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[24/02/1993; High Court (England); First Instance]
Re L. (Child Abduction) (Psychological Harm) [1993] 2 FLR 401, [1993] Fam Law 514

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

24 February 1993

Hollis J

In the Matter of L.

Mark Everall for the father

Nigel Page for the mother

HOLLIS J: This is a father's application for his child to be returned to Texas, pursuant to Art 12 of the Hague Convention incorporated into the Child Abduction and Custody Act 1985.

Article 12 is mandatory. Apparently it is conceded that the child's removal by the mother from Texas on 25 September 1992 was wrongful. The short facts are these: the father is a citizen of the USA. He is a welder. The mother is a British citizen. The parties were married in October 1990 in Texas and made their home in Texas. T., the child with whom I am concerned, was born on 22 July 1991, and so he is now some 18 or 19 months old.

Under the law of Texas the child is deemed to be in the joint custody of the parties. On 25 September 1992 the mother wrongfully removed T. to England, where she is now living with him and with her parents in Nottingham. On 11 January 1993 she filed a petition for divorce in the Nottingham County Court.

The mother resists T.'s return to Texas, relying on Art 13(b) of the Convention. That article, so far as material to this case, reads as follows:

'The court 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 expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.' Apparently, after these proceedings were commenced by the father, the mother in fact applied for a visa to visit the USA, but that application was refused on 19 February 1993.

Thus, she says, that if T. is ordered to be returned to Texas without her, there is a grave risk that he will suffer psychological harm.

In support I have read two affidavits by Professor Newman, a chartered psychologist, who has been researching children's psychology for some 30 years. He says in his affidavit sworn on 23 February 1993, para 6:

'In the final paragraph of my first affidavit I expressed the opinion that there must be a grave risk that the removal of a child of this particular age from his mother would do him psychological harm.

Following my observations of mother and child together, I have no doubt whatsoever to remove from that opinion or qualify it in any way, and I believe that the removal of T. from the care of his mother within what is manifestly a stable, secure and supportive environment, which they currently enjoy, might well do this child grave psychological harm.'

That view is supported in different words by one Sylvia Duncan who is a clinical psychologist. However, in my view, that is no more than saying that a young child who has always been brought up by his mother should not be removed from her. It goes to the merits of an application for care and control or custody between the parents, and takes no account of s 12 of the 1985 Act.

I have been referred helpfully to a decision of the Court of Appeal in Re C (A Minor) (Abduction) [1989] 1 FLR 403. That was a case where a mother had wrongfully removed a child from Australia to England, and refused to return with that child. Butler-Sloss LJ, at p 410D, said this:

'The grave risk of harm arises not from the return of the child but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child will be placed in an intolerable situation if the mother refused to go back. In weighing up the various factors, I must place in the balance, and it is of the greatest importance, the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create a psychological situation and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I for my part, cannot believe that this is in the interest of international relations. Nor should the mother, by her own actions, succeed in preventing the return of the child who should be living in his own country, and deny him contact with his other parent.'

And at p 413D, the then Master of the Rolls, Lord Donaldson, said this:

'We have also had to consider Art 13 with its reference to "psychological harm". I would only add that in a situation which it is necessary to consider operating the machinery of the Convention, some psycho-logical harm to a child is inherent, whether 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 casts considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the State to which the child is to be returned to minimise or eliminate this harm, and in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. 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.'

As it happens, while I was waiting for this case to be resumed, I happened on the recent publication of the Family Court Reporter, which refers to a case called Re NB (A Minor) (Abduction) [1993] 1 FCR 271. In that case, in which the other country concerned was Canada, it was an appeal from Ewbank J who had found that if returned, the child would have been placed in an intolerable situation.

That was also a decision on appeal of the Court of Appeal. The President, during the course of his judgment, said this, at p 281:

'I consider that the judge did not have the material before him on which to find that there was a grave risk that the child would be placed in an intolerable situation if the court were to order his return to Canada. I stress what Balcombe LJ said in Re A that a very high degree of intolerability must be established in order to bring into operation Art 13(b). It seems to me that the facts of this case do not come anywhere near to the level of intolerability which is required when considering the provisions of Art 13. It must also be borne in mind that Art 13 does not oblige the court to decline to order the return of the child, even if grave risk of an intolerable situation is established. It provides a discretion to the judge to consider whether the return is the appropriate order to make in all the ' As to the mother's application for a visa, it can of course be appreciated, even if only cynically, that it would strengthen the mother's case on this application if her application for a visa were refused. I have been referred to various letters from the American embassy about applying for and obtaining such visas.

The first relevant letter is dated 10 February 1993. On p 2 of the letter the Consul, Mr Reagan, writes:

'Regarding visiting the USA on a temporary basis, Mrs L could apply for a non-immigrant visa such as a visitor's visa. Visitor's visas do not specify how long the individual may remain in the USA. This is determined by Immigration and Naturalisation Service inspectors at the time the bearer of the visa applies for admission at a USA port of entry. In general INS admits qualified visitors for an initial 6-month period, although initial stays of up to one year can be given.

Visitors already in the USA may apply to INS offices for an extension of their initial stay.

Under s 214(b) of the Immigration and Nationality Act, applications for visitor's visas are assumed to be immigrants until they can establish otherwise by demonstrating that they maintain strong ties to a residence outside the USA which they do not intend to abandon.

Section 214(b) also applies at the time the holder of a visitor's visa applies for admission at a USA port of entry. Applicants must show that they are seeking to enter the USA for a purely temporary, non-working stay. If an applicant is unable to establish convincingly that the proposed stay in the USA will be temporary, he or she will be refused the visa and/or admission.'

Then he refers to the fact that the person wanting a visa must show they have sufficient funds to support themselves, and further says:

'While an applicant for a visa must demonstrate that he or she is not likely to become a public charge, there is nothing in USA law that would prohibit the applicant from receiving public assistance should circumstances warrant.'

Then he refers on p 3 to the visa waiver pilot program:

'Those using this program are also subject to the ineligibilities of s 212(a), as well as having satisfied the immigration inspector at the port of entry that they meet the requirements of s 214(b). Such travellers are admitted for 90 days only. There is no provision for extension of the stay.'

In a further letter dated 23 February 1993, the Consul, Mr Reagan, writes:

'Mr L's offer of support for Mrs L during the proposed stay in the USA would be likely to overcome any possible ineligibility under s 212(a)(iv) of the Immigration and Nationality Act which prohibits issuing a visa or allowing entry to the USA to anyone who is likely to become a public charge.

Regarding Mrs L's previous overstay in the USA, during her interview here on 19 February, the interviewing officer determined that Mrs L had not misrepresented herself when she entered the USA and therefore is not ineligible under s 212(a), 6(c), which prohibits the issuance of a visa to persons who have misrepresented themselves in order to obtain a visa or entry into the USA.

Mrs L was however found ineligible under s 214(b) under which applicants for visitor's visas or for admission to the USA at a port of entry must establish that they are not planning to remain in the USA on a permanent basis.

If Mrs L has new information to present she may of course reapply for a visitor's visa.'

Quite frankly, I cannot believe that if properly presented and backed by an order of this court, that the mother would be refused a visa to the USA in order to contest custody proceedings in Texas. Even if she still failed to obtain such a visa, I do not accept that there is a grave risk that T. would be exposed to psychological harm of the necessary degree, or be placed in an intolerable situation of the necessary degree. After all, he will be collected by his father here, and taken to Texas, and then will be cared for by his father and by his paternal grandmother thereafter.

He knows, of course, his father, although he has not seen him since last September. He knows his paternal grandmother, although less well than his father.

I would only add further and emphasise that I have not gone into the merits concerning care and control as between these parties, or indeed what is in the child's best interests as to where and with whom he should live. That is not my function. That is in my view for decision by the appropriate court in Texas.

The father has offered certain undertakings. One, to issue forthwith process in the relevant court in Texas concerning the child; to allow the mother to stay in what was the former matrimonial home, vacating it himself, until the first inter partes hearing before the Texan court, when no doubt that court can deal with provision for the mother's future housing and finance; and further, he undertakes until the first inter partes hearing before the same court, to supply the mother with $50 a week plus food.

On that basis, and upon the basis that the father will pay the necessary air fares for mother and T., I will order the child's return forthwith to Texas. If the mother cannot, or indeed will not, go to Texas then the father is to collect T. from England and take him to Texas.

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