would put Mrs H and Mrs S in a better position with regard to their children than they are in at present.

The Convention, which was signed by the United Kingdom on 19 November 1984 and ratified by it on 20 May 1986, provides, so far as material:

"The states signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody.

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

Chapter I Scope of the Convention

Article 1

The objects of the present Convention are -- (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

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.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.

Article 4

The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -- (a) 'rights of 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; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Chapter II Central authorities

Article 6

A contracting state shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. . . .

Article 7

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

Chapter III Return of children

Article 8

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

Article 12

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. . . .

Article 13

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take accounts of its views. . . .

Chapter V General provisions

Article 35

This Convention shall apply as between contracting states only to wrongful removals or retentions occurring after its entry into force in those states.

The Convention entered into force in the United Kingdom on 1 August 1986 upon the coming into force of the Act of 1985 pursuant to the Child Abduction and Custody Act 1985 (Commencement) Order 1986 (SI 1986 No 1048). The Act of 1985 provides, so far as material:

Part 1

International child abduction

1(1) In this Part of this Act 'the Convention' means the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25 October 1980. (2) Subject to the provisions of this Part of this Act, the provisions of that Convention set out in Schedule 1 to this Act shall have the force of law in the United Kingdom.

2(1) For the purposes of the Convention as it has effect under this Part of this Act the contracting states other than the United Kingdom shall be those for the time beginning specified by an Order in Council under this section. (2) An Order in Council under this section shall specify the date of the coming into force of the Convention as between the United Kingdom and any state specified in the Order; and, except where the Order otherwise provides, the Convention shall apply as between the United Kingdom and that state only in relation to wrongful removals or retentions occurring on or after that date.

Schedule 1 to the Act of 1985 sets out (inter alia) articles 3, 4, 5, 7, 8, 12 and 13 of the Convention. It does not set out preamble article 1 or article 35.

The relevant Orders in Council for the purposes of section 2 of the Act of 1985 are the Child Abduction and Custody (Parties to Conventions) Order 1986 (SI 1986 No 1159), as amended, and the Child Abduction and Custody (Parties to Conventions) (Amendment) (No 2) Order 1988 (SI 1988 No 1083). Under the first of these Orders the Convention came into force as between the United Kingdom and Ontario on 1 August 1986. Under the second Order the Convention came into force between the United Kingdom and the United States of America on 1 July 1988. Neither Order "otherwise provides" for the purposes of section 2(2).

The same question arises for decision in both In re H and In re S. It is what is the meaning in the Convention of the expression removal, with its cognate verb removed, on the one hand, and the expression retention, with its cognate verb retained, on the other. The question comprises three points which need to be considered separately. The first point is whether removal and retention are both events which occur once and for all on a specific occasion, or whether, while removal is such an event, retention is a state of affairs beginning on a specific occasion but continuing from day to day thereafter. The second point is whether removal and retention are mutually exclusive concepts, so that in any particular situation a child may either be removed or retained but not both, or whether removal can, and ordinarily will, be followed by continuing retention. The third point is whether removal or retention means removal from or retention out of the care of the parent having the custodial rights, or removal from or retention out of the jurisdiction of the courts of the child's habitual place of residence.

The Court of Appeal in In re H dealt with these three points as follows. With regard to the first point, it held that removal and retention are both events which occur once and for all on a specific occasion. With regard to the second point, it held that removal and retention were mutually exclusive concepts. With regard to the third point, it held by a majority (Stuart-Smith LJ dissenting) that removal or retention meant removal from or retention out of the jurisdiction of the courts of the child's habitual place of residence, so that In re H was one of removal and not one of retention. It was not in dispute that Mr H had taken his two children out of Ontario a few days before 15 March 1986, that is to say on a date well before the date of 1 August 1986 on which the Convention came into force as between the United Kingdom and Ontario. It follows, on the Court of Appeal's views on the meaning in the Convention of the expressions removal and retention, that the Convention did not, by reason of section 2(2) of the Act of 1985 apply to In re H and that the court therefore had no jurisdiction to make the order sought by Mrs H.

Mr Munby, as counsel for both the appellants, Mrs H and Mrs S challenged the views of the Court of Appeal on each of the three points referred to above. With regard to the first point, he submitted that, while removal was an event which occurred once and for all on a specific occasion, retention was a continuing state of affairs, beginning on a specific occasion but continuing from day to day thereafter. With regard to the second point, he submitted that, while retention could occur without prior removal, where there was removal it would in

practice always be followed by retention. The two expressions could not therefore, be treated as mutually exclusive. With regard to the third point, he submitted that removal or retention meant removal from, or retention out of, the care of the parent with custodial rights. On the basis of these submissions, Mr Munby contended that the case of In re H was a case of retention rather than one of removal; that the retention continued from day to day after its inception; and that it was, therefore, still in existence at all material times from 1 August 1986, the date on which the Convention came into force as between the United Kingdom and Ontario.

In support of his contention that retention in the Convention meant a continuing state of affairs which could follow on after removal, Mr Munby relied on two main matters. First, the ordinary and natural meaning of the word retention and, secondly, various observations made by judges in a number of reported cases, including in particular observations contained in my speech in In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, 578-579. With regard to the first matter, I would agree that retention can and usually does connote a continuing state of affairs. The word may, however, be used in a context in which it means, and can only mean, an event occurring once and for all on a specific occasion. Imprisonment is another word which is capable of having two similarly different meanings. With regard to the second matter, in none of the reported cases, including In re J, in which the observations relied on by Mr Munby were made, was it necessary to decide between the two possible meanings of retention. It follows that all such observations were no more than obiter dicta. In these appeals, however, it is necessary to decide between the two meanings and for that purpose to have regard to the context of the Convention as a whole.

Before addressing the three points in respect of which Mr Munby challenges the view taken by the Court of Appeal, I would make some preliminary observations about the nature and purpose of the Convention. The preamble of the Convention shows that it is aimed at the protection of children internationally (my emphasis) from wrongful removal or retention. Article 1(a) shows that the first object of the Convention is to secure the prompt return to the state of their habitual residence (that state being a contracting state) of children in two categories: (1) children who have been wrongfully removed from the state of their habitual residence to another contracting state; and (2) children who have been wrongfully retained in a contracting state other than the state of their habitual residence instead of being returned to the latter state. The Convention is not concerned with children who have been wrongfully removed or retained within the borders of the state of their habitual residence.

So far as category (1) is concerned, it appears to me that a child only comes within it if it is wrongfully taken out, ie across the frontier, of the state of its habitual residence. Until that happens, although the child may already have been wrongfully removed within the borders of the state of its habitual residence, it will not have been wrongfully removed for the purposes of the Convention. So far as category (2) is concerned, it appears to me that a child can only come within it if it has first been removed rightfully (eg under a court order or an agreement between its two parents) out of the state of its habitual residence and subsequently retained wrongfully (eg contrary to a court order or an agreement between its two parents) instead of being returned to the state of its habitual residence. The wrongful retention of a child in one place in the state of its habitual residence, instead of its being returned to another place within the same state, would not be a wrongful retention for the purposes of the Convention. The typical (but not necessarily the only) case of a child within category (2) is that of a child who is rightfully taken out of the state of its habitual residence to another contracting state for a specified period of staying access with its non-custodial parent, and wrongfully not returned to the state of its habitual residence at the expiry of that period.

In the light of these preliminary observations I turn to the three points in respect of each of which the view taken by the Court of Appeal has been challenged by Mr Munby. With regard to the first point, whether retention is an event occurring on a specific occasion or a continuing state of affairs, it appears to me that article 12 of the Convention is decisive. I set out that article earlier but it will be helpful to set it out again now. It 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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. . . ."

The period of one year referred to in this article is a period measured from the date of the wrongful removal or retention. That appears to me to show clearly that, for the purposes of the Convention, both removal and retention are events occurring on a specific occasion, for otherwise it would be impossible to measure a period of one year from their occurrence. It was submitted by Mr Munby that, in the case of retention, the date from which the period of one year was to be measured was the date of the inception of the retention and that, if article 12 was interpreted in that way, it was not inconsistent with retention being a continuing state of affairs. I find myself unable to accept that submission. To interpret article 12 in that way involves inserting into it words which are not there and, if intended to apply, could readily have been put in. I consider that article 12 leads inevitably to the conclusion that retention, like removal, is an event occurring on a specific occasion.

With regard to the second point, whether removal and retention are mutually exclusive concepts it appears to me that, once it is accepted that retention is not a continuing state of affairs but an event occurring on a specific occasion, it necessarily follows that removal and retention are mutually exclusive concepts. For the purposes of the Convention, removal occurs when a child, which has previously been in the state of its habitual residence, is taken away across the frontier of that state; whereas retention occurs where a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that state on the expiry of such limited period. That being so, it seems to me that removal and retention are basically different concepts, so that it is impossible either for them to overlap each other or for either to follow upon the other. This interpretation of the Convention is strongly supported by the fact that, throughout the Convention, removal and retention are linked by the word "or" rather than by the word "and," which indicates that each is intended to be a real alternative to the other. It was submitted by Mr Munby that the word "or," where it links removal and retention, should be construed as meaning "and/or." This again involves inserting into the Convention words which are not there, and which could, if intended to apply, readily have been put in. I cannot, therefore, accept that submission.

With regard to the third point, whether removal or retention means removal from or retention from or retention out of the care of the parent having the custodial rights, or removal from or retention out of the jurisdiction of the courts of the state of a child's habitual residence, I am of opinion that the latter meaning is the correct one. I think that follows necessarily from the considerations to which I referred in my preliminary observations about the nature and purpose of the Convention, that the Convention is only

concerned with international protection for children from removal or retention, and not with removal or retention within the state of their habitual residence. It was suggested in argument that article 3(b) was difficult to reconcile with the view on the third point which I have said that I regard as correct. Article 3(b) specifies the second of two matters required to render a removal or retention wrongful. That second requirement is that at the time of removal or retention the custody rights of the custodial parent "were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." It was suggested that, if removal for the purposes of the Convention involved the taking of the child concerned across the frontier of the state of its habitual residence, it might be impossible for the custodial parent to show that the requirement contained in article 3(b) was satisfied. In my view article 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day to day care and control. If the narrow meaning was adopted, it could be said that a custodial parent was not actually exercising his or her custodial rights during a period of lawful staying access with the non-custodial parent. That, as it seems to me, cannot be right. Provided that what I have described as the broader meaning of the requirement contained in article 3(b) is adopted, I do not consider that such requirement is inconsistent with the view on the third point which I have said that I regard as correct.

I would add that the views which I have expressed on the first and second points are in accordance with the decision of the Lord Ordinary (Lord Prosser) in the Scottish case, Kilgour v Kilgour, 1987 SLT 568.

In the result I have reached the same conclusions on each of the three points in issue as the Court of Appeal reached, either unanimously or by a majority, in In re H. I also agree with the Court of Appeal that, on the basis of those conclusions, In re H was a case in which the children were the subject of removal rather than retention. Since it is common ground that the essential facts in In re S cannot be distinguished from those in In re H, it follows that the children in In re S were also the subject of removal rather than retention. It further follows that in In re H the wrongful removal took place before the Convention had come into force as between the United Kingdom and Ontario, and that in In re S the wrongful removal took place before the Convention had come into force as between the United Kingdom and the United States of America, so that, by reason of section 2(2) of the Act of 1985, the court had no jurisdiction in either case to make an order for the summary return of the children under the Act.

My Lords, for the reasons which I have given I would dismiss both the appeals.

Lord Griffiths: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and, for the reasons which he gives, I too, would dismiss both the appeals.

Lord Oliver of Aylmerton: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and, for the reasons which he gives, I too, would dismiss both the appeals.

Lord Jauncey of Tullichettle: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and, for the reasons which he gives, I too, would dismiss both the appeals.

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