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http://www.incadat.com/ ref.: HC/E/UKs 353
[20/04/2001; Outer House of the Court of Session (Scotland); First Instance]
D. Petitioner

OUTER HOUSE, COURT OF SESSION

OPINION OF T.G. COUTTS

(Sitting as Temporary Judge)

in the Petition

D

Petitioner;

for

An Order under the Child Abduction and Custody Act 1985

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Petitioner: MacNair; Skene Edward, W.S.

Respondent: Kelly; Anderson Strathern, W.S.

20 April 2001

[1] This is a petition at the instance of a mother of two children, seeking an order under the Child Abduction and Custody Act 1985, in respect of the now admitted wrongful removal of the children from California by the respondent. The respondent's case was that there was a grave risk that if the children were returned, they would suffer physical or psychological harm or be placed in an intolerable situation.

[2] The petition was presented on 28 March 2001 in respect of their removal, which had occurred on 28 December 2000. The petition sought interdict and the respondent, who was present at the interdict hearing, was ordained to lodge answers in four days. 6 April 2000 was assigned as a first hearing. The respondent's answers disclosed matters which were relevant to any consideration of return of the children and contained serious allegations. He supported his allegations with his affidavit together with an affidavit in respect of the present welfare of the children from his mother. On 6 April the petitioner and her mother were present in Court. Affidavits were produced from them dated 6 April. They contained

the petitioner's answers to the allegations. The respondent was given sight of these very shortly before the hearing and sought a second hearing and the opportunity to obtain further affidavit evidence from *inter alios* Javier Bocanegra. He also sought the opportunity to ascertain what might happen to the children and the parties in respect of the various difficulties facing them hereafter mentioned if return was ordered. Counsel for the petitioner moved for decree there and then.

[3] In view of the serious allegations made against the petitioner in respect of a felony charge in California relating to firearms and drugs, I considered that justice could not be done without giving the respondent the further opportunity he sought. A second hearing was fixed for 20 April. Contact between the petitioner and the children in Scotland was arranged and the first hearing concluded in the late forenoon. When Mr Bocanegra's affidavit was eventually produced, it disclosed the disquieting information that virtually immediately after I had ordered the affidavits the petitioner had telephoned him at 6.30am his time in California. She admitted on 20 April that she did so but asserted, through her counsel, that this was an enquiry about the evidence he was to give. On the contrary, according to Mr Bocanegra's affidavit, not only had she threatened him should he become involved but others also made further threats thereafter about which he contacted the police. Even if the matter rested on the petitioner's account, which I do not accept, it was to say the least, entirely inappropriate that the petitioner should have contacted that gentleman immediately after the Court had risen. It might be thought to come perilously close to an attempt to pervert the course of justice. Other persons named in Court, as potential providers of affidavits Maria Bocanegra, Thomas Martines and Robert Bloomfield, declined to become involved and did not provide an affidavit for the respondent. It is not known whether that was as a result of other telephone conversations from the petitioner. If it were, the situation would indeed be serious in that relevant information has as a result not been provided to this Court.

[4] The respondent avers that he removed the children as a result of an increasing dependency upon drug taking by the petitioner and specifically that he did so after the petitioner and a Brian Schwake had been present in the house and creating a scene. He alleged that both the petitioner and Brian Schwake had a drug habit and used to buy and sell drugs.

[5] In her affidavit in reply, the petitioner denied taking drugs on any occasion other than that referred to in a felony complaint against her in the Superior Court of California, wherein it was alleged that she and Schwake did possess methamphetamine a controlled substance for sale; that they were personally armed with a .3 calibre rifle which was loaded and operable and that they were in possession of controlled substance paraphernalia i.e. an opium pipe and a device, contrivance, instrument and paraphernalia used for unlawfully injecting and smoking a controlled substance. In her affidavit of 6 April, the petitioner stated that she absolutely denied having taken any drugs prior to the children being taken but admitted being under the influence of methamphetamine on that occasion. In my opinion, there is sufficient evidence to support the respondent's allegation of prior drug taking and that of a Class A drug in the UK classification, and I do not accept the explanation given by the petitioner. The respondent also asserted that he had been threatened by the petitioner and her associates, an allegation which was denied by the petitioner but which again finds a measure of support in the petitioner's said conduct towards Mr Bocanegra. Accordingly the circumstances in the present case were considered by me on the footing that there was substance in the contention of the respondent in relation to drug taking and threats towards him.

[6] The parties' eldest child was residing with the parties' consent in Tennessee with her maternal grandmother throughout the events in question.

[7] The respondent also has difficulties with the criminal authorities in California. He was remanded in custody in August 2000 for 40 days following a driving accident involving a death. When he was released from custody, the petitioner left him for another man but subsequently returned to him. The respondent at the time of his departure from the United States was on bail and he has failed to answer his bail. As a consequence he is liable to be arrested if and when he returns to the United States. Enquiries had been made of the District Attorney who would have dealings with the parties on their return. He offered to send a officer of Court to Scotland to escort the children back to California. He invited me in a letter which is 6/23 of process, to telephone and speak to the Californian judge who is seized of this dispute. This I declined to do as being inappropriate just as I declined to read a document which bore to be a letter emanating from the petitioner's mother addressed to me, which arrived in the hands of the Clerk of Court on 20 April.

[8] Counsel for the respondent accepted that the onus which lay upon him in relation to Article 13 of the Convention was a heavy one and claimed to have discharged it on the basis of the unsatisfactory character of the petitioner. He also claimed that because of the evidence of threats from associates of the petitioner that there was a grave risk that the American Court would not be able in time to afford adequate protection to the children if they had to return and that accordingly the children would be placed in an intolerable situation.

[9] Counsel for the petitioner drew my attention to the opinions of Lord Abernethy in *Starr* v *Starr* 1999 S.L.T. 335 and to *D I* Petitioner 1999 Green's F.L.R 126. These cases and the cases cited therein, he maintained, were authority for the proposition that, when considering grave risk, the Court had to be satisfied by the respondent that the Courts of the country to which the children were to be sent would not be able to afford appropriate protection if that were needed. Further should the question of an intolerable situation arise, the respondent having brought about the situation was not entitled to found upon it. A similar view was expressed in England in *M,* 2000 1 F.L.R. 930. In that case the judge expressed the view that if there were difficulties that might be some deterrent to persons wrongfully removing children. My attention was also drawn to *Q* Petitioner 2001 S.L.T. 243 and the citation therein of In re *H* (Abduction) 1998 A.C. 72 and the remarks of Lord Browne-Wilkinson at page 87 where he states that the Convention must have the same meaning and effect under the laws of all contracting states. His Lordship was, of course, in that case only considering the particular point of rules of English law relating to acquiescence. He cannot in my opinion be considered to have ruled that cases in other jurisdictions about the meaning and effect of the Hague Convention require to be followed for the sake of uniformity.

[10] Counsel for the petitioner urged upon the Court the case of *Friedrich* v *Friedrich* 7DF3d1060 (1996) in which the following statements were made:

> **"A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the Court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm ...**

> **"Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g. returning the child to a zone of war, famine, or of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. Psychological evidence of the sort ... introduced in the proceeding below is only relevant if it helps prove the existence of one of these two situation".**

[11] I decided that the respondent had not demonstrated a sufficient degree of grave risk which is necessary to allow Article 13(b) of the Convention to be invoked. In so deciding I am specifically not following any suggestion that because the wrongful removal may have brought a situation of risk or intolerable situation about, that the Court should not consider separately and as a matter of importance the impact of return on the child. Nor do I necessarily think that it is invariably a matter for the respondent to satisfy the Court that the foreign Court cannot protect. That did not appear to be a matter which weighed with the Inner House in *MacMillan* v *MacMillan* 1989 S.C. 53. There the Lord Ordinary took the view that he might be satisfied that suitable arrangements could be made in Canada, whereas the Inner House said, once there was a grave risk, then the petition should be refused. No presumptions about the capability of the Canadian courts were made or considered.

[12] The approach which I have adopted in the present petition is to consider not as a matter of presumption alone but, in the light of all the information before me, whether there would be grave risk or an intolerable situation were the two children to be returned.

[13] I note that the Californian Court, despite having a petition before it for custody of these children, did not make any order other than the request under the terms of the Hague Convention which is before me. There has been no pre-judgment of the situation which could have been the case in *H* petitioner and would appear to have been the case in *Q* petitioner.. There is evidence that the District Attorney's Office is seized of the whole situation and can take such steps as it deems appropriate. It was also stated to this Court that the District Attorney had suggested that the respondent was unlikely to receive a custodial sentence, and that the petitioner might only be imprisoned for 4 months for possessing and being concerned in the sale of a Class A drug. I therefore cannot conclude that should the children return to the United States accompanied by their father and or the father and grandmother, that there is a grave risk in terms of Article 13(b).

[14] It is for the United States Court as the Court having primary jurisdiction to determine which parent, if either, should have custody in the best interests of the children. The relevant evidence is all in the United States and it is for that Court to weigh up the serious allegations about both parents present in the case, the conduct of the parties both in relation to each other and in relation to the present proceedings and to make a decision based on actual as opposed to affidavit evidence.

[15] I am fortified in the view that I have taken by the absence of any evidence of ill-treatment or suggested ill-treatment of the children themselves, unlike the situation in for example *D I* petitioner or *M*. There has been no specific misconduct narrated in relation to the children and I was given no indication that the contact with the petitioner which had taken place in April 2001 in Scotland had caused any adverse reactions. There was no medical or psychological evidence of potential damage and in short, there is nothing before

the Court which might indicate that the children would be harmed if they returned to America for consideration of their eventual custody

[16] Arrangement for the return require to be made. The respondent will have to consider whether he should go and surrender to his bail. If he does not, he may never see his eldest child again. The question of accommodation for the children and or their parents requires to be investigated and arrangements made for flight. In these circumstances I have put the case out By Order on 9 May so that the Court can be apprised of the arrangements which have been or can be made.

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