

[2021 Gib LR 266]**CARE AGENCY v. RESPONDENTS**

SUPREME COURT (Yeats, J.): May 11th, 2021

2021/GSC/12

Family Law—children—removal from jurisdiction—child in care of Care Agency removed from Gibraltar by father without permission—father ordered to return child to jurisdiction

The Care Agency applied for an order that a father return a child to Gibraltar.

In March 2020, the court made interim orders that the six children of the family be removed from their parents and placed in the care of the Care Agency. Pursuant to s.67 of the Children Act, the Care Agency had parental responsibility for the children.

In April 2021, the father removed two of the children from the jurisdiction, taking them to Spain. One child was subsequently returned but the other child, who was aged 9, remained in Spain. The child had told the guardian that he wished to remain in Spain. The Care Agency sought an order that the father return the child to Gibraltar. The application was supported by the guardian but not by the mother. The children were born in Gibraltar and were British nationals.

Held, ruling as follows:

(1) Section 67(3) of the Children Act provided that whilst a care order was in force in respect of a child, the Care Agency would have parental responsibility for the child. Section 67(7) provided that whilst a care order was in force no person could remove the child from Gibraltar without the written consent of every person who had parental responsibility for the child or leave of the court. It was clear that the Care Agency did not consent to the removal of the children to Spain. No application had been made to the court for permission to remove the children. The removal by the father was therefore unlawful. The retention of one of the children in Spain was also unlawful. There was no doubt that the father knew that he had acted unlawfully (para. 7).

(2) The court retained jurisdiction over the child because he was habitually resident in Gibraltar before his removal. The removal of the child having been contrary to the provisions of the Children Act, the court had power, by way of a specific issues order pursuant to s.25 of the Children

Act, to order the father to return him to this jurisdiction. Furthermore, pursuant to art. 5 of the Hague Convention, the court was able to take measures directed towards the protection of the child. An order for the return of the child was a measure which was directed towards the protection of the child. The court would therefore order that the father return him to Gibraltar forthwith. The court would respectfully request the Spanish authorities and courts, or the courts in such other place as the child might be, to take such steps and measures as they considered necessary to secure his return to Gibraltar (paras. 13–16).

D. Conroy (of the OPCL) for the applicant;

J. Rodriguez (instructed by Verralls) for the first respondent;

G. Guzman, Q.C. (instructed by guardian *ad litem*) for the third to eighth respondents.

1 **YEATS, J.:** On March 24th, 2020, I made interim orders that the six children of the family (the third to eighth respondents) be removed from their parents' care and be placed in the care of the Care Agency. The application, which had been made by the Care Agency pursuant to ss. 64 and 85 of the Children Act 2009, was not objected to by the first respondent (the children's mother) or the second respondent (the children's father). (I shall refer to the first and second respondents as "mother" and "father" respectively.) Pursuant to the order of March 24th, 2020, a guardian *ad litem* was appointed to independently represent the children's interests. The proceedings, for a final care order, are ongoing—with a final hearing presently set to commence on June 21st, 2021.

2 The interim care orders have been extended by agreement periodically, the effect of which being that all six children have throughout remained under the care of the Care Agency. Pursuant to the provisions of s.67 of the Children Act, the Care Agency has parental responsibility for the children.

3 On April 4th, 2021, the father removed the fourth respondent and the fifth respondent from the jurisdiction by taking them across the land frontier to the Kingdom of Spain. The fourth respondent returned to Gibraltar on April 18th, 2021. The fifth respondent, who is aged 9, remains in Spain.

4 This is an application by the Care Agency that I order father to return the fifth respondent to Gibraltar. The application is supported by the guardian. It is not supported by mother. Father's previous solicitors were served with the application but since the application was served on the solicitors they have come off the record. It is not clear whether or not the father has the documentation himself but I am, in any event, satisfied that father is aware that the application is being made but has chosen not to participate. The guardian, in a report dated May 9th, 2021, explains that he has been in communication with father by text message and that he spoke to both father and the fifth respondent on May 9th, 2021. The application

being made by the Care Agency was discussed by the guardian and father but father is adamant that he will not return the fifth respondent to Gibraltar. I am therefore satisfied that father is aware of the application and could have participated if he wished to do so. Due to the urgency of the matter, I am setting out my reasons for making the orders that I propose to make in this short extempore judgment.

5 Mother (a British Gibraltarian who is 32 years old) and father (a Spanish national who is 39 years old) entered into a relationship in or around 2009. They have six children together. All six children were born and registered in Gibraltar. They are British nationals and have lived in Gibraltar throughout their lifetimes. The Care Agency have been involved with the family since the birth of their first child. There is a history of domestic abuse and neglect. The application of March 24th, 2020 was made on the basis that the children were at risk of suffering significant emotional harm as a result of neglect. The Care Agency's case at the time was that the neglect was manifested by inconsistent care giving which included domestic violence, poor presentation, neglect of medical needs and low school attendance. Although mother and father did not agree with all of the allegations made by the Care Agency, they agreed that the threshold for the interim care orders had been met. Father and mother have now separated.

6 In March 2021, the Care Agency placed the three older children with the mother. On April 4th, 2021, mother and the three children were out of their residence and accompanied by a carer. Father appeared and asked the children if they wanted to leave with him. The fourth and fifth respondents ran away with father and together they made their way to Spain. The children did not have their travel documents and according to information which has been provided to the Care Agency by the Royal Gibraltar Police, they did not cross the frontier at the official crossing point. Two weeks later, as I have said already, on April 18th, 2021, the fourth respondent contacted mother to say that she wanted to return to Gibraltar. She was collected by mother and they returned. The fifth respondent remains in Spain. He has indicated to the guardian that he wishes to remain in Spain. The latest information in that respect is contained in the guardian's report dated May 9th, 2021.

7 Section 67(3) of the Children Act provides that whilst a care order is in force in respect of a child, the Care Agency shall have parental responsibility for the child. Section 67(7) then provides that, again, whilst a care order is in force, no person may remove the child from Gibraltar without either the written consent of every person who has parental responsibility for the child or the leave of the court. It is clear that the Care Agency did not consent to the removal of the fourth and fifth respondents to Spain. Furthermore, no application for permission to remove the children was

made to this court. Their removal by father was therefore unlawful. The retention of the fifth respondent in Spain is also consequently unlawful. There is no doubt that father knows that he has acted unlawfully.

8 Father has not provided his address or whereabouts to the Care Agency or other authority in Gibraltar, save that he provided a photograph to the guardian which shows the fifth respondent in a park in La Linea de la Concepcion in Spain. Mother appears to be aware of where the fifth respondent is being retained but has been unwilling to provide the Care Agency with the address.

9 According to the guardian, father is refusing to return the fifth respondent because he blames the Care Agency for the problems his family have experienced and he wants the social services in Spain to deal with his case and reunite his family. I will simply observe that any issues or complaints he may have with the Care Agency can be resolved here in Gibraltar. It is this court that will decide what happens to the children and whether or not a final care order will be made.

10 Mother's position is that she does not support this application because she is aware of the fifth respondent's wishes that he wants to remain in Spain because he does not want to return to Gibraltar and be placed in residential care.

11 The Care Agency are very concerned about the fifth respondent's welfare and this has led to a referral to the Royal Gibraltar Police, discussions with social services in Spain and to the making of this application. In support of the application, Ms. Sally Harrison, the acting Head of Children's Services at the Care Agency, has filed an affidavit dated April 27th, 2021. I have carefully considered her evidence. In the affidavit, Ms. Harrison sets out the background to the following: the Care Agency's involvement with the family; the care proceedings; the removal of the fourth and fifth respondents to Spain by father; and the steps taken since then. In particular as to the Care Agency's present concerns, Ms. Harrison says as follows at para. 13.4 of her affidavit:

"The Care Agency were and remain concerned that no assessment has been possible as to the emotional impact of such a radical severance from their habitual residence, where they are staying, who will be caring for them, what services and education will be open to them as well as their best interests generally. In this respect, it is clear from the Care Proceedings that the Care Agency is of the view that the father is not able to provide safe and consistent parenting to these children."

12 The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded on October 19th, 1996,

came into force in the United Kingdom on November 1st, 2012. The Convention has been extended to Gibraltar.

13 Mr. Conroy submits that this court retains jurisdiction over the fifth respondent because he was habitually resident in Gibraltar before his removal to Spain and the removal was wrongful. I agree that there is no doubt that he was habitually resident in Gibraltar before his removal. The submission that this court retains jurisdiction is also correct and accords with arts. 5 and 7 of the Convention. I am therefore satisfied that this court has jurisdiction to continue to make orders regarding his welfare and protection, notwithstanding the fact that he is presently outside Gibraltar.

14 The removal of the fifth respondent having been contrary to the provisions of the Children Act, the court has the power, by way of a specific issues order pursuant to s.25 of the Children Act, to order father to return him to this jurisdiction. Furthermore, pursuant to art. 5 of the Convention, this court is able to take measures directed towards the protection of the child. An order for the return of the fifth respondent is a measure which is directed towards the protection of the child. I shall therefore order that father return him to Gibraltar forthwith.

15 The concerns that the Care Agency have outlined need to be determined. As I have indicated, the matter is due to be heard at a trial which will commence on June 21st, 2021. In any event, the fifth respondent was wrongfully removed from Gibraltar without the Care Agency's consent. He should be returned. Quite apart from the concerns the Care Agency have about the care that father can afford him, it is also relevant that he has lived in Gibraltar throughout his lifetime; his siblings and mother are here; and he attends school in Gibraltar. There is clearly an urgent need for him to be returned to Gibraltar.

16 I consider it appropriate to respectfully request the authorities and courts of the Kingdom of Spain, or the courts in such other place as the fifth respondent may be present, to take such steps and measures as they may consider to be necessary to secure his return to Gibraltar.

17 I shall also order that a transcript of this extempore judgment and order, and the documents filed in court in connection with this application, may be disclosed to any authority in Gibraltar and/or to the authorities and courts in the country where the fifth respondent may now be present, for purposes limited to securing his return.

Order accordingly.