

Re D (A Child) (2006)

[2006] UKHL 51; (2007) 1 AC 619 : (2006) 3 WLR 989 : (2007) 1 All ER 783 : (2007) 1 FLR 961 : Times, November 17, 2006 : Independent, November 21, 2006

16/11/2006

Barristers

Henry Setright KC
Private: Marcus Scott-Manderson QC
Teertha Gupta KC

Court

House of Lords

Summary

A right of veto, giving one parent the right to insist that the other parent did not remove the child from the home country without his or her consent or a court order, did amount to “rights of custody” within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction 1980 Art.5(a). Having sought a determination from the Romanian court under Art.15 of the Convention as to whether the removal of a child from Romania was wrongful, the English court should not have allowed a parent to challenge the Romanian court’s decision as to the content of his rights under Romanian law.

Facts

The appellant mother (M) appealed against the decision ((2006) EWCA Civ 830) that her son (B) should be returned to Romania upon certain undertakings by the father (F). B had been born in Romania in 1998. B and F had been married in Romania in that year but were divorced two years later. Two years after that M brought B to England without F’s knowledge or consent. F brought proceedings under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 . A dispute arose as to the effect of the orders made about B when his parents divorced. The judge was unable to resolve the difference of opinion between the parties’ experts on Romanian law and directed that a determination be obtained from a Romanian court pursuant to Art.15 of the Convention. The Romanian Court of Appeal ruled that the removal of B to England was not wrongful under Romanian law. The English court nevertheless heard evidence on Romanian law from an expert who reached different conclusions from the Romanian court. On that basis the judge ordered B’s return to Romania. The Court of Appeal dismissed M’s appeal. M submitted that a mere right to prevent the removal of a child from a country without consent did not amount to rights of custody within Art.5(a) of the Convention.

Held

HELD: (1) A right of veto, giving one parent the right to insist that the other parent did not remove the child from the home country without his or her consent or a court order, did amount to “rights of custody” within the meaning of Art.5(a) of the Convention, *C v C (Abduction: Rights of Custody)* (1989) 2 All ER 465 approved. There was no good reason to distinguish the court’s right of veto, which was recognised as rights of custody, from a parental right of veto, whether the latter arose by court order, agreement or operation of law, *H (A Child) (Abduction: Rights of Custody), Re* (2000) 2 WLR 337 applied. A parent’s potential right of veto, where for instance the parent had the right to go to court and ask for an order, would not amount to rights of custody. To hold otherwise would be to remove the distinction between rights of custody and rights of access altogether, *J (A Minor) (Abduction: Custody Rights), Re* (1990) 2 AC 562 considered. (2) In a fully reasoned judgment, the final Court of Appeal in Romania had held that as Romanian law then stood F, as the divorced non-custodial parent, did not have a right of veto of measures taken by M as the custodial parent relating to B’s person. Therefore the removal of B from Romania had not been wrongful. Having sought a determination under Art.15, the English court should not have allowed F to challenge the Romanian court’s decision as to the content of his rights under Romanian law. Save in exceptional circumstances, for example where the ruling had been obtained by fraud or in breach of the rules of natural justice, such a determination had to be treated as conclusive as to the parties’ rights under the law of the requesting state. Only if the foreign court’s characterisation of the parent’s rights was clearly out of line with the international understanding of the Convention’s terms should the court in the requested state decline to follow it, *H v M* (2005) EWCA Civ 976, (2005) 2 FLR 1119 considered. (3) Since F did not have “rights of custody” for the purpose of the Hague Convention when B was removed to England, that removal was not wrongful under Art.3 and no obligation to return B arose under Art.12 of the Convention.

Appeal allowed.

Permission

Lawtel 