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[15/07/1994; Court of Appeal (England); Appellate Court]
Re M. (Abduction: Undertakings) [1995] 1 FLR 1021

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

15 July 1994

Butler-Sloss, McCowan LJJ, Sir Tasker Watkins

In the Matter of M.

Augustus Ullstein QC and Timothy Scott for the mother

James Munby QC and Indira Ramsahoye for the father

BUTLER-SLOSS LJ: This is an appeal on a Hague Convention application. The applicant father is Israeli, and he seeks the return to Israel of his two children, a boy born in October 1991, so now 2 3/4, and a girl born in December 1993, now 7 months. Both children were born in Israel and are Israeli citizens. The mother is English.

She met the father in Israel and married him in 1989 and settled in Israel. By 1993 the marriage was no longer a success. The mother was pregnant again and she left the father. There was an application by the mother to the domestic court in Israel for custody of the elder child, the younger child not then having been born. An order was made by the Israeli judge in the domestic court on the basis of an attempt at reconciliation, and it would appear to me that it is similar to an interim order. There was an unsuccessful attempt at reconciliation between the parents.

On 23 February 1994 the mother secretly left Israel and flew to London with the two children to stay with her parents in North London. On April 1994 Kirkwood J heard the application under the Convention made by the Central Authority on behalf of the father. The judge found that the mother had taken trouble to conceal from the father that she was leaving the country. There is no argument that the habitual residence was Israel. The decision of 15 April 1994 is subject to the first appeal to this court. The judge ordered that both children should be returned, despite the arguments of the mother that the removal of the two children was not wrongful, that there was consent by the father, and that under Art 13(b) there was a grave risk of an intolerable situation if the children were returned.

However, the judge required certain undertakings to be given by the father before the return was ordered: that there should be the airfares paid for the children, the provision of a flat, maintenance for the children, and nursery fees for the elder child. Those undertakings

took to the beginning of June 1994 for the father to comply with them, and there was a further hearing before Kirkwood J for clarification of the undertakings.

On 20 June 1994 there was a hearing before Johnson J on an application by the mother to set aside the decision of Kirkwood J on the basis of new evidence relied upon by the mother as vitiating the earlier decision to return the children. Johnson J declined jurisdiction, and that is the second appeal to this court.

In fact, there are four matters before this court: the appeal against the order of Johnson J, extension of time to appeal the order of Kirkwood J, leave to adduce further evidence, and the appeal against Kirkwood J if leave is granted.

With the agreement of Mr Munby QC for the father, the court gave leave to appeal against the April 1994 decision and allowed the additional evidence to be adduced.

We have considered both judgments and the issues raised on the procedure and on the merits. There remain two issues on the appeal: first, whether the order of Kirkwood J, directing the return under Art 12, was an interlocutory order or a final order, and Johnson J should have considered the merits of the application to set aside, or whether it was a matter for the Court of Appeal. Secondly, whether Kirkwood J was wrong to find that Art 13(b) did not apply.

The mother no longer suggests that the father gave consent, nor that the removal was not wrongful. It is clear that the removal of the baby was wrongful, and there is a question as to the status of the order for custody of the elder boy, and it appears, as I have already said, that it was an interim measure.

The expert evidence of the father's expert on Israeli law is that, despite the interim custody order, both parents retained rights of guardianship. This was accepted by the trial judge, and I can see no reason to disagree, and the contrary has not been pursued by counsel for the mother.

Turning, therefore, to the first issue; is this order interlocutory or final? Mr Ullstein QC, for the mother, has argued that a Hague Convention order was analogous to custody, access, etc, and treated as other proceedings in RSC Ord 59, r 1A(6)(y), in which the wording is:

'An order relating to access to, or the custody, care, education or welfare of a minor, whether in matrimonial, wardship, guardianship, custodianship or any other proceedings, or a certificate under section 41 of the Matrimonial Causes Act 1973.'

In para (6)(y), all orders are treated as interlocutory.

He invited our attention to a number of decisions as to whether orders are final or interlocutory. I do not feel it necessary to set them out in detail. He has also sought to persuade us that the order made by Kirkwood J is interlocutory, since its implementation depended on the fulfilment of undertakings by the father. So long as the undertakings are not complete, the order is not final. He has also argued that there is an inherent jurisdiction in the Family Division to hear matters concerning children, and it is for the Family Division judge to vary or set aside the order and not a matter for the Court of Appeal. If it is to go to the Court of Appeal, he argues, there are great disadvantages of procedure, delay and additional evidence which may be disputed.

On the last point, in Re M (Abduction: Non-Convention Country) [1995] 1 FLR 89, CA, Waite LJ said at p 90F:

'. . . it is of the essence of the jurisdiction to grant a peremptory return order that the judge should act urgently. That means the court has no time to go into matters of detail. The case has to be viewed from the perspective of a quick appraisal of its essential features. Any risk of injustice suffered by the abducting parent as a result of limiting the scales of the survey in the interests of speed is minimised by the adoption in the Court of Appeal of a policy which, whilst discouraging appeals that attempt to reargue the merits, allows some relaxation of the rule in Ladd v Marshall [1954] 1 WLR 1489. That relaxation is applied to the extent necessary to enable this court to determine whether there are any matters not dealt with at first instance which might have materially affected the judge's decision, had he been aware of them.'

I respectfully agree with what Waite LJ said, and in this case we accepted the additional evidence and took it into consideration.

Hague Convention cases are a special type of proceedings in which this country adheres to an international Convention which we are duty-bound to observe and to implement. The procedure is summary, and intended expeditiously to deal with the mischief of wrongfully removing children from the jurisdiction of their habitual residence. By Art 11 of the Convention, speed is of the essence. It is an entirely different procedure from internal proceedings concerned with making orders based upon the principle of paramountcy of the welfare of the child. Article 13, if invoked, deals with specific instances where the welfare of the child may inhibit an order for return under Art 12. Article 13 has to be raised as a defence to the Convention application, and a court has to be satisfied that the matters raised are so important as to displace the prima facie requirement to return the child under Art 12 upon proof of wrongful removal or wrongful retention under Art 3.

The order to return, or not to return, is final in the Hague Convention proceedings brought by the Central Authority, and disposes of those proceedings. Any proceedings dealing with the custody, residence or other needs of a child are between different parties, with considerations wholly different from those relevant to a Convention application to return the child.

Now I have heard further argument on the issue, I am not persuaded that my earlier view that a Hague Convention order is a final order is wrong.

In Re M (A Minor) (Child Abduction) [1994] 1 FLR 390, I said at p 397E:

'A decision to return children made on an application under the Convention procedure is in my view a final order not capable of variation, save as to the implementation such as already happened earlier. In the absence of full argument on the point an application to set aside an order to return the children under the provisions of the Convention should in my view be by way of appeal to the Court of Appeal, and the deputy High Court judge was right not to entertain the application.'

The disadvantages suggested in the requirement that the decision whether or not to set aside an order to return should be made in the Court of Appeal are overstated. All the evidence is written, and if it becomes necessary the Court of Appeal can remit the matter to a High Court judge.

In the interests of comity, where the Art 12 order has been made, the court should be slow to set it aside, other than on compelling evidence which must satisfy the appellate court. All the Convention applications and appeals are treated as being urgent, and there is unlikely to be unacceptable delay in the present process. Johnson J was clearly right to refuse to entertain an application to set aside the order of Kirkwood J, which is a matter for this court.

It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Art 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction.

In Re C (A Minor) (Abduction) [1989] 1 FLR 403, Lord Donaldson MR said at p 413:

'Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child.'

This court must be careful not in any way to usurp or to be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations, as was suggested by Sir Thomas Bingham MR in Re M (A Minor) (Child Abduction) (above) at p 397. Undertakings have their place in the arrangements designed to smooth the return of and to protect the child for the limited period before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child.

It would be helpful if realistic time-limits for the compliance with the undertakings were included in the orders to return the child, but in the absence of a specified time, clearly the court would consider a reasonable time and not allow the case to drag on with repeated applications to the court.

I turn now to the second issue, that is Art 13(b), the relevant part of which reads as follows:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

. . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation.'

The words with which we are concerned on this appeal are: 'a grave risk of placing the child in an intolerable situation'. That grave risk is based, on the mother's case, almost entirely upon financial considerations, the seriousness of which has been set out in the additional evidence. The mother says that the debts of father are extremely serious. She doubts whether he actually has a job; she asserts that he is being chased by various creditors, and that all this is indicative of his feckless attitude to money and reckless disregard for the welfare of his family. She also asserts that she is jointly liable for some of the debts, including a large debt to a bank, and that the bank has obtained an injunction ne exeat regno against her, which will prevent her leaving Israel, even if an Israeli domestic court gives her custody of the children and allows her to bring them back to England.

The father disputes the seriousness of the debts, and suggests that she is responsible for many of them. He asserts that he has a job and that he can maintain her and the children. The ne exeat regno injunction is admitted.

In the light of all this, Mr Ullstein has argued that there is a grave risk of placing the children in an intolerable situation, since their housing and maintenance are at risk and there is no probability that they can, with their mother, be properly cared for if they return to Israel.

I have no doubt that if an order requiring the children to return to the country of their habitual residence was demonstrated to result in young children being left actually homeless, on the street and destitute without recourse to State benefits, a court would be likely to find that Art 13(b) had been met.

It is, however, important to recognise, to my knowledge at least, no English court has yet found circumstances to meet the stringent requirements under Art 13(b), nor do I believe they have been met in the Convention countries with which we principally are concerned, such as the USA, Canada, Australia and New Zealand.

In the present case, the position of the children is nothing like as parlous as the mother would have us believe. Although somewhat late, the father has complied with the financial undertakings and the airfares are available for the children, and there is money awaiting the mother with lawyers in Israel to pay a deposit on a flat in the town of her choice -- Jerusalem -- in preference to the town where the parents lived, together with the first month's rent. The lawyers also hold the first month's child maintenance. The mother is understandably worried about the outcome of the debts and how to extricate herself from the financial difficulties, but there is money available to keep the family with a roof over its head for that limited period with which the English court is concerned.

Mr Ullstein has raised the problem that an Israeli court might not hear the case expeditiously, or the money would run out and the children would then be destitute. There are two answers to that, and the first, in my view, is conclusive. At our request, Mr Munby has been in touch with the father's Israeli lawyer and we have been provided with a fax which reads as follows:

'Pursuant to your question as to how early the above matter might be before an Israeli court, notwithstanding summer court recess, given the urgent nature of the matter, including issues of place of abode, visitation, financial support, etc, upon application made to the Israeli District Court (and Mr M is prepared to make such application within the week), in my experience it can be noticed for and preliminary hearing can be had within 15 days.'

That information covers the period within which we are concerned as to grave risk. The other answer relates to provision by the State in respect of State benefits. Israel has, as we would expect, a developed policy of State benefits, and it is not for this court to suggest that they would be inadequate, nor to delve unnecessarily into the details. If the family are forced to live on State benefits, it is likely the mother and children would not be as comfortably off as they might be with the maternal grandparents in London. However, to be dependent on Israeli State benefits, or English State benefits, cannot be said to constitute an intolerable situation, and I adapt the observations of Balcombe LJ in respect of Australian State benefits in the case of Re A (Minors) (Abduction: Acquiescence) [1993] Fam 106, [1992] 2 FLR 14 at pp 119 and 25F respectively to the present case. Both in Re A (above) and in B v B (Abduction) [1993] 1 FLR 238, financial difficulties were held not to constitute grave risk.

Sir Stephen Brown P, in B v B, said at p 247:

'I stress what Balcombe LJ said in Re A (above) that a very high degree of intolerability must be established in order to bring into operation Art 13(b).'

I should like also to refer to another passage in the judgment of Waite LJ in Re M (Abduction: Non-Convention Country) (above). In that case it was not a Convention application, but was treated as analogous to the Convention, and Waite LJ said at p 98B:

'The fact that there is jurisdiction to grant a peremptory return order in child abduction cases where the Convention does not apply, is itself based upon nothing else but an appreciation of the general demands of the best interests of all children. It assumes that in the absence of special circumstances, it will best serve the immediate welfare of the abducted child to have its long-term interests judged in the land from which it was abducted. When that principle is taken with the general principle of comity which applies between civilised countries, and especially between partners in the European Union, an element of trust is bound to become involved. Judges in one country are entitled, and bound, to assume that the courts and welfare services of the other country will all take the same serious view of a failure to honour undertakings given to a court (of any jurisdiction), failure to maintain financially, failure to afford contact, and so on. It is to be assumed that the courts in every country will not hesitate to intervene to enforce whatever orders, or to direct whatever inquiries, are called for in the children's best interests. In that process every judge is bound to take into full and careful account of what his or her colleague has already ordered in antecedent proceedings in another jurisdiction.'

I respectfully endorse what Waite LJ has said and say that this court must trust the Israeli judge, who will soon be dealing with this case, to do what is right for these children so that they would not be harmed by the return to Israel. We have no reason to think other than that the Israeli judge will deal with these children as we would hope our courts would deal with similar cases.

The problem of the debts of the ne exeat regno injunction, which no doubt the mother will seek to set aside, is not, in itself, a reason not to send these children back to their own country and to the court best fitted to deal with this case.

I would dismiss both appeals and direct the immediate return of the children to Israel.

MCCOWAN LJ: I agree.

SIR TASKER WATKINS: I too agree.

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