RE T (ABDUCTION: RIGHTS OF CUSTODY) [2008] EWHC 809 (Fam)

Family Division

Coleridge J

17 March 2008

Abduction – Rights of custody – Forum – Legal representation abroad – Costs

Costs – Abduction – Forum for rights of custody issue – Funding legal representation abroad

The father asserted that the mother had wrongfully removed the child from the state of Oregon, in the USA, in contravention of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The mother raised a number of defences, including the assertion that removal was not wrongful because the father had no rights of custody under Oregon law. To complicate matters, the local authority had already begun care proceedings in relation to the child. A preliminary question arose in the abduction proceedings as to whether the English court should rule on whether the father had custody rights in Oregon, or whether, using the Hague Convention Art 15 procedure, the Oregon courts should be asked for a ruling as to whether the mother's removal of the child had been wrongful. The opinion of the father's expert was that the father had held custody rights under Oregon law, while the opinion of the mother's expert was that he had not, but both experts agreed that the issue of rights of custody was a finely balanced matter which depended upon a careful interpretation of the law of Oregon. However, the Legal Services Commission, which was funding the mother's legal representation in England, considered that they could not fund any proceedings in Oregon because such funding would be contrary to s 19 of the Access to Justice Act 1999 which stated that public funding could not be provided for foreign proceedings.

Held – the issue of rights of custody was to be referred to Oregon under the Art 15 procedure, conditional upon the mother's public funding –

(1) In Hague Convention cases it was peculiarly important that issues like rights of custody should be very clearly settled by the foreign law, either directly by reference to statute or other written material or by reference to the foreign court's previous decisions. The issue of whether the father had rights of custody in Oregon was a finely balanced and novel point from the Oregon perspective, and was apt to be heard in Oregon, provided the mother could be fully represented at the Oregon hearing; if she were not represented, the value of the decision in the Oregon proceedings would be hugely undermined. If the Legal Services Commission would not fund the litigation, and there was no other source from which the mother could fund the litigation before the Oregon court, the matter would have to be determined in a second best way by an English judge (see paras [11], [12], [15]).

(2) The Legal Services Commission were urged to reconsider urgently their decision not to fund the mother's representation before the Oregon court. The Oregon proceedings would not be foreign proceedings within s 19 of the Access to Justice Act 1999 but rather English proceedings under the Hague Convention. From time to time issues or sub-issues in such proceedings had to be determined abroad under Art 15 of the Hague Convention. It would be very strange indeed if a vital issue like the one before the court could not be properly determined because one party could not be represented before the foreign court; such an approach would render the whole of Art 15 completely useless because a decision that was not taken inter partes would be given very little weight in the English hearing (see paras [13], [14]).

Statutory provisions considered
Child Abduction and Custody Act 1985
Children Act 1989, s 31
Access to Justice Act 1999, s 19
Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 5, 15

Henry Setright QC and *Hassan Khan* for the applicant father
Alex Verdan QC and *Rebecca Foulkes* for the respondent mother
The second respondent did not attend and was not represented
Darren Howe for the guardian ad litem

Cur adv vult

COLERIDGE J:

[1] Before the court is an application under the Child Abduction and Custody Act 1985 in relation to a boy, T, born on 30 July 1997, so he is rising 11. It is a very unusual application under that Act, and the unusual nature of it can be collected simply from the fact that the final hearing of it is due to take place in this court on 21 April this year, with a time estimate of no less than 5 days. The reason for that lengthy time estimate is that the mother opposes the return of the child, in this instance to the State of Oregon in the USA, on no less than eight different grounds.

[2] The very brief background giving rise to the application is as follows. The child was born in 1997. In about May 2005 he was brought to this country by his mother without the knowledge or consent of the father, so it is said, and it is asserted that that removal contravened the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). The father did not discover the child's whereabouts – again, I say this is his case, and it may be that many of these facts are not agreed – until the end of last year, that is to say, December 2007, when, as a result of information becoming available on the internet, he discovered that his son was in this country.

[3] By this time, in fact coincidentally, proceedings had been begun by the local authority, in the area in which the child and the mother resided, of a type well known in these courts (they are care proceedings) in relation to the child. So that parallel with these proceedings are care proceedings under s 31 of the Children Act 1989. It is agreed by all that the Hague Convention proceedings must be determined before the court can go on and decide whether or not to exercise its powers under the Children Act 1989.

[4] One of the, if not *the* first, line of defence which the mother relies upon is under Arts 3 and 5 of the Hague Convention, namely that the father does not even have rights of custody which have been breached. Of course, if that is the case, that is the end of the Hague Convention proceedings. Whether or not the father does have those rights depends entirely upon a careful interpretation of the law of Oregon in relation to these matters, Oregon being the place where the child was born. It will therefore be necessary, in the Child Abduction and Custody Act proceedings, for the English judge, on the face of it, to determine whether or not the father has those rights of custody under Arts 3 and 5.

[5] Contemplating that this was the kind of issue that might arise in these international child abduction proceedings, the Hague Convention itself provides a mechanism for permitting the relevant foreign court to determine, in any given case, whether or not rights of custody under that local law are or are not made out. That mechanism is provided under Art 15, which reads as follows:

> 'The judicial or administrative authorities of a contracting state may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the state of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that state. The central authorities of the contracting state shall so far as practicable assist applicants to obtain such a decision or determination.'

[6] Thus, the question arises preliminarily in this court as to whether or not the Art 15 route should be adopted and followed or whether, on the other hand, it is more practicable and sensible for that preliminary decision as to Oregon law to be taken by the English judge in these proceedings.

[7] Both parties have obtained the help of local foreign experts. The upshot of the experts' opinion is that this is a very finely balanced matter. The mother's expert is adamant that the father has no such rights of custody, the father's expert, on the other hand, does not agree and says that, on the basis of what he knows about the position, the father does indeed have joint legal custody of the child according to Oregon law. Of course it would be helpful if there were any Oregon judicial decisions on the point. I am told that none exist. Therefore, this will be a novel point of Oregon law if it is dealt with in that jurisdiction. So the matter comes before me this afternoon to decide whether or not the English court should decide the foreign law point or whether, on the other hand, the Oregon court should be invited to determine the point under Art 15.

[8] The matter is not very strongly advocated by either side. So far as the father is concerned, he takes almost a neutral stance, save only that he would like the matter determined quickly, and, of course, I remind myself that this case is set down for final hearing in a little over one month's time.

[9] So far as the mother is concerned, she too does not want to lose the date. She is perfectly content for the matter to be dealt with in the Oregon court, and, indeed, she has a strong opinion from her own legal expert to the effect that she is likely to be successful. But she has two major concerns. The first is that she would not want the Oregon court to determine this unless she was represented, preferably by her expert, Ms Rute. The second condition (if that is the proper way to describe it) to her agreeing to the matter being dealt with in Oregon is that she should not be required to go to Oregon for the purposes of the hearing because that might prejudice her own immigration status in this country. I am not privy to precisely the difficulties in relation to her immigration status I only know that they exist and that she is in contact (if not in dispute) with the immigration authorities in this country seeking to

establish her right to remain here. Obviously she does not want to leave the shores of this country whilst that is still a live issue before the immigration tribunal.

[10] The guardian is also represented this afternoon on behalf of the child. The guardian, as Mr Setright says, takes a more welfare based approach to the case. I have a short position statement from her, and she says that the child is very upset and disturbed by the intervention of these proceedings and therefore, obviously, she wishes the matter to be determined speedily. So far as the pure question of whether or not the foreign legal point should be decided here or in Oregon, she takes a neutral position, whilst urging the court, obviously, to do all it can not to allow the fixture to be lost.

[11] I have no doubt at all that if ever there were a case where it would be helpful for the foreign court to make the decision it must be this one. This is a very finely balanced point. I am told it is a novel point, so far as the Oregon court is concerned. It may involve a more wide-ranging consideration of the law of Oregon in relation to this and other matters, and, as one knows perfectly well, there is always a different flavour, if I may put it that way, to having these matters determined by foreign lawyers and foreign judges in foreign courts and one is reluctant always to trespass into the area of making determinations of foreign law unless it is unavoidable. In these Hague Convention cases it is peculiarly important that issues like rights of custody should be very clearly settled by the foreign law, either directly by reference to statute or other written material or, if not, by reference to the foreign court's previous decisions. It would be, I think, highly invidious for the English court to trespass into this area unless it was unavoidable.

[12] So there can be no doubt whatever in my mind, both on the facts of this case and also on the basis of previous decisions in this country in the House of Lords, that this is a matter apt for the Oregon judge, and I shall make an order to that effect. I shall also attach to that, the conditions which the mother seeks, namely that this matter should only be determined by the Oregon court if the mother is able to be fully represented before that court. It hardly needs to be a condition, because, as Mr Verdan QC who appears on her behalf this afternoon, indicates, if she is not before the court, one wonders what the value of the decision will be in the English proceedings in any event. She would be entitled to say, if she was not satisfied, that since she took no part in the proceedings, the value of the decision was hugely undermined, if not rendered nugatory. So that will be condition number one, and certainly she is not required to attend before the Oregon court, but I am told that that is unlikely to be a problem in that court.

[13] The issue of her being represented in that court would be very much less complicated were it not for the fact that the Legal Services Commission in this country seem to think that they do not have to fund her representation before the Oregon court.

[14] The point they take, apparently, is under s 19 of the Access to Justice Act 1999, which, of course, prevents or disqualifies people from receiving public funding if the proceedings are foreign proceedings; but, if I may say so, with the greatest of respect to the Legal Services Commission, these are not foreign proceedings so defined. The proceedings before the court in England are proceedings under the Hague Convention. Necessarily, by operating the route set out by the Convention, of which this country is a signatory, Art 15

may from time to time call for issues or sub-issues to be determined abroad. It would be very strange indeed if a vital issue like the one before this court could not be properly determined because one party (in this case the mother) was not able to be represented before the foreign court. It would render the whole of Art 15 completely useless because, for reasons I have already indicated, a decision taken that is not inter partes would be given very little weight in this country. I disagree with the Legal Services Commission (if that is their interpretation) and I invite them to reconsider it at the highest level in relation to this matter, which obviously has implications for other cases. May I also politely urge the Legal Services Commission to determine this matter as fast as their processes allow, because, as I have indicated, the hearing is due in this country on 21 April and by then the Oregon court will have to have processed the whole of the determination of this issue in a timely way so that the judgment can be communicated to the parties and back to the English court. As I say, I cannot urge the Legal Services Commission too strongly to think again about the proper interpretation of s 19 in these circumstances.

[15] May I also, again, with the greatest of respect, and, I hope, gratitude to the Oregon judge who will have to determine this tricky issue, urge him or her to deal with this matter as speedily as possible and at the highest level. I am told by Mr Setright QC, and I have no reason to disagree with his view, that it is thought desirable for these kinds of preliminary issues to be determined at the highest possible level of court of first instance that is below appeal level. If that means that it should be a federal court then that obviously would be desirable. However, there may be a balance to be struck in that jurisdiction between the desirability of having the matter dealt with speedily, within the time frame which I have indicated, and the matter being dealt with at a higher level. Of course, it is not for me to interfere with the listing and other administrative matters in that court.

[16] So I shall make the order in that conditional way. If it turns out that the Legal Services Commission will not fund the litigation, and there is no other source from which the mother can fund the litigation before the Oregon court, then the matter will have to be determined in a second best way by the English judge on 21 April.

[17] I shall give permission to the parties to apply for further directions, depending upon various decisions taken by the various bodies who are involved in this decision. The mother also would like directions, in the event that the matter is to be dealt with here, that there should be a meeting between the experts prior to the video link hearing and a statement arising out of that meeting, identifying, with clarity, the common grounds and the areas of disagreement. That, of course, must be sensible – and also a direction that all the authorities and other material that emanate from the foreign court will be made available as soon as possible, so that the English lawyers can familiarise themselves with them.

[18] It remains only to deal with an issue which is not in contention, which is that I give leave for the papers in these proceedings to be disclosed to the immigration tribunal determining the mother's application.

Order accordingly.

Solicitors: *Dawson Cornwell* for the applicant father
TV Edwards for the respondent mother
Bindman & Partners for the guardian ad litem

PHILIPPA JOHNSON
Law Reporter