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[24/05/1995; Court of Appeal (England); Appellate Court]
Re K. (Abduction: Psychological Harm) [1995] 2 FLR 550, [1995] Fam Law 662

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COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

24 May 1995

Leggatt, Waite, Saville LJJ

In the Matter of K.

Jan Karsten QC and Gary Crawley for the mother

Mark Everall QC and Richard Bond for the father

LEGGATT LJ: K will be 3 years old on 16 June 1995. On 20 December 1994 she was abducted by her mother from Texas in the USA and brought back to this country with her half-brother D. On 12 April 1995 Kirkwood J ordered that K be returned forthwith to Texas pursuant to Arts 3 and 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the provisions of the Child Abduction and Custody Act 1985 by which the Hague Convention is given legal effect for the purposes of English law. The judge also ordered that wardship should continue for the sole purpose of ensuring the child's return.

There is no appeal against the judge's finding that the removal of the child from Texas was unlawful for the purposes of Art 3 of the Hague Convention, as is her continued retention in this country. Less than a year has elapsed since she was brought back to this country. So, by force of Art 12 of the Hague Convention, the court is bound to order the return of the child to Texas forthwith, unless the mother establishes, in the language of Art 13, that there is a grave risk that her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

In a model judgment, the judge held: 'In this case a possible Art 13 defence is not established'. He had correctly directed himself in law by reference to the many cases in this court which have emphasised the gravity of the risk to which a child would have to be exposed if return were not to be ordered to the country whence he or she has come. This court has also emphasised the degree of harm, equated, as it is, with an intolerable situation, to which a child must have a risk of exposure. Finally, the language of Art 13 is to be noted, because in its opening words it says that the judicial authority is not bound to order the return of the child unless the person concerned establishes the grave risk of which I have already made mention. Those words confer on the court, once the requisite risk has been established, a discretion whether or not to order the return of the child.

The background circumstances are summarised in the judgment. The judge recited how K was born to an English mother and an American father who, at that time, was serving in the US Air Force. K is a US citizen, as is her half-brother D, who was born to the mother by a previous marriage to another US serviceman. After the marriage, the family lived for a while on a US Air Force Base in England. In the course of 1993, it is said that difficulties developed in the marriage, and although preliminary steps were taken to secure the mother's immigration into the USA, those formalities were never accomplished, with the result that she can only go there now with a visa as a visitor.

In February 1994 the father's father was very ill in Texas, so the whole family went there. He died within a week of their arrival. Having gone there, they decided to stay, and the father chose to leave the Air Force and become a policeman, as he did on 22 March 1994, having in the meanwhile paid a brief visit to this country for the purpose of collecting their belongings and taking them to Texas. The mother had entered the USA on 8 February 1994. The judge said:

'On 4 November 1994 the mother left the home and went to a refuge. She returned home on 18 November 1994 because, as she says, she still loved her husband very much and wanted to give the marriage another try. She left again after a row, taking the children, on 29 November 1984. She went back to the refuge. On 6 December 1984 the father began divorce process in Texas and obtained, by what looks like an ex parte procedure, certain orders . . . The orders, of which the mother had notice, restrained her from . . . [r]emoving K beyond the jurisdiction of the court, acting directly or in concert with others . . .'

The matter was due to return to court on 20 December 1994, but on that day the mother left the USA with both children and returned to London.

The judge then reviewed the allegation that the removal of K was not wrongful, and came to the clear conclusion that it was, with the result that he was bound to order her return, unless a discretion arose under Art 13. The judge held, and it has not been challenged, that the Texan court is already seised of the case, and that there is a home awaiting K with her father and (the judge said) grandmother, but he must be taken to have meant the father's grandmother, that is to say K's great-grandmother. The judge mentioned specifically that that home was the child's home until October 1994. It therefore could not be contended that care by the father and his grandmother would expose K to risk of physical or psychological harm or to an intolerable situation. The judge said:

'Thus, given that this child could travel back to Texas with her father, if not with her mother, and be looked after pending further decision of the Texas court, the mother fails to establish that a return would expose the child to matters mentioned in Art 13(b).'

The judge then viewed certain arguments advanced by Mr Karsten QC, who conducted the case for the mother in the court below as he has in this court. He there argued that, if the mother could not go to the USA, that would cause a grave risk of psychological harm. That, and other such arguments, have now been dissipated by the evidence that the mother can obtain at least a visitor's visa to enable her to travel to the USA and stay there for a period, which is normally of the order of 6 months unless such period is extended by the Immigration and Naturalisation Service.

The judge, having considered such supporting arguments as Mr Karsten relied upon, came to the conclusion that it would be probable that the mother would be allowed to go to Texas to conduct custody proceedings, and that conclusion has, as I have mentioned, been vindicated by what has since occurred. The judge added:

'But, even if she were not able to go, the mother would not, to my mind, have established s 13 [Art 13] matters for the reasons I have already given.

The judge then recited undertakings given by the father in relation to the custody order to share possession of K on the basis that she would stay with her mother 4 days a week and with her father on the 3 days each week when he is not working. The judge continued:

'He offers the mother food and lodging at his grandmother's home or with his brother and sister-in-law. That offer extends to K and D. Furthermore, the Family Abuse Centre has, I am told, agreed to provide room and board to the mother and K and D until the Texas court can deal with these matters.'

It is in the light of those factors that the judge reached the conclusion that I have indicated that a possible Art 13 defence had not been established.

Since the matter was before the judge, it has been confirmed by individual affidavits from the father's brother and also from his grandmother that accommodation would be available in either of their houses, as indeed it would at the family abuse centre where the mother was housed for a period while she was in Texas before.

The legal position is not in issue between the parties. An affidavit sworn on behalf of the father summarises the position in relation to a motion to modify the existing custody order. It should be said that the material parts of the order made on 9 February 1995 provide:

'Sole managing conservator. It is ordered and decreed that [the father] is appointed sole managing conservator of the child.'

Similarly, the mother is appointed possessory conservator. The material part of the order provides:

'It is ordered that the possessory conservator shall have possession of the minor child at any and all times mutually agreed upon in advance by the parties, so long as said agreement is in writing signed by both parties; provided, however, said periods of possession shall occur . . . Texas.'

I have indicated the nature of an agreement, though it does not appear that it is as yet in writing, made between the parties as to the possession of the child, by each of them in the course of a normal week. But it is to the concluding words that the mother takes chief objection because, in order to exercise possession under the existing order, she would be obliged to do so in Texas where, since she would be no more than a visitor, she would not be allowed to work.

The power of the court at this stage to modify the order, from which I have read the material excerpts, is contained in the Texas Family Law Code, para 156.102, which deals with modification of sole managing conservatorship within one year of order. Subpara (b) provides, so far as material, that the affidavit sworn for this purpose:

'. . . must contain, along with supporting facts, at least one of the following allegations:

(1) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development . . .'

About that provision, an expert witness deposes that it is a motion under that section which the mother would be entitled to file in less than a year after the entry of the divorce decree.

She explains that this creates a much greater burden of proof, but it is similar to an allegation of psychological harm in the Hague proceedings. That is a reference to the language of Art 13 of the Hague Convention. That witness also explains that the court would first determine whether the mother's affidavit contains sufficient facts to support a claim of present environment endangerment and that, if the affidavit is sufficient, the motion to modify will be heard. In her affidavit the expert witness also mentions that the father has authorised her to register what she calls the Hague Convention order issued by Kirkwood J, assuming that it is upheld on appeal. Of the judge who would have charge of this matter were the child to be returned to Texas, the witness says:

'Based upon my years of practice in Judge Logue's court, it is inconceivable that he would award custody to [the mother], yet require her to remain in Texas as an illegal alien who could not support herself or obtain employment or qualify for public assistance. This could not possibly be deemed in the best interest of the child.'

It is convenient in reviewing Mr Karsten's arguments in this court (which of necessity divagated from those upon which he had relied in the court below), that I refer first to three of his subsidiary arguments, upon which, it is fair to say, he placed no great reliance. The first concerns the nature of the legal representation that the mother might obtain in the Texan court. That would be, it is anticipated, by what in that court is called a 'pro bono lawyer', that is to say, a lawyer appearing for a client voluntarily without fee, though with an expectation that his or her expenses would be reimbursed. The mother at present enjoys the assistance of such a pro bono lawyer, but Mr Karsten characterises this as a hazardous enterprise because, he says, the mother cannot be confident that that kind of representation is going to continue indefinitely, with the result that she might find herself stranded without a lawyer.

The point does not appear, however, to be a forceful one so far as the requirements of the Convention are concerned. Nothing in Art 12 makes the return of a child to a requesting country dependent upon the availability to the child or his or her parent, of legal representation in that country. It appears to me that any court such as the relevant Texan court can well see that justice is done, even if the mother proves not to be able to obtain legal representation. One has only to contemplate, as does the skeleton argument of Mr Everall QC (although we have not heard him orally), what the position would be were the countries to be reversed and were this court or a court of the Family Division to be invited to determine whether justice could be done for a litigant who was not legally represented, to see what attitude to that prospect a court in Texas would be likely to take.

Next Mr Karsten argues, and does so by reference to the final ground of appeal in his amended notice of appeal, that the court should in some way take account of the disruption to D if he has to go with his mother, as he might be expected to have to do, when she returns to Texas with her daughter and takes the relevant legal proceedings to obtain a modification of the custody order. It is said that the anxiety which the mother would feel on that account might well be transferred to D. The only question for this court is, however, whether that disruption would be such as to create a grave risk of physical or psychological harm to D's half-sister. There is no evidence whatever that it would, and I must add that there is no reason to suppose that it might.

The other subsidiary argument relied upon by Mr Karsten related to the undertaking, of which I have made mention, given by the father. He remarks that such undertakings would be unenforceable in Texas and adds that some of them, though given by the father, were on behalf of others. It appears to me that, insofar as they were, that defect has now been made good by the affidavits to which I have referred, sworn by his brother and by his

grandmother. The practice of this court is to accept such undertakings, bearing in mind that they have the very limited function of protecting the child, so far as can be, before such time as the foreign court resumes its consideration of the custody position. It seems to me that this court is, at all events for that limited purpose, entitled to place reliance upon the father's undertakings. As Waite LJ has said in Re M (Abduction: Non-Convention Country) [1995] 1 FLR 89 at p 98C:

'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 what his or her colleague has already ordered in antecedent proceedings in another jurisdiction.'

Realistically, Mr Karsten acknowledges the force of those observations and, as I understood him, did not press that ground of appeal.

The main thrust of Mr Karsten's argument is now devoted to the situation in which the child would find herself in the event of an order being made for her return to Texas. In the language of Art 13(b) Mr Karsten characterises that as intolerable. The mother has always been the primary carer of K. Mr Karsten remarks that the father knew from very soon after the moment when the mother left Texas that she had gone, and he, none the less, proceeded to obtain the final decree and the custody order of 9 February 1995 without, according to Mr Karsten's submission, giving proper notice to the mother, either of the hearing date or of the subject matter of the hearing. The effect of the order has, albeit incidentally, been to put an end to the possibility of the mother being allowed to remain in the USA as an immigrant by virtue of her marriage. Therefore, as Mr Karsten submits, the child is doomed to have parents normally resident in separate countries.

That the custody order must stand follows as a matter of the law of the State of Texas from the fact that the mother is shown to have had notice of the order, even though she was unaware of the time-limits following the expiry of which the order has become absolute. Mr Karsten submits that K is placed in an intolerable position within the meaning of Art 13(b) because the result of the order is that she will inevitably be permanently separated from her mother without any court having adjudicated on the mother's claim to continue caring for K in this country.

In aid of that submission Mr Karsten relies on Art 20 of the Hague Convention which, although it has not been afforded the force of law in this country, was referred to by the Lord Chancellor at the time when the Act that gives effect to other parts of the Convention was before the House of Lords as a Bill.

On that occasion Mr Karsten says, by reference to the relevant passage from Hansard, that the Lord Chancellor gave the assurance that '. . . the court can have regard to Art 20'. That Article provides that the return of the child under the provisions of Art 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. It is only for the reference to 'protection of human rights' that Mr Karsten invokes that Article.

He formulates the human rights, to the protection of which the child would be entitled if Art 20 had the force of law in this country, in this way.

The child has the right:

(1) Not to be separated from a parent without that parent -

(a) having been given adequate notice of the hearing at which the issue is to be considered;

(b) having had advance opportunity to participate in the proceedings; and

(c) having been given sufficient notice of the case which that parent has to meet.

(2) Not to be separated from a parent as a result of that parent not being able to reopen a decision in which the parent was unable to participate because of an absolute time-bar on reopening the decision of which that parent was unaware.

So far as relevant, Mr Karsten contends that a parent, such as in this case the mother, would have corresponding human rights.

It is the essence of his submission that because the mother has been deprived of these rights, she has been, and for the time being continues to be, unable to advance before the Texan court (or any court) any submissions about what is in the best interests of the child. The submission is that K is denied her human rights by having her future determined in a jurisdiction in which, without fault on the part of her parent, that parent's burden of proving that she should be entitled to have the child living with her is heavier than it would have been if the parent had been given such notice of the hearing at which the custody order was made as would have enabled her to be heard in relation to it. As the evidence before the court shows, the mother did attempt, shortly before the hearing, to apply for an adjournment. She did so by means of a letter sent by fax transmission by her solicitors to the Texan court. But it must be borne in mind that the mother found herself in that predicament only because she had not responded to the divorce citation served on her. As the father's affidavit of 28 March 1995 shows, the divorce citation served on the mother on 6 December 1994 clearly stated that, unless her written response was filed within the prescribed time period, a default judgment could be taken against her. The temporary restraining order citation named the mother to appear in court on 20 December 1994. She filed no response and failed to appear in court as ordered. Therefore, at the final hearing on 9 February 1995, the court held that the mother was in default and was not entitled to prior notice of the final hearing. The father then refers to the court having received the letter from the mother's solicitors, to which I have already referred, and comments: 'This letter did not indicate the solicitor representing [the mother] in the divorce'. It seems that, for that reason, the application made by the letter for an adjournment was not granted.

So far as human rights are concerned, it seems to me that there is obvious objection to adopting such a construction of Art 20 as would have the effect of overriding, or materially altering, the scope of any of the other Articles and in particular Art 13(b). It may well be that the court, as the Lord Chancellor indicated it should, will 'have regard to Art 20' in the sense of seeking to construe other Articles, such as Art 13(b), in such a way as not to infringe human rights. Further than that, however, it does not go. Here, if the child is returned to Texas, there will be opportunity to apply for modification of the sole managing conservatorship within one year (within a year, that is, of the custody order having been made), on the ground that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development.

The expert witness asserts, and Mr Karsten accepts, that that ground resembles the test which this court has to apply under Art 13(b). Therefore, if K returns to Texas, the court will be able to modify the custody order if her emotional development would be significantly

impaired unless the mother has charge of her. The mother can argue that that will not be possible in the circumstances unless K is permitted to live with her outside Texas. The prospect of success of that argument is, for present purposes, immaterial.

The fact that it is available defeats the submission that the situation in which the child would find herself in Texas would be intolerable. There can be no grave risk of psychological harm to which K would be exposed on return to Texas, if the harm apprehended would arise from living apart from her mother, since the Texan court has power to modify its order if the effect of confining the mother's possession of K to Texas is significantly to impair K's emotional development.

In short, the return of the child to Texas would neither deny her human rights nor put her in an intolerable position, because the Texan court will have power to ensure that her emotional development is not significantly impaired, and thereby in practice ensure that she is properly protected. No person, whether judge or not, could fail to understand the anguish which the mother must feel in her present predicament. It stems ultimately from the factor of marriage to a foreign national. Because she and the father wish to live in their own respective countries, or in her case is precluded from living in the USA, it follows that one or other of them must in practice have possession of their only child. But the court of one or other of the countries must determine what is in the best interest of the child and take such steps as may be necessary to protect her. The Hague Convention has naturally imposed that obligation on the country which has already assumed jurisdiction to grant custody rights. In aid of that court, the courts of a country to which the child has been taken are required to order the return of the child unless the circumstances exist that are described in Art 13(b). For the reasons I have sought to explain they do not exist here, even when regard is paid to Art 20. It follows that this court has, in my judgment, no option but to uphold the judge's order and to direct that K be returned forthwith to Texas.

WAITE LJ: I agree.

SAVILLE LJ: I also agree.

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