COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

28 July 1993

Balcombe, Rose, Peter Gibson LJJ

In the Matter of M.

F Holman QC for the Applicant

P Scriven QC for the Respondent

BALCOMBE LJ: This is an appeal by the father of a boy who is nearly 5 years old from an Order made by Ewbank, J, sitting in chambers on 12th July 1993, whereby he refused the father's application for the immediate return of the boy to Australia, pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, which, of course, is now part of our domestic law under the Child Abduction and Custody Act 1985.

The father is a man of fifty. He was born in this country, but emigrated to Australia in 1963, and became an Australian citizen in 1967. He returned to this country some time in the 1950s and met the respondent to this appeal in 1986. Both had been previously married; the father had been married twice before, and has 5 children by his second marriage; the mother had one previous marriage by which she had three children.

The father and the mother (as I will call them) started to live together in 1986. At this stage, the mother's three children were with her. They married in England on 7th July 1988, and the child, A, with whom this case is concerned, was born on 21st August 1988. In June of 1991, the mother issued proceedings for divorce in the County Court at Southend (that being the Court of the area in which the parties were then living), and she also applied for an ouster Order and a non-molestation Order.

Those applications came before His Honour Judge Rice, sitting in the County Court at Southend on 12th July 1991. We have a copy of the note of the judgment which Judge Rice gave on that occasion. Although it is not authenticated by the Judge's signature, for present purposes, I am prepared to accept that it is an accurate record of what the Judge then said.

He sets out the mother's complaints against the father in some detail. The Judge refers to the mother's description of her husband as being of a violent and aggressive disposition and drinking too much; that he was abusive to her, and to her three children who were then

living with them. The Judge refers to an incident which had happened over the weekend of 21st June 1991, and says that, in general, he prefers the evidence of the mother to that of the father. I quote from a passage in the judgment:

"The husband says that he was drinking a great deal, by his own admission."

It was then that the Judge said that he preferred the mother's account of what had happened over the weekend. I continue reading from the note of the judgment:

"It was clearly the climax of a very disagreeable year and the husband had got to the point when he could take no more. I am satisfied that the wife took a decision which she did not take lightly. She fled the household and went to the Women's Refuge.

The husband is prepared to give an undertaking but the wife says that she is no longer prepared to trust him."

A little later in the judgment, he says:

"I am satisfied that when faced with something which upsets him, [the husband] is likely to revert to drink again. He cannot control his temper and is verbally and physically abusive to the [wife].

I find that the [husband] is both violent and aggressive."

In the light of that, the Judge made the two Orders for which the mother was asking - a non-molestation Order and an ouster Order.

However, not very long after that hearing (which was in July 1991), and certainly by October 1991, on the mother's own version of events, there was a reconciliation, and plans which had been talked about previously to go to Australia were renewed. Since the father of the mother's three children by her previous marriage was not prepared to consent to them going out of the jurisdiction, they went to him, and the mother, the father and A went to Australia in May 1992.

They had various addresses in Australia. The father's job position was not very satisfactory, but certainly by December 1992, they had settled in a rented house in Queensland and A started pre-school there in January of 1993.

It is the mother's case that matters went wrong between them again, and that the father treated her very badly. I quote from a passage in the affidavit which she swore in the present proceedings:

"He used to lock me out of the house and once prevented me from regaining entry by jamming the rear door from the inside with the use of spades and other garden implements. [He] continuously used vile and abusive language to me [she then gives examples of that]. [He] constantly badgered me undermining my confidence and implying that I was useless as a mother and wife."

She then exhibits a letter which she says the father wrote to her, which is clearly a very, very unattractive letter indeed. The Judge, Ewbank, J, placed considerable reliance on this letter, and commented, quite correctly, that the father, in his evidence, has not sought to deny its provenance. She gives further examples of the unattractive way in which the father spoke to her. She also says that the father "had often spoken badly to A in front of me." She recalls a

single occasion in August of 1992 when A became upset and began to cry. That is the picture up to June of this year.

On 2nd June 1993, the mother bought an airline ticket, told her brother in England of her plan, and on the following day, 3rd June, telling the father that she was going to a children's party with A, left Australia by air and came to England. When the father found out what had happened, he obtained various interlocutory Orders from the Family Court of Australia, including an Order giving him interim custody of A. He made his application very quickly under the Hague Convention.

That application came before Ewbank, J. It was common ground before Ewbank, J, as it has been before us, that prima facie this is a case where the Hague Convention applies, namely, that as both parents had rights of custody, the mother's removal of A was wrongful under Article 3 of the Convention, and secondly, that the habitual residence of the family, including A, immediately before the wrongful removal was in the state of Queensland in Australia.

It was therefore common ground that Article 12 of the Convention applies, unless the mother satisfies the onus, which is undoubtedly on her, that Article 13 applies. Article 13, so far as relevant, 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 . . . which opposes its return establishes that . . . (b) there is a grave risk that his or her return would . . . place the child in an intolerable situation." I have read only those parts of the Article upon which the mother relies in this case. The mother has to establish that the return of A to Australia would result in a grave risk of placing A in an intolerable situation.

Apparently, no cases were cited to Ewbank, J and he did not refer to any. In his judgment, after setting out the relevant facts, largely as I have referred to them already in this judgment, although in somewhat more detail, he says this:

"The circumstances of this case are unusual."

By that, he seems to mean that the English divorce proceedings, started in 1991, are still in existence. He goes on to say:

"The actual connection with Australia, as far as the mother and child are concerned, is tenuous compared to many cases."

It is difficult to understand the relevance of that remark, since it is clear that this was a case where habitual residence was established and the removal was wrongful. I think perhaps the highest that could be said is that the mother had no friends or relations in Australia to whom she could turn for help.

He then refers to the fact that the father is prepared to give undertakings to try to persuade the mother or the Court to arrange the return of A to Australia. I will deal with those at a later stage in the judgment. He goes on to say that the mother has no confidence in his undertakings, any more than she did when he was giving undertakings to Judge Rice. I merely comment that the Order by Judge Rice only lasted, effectively, three months, before the reconciliation. The mother's case is summarised by the Judge, at the top of page 6 of the transcript of judgment, when he says:

"She says that the effect on her of the father's conduct is such that A is bound to be adversely affected and would be put in an intolerable situation. She says that the whole situation, taking all the circumstances into account, would place A in an intolerable position if he has to be returned to Australia."

The Judge continues:

"The background to this case is different from the background of almost all the cases which have been before the courts under the Hague Convention. I have to say, having read the evidence and seen what has happened in the past and being aware of the judgment of Judge Rice in the Southend County Court concerning the behaviour and character of the father, I consider that there would be a grave risk that A would be placed in an intolerable situation if he was returned to Australia. In those circumstances, this court is in a position to refuse to order the return of the child."

As I have said, the Judge was not referred - and did not himself refer - to any of the decided cases, but I have to question his statement when he says that the background to this case is different from the background of almost all the cases which had been before the Courts under the Hague Convention. In my experience, save for certain matters of detail, this case is only too familiar an example of the cases that come before the Court under the Hague Convention. I do not propose to refer to them all in detail, because most of them are referred to in the recent decision of this Court: B and B (Abduction) [1993] Fam 32, [1993] 1 FLR 238. Sir Stephen Brown, the President, giving the leading judgment, deals with one of the points that was made in that case, which was again that there was a grave risk that the return of the child would place him in an intolerable situation. Sir Stephen Brown cites first part of the judgment of Lord Donaldson MR, in the case of Re A (Abduction: Custody Rights) [1992] Fam 106, [1992] 1 All ER 929. He then cites a further passage from the judgment of the Master of the Rolls in another case, Re C (A Minor) (Abduction) [1989] 2 All ER 465, [1989] 1 FLR 403. I cite a passage from the judgment of Master of the Rolls in Re C:

"We have also had to consider Article 13, with its reference to 'psychological harm.' I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention some psychological harm to a child is inherent, whether or not the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation' which cast considerable light on the severe degree of psychological harm which the Convention has in mind."

The President then refers to a judgment of my own, also in the case of Re A [1992] Fam 106, when I cited part of the judgment of Thorpe, J at first instance in that case. I said:

"The judge also rejected a submission on behalf of the mother that there was a grave risk that to return the boys to Australia would place them in an intolerable situation. If the Judge had accepted that submission that would have unlocked the door to the exercise of his discretion under article 13(b). The argument relied on to support that submission is set out in the judgment in the following passage."

That was largely a matter of financial considerations in that case. I said:

"The Judge rejected this argument:

'I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently substantial intolerable situation.'" I said that I was quite clear that the matters, which in that case were largely financial, upon which the mother sought to rely as

constituting an intolerable situation in Australia came nowhere near to establishing what the Hague Convention required by that phrase. The President later on went on to say:

"I stress what Balcombe LJ said in Re A, above, that a very high degree of intolerability must be established in bringing into operation Article 13(b)."

Leggatt, LJ was to the same effect and Scott, LJ also agreed.

It is clearly established that the principle of the Hague Convention is that where a child is wrongfully abducted from one country and brought into the jurisdiction of another, the Court should, in all normal circumstances, immediately return the child to the country whence it was taken, and let the Courts of that country deal with the issues that arise as between the parents. It is the exception where a Court under Article 13 has a discretion (which it does not necessarily have to exercise), not to order the return of the child.

The way in which Miss Scriven, for the mother, has put her case in this Court is quite simply this: even though the issues of fact which arise between the mother and father in this case have not yet been decided -- and, of course, the father in his affidavit evidence has denied many of the factual matters which the mother asserts -- the mother has shown that she has a legitimate fear for both her physical and her emotional well being. She relies on what his Honour Judge Rice said in the case in Southend, in July 1991, and - although this was not what Miss Scriven herself said, I think it is not an unfair paraphrase - a leopard does not change his spots. It is the character of the father that we are entitled to infer both from that judgment, and from what the mother has said subsequently. He is a man inclined to drink and he is aggressive and violent and she is legitimately in fear of him.

Without for one moment saying that is necessarily true, for the purposes of this judgment I am prepared to assume that it may be true, and that the mother, therefore, has a legitimate fear of violence at the hands of the father. But, if she goes back to Australia, she will have the protection of the Australian Courts. The father has already offered undertakings, both to Ewbank, J and to this Court. Those undertakings are designed to ensure that any fears that the mother may have will be alleviated, at least until the matter comes before the Australian Courts again. He has offered undertakings to keep away from the home in Australia (which is still there available for the mother and A) and also to pay $100 per fortnight towards its rent. It may well be that he should also give the further undertaking against molestation. But, subject to that, he is, as I said, prepared to give undertakings and, of course, if he does give the undertaking to keep away from the home (and according to his evidence he has found accommodation elsewhere at some distance from where the mother and A would be living), there is much less risk of the opportunity arising to occasion violence.

We have before us in evidence a letter from the Australian Governmental Services which makes it clear that not only will they provide State benefits for the mother and A, which so far as I am aware are at least as good as the equivalent State benefits in this country, they will also pay for the air fare of the mother and A to return to Australia.

Assuming in the mother's favour that she does have a legitimate fear for her physical and emotional well being, and assuming too, having regard to A's age, that some part of that fear may well rub off on to him and affect him to that extent, nevertheless I am clear in my mind that that legitimate fear, if it be such, and the possibility that it will rub off on to A, comes nowhere near to establishing the grave risk that the child's return to Australia would place him in an intolerable situation.

A would be living with his mother (if she so wishes) in accommodation for which financial provision has been, and will be made. They will have the protection both of the Australian

Courts and of the undertakings which the father is offering to this Court to preserve the position until such time the matter gets back before the Australian Courts.

I should also have mentioned that in the course of the argument before us it came out that there were some arrears of rent outstanding on the property which was the matrimonial home in Queensland, and which will be the house available to the mother and A when they return. The father has offered an undertaking to pay off those arrears by some appropriate instalments.

For all those reasons, I am satisfied that the Judge was wrong in the decision to which he came on the effect of Article 13(b). Indeed, I have to say that it seems to me that Mr Holman, who appeared before us for the father, is right: if the Judge's decision were to stand, it would, in effect, drive a coach and four through the provisions of the Hague Convention.

In the circumstances, it is unnecessary for me to consider the second question which was put before us, namely whether, even assuming that the key had been unlocked by the application of Article 13(b), nevertheless there was still a possibility that the Judge's decision could be upset, on the basis that he had not properly exercised the discretion entrusted to him, but, in view of the decision to which I have come on the first point, that does not arise.

I would allow this appeal, discharge the Order below, and in particular, since the Judge at the same time as dismissing the father's application under the Hague Convention, made an Order, intended, I think, to be an interim Order for the residence of A with the mother in this country, discharge that Order also. Miss Scriven very fairly accepts that, if we were against her, as we are, on the main part of the appeal that Order cannot stand. We will hear further submissions as to the precise form of the undertakings which are to be offered.

ROSE LJ: I agree. I add only a few words because we are differing from the learned Judge. It is unfortunate that the Judge was not referred to the authorities to which this Court has been referred, or, indeed, to any authority. It is clear from what the President, Sir Stephen Brown, said in B v B (Abduction) already cited by my Lord, and what my Lord, Lord Justice Balcombe said at page 118, in Re A (A Minor) (Abduction) (Acquiescence) that the Article 13(b) requirement for not ordering return, namely a grave risk of the child being placed in an intolerable situation, presents a high threshold for a defendant (the mother in this case) to overcome. As Mr Holman pointed out in argument on behalf of the father, marital disharmony, invariably, and bad behaviour, frequently, feature in the background to cases of abduction. As Leggatt, LJ said in B v B at 247G the fact that:

"The mother's situation might be unsatisfactory, and she might suffer discomfort or perhaps even hardship" or, I would add, even the possibility of the husband taking excessive drink, does not give rise to a risk, still less a grave one, that the child's position, if returned, would be intolerable. Comity in general, and Article 12 of the Convention in particular require that, only in the exceptional circumstances identified in Article 13, will the Court not order that an abducted child be returned. Accordingly, and for the reasons given by Lord Justice Balcombe, I agree that this appeal should be allowed, and the Order below discharged.

PETER GIBSON LJ: I agree with both judgments.

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