

1988 April 7

(A. LOIZOU, P., MALACHTOS, PIKIS, JJ.)

1. ELENA ELLINA,
2. CHARALAMBOS PAPAKYRIACOU,

Appellants-Respondents,

v.

MINISTER OF JUSTICE AS CENTRAL AUTHORITY
ACCORDING TO LAW 36/86 ON BEHALF OF LOIZOS
MICHAEL ELLINA,

Respondent-Applicant.

(Civil Appeal 7560).

*The European Convention on Recognition and Enforcement of Decisions
Concerning Custody of Children and Restoration of Custody of
Children — Art. 10.1(b) — Ambit of.*

International Conventions — Mutuality, principle of.

5 Loizos Ellina is a British subject of Cypriot origin, resident of the
United Kingdom. Elena Ellina is a Cypriot national. They got married
in 1984. Following their marriage they settled in the United
Kingdom. In 1985 a girl was born to them. In the course of time
10 relations between them deteriorated. Unknown to the father and
contrary to his wishes, Elena brought the child with her to Cyprus.
The child was a British subject and a resident of the United Kingdom.

15 The father reacted swiftly. Upon petition by him to the High Court
in England he obtained an order under the European Convention on
Recognition and Enforcement of Decisions Concerning Custody of
Children and Restoration of Custody of Children. The order was for
the return of the child to the United Kingdom.

20 Both the United Kingdom and Cyprus are signatories to the said
Convention*. The Minister of Justice of the Republic of Cyprus, the
Central Authority under the Convention, applied to the District Court
of Lamaca for recognition and enforcement of the English order.

* Ratified by Law 36/86.

The District Court granted the application.

Hence this appeal. The District Court held, inter alia, that, notwithstanding the reservation made by the United Kingdom under Art. 17.1 of the Convention, the provisions of Art. 10.1*, which provide for additional grounds of denial of recognition of a foreign order, are not applicable to the case in hand. 5

Held, dismissing the appeal: (1) By the principle of mutuality, an English order may be opposed in Cyprus on the same grounds as a Cyprus order can be opposed under the Convention in the United Kingdom. Hence the trial Court misdirected itself in declaring Art. 10.1 to be inapplicable. 10

(2) Paragraphs (a), (c) and (d) of Art. 10.1 cannot be legitimately invoked.

(3) Careful consideration of the facts put before the trial Court, does not disclose any noticeable change in the circumstances of the child or the family. 15

(4) Para. (b) of Art. 10.1 expressly enjoins that changes resulting from mere change in the residence of the child after improper removal, should be excluded from the range of relevant circumstances. 20

Enforcement and recognition of an order may be denied under Art. 10.1(b) only in the face of (a) circumstances relevant to the well-being of the child, such as to render (b) the decision to return the child manifestly antagonistic to the welfare of the child. Only an extreme change of relevant circumstances may produce that result, a corollary of the employment of the word «manifestly», that is, beyond controversy. 25

*Appeal dismissed.
No order as to costs.*

Appeal. 30

Appeal by respondent against the judgment of the District Court of Lamaca (Arestis, D.J.) dated the 6th February, 1988 (Appl. No. 3/87) whereby an order for the recognition and enforcement of the order of High Court of Justice in England (Family Division) was made ordering the return of the child to the United Kingdom. 35

P. Demetriou, for the appellants.

* Article 10.1 of the Conventions is quoted at pp. 243-244 post.

A. *Evangelou*, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

5 A. LOIZOU P.: *The judgment of the Court will be delivered by*
Pikis, J.

PIKIS J.: Loizos Michael Ellina is a British subject of Cypriot origin. He is a resident of the United Kingdom. Elena Ellina is a Cypriot national, the holder of a Cypriot passport. They got married in 1984 (ecclesiastically in Cyprus accompanied by a civil
10 marriage in the United Kingdom). Following their marriage they settled in the United Kingdom. In 1985 a girl was born to them. In the course of time relations between them deteriorated. Elena felt unhappy in the United Kingdom and longed to return to Cyprus. In April 1987 she gave vent to her wishes and returned to Cyprus.
15 Unknown to the father and contrary to his wishes, she brought the child with her to Cyprus. The child was a British subject and a resident of the United Kingdom.

The father reacted swiftly; he petitioned the High Court in England (Family Division) to order the return of the child to
20 England. The Petition was founded on the provisions of the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children (hereafter referred to as the Convention), to which both the United Kingdom and Cyprus are signatories.
25 Cyprus ratified the Convention that became part of our municipal law (Law 36/86).

The High Court of England ordered, pursuant to the provisions of the Convention, the return of the child to the United Kingdom on the ground that she had been illegally removed from its
30 jurisdiction. On 28th May, 1987, the order was addressed to the appropriate authority of the Cyprus Republic, the Ministry of Justice, for implementation. The Minister of Justice, the central authority under the Convention, applied to the District Court of Larnaca, where the mother and the child resided, for recognition
35 and enforcement of the English order.

On 27th May, 1987, the hearing of the application for recognition and enforcement was suspended pending the determination of Custody Application 11/87 submitted to the District Court by the mother. On her return to Cyprus the mother
40 initiated proceedings for the custody and care of the child. The

Minister successfully appealed against the order of the District Court of Larnaca suspending the application for the recognition and enforcement of the order of the High Court of England. The Supreme Court decided that the District Court had no jurisdiction to suspend the proceedings for recognition and enforcement of the English order and remitted the case back to the District Court of Larnaca to be dealt with according to law (Civil Appeal 7450 - *The Minister of Justice, as the Central Authority under Law 36/86, on behalf of Loizos M. Ellinas, of London v. 1. Elena Ellina, of London; 2. Charalambos Papakyriacou, of Larnaca**). 5 10

Art. 10.2. of the Convention was inapplicable, it was pointed out, in the absence of the pre-conditions rendering it operative.

At the resumption of the hearing of the application for recognition and enforcement of the English order, the District Court of Larnaca took the view that Art. 10.1 of the Convention was also inapplicable, notwithstanding the reservation made by the United Kingdom under Art. 17.1 of the Convention. The only grounds upon which recognition and enforcement could be denied were those enumerated in Art. 9.1 of the Convention, none of which had been substantiated. In the face of this finding an order for the recognition and enforcement of the English order was made ordering the return of the child to the United Kingdom. 15 20

The mother appealed contending that the trial Judge was wrong in holding that Art. 10.1 was inapplicable. Consequently the case should, once more, be remitted to the trial Court to examine whether recognition and enforcement of the English order should be denied on the authority of any one or more of the grounds listed in Art. 10.1. Counsel of the Republic espoused the submission that the trial Court erred in ruling that Art. 10.1 was inapplicable. Nonetheless he invited the Court to dismiss the appeal considering that the facts founding the opposition to the enforcement of the English order left unaffected the outcome of the case as the facts (disclosed in the affidavit of the appellant) and circumstances of the case, could not give rise to the legitimate invocation of any of the grounds of opposition enumerated in Art. 10.1. 25 30 35

The learned trial Judge erred in holding that Art. 10.1 was inapplicable and was wrong in interpreting the decision of the Court of Appeal (Civil Appeal 7450) as warranting such a finding. The reservation made by the United Kingdom and sequential

*(1987) 1 C.L.R. 536.

applicability of Art. 10.1 were not debated before the Supreme Court. The issue had been specifically raised only at the resumed hearing. The Supreme Court in its judgment did contemplate the possibility of Art. 10.1 becoming applicable in the face of a reservation of a signatory made under Art. 17.1. As a matter of fact, the United Kingdom deposited a reservation simultaneously with the signature of the Convention (20th May, 1980). As a result recognition and enforcement of an order for the return of a child to the jurisdiction of a foreign Court that issued the order may be denied in addition to any other grounds provided for in the Convention, on the basis of the grounds enumerated in Art. 10.1. By the principle of mutuality, an English order may be opposed in Cyprus on the same grounds as a Cyprus order can be opposed under the Convention in the United Kingdom. Hence we conclude that the trial Court misdirected itself in declaring Art. 10.1 to be inapplicable.

Art. 10.1 of the Convention provides:

«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:

(a) if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed;

(b) if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child;

(c) if at the time when the proceedings were instituted in the State of origin:

(i) the child was a national of the State addressed or was habitually resident there and no such connection existed with the State of origin;

(ii) the child was a national both of the State of origin and of the State addressed and was habitually resident in the State addressed;

(d) if the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before

the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child».

Paragraphs (a), (c) and (d) cannot be legitimately invoked in opposition to the application for recognition and enforcement and no such suggestion has been made either. The only ground that could be relied upon is that set out in para.(b). Admittedly it involves ponderation of relevant facts associated with «change in the circumstances of the child and family including the passage of time». Careful consideration of the facts put before the trial Court, especially those set out in the affidavit of the mother, does not disclose any noticeable change in the circumstances of the child or family. Para. (b) of Art. 10.1 expressly enjoins that changes resulting from mere change in the residence of the child after improper removal, should be excluded from the range of relevant circumstances. The facts deposed to by the mother are in substance directed towards eliciting changes resulting from the change in the residence of the child as a result of her improper removal. As such they are irrelevant. Her reasons for bringing over the child to Cyprus are primarily related to what she perceives to be her welfare and the way that such well being may benefit her infant daughter.

Enforcement and recognition of an order may be denied under Art. 10.1(b) only in the face of (a) circumstances relevant to the well-being of the child, such as to render (b) the decision to return the child manifestly antagonistic to the welfare of the child. Only an extreme change of relevant circumstances may produce that result, a corollary of the employment of the word «manifestly», that is, beyond controversy. The Convention, we may remind, set out to achieve an important goal to protect children from the capricious conduct of parents taking the form of removal of the child from the country of its residence as a result of a parental conflict. The Convention aims to lessen hardship to children upon the break up of a marriage. In addition to its unsettling effects, unlawful removal of a child has the inevitable consequence of loosening the ties between the child and the parent who stays behind. The Convention aims to put an end to the unlawful removal of children. The child and its custody must not be made a bone of contention among disputing parents. The welfare of the child should, after separation too, unite parents in common endeavours for its well-being. In that way they mitigate the unavoidable loss and hardship to a child occasioned by the break up of the marriage of its parents.

Art. 14 of the Convention enjoins contracting States to improvise an expeditious procedure for the recognition and enforcement of decisions relating to the custody of child. The Courts of the Republic must no doubt deal with applications for
5 recognition and enforcement in that spirit and endeavour to determine them as speedily as possible.

The appeal is dismissed; the order for recognition and enforcement of the English order is affirmed. There will be no order as to costs.

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*Appeal dismissed.
No order as to costs.*