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[09/12/1998; High Court (England); First Instance]
Re S. (Abduction: Return into Care) [1999] 1 FLR 843

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

9 December 1998

Sir Stephen Brown P

In the Matter of re S.

Counsel: Jeremy Rosenblatt for the mother; Henry Setright for the father.

Solicitors: Hudson Freeman Berg for the mother; Aitken Kelly Associates for the father.

SIR STEPHEN BROWN P: This is an application by the mother of a young girl, N, who is now 9 1/2 years of age. She is a Swedish child, born in Sweden and habitually resident in Sweden. Her mother and father were divorced in Sweden in September 1994 and the court ordered that the custody of N should vest in her mother. She has resided with her mother until the summer of this year. The father had visited her and his former wife in Sweden after he had left Sweden for England in 1996. The child, as I have indicated, remained living with her mother in Sweden. The father visited her there on a number of occasions in 1996 and more recently went at Easter 1998.

On 5 June 1998 he, with the consent of the mother, brought N to England for vacation contact, and indeed he took her, with I think his parents, to the Canary Islands for a holiday during that time. He did not return her to her mother in Sweden and has retained her in England since that time against the wishes of the mother. The father made a residence application pursuant to the provisions of the Children Act 1989 in August 1998. There were certain preliminary hearings and an interim residence order was made at the beginning of September 1998 in his favour. Included with it was a prohibited steps order, preventing the mother from taking the child from the father.

The basis of the father's application was that the child had 'disclosed' to him (to use the technical language) during the holiday certain allegations of sexual misbehaviour by in particular the mother's cohabitee. These matters were subsequently reported to the services in Camden. A video interview was recorded and in fact the social services in Camden communicated in due course with the social services in Sweden. The video was sent to Sweden to the social services there.

The mother, through solicitors acting on her behalf, at the beginning of August 1998 wrote requiring and requesting the return of the child to Sweden. She had been made aware of the allegations and indeed, at p B28 of the bundle which is before the court, there is the solicitor's communication dealing in effect with the case being put by the mother. It is a short summary and the letter states:

'She [that is the mother] denies the application and demands that her daughter immediately comes back to Sweden. If a crime has been committed to her daughter then it will be taken care of by the Swedish police and the Swedish court house. Of course the mother can in that case protect her child. The father has not been in contact with the mother. She has tried to get in contact with him for the last week but he has not been answering her telephone calls. I can also inform about that a court in Sweden at 29 September 1994 made the decision that the mother should have full custody of the child. The father has today been reported to the police in Sweden for having kidnapped the girl. The Swedish police is now taking legal action with help from Interpol.'

That was dated 6 August 1998.

The father has sworn a number of affidavits which I have read. He seeks to retain the child in this jurisdiction.

In the course of a preliminary directions hearing an order was made seeking what is termed a s 7 report -- s 7 of the Children Act 1989 -- in relation to the child and her situation from the Camden social services. Reports have been made by a Miss Sellway of the Camden Social Services Department and she has given oral evidence at the request of the father's counsel to the court today.

The position is that the social services' representative in England views the allegations as serious, quite naturally, and is disposed to place weight upon their substance. These allegations however are fully and completely denied by the mother.

The Swedish social services have been in communication with the solicitors in England and their communications have been made available to the court and are contained in the bundle of documents. At B52 of the documents there is a communication of 21 September 1998 from the head of the department of social services at Sjobo, directed to the solicitors acting, I believe, for the mother in this case in England:

'We are sending, as requested, our local council's understanding on the continuing S case when [N] returns to Sweden.

Due to the seriousness of the information we have had from the social services in England, we intend to investigate [N]'s home situation.

The information is so serious that we deem it necessary that mother and child be placed in an investigation home while investigations are made.

[S] [that is the mother] has been offered, and accepted, a place in such a home when her daughter returns to Sweden.

The local council take the accusations so seriously that should [S] not follow the above decisions then they will be forced to take further legal action.

The council see it as vital that [N] return to Sweden as soon as possible, considering that she is so young. The council is, according to the law, required to see to the child's best interests.

Yours faithfully

Ulf Nilsson

Head of the Department, Social Services, Sjobo. Boras.'

That was, as I have said, the communication which was sent in September 1998. On 7 October 1998 the same official in charge of operations wrote again and his letter is to be found at C25 and 26 of the bundle of documents. It is dated 7 October 1998 and it reads:

'Re: [NS] case

On the information of advocate Remsell who is representing the interests of [S] [the mother], it is the wish of the parties, after the discussions of 23 September that the social authorities in Sweden concerned should be acquainted with all the material in the case and make an assessment of the material and what [action] the social welfare committee will take.

Advocate Remsell handed over the video hearing with [N] together with the other documents pertaining to the case on 25 September 1998.

As in accordance with our legal practice it is not appropriate to communicate with the individual parties our comments have been sent to Jo Seleway, Camen [sic] Social Services.

After a [careful] study of all the material, we make the following appraisal: We take very seriously the statements concerning the alleged sexual attack on [N]. [In] consideration of all the material the suspicion is further reinforced.

The information from Mr Seleway [that should be Miss Sellway, I think] led to an immediate report to the police on 14 August 1998. Preliminary investigations have been conducted by the police authorities. On [N]'s return home the police will immediately conduct a further video interview with [N]. The report has now been supplemented with your video interview with [N] and all the other written material.

The important question now is how the social authorities in Sweden can protect the child on her eventual return home.

After becoming acquainted with [all] the material and in consideration of the ongoing police investigation the situation is judged to be serious. Overriding legislation will be used to protect [N] until a thorough investigation has been conducted.

When [N] arrives at the airport in Sweden our staff will immediately take charge of [N] and place the girl in an analysis home together with her mother. The analysis home is to be arranged like a normal home.

The aim of the stay in the home is partly to protect the girl against the risk of any further attack and partly to give the social services the opportunity to carry out a thorough investigation of [N]'s home circumstances and the mother's ability and qualifications to take care of her child.

Swedish legislation very clearly expresses the responsibility of the social services for children and adolescents in risk situations.

In the Social Services Law para 12 it is stated:

". . . that the social welfare committee shall in close co-operation with the home ensure that the children and adolescents who are at risk from unpleasant developments receive the protection and support they require and, if consideration for the welfare of the young person justifies it, provide care and fostering outside their own home, and also ensure in their care of children and adolescents the special need for support and assistance which may arise after legal proceedings or a case for protection from relations has been decided is satisfied."

In order for Swedish legislation to apply the child must reside in Sweden.

By way of information can be mentioned that [S] [the mother] has according to her own statement separated from her husband and moved to her own apartment. The monthly rental for the apartment is currently paid for by social benefits.

According to information from the police in Sweden the ongoing preliminary investigations concerning sexual interference/attack have been set down alternatively with sexual molestation. The statement was given on 13 October 1998.

Yours sincerely

Uli Nilsson

Office in charge of operations

Individual and family care

Sjoberg, KDK.'

The reference in that letter to the mother separating from her husband is, I think, to be read as separating from the cohabitee who was the subject of the complaints.

The social services have also sent answers to certain questions which had been put to them about the situation. They said:

'We judge the contents to be extremely serious [that is the documents sent] and for this reason we are considering taking [N] into care immediately (under the Care of Young Persons (Special Provisions) Act, which is an Act authorising coercive measures) if the mother does not agree to voluntary placement in care, pending an investigation. The aim of placing the child in care was given in the letter dated 7 October 1998. The letter also describes the way in which we will take care of [N] when she returns to Sweden.'

That was one of the answers -- the principal answer -- given to the specific questions addressed by the mother's solicitor.

As to the details of the proposed placement in care pending investigation, this letter (which is C27/28 in the bundle) goes on to say:

'It may be added that the home is located in a normal residential area. The staff are used to looking after children who live in exposed social environments. They have sound qualifications in psychology. They carry out investigations into parents' ability to care for their children on behalf of the social welfare authorities and suggest suitable courses of treatment. In terms of premises and staff, they are able to look after children who have been taken into compulsory care.

The name of the home is Hasslehem.'

The plaintiff in this matter -- the mother -- submits, and it is not indeed in dispute, that the child's habitual residence is in Sweden, and that the father is unlawfully retaining the child from her habitual residence, and that indeed it was herself, the applicant, who was exercising and had the rights of custody of the child and would have continued to exercise them but for the wrongful retention of the child in this jurisdiction outside Sweden. Article 12 therefore comes into play, which provides that:

'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.'

An originating summons was issued on 29 September 1998, therefore well within the 12-month period. I should say that at the commencement of this hearing Mr Setright for the father took a technical objection to the originating summons on the ground that it did not state in terms that it was being issued under the Hague Convention, and did not use the language of the Hague Convention and that it appeared on the face of it to be more in tune with the European Convention.

But there is no doubt that at a directions hearing on 23 September 1998 before Johnson J the mother's solicitors undertook specifically through counsel to issue an originating summons under the Hague Convention within 7 days. It may be that the originating summons as drafted did not adopt the precise language of the Hague Convention. The intention, however, was quite clear, and in the circumstances I gave leave to amend the originating summons (which is at A13 on the file of documents before the court) to reflect the correct form of an application under the Hague Convention. Mr Setright has not been placed in any difficulty about this matter because he has approached the case upon the basis that it is a substantive application made pursuant to the Hague Convention.

Mr Setright raises in 'defence' the provisions of Art 13. He does not abandon Art 13(a) which raises consent and acquiescence, but realistically acknowledges that he is not on very firm ground in seeking to rely on Art 13(a). I am quite satisfied on all the evidence before me that the mother has not consented to the child being retained in this jurisdiction and has not acquiesced in the retention of the child in this jurisdiction. The letters that I have briefly referred to indeed make that perfectly apparent. That is to say, quite apart from the mother's own affidavits which strenuously deny the father's claim to retain the child in this jurisdiction.

Mr Setright places greater reliance upon Art 13(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.'

He goes on, further, to rely upon the next paragraph which reads:

'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.'

Mr Setright submits that the nature of the allegations of sexual abuse, to use the generic phrase, are of a nature which must be considered seriously and, accordingly, he argues that it would place the child at grave risk of physical or psychological harm or would otherwise place her in an intolerable situation if she were to be returned to the care of her mother. In

point of fact of course the proposals of the Swedish social services do not propose that the child should be returned to the care of her mother simpliciter. It would be to the care of her mother in the monitored situation in the premises which I have referred to in the course of reading the letters and memoranda from the officer in charge of operations in the social services department in Sweden.

Mr Setright places greater reliance, I think, upon the child's wish not to return. That has been substantiated by the inquiry made by Miss Sellway of Camden social services who has prepared three reports pursuant to s 7 and has specifically asked the child about her wish either to return or not to return. The child has said that she is not willing to return and does not wish to return to Sweden.

In these circumstances, the court is asked by Mr Setright to find either that she would be being returned to a grave risk of either being exposed to physical or psychological harm or being placed in an intolerable situation, or, in any event, that the court should take into account -- and fully into account -- the child's wish not to be returned. I reject the submission that there is a grave risk that her return would expose her to physical or psychological harm or place her in an intolerable situation. It is clear from the inquiries which have been made and from the provisional arrangements made by the Swedish social services department that they would eliminate any risk. I find that the father has not made out, as the onus is upon him to make out, that the return (which is the return to the jurisdiction of Sweden, the habitual residence of N) would expose her to the grave risks which are set out in Art 13(b).

I have considered and I note that she does not wish to return, she would rather remain here. The court has to take that into consideration. I do take that fully into consideration. But the court has to have in mind that the comity of nations is concerned in this matter; that the whole purpose of the Hague Convention is to secure the summary return of children who have been unlawfully taken from or retained out of the jurisdiction of their habitual residence back to that jurisdiction. There is, as it seems to me, implicit in Mr Setright's submissions to this court, a clear conflict of jurisdictions. It is plain under the terms of the Hague Convention that it is not open to this court to take into account what are welfare considerations in relation to the situation of a child whose parents are in dispute. That is specifically and properly a matter for the courts in Sweden and for the authorities in Sweden. In this case there has clearly been full disclosure to the Swedish authorities by Camden and the solicitors acting for the father, so it seems, because the documents recording the allegations made have been sent to the social services in Sweden, and they are assuming the duty of investigating these matters. As is stated in the letter of 7 October 1998, these matters cannot be properly investigated unless N is there in Sweden. Reference is made to the taking of a further video in Sweden. That is where the matters of complaint have arisen and, in my judgment, it is the proper place where they should be investigated and weighed.

In all the circumstances, I consider that this is a case where the child should go back to Sweden so that these matters can be properly investigated. The current order for the custody of the child is that of September 1994 in favour of the mother, but, as the Swedish social services have made plain, they have been alerted to and are seriously embracing the matters of complaint which have been made to them. It is not appropriate for the courts here to assume jurisdiction in those matters. This is a matter where, in my judgment, the provisions of the Hague Convention require that there should be an order for return notwithstanding the understandable reluctance of N to go back to Sweden. However, in order that the matters can be properly investigated and determined, the order for return should be made, and accordingly I make an order for return forthwith.

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