RE F (ABDUCTION: JOINDER OF CHILD AS PARTY) [2007] EWCA Civ 393

Court of Appeal

Thorpe, Smith LJJ and Munby J

27 March 2007

Child – Joining as party to proceedings – Abduction – Test for joinder of child as party to proceedings – Whether exceptional case

Following proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the Brussels II Revised Regulation, concerning the return of the parties' 7-year-old daughter, the respondent mother appealed, out of time, against the decision made to return the child to Spain from North East England. Pending the hearing of the application for leave to appeal, an application was made for the child herself to be joined to the proceedings. The mother argued that the judge had not observed her obligation to hear the child under Art 11 of Brussels II Revised.

Held – refusing leave for the child to be joined in the proceedings, granting an extension of time and leave for the appeal to be heard –

(1) A long line of Court of Appeal authority emphasised that a grant of permission to intervene was exceptional and demonstrated that party status had only been granted in those cases in which there had been some element of state intervention within the affairs of the family. Although the House of Lords in *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51 had disapproved the suggestion of Thorpe LJ in *Re H (Abduction)* [2006] EWCA Civ 1247 that the bar for allowing the child intervener status should be raised rather than lowered, that bar had essentially remained where it was. *Re D* was not interpreted by the present court as having the effect of lowering the bar with respect to the grant of party status to the child and there remained a need to demonstrate that the case was sufficiently exceptional given that there was no public law element involved (see paras [4], [7]).

(2) The present case was a standard inter-European wrongful retention. The child had been within the present jurisdiction for a considerable period and had predictable concerns and desires about maintaining her current living circumstances. Granting the child intervener status would mean acknowledging that the existing line of authority was at an end, with serious consequences for the future conduct of proceedings under Brussels II Revised; risking the magnification of representation in almost every case, and complicating the process of trial, causing delay, in what was essentially a summary process (see paras [8], [9]).

(3) The obligation to hear the child and to have proper respect for the child's rights under Art 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 could be achieved without joining the child as a party to the proceedings (see para [10]).

Statutory provisions considered

Family Proceedings Rules 1991 (SI 1991/1247), Part V

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

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 6, 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Art 13

© Jordan Publishing Limited 2007

Cases referred to in judgment

D (A Child) (Abduction: Custody Rights), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

H (Abduction), Re [2006] EWCA Civ 1247, [2007] 1 FLR 242, [2006] All ER (D) 302 (Jul), CA

T (Abduction: Appointment of Guardian ad Litem), Re [1999] 2 FLR 796, CA

Henry Setright QC for the appellant mother
Marcus Scott-Manderson QC for the respondent
James Turner QC for the child

Cur adv vult

THORPE LJ:

[1] There was a trial before Macur J on 31 January. On 5 March a notice of appeal against her order was filed by the mother, the unsuccessful respondent below. The application for permission, given that it is a case proceeding under international instruments, namely the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) and the 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) (the Regulation), was referred to me reasonably promptly and on 12 March, letters were written to the parties informing them that the application for permission and for an extension of time would be listed for hearing today on 27 March.

[2] On about 20 March, an application was made informally for intervener status for the child at the heart of the proceedings, the 7-year-old daughter of the parties. Plainly, an application of that sort is very substantial and can only be determined on notice before the full court. Subsequently, an application was made for the release of some of the case papers and that application was granted, the father's solicitors having indicated their consent. That release provided Mr James Turner QC with necessary straw for the making of bricks and the result is an exceptionally learned 36-page skeleton (which I think was delivered to the court yesterday when I was not in London) in which he traverses the broad field of law that has been created in the 25-odd years since the Convention became part of the law of England. What he does not seem to me to address very directly in that learned treatise, is the high test imposed by this court for any application seeking party status on behalf of a child. Now the Regulation, in Art 11, which governs the return of children wrongfully removed or retained, introduces a number of refinements to the Hague Convention. It, in effect, raises the bar for a successful Art 13 defence under the Hague Convention, in that it places particular emphasis on the capacity of the requesting state to protect the returning parent. It also introduces a complex mechanism which allows the court of the requesting state to embark upon a further review of the case if the requesting state refuses return.

[3] The third and significant innovation for the European region is the requirement to hear the child in every case, unless that is inappropriate, having regard to the child's age and level of understanding. Now this appeal is skilfully advanced on paper by Mr Setright QC, taking the point that the judge's obligation to hear the child under Art 11 was simply never observed,

© Jordan Publishing Limited 2007

Letterpart Ltd – Typeset in XML ✱ Division: FLR_flr2295 ✱ Sequential 2

and that is a point that will have to be carefully weighed when we hear the application for permission and an extension of time.

[4] Hearing the child is one thing and giving the child party status is quite another. There is a long line of authority in this court which emphasises how exceptional is a grant of permission to intervene. We in this court looked at that line of authority as recently as 20 July 2006 and the court's judgment is reported in *Re H (Abduction)* [2006] EWCA Civ 1247, [2007] 1 FLR 242.

[5] An analysis of the authorities in this court demonstrate that party status has only been granted in those cases in which there has been some element of state intervention within the affairs of the family. The best example of that is the case of *Re T (Abduction: Appointment of Guardian ad Litem)* [1999] 2 FLR 796, where effectively it was the Irish state seeking the return of the child.

[6] Mr Turner has submitted that a recent decision of the House of Lords in *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 FLR 961 has lowered the bar in favour of the applicant and he relies particularly on para [60] of the speech of Baroness Hale of Richmond. The case of *Re D* was a case in which party status had been refused to the child in this court and was then granted by the House of Lords in the interlocutory stages; so the House of Lords did not have to consider the question as fully as it would have had to do had the application for intervention been launched at the hearing of the appeal.

[7] Mr Turner makes the fair point that Baroness Hale of Richmond seems to suggest the sort of case in which party status would be granted in the final two sentences of para [60]. However, she then in para [61] considers the authorities in this court, when she says that 'the courts have only allowed separate representation in exceptional circumstances'. She then disapproves the suggestion for which I was responsible in the case of *Re H* that in European cases the bar should be raised rather than lowered. That is transparent, but what results in my opinion, is that the bar essentially remains where it was. I do not take the descriptive sentences at the end of para [60] as having the effect of lowering the bar.

[8] So how can Mr Turner demonstrate that this case is sufficiently exceptional, given that there is no public law element anywhere in the case? It is an absolutely standard inter-European wrongful retention where, he says, there are arguments that could and should have been run at the trial but which were not raised. He says that the focus of the very experienced counsel who represented the respondent below was too much on the risk of harm to the child and not sufficiently on the intolerable situation to which the child would be returned. He tries to elaborate that submission by saying, well, intolerable because the child is so well settled here as a result of the delay; and the intolerability lies not so much on what is to be found in Spain, but what would be lost in the North East of England. That is an ingenious submission, but not, in my judgment, sufficient to overcome the high test of exceptionality. Then he says, well, the child's objections were not heard below. That is undoubtedly the case. That was never part of the respondent's reaction to the proceedings. Indeed, it seems that she took the parental decision not even to inform the child of the hearing before Macur J. Mr Turner also says that this is a case in which a subsequent sensitive interview by his instructing solicitor reveals that, within the child's objections to return, there are rational

© Jordan Publishing Limited 2007

Letterpart Ltd – Typeset in XML ✱ Division: FLR_flr2295 ✱ Sequential 3

arguments founded on her attachment to her present way of life in the North East. That again seems to me an ingenious presentation, but does not really carry the case out of the perfectly standard.

[9] Manifestly the child, having been within this jurisdiction for a considerable period, is going to have concerns abut return and desires to maintain the close knit community, the grandmother with whom she has lived (sometimes without her mother), school friends and school. All that is absolutely predictable. Were we to grant Mr Turner's application we would, in effect, be acknowledging that the existing line of authority in this court is at an end, with serious consequences for the future conduct of proceedings under the Regulation; risking the magnification of representation in almost every case, and complicating the processes of trial in what is essentially a summary process.

[10] One of the innovations of Art 11 to which I have not yet referred is that it is the obligation of the court of trial to complete the process within 6 weeks. That obligation has been very clearly underlined and will, I think, be reflected in the revision of Part V of the Family Proceedings Rules 1991 which is currently underway. In this case the target was not even reached by the process of trial in the Family Division; commencing, I think, on 22 November and not terminating until 31 January. There would be easily foreseeable ramifications if we were to elaborate the process in the way that Mr Turner suggests. It is an obligation to hear the child and to have proper respect for the child's rights under Arts 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, but that can be achieved without joining the child as a party to the proceedings.

[11] In reaching that conclusion I emphasise that I do not for a moment minimise the importance for all courts within the process of trial and within the appellate system to hear the voice of the child. That is not only consonant with current socio-legal thinking, but it is our obligation – our treaty obligation – under the terms of the Regulation itself.

[12] I would refuse the application.

SMITH LJ:

[13] I agree.

MUNBY J:

[14] I also agree.

Application for permission to intervene refused. Application for extension of time granted. Appeal allowed.

Solicitors: *Wilkin* for the appellant mother
Brethertons for the respondent
Dawson Cornwell for the child

CATHERINE SHELLEY
Law Reporter

© Jordan Publishing Limited 2007