

H v M (2005)

(2005) 2 FLR 1119; [2005] EWCA Civ 976

28/07/2005

Court

Civil Division

Summary

Guidance was given as to the appropriate circumstances in which to request a determination pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 Art.15 and the significance of such a determination.

Facts

The appellant father (H) appealed against a decision rejecting a determination of the New Zealand court that the removal of his son (X) from New Zealand to England by the respondent mother (M) was unlawful. H and M were New Zealand citizens. X was conceived during the course of the relationship between H and M and born in New Zealand after the breakdown of their relationship. H was registered as X's father on the birth certificate. H and M agreed contact arrangements between H and X. H had contact with X two or three times each week and arranged birthday and christening celebrations which included family members on both the maternal and paternal side. The contact arrangements took place for four years and 10 months. M then removed X from New Zealand and went to live in London. H initiated proceedings in London seeking the return of X to New Zealand under the Hague Convention on the Civil Aspects of International Child Abduction 1980 or under the court's inherent jurisdiction. It was ordered that H sought from the New Zealand court a description of the rights he enjoyed in connection with X and a decision whether the removal of X was wrongful within the meaning of Art.3 and Art.5 of the Convention as being in breach of H's rights of custody pursuant to Art.15 of the Convention. That request resulted in delay to the case while judgment was awaited. The New Zealand court determined that X's removal had been wrongful. In reaching that determination the New Zealand court had applied the facts to the Guardianship Amendment Act 1991 s.4, a New Zealand Act which had incorporated Art.3 and Art.5 of the Convention. It also reached the conclusion that the contact which H had enjoyed amounted to rights of custody and the arrangement between H and M had legal effect within the New Zealand Guardianship Act 1968 s.18. However, the English court rejected the liberality that simple contact arrangements constituted rights of custody, rejected the determination of the New Zealand court and went on to hold that on the construction in the English jurisdiction of Art.3 and Art.5, the removal of X had not been wrongful. The issues which arose for determination were (i) whether it was open to the court, having referred to New Zealand a determination of whether X's removal was wrongful within the meaning of Art.3, to reject a positive determination made by New Zealand, and (ii) whether New Zealand's ruling that H held rights of custody which were breached by M's removal of X was consonant with the construction in England and Wales of Hague Convention law.

Held

HELD: The court was not bound by the determination of the New Zealand court. When determining whether the removal was wrongful within Art.3, the first task was to establish what rights if any H had under the law of the state in which the child was habitually resident immediately prior to his removal. That was to be determined in accordance with the domestic law of that state and the rights recognised by that law and not how those rights were characterised. In determining whether or not H had exercised custody rights immediately prior to X's removal the court was required to apply the autonomous law of the Convention and not English law, *Re V-B (Abduction : Custody Rights)* (1999) 2 FLR 192 and *Re P* (2004) 2 FLR 1057 followed. The autonomous meaning was to be determined in accordance with English law as the law of the court whose jurisdiction had been invoked under the Convention. However, the Convention could not be construed differently in different jurisdictions: it had to have the same meaning and effect under the laws of all contracting states. It was not appropriate for the Art.15 request to have been made in the instant case. Where a question for determination in the requested state turned on a point of autonomous law it was difficult to see in what circumstances an Art.15 request would be worthwhile. If the request had been made to ascertain rights under the domestic law of the requesting state its use would have been more apparent. In any case which involved the construction of an article in the Convention the answer was to be found in the international jurisprudence of the contracting states. In addition a request under Art.15 would inevitably result in delay and could be inimical to the best interests of the child. On the facts of the instant case, it had not been right to request a ruling on the domestic law question under Art.15 and no useful purpose had been served in asking for a determination on the Convention question as the New Zealand courts were no better placed than the English courts to decide whether the rights enjoyed by H in relation to X according to New Zealand domestic law amounted to rights of custody within the autonomous meaning of Art.3 and Art.5.

Permission

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