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Re O (Child Abduction) (1997)

(1997) 2 FLR 712

30/05/1997

Barristers
Henry Setright KC

Court
Family Division

Summary
A mother wrongfully removed her children from State A to State B and the courts of State B exercised their discretion under the Hague Convention to refuse to order the return of the children. The father then reabducted the children. The court refused to entertain his application for an order for the return of the children under the Hague Convention.

Facts
A mother wrongfully removed her children from California to Sweden. Both the USA and Sweden are Contracting States to the Hague Convention on the Civil Aspects of International Child Abduction 1980. The father applied through the American and Swedish central authorities for the return of his children to California pursuant to the Convention. After full and careful consideration, the appropriate Swedish court applied the discretion under art.13(b) of the Convention to refuse to order the return of the children to California. The father appealed from that decision to a higher Swedish court and judgment in the appeal was reserved. The father, who had travelled to Sweden for the hearing of the appeal then himself 'abducted' the children from Sweden. Whilst travelling back to California with them by air, he touched down at Heathrow to change flights and was arrested. The children were therefore temporarily in England. The father now applied, through the American and English Central Authorities, for an order for the return of the children to the USA pursuant to Art.12 of the Hague Convention. The issue before the court was whether that application should be entertained on its merits. Alternatively the father applied for an order for the return of the children to California under the Children Act 1989 and/or in the exercise of the court's inherent jurisdiction. The mother cross-applied for orders under the 1989 Act and/or in the court's inherent jurisdiction for the return of the children to Sweden.

Held
(1) One fundamental objective of the Convention was to provide an effective mechanism for the prompt return of children through administrative and judicial procedures so that people in the position of the father did not resort to self-help and secondary abduction. It would run quite counter to this objective if a parent, who had failed to procure the return of his child from one Contracting State, could successfully obtain a rerun of his application by himself abducting the child to or via another Contracting State. (2) The machinery of the Convention contemplates a summary procedure to be operated once only. In

particular, Art.16, provides that the judicial or administrative authorities of the State to which the child had been removed, or in which it had been retained, should not decide on the merits of rights of custody ‘until it has been determined that the child is not to be returned under this Convention’. There could not be second or subsequent applications under the Convention and that principle and approach must apply no less forcefully just because the summary procedure under the Convention had taken place in another Contracting State. The judge could not sit ‘on appeal’ from the original Swedish decision than he could if an earlier decision not to return the children had been made in proceedings here. (3) Even when a court is exercising a statutory jurisdiction and duty there is a discretion to decline to exercise the jurisdiction. The judge exercised his inherent jurisdiction and discretion and refused to entertain the father’s application under the Convention. (4) In considering the applications under the 1989 Act or in wardship, the tests in s.1 of the 1989 Act applied. It seemed to the judge that for the few weeks until the result of the Swedish appeal was known the welfare of the children was clearly better served by their returning to Sweden where they were living in satisfactory and relatively settled conditions until only a few days before.