

Re K (A Child) (2014)

[2014] UKSC 29

05/05/2014

Barristers

Henry Setright KC
Michael Gratton KC

Court

Supreme Court

Practice Areas

International Children Law

Summary

The concept of “rights of custody” within the Hague Convention on the Civil Aspects of International Child Abduction 1980 and Regulation 2201/2003 was to be interpreted purposively as a reference to a wider category of “inchoate rights”, which would have been legally recognised had the question arisen before the wrongful removal or retention in question. A grandmother who had been delegated primary care of a child subsequently removed from her care by his mother therefore had “rights of custody” for the purposes of the Convention and the Regulation.

Facts

The appellant grandparents (G) appealed against a decision ([2014] NICA 15) that the respondent mother (M) had not acted unlawfully when she removed her child (K) from G’s care in Lithuania.

M had left K in G’s care shortly after he was born. She executed a power of attorney in respect of K in favour of the grandmother. M moved to Northern Ireland. The Lithuanian local authority made a temporary care order in the grandmother’s favour. When K was seven, M returned to Lithuania and abducted him, taking him to Northern Ireland. The Lithuanian local authority terminated its temporary care order when M took K into her own care. G brought proceedings in Northern Ireland. They sought a declaration that K was being wrongfully retained in breach of their rights of custody and an order for his return. The judge noted inconsistencies in the English case law and concluded that G had failed to establish a right of custody at the date of abduction. The Court of Appeal upheld that decision. The issue was whether the concept of “rights of custody” within the Hague Convention on the Civil Aspects of International Child Abduction 1980 and Regulation 2201/2003 was to be interpreted strictly and literally as a reference to legally recognised and enforceable rights, or purposively as a reference to a wider category of “inchoate rights” which would have been legally recognised had the question arisen before the wrongful removal or retention in question.

Held

(Lord Wilson dissenting) (1) The concept of inchoate rights had been recognised in England and Wales where the person with legal rights of custody had abandoned the child or delegated primary care to others. Such rights had not been recognised where the person with legal rights of custody continued to have primary care (see paras 23-42 of judgment). It was not enough that the instant case involved a classic example of the conduct the Convention was designed to prevent and remedy. As referred to in an explanatory report on the Convention, the court was also looking for “the existence of a right of custody which gives legal content” to the situation modified by the abduction. The “content” of the “rights of custody” protected by the Convention had its own autonomous meaning. The concept of inchoate rights was developed as an answer to the question of whether rights of custody existed for the purposes of the Convention, B (A Minor) (Child Abduction: Consent), Re [1994] 2 F.L.R. 249 considered. The European Court of Justice decision in McB v E (C-400/10 PPU) [2011] Fam. 364 did not constitute an insuperable obstacle to a continuation of the approach taken by the English courts, McB considered. If a strictly limited category of so-called “inchoate rights” fell within the concept of rights of custody for the purpose of the Convention, there was no reason why they should not do so for the purpose of the Regulation, which was intended to strengthen implementation of the Convention. People with that strictly limited category of inchoate rights could be defined, consistently with the principles and purposes of the Convention and the Regulation, as: (a) undertaking the responsibilities and therefore enjoying the concomitant rights and powers entailed in the primary care of the child; (b) not sharing those responsibilities with the persons having a legally recognised right to determine where the child should live and how he should be brought up. That person or persons must have either abandoned the child or delegated his primary care to them; (c) having some form of legal or official recognition of their position in the child’s country of habitual residence, to distinguish between those whose care of the child was lawful from those whose care was not; (d) having every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being, so that the child’s long-term future could be determined in those courts in accordance with his best interests, and not by the pre-emptive strike of abduction. Those requirements were consistent with the twin purposes of the Convention. First, they protected the child from the harmful effects of international child abduction by recognising that he should not be peremptorily removed from their care. Second, they enabled the courts of the child’s habitual residence to determine where his long-term future should lie. Applying that concept to the instant case, G had undertaken the responsibilities entailed in K’s primary care for many years and had exercised all the associated decision-making rights and powers. M had delegated K’s care to them, and the grandmother’s status had been officially recognised. Had it not been for the cancellation of that status on M’s return, there would have been no problem in ascribing rights of custody to the grandmother as there would have been no need to involve any concept of inchoate rights. However, the grandmother’s status did constitute “rights of custody” on the day K was removed. Her status had legal content derived from the decisions taken by the competent authorities in the light of M’s previous delegation of primary care to her (paras 50-62). (2) (Per Lord Wilson) The appeal should be dismissed. G lacked rights of custody at the relevant time, following termination of the temporary care order (paras 68-84).

Appeal allowed

Permission

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