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S. v. S. [1998] 2 HKC 316

S. v. S.

In the High Court of the Hong Kong Special Administrative Region

Court of First Instance

Miscellaneous Proceedings

3 April 1998

Waung J.

Waung J.: On 5 September 1997, the Child Abduction and Custody Ordinance (Cap 512) (the Ordinance) came into force in Hong Kong. The Ordinance was to give effect to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention). The necessity for this Ordinance was of long standing as international abduction of children had become a major international problem for many years and this had resulted in the international agreement known as the Hague Convention. Large number of western countries in the eighties enacted laws to bring into force the Hague Convention and their courts applied the Hague Convention by summarily ordering the return of abducted children back to the countries where the children were habitually resident.

On 24 January 1998, the Department of Justice of the Hong Kong Special Administrative Region made to me as the duty judge the first application in Hong Kong under the Ordinance. The application was made in respect of an abducted six year old male child (the child) who was abducted by the mother (the mother) from the United Kingdom and brought to Hong Kong. The Lord Chancellor of Great Britain at the request of the British father (the father) made the request to the Hong Kong Secretary for Justice under the Hague Convention for the return of the child and the present action was accordingly initiated.

History leading to the child abduction

The child was born in the United Kingdom on 4 July 1991 to a Leicestershire turkey farmer father and a Hong Kong born Chinese surgeon mother. The mother came to the United Kingdom in 1983 to obtain her fellowship of the Royal College of Surgeons which she did. The father and mother met in 1989 and they were married in December 1990. The father at the time of marriage was close to 50 and the mother at the time of the marriage was close to 40. The child therefore came to both parents rather late in life, being for both parents, a first child. The family lived in the farm where the father carried on his business as a turkey farmer. At the farm, there was no raising of turkeys but the turkeys were brought periodically to the farm to be slaughtered at the turkey shed. The house where the family lived was set back some distance from the turkey shed but with the turkey farming business being carried on at the farm, it was natural that the child was exposed to turkeys and the turkey environment. From a young age he was very often taken by his father into the turkey shed and there was no health problem arising from the child's general exposure to the turkey environment during the years he was living at the farm.

At the age of about 11 months, the child started having wheezing and coughs which were symptomatic of asthma. For the four years that the child lived there at the turkey farm, there was

nothing unusual about the health of the child. Although the child had about six times a year, recurrent coughs, wheeze and dyspnoea, these symptoms only lasted a few days and no treatment was required. The child grew up happy, healthy and the evidence indicated a normal relationship with the father and mother.

In June 1995 (when the child was just under four) the father and mother separated due to differences. The mother and the child moved to a new home some 15 miles away from the farm. The child started school in September 1995 at Leicester Grammar School. From June to November 1995, the contact between the father and the child was haphazard and irregular. In November 1995, the father issued a contact application in the Leicester County Court (UK Court) wanting half of D.'s free time including alternate staying weekends. The mother opposed increased contact. In late March 1996, the welfare officer of the UK Court recommended increase contact between the father and the child. There was no mention in the welfare officer's report that the mother was complaining about the turkeys at the farm causing asthma in the child. Two weeks after this welfare officer's report copied to the mother, for the first time the mother through her solicitors suggested that the child's bronchial problem was linked to the turkeys at the farm. In that letter dated 15 April 1996, the mother's solicitors said that therefore she would be opposing any extension to overnight stay contact until the situation was clarified. In May 1996, both father and mother made statements for the purpose of the contact application of the father to the UK Court. On 15 May 1996, there was a preliminary hearing for the contact application with the hearing date set for 25 July 1996. At the preliminary hearing, the judge made an order that the parties forthwith appoint a bronchial specialist to report upon the child's asthmatic condition and whether that was provoked or worsened by exposure to turkeys. Pursuant to this order, the mother's solicitors appointed Dr Spencer to report on the condition of the child. By Dr Spencer's report dated 27 June 1996, Dr Spencer said that the child had mild intermittent asthma and that it was unlikely that turkey was a significant factor in the child's respiratory illness. He also said that extrinsic allergic alveolitis is very rare and is accompanied invariably with weight loss, respiratory distress and presence of crackles on auscultation, all of which were absent in the case of the child. The conclusion of Dr Spencer was against any relationship between the respiratory illness and exposure to turkeys. Dr Spencer's report was presented to the court on the contact application hearing on 25 July 1996 but the mother said it was wrong and wanted Professor Silverman to examine the child. Judge Merriman in his judgment on 6 August 1996 came to the conclusion that the mother was wrong and he accepted Dr Spencer's conclusion that the child did not have alveolitis and his asthma was not as a result of turkeys. The judge said that to convince the mother, a further report was required. The judge granted to the father the greater contact requested by the father.

Professor Silverman who ran the Asthma Clinic at the Leicester Royal Infirmary is a world expert in the field and therefore the mother chose Professor Silverman. This is bound to be an informed choice as the mother herself is a highly qualified doctor. By the report of Professor Silverman dated 17 October 1996, he made no reference to turkey as the source of the asthma problem of the child and in fact he said in a postscript that the dust mite is the most likely antigen to be causing problem during the child's visit to the farm. In a separate letter to the mother's solicitors dated 30 October 1996, Professor Silverman said that the relevant trigger factor at the farm is almost certainly house dust caused by old furnishings and carpets. Professor Silverman saw the child and the mother again on 21 January 1997 when the mother again complained about a severe attack (requiring oral steroid tablet) following the child's visit to the farm. But the professor in his report dated 22 January 1997 refused to say there was any connection between the attack and the child's visit to the farm. He said it was an open question. Turkeys did not even come into this 'open question'. Two days after that Silverman report, the solicitors of the mother telephoned the solicitors of the father indicating that the mother was seeking to move with the child permanently to Hong Kong.

On 29 January 1997, there was a hearing before Judge Hamilton at the UK Court and the initial application was by the father to clarify from the mother her intention to change the child to another school. But at the hearing the mother raised the matter of wishing to move with the child permanently to Hong Kong. In relation to contact, the vexed question of the mother's objection of the child going to the father at the farm again came up. Judge Hamilton referred to Silverman's reports and concluded against the mother and said that there was no basis to restrict contact at the farm. He said asthma was susceptible to a number of causes. It would seem that because of the

mother wishing to move permanently to Hong Kong with the child, the mother was ordered by the court to surrender the child's passport.

On 3 February 1997, the mother formally issued the application to the UK Court for moving permanently to Hong Kong with the child. The hearing before Judge Brunning on 18 March 1997 was to determine the mother's application for the return of the passports to enable the mother and the child to go to Hong Kong for two weeks commencing about 18 March 1997 so that the mother could attend job interviews in Hong Kong. At the hearing, the undesirability of contact with the father at the farm (therefore justifying taking the child to Hong Kong) was again raised by the mother and Judge Brunning said that the question had been litigated on four previous occasions before the UK Court and on each occasion no link was established. The judge therefore refused to grant leave for the child to travel to Hong Kong and he readjusted contact. The mother left for Hong Kong the next day and it could be clearly seen from the father's diary of the three week period when the child was with him at the farm, how much the child enjoyed the stay with his father at the farm and apparently without any health problem.

In preparation for the important hearing of the mother's application to remove herself and the child permanently to Hong Kong, the welfare office of the UK Court made a second report dated 2 April 1997 and again in that report there was nothing to indicate that the child was suffering seriously from asthma or that serious physical harm was being caused to the child by his asthma or by the stay at the farm. The child enjoyed staying with the father at the farm and this was one of his top wishes as appears in the welfare officer's report.

By letter dated 26 June 1997, the mother's solicitors wrote to the father's solicitors indicating that in the event that the mother was unsuccessful in her application to move with the child permanently to Hong Kong then she herself would move permanently to Hong Kong in any event. The mother made a statement dated 3 July 1997 for the UK Court application but there was no reference in that statement to the undesirability of the child staying with the father at the farm arising from turkeys causing serious harm to the health of the child. The hearing of the mother's application took place on 23 July 1997 and by his judgment of that day, Judge Brunning rejected the application and said in relation to the alleged link between turkey and the asthma of the child that the mother had obstinately refused to accept the absence of causative link. The judge however gave the mother an opportunity to reconsider her decision to move permanently to Hong Kong as this would entail the UK Court making a new residence order in favour of the father. Two days later, the mother said she was no longer going to Hong Kong permanently. Therefore Judge Brunning did not change the residence order in favour of the father. It is to be noted that the mother did not appeal the order of Judge Brunning. It would seem that she had already planned to achieve her objective of moving with the child to Hong Kong not through the legal route but by taking the law into her own hands, through unlawful abduction.

After the hearing on 23 July 1997, the passport of the child was not returned to the mother but was kept by the UK Court. It was only to be released upon the Hague Convention coming into force in Hong Kong. Sometime in September 1997, upon the Ordinance (and the Hague Convention) coming into effect in Hong Kong, the passport of the child was returned to the mother. The UK Court placed confidence in the Hong Kong Court carrying out properly the duties under the Hague Convention.

On 5 December 1997 the mother collected the child from his school. Her attempt to take all the school belongings of the child was stopped by the school. On 6 December 1997 the mother and the child left the United Kingdom and came to Hong Kong. In the letter to the school dated 5 December 1997, the mother said that the child would return to the school on 6 January 1998 upon his return from Hong Kong. The mother even instructed her solicitors to write to the father informing him that the child would return to the United Kingdom on 5 January 1998. In fact as the mother well knew they would not be returning to the United Kingdom as she had taken steps before their departure to sell her car, rented her house and moved all their belongings to Hong Kong. On 30 December 1997, the mother and child moved out of the Hong Kong home of the grandmother into their new home. The abduction was complete.

The Hague Convention and the Ordinance

The main objective of the Hague Convention was to ensure the uniform and speedy return of abducted children. International uniformity was to be achieved by requiring mandatory return orders to be made with very limited exceptions (art 12). Speed was to be achieved by requiring the judicial and administrative authority to effect the return expeditiously, to the extent of imposing on the judicial authority an obligation to give reasons for delay (art 11). The stringent requirements of the Hague Convention are unique in the field of international agreements but welfare of the abducted children require urgent steps to be taken to undo the enormous harm of taking children out of their home environment, namely their habitual place of residence.

Articles 11, 12 and 13 of the Hague Convention provide as follows: Article 11 The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of the child.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be. Article 12 Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. . . . Article 13 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 --

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of the child; or

(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 judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

It is to be noted from a reading of the Hague Convention that the primary requirements had to be satisfied by the applicant before the mandatory return obligation arises. The primary requirements are:

(a) child is under 16 (art 4);

(b) child was habitually resident in the UK before the removal (art 3(a) and art 4);

(c) the removal of the child was in breach of the rights of custody of the applicant (art 3(a));

(d) the right of custody was exercised by the applicant at the time of removal (art 3(b)).

Once the applicant has established that it is a case of wrongful removal (or in non technical language international child abduction) then the mandatory return obligation under the Hague Convention arises and it is for the abducting parent to prove that there is a defence to the mandatory return.

Hong Kong proceedings

The proceedings for mandatory return commenced on 24 January 1998 and the first application to my court was to secure:

(a) the whereabouts of the child;

(b) the injunction order to prevent the mother and child from leaving Hong Kong pending the hearing of the originating summons;

(c) the surrender of their passports to prevent any further travelling out of Hong Kong.

On the ex parte application by the Secretary for Justice on behalf of the father, I made the above ex parte orders. There then followed considerable difficulties in finding the child, in effecting service of the ex parte orders and the originating summons on the mother. A series of orders had to be made by me from 26 January 1998 to 2 February 1998 (including compelling the brothers of the mother to give evidence as to the whereabouts of the mother and the child) to achieve the objective of compelling the mother to comply with the orders of the court.

On 2 February 1998, the mother accepting the reality instructed solicitors to appear for her and I accordingly made the direction that she file her affidavit in answer to the originating summons by 13 February 1998. On 3 February 1997 the mother applied for legal aid and on 6 February 1998, taking into account her application for legal aid, her plea for time and the state of the court diary, I set the date of hearing of the originating summons for 26 and 27 March 1998 and ordered that affidavits of and for the mother to be filed by 13 March 1998 with affidavits in reply of the applicant father to be filed by 21 March 1998 and that no further affidavits are to be filed thereafter without leave or specific order of the court. To cater to the possibility of conflict of evidence and in ignorance of the unique speedy nature of the Hague Convention cases, I also directed that: Subject to further order of the Court, the deponents of the affidavits shall attend the hearing of the Originating Summons for cross-examination.

I also refused to order any stay due to legal aid application. I gave the appropriate case management directions on lists of issue and pre-trial review. On 12 March 1998, I changed the trial dates to 30 March to 2 April 1995 and extended the time of expert affidavits for the mother by three days to 16 March 1998. But otherwise I refused to grant any extension of time to the mother for her factual affidavits. I changed slightly the timing of the affidavits in reply and I repeated my previous order that no further affidavits be filed without leave or specific order of the court. I also slightly amended the timing of my case management directions.

At the trial, the bundles put before the court revealed a number of defences relied on by the mother to defeat the mandatory return under the Hague Convention. Two of the matters raised in the papers were effectively abandoned by the mother, namely 'psychological harm' and 'place the child in an intolerable situation'. They were rightly abandoned as they had no chance of success. The trial concentrated on really two questions, namely the defence of grave risk of exposure to physical harm which I will call the first issue and objection by the child to return to the UK, which I will call the second issue. Most of the energy of the trial was directed on the first issue. A preliminary problem arose over the mother wishing to:

(1) rely on two affidavits in rejoinder by her medical experts, Dr Tseng and Dr Hui;

(2) seek leave that the medical evidence be expanded orally by the three medical experts, namely Dr Tseng and Dr Hui for the mother and Dr Tam for the father.

I refused both applications of the mother as part of the case management of the trial and I state briefly my reasons for so ordering.

The principle which governs the Hague Convention is that wrongful removal of a child to a foreign jurisdiction must be immediately corrected by a mandatory return to the home jurisdiction of the child. The reason for this is that the removal of a child from its home environment of habitual place of residence is always against the welfare of the child. Therefore such harm and damage to the welfare of the child must be immediately corrected by the urgent return of the child. The procedure is therefore pre-emptory, summary and 'speed is of the essence. It is an entirely different procedure from internal proceedings concerning with making orders based upon the principle of paramountcy

of the welfare of the child.' (per Butler-Sloss LJ in Re M (Abduction: Undertakings) (1995) 1 FLR 1021 at 1024B). That speed is of the essence can be seen from:

(1)the requirement in the Hague Convention that the application is dealt within six weeks or otherwise requiring the foreign court to explain the delay;

(2) the short time period of seven days in our new Order 121 (made on 11 February 1998 and gazetted on 20 February 1998) for the acknowledgment of service (r 6);

(3) the very very short time period of five days for the affidavit of defence and for the affidavit in reply (r 7).

The whole procedure is therefore not to permit any protracted litigation or investigation but to ensure that as much as possible, the whole judicial process in Hong Kong for the return of the abducted child can be concluded within the six-week period and if not possible within the shortest possible period. With that fundamental principle of speed in mind, I therefore approach the twin applications of the mother.

The affidavits in rejoinder of Dr Tseng and Dr Hui have no place under our Order 121. This special type of proceedings will not contemplate affidavits in rejoinder, especially when these affidavits in rejoinder raise controversial and disputed questions of scientific facts. In my case management orders of 6 February and 12 March 1998 I had expressly laid down that no further affidavit was to come in after the affidavits in reply and the circumstances here simply do not warrant allowing in affidavits in rejoinder. The lateness of the affidavits in rejoinder also is a factor which weigh against their admission. I am convinced by the subsequent course of the trial that this is the right course to take, namely to refuse their admission.

As for oral evidence, once it has been brought home to me the proper principle behind the Hague Convention and the true nature of this type of proceedings and having studied the trial bundles, it was clear that oral examination of the three doctors on the physical harm issue must not be permitted. The text books and the authorities all state that oral evidence in Hague Convention cases are very rare and should be allowed sparingly for obvious reasons as otherwise it would defeat the primary purpose of speed under the Hague Convention. In Gazi v Gazi (1993) FLC 92-341, the Full Court of the Family Court of Australia held that there was no denial of natural justice when the parties were not permitted to cross-examine. It said: The primary purpose of the Convention . . .is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return to the country of their habitual residence of children who are wrongly removed . . .. Accordingly, whilst there may be cases in which it is appropriate to allow cross-examination of deponents of affidavits, such cases would be rare. The majority of proceedings for the return of children, pursuant to the Convention should be dealt with in a summary manner and cross-examination of deponents of affidavits would not be appropriate. . .. That cross-examination can take place at a hearing of his claim for custody of the children in the appropriate Court after the resolution of proceedings brought pursuant to the Convention. In this case, the appropriate court is clearly the French Court.

In this case, the matter sought to be the subject of oral evidence is the disputed asthma and alveolitis condition of the child and their connection with the turkeys at the farm. This had been the subject of intensive study by experts and by the UK Court not on one occasion but on several occasions, the results of which were against the mother. She would not accept the findings of experts of her choice. In my judgment, indulgence of the court to allow days and days of oral difficult and scientific evidence by three experts will not in any way assist in the discharge of the two important functions of this particular proceeding, namely speed and court's assessment of grave risk of physical harm. As was said by Wall J in Re K (Abduction: Child's Objections) (1995) 1 FLR 977: . . . it was not necessary for there to be specific findings of fact on contested issues for a defence under Art 13(b) to succeed. Under Art 13(b) the court was assessing risk and it may be inappropriate for the court to make findings of fact if the factual issues were to be litigated elsewhere . . .

Having regard to the nature of the evidence and the reasons for such evidence on the grave risk of physical harm, I am of the view that it is wholly inappropriate for this court to allow oral evidence by the three doctors. This is really well-trodden ground. The mother is obliged to put forward her best case on grave risk of physical harm with her affidavits of Dr Tseng and Dr Hui and if these first reports by Dr Tseng and Dr Hui are not good enough by comparison to the affidavit of Dr Tam and the affidavit evidence on the past medical history, then she would not have made out a case under art 13(b). But that does not mean the end of the road on the issue she wishes to raise of physical harm. The subject is really the residence of the child at the farm and this is a matter which ought to be conclusively and finally litigated in the court of the place where the child has his usual place of residence, namely the UK Court which after all had all the expertise, having dealt with it on no less than (as I understand it) five occasions, in August 1996, in November 1996, in January 1997, in March 1997 and in July 1997, albeit each time against the mother. In all the circumstances of this case, I firmly exercised my discretion by refusing to allow oral evidence from the three doctors.

With the procedural problems out of the way, the parties agreed that there are three issues before the court:

First, has the mother shown that grave risk of physical harm to the child by his return to UK;

Second, has the mother shown that the child was of an age and maturity that his objection against return should be taken into account by the court;

Third, if any of the above two threshold requirements under the first and second issue is satisfied, whether the court should exercise its discretion not to order the return of the child to the United Kingdom.

Grave risk of physical harm

At this trial, Ms Wee has rightly conceded that all the preliminary conditions for a mandatory return are satisfied and that it is for the mother to prove and establish a defence under art 13(b), namely grave risk of physical harm. It is common ground between the parties that the risk of physical harm must be weighty and it must be of substantial or severe and not trivial, harm. A very high degree of intolerability of physical harm must be established. The test is a stringent one and will only be satisfied in exceptional circumstances, as the case law confirms. (see para 829 of Butterworths Family Law Service Vol 2). The few instances of such defence being successful is an indication of the difficulty of establishing such a defence.

The case of the mother (as opposed to the evidence), stripped of technical and scientific obscurity, amounts to the assertion by her that the child was suffering from very severe asthma and alveolitis which were connected to or caused by the turkeys at the farm and that therefore to send the child back to the UK and back to the farm with the father (because the mother has decided in any event to pursue her career as a doctor in Hong Kong) with the exposure to the turkeys would amount to grave risk of physical harm. In my judgment, even if that case of the mother is supported by evidence, that still would not amount to the high requirement of art 13(b) and that therefore the physical harm defence would have failed.

The evidence however made the point wholly devoid of merit. The starting point of the evidence on serious risk of physical harm in the United Kingdom must be the medical history on the linkage between turkeys and the respiratory problem. From Dr Spencer to Professor Silverman on the medical side and from Judge Merriman, through Judge Hamilton to Judge Brunning on the judicial side considering the medical assertion, this point has been roundly rejected. The English evidence and the history of the medical evidence up to arrival in Hong Kong is therefore strongly against the mother's case of grave risk of physical harm. My assessment of the establishment of grave risk of physical harm must be set against this powerful factor. A very high mountain to climb even with her Hong Kong medical evidence.

But the Hong Kong evidence is not much better. Take Dr Tseng who said in his report dated 9 March 1998 that the child was previously only of moderate persistent asthma. He could only say

that: it is possible, as mother suggested, that when the farm become dusty during turkey unloading, that particular droplets of turkey allergens, become airborne anywhere in the farm, including living quarters.

He went on to mention at para (5), the child's sensitivity to house dust mite from the carpets in the house at the farm. He then said there may well be allergens deposited in the farm house which needs much closer examination and concluded that the mother's suspicion should be given the benefit of the doubt. The language of Dr Tseng's report can only lead to the conclusion that he could not link turkey directly to the asthma and all he could do was to suspect and therefore want to give the mother the benefit of the doubt of the existence of the possibility. It is in these circumstances, that even Ms Wee had to concede in answer to my question that this report of Dr Tseng does not reach the high standard required by art 13(b). It is also of interest to note that the report of Dr Tseng dated 9 March 1998 might have been written without having seen the report of Dr Spencer.

The next Hong Kong report is that of Dr Hui dated 16 March 1998. Again there was no reference to Dr Spencer's report in Dr Hui's report. So far as linkage between the turkey and the child's asthma problem is concerned, there was no such positive finding. He said the child is strongly sensitive to house dust mite and we do not currently have antigens for turkey which were the potential sensitising agents from the turkey farm. His conclusion from his lung function test about the asthma of the child may have progressed to a chronic lung condition known as extrinsic allergic alveolitis is clearly wrong as he had based his calculation at p G26 on the wrong height of 141cm. With a report of such fundamental error, very little reliance could be placed on the rest. But in any event the possibility in the report is so suggestive as not being capable of amounting to the high standard required under art 13(b). Again Ms Wee when pressed by the court, had to concede that this report of Dr Hui does not reach the high standard required by art 13(b).

In Dr Tam's report dated 23 March 1998, he said asthma is a disease in which the airways have become hyper-reactive and the airway is usually sensitive to a multitude of 'triggers'. He cites house dust mite, cat fur, dog hair, cockroaches, pollen, exercise, weather changes and emotional upset and refers to exposure of the asthmatic person to one or more of these factors may bring on the symptoms of coughing, wheezing and breathing difficulty. He said in children especially the patient is usually sensitive not to one but a number of triggers. He concluded that he found the child free from any signs suggesting of chronic uncontrolled asthma. Very crucially Dr Tam said there is no evidence at all of any extrinsic allergic alveolitis in the child as his chest signs and lung function are completely normal. In relation to the linkage to turkey, Dr Tam said this in his report: Therefore it will remain an open question . . .. If D. really was sensitized through his contact with turkeys, one should expect to see symptoms occurring in the years when he was living in the farm, namely from 1991 to 1995 . . .. If he was sensitive to turkey, one should expect his symptoms to get better after 1995 since he was physically removed from the farm, only coming back mostly on alternate weekends. But this did not seem to be the case.

Then he agreed with Dr Silverman that as house dust mite are the most allergic of all allergens and the child is sensitive to house dust mite that every effort should be taken to decrease house dust mite in his environment.

It seems to me that Dr Tam identifies correctly the heart of the weakness of the mother's case, namely that asthma sensitivity of the child is due to and exasperated by many, many possible causes and it is certainly not possible for any doctor or expert to point to the presence of turkeys and say this is the sole cause of the problem or this is definitely one of the causes of the problem. The mother cannot object to dusty carpets at the farm (or at any friend's house) and say that therefore the child should not return to the United Kingdom because of the dusty carpet at the farm. Yet by all accounts, many doctors agreed that dusty carpets at the farm rank very high amongst the suspected agents of mischief. By the nature of the complaint of the mother against turkeys at the farm, it seems to me that the question is capable of infinite debate and incapable of a clear answer and certainly not a clear answer in terms of grave risk of physical harm caused by the turkeys. Therefore by its nature, the allegation cannot be established and the linkage cannot be shown and the high standard of art 13(b) cannot be met.

But stand back from the technical language and its medical imperfections, the central question on this first issue is a simple one, namely could it be said that the child had been under grave risk of physical harm all these years when he was living at the farm and when he was visiting the farm every other weekend or every weekend and for some longish periods in summer. It is inconceivable for me that the mother as a medical doctor would expose him to grave risk of physical harm, year after year and weekend after weekend if exposure to the turkey environment is as harmful as is now suggested by the mother. In reality even though the child has asthma (which no one disputes), this condition has always been under control and is quite manageable. The worse that had happened to the child was the seven occasions from January 1996 to March 1997 when he took the oral steroid tablets (assuming that the mother's evidence is to be accepted that the prescription at F174 equates the child actually taking the prescribed tablets on those days). He had never reached a stage where oral steroid tablet was not sufficient but injection had to be given and certainly as pointed by various doctors, he had never once been hospitalised (as very often happened in bad cases of asthma). He had never missed school because of his alleged physical harm. To the doctors in the UK, the Leicester Grammar School, the social welfare officer of the UK Court, the UK Court and to everyone else, the child all these years appeared to be in reasonably good health and happy and certainly not the victim of grave physical harm. The only one person who did not see it that way was the mother and yet this mother who is herself a highly qualified doctor could see herself leaving the child at the turkey farm with the father for three weeks from March to April 1997, when she went to Hong Kong to find a better prospect for her career and could say to the UK Court in July 1997 that she would go to Hong Kong in any event and leave the child at the farm with the father permanently. It seems to me that from her own repeated actions, she had demonstrated that she did not regard her son as being exposed to grave risk of physical harm. On the totality of the material before me, I have therefore no doubt that on the first issue, the mother has totally failed to establish that if the child is returned to the UK, he would be exposed to grave risk of physical harm.

The above finding is strictly speaking enough to dispose of the first issue but the authorities have shown that in considering this question of grave risk of physical harm, one can also take into account of the likely actual circumstances and in this context, it seems to me that in order to succeed, the mother not only has to demonstrate the theoretical but also the practical and actual, that is to say that the UK Court, UK doctors, the school, the mother, the neighbours and most importantly of all the father, would not have taken steps to ensure that the child would be healthy, would be given regular medication or such medicine as may be necessary when he has the asthma attacks. They would have ensured that the child would suffer no serious harm in his health. As I see it, this is not a case of a child going into an active war zone with a very very high risk of death or a child going to Peru with a known high-altitude disability illness which cannot be remedied by medication. In my judgment, the child can fly out tomorrow to the United Kingdom without the mother and he will fare physically as well as he had always done, but of course with the slight handicap that the good medical care which he had previously enjoyed through the presence of the mother, will be absent. But this is his only misfortune. He is not damned to physical harm as his mother would like this court to believe. In my view, on this first issue, the mother has a hopeless case (which Ms Wee has argued with patience and fortitude) and I have no hesitation in rejecting the mother's defence of physical harm.

Objection of child to return to UK

It is accepted by the parties that under this second issue, the mother has to establish three elements before I can begin to have a discretion not to return. The three essential elements are the child:

(1) must be of a sufficient age at which it is appropriate to take account of the child's view;

(2) must be of a degree of maturity at which it is appropriate to take account of the child's view;

(3) must express a valid objection to being returned.

I first start with age. Six years is very very young and for me it is really too young an age at which it is appropriate for a court to take account of a child's view (not preference but objection which

carries with it a degree of rationality). Having seen the child and talked to the child today, I am confirmed in my view that he is really too young for his view to be taken into account.

I turn to maturity which is of course generally connected with age. The latest available social welfare report from the UK Court dated 2 April 1997 does not show the child in any way as being specially precocious or of maturity well beyond his age. His three wishes indicate a normal boy with greater attachment to the father than the mother and with a healthy need for friends and play (as opposed to hard work). The evidence of the father and mother also do not show him as being particularly mature. Dr Chan Chee Hung's report dated 14 March 1998 expressed the view that the child was mature and very verbal and was of the opinion that he is 'of a sufficient degree of maturity that his views should be taken into account'. Dr Chung See Yuen's report dated 21 March 1998 expresses the judgment that the child could not elaborate his ideas. Dr Chung disagreed with Dr Chan's view of the maturity of the child for the purposes of taking into account his views. Dr Chung said the child's ability was deficient. During the visit of the child to my chambers this afternoon in the presence of the mother and father and the social welfare officers of Hong Kong, I found the child to be shy, very clingy to the mother and not very responsive. He is very likeable. He is intelligent. But nevertheless he behaves like a six year old child and I have not found him to be particularly mature so as to be able to articulate his reasons or views to an extent which commands this court's attention to such views. On the matter of maturity, I am also satisfied that I should not take into account the view of the child.

Finally, I consider the nature of the objection expressed by the child. In this respect I agree with Ms Lau that what had been expressed was really a wish or preference rather than a valid objection. The child is naturally close to the mother, his primary carer and would naturally want to stay with the mother. Nature's bonding has seen to this process and my impression of the visit this afternoon is that he is very dependent on the mother. His view on not wanting to go to the United Kingdom is directly connected to the mother staying in Hong Kong. It has been said and it is accepted by the parties that the objection I must consider is the objection to the country not to the person who will be living with the child in a particular country. A fair test of this is whether the child would still object to the United Kingdom if the mother will be in the UK and the father in Hong Kong. If not then the preference is not country related but person related. I do not believe that apart from the mother staying on in Hong Kong, there can be any valid objection by the child to his return to the United Kingdom. He enjoyed his English School. He enjoyed his friends in the UK, J., J. and C. He enjoyed his house in England, Littlehorpe and he enjoyed his father's farm. Without proper reasons or articulation for his objection of returning to the United Kingdom, it seems to me that his objection really should not be taken into account, specially when it is more than likely that his recent closeness to his mother would have influenced his preference for Hong Kong. The question of the child's preference for Hong Kong and United Kingdom was not touched on during his visit to my chambers this afternoon and I did not ask him as I took the view that the matter could be painful to him.

It was pointed out by Ms Lau at the trial that applying Emmett v Perry (1995) FLC 82-519, the time of the objection by the child is when the abduction took place and on that basis if December 1997/January 1998 is the operative time, then according to the father's diary the preference of the child would probably be for return to the UK and certainly not for staying in Hong Kong. I accept that submission.

Therefore, on this second issue, having regard to the three factors I discussed earlier and my view stated in the last paragraph, I conclude that the mother has not established that the court should take into account the objection of the child. It follows therefore that under the second issue, I must also order the mandatory return of the child to England.

Exercise of discretion if not case of mandatory return

As I have decided under both the first and second issues against the mother, it follows that there must be a mandatory return of the child to the United Kingdom and that there would be no freedom or discretion for me to permit the child to stay in Hong Kong. However, as the mother might wish to test the correctness of my decision on the two issues elsewhere, I will just briefly state how I would have exercised my discretion if I had found in her favour on the two issues.

The discretion I would have exercised if I had found in her favour on the first issue would be nevertheless to return the child to the United Kingdom. My reasons for such decision is that although there is a strong case made out for grave risk of physical harm to the child from the turkeys at the farm, that harm could be corrected and controlled by the appropriate measures which the UK Court could order and which the mother could enforce even from Hong Kong in the event she did not want to return to the United Kingdom. The objection to return is not to the United Kingdom per se or to the absence of the mother in the UK or to the child living with the father but specifically to the farm and the possible harm which could be caused to the health of the child in two respects, namely the asthma and the alveolitis. But these are not diseases which are immediately fatal or which could cause substantial detriment in health immediately upon exposure to the farm turkey environment. The harm if any would be incremental with the amount of exposure, measured perhaps more in terms of years and months rather than weeks or days if the harm alleged to be done in the past is a reliable guide. The risk of harm in this case is totally different in kind to risks caused by aids or other fatal diseases or active war zone where there is no room for error. The security or fall-back for the child against the alleged harm are the English doctors, the UK Court, the sensible measures to be taken by the father and the monitoring system which the mother could insist that the UK Court impose on the child and the father. Come to the worst, the mother could obtain the necessary order from the UK Court to ensure that the child lives with the father not at the turkey farm but at her Littlehorpe home or somewhere else acceptable to her and to the English doctors. This is my first and primary reason for ordering return notwithstanding my finding grave risk of physical harm. But in addition it seems to me that the following factors also point to the necessity for ordering return to the United Kingdom:

(1)The Hague Convention is to discourage abduction and to secure the speedy return to the home country and therefore a return to the United Kingdom is to implement the policy of the Hague Convention and also to compel the mother to dislodge her illegal advantage gained by the abduction;

(2) The child although half Chinese had been brought up in the English environment and such upbringing should not be lightly disturbed;

(3) The child had been happy in the United Kingdom, his only home so far and it is wrong to suddenly cut him off from his school, his friends, his animals, his countryside and his father;

(4) The proper jurisdiction to determine the long term future of the child is the UK Court and not the Hong Kong Court and the child should be returned to the United Kingdom where his future could be properly decided;

(5) Whereas there is always a possibility that the mother might return to live in England (either because her work in Hong Kong is no more successful than in UK or that she eventually prefers her son over her medical career) either working or non working in the UK, there is no realistic possibility of the father coming to be a turkey farmer in Hong Kong and to be near his son. In principle, it is wrong to permanently deprive a father of regular contact with his son during the most important years of the life of the child (whereas the non-contact with the mother is that of the mother's own making).

My exercise of my discretion if I should find in favour of the mother on the second issue would be the same based on the five factors I outlined in the last paragraph. The reason why I would override the child's objection to the return to the UK is that the objection although valid was nevertheless one made by a young child, even though of an age and maturity deserving to be given consideration. But the objection by the child does not however mean that in the long term, his non-return is in the best interest of the child. We do not always make the best decision for ourselves and at the age of six, there is in my view the overriding duty of the court to ensure that in these difficult circumstances, a proper decision on his future should be made by the best tribunal, namely the UK Court. The child must therefore be returned as quickly as possible so that such proper decision could be made and at that tribunal the child can express his views on his long term future, either by way of being with the father or with the mother or by way of country of residence in the UK or Hong Kong or by way of venue and quantum of contacts/visits.

It follows therefore that even if I should find against the father on the first and second issues, I would have nevertheless exercised my discretion by ordering the immediate return of the child to the United Kingdom.

Undertakings

Towards the tail end of this trial, the question of undertakings came up and I expressed the view that once the child goes back to the UK, most of the concerns of the mother could be addressed by the UK Court and should be the subject of decision making, orders and directions by the UK Court. The Hong Kong Court should not be hampering the freedom of the UK Court by undertakings given to the Hong Kong Court. In my judgment, undertakings given to this court by the father should be simple, clear, easy to implement and mainly to cover the brief interim period when the UK Court had not yet had the opportunity to react to what had happened in Hong Kong. That period is likely to be very short, a matter of two or three weeks at the most and accordingly, the undertakings which should be imposed should be few in numbers and easy to perform. I would include in that category probably the following undertakings:

(1) Within one week of the arrival in the UK, the father to supply to Professor Silverman all the Hong Kong medical reports and to seek from Professor Silverman a report on the condition of the child and the proper medical steps to be taken by the father for the child and to supply such medical report of Silverman to the mother;

(2) Within one week of arrival in the UK, the father to apply to the Leicester County Court for proper directions on the residence of the child and the health measures necessary to be taken by the father for the child in the light of the Hong Kong medical reports and the Hong Kong judgment;

(3) Subject to any order of the UK Court, not to leave D. alone for any period in excess of 30 min;

(4) The father to meet jointly Dr Tam and Dr Hui before departure for the United Kingdom and to discuss with them what measures ought to be implemented at the farm having regard to the medical condition of the child.

Bearing in mind the limited scope of the undertakings which I had described earlier, the parties can now address me as to the precise terms of the order which should be made as to the return of the child to the United Kingdom, including matters such as the immediate custody of the child, the question of passports, the timing of the departure of the father with the child for the Untied Kingdom and the matters of costs.

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