

1987 September 15

(TRIANTAFYLIDIS. P. DEMETRIADES. LORIS JJ)

THE MINISTER OF JUSTICE AS THE CENTRAL
AUTHORITY UNDER LAW 36/86, ON BEHALF
OF LOIZOS M. ELLINAS, OF LONDON, .

Appellant (Applicant),

v.

- 1. ELENA ELLINA,
- 2. CHARALAMBOS PAPAKYRIACOU,

Respondents.

(Civil Appeal No. 7450).

Children — Custody of — The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Ratification) Law 1986 (Law 36/86) — Articles 1(d), 8, 9, 10(1), 10(2)(b), 12 and 17 of the Convention.

Words and Phrases — «Improper removal» of a child in the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Ratification) Law, 1986 (Law 36/86). 5

Upon application by the father of the minor child Andreas Ellina the High Court of Justice (Family Division) in England ordered on 19.5.87 respondent 1, i.e. the mother of the minor, to return the child to its jurisdiction within twenty-one days. 10

On 10.5.87 the Minister of Justice filed before the District Court of Lamaca an application for the recognition and enforcement of the aforementioned order of the High Court of Justice in England. Earlier on, on 30.4.87 respondent 1 had filed before the same Court Guardianship Application No. 11/87 as a result of which on 22.5.87 an interim order was made granting to the mother the custody of the minor. 15

On 27.7.87 the District Court of Lamaca, purporting to act under Article 10(2)(b) of the aforesaid Convention, suspended the proceedings in the application of the Minister of Justice. 20

Hence this appeal.

Held, allowing the appeal (1) In as much as by means of the
 5 forementioned order of the High Court in England dated 19 5 87 it was
 declared that the removal of the minor from its jurisdiction was unlawful in
 terms of the Convention in question, there can be no doubt, under Articles
 1(d) and 12 of the Convention, that this is a case of improper removal of the
 said minor to which Article 10(1) of the Convention is not applicable and, also,
 in view of its wording, Article 10(2) is not applicable either

(2) Whatever the exact nature of the reservation made by the United
 10 Kingdom under Article 17 of the Convention, it has not rendered applicable
 Article 10(2) of the Convention

Appeal allowed
No order as to costs.

Appeal.

15 Appeal by applicant against the judgment of the District Court of
 Lamaca (Arestis, D.J.) dated the 27th July, 1987 (Appl. No. 3/87)
 whereby proceedings in the application of the appellant Minister
 of Justice for the recognition and enforcement of the order of the
 High Court of Justice in England dated 19 May, 1987 were
 20 suspended until after the final determination of Guardianship
 Appl. No 11/87.

*A. Evangelou, Senior Counsel of the Republic with Chr.
 Ioannides, for the appellant.*

P. Demetriou, for the respondent

Cur. adv. vult.

25 **TRIANTAFYLLIDES P.** read the following judgment of the
 Court. On 19 May 1987 the High Court of Justice (Family
 Division) in England ordered respondent 1 to return the minor
 Andrea Ellinas to its jurisdiction within twenty-one days.

30 The said minor is the daughter of respondent 1 and of Loizos
 Ellinas who had applied to the High Court of Justice for such an
 order.

35 On 28 May 1987 the said order was forwarded to the Ministry of
 Justice of Cyprus by the Lord Chancellor's Department in
 England for recognition and enforcement under the European
 Convention on Recognition and Enforcement of Decisions
 Concerning Custody of Children, which was ratified by the
 European Convention on Recognition and Enforcement of

Decisions Concerning Custody of Children and on Restoration of Custody of Children (Ratification) Law, 1986 (Law 36/86).

As a result the Minister of Justice, as the Central Authority for Cyprus for the purposes of the said Convention, filed before the District Court of Lamaca, on 10 June 1987, an application for the recognition and enforcement of the aforementioned order of the High Court of Justice in England. 5

The application was opposed by the respondents.

Earlier on, on 30 April 1987, respondent 1 had filed before the District Court of Lamaca Guardianship Application No. 11/87 as a result of which on 22 May 1987 an interim order was made granting to respondent 1 in the present proceedings the custody of her minor daughter who had been brought to Cyprus by her. 10

On 27 July 1987 the District Court of Lamaca, purporting to act under Article 10(2)(b) of the aforesaid Convention, suspended the proceedings in the application of the appellant Minister of Justice for the recognition and enforcement of the order of the High Court of Justice in England dated 19 May 1987 until after the final determination of Guardianship Application No. 11/87 in the District Court of Lamaca. 15 20

Against the order made as aforesaid on 27.7.87 the present appeal has been made.

Article 10(1)(2)(b) of the Convention reads as follows:

«1. In cases other than those covered by Articles 8 and 9, recognition and enforcement may be refused not only on the grounds provided for in Article 9 but also on any of the following grounds: 25

.....

2. In the same cases, proceedings for recognition or enforcement may be adjourned on any of the following grounds: 30

(a)

(b) if proceedings relating to the custody of the child, commenced before the proceedings in the State of origin were instituted, are pending in the State addressed; 35

(c) »

Article 8 and 9 of the Convention, which are referred to in Article 10(1) of the Convention apply to cases of «improper removal» of a child; and by means of Article 1(d) of the Convention improper removal is defined as follows:

5 «(d) 'improper removal' means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:

10 (i) the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised;

15 (ii) a removal which is subsequently declared unlawful within the meaning of Article 12.»

It is, also, useful to refer to Article 12 of the Convention which reads as follows:

20 Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of
25 any interested person.»

Inasmuch as by means of the aforementioned order of the High Court in England dated 19 May 1987 it was declared that the removal of the minor Andreas Ellinas from the jurisdiction of England and Wales was unlawful in terms of the European
30 Convention in question there can be no doubt, under Articles 1(d) and 12 of the Convention, that this is a case of improper removal of the said minor to which Article 10(1) of the Convention is not applicable and, also, in view of its wording Article 10(2) is not applicable either. Consequently, paragraph (b) of Article 10(2)
35 was not applicable and could not have been resorted to by the District Court of Lamaca as it was done by means of its order of 27 July 1987.

During the course of the argument before us reference was made to a reservation by the Government of the United Kingdom, under Article 17 of the Convention, which reads as follows

«1. A Contracting State may make a reservation that, in cases covered by Articles 8 and 9 or either of these Articles, recognition and enforcement of decisions relating to custody may be refused on such of the grounds provided under Article 10 as may be specified in the reservation 5

2 Recognition and enforcement of decision given in a Contracting State which has made the reservation provided for in paragraph 1 of this Article may be refused in any other Contracting State on any of the additional grounds referred to in that reservation » 10

It is clear in our opinion from the wording of Article 17, above, that whatever the exact nature of the reservation made by the United Kingdom under such Article it may have rendered applicable grounds provided under Article 10(1) of the Convention but it has not rendered applicable Article 10(2) of the Convention 15

For all the foregoing reasons the order of suspension or adjournment of the proceedings made by the District Court of Lamaca, as aforesaid, on 27 July 1987 has to be set aside and the said District Court has to proceed to determine the application of the appellant Minister of Justice which was made for the recognition and enforcement of the order made by the High Court of Justice in England on 19 May 1987 20 25

This appeal is, therefore, allowed accordingly, but with no order as to its costs

*Appeal allowed with
no order as to costs.* 30