

HUNTER v MURROW
(ABDUCTION: RIGHTS OF CUSTODY)
[2005] EWCA Civ 976

Court of Appeal

Thorpe, Dyson and Lloyd LJJ

28 July 2005

Child abduction – Hague Convention – Rights of custody – Autonomous Convention law – Article 15 – Whether determination of foreign court under Art 15 binding

The 4-year-old child was removed from New Zealand to London by his mother in September 2004 without his father's knowledge or consent. Prior to the removal, the child's father had had regular contact with the child on an informal basis, usually seeing the child on Wednesday evenings and Sunday afternoons. The father issued proceedings in which he sought the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) or under the court's inherent jurisdiction. The judge sought from the New Zealand court under Art 15 of the Hague Convention a description of the father's rights under New Zealand law, and a decision whether the removal had been wrongful within the meaning of the Convention. The New Zealand court duly made a decision that the father had enjoyed 'rights of custody' prior to the removal and that the removal had been a wrongful removal for the purposes of the Convention. The judge rejected that determination and held that on the construction of the Hague Convention adopted in England and Wales, the removal had not been wrongful. The father appealed.

Held – dismissing the appeal –

(1) The Hague Convention was a living instrument to be interpreted and applied as necessary to keep pace with social and other trends. Questions involving the construction or interpretation of an Article of the Convention were to be answered according to the international jurisprudence of the Contracting States and not simply according to the law of one particular jurisdiction (see paras [29]-[30], [42]).

(2) The question of whether or not the father exercised rights of custody immediately prior to the removal was one of domestic law in New Zealand. That question had to be distinguished, however, from the separate question of whether the rights enjoyed by the father under New Zealand domestic law amounted to rights of custody within the autonomous meaning of the Articles of the Hague Convention. It was the task of the court to apply the English perception of the autonomous law of the Convention. According to that perception, simple contact arrangements did not constitute 'rights of custody' for the purposes of the Convention and the removal had, therefore, not been wrongful (see paras [46]-[47], [56]-[59]).

(3) A declaration made under Art 15 of the Hague Convention was persuasive but not binding upon the court which had sought it (see paras [27]-[28]).

Per curiam: whether it is right to request a determination on the parents' rights under domestic law under Art 15 will depend on the circumstances of the case, including the nature of the dispute, whether the parties intend to adduce evidence from experts and whether delay is likely to be caused by the request. The Art 15 request was not appropriate in this case, since the case hinged on a point of autonomous Hague Convention law (see paras [40]-[41], [51], [56]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Adoption and Children Act 2002, s 111

United Nations Convention Relating to the Status of Refugees 1951 and Protocol of 1967
 Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 5, 8, 14, 15, 21
 Vienna Convention on the Law of Treaties 1969, Art 31(3)(b)
 New Zealand Guardianship Act 1968, s 18
 New Zealand Guardianship Amendment Act 1991, s 4
 New Zealand Care of Children Act 2004, Part 2, s 18

Cases referred to in judgment

C v C (Abduction: Rights of Custody) [1989] 1 WLR 654, [1989] 1 FLR 403, [1989] 2 All ER 465, CA
Dellabarca v Christie [1999] 2 NZLR 548, NZCA
F (A Minor) (Child Abduction: Rights of Custody Abroad), Re [1995] Fam 224, [1995] 3 WLR 339, [1995] 2 FLR 31, [1995] 3 All ER 641, CA
G (A Minor) (Enforcement of Access Abroad), Re [1993] Fam 216, [1993] 2 WLR 824, [1993] 1 FLR 669, [1993] 3 All ER 657, CA
Gross v Boda [1995] 1 NZLR 569, NZCA
H (Abduction: Acquiescence), Re [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, [1997] 2 All ER 225, HL
J (A Minor) (Abduction: Custody Rights), In re [1990] 2 AC 562, [1990] 3 WLR 492, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, [1990] 2 All ER 961, HL
P (Abduction Consent), Re [2004] EWCA Civ 971, [2004] 2 FLR 1057, CA
R v Secretary of State for the Home Department ex parte Adan; R v Same ex parte Subaskaran; R v Same ex parte Aitseguer [2001] 2 AC 477, [2001] 2 WLR 143, [2001] INLR 44, [2001] 1 All ER 593, HL
T and Others (Minors) (Hague Convention: Access), Re [1993] 2 FLR 617, FD
V-B (Abduction: Custody Rights), Re [1999] 2 FLR 192, CA

Henry Setright QC for the petitioner
John Reddish for the respondent

Cur adv vult

THORPE LJ:

[1] This is a Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention) appeal against an order made by Singer J on 26 April 2005. The appellant's notice was sealed on 10 May 2005 and swiftly referred to me. On 19 May I directed an oral hearing without notice on 25 May. On 24 May the appellant's solicitors lodged with the court a request for the dismissal of the appellant's notice and for a detailed assessment of the publicly funded costs. That notice was referred to me. Between 19 May and 24 May I had prepared for the hearing in court and had realised that there were difficult points of general application, including questions of comity. Accordingly, I directed that the appellant's notice was to stand and I granted permission to appeal. It was made plain to the appellant's solicitor that the court was in their hands and that the appellant's notice would be dismissed in due course should they decide to take no steps to further the appeal. In the event, the appellant's decision was to proceed. Unfortunately the respondent had been informed of the request for dismissal and was naturally disappointed to find that the possibility of a defeat in the Court of Appeal had revived.

[2] These unusual events prompted Mr Reddish for the respondent to apply at the opening for me to recuse. He submitted that his client could have no confidence in the tribunal since my refusal to dismiss was a declaration of my support for the appellant. We refused the application for a variety of reasons which hardly require elaboration. The issues raised by the appeal were pure points of law. The factual substratum was not in dispute. A mere grant of permission is not indicative of more than that the appellant has demonstrated reasonable prospects of success. In any event, the application should have been made promptly as soon as the circumstances relied on were known to the respondent.

[3] The principal points raised by the appeal are as follows:

- (a) *Article 15*: England/Wales had referred to New Zealand a determination of whether the removal was wrongful within the meaning of Art 3; was it open to England/Wales to reject a positive determination made by New Zealand?
- (b) *Articles 3 and 5*: was New Zealand's ruling that the plaintiff held rights of custody breached by the defendant's removal (a ruling founded on New Zealand's construction of Hague Convention law) consonant with our construction of Hague Convention law?

[4] That rather cumbersome prelude brings me to the relevant history. It is conveniently summarised in a judgment of the High Court of New Zealand dated 21 March 2005 (a judgment to which I will come when I record the litigation chronology). I, therefore, set out paras [3]–[6] inclusive of that judgment:

'[3] Ms Murrow is aged 35 and Mr Hunter 30 years. They are both New Zealand citizens. Their son [X] was conceived during the course of a relationship which ended in March 2000. He was born on 22 November 2000.

[4] The applicant visited [X] at the hospital soon after his birth. At Ms Murrow's request, Mr Hunter was recorded as [X]'s father when the birth was registered. There was ongoing contact between father and son for the next 4 years and 10 months until the respondent removed [X] to London. The extent of that contact shall be further detailed shortly.

[5] On 19 September 2004 Mr Hunter became concerned when [X] was not delivered to him for agreed access contact. His attempts to telephone Ms Murrow were unsuccessful. On or about 21 September she flew from New Zealand to England with [X]. On or about 23 September Ms Murrow rang Mr Hunter from London and advised him of their whereabouts.

[6] The following month Ms Murrow advised Mr Hunter that she may continue living in London and that to that end she was seeking permanent employment there. On 29 October 2004 Mr Hunter filed an application for the return of [X] to New Zealand and authorised the Central Authorities in New Zealand and England to take the necessary steps to secure such return pursuant to the Hague Convention.'

[5] The detailed contact arrangements can be recorded by adopting paras [13]–[18], inclusive of the judgment of Judge Costigan given on 21 February 2005 in the Family Court of New Zealand. Those paragraphs are as follows:

[13] Both parties accept that the type of contact that the applicant enjoyed with [X] at the time of his removal varied from the contact that was either agreed or simply took place informally subsequent to his birth in November 2000. It is now common ground that the respondent visited family members on two separate occasions in the first few months of [X]’s life. This precluded the applicant’s contact with [X] being on a daily basis, as he had initially contended. The respondent was not absent, however, for an extended period on either occasion. It appears that contact resumed on her return to Christchurch.

[14] From about July 2001, it was agreed that the applicant would have contact with [X] on Tuesdays, Thursdays and Sunday afternoons. There were difficulties at times with this arrangement. It nonetheless continued until February 2002 when a further variation was agreed to. This was principally to accommodate work commitments of the applicant. The effect of this agreement was that a new pattern of contact was established. It took place on Wednesday evenings after the applicant had finished work and also on Sunday afternoons. This was the contact that was in place and which the applicant anticipated would continue at the time of [X]’s departure.

[15] Whilst the frequency of contact at times has been disputed, no issue has arisen in respect of the applicant’s entitlement to that contact. It is relevant that the applicant was involved in a car accident in December 2002 and suffered head injuries as a consequence. This had an effect on contact arrangements. There had also been a period of time prior to this when the applicant had a number of personal issues to contend with. This had an impact on his contact with [X]. For some time after his car accident he resided with his parents. Contact arrangements continued, however, with assistance being given by the respondent in respect of transportation. At other times, the applicant or his mother were responsible for transportation to enable contact to take place.

[16] The Court received clarification from the bar of the applicant’s evidence that he had helped arrange both a christening party and a birthday party for [X]. This was in fact a combined party held when [X] reached 2 years of age in November 2002. To some extent that information is confirmed in the supporting evidence of Mr RT Keith. The applicant boarded with Mr RT Keith for a period of about 2 years.

[17] This particular evidence has relevance because it points to a gathering of members of both the maternal and paternal families and friends on what was an important occasion for the child and his parents. It also points to at least acquiescence and approval by the respondent in a guardianship decision affecting [X], namely his christening. This event also paints a picture somewhat at odds with the respondent’s contentions that the applicant had no significant input into [X]’s life.

[18] Allegations have now been made by the respondent as to inappropriate parenting and behaviour by the applicant towards [X]. These allegations have been refuted by the applicant. They are also clearly inconsistent with the observations of the deponent, Mr RT Keith, as to the nature of the relationship between the applicant and [X] during the time contact took place at his home.'

[6] Having set out the family history, I can now come to the litigation chronology. On 15 November 2004 an originating summons was issued in London on the father's behalf seeking a return order under the Hague Convention. Alternatively, X's return was sought under the court's inherent jurisdiction. Direction orders were made on 16 and 23 November for final hearing on 16 December. However, on that day the defendant's counsel proposed, and the plaintiff's counsel and the judge agreed that:

'the plaintiff do obtain from a court of competent jurisdiction in New Zealand—

- (i) a description of any rights in relation to the said child enjoyed by the father, and
- (ii) a decision whether the removal of the child ... was wrongful in the meaning of Articles 3 and 5 of the Hague Convention as being in breach of the plaintiff's rights of custody pursuant to Article 15 of the Hague Convention.'

[7] Although the drafting is not elegant, there can be no doubt that this was a request to the plaintiff pursuant to Art 15 to obtain from the New Zealand court a determination of (i) his rights in relation to the child and (ii) whether the removal had been wrongful within the meaning of Arts 3 and 5. In fact, it is only the second question that Art 15 contemplates being referred for determination. We were informed that the addition of para (i) resulted from conflicting written opinions from specialist New Zealand lawyers as to whether there had ever been any agreement between the parents to define and safeguard the plaintiff's relationship with his son. The contention of the defendant's expert was that there was no such agreement and accordingly the defendant had been at liberty to leave New Zealand for good without regard to the interests of the plaintiff.

[8] Inevitably, Hedley J's request of 16 December effectively acted as a stay of the originating summons. Although the response of the Family Court of New Zealand was swift, its judgment was not available until 21 February. That resulted in the restoration of the originating summons before Charles J on 4 March. He was informed that the defendant was appealing the decision of Judge Costigan. He referred the case to me as the Liaison Judge for England and Wales with a number of questions, largely relating to timetabling in New Zealand. Accordingly I conferred with the Liaison Judge for New Zealand, Judge Boshier, the Principal Judge of the Family Court. Through his intervention the mother's appeal to the High Court was expedited and dismissed on 21 March. That led to a further directions hearing before yet another judge of the Family Division. The outcome was the fixture of the final hearing for 26 April. On that day it was listed before Singer J. He was fresh to

the case and the seventh judge to take a hand since the issue of the originating summons.

[9] There was no oral evidence and no material dispute on the written evidence. The defendant's case was simple. On her behalf Mr Reddish submitted that the determination of the High Court of New Zealand was not binding and that clear authority in this court demonstrated that our interpretation of Arts 3 and 5 of the Hague Convention diverged starkly from the New Zealand interpretation. According to our interpretation, the only permissible conclusion was that at the date of removal the father was enjoying rights of contact as defined by Art 5(b) and not rights of custody as defined by Art 5(a).

[10] Singer J upheld Mr Reddish's submission despite the efforts of counsel then instructed on behalf of the father to persuade him to support the determination of a court demanding our highest respect.

[11] The arguments presented to Singer J are essentially the arguments that have been presented to us on the appeal. Before considering those submissions I will set out the relevant statutory provisions.

[12] Hedley J's request to the Family Court of New Zealand was made pursuant to Art 15 of the Hague Convention as enacted by the Child Abduction and Custody Act 1985. Article 15 provides the mechanism thus:

'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 States shall so far as practicable assist applicants to obtain such a decision or determination.'

[13] The relevant provisions of Art 3 of the Hague Convention are as follows:

'The removal or retention of a child is to be considered wrongful when—

- (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 ...

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.'

[14] Article 5 provides two definitions as follows:

'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.’

[15] The contrast between ‘rights of custody’ and ‘rights of access’ has been very fully considered in a number of authorities in this court. Before further reference I turn to the law of New Zealand and the basis upon which the Family Court and the High Court concluded that the removal of X had been wrongful.

[16] In incorporating the Hague Convention many jurisdictions have taken the same path as this jurisdiction, the path of more or less wholesale incorporation. Thus the majority of the Convention is simply a schedule to our Child Abduction and Custody Act 1985. However, other jurisdictions have preferred to achieve the effect of incorporation by independent legislative provisions. New Zealand has followed this latter course. Thus it was through the New Zealand Guardianship Amendment Act 1991 that the Hague Convention was implemented. The effect of Arts 3 and 5 was achieved by s 4 of the Act in these terms:

‘Rights of Custody

For the purposes of this part of this Act, the term “rights of custody”, in relation to a child, shall include rights relating to the care to the person of the child and, in particular, the right to determine the child’s place of residence, attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.’

[17] Thus the decision of the Family Court determining whether or not the removal of X had been wrongful required the application to the agreed facts of s 4 of the Act rather than Arts 3 and 5. The desirable goal of a uniform construction of the Convention amongst all the Contracting States may obviously be impeded by the preference of some States to embark upon a redrafting exercise in the process of implementing the Convention.

[18] As to the basis upon which the courts of New Zealand determined the reference in the applicant’s favour, it is essentially to be found in para [20] of the judgment of the High Court, as follows:

‘In terms of the test adopted in New Zealand did Mr Hunter have rights of custody? We consider that he did. His access to his son did not extend to overnight care of the child. On the other hand, over a period of some years Mr Hunter exercised regular access to his son on either 3 or 2 days of each week and for periods of some hours. There was always a defined and committed relationship between the two. This, we consider, constituted substantial intermittent possession and care of the child.’

[19] The court went on to consider whether the arrangements between the parents constituted an agreement having legal effect within the terms of s 18 of the New Zealand Guardianship Act 1968 which provides:

'Effect of custody agreements

an agreement between the father and mother of a child with respect to the custody of or upbringing of or access to the child shall be valid, whether or not either of the parties is a minor, but shall not be enforced if the court is of opinion that it is not for the welfare of the child to give effect to it.'

[20] The court rejected the submission of the mother's counsel that an informal oral arrangement, such as these parents had made, did not constitute an agreement for the purposes of s 18. That submission had been rejected by Judge Costigan and the High Court endorsed both her conclusion and her reasoning.

[21] On the first question, the submission of the mother's counsel was that it was essential to maintain a distinction between rights of custody and rights of access. In support of that submission she relied heavily on the authorities in this court. In rejecting her submission the High Court observed:

'However, the fact remains that the (New Zealand) Court of Appeal has fashioned an approach in this country which may well be different to that in other jurisdictions, but which is nonetheless binding on both the Family Court and this court.'

[22] That citation brings us to the crux of this case. New Zealand has rejected the approach adopted in this jurisdiction and is ready to categorise simple contact arrangements as constituting 'rights of custody'. The authorities in this jurisdiction, to which I will shortly refer, do not permit that liberality. Accordingly, Singer J felt constrained to reject the determination of the New Zealand courts and to hold that, on the construction of Arts 3 and 5 adopted in this jurisdiction, the removal of X had not been wrongful.

[23] The cases in this court which uphold the boundary between Art 5(a) and 5(b) of the Hague Convention are, most recently, *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192 (*Re V-B*) and *Re P (Abduction Consent)* [2004] EWCA Civ 971, [2004] 2 FLR 1057 (*Re P*). In both these cases the lead judgment was given by Ward LJ. In the first of these cases he said at 198H:

'It seems to me, therefore, that the proper approach to the consideration of whether or not the father's rights amounts to rights of custody is to view the expression broadly, endeavouring to give it a universal meaning but one which preserves the essential distinction between, on the one hand, the rights of custody which should only be varied by the courts of the child's habitual residence for the purpose of which consideration the child should be speedily returned, and, on the other, the rights of access, the protection of which do not require so Draconian a remedy and which can be safeguarded in the country to which the children will have been lawfully and not wrongfully removed.'

[24] In the latter case he said at para [60]:

‘Accordingly on this aspect of the case, we conclude that:

- (1) the Hague convention requires the court to give the expression “rights of custody” an autonomous interpretation;
- (2) the reference in Art 3 to “rights of custody attributed to a person under the law” of the child’s habitual residence is not a choice of law of that State in the sense that if the domestic law (still less the conflict-of-laws rule) does not characterise the right as a right of custody, then it will not be such a right for Hague Convention purposes;
- (3) the task of the court is to establish the rights of the parents under the law of that State and then to consider whether those rights are rights of custody for Hague Convention purposes;
- (4) in considering whether those rights are rights of custody, the court is entitled and bound to give a purposive and effective interpretation to the Hague Convention.’

[25] I turn now to the rival submissions. On behalf of the father, Mr Setright QC, who did not appear at the hearing before Singer J, boldly submitted that since one judge of the Division had requested the determination by the courts of the child’s habitual residence of the essential question of whether the removal had been wrongful, the determination was conclusively binding upon the judge before whom the originating summons was eventually listed. He added that the refusal of a positive determination following from an Art 15 request was unprecedented. If he failed in that submission, Mr Setright contended that the more liberal construction of ‘rights of custody’ adopted by the New Zealand Court of Appeal should be preferred despite its obvious conflict with prior decisions of this court by which we would ordinarily be bound. He suggested that the New Zealand approach was not isolated but was representative of a general trend that liberated us from the constraints of the authorities followed by Singer J.

[26] Mr Reddish, in a succinct skeleton argument, adopted and supported the reasoning of the judge.

[27] On the Art 15 point, I note that before Judge Costigan it was common ground ‘that the declaration sought is not binding on the requesting authority or the Courts of that country but is designed to be of assistance’: see para [22] of her judgment. That concession by the father’s counsel in New Zealand is, in my judgment, a proper concession. It rests both on the construction of Art 15 and on general principles. It is supported by the relevant paragraph in Lowe, Everall and Nicholls on *International Movement of Children* (Family Law, 2004), para 15.9 at 284 which states:

‘Accordingly, a declaration made under Art 15 can be no more than persuasive, and cannot bind the parties or the authorities of the requested State, who will accept as much or as little of the judgment as they choose.’

[28] The authority cited in the footnote is the case of *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442. In that case Lord Brandon of Oakbrook said of a prior declaration by an Australian court that a removal from Australia had been unlawful:

‘I pay to Anderson J’s decision the respect that comity requires, but the Courts of the UK are not bound by it and for the reasons which I have given I do not consider that it was rightly made.’

In that case the declaration had not been made pursuant to an Art 15 request, but that distinction does not invalidate the principle stated. It is, in my judgment, an important principle and there are examples in our case-law of instances in which negative determinations, whether or not resulting from an Art 15 request, have been rejected in the adoption of a purposive construction leading to the making of a return order. Mr Setright has suggested that the obligation to give the Convention a purposive construction stretches so far as to justify the proposition that, whilst a negative determination is not conclusive, a positive determination by a requested state of the child’s habitual residence is. In my judgment, there is no sufficient foundation for that submission and I reject it.

[29] Turning to Mr Setright’s second submission, it is fairly said that in determining whether or not the father exercised rights of custody immediately prior to X’s removal this court applies not English law but the English perception of the autonomous law of the Hague Convention. That proposition can be easily demonstrated by reference to the speech of Lord Browne-Wilkinson in the case of *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872, where at 88A–C and 882 respectively he reviewed relevant reported cases in other jurisdictions.

[30] Equally, I recognise that the Hague Convention is a living instrument. Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore, evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came into force in 1980. Article 31(3)(b) permits a construction that reflects ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.

[31] Let me take as an example Art 21 of the Hague Convention, an Article that deals with access. The decisions in this jurisdiction of *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam 216, [1993] 1 FLR 669 and *Re T and Others (Minors) (Hague Convention: Access)* [1993] 2 FLR 617 held that the Article did not permit the making of a contact order by a requested State. Thus, a court in this jurisdiction entertaining an application under the Convention would have to require the issue of separate proceedings within our domestic law to obtain the jurisdiction necessary to make a contact order. In the intervening 12 years the majority of the common law Contracting States have adopted a more positive position and thus one that extends the utility of the Convention. Plainly, in my judgment, when the point returns for consideration to this court it is open to this court to reconsider the issue in the

light of international jurisprudence. Since the question is to be decided according to Hague Convention law, this court is not eternally bound by the decision properly taken over 12 years ago reflecting the international jurisprudence as it then was.

[32] However, those recognitions are by no means sufficient to ensure Mr Setright's success. The difficulty for him is that the clear decision of the court in *Re V-B* was taken in March 1999 and the decision in *Re P* within the last 12 months. Mr Setright had the opportunity to demonstrate that the New Zealand approach had become general, if not universal, but he produced nothing but responses to a request for information sent by his instructing solicitors to the central authorities of the other Contracting States. Although the request was only sent on 1 June, it is a demonstration of how committed is the international community to collaboration. No less than 20 responses were received and many of them had clearly involved a great deal of effort in their preparation. However, Mr Setright was unable to mine any gold from this seam.

[33] The inevitable conclusion is that Mr Setright fails in both his submissions and the appeal must, therefore, be dismissed.

[34] However, I wish to record that I dismiss this appeal with considerable regret. This father involved himself profoundly in X's life from the moment of his birth. Apart from his frequent and consistent sharing of X's life, he ensured that both sides of X's family were involved in major events such as the christening/birthday. Through him X had the advantage of grandparents on both sides. The complete removal of the father from X's life without preparation or forewarning must have been extremely distressing to the father but also, and of greater importance, a harmful deprivation to X. Putting authority aside, children should be protected from such harm.

[35] Both Mr Setright and Mr Reddish agree that there is a general movement away from the labels that were appropriately adopted in 1980 in the drafting of the Hague Convention but which are no longer legal currency. They both submit that parental responsibility is now the determinative factor. Both submit that where a father holds parental responsibility, whether by virtue of marriage or, in the absence of marriage, by virtue of agreement order or operation of law, then the father enjoys rights of custody even if he has little or no share of the child's monthly calendar.

[36] In this jurisdiction as a consequence of s 111 of the Adoption and Children Act 2002 with effect from 30 December 2003 an unmarried father obtains parental responsibility if he appears as the father on the registration of the child's birth. Similarly, in New Zealand s 18 of the Care of Children Act 2004 achieves the same result from 1 July 2005 for a father whose particulars are registered on the child's birth certificate.

[37] Thus, with the passage of time the number of fathers who have not acquired parental responsibility by one route or another will be a diminishing band. Accordingly, the distinction carefully drawn in our jurisprudence between 'rights of custody' and 'rights of access' will be of diminishing significance.

[38] Where a father does not hold parental responsibility, in determining whether or not he held 'rights of custody' at the date of the removal, in my judgment, particular regard should be paid to the sharing arrangements then in operation. Nowadays joint residence orders are not uncommon where the division of time between the two parents directed by the court leaves one with

what could equally be expressed as contact on alternate weekends and half school holidays and half-terms. Equally, there are contact orders which by agreed extension leave the contact parent in possession for a very substantial proportion of the child's monthly calendar.

[39] The trend away from the use of labels determinative of rights is mirrored in the New Zealand Care of Children Act 2004 which came into force on the first of July. Part 2 of the statute deals in its first subpart with guardianship, responsibility for children and decisions about children.

[40] It seems to me that there are two lessons to be learned from this appeal. The first is in the use of Art 15. In my judgment, the Art 15 request was not appropriate in this case. The dispute between the New Zealand experts as to whether there was an agreement recognised in law regulating the father's contact was a byway. The mother's real defence was that what he exercised was no more than a few hours of visiting contact each week and that, according to this jurisdiction's construction of Arts 3 and 5, could not have amounted to 'rights of custody'. That defence had to be adjudged here. The New Zealand adjudication would not be binding. Its request merely risked the waste of precious months and substantial legal costs. It has extended what is intended to be a swift summary remedy into a lengthy and complex piece of international litigation.

[41] I have had the advantage of reading in draft the judgment of Dyson LJ with which I agree. Had Art 15 been directed to requests to ascertain rights under the domestic law of the requesting State its utility would be more apparent. Where, however, the question for determination in the requested State turns on a point of autonomous (ie the Hague Convention) law then I find it hard to see in what circumstances an Art 15 request would be worthwhile.

[42] Secondly, it must be recognised that in any Hague case involving the construction or interpretation of an Article of the Convention the answer is to be found in the international jurisprudence of the Contracting States. Therefore, counsel preparing their skeleton arguments cannot simply research and cite relevant decisions in this jurisdiction. It is incumbent on them to research the reported decisions in other Contracting States. The task is made easy by the service that the Permanent Bureau has provided by setting up and maintaining (at no small expense) the INCADAT website.

[43] I should perhaps have mentioned that within his submissions Mr Setright suggested that Singer J had had insufficient regard to considerations of comity between our jurisdiction and the jurisdiction of New Zealand. In my judgment, the criticism was without foundation since Singer J was bound by clear authority to reject the determination of the New Zealand courts. However, Mr Setright's point is valid in the sense that our rejection of the New Zealand determination does seem churlish when the request has been fulfilled so swiftly and with such impressive judgments. It may well be that the New Zealand decisions will influence other jurisdictions and lead the way to a readier finding of breach of 'rights of custody' in cases where the father's long established, frequent and regular relationship with the child is cut off by a unilateral removal. Perhaps the issues debated in the decisions of this case could usefully be considered during the next Special Commission to consider the operation of the Hague Convention, provisionally fixed for March 2006.

[44] Of course, the dismissal of the father's appeal does not signal a conclusion of the principal issue. His application for a return order under the

inherent jurisdiction remains to be decided. We have given directions to ensure that all outstanding issues are listed for final hearing before the end of the month.

DYSON LJ:

[45] I agree that this appeal should be dismissed. I add a few observations of my own, in particular on the question of when it is appropriate to request a determination pursuant to Art 15 of the Hague Convention, and the significance of such a determination.

[46] There is no longer any doubt as to the approach that a court should adopt when determining whether the removal or retention of a child is wrongful within the meaning of Art 3. As Ward LJ said in *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192, at 196B, the first task is to establish what rights, if any, the applicant had under the law of the State in which the child was habitually resident immediately before his or her removal or retention. I shall refer to this as ‘the domestic law question’. This question is determined in accordance with the domestic law of that State. It involves deciding what rights are recognised by that law, not how those rights are characterised. As Lord Donaldson of Lynton MR said in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403, at 663F and 413 respectively: ‘it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of “rights of custody”’. To similar effect, Millett LJ said in *Re F (A Minor) (Child Abduction: Rights of Custody Abroad)* [1995] Fam 224, [1995] 2 FLR 31, at 235 and 40F respectively, that the Colorado lawyers should not have been asked ‘whether the appellant’s conduct in removing the child from Colorado was wrongful by the law of Colorado, whether at the time of the child’s removal the respondent had what a Colorado court would describe as “rights of custody” or whether the child’s removal would be regarded by a Colorado court as being in breach of those rights’. The only question which the Colorado lawyers should have been asked was what rights, if any, were possessed by the applicant in relation to the child at the time of his removal from Colorado.

[47] The next question is whether those rights are properly to be characterised as ‘rights of custody’ within the meaning of Arts 3 and 5(b) of the Hague Convention. I shall refer to this as ‘the Convention question’. This is a matter of international law and depends on the application of the autonomous meaning of the phrase ‘rights of custody’. Where, as in the present case, an application is made in the courts of England and Wales, the autonomous meaning is determined in accordance with English law as the law of the court whose jurisdiction has been invoked under the Convention. But as Lord Browne-Wilkinson said in *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872, at 87F and 882 respectively, the Hague Convention cannot be construed differently in different jurisdictions: it must have the same meaning and effect under the laws of all Contracting States. In *R v Secretary of State for the Home Department ex parte Adan; R v Same ex parte Subaskaran; R v Same ex parte Aitseguer* [2001] 2 AC 477, [2001] INLR 44, at 517 and 56 respectively, when referring to the meaning of the United Nations Convention Relating to the Status of Refugees 1951 and Protocol of 1967, Lord Steyn said:

'In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.'

[48] This is the background against which the utility of a request for a determination under Art 15 should be considered. An assertion that the removal of a child is wrongful within the meaning of Art 3 entails three propositions, viz: (i) the applicant enjoys certain rights in relation to the child; (ii) these rights are 'rights of custody' within the meaning of the Convention; so that (iii) the removal of the child is in breach of those rights and therefore wrongful.

[49] The first proposition raises the domestic law question. In many cases this question is satisfactorily resolved on the basis of expert evidence; or in reliance on a certificate or affidavit under Art 8(f) 'emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State'; or by taking notice 'directly of the law of, and judicial or administrative decisions, formally recognised or not in the state of habitual residence of the child, without recourse to the specific procedures for the proof of that law or the recognition of foreign decisions which would otherwise be applicable' (see Art 14).

[50] But it can also be resolved by a determination pursuant to Art 15: a request for a determination that the removal was wrongful within the meaning of Art 3 can include a request for a determination of the domestic law rights (if any) of the applicant in relation to the child. Such a request was made in the present case. Hedley J made a consent order that the father obtain from a court of competent jurisdiction in New Zealand 'a description of any rights in relation to the said child enjoyed by the father'. The decision of a court of competent jurisdiction is, obviously, more authoritative on the domestic law question than the opinion of an expert. In some circumstances, it is preferable to obtain a court ruling. But delay is inimical to the best interests of the child. The present case demonstrates that there may be a price to pay for seeking an authoritative ruling under Art 15. It is reasonable to believe that the domestic law question could have been determined earlier in the present case if it had been resolved by the courts of this country without invoking Art 15. I hasten to say that I intend no criticism of the New Zealand courts which heard and decided the case and the appeal with commendable speed. But recourse to Art 15 will usually involve delay.

[51] Whether it is right to request a determination on the domestic law question under Art 15 will depend on the circumstances of the case. These will include (i) the nature of the dispute raised by the question, (ii) whether the parties intend to adduce evidence from experts who appear to be suitably qualified to express an opinion on the issues raised by the dispute, (iii) whether the question can be satisfactorily answered on the basis of Arts 8(f) or 14, and (iv) what delay is likely to be caused by the request. In many cases, the court is likely to conclude that the domestic law question can be resolved without recourse to a request under Art 15.

[52] I turn to consider the use of Art 15 to obtain a determination on the Convention question. It is convenient to refer to *Re J (A Minor) (Abduction:*

Custody Rights) [1990] 2 AC 562, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442. The child was habitually resident in Western Australia and was removed by his mother to the UK. The father issued an originating summons in Western Australia and the judge made an order vesting sole custody rights in the father and declared that the removal of the child was wrongful within the meaning of Art 3 of the Hague Convention. The father then issued proceedings in this country for the return of the child. It was held by the courts of this country that the removal was not wrongful. Although no order had been made pursuant to Art 15, Lord Donaldson of Lymington MR referred to that Article and said at 568D and 446 respectively:

‘In my judgment, Art 15 and, indeed, Art 14 were intended to assist a court which is asked to order the return of a child to ascertain the law of the other Contracting State, insofar as that law is relevant to whether the removal or retention was wrongful within the meaning of Art 3. It cannot, as I see it, have been the intention that the courts of the other Contracting State should be asked to determine the issue of the applicability of Art 3 insofar as it turns on the meaning of the Convention itself, because that is something which the courts of both countries are equally able to determine. Indeed, they would be expected to arrive at similar determinations. If, unhappily, this did not occur, the court which is being asked to order the return of the child would be bound to apply its own view of the Convention, particularly where, as here, the Convention only takes effect by virtue of a domestic Act of Parliament.

In this case we have had the advantage of the reasons for his judgment which were given by Anderson J when making his ex parte order on the father’s application for custody and guardianship. These reasons cover not only the law of Western Australia in relation to custody, but also, I think, on a fair reading, his view of the applicability of the Convention on the facts as he knew them. The judge’s views on Western Australia law I, of course, accept unreservedly. The latter are in a slightly different category in that, as I say, I think that we are under an obligation to form our own view, albeit it must be one which takes the fullest possible account of the views which have been expressed by the judge.’

[53] In the House of Lords, Lord Brandon of Oakbrook made no reference to Art 15 but at 577H and 453 respectively said:

‘I recognise that Anderson J thought fit to make a declaration that J had been wrongfully removed from Australia. I pay to his decision the respect which comity requires, but the courts of the UK are not bound by it and for the reasons which I have given I do not consider that it was rightly made.’

[54] In that case, the court of Western Australia had made a ruling before the matter came before the courts of this country. In those circumstances, one can well understand why Lord Donaldson of Lymington MR said that it was necessary to take the fullest possible account of the views expressed by the Australian judge, and why Lord Brandon of Oakbrook paid them the respect

which comity required. But those views were in no way binding on the courts of this country.

[55] When Lord Brandon of Oakbrook spoke of paying ‘respect’ to the views of the Australian judge, I understand him to have meant no more than that. This language is in substance no different from that of an appellate judge who, when overruling the decision of an experienced judge, says: ‘the views of Judge X in this area of the law deserve the greatest respect, but in my opinion he reached the wrong conclusion’. In saying this, the appellate judge is not paying deference to the decision of the judge below in the public law sense, or allowing a margin of appreciation in the sense explained in the Strasbourg jurisprudence, or according latitude to a person who is exercising a discretion. He is merely saying: ‘this is an experienced judge whose views must always be taken seriously, but in my view on this occasion he is wrong’.

[56] In my judgment, therefore, no useful purpose is served in asking for a determination solely on the Convention question. Take the present case. The courts of New Zealand are no better placed than the courts of this country to decide whether the rights enjoyed by the applicant in relation to the child according to New Zealand domestic law amount to rights of custody within the autonomous meaning of Arts 3 and 5 of the Hague Convention. It is regrettable, but perhaps inevitable, that there are divergences of view as to the international meaning of concepts such as ‘rights of custody’ and ‘rights of access’. The present case illustrates this only too vividly, and shows why there is no point in obtaining a ruling on the Convention question.

[57] The English approach to the interpretation of these concepts has been to emphasise the difference between them. Thus, in *Re V-B*, Ward LJ said at 197C:

‘... One goes to the preamble which expresses the desire of the States signing the Convention:

“... 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 habitual residence, as well as to secure protection for rights of access.”

One sees at once a sharp distinction drawn between rights of custody and rights of access. The distinction was exposed in the trenchant judgments of Hale J in *S v H (Abduction: Access Rights)* [1998] Fam 49, [1997] 1 FLR 971 and *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146, with which I agree. In the latter she said at 157F:

“Thus a deliberate distinction is drawn between rights of custody and rights of access ... Rights of custody are protected under Art 12 by the remedy of speedy return to the country where the children were habitually resident before they were removed. Rights of access are protected under Art 21 by remedies to organise and secure their effective exercise in the country where the children are now living.”

[58] As the present case demonstrates, New Zealand does not recognise the sharp distinction between rights of custody and rights of access which the

courts of this country have identified in the Hague Convention. The New Zealand approach is that a parent who has 'substantial intermittent rights to the possession and care of the child' may have rights of custody. Singer J was right to conclude that the New Zealand interpretation of the Convention question that arises in this case is wrong.

[59] I would, therefore, dismiss this appeal for the reasons that he gave, which in substance are the same as those expressed by Thorpe and Lloyd LJ. I would add that I am not persuaded that, on the facts of this case, it was right to request a ruling on the domestic law question under Art 15. For the reasons that I have given, still less was there justification for a request for a ruling on the Convention question.

LLOYD LJ:

[60] I agree that the appeal should be dismissed.

[61] In particular, I agree as to the disadvantages of following the Art 15 procedure in the present case. There could be cases in which it would be valuable to have an authoritative and speedy decision from the courts of the State of the child's habitual residence before removal, if there is doubt as to the extent and nature of the rights exercised by the applicant before the removal. Those rights are likely to have taken effect under and been governed by the law of that State. Depending on the nature of the dispute and the circumstances of the case, recourse to a court in that State may be the best way of resolving the dispute, but as Dyson LJ says, there are also other, possibly quicker and more economical, methods as well.

[62] As Thorpe LJ says, that is not, in terms, what Art 15 provides for, but resolving a dispute as to what the rights were would be an integral part of the process of deciding whether the removal was wrongful. In the present case, the question what were the rights was posed in terms in Hedley J's order, together with the general question, provided for by the Article, whether the removal was wrongful.

[63] Like Thorpe and Dyson LJ I welcome the speed with which the New Zealand Family Court heard and decided the case. I would have found the result of that hearing the more helpful if the specific question as to the nature of the rights had been answered in terms in the judgment or in an order giving effect to the judgment. We were told that no order existed in written form. However interesting the question as to the status of the rights may be for New Zealand lawyers, it seems to me regrettable, from the point of view of the parties to this litigation and of X, that an appeal was brought against the Family Court's decision.

[64] As my Lord says, however, leaving aside the question whether the contact arrangements between father and child were legally enforceable, there does not seem to have been any doubt as to what those arrangements were. The applicant's rights were, at the highest, simple contact arrangements.

[65] In *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403 this court held that a father who had contact rights but was also entitled to a veto over the removal of the child from the jurisdiction, except for short periods, had rights of custody, in Hague Convention terms, because the right of veto amounted to a right to determine the residence of the child. On the other hand, this court has also held that, if the applicant has only the right to be informed about proposals for removal, that does not amount to a right of custody: see *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192.

Thus, although a removal from the jurisdiction will profoundly affect any subsisting contact arrangements, the present state of the decided cases in England and Wales is such that an English court cannot hold that simple contact arrangements constitute rights of custody under the Hague Convention.

[66] The New Zealand courts interpret the Hague Convention differently. The Court of Appeal there has held that contact rights do amount to rights of custody: see *Gross v Boda* [1995] 1 NZLR 569 and *Dellabarca v Christie* [1999] 2 NZLR 548. That conflict results in an unavoidable but regrettable lack of comity between our courts and those of New Zealand in a case where the applicant has contact rights alone, and does not have parental responsibility.

[67] For this reason it seems to me that Singer J had no alternative, and nor does this court, but to hold that the applicant father does not have rights of custody within the meaning of the Hague Convention, and that X is, therefore, not to be returned to New Zealand summarily. Whether he should in fact be returned will depend on the outcome of the continuing proceedings in the Family Division, and the view taken by the court of what is in his best interests.

Appeal dismissed.

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Dawson Cornwell for the respondent

ALISON PERRY
Law Reporter