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[21/05/1999; Outer House of the Court of Session (Scotland); First Instance]
D.I. Petitioner [1999] Green's Family Law Reports

Re I.

Court of Session

Outer House

Lord Abernethy

21 May 1999

Counsel: Act: McNair, Drummond Miller WS; Alt: Stewart, Bonar MacKenzie WS

Lord Abernethy: The petitioner lives in Sicily, Italy. He lived there for some time with the respondent. A child was born of their relationship. He is AI ("A") who was born on 2 July 1994. The parties separated on or about 6 August 1998. On or about that date the respondent ("the mother") left the petitioner ("the father") and travelled with A to Scotland. Since then they have lived in Galashiels. An order for the return of A is now sought in terms of the Child Abduction and Custody Act 1985 which by section 1(2) incorporates The Hague Convention on the Civil Aspects of International Child Abduction into the United Kingdom domestic law. The terms of the Convention form Schedule 1 to the Act. By subsequent Order in Council the Convention was brought into force as between the United Kingdom and Italy.

The case came before me at a first hearing in terms of Rule of Court 70.6. After twice granting the mother a short continuation to enable further information to be obtained the matter was fully argued. At the outset Mr Stewart, counsel for the mother, accepted that A was wrongfully removed by the mother from Sicily in terms of Article 3 of the Convention. In that situation Article 12 would come into play. That article provides, inter alia:

"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 . . .".

Mr Stewart, however, prayed in aid the terms of Article 13(b). That provides as follows:

"Notwithstanding the provision 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 expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Mr Stewart accepted that the onus was on him to establish that the requirements of paragraph (b) are met. If he succeeded in that, then in terms of Article 13 the court may in its discretion decline to order the return of the child. Mr Stewart began by referring me to the Answers to the Petition. In particular, in answer 4 the mother avers a number of episodes of violence by the father. Most of these on the averments were directed at the mother, but there is an averment that on one occasion the father kicked A because he was screaming when the father was assaulting the mother. It is also averred that as A grew up (he was only just 4 when he left Sicily) he would on occasion copy the behaviour which the father showed to the mother and would kick her and call her names. That behaviour has ceased since the child returned to Scotland. Then there is an averment of an incident during which there was a struggle between members of the father's and mother's families. This took place in front of the child who was upset, crying and shaking. Then there is an averment that on a visit to Scotland in February 1999 the father, when the mother would not agree to return to Italy, threatened to make use of contacts with organised crime so as to remove A from her care if she would not agree to relinquish him to him. This frightened her. There are also averments in the following terms:

"The petitioner was known to the local criminal investigation authorities in respect of their suspicions anent his use of and traffic in drugs et separatim his possession of illegally held firearms. On three occasions during the period in which the petitioner and the respondent lived together in Italy the house in which they lived was searched by the police. The respondent believed and averred that the purpose of the said searches was to discover illegal drugs or firearms or both, held by the petitioner. The petitioner was the subject of an order of the court prohibiting his entering the nearby town of Gaggi. On several occasions he boasted to the respondent of his connections with organized criminals. Believed and averred that in the past the petitioner has been the subject of curfew orders which obliged him to return home by a particular time in the evening, and of surveillance by the criminal investigation authorities."

Mr Stewart submitted that the averments of actings of a criminal character on the part of the father, which were supported by affidavits by the mother and her sister, Mrs Sarah Wood, and also by a report from the State Police in Taormina, amounted to a grave risk that A's return would expose him to physical or psychological harm in terms of paragraph (b) of Article 13. Moreover, in that the mother was unable to set up home separately in Italy, that would place the child in an intolerable position in terms of Article 13(b). Answer 5 summarised the mother's position but Mr Stewart accepted that in so far as it was directed to the question of what was in the best interests of the child that was not a matter for this court at this stage.

In support of his submission that practical considerations had to be taken into account in the context of Article 13(b) Mr Stewart referred to *C v C* (minor: abduction: rights of custody abroad) [1989] 2 All ER 465, [1989] 1 WLR 654 and in particular to the opinion of Lord Justice Butler-Sloss at p 469B to 470F. In this case, as in *C v C*, the father had given certain undertakings, but there were differences between this case and *C v C*. In the first place, said Mr Stewart, in *C v C* there was no background of alleged physical violence. Then, in *C v C* any grave risk of psychological damage was held to have been caused by the respondent herself abducting the child in the first place, whereas in this case that risk was present before the mother removed the child by reason of the father's conduct and might be anticipated to resume if he were returned to Sicily. And thirdly, the undertakings given in *C v C* to deal with the practical considerations were far greater than given by the father in this case. Having said all this, however, Mr Stewart accepted that he had no basis for saying that the authorities in Italy would not be able to protect the mother and A from any harm of the kind which the mother averred had taken place before she left Italy with A. With regard to

the question of undertakings Mr Stewart submitted that to meet the practical realities of the situation the father should undertake first, to pay the air fares for the mother and A to return to Italy; second, to provide suitable accommodation for the mother and A, to aliment the mother for a reasonable period until she had found employment (she had been in employment before she left Sicily in August 1998), and to aliment A; third, to accept that the mother should have care of A until the question of custody, or interim custody, was decided by the Italian courts; fourth, not to molest the mother; and fifth, to give these undertakings to the court in Italy where the custody action is to be raised.

In summary, therefore, Mr Stewart's primary submission was that on the basis of the information available at present I should appoint a second hearing. He did not, however, specify what further steps should be taken prior to a second hearing in terms of Rule of Court 70.6(5). His secondary submission was that if an order for the return of A was made, it should only be on the basis of more extended undertakings than had so far been offered, with a period of perhaps two weeks to work out all the necessary details.

In reply Mr McNair, counsel for the father, submitted that the critical point here was that Mr Stewart had accepted that he could not show that the Italian authorities could not protect abused spouses and children. In that situation the mother could not satisfy the terms of Article 13(b). Mr McNair referred me to *Friedrich v Friedrich* 78 F 3d 1060 1996; in re H (Minors) (Abduction: Acquiescence) [1998] AC 72, [1997] 2 All ER 225 and *Starr v Starr* 1999 SLT 335.

Turning to the question of undertakings Mr McNair referred to *C v C*, and to *Starr v Starr*, and also to *Whitley*, Petitioner [1998] FLR 7. He submitted that in practice undertakings were less common in Scotland than in England. Any necessity for undertakings in *Whitley* had been rejected. In this case the undertakings offered were not strictly necessary but were in any event adequate and reasonable given the financial position of the father. In particular, the figure in aliment that he was undertaking to provide was about half his income.

As I said in *Starr v Starr*, cases of this kind almost always give rise to great anxiety and this is no exception. Two things, however, must not be forgotten. The first is that in the context of the Convention it is the mother who has brought about the present situation by removing A wrongfully from Italy. The second is that this court cannot be concerned at this stage with what is in A's best interests. The question for the court now is a narrow one. Since the mother removed A wrongfully, A must be returned to Italy in terms of Article 12 of the Convention unless, in this case, the requirements of Article 13(b) can be met.

Whether they are met turns in my opinion on the circumstances of the particular case. I have carefully considered all the information available to me in this case and the various legal authorities to which I was referred. It was accepted that the test to meet the requirements of Article 13(b) must be a high one if the central aims of the Convention are not to be defeated. I also agree with Mr McNair that the critical question here is whether it has been shown that the Italian authorities could not deal appropriately with any of the points raised by the mother bearing upon risk of harm to which A might be exposed or any situation in which he might be placed. Mr Stewart very fairly and candidly accepted that he could not show that. In these circumstances I have come to the conclusion that the requirements of Article 13(b) have not been met and there is no need in this case for a second hearing. In that situation I am bound in terms of Article 12 of the Convention to order the return of A to Italy forthwith. I shall therefore make that order. What "forthwith" means must depend on the circumstances. The prayer of the petition mentions a period of forty-eight hours. Mr McNair accepted that that was probably unrealistically short and

suggested seven days instead. Mr Stewart did not take issue with that. I think seven days is a reasonable period in the circumstances. I shall therefore specify that period in the order.

Prior to the hearing the father offered certain undertakings and they were the subject of discussion in the hearing before me. In my view they were not essential for my decision as to whether the terms of Article 13(b) had been met. Nevertheless they were offered and I think it would be appropriate to record them in the Minute of Proceedings in words which appropriately reflect the terms, both express and implied, of what was offered. I exclude from this the offer by the father to pay the travelling expenses of the mother and A from Scotland to Italy. The primary responsibility for those in the present circumstances where the mother, in terms of the Convention, wrongfully removed the child, must in my opinion lie with her. But, as I understand it, payment will in fact be met by the Scottish Legal Aid Board.

The terms of the undertakings which I propose to put in the Minute of Proceedings, subject to anything that counsel might have to say about them, are as follows:

The father will provide accommodation for the mother and A either in one of the two properties he owns in Sicily (one at Castiglione di Sicilia, one at Giardini Naxos) or at another reasonably priced and appointed address in Sicily of the mother's choosing;

1. The father will pay any rent payable for the accommodation provided;
2. The father will pay aliment for the mother and A at the rate of 800,000 Italian Lire per month;
3. The father will not remove A from the mother's care (with the exception of any periods of contact with A.)
4. The undertakings will subsist pending any order by the Italian courts in relation to the matters with which they deal.

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