1982 July 9

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF HABEAS CORPUS BY SUSANNA ANNANDER,

and

IN THE MATTER OF JOSEPH ANNANDER (ALSO KNOWN AS JOSEPH CHRISTODOULIDES) A MINOR.

(*Application No.* 9/82).

Habeas corpus—Jurisdiction—Infant living with his father and grandmother—Mother's application for an order of habeas corpus so that her infant son should be produced in Court for the purpose of being delivered to her—Court vested with jurisdiction to entertain the application—Article 155.4 *of the Constitution and relevant principles of the Common Law and Equity applicable in England up to, at least, the time when Cyprus became an independent country in* 1960*—Merits of the application—Welfare of the infant to be taken into account—Directions for preparation of a comprehensive report covering various aspects which are relevant to the infant.*

Habeas corpus—Is a writ of right and not a writ of course—May be refused where there is another alternative effective remedy—Illegitimate child—Living with father and grandmother—Mother refused custody—Applying for order of habeas corpus—No alternative remedy under the Guardianship of Infants and Prodigals Law, Cap. 277 *because this Law applies only to legitimate children.*

Guardianship of Infants and Prodigals Law, Cap. 277*—Applicable only to legitimate children.*

The applicant, a Swedish citizen at present residing in Cyprus, applied for an order of habeas corpus so that her infant son, Joseph, who was two years old, should be produced in Court for the purpose of being delivered to her. The child was a Swedish national and was the illegitimate offspring of the coha-

bitation of the applicant and the respondent Andreas Christodoulides. The child was residing in Nicosia with his father and his grandmother who was the other respondent in these proceedings. The respondents refused to let the applicant have custody of the infant unless she accepted certain conditions aiming mainly at securing that the infant will remain in Cyprus.

Held, (I) *on the question whether the Court possesses jurisdiction to entertain the application:*

That this Court possesses such jurisdiction under Article 155.4 of the Constitution and on the strength of the relevant principles of the Common Law and Equity applicable in England up to, at least, the time when Cyprus became an independent country in 1960 (see, inter alia, *The Queen* v. *Nash, In re Carey, an Infant* [1883] 10 Q.B. 454).

(II) *on the merits of the application:*

That it appears that it is necessary to take into account, within the proper limits, the aspect of the welfare of the infant concerned, especially in a case such as the present one where the infant is not detained by a stranger, but is in the custody of his natural father; that it is, therefore, directed, that there should be prepared by the Department of Welfare Services a comprehensive report, covering the various aspects which are relevant to the infant in question, copies of which should be furnished to both counsel who are free to place before the Court by way of affidavits any other material which they deem relevant and the case is fixed for continuation on August 24, 1982 at 10 a.m

(III) *on the question whether applicant possessed an alternative effective remedy under the provisions of the Guardianship of Infants and Prodigals Law, Cap.* 277, *in view of the legal position that a writ of habeas corpus is a writ of right and not a writ of course and may be refused where there is another effective remedy.*

That the provisions of Cap. 277 do not apply to illegitimate children, like the infant involved in the present case; and that, therefore, the applicant does not possess under Cap. 277 an effective remedy in addition to the remedy by way of an order of habeas corpus.

Order accordingly.

Cases referred to:

Queen v. *Nash, In re Carey, an Infant* [1883] 10 Q.B. 454;

Barnardo v. *McHugh* [1891] A.C. 388;

In re J.M. Carroll (an Infant) [1931] 1 K.B. 317;

Ex parte Corke [1954] 2 All E.R. 440;

Re C.T. (an Infant), Re J.T. (an Infant) [1956] 3 All E.R. 500.

Application.

Application for an order of habeas corpus by Susanne Annander of Sweden so that her infant son, Joseph, should be produced in Court for the purpose of being delivered to her.

A. Georghiades, for the applicant.

Gl. Raphael, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following decision. In this application for an order of habeas corpus the applicant, Susanne Annander, is a Swedish citizen who is at present residing in Cyprus.

She seeks the said order so that her infant son, Joseph, who is two years old, should be produced in Court for the purpose of being delivered to her. The child is a Swedish national, too.

It is common ground that the father of the child is respondent Andreas Christodoulides and that the child is the illegitimate offspring of the cohabitation of the applicant and of the said respondent from May 1975 onwards, both in Sweden and in Cyprus.

The child resides, at present, in Nicosia with his father and with his grandmother, Adamantini, or Ada, Christodoulides, who is the other respondent in these proceedings. Until June 4, 1982, the applicant was, also, residing with them, but she ceased doing so because she broke off relations with the father of the infant due to personal friction with him.

As has been stated by their counsel, the respondents refuse to let the applicant have custody of the infant unless she accepts certain conditions aiming mainly at securing that the infant will remain in Cyprus.

The first issue which I have had to examine in this case was whether I possess jurisdiction to entertain this application:

I have reached the conclusion that I do possess such jurisdiction under Article 155.4 of the Constitution and on the strength of the relevant principles of the Common Law and Equity applicable in England up to, at least, the time when Cyprus became an independent country in 1960. In this connection, I may refer, by way of illustration, to the cases of *The Queen* v. *Nash, In re Carey, an Infant*, [1883] 10 Q.B. 454, *Barnardo* v. *McHugh*, [1891] A.C. 388 and *In re J.M. Carroll (an Infant)*, [1931] 1 K.B. 317.

A question which has arisen is whether the applicant possesses an alternative effective remedy under the provisions of the Guardianship of Infants and Prodigals Law, Cap. 277, and whether, if that is so, I should refuse to exercise my jurisdiction as regards the making of an order of habeas corpus in this case:

It is correct that in the commentary to rule 1 of Order 54 of the Rules of the Supreme Court in England (see The Supreme Court Practice, 1979, vol. 1, p. 835) which corresponds to rule 14 of Order 59 of the old Rules of the Supreme Court in England (see The Annual Practice, 1958, vol. 1, p. 1735) it is stated that habeas corpus "is a writ of right and granted ex debito justitiae, but not as of course, and may be refused where another remedy lies whereby the validity of the restraint can be effectively questioned". A case which is referred to, in this respect, in the said commentary is *Ex parte Corke*, [1954] 2 All E.R. 440, where Lord Goddard C.J. stated the following:

> "It has always been the law, since it was laid down by WILMOT, J., in giving his opinion on the writ of habeas corpus, in answer to the questions proposed to the judges by the House of Lords in 1758, that a writ of habeas corpus is a writ of right and not a writ of course: See WILMOT'S NOTES OF OPINIONS AND JUDGMENTS, p. 82".

It has to be examined, next, whether there exists an effective alternative remedy under Cap. 277 in a case such as the present one:

Cap. 277 was enacted as the Guardianship of Infants and Prodigals Law, 1935 (Law 32/35) and its long title was "A law to provide for the Guardianship of Infants not being Heirs under Disability and of Prodigals"; and, in section 2 of the Law, "infant" was defined as meaning "a person who (a) has not

attained the age of eighteen years, and (b) is not an heir under disability as defined in section 1 of the Infants' Estates Administration Law, 1894"; and it was provided further "that a married woman who has not attained the age of eighteen years shall not be deemed to be an infant for the purposes of this Law".

The long title of Law 32/35, which was Cap. 102 in the 1949 Edition of the Statute Laws of Cyprus, and the above definition of "infant" were amended by the Guardianship of Infants and Prodigals (Amendment) Law, 1954 (Law 41/54) with the result that the reference to infants "not being Heirs under Disability" was deleted from the long title of the Law and paragraph (b) of the aforequoted definition of "infant" was repealed.

These amendments coincided with the enactment of the Administration of Estates Law, 1954 (Law 43/54) which repealed the Infants' Estates Administration Law, 1894 (which was originally Law 7/1894 and then Cap. 218 in the 1949 Edition of the Statute Laws of Cyprus).

At the time when the said Law 7/1894 was enacted there was in force the Intestate Succession Law, 1884 (Law 8/1884) by virtue of which only legitimate children could become heirs.

Therefore, when at the time of the enactment of Law 32/35—now Cap. 277—there was made, as aforesaid, reference in its long title and in the definition of "infant" to "heirs under disability", such heirs included legitimate children only, and not illegitimate children, too. Consequently, this is a quite significant indication that Law 32/35 has since its enactment been destined to relate only to legitimate children

Another reason for which Cap. 277 seems to be applicable only to legitimate children is the express reference to "lawful father" in its section 6, which, having remained the same all along since it was first enacted, reads as follows:

"6. Subject to the provisions of this Law—

(a) the lawful father of an infant shall be the guardian of the infant's person and property;

(b) where an infant has no lawful father living, the mother of the infant shall be the guardian of the infant's person and property;

(c) if both the parents of an infant are dead, the testamentary guardian (if any) appointed by the last surviving parent shall be the guardian of the infant's person and property".

It is useful, also, to note that in *Re C.T. (an infant), Re J.T. (an infant)*, [1956] 3 All E.R. 500, Roxburgh J. after an extensive review of relevant case-law and legislative provisions in the analogous to Cap. 277 statutes in England—such as the Guardianship of Infants Act, 1886, and the Guardianship of Infants Act, 1925, as amended by the Administration of Justice Act, 1928—proceeded, very convincingly, to express the views, inter alia, that "prima facie, the titles of 'father' and 'mother' belong only to those who have become so in the manner known to and approved by the law" (see p. 504), that "it is, therefore, almost impossible to believe that the Guardinaship of Infants Acts were intended to embrace illegitimate children" (see pp. 507-508), and that "the prima facie meaning of the terms 'mother' and 'father' is not to be departed from unless a compelling reason can be found in the statute for doing so" (see p. 510).

It appears that in England express special provision for the applicability to illegitimate children of only certain legislative provisions relating to the guardianship of infants had to be made (see, in this respect, section 14 of the Guardianship of Minors Act, 1971).

In the light of the foregoing I am inclined to the view that —(as also there is not to be found in it any compelling indication to the contrary)—Cap. 277 should be treated as being applicable only to legitimate and, not, also, to illegitimate, children; and, a further indication in support of this view is that all matters in relation to illegitimate children in respect of which legislative provisions were deemed necessary are regulated by a special Law, the Illegitimate Children Law, Cap. 278, the long title of which is "A Law to Consolidate and Amend the Law Relating to Illegitimate Children", and which was enacted in 1955 as Law 15/55.

Since, therefore, I have reached the conclusion that the provisions of Cap. 277 do not apply to illegitimate children, like the infant involved in the present case, the applicant does not possess under Cap. 277 an effective remedy in addition to the remedy by way of an order of habeas corpus.

I would, however, go further and say that, in so far as the situation in the case now before me is concerned, there is so much essential difference between the nature of the remedy of habeas corpus and the nature of the remedies under Cap. 277, that even if Cap. 277 was applicable to illegitimate children, too, I would not be prepared to regard the remedies under Cap. 277 as being so truly alternative to that of an order of habeas corpus as to hold that this would not be a proper case in which to make such an order if it is found that the applicant is entitled to it on the merits of the case.

Whether or not the order of habeas corpus which is applied for by the applicant should be made is a question which I cannot answer today as I do not yet have before me all the required material. In the light of case-law such as *Nash*, supra, *Barnardo*, supra and *Carroll*, supra, it appears that it is necessary to take into account, within the proper limits, the aspect of the welfare of the infant concerned, especially in a case such as the present one where the infant is not detained by a stranger, but is in the custody of his natural father.

It is directed, therefore, that there should be prepared by the Department of Welfare Services a comprehensive report covering the various aspects which are relevant to the infant in question. The Registrar of this Court should take all necessary steps to ensure the preparation of such report, copies of which should be furnished to both counsel.

Both sides are, also, free to place before the Court, by way of affidavits, any other material which they deem relevant.

This case is fixed for continuation on August 24, 1982, at 10 a.m., and, in the meantime, and until further order, there will remain in force the order regarding the child which was made by consent on June 16, 1982.

Order accordingly.