

A & B v C (2018)

[2018] EWHC 2048

30/07/2018

Barristers

Jacqueline Renton

Court

Family Division

Practice Areas

Private Children Law

Cohen J concludes that a non-parent without rights granted by a court or by someone with parental rights could avail him or herself of Article 21 of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

In this case, Cohen J considered whether Article 21 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('The 1980 Convention') is engaged in respect of a non-parent without rights granted by a court or parental rights holder.

The child (P) had been living with his mother and the maternal family in Poland until the mother's death in late 2016. In January 2017, P's father returned to Poland from living in the UK and P moved to live with him and his paternal grandparents. In June 2017, the father returned to the UK with P and the maternal family had not had contact with him since.

The maternal aunt and maternal grandmother made applications for disclosure orders as to the whereabouts of P in this country and for rights of access pursuant to Article 21 of the 1980 Convention.

Prior to her death the mother signed a declaration and executed a will to the effect that P's custody would be granted to the grandmother in the event of her death. The aunt had been granted no such custody rights but had been living intermittently with P and his grandmother in Poland and had some significant role in his care before the mother's death.

Article 21 enables applications: 'to make arrangements for organising or securing the effective exercise of rights of access.' The Article was clearly engaged in respect of the grandmother but the key issue in this case was whether the aunt also had 'rights of access' within the meaning of the Convention.

Cohen J sets out the relevant definitions of 'rights of access' at [14]:

" 'Rights of access under the 1980 Convention are defined at Article 5 (B) as follows:

'Rights of Access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

This is the almost identical wording to the Brussels IIA definition which at Article 2.10 describes:

'Rights of Access' shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time."

When the learned judge initially considered the present case, he was concerned that:
'if the aunt was entitled to bring an application under Article 21 then so might anyone of a myriad of family members.' [15]

There was also a concern that a family friend, schoolteacher or any other person who had played a part in the child's life may be able to use Article 21.

However, recent European case law was 'significantly influential' in the judge's thinking (see [10]), namely the recent opinion of Advocate General Szpunar in the case of *Valcheva v Babanarakis* in the Court of Justice of the European Union (Case C-335/17) (published at [2018] 1FLR 1571) followed by the judgment of the CJEU on 31 May 2018 under the number Case C-335/17.

The *Vavelcha* case considered a grandmother's wish to exercise rights of access to her grandson. The question on referral to the Court of Justice was whether such a claim fell within the scope of Brussels IIA 2201/2003. In that case, the grandmother was in a similar position to the aunt in the present case in that no specific right had been granted to her. The court considered in detail the jurisprudence of EU legislature and the travaux préparatoires in concluding at paragraphs 33-34 and 37 that rights of access must be understood:

"as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility."

In the present case, Cohen J adopted this reasoning and concluded:

"...my initial reaction that the application by the aunt fell without the terms of Article 21 was incorrect and that both grandmother and aunt, as people to whom it is important that the child maintains a personal relationship fall within the Article."

Permission

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