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In the matter of C (Children) (2018)

[2018] UKSC 8

14/02/2018

Barristers
Henry Setright QC
Michael Gration
Charles Hale QC
Jacqueline Renton
Michael Edwards
Christopher Hames QC
Mark Jarman

Court
Supreme Court

Practice Areas
International Children Law

Supreme Court judgment determining that (i) the 1980 Abduction Convention cannot be invoked if by the time of the alleged wrongful act, whether by removal or retention, the child is habitually resident in the state where the request for return is lodged; and (ii) repudiatory retention is possible in law. The Supreme Court was unanimous on the principles but Lords Kerr and Wilson gave dissenting judgments on the outcome of the case on its facts. Appeal by mother allowed; cross-appeal by father dismissed.

This matter centres around a married man and woman who, until 2015, had been living together in Australia with their two children. By the end of 2014 the marriage was in difficulties. The mother, who holds British citizenship, wanted to make a trip to England with the children before returning to work from maternity leave. The father agreed to an eight-week stay. The mother and the children came to England on 4 May 2015 where they have since remained. Discussions between the mother and father resulted in the father agreeing to an extension of the eight-week visit up to a year. Based on the extension, the mother gave notice to her employer and looked for work in England.

In September 2015, the mother enrolled the older child at a local pre-school. Without telling the father, on 2 November 2015, she applied for British citizenship for both children who had entered England on six-month visitor visas. Her solicitors wrote a letter to the immigration authorities on her behalf indicating that she and the children could not return to Australia for fear of domestic abuse.

In continuing correspondence, the father pressed the mother on the children's expected date of return. The mother indicated that she did not know what her plans were but made clear that she would not be returning in May 2016. In June 2016, she expressed her intention to remain in the UK.

The father made an application in the High Court under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "Abduction Convention"). The issue of when the mother had decided not to return to Australia was in contention. The mother's own case was that by April 2016 she had felt she and the children would not be returning. The arguments before the Court meant that, on any view, there was a decision not to return to Australia before the expiry of the agreed year. The judge held that the children were habitually resident in England and Wales by the end of June 2016 so that mandatory summary return was unavailable under the Abduction Convention. But he accepted mother's evidence that she did not have the intention, in November 2015, or before April 2016, not to return to Australia.

The mother now appeals against the Court of Appeal's decision. The issues in the appeal are: (1) what is the effect on an application under the Abduction Convention if a child has become habitually resident in the destination state before the act relied on as a wrongful removal or retention occurs; and (2) if a child has been removed from their home state by agreement with the left-behind parent for a limited period can there be a wrongful retention before the agreed period of absence expires (so-called "repudiatory retention")? The father cross-appeals on the issue of habitual residence.

Judgment
The Supreme Court allows the appeal and dismisses the cross appeal. Lord Hughes gives the lead judgment with whom Lady Hale and Lord Carnwath agree. Lord Kerr and Lord Wilson each give judgments concurring on the two points of principle but dissenting on the outcome of this case on its facts.
Reasons for the judgment

Issue 1
When considering the general scheme of the Abduction Convention, the construction that summary return is available if, by the time of the act relied on as a wrongful removal or retention, a child is habitually resident in the state where the application for return is made is unpersuasive. That construction is inconsistent with the operation of the Abduction Convention since 1980 and its treatment by subsequent international legal instruments. [19]

The Abduction Convention is designed to provide a summary remedy which negates the pre-emptive force of wrongful removal or retention and to defeat forum-shopping. [21] The point of the scheme adopted by the Abduction Convention was to leave the merits to be decided by the courts of the place of the child's habitual residence. If the forum state is the habitual residence of the child, there can be no place for a summary return to somewhere else, without a merits-based decision. This understanding of the scheme of the Abduction Convention is reflected in the provisions of both the Revised Brussels II Regulation and the 1996 Hague Convention on Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. [23]

The Abduction Convention cannot be invoked if by the time of the alleged wrongful act, whether by removal or retention, the child is habitually resident in the state where the request for return is lodged. In such a case, that state has primary jurisdiction to decide on the merits, based on the child's habitual residence, and there is no room for a mandatory summary decision. [34]

Issue 2
Repudiatory retention has been recognised in some jurisdictions, but no generally accepted international practice or authority exists on the point. [39] The desirability of inducing a prompt change of mind in the retaining parent is an argument for recognising a repudiatory retention when and if it occurs. The 12 month time limit for seeking mandatory summary return runs from the point a repudiatory retention

occurs and that period may pass before an applicant is aware of the repudiatory retention. However, it is not a limitation period but a provision in the child's interest to limit mandatory summary return. Once elapsed it renders a summary return discretionary. The concern that repudiatory retention would make Abduction Convention applications longer and more complicated is a point well made. However, Family Division judges are used to managing applications actively and controlling any tendency to spill outside the relevant issues. Further, if repudiatory retention requires an overt act or statement, this lessens the danger of speculative applications. [46-48]

Repudiatory retention is possible in law. The objections to it are insubstantial, whereas the arguments in favour are convincing and conform to the scheme of the Abduction Convention. It would be unwise to attempt an exhaustive definition of proof or evidence. An objectively identifiable act of repudiation is required, but it need not be communicated to the left-behind parent nor does an exact date need to be identifiable. [50-51]

On the present facts there could not have been a wrongful retention in April 2016 as the mother's internal thinking could not by itself amount to such. If she had such an intention in November 2015, the application to the immigration authorities could have amounted to a repudiatory retention. But it was open to the judge to believe the mother's evidence that she did not possess this intention in November. [55] There is no basis in law for criticising the judge's decision as to habitual residence. [57]

Lord Kerr dissents on the outcome of this case on its facts. He expresses misgivings about repudiatory retention requiring an overt act by the travelling parent. [63] The judge's finding that wrongful retention did not arise in this case could not be reconciled with his statement that the mother had concluded by April 2016 that she and the children should remain in England. [68] Moreover, the judge's conclusion that the mother had not formed any intention to retain the children in England in November 2015 is insupportable as he failed to address the question of what bearing the letter of November 2015 had on her intention. [72]

Lord Wilson also dissents on the outcome of this case on its facts. The solicitor's letter to the immigration authorities in November 2015 represented a major obstacle to any finding that the mother had not by then intended to keep the children in the UK indefinitely. The judge's finding as to the mother's intention in November 2015 was flawed and the Court of Appeal were correct to order a fresh inquiry into her intention. [91-92]