CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANTS

Judgment of 28 November 1958

The case relating to the application of the Convention of 1902 governing the Guardianship of Infants, between the Netherlands and Sweden, was concerned with the validity of the measure of protective upbringing (*skyddsuppfostran*) taken by the Swedish authorities in respect of an infant, Marie Elisabeth Boll, of Netherlands nationality, residing in Sweden. Alleging that this measure was incompatible with the provisions of The Hague Convention of 1902 governing the guardianship of infants, according to which it is the national law of the infant that is applicable, the Netherlands, in their Application instituting proceedings, asked the Court to declare that the measure of protective upbringing is not in conformity with the obligations binding upon Sweden by virtue of the Convention and to order the termination of the measure.

By twelve votes to four, the Court rejected this request.

Judges Kojevnikov and Spiropoulos append declarations for the Judgment of the Court.

Judges Badawi, Sir Hersch Lauterpacht, Moreno Quintana, Wellington Koo and Sir Percy Spender, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Vice-President Zafrulla Khan states that he agrees generally with Judge Wellington Koo.

Judges Winiarski and Cordova and M. Offerhaus, Judge *ad hoc*, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their dissenting opinions.

Recalling the essential and undisputed facts underlying the case, the Judgment states that the Netherlands infant Marie Elisabeth Boll was born of the marriage of Johannes Boll, of Netherlands nationality, and Gerd Elisabeth Lindwall, who died on December 5th, 1953. On the application of the father, the Swedish authorities had, in the first place, on March 18th, 1954, registered the guardianship of the latter and appointed a *god man* of the infant, pursuant to Swedish law of guardianship. Subsequently, on April 26th, 1954, the infant was placed by the Swedish authorities under the regime of protective upbringing instituted under Article 22 (*a*) of the Swedish Law of June 6th, 1924, on the protection of children and young persons.

On June 2nd, 1954, the Amsterdam Cantonal Court had instituted guardianship according to Netherlands law. The father and the deputy-guardian had then appealed for the termination of the protective upbringing, but this appeal was rejected by the Provincial Government of Östergötland. On August 5th, 1954, the Court of First Instance of Dordrecht, upon the application of the Guardianship Council of that town and with the consent of the father, discharged the latter from his functions as guardian and appointed in his place a female guardian and ordered that the child should be handed over to the latter. On September 16th, 1954, the Swedish Court at Norrköping cancelled the previous registration of the guardianship of the father and dismissed an application for the removal of the Swedish *god man*. Lastly, on February 21st, 1956, the Swedish Supreme Administrative Court, by a final judgment, maintained the measure of protective upbringing.

The Judgment of the International Court of Justice states that, of all the decisions given in Sweden and in the Netherlands, those which relate to the organisation of guardianship do not concern the Court. The dispute relates to the Swedish decisions which instituted and maintained protective upbringing. It is only upon them that the Court is called upon to adjudicate.

In the opinion of the Government of the Netherlands, the Swedish protective upbringing prevents the infant from being handed over to the guardian, whereas the 1902 Convention provides that the guardianship of infants shall be governed by their national law. The exception to which Article 7 of the Convention relates is not applicable because Swedish protective upbringing is not a measure permitted by that Article and because the condition of urgency required was not satisfied.

For its part, the Government of Sweden does not dispute the fact that protective upbringing temporarily impedes the exercise of custody to which the guardian is entitled by virtue of Dutch law, but contends that this measure does not constitute a breach of the 1902 Convention, in the first place because, when the measure was taken, the right to custody belonging to the father was an attribute of the *puissance paternelle* which is not governed by the 1902 Convention; a

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female guardian having succeeded to this right, the 1902 Convention does not apply in her case either. In the second place, the Swedish Law for the protection of children applies to every infant residing in Sweden; the Convention governs only conflicts of law in respect of guardianship; protective upbringing, being a measure within the category of *ordre public*, does not constitute a breach of the Convention. The contracting States retain the right to make the powers of a foreign guardian subject to the restrictions required by *ordre public*.

With reference to the first ground relied upon by Sweden, the Court observes that the distinction between the period during which the father was invested with the guardianship and the period when the guardianship was entrusted to a third party may lead to a distinction being drawn between the original institution of the regime of protective upbringing and its maintenance in face of the guardianship conferred upon a third party. The Court does not consider that it need be concerned with this distinction. The grounds for its decision are applicable to the whole of the dispute.

In judging of the correctness of the argument according to which protective upbringing constitutes a rival guardianship in competition with the Dutch guardianship, the Judgment notes that certain of the Swedish decisions concerning the administration of the property of the infant proceeded on the basis of recognition of the Dutch guardianship.

The judgment of the Supreme Administrative Court of February 21st, 1956, merits particular mention. The Supreme Administrative Court did not question the guardian's capacity to take proceedings; it thereby recognized her capacity. It did not raise protective upbringing to the status of an institution the effect of which would be completely to absorb the Dutch guardianship. It confined itself, for reasons outside the scope of the Court's examination, to not complying with the guardian's request. Finally, under the regime thus maintained, the person to whom the child was entrusted in application of the measure of protective upbringing has not the capacity and rights of a guardian.

Protective upbringing, as it appears according to the facts in the case, cannot be regarded as a rival guardianship to the guardianship established in the Netherlands in accordance with the 1902 Convention.

In dismissing the guardian's claim, the Swedish Supreme Administrative Court limited itself no doubt to adjudicating upon the maintenance of protective upbringing, but, at the same time, it placed an obstacle in the way of the full exercise of the right to custody belonging to the guardian.

In order to answer the question whether this constituted a failure to observe the 1902 Convention which provides that "the administration of a guardianship extends to the person . . . of the infant", the Court did not consider that it was necessary for it to ascertain the reasons for the decisions complained of. Having before it a measure instituted pursuant to a Swedish Law, it has to say whether the imposition and maintenance of this measure are incompatible with the Convention. To do that, it must determine what are the obligations imposed by the Convention, how far they extend, and whether the Convention intended to prohibit the application to a foreign infant of a law such as the Swedish Law on the protection of children.

The 1902 Convention provides for the application of the national law of the infant, which it expressly extends to the person and to all the property of the infant, but it goes no farther than that. Its purpose was to put an end to the divergences of view as to whether preference ought to be given to the national law of the infant, to that of his place of residence, etc., but without laying down, particularly in the domain of the right to custody, any immunity of an infant or of a guardian with respect to the whole body of the local law. The national law and the local law may present some points of contact. It does not follow, however, that in such cases the national law of the infant must always prevail over the local law and that the exercise of the powers of a guardian is always beyond the reach of local laws dealing with subjects other than the assignment of guardianship and the determination of the powers and duties of a guardian.

The local laws relating to compulsory education and the sanitary supervision of children, professional training or the participation of young people in certain work are applicable to foreigners. A guardian's right to custody under the national law of the infant cannot override the application of such laws to a foreign infant.

The Judgment states that the Swedish Law on the protection of children and young persons is not a law on guardianship and that it is applicable whether the infant be within the *puissance paternelle* or under guardianship. Was the 1902 Convention intended to prohibit the application of any law on a different subject matter, the indirect effect of which would be to restrict, though not to abolish, the guardian's right to custody? The Court considers that to take this view would be to go beyond the purpose of the Convention, which is confined to conflicts of laws. If the Convention had intended to regulate the domain of application of laws such as the Swedish Law on the protection of children, that law would have to be applied to Swedish infants in a foreign country. But no one has sought to attribute to it such an extraterritorial effect.

The Judgment recognises that guardianship and protective upbringing have certain common purposes. But though protective upbringing contributes to the protection of the child, it is, at the same time and above all, designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people. In order to achieve its aim of individual protection, guardianship, according to the Convention, needs to be governed by the national law of the infant. To achieve its aim, the aim of the social guarantee, the Swedish Law on the protection of children must apply to all young people living in Sweden.

It was contended that the 1902 Convention must be understood as containing an implied reservation authorizing, on the ground of *ordre public*, the overruling of the application of the foreign law recognized as normally the proper law. The Court did not consider it necessary to pronounce upon this contention. It sought to ascertain in a more direct manner whether, having regard to its purpose, the 1902 Convention lays down any rules which the Swedish authorities have disregarded.

In doing this, the Court found that the 1902 Convention had to meet a problem of the conflict of private law rules and that it gave the preference to the national law of the infant. But when the question is asked what is the domain of the applicability of the Swedish Law or of the Dutch Law on the protection of children, it is found that the measures provided for were taken in Sweden by an administrative organ which can act only in accordance with its own law. What a Swedish or Dutch court can do in matters of guardianship, namely, apply a foreign law, the authorities of those countries cannot do in the matter of protective upbringing. To extend the 1902 Convention to such a situation would lead to an impossibility. That Convention was designed to put an end to the competing claims of several laws to govern a single legal relationship. There are no such competing claims in the case of

laws for the protection of children and young persons. Such a law has not and cannot have any extraterritorial aspiration. An extensive interpretation of the Convention would lead to a negative solution if the application of Swedish law was refused to Dutch children living in Sweden, since Dutch law on the same subject could not be applied to them.

It is scarcely necessary to add, says the Court, that to arrive at a solution which would prevent the application of the Swedish Law on the protection of children to a foreign infant living in Sweden, would be to misconceive the social purpose of that Law. The Court stated that it could not readily subscribe to any construction of the 1902 Convention which would make it an obstacle on this point to social progress.

It thus seems to the Court that, in spite of their points of contact and of the encroachments revealed in practice, the Swedish Law on the protection of children does not come within the scope of the 1902 Convention on guardianship. The latter cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned. Accordingly, the Court did not, in the present case, find any failure to observe the Convention on the part of Sweden.

For these reasons, the Court rejected the claim of the Government of the Netherlands.
