RE D (ABDUCTION: RIGHTS OF CUSTODY) [2006] UKHL 51

House of Lords

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-Under-Heywood

16 November 2006

Abduction – Custody rights – Determination sought from requesting state – Further expert evidence permitted and determination not followed – Impact of delay – Moral considerations – Views of child

The mother and father were divorced, the child, then one year old, remaining with the mother. When the child was 4 years old, the mother removed the child from Romania to England without the father's knowledge or consent; almost immediately the father sought the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). The mother's case was that the removal had not been wrongful, in that the father had no custody rights to be breached by the removal. The English court sought determination of that issue from Romania under Art 15 of the Hague Convention. After considerable delay, the final ruling from the Romanian courts was that the removal had not been wrongful, because the father's rights had not amounted to rights of custody; joint custody had ended on divorce, and thereafter the parent awarded custody on divorce, in this case the mother, exercised parental rights and fulfilled parental duties, while the parent without custody had a right to personal contact with the child, and to watch over, but not to direct, the child's upbringing. None of the rights granted to the non-custodial parent on divorce involved a right of veto or to decide the child's place of residence; the agreement of the non-custodial parent was required only in the case of certain specified measures, including adoption and loss of Romanian citizenship. Although subsequent legislation required both parents to consent to the removal of a child from Romania, that law did not apply retrospectively to this case. The English court did not consider itself bound by the ruling of the Romanian court and ordered jointly-instructed expert evidence on the issue. The expert differed from the Romanian court, and concluded that the father's potential right to veto removal of the child had amounted to rights of custody. The English court ordered the immediate return of the child under the Hague Convention, notwithstanding that the child had been living in England for over 3 years. The Court of Appeal refused the application of the child, now 8 years old, to be joined as a party to the appeal, instead ordering an interview with a Children and Family Court Advisory and Support Service (CAFCASS) officer; the officer confirmed that the child was expressing very strong objections to returning to Romania. The Court of Appeal dismissed the mother's appeal. The child was given leave to intervene, through his litigation friend from the Children's Legal Centre, in the mother's appeal to the House of Lords.

Held – allowing the appeal –

(1) There had been no warrant for the English court to allow the father to challenge the Romanian court's decision as to the contents of his rights under Romanian law. An Art 15 ruling from a requesting state must be conclusive as to the parties' rights under the law of the requesting state save in exceptional circumstances, for example where the ruling had been obtained by fraud or in breach of the rules of natural justice. Further, the foreign court was much better placed than the English court to understand the true meaning and effect of its own laws in Hague Convention terms and only if its characterisation of the parent's rights was clearly out of line with the international understanding of the Hague Convention's terms should the court in

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the requested state decline to follow it. If an Art 15 ruling was necessary, great care had to be taken to keep the inevitable delay involved to a minimum (see paras [6], [43], [44], [70]–[72], [81], [83]).

(2) The right to insist that a parent did not remove the child from the home country without first obtaining either consent from the other parent or a court order, the 'right of veto', amounted to 'rights of custody' under the Hague Convention. There was no good reason to distinguish the court's right of veto, recognised as 'rights of custody', from a parental right of veto, whether the latter arose by court order, agreement or operation of law. However, a parent's potential right of veto would not qualify as 'rights of custody'; if all that the non-resident parent had was the right to go to the court and ask for an order about some aspect of the child's upbringing, including relocation abroad, that did not amount to 'rights of custody' under the Hague Convention. To hold otherwise would be to remove the distinction between 'rights of custody' and 'rights of access' (see paras [9], [37], [38]).

(3) While the defences in Art 13 should be restrictively applied to ensure that the objectives of the Hague Convention were not defeated, that does not mean that it should never be applied at all. There were circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Hague Convention to require it. Although in many cases extracting undertakings from the applicant parent would be sufficient to prevent placing the child in an intolerable situation, such undertakings were not invariably sufficient to prevent this. It was inconceivable that a court which had reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm, or otherwise place him in an intolerable situation, would nevertheless return him. Article 13 'defences' could be made out on the facts of the individual case, regardless of the court's view of the morality of the abductor's actions. Moral condemnation was both unnecessary and superfluous; the court had heard none of the evidence which would enable it to make a moral evaluation of the abductor's actions, was not in a position to judge and should refrain from doing so (see paras [51], [52], [55], [56]).

(4) A delay of this magnitude in securing the return of the child had to be one of the factors in deciding whether the child's summary return, without any investigation of the facts, would place the child in a situation which he should not be expected to have to tolerate (see paras [53]).

(5) Children ought to be heard far more frequently in Hague Convention cases than had been the practice hitherto. The principle set out in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) that children should be given an opportunity to be heard when applying Arts 12 and 13, although strictly only applicable to cases within the European Union, was of universal application and consistent with international obligations under Art 12 of the United Nations Convention on the Rights of the Child 1989. There was a large difference between taking account of a child's views and doing what the child wanted, but there was a growing understanding of the importance of listening to children involved in children's cases. In most cases an interview with a CAFCASS officer would be sufficient, but in other cases it might also be necessary for the judge to hear the child, especially if the child had requested this. Only in a few cases would full scale legal representation be necessary, but whenever it seemed likely that the child's views and interests might not be properly presented to the court, in particular if there were legal arguments which the adult parties were not putting forward, the child should be separately represented. Brussels II Revised required the court to address at the outset whether and how the child was to be given the opportunity of being heard and there was no reason why this should not happen in non-European cases as well; the more uniform the practice the better, and the earlier the issue of the child's views was addressed the less likely that the issue would cause delay (see paras [57]–[61]).

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Per Lord Hope of Craighead: courts throughout the UK would give effect to ne exeat clauses that prohibited the removal of a child from another Contracting State; it was unfortunate that some of the courts in North America differed on this point (see para [19]).

Per Lord Browne of Eaton-Under-Heywood: assuming, without deciding that declarations as to wrongful removal made by English courts on a without notice application might properly be made under s 8 of the Child Abduction and Custody Act 1985, they should carry altogether less weight than true Art 15 determinations made in response to a request from a foreign state (see para [80]).

Statutory provisions considered

Child Abduction Act 1984, ss 1, 6
Child Abduction and Custody Act 1985, ss 8, 9
Children Act 1989, s 13(1)(b), (2)
Children (Scotland) Act 1995, s 2(3), (6)
Human Rights Act 1998, s 6
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 6, 8
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(a), 8(a), 12, 13(a), 14, 15, 16, 20, 21
United Nations Convention on the Rights of the Child 1989
Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Art 11.4

Cases referred to in judgment

Bader v Kramer (2006) 445 F 3d 346, US CA (4th Cir)
C v C (Abduction: Rights of Custody) [1989] 1 WLR 654, [1989] 1 FLR 403, [1989] 2 All ER 465, CA
Croll v Croll (2000) 229 F 3d 133, US CA (2nd Cir)
Director General, Department of Families, Youth and Community Care v Hobbs [1999] FamCA 2059, Aust FC
DS v VW and JS and Rodrigue Blais [1996] 2 SCR 108, Can Sup Ct
D v C [1999] NZFLR 97, NZ CA
Fawcett v McRoberts (2003) 326 F 3d 191, US CA (4th Cir)
Foxman v Foxman (5271/92) (unreported) 1992, Israeli HC
Furnes v Reeves (2004) 362 F 3d 702, US CA (11th Cir)
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
G v B [1995] NZFLR 49, NZ HC
Gonzalez v Gutierrez (2002) 311 F 3d 942, US CA (9th Circ)
H (A Child), Re [2006] EWCA Civ 1247, [2007] 1 FLR 242, [2006] All ER (D) 302 (Jul), CA
H (A Minor) (Abduction: Rights of Custody), Re [2000] 2 AC 291, [2000] 2 WLR 337, [2000] 1 FLR 374, [2000] 2 All ER 1, HL
H (Abduction: Acquiescence), Re [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, [1997] 2 All ER 225, HL
H (Child Abduction) (Unmarried Father: Rights of Custody), Re [2003] EWHC 492 (Fam) [2003] 2 FLR 153, FD
Hunter v Murrow (Abduction: Rights of Custody) [2005] EWCA Civ 976, [2005] 2 FLR 1119, [2005] All ER (D) 448 (Jul), CA

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J (A Minor) (Abduction: Custody Rights), 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
J, Petitioner [2005] CSIH 36, 2005 GWD 15-251, Ct Sess (IH)
JR v MR (unreported) 22 May 1991, Aust FC
P (Abduction Consent), Re [2004] EWCA Civ 971, [2005] Fam 293, [2005] 2 WLR 201, [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
Sonderup v Tondelli (2001) (1) SA 1171 (CC), SA Const Ct
T and Others (Minors) (Hague Convention: Access), Re [1993] 2 FLR 617, FD
Thomson v Thomson (1994) 119 DLR (4th) 253, [1994] 3 SCR 551, Can Sup Ct
V-B (Abduction: Custody Rights), Re [1999] 2 FLR 192, CA
W (Minors) (Abduction: Father's Rights), Re; Re B (A Minor) (Abduction: Father's Rights) [1999] Fam 1, [1990] 3 WLR 1372, [1998] 2 FLR 146, FD

James Turner QC and *Richard Harrison* for the appellant
Henry Setright QC and *Marcus Scott-Manderson* for the respondents
Charles Howard QC and *Teertha Gupta* interveners

Cur adv vult

LORD NICHOLLS OF BIRKENHEAD:

My Lords,

[1] I have had the advantage of reading in draft the speech of my noble and learned friend, Baroness Hale of Richmond. I agree that, for the reasons she gives, this appeal should be allowed.

LORD HOPE OF CRAIGHEAD:

My Lords,

[2] I have had the privilege of reading in draft the speech of my noble and learned friend, Baroness Hale of Richmond. I agree with it, and for the reasons she gives I would allow the appeal. I wish to add only a few comments of my own to what she has said. I do so in view of the importance of the matters that were raised with us in the course of the debate.

[3] The question at the heart of this case is, and has always been, whether the father had rights of custody within the meaning of Art 5 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) which were breached by the mother when she removed the child to England from Romania in December 2002. In that respect it is no different from all the other cases where the Hague Convention has been invoked to protect children from the harmful effects of their wrongful removal and to ensure their prompt return to the state of their habitual residence.

[4] But if the child were to be returned now, almost 4 years after his arrival in this country, his return would be anything but prompt. The delays that the procedures adopted in this case have given rise to have exceeded by far anything that the framers of the Hague Convention appear to have contemplated. They are so extreme that it is impossible to believe that the child's best interests would be served by his return forthwith to Romania, as Art 12 would require if his removal from Romania were to be held to have been wrongful. As the preamble to the Hague Convention indicates, its

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purpose is to protect children from the harmful effects of their wrongful removal. The assumption on which the remedy of prompt return proceeds is that the state to which the child will be returned is the state of his habitual residence. Through no fault of his own, the child whose return is being sought in this case has now been settled for so long in this country that this assumption is scarcely tenable.

[5] Delay does not, in itself, excuse compliance with the Hague Convention. Courts must do the best they can to give effect to it, so long as its provisions have not become completely unworkable. The lesson of this case is that every effort must be made to avoid such delays. If there is a dispute as to whether the removal was wrongful it should be dealt with summarily. A balance must, of course, be struck between acting on too little information and the search for too much. A court cannot make a finding that the child's removal was wrongful unless it is provided with a basis for doing so. But if it is to deal with the case summarily the court must not seek perfection. It has to do the best it can on the information that has been made available, as Butler-Sloss LJ indicated in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403, at 658A and 407 respectively.

[6] Article 15 of the Hague Convention contemplates that the court may need to be provided with a determination from the authorities of the state of the child's habitual residence that the removal was wrongful. So a judge is not to be criticised if he decides to use this procedure because he cannot responsibly resolve the issue on the information provided by the applicant. Nevertheless, if he decides on this course delay will be inevitable. Great care must therefore be taken, in the child's best interests, to keep this to the absolute minimum. The misfortunes that have beset this case show that, once the court has received the response, it should strive to treat the information which it receives as determinative.

[7] Of course, it is for the court to which the application is made, not the authorities of the requesting state, to decide whether the removal was wrongful within the meaning of Art 3. The court must apply its own view of the Hague Convention as best it can in the light of what it knows. No doubt there will be situations where the court feels that there may still be room for argument as to what the Art 15 determination amounts to. But, as my noble and learned friend Lord Brown of Eaton-under-Heywood makes clear, it must resist calls for further evidence. The further delay that this would cause is incompatible with the objects of the Hague Convention. Detailed scrutiny of the child's welfare must be left for later. That is a matter for the state of his habitual residence. Speed is of the essence if the child is to be returned promptly to that state. The court must take this into account when considering whether enough information as to whether the removal was wrongful is available, and whether the information that it has is reliable.

[8] In this case the response that was received from Romania was sufficient to show that the child's removal was not wrongful within the meaning of Art 3. On 9 June 2005, the Final Court of Appeal of Bucharest, upholding the Court of First Appeal, stated in the clearest terms that, under the law as it then stood in Romania, termination of marriage through divorce brings joint custody to an end, that cases where the agreement of the parties is required about a measure which the parent with custody proposes are limited, and that none of the rights that the father had been granted on divorce gave

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him a right of veto or to decide the child's place of residence. It is wholly understandable that the father should feel aggrieved by what has happened in this case. The effect on his ability to exercise his rights of access is plain to see. But the phrase 'rights of custody' has been given a particular definition by the Hague Convention. It is only if there has been a breach of rights of custody as so defined that the removal can be described as wrongful for its purposes. The information provided by the Romanian court shows that, as the law stood at the time of the child's removal, the father had no such rights.

[9] The absence of a right of veto is, then, decisive in this case. Had there been a right of veto the result might perhaps have been different, despite the delay. It has come to be appreciated in most, but not all, Contracting States that for the Hague Convention's purposes a right to grant or withhold consent to the child's removal from the state where he resides is a right of custody. Article 5 states that for the purposes of the Hague Convention '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. To understand what this means reference must be made to Art 3, where the words 'rights of custody' are used to define the circumstances in which the removal or retention of a child is to be considered wrongful – 'wrongful' because the Convention proceeds on the assumption that welfare issues are best dealt with in the state where the child is habitually resident.

[10] The key to what the phrase means lies in these facts. The Hague Convention is an agreement between states. It seeks to address the problems that arise where a child is moved across international borders. It does not concern itself with disputes about the exercise of custody or access rights within the country of the child's habitual residence. The right to determine the child's place of residence has to be seen in that context. The word 'place' in the phrase 'the child's place of residence' must be taken, for Hague Convention purposes, to include the country of the child's residence. A right to object to the child's removal to another country is as much a right of custody, for those purposes, as a right to determine where the child is to live within the country of its residence.

[11] The phrase 'rights of access' is also defined for the purposes of the Hague Convention by Art 5. But it is important not to treat this definition as limiting the rights that are included within the expression 'rights of custody'. There is no doubt that a right to determine the place of the child's residence will be helpful to the parent who wishes to exercise the right to take the child for a limited period of time to a place other than the child's habitual residence. Time and distance matter to parents who lead busy lives, and the place of the child's habitual residence may have a very real bearing on how often, or for how long, it is practicable for a right of access to be exercised. But the fact that a right to determine the place of the child's residence may be helpful to the parent who seeks access is not a reason for treating the right to determine where the child resides as something other than a right of custody for Hague Convention purposes. They are not mutually exclusive rights. The Hague Convention provides different remedies where rights of custody and rights of access have been breached. The nature and purpose of those remedies helps to show why, when it comes to removal or retention across international borders, the right to determine the place of the child's residence is treated as a right of custody.

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[12] This was not Professor AE Anton's view. Writing shortly after the Hague Convention was entered into, he said that the definition of 'rights of custody' in Art 5 suggests that the breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Art 3: 'The Hague Convention on International Child Abduction' (1981) 30 ICLQ 537, at 546. He referred to the fact that a suggestion that the definition of 'abduction' should be widened to cover this case was not pursued. The suggestion was made by a member of the Canadian delegation during the final diplomatic conference on the Hague Convention in October 1980: see footnote 16 to the judgment in *Furnes v Reeves* (2004) 362 F 3d 702, quoting from Linda Silberman, 'Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA' (2003) 38 Tex Int LJ 41, 46, n 34. It was in these terms:

> 'Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that constitutes wrongful removal.'

The fact that this suggestion was not pursued was taken by Professor Anton to indicate that, as the definition stood, taking the child out of the jurisdiction in those circumstances would not have been wrongful for the Convention's purposes.

[13] Professor Anton was very well placed to comment on this issue, and his comments were noted by the Supreme Court of Canada in *DS v VW and JS and Rodrigue Blais* [1996] 2 SCR 108 in support of its opinion that to hold otherwise would confuse the concepts of custody rights with access rights; see also *Thomson v Thomson* [1994] 3 SCR 551. But the view which Professor Anton expressed was his own view, as he was careful to point out in a footnote at the beginning of his article. It was not shared by the Court of Appeal in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403. Referring to the phrase 'the right to determine the place of the child's residence', Lord Donaldson of Lymington MR said at 663H–664B and 413 respectively:

> 'If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the [Hague] Convention. I add for completeness that a "right to determine the child's place of residence" (using the phrase in the Convention) may be specific – the right to decide that it shall live at a particular address or it may be general, eg "within the Commonwealth of Australia".'

[14] In *Re P (Abduction Consent)* [2004] EWCA Civ 971, [2005] Fam 293, [2004] 2 FLR 1057 the Court of Appeal had to decide whether the child's removal by the mother from the state of New York to England was wrongful. The father claimed that he had not consented to the removal and that he had rights of custody, in the Convention sense, under New York law. This was because he had been granted visitation rights, and because the court ordered

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that neither party was to remove the child from the state of New York except for temporary vacations without the prior written consent of the other party or prior court order. This was a ne exeat right similar to that which s 13 of the Children Act 1989 has laid down: see also s 2(3) of the Children (Scotland) Act 1995. The approach which was taken to this issue in *C v C* is now commonly held amongst Contracting States, as Hale J observed in *Re W (Minors) (Abduction: Father's Rights); Re B (A Minor) (Abduction: Father's Rights)* [1999] Fam 1, [1998] 2 FLR 146, at 9 and 153 respectively. Ward LJ said in *Re P* that the court was abundantly satisfied that C v C and the subsequent decisions in England to the same effect were right: para [55]. In *J, Petitioner* [2005] CSIH 36, 2005 GWD 15-251 the Inner House of the Court of Session in its turn held that 'rights of custody' for Hague Convention purposes included the right to grant or withhold consent to the child's removal from the UK under s 2(3) of the Children (Scotland) Act 1995. The issue can now be regarded as settled, so far as the UK is concerned.

[15] Unfortunately, as is usually the case in international Conventions on private law, the Hague Convention has not provided any formal mechanisms to ensure that the international legal norms that it has created are applied uniformly and consistently in the numerous Contracting States: see Linda Silberman, 'Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence' (2005) 38 U C Davis Law Review 1049, at p 1057. This means that its effectiveness is left in the hands of the respective central authorities and national courts that implement and interpret the Hague Convention. Professor Silberman is highly critical of the way the courts in the USA have approached this issue: see p 1069:

> 'As I have indicated, it is important to separate [Hague] Convention concepts from domestic analogues found in particular judicial systems. The term "rights of custody" is an important concept within the meaning of the Convention and rests on an autonomous definition that triggers the return remedy. Contracting States have agreed to those situations in which they will order return – ie a breach of "rights of custody" – and domestic definitions of custody rights are not necessarily the equivalent of the concept created by article 5(a).
>
> Recent decisions by courts in the United States have been the most blatant offenders of this important principle by imposing parochial domestic notions of custody on the Convention concept, effectively undermining the goals and objectives of the Convention.'

[16] Professor Silberman has singled out for particular criticism *Croll v Croll* (2000) 229 F 3d 133, cert denied, (2001) 534 US 949. The Court of Appeals for the Second Circuit departed in that case from the position that had been adopted almost unanimously by earlier decisions of intermediate courts, that a parent who could restrict whether the child moved away did have rights of custody within the meaning of the Hague Convention. In footnote 94 at p 1071 she says that the mischief potentially caused by *Croll* should not be underestimated. In the same footnote she observes that 'fortunately' the Court of Appeal in *Re P* decided not to follow the views of the majority in *Croll*, which had concluded that *Webster's Third New International* Dictionary (Merriam-Webster, 2000) and *Black's Law Dictionaries* (West Publishing

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Company, 1999) were an appropriate source for the definition of custody rights and that nothing in the Hague Convention suggested that the drafters intended anything other by the use of this expression than the ordinary understanding of custody as revealed by these dictionaries. Judge Sotomayor's dissent in *Croll* attracts this comment, at p 1070:

> 'A perceptive dissent by Judge Sotomayor in *Croll* was critical of her colleagues for applying American concepts instead of international and Convention norms. She emphasized the object and purpose of the Convention and explained that the official history and commentary on the Convention "reflect a notably more expansive conception of custody rights" that US/English dictionaries. As she pointed out, a restriction on removal affects the specific choice as to whether a child will live in England or Cuba, Hong Kong or the United States, and it is precisely this kind of choice that the Convention is designed to protect.'

[17] Certiorari was denied in *Croll* when it was considered by the Supreme Court, and other federal courts have followed the decision of the majority: *Gonzalez v Gutierrez* (2002) 311 F 3d 942; *Fawcett v McRoberts*. In *Gonzalez*, at 949, the court said that a ne exeat clause served only to allow a parent with access rights to impose a limitation on the custodial parent's right to expatriate his child and that this, in its view, hardly amounted to a right of custody 'in the plainest sense of the term.' The Ninth Circuit followed this reasoning in *Fawcett* at 500, holding that the ne exeat provision in s 2(3) of the Children (Scotland) Act 1995 did not confer 'rights of custody' on the petitioning parent where the other parent had the exclusive right to determine the child's place of residence within Scotland.

[18] The US decisions are not all one way. In *Furnes v Reeves* the Court of Appeals for the Eleventh Circuit said that it was not persuaded by the analysis in *Croll*. In a unanimous decision it said that the Convention's purpose is to prevent the international abduction of children and that it is thwarted, not satisfied, by the *Croll* majority's construction of the ne exeat right. And the Constitutional Court of South Africa referred with approval to Sotomayor J's dissenting opinion in *Croll*'s case in *Sonderup v Tondelli* (2001) (1) SA 1171 (CC), noting in para 22 that the majority opinion was contrary to the weight of authority. Unfortunately when the Court of Appeals for the Fourth Circuit returned to the issue in *Bader v Kramer* (2006) 445 F 3d 346 it referred to its decision in *Fawcett*, which followed *Croll*, without disapproval. But it was able to distinguish those cases on the ground that rights of access and rights of custody were not mutually exclusive in German law, and that the visitation rights of one parent could be modified without disturbing the underlying joint custody of both parents. It held that, in the absence of any order removing the father's ability to determine the child's residence, he continued to retain joint custody over the child.

[19] It is unfortunate that there remains such a profound difference of view between some, although not all, of the courts in North America and the view so widely adopted elsewhere in the common law world that a ne exeat clause confers rights of custody within the autonomous meaning which Art 5 of the Hague Convention indicates. One can only hope that the contributions that have been made to this debate by Professor Silberman in support of the

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dissent in *Croll*'s case, taken together with the increasing weight of international authority, will encourage further thinking in those jurisdictions which still reject this view. It is, after all, in the best interests of the children who are caught up in these unhappy disputes that all states parties to the Hague Convention should adopt the same approach. It can now be taken for granted that courts throughout the UK will give effect to ne exeat clauses that prohibit the removal of a child from another Contracting State. Is it too much to hope that this approach will come to be universally recognised?

BARONESS HALE OF RICHMOND:

My Lords,

[20] The facts of this case are on any view extraordinary. They concern a little boy, A, who was born in Romania in July 1998 and is now aged 8. His parents were married in Romania in January 1998 and divorced there in November 2000. In December 2002, the mother brought him to England without the knowledge or consent of his father. Proceedings under the Child Abduction and Custody Act 1985 and Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) were launched in February 2003.

[21] A dispute arose as to the effect of the orders made about A when his parents divorced. Each was permitted to adduce expert evidence. The judge found himself unable to resolve the difference of opinion between the experts and directed that a determination be obtained from a Romanian court pursuant to Art 15 of the Hague Convention. The Romanian proceedings were not resolved until 9 June 2005, when the Final Court of Appeal in Romania ruled that the removal of A to this country had not been wrongful under Romanian law. Nevertheless, when the case came back before the English court on 1 August 2005 it was ordered that further evidence on Romanian law be obtained from an expert jointly instructed by the parents. That expert reported in October 2005 and reached different conclusions from the Romanian court. Thereafter the parties were permitted to put further questions to him.

[22] The case eventually came on for hearing in February 2006 and judgment was handed down on 28 March ordering A's immediate return to Romania upon certain undertakings by the father. The mother then issued proceedings in Romania seeking permission to remain here with A. Those proceedings have still not been heard. The mother also appealed against the English order. At this point the child applied to be made party to these proceedings, but this was refused by the Court of Appeal. Nevertheless, the court directed a report from a (Children and Family Court Advisory and Support Service) CAFCASS officer. This made it clear that A was adamantly opposed to returning to Romania. The next day, on 24 May 2006, the Court of Appeal dismissed the mother's appeal.[1] She now appeals to this House. A, through his litigation friend from the Children's Legal Centre, has been given leave to intervene in this appeal.

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1 Editor's note: see *DK v Secretary of State for the Home Department* [2006] EWCA Civ 830, [2006] All ER (D) 356 (May).

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The issues

[23] The simple question before us is whether A should now be returned to Romania, some 3 years and 10 months after he left. But this depends upon the answers to some more complex questions arising under the Hague Convention. The first, and most important, is whether removing A from Romania to England was 'wrongful' within the meaning of Art 3 of the Hague Convention. Only then does the duty under Art 12 to return him to his home country arise. Central to the answer to that question is whether the father has 'rights of custody' or only 'rights of access' within the meaning of Art 5. In answering that question, the effect of the Romanian judgment under Art 15 must be considered. If the conclusion is that the removal was wrongful, two further questions arise. Is the court entitled to refuse to return the child under Art 13 – either because there is a grave risk that his return would place him in an intolerable situation or because he objects to his return and is of an age and maturity where it would be appropriate to take account of his views? Finally, we are asked to consider the ways in which the point of view of a child in A's situation should be placed before the court in Hague Convention proceedings.

Wrongful removal

[24] The world would be a simpler place if the Hague Convention had provided that all removal or retention of a child outside the country where he or she is habitually resident without the consent of the other parent or the authority of a court is wrongful. But it does not. The Hague Convention recognises that not all parents have the right to demand the automatic return of children who have been taken away without their consent. It does so by providing that the removal or retention of a child is only wrongful under Art 3 if 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'. These rights may arise '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.' In addition, those rights must actually have been being exercised at the time (or would have been had it not been for the wrongful removal). Article 5(a) provides that ''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'.

[25] The Hague Convention also obliges, in Art 21, the central authorities to assist a 'left behind' parent in realising his or her 'rights of access', not by securing summary return to the home country, but through promoting their peaceful enjoyment, removing obstacles to their exercise, and initiating or assisting the initiation of proceedings to protect them. Article 5(b) provides that '"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'. Thus it was envisaged that the right to have the child to stay away from his home might still amount to 'rights of access' rather than 'rights of custody'. It is quite clear from the Explanatory Report of Professor Elisa Pérez-Vera (April 1981) that the original parties to the Hague Convention drew a deliberate distinction between rights of custody and rights of access and did not intend that mere rights of access should entitle a parent to demand the summary return of the

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child. As Professor Pérez-Vera pointed out, such an approach would ultimately lead to 'the substitution of the holders of one type of right by those who held the other' (see para 65).

[26] Nevertheless it is common ground between all the parties to this case that they are not mutually exclusive concepts. A person may have both rights of access and rights of custody. The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not? States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between the parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with the different package of rights which that entails. This is by no means an unusual way of looking at the matter. Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or qualified by the necessary effect of a court order or an enforceable agreement between them. The expert evidence in this case demonstrates that there was serious academic debate in Romania about whether the law adopted the first or the second approach. In the event, the Romanian court adopted the former whereas the single joint expert adopted the latter.

[27] As Professor Pérez-Vera points out, following a long established tradition of the Hague Conference, the Convention does not define the legal concepts used by it. However, Art 5 does make clear the sense in which the concepts of custody and access rights are used, 'since an incorrect interpretation of their meaning would risk compromising the Hague Convention's objects' (see para 83). Custody relates to the care of the child's person rather than his property. It is a narrower concept than that of 'protection of minors' used elsewhere. It may, however, be jointly held. Access includes the right to 'residential access' even across national boundaries.

[28] In the absence of a supranational body to define and refine these autonomous terms, Member States must strive for consistent practice – not in the content of their domestic laws but in the effect that they give to the particular features of one another's laws. As Lord Browne Wilkinson said in *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872, at 87 and 881 respectively, (albeit in the context of the meaning to be given to 'acquiesced' in Art 13(a) of the Convention):

> 'An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states.'

In that case, therefore, English concepts and English law rules about the meaning of acquiescence could have no direct relevance to the interpretation of the Hague Convention. We must be equally prepared to resist projecting the

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view taken in English law of the rights of parents onto the Hague Convention concepts as they apply to the laws of other member states which may take a different view.

[29] There is no problem when return is requested by the parent with the right to the day-to-day care of the child – or in English terms, the parent with whom it has been determined that the child is to live. The problem is with the characterisation of the other parent's rights. If these amount to joint custody, there is equally no problem. The main debate has been over the effect of what are sometimes referred to as 'travel restrictions' – either a court order prohibiting the removal of the child from the home country or a 'right of veto' giving one parent, who may or may not also have rights of access, the right to insist that the other parent does not remove the child from the home country without his or her consent or a court order.

[30] The internal position in English and Scottish law is clear. Parents who share parental responsibility (that is all married parents and increasing numbers of unmarried parents) each have all the rights and responsibilities of parents. They retain those rights subject only to the practical limitations of any court order and can exercise them independently of one another unless this is inconsistent with a court order. While a residence order is in force, no person may remove the child from the UK without the written consent of each person with parental authority or the leave of a court (s 13(1)(b) of the Children Act 1989). In England, the person with the benefit of the residence order may remove the child for less than one month: s 13(2). Even if there is no residence order, it is a criminal offence for a parent to remove a child from the UK without the consent of each person with parental responsibility or the leave of a court (ss 1 and 6 of the Child Abduction Act 1984; in England with the one month exception for people with the benefit of a residence order).

[31] But the mere fact that English and Scottish parents enjoy such rights of veto does not of itself mean that they enjoy 'rights of custody' within the meaning of the Hague Convention. Hitherto, however, both in England and Scotland, the courts have regarded travel restrictions as giving rise to rights of custody. As long ago as *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403, the Court of Appeal held that a court order prohibiting either parent from removing a child from Australia without the other's consent gave the other parent rights of custody under the Hague Convention. Lord Donaldson MR observed, at 664 and 413 respectively, that the right to determine the child's place of residence 'may be specific – the right to decide that it shall live at a particular address or it may be general, eg "within the Commonwealth of Australia"'. In *Re W (Minors) (Abduction: Father's Rights); Re B (A Minor) (Abduction: Father's Rights)* [1999] Fam 1, [1998] 2 FLR 146, I applied the same approach to rights of veto arising by operation of law. Both cases were relied upon by the Inner House of the Court of Session in *J*, *Petitioner* [2005] CSIH 36, 2005 GWD 15–251, where it was held that the right of veto enjoyed, by virtue of s 2(3) and (6) of the Children (Scotland) Act 1995, by a parent with the right to contact amounted to 'rights of custody' under the Hague Convention.

[32] Mr James Turner QC, on behalf of the mother, has questioned whether a mere right of veto should amount to 'rights of custody'. The reasoning is simple. If rights of custody 'shall include' the right to determine the child's place of residence, it is not enough that they include the right to determine for

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the time being the country where the child lives – it must mean the right to determine where the child actually lives. The Hague Convention envisages a compendium of more than one right. Furthermore, the purpose of the right to determine the country where the child lives is simply to facilitate the exercise of the right of access – and that does not attract the right to demand summary return to the home country. Indeed, a person possessing a right of veto may have no access rights at all; whereas a person having access rights may have no veto right. It would be surprising if a parent who enjoyed a close and continuing relationship with his child might have no rights of custody whereas a parent who has not seen his child for years might do so.

[33] Mr Turner is able to cite other jurisdictions in the common law world which have taken this view. In 2000, in *Croll v Croll* (2000) 229 F 3d 133, a majority of the US Court of Appeals for the Second Circuit held that a ne exeat clause in a Hong Kong custody agreement giving custody, care and control to the mother did not give rights of custody to the father. That decision was followed in 2002 by the Court of Appeals for the Ninth Circuit in *Gonzalez v Gutierrez* (2002) 311 F 3d 942; and in 2003 by the Court of Appeals for the Fourth Circuit in *Fawcett v McRoberts* (2003) 326 F 3d 191(referred to without comment but distinguished in 2006 in *Bader v Kramer* (2006) 445 F 3d 346). The majority in *Croll* relied on the deliberate distinction drawn in the Convention between rights of custody and rights of access, the lack of international consensus on the issue, and the published views of Professor AE Anton, chair of the Hague Conference Commission which had drafted the Hague Convention at (1981) 30 ICLQ 537, at 546.

[34] The majority in *Croll* were able to point to two decisions in the Supreme Court of Canada to demonstrate a lack of international consensus. In *Thomson v Thomson* [1994] 3 SCR 551, the court had held that removal in breach of a ne exeat clause in an interim custody order was in breach of rights of custody held by the court, in order to preserve its jurisdiction to make a final determination, but expressed the view that such a clause in a final order would not give the other parent rights of custody. In *DS v VW and JS and Rodrigue Blais* [1996] 2 SCR 108, *Thomson* was relied upon a fortiori where any prohibition upon removal had been implicit in the custody order made in the United States.

[35] However, in 2004 the United States Court of Appeals for the Eleventh Circuit in *Furnes v Reeves* (2004) 362 F 3d 702 rejected the reasoning of the majority in *Croll* in preference for the dissenting views of Sotomayor CJ. They pointed out that to order return of the child did not convert the other parent's rights of access into rights of custody, because there was no obligation to return the child to that other parent. The object was to maintain the status quo and the jurisdiction of the home country over any disputes. The observations in both Canadian cases were obiter. Apart from them, known opinion elsewhere in the common law world was united. Thus the full court of the Family Court of Australia, in *JR v MR* (unreported) 22 May 1991, had followed the English decision in *C v C* , as did Lindenmayer J at first instance in *Director General, Department of Families, Youth and Community Care v Hobbs* [1999] FamCA 2059. The Constitutional Court of South Africa had reached the same result in *Sonderup v Tondelli* (2001) (1) SA 1171 (CC). The Israeli High Court, in *Foxman v Foxman* (5271/92) in 1992 had also held that rights of custody should include cases where parental consent is required to

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