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[23/04/1999; Court of Appeal (England); Appellate Court]
Re C. (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

23 April 1999

Butler-Sloss, Thorpe, Mummery LJJ

In the Matter of C.

BUTLER-SLOSS LJ: This is an appeal with the leave of Thorpe LJ from the decision of Hogg J made on 19 January 1999 when she refused to return the child to Cyprus under a Hague Convention application made by the father on the basis that Art 13(b) had been satisfied.

The child, known as B, was born on 10 November 1992 and he is now 6 1/2. The mother is English and the father is Greek Cypriot. They are both British nationals. They met and married in England. The mother had a child by an earlier relationship, A, born in October 1984, who is now 14 1/2. They lived first in England and then moved to Cyprus. The marriage was not successful. The father did not tell his parents for some years that they were married and appears to have been ashamed that the mother had a child by an earlier relationship. Whatever may have been his conduct towards A as a stepfather, it seems clear that there was not a successful stepfather/ stepdaughter relationship. The mother has made numerous criticisms of the father: heavy gambling; lack of money, even for necessities; aggression; unkind behaviour towards A. Although not accepting all these allegations, the father has agreed that the marriage has been difficult.

The father made an application on 22 November 1997 in the Larnaca District Court for an injunction restraining the mother from removing B from Cyprus without his consent. An order was made ex parte on 2 December 1987 granting that relief. The father applied for the custody of B but did not proceed with the application. That application was dismissed and the injunction removed on 21 May 1998.

The mother brought both children to England on 9 June 1998 without the knowledge or the consent of the father. She has lived with them in Nottingham and both children have been at school there. There has been no direct contact with the father since the removal by the mother. For reasons beyond the control of the father, the Convention proceedings were not begun in England until October 1998. The mother filed a statement of defence under Art 13 (b). On 2 November 1998 Bennett J gave directions for the hearing to commence on 15 January 1999.

At the hearing, Hogg J found that all the conditions of the Convention were met; that B was habitually resident in Cyprus before his removal and that that removal was unlawful and in breach of the father's rights of custody. The only issue which remained was whether the requirements of Art 13(b) were made out and whether, if they were, the child should or should not be returned to Cyprus.

B is 6 1/2. He was born and has been brought up in Cyprus where his paternal family, his father and his grandparents live. Other members of the paternal family live in England. He is, I assume, bilingual. There is no real criticism of his relationship with his father before he was removed from Cyprus. It is, however, a fact that, although the father was in and out of work, the primary care of B has always been by the mother and he has not been cared for by the father or the paternal grandparents in the absence of his mother. For nearly a year he has been solely cared for by his mother and has not seen his father. He and his half-sister are said to be very close, although there is an 8-year gap in age. The mother relies upon Art 13 (b), which reads as follows:

'Notwithstanding the provisions of the preceding Article, the judicial . . . authority of the requested State is not bound to order the return of the child if the person . . . [who] opposes its return establishes that –

(a). . .

(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 mother's reliance is based upon grave risk that B's return would expose him either to psychological harm or otherwise place him in an intolerable situation. Both those situations are based upon the result of her flight from Cyprus to England. A is at the centre of the problem and of the mother's defence, although, in any event, the mother does not want to live in or go back to Cyprus. A was at a non-fee paying state school in Larnaca. We were told by Mr Turner on behalf of the mother that state education in Cyprus ceases for pupils at 14 to 15, although a child may go on to further secondary education with a view to entering university or technical college for tertiary education. There was before us a dispute whether the post-14 education is free or requires payment. We have now seen handed in today correspondence that makes it clear that state education up to leaving school and beyond is free. There is no suggestion that the father or the grandparents would pay A's fee-paying education. A has now disclosed details of how she was treated by the father with great unkindness and discriminated against in comparison with B who was given preferential treatment. That, of course, is the account given by A. According to the mother, A has blossomed since her return to England. She is now in the third term of a 2-year GCSE course in Nottingham and is happy and well settled there. She has expressed a strong objection to returning to Cyprus. It is not clear whether she has had explained to her clearly that a return to Cyprus would not in this case be a return to the father's house -- I suspect probably not. There is no family with whom she could stay in Nottingham. Her natural father takes no interest in her. Her maternal grandparents are 59 and 62 and live in Reading. There is some suggestion, uncorroborated, that her relationship with her grandparents is not at present a good one. In any event to live with them would require a change of schooling in the middle of the GCSE course.

The mother is therefore torn between the two children. If she returns with B there are major problems about what to do with A, who says she will not go back to Cyprus. If she stays with A, B who has never lived away from her would be forced to go to his father who has not so

far pursued a claim for his custody and in respect of whom there is no evidence about his present arrangements and how he would look after his son.

The mother's case is therefore that A will not go back and should not be expected again to disrupt her schooling and her life in order to return to Cyprus. The mother is in an impossible position and cannot leave her behind. But if she did leave her behind and go with B to Cyprus she would be consumed with guilt; the children would be separated and either way B would be placed in a situation which comes within Art 13(b).

The judge said as follows (and I will read certain extracts from the judge's judgment) -- first, at p 7, lines 16-18:

'[The mother] says that there is a grave risk that the return of Cwould expose him to psychological harm or otherwise place him in an intolerable position.'

She then sets out the points which I have summarised. Those passages are to be found at the bottom of p 7 through to the top of p 8. The judge said also at p 15, line 3:

'Therefore the mother says that if C has to return to Cyprus he will be placed in an intolerable situation. Which child should she remain with? She says she could not leave A and A will not go to Cyprus. She could not leave A in circumstances which were not suitable for her accommodation and education. If she left the child in Nottingham, A would be left there without proper arrangements for her care and without anyone to look after her. The child is only 14 and the grandparents have not volunteered to take the child.'

Then the judge points out that C would be separated from his sister:

'It is irrelevant to him that she is only his half-sister. He has always looked on her, has always been brought up with her and regards her as his sister. He sees her and loves her as his sister and the question of being a half-sister has not entered his mind, although he may know that they have different fathers. To him she is his sister. So if she were left behind in this country he would lose that sister. The mother says that would inevitably cause him enormous distress. She says psychological harm. Moreover, if the mother chose to go to Cyprus with her son she would endeavour to look after him well, but no doubt she would be guilt-ridden and extraordinarily anxious about the well-being of her daughter left behind in circumstances which may not be suitable or appropriate. The impact on her son of that guilt and anxiety must be something which I have to consider.

Alternatively, if C were ordered to be returned to Cyprus the mother may decide, because of A's difficult circumstances in this country, that she, the mother, could not return to Cyprus with her son. That is a distinct possibility bearing in mind the position that A has adopted. That would mean that C would be doubly deprived, deprived of his sister and also deprived of the comfort, love and nurturing of his prime carer with no prospect of regular or frequent direct contact between the mother and himself and the sister and himself.

The onus, I recognise, is very much on the mother to establish that there is a grave risk of real serious harm to C if he were to be returned.

This is an exceptional case.'

She also pointed out that there appeared to be no comparable reported decision. She referred to a decision of this court in Re C (A Minor) (Abduction) [1989] 1 FLR 403. She continued at p 17 of her judgment at line 27:

'In this particular case the mother, if I accept her evidence, did not deliberately create the psychological problem. On her evidence, and in part corroborated by her own parents, and also partly corroborated by the father, the relationship between father and A was, to say the least, poor, but she says that she did not realise the extent of the poor nature of the relationship or the perceptions that A had at the time of removal. She did not know that A would refuse to return to Cyprus and that these matters emerged and became apparent after the removal. The mother in this case is not saying she will not return purely for personal, emotional and selfish reasons. She is saying she is caught between the two children. She has a conflict of interests and has to consider the welfare of both children. Although I as a judge have to consider C's position as the subject of these proceedings, the mother would say she has to consider both children, including A's position, if there were an order for her son to be returned.'

She said again at p 19, line 19:

'As I say, in this case, C has never lived apart from his mother, nor his sister A. If he were to be returned to Cyprus there is a grave risk, a real risk, that A would not go with him. I have heard what the mother is saying about A's position in this country and there is no evidence to suggest to me that that is not the case. The mother would be in a very difficult situation, an impossible situation, if A were to stay here and C were to go to Cyprus, as to which child she would choose to be with. She would be tom. If she were with one she would be ridden with guilt and anxiety about the other. That in itself would impact upon the care of the child she has with her, whether it is C or A.

I have come to the view in this particular case, bearing very much in mind what Butler-Sloss LJ said in Re C about the coach and four and the mother who has created the psychological harm, that this is a case where the mother, albeit having acted wrongly by removing the child, now finds herself in a situation which involves another human being, namely A and that A's position is extremely difficult in view of what I now know about her situation that existed in Cyprus before her departure.

I therefore come to the very firm view that to separate the children would be to cause psychological harm of a serious nature to C. It would not be of a transitory period. A significant time would elapse when the two would be separated. It may or may not be a permanent separation. It would be a very distressing situation for the child and it would certainly last for some months. Such harm could be of a lasting nature. The harm of being separated from his mother would also create enormous psychological harm to C and there is a grave risk that the mother would be forced to balance the needs of the two children and be forced to stay in this country to look after A . . . That would cause C enormous psychological harm. It would be doubled because he would have . . . lost the presence of his sister.'

She found that Art 13(b) grounds were satisfied and she refused to send B back to Cyprus.

Mr Setright for the father on appeal to this court has pointed out that the judge dealt with this case on the papers with the sworn affidavits on behalf of the parties. There was no intervention by a court welfare officer nor any medical expert. Mr Turner QC for the mother pointed out that the absence of a court welfare officer's report was as a result of a refusal of Bennett J to allow it at the directions hearing. That decision was, in my view, entirely proper in the present case and indeed in the majority of Convention cases, that is to say there should not be either a welfare officer's report or expert evidence. It was in accordance with the decision of this court in Re E (A Minor) (Abduction) [1989] 1 FLR 135 and with the spirit of the Convention. These cases should, where possible, be disposed of quickly and summarily on the written evidence. There will sometimes be cases where more

evidence is needed, occasionally the intervention of the court welfare officer of the Royal Courts of Justice or occasionally expert medical evidence and very rarely oral evidence. There is nothing in this case which required any directions which were out of the ordinary. Hogg J carefully directed herself on the approach which she should adopt in this case. Nonetheless, Mr Setright has submitted that she was wrong to place the degree of weight upon the problems of A and to focus upon her since she was not a child within the ambit of the Convention.

Mr Turner has argued that the acute dilemma faced by the mother as a result of A's situation has created the grave risk for B. It was probable that the mother would not return, but whether the mother did or did not return to Cyprus the risk to B remained.

He argued that the undertakings were inadequate and that the mother if forced to return would have inadequate financial assistance, no resources to obtain the assistance of lawyers and there was not even an undertaking to pay the fares to Cyprus.

To dispose immediately of the question of undertakings -- the judge was satisfied that the objections to the undertakings were minor in comparison to the issue over A. Since the judge decided that B should not return, it was not necessary for her to investigate the adequacy of the proposed offer. At the hearing of the appeal, we indicated that we were going to allow the appeal and send B back in accordance with the requirements of the Convention. We also indicated that sufficient undertakings would have to be in place before we ordered his return. At the end of our judgments today we shall consider whether B's welfare will be sufficiently protected by the undertakings that have been handed in today until such time as a court in Cyprus is seized of the case. Thereafter, it is a matter for the judge in Cyprus and not a matter for the English court. We are told from a letter from Cyprus lawyers that the case might be decided within a period of 2 to 6 months. That would seem to us to be a perfectly reasonable period for a domestic law, family law matter to be decided. It is noteworthy that the father was able to issue proceedings for an injunction in November 1997 and he obtained a hearing within 2 weeks. The mother does at present appear to have Cypriot lawyers acting for her.

Article 13(b) is invoked only when the removal is found to be unlawful and the child must otherwise be returned under Art 12 to the State of his habitual residence. As has been said on many occasions, the spirit of the Convention requires that the best interests of a child should be determined by the courts of the State of habitual residence. Article 13(b) is an exceptional remedy intended to deal with unusual issues of welfare of the child which take the case outside the normal provisions of the Convention.

The circumstances of this case provide a good example of how easily problems which arise in many child abduction cases caused by the actions of the abducting parent can be demonstrated by that parent to come within Art 13(b) and thereby frustrate a return under Art 12. In Re C (above) the actions of the Australian mother created the possibility of the grave risk to her child. I said at 410D-F:

'The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation, and then rely upon it? If the grave

risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.'

Lord Donaldson MR said at 413D:

'We have also had to consider Art 13, with its reference to "psychological harm". I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognized by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the State to which the child is to be returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child.'

The question which arises in this appeal as to the extent to which another child, not the object of the Convention, should determine the outcome was considered by this court in Re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145. We have a copy of the judgment of Ward LJ given on 12 February 1999 with which Nourse LJ and Auld LJ agreed. In that case the State of habitual residence was California and the two children, M and L, the objects of the Convention, had a half-sister E by the subsequent marriage of their mother to another man. The Art 13(b) defence was raised based upon the evidence of the behaviour of the father to the children and he had been granted only supervised contact to them, the objections of the children to a return to California, the possibility of the prosecution of the mother for child abduction and the dilemma for the mother in respect of her second marriage and the youngest child, E. Her second husband had been denied entry to the USA. She either stayed with him and E or she went to California with M and L. This court allowed an appeal from the judge's refusal to return the children under Art 13(b).

In his judgment Ward LJ, at 1152F, cited a passage from the speech of Lord Browne-Wilkinson:

'The recitals and Art 1 of the Convention set out its underlying purpose. Although they are not specifically incorporated into the law of the UK, they are plainly relevant to the construction of an international treaty. The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by a procedure to ensure the prompt return of the child to the State of his habitual residence.'

The burden of proof is upon the defendant who must meet a high standard when invoking Art 3(b). Ward LJ said at 1154A-D:

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in

the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.

I have already observed that Connell J did not expressly direct himself to the stringency of the test he should adopt. I would not allow the appeal for that reason alone because Connell J is a judge of vast experience . . . That, however, does not absolve this court on our rehearing the matter from testing his findings of fact against the high standard which, in my judgment, it is vital that our courts maintain in order to give full effect to the purpose of the Convention so to carry out our international obligations. The stringent test must be enforced, not diluted.

In approaching our review of the judge's findings, I bear in mind that he reached his conclusions from the same written material placed before him as is now before us and he did not, therefore, enjoy that special advantage which the trial judge so often enjoys over the appellate court of seeing and hearing the witnesses give evidence and judging their credibility accordingly.'

I would only say regarding that last passage, that is the position that we have in this case.

Ward LJ set out the difficulties that would arise from the splitting of the family in the case of Re C and that the possibility of a split ought to have been known to the mother. He said in respect of that at 1156A:

'That the family might be split was a matter which was or ought to have been known to [the family] and it was a factor which . . . ought to have been revealed to the Californian court.'

Then he said at 1157A:

'. . . the important point is that the judge [in that case Connell J] has again overlooked that the mother is the author of her own misfortune.'

Re C (A Minor) (Abduction) [1989] 1 FLR 403 gives powerful support to the submissions of Mr Setright that too much weight had been given by the judge to the self-induced dilemma of this mother. She took A to Cyprus after her marriage to the father. She arbitrarily brought A back to England after 6 years away. Faced with the requirement to return B to the State of his habitual residence, she must make such arrangements as she can for A and, in a situation created by her, she has to make the choice whether she goes with B or not. There are a number of options, some of which at least could provide a return for B without serious adverse consequences. This is a stronger case in favour of the return of the child than was the case in Re C since there is no criticism of the father in respect of his relationship with B, unlike the father in Re C. If the mother does not go back, the father will have to make suitable arrangements for his son.

The position of A is a relevant factor in the case to which the court has to have regard. But the mother had the opportunity to consider the implications of returning to England with both children. On the facts of this case I do not consider that the consequences of that return on A should deflect the court from concentrating upon the right of B to have his future decided in the State of his habitual residence. Although his mother is English, he is a Greek-speaking Cypriot boy brought up in Cyprus with a paternal as well as maternal family.

The judge did not, of course, have the assistance to be derived from the judgment of Ward LJ in Re C. She gave far too much weight to the position of A and to the dilemma created by the mother. The judge did not have sufficiently in mind the stringent test to be applied. I would just as a final reference read for convenience from Ward J's judgment at 1153H. It is

in fact a reference to observations by Sir Christopher Slade in the case of Re F (A Minor) (Child Abduction: Rights of Custody Abroad) [1995] Fam 224, 238, sub nom Re F (Child Abduction: Risk if Returned) [1995] 2 FLR 31, 43G. In that case the Court of Appeal found the Art 13 defence was established. Nonetheless Sir Christopher Slade said:

'I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the courts' discretion under Art 13(b), are satisfied. They are in my view quite right to be cautious and to apply a stringent test. The invocation of Art 13(b), with scant justification, is all too likely to be the last resort for parents who have wrongfully removed their child to another jurisdiction.'

This court must, of course, pay proper regard to the decision of the trial judge. But since the information available to her is identical to that before us on the Art 13(b) defence, I am satisfied that the evidence upon which the mother relies does not meet the stringent test required to produce that defence.

The dilemma faced by the mother and the right of A also to the care of her mother during her minority are no doubt matters for the judge in Cyprus to take into account as is the fact that the father has not made a current application for custody of the child who has always been cared for by the mother. These matters and all other relevant considerations are, however, the province of the judge in Cyprus and not of the English court.

I would allow the appeal and, upon the giving of suitable undertakings by the father to the court, I would direct the immediate return of B to Cyprus.

THORPE LJ: I am in complete agreement.

Mr Turner, during argument, suggested that since 1995 there have been a significant number of decisions at first instance upholding Art 13(b) defences. If that be the case then the recent judgment of Ward LJ is a necessary reminder of how scrupulous first instance judges must be in upholding our Treaty obligations. An Art 13(b) defence must be scrutinised rigorously and, I would emphasise, in the round before it is upheld.

A good illustration of the need for the court to adopt a wide perspective is the case of N v N (Abduction: Article 13 Defence) [1995] 1 FLR 107. In that first instance decision I sought to emphasise that any Art 13(b) defence needs to be weighed both in the light of the history and comparatively. There, as here, the mother had removed the children from their familiar environment by subterfuge and without much apparent regard to the psychological impact on the children of the exercise of her adult will. Here, as there, there is a risk of psychological harm to B by retaining him in this jurisdiction with diminishing attachment to his roots. In many cases, a balanced analysis of the assertion that an order for return would expose the child to the risk of grave psychological harm leads to the conclusion that the respondent is in reality relying upon her own wrongdoing in order to build up the statutory defence. In testing the validity of an Art 13(b) defence, trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer be scant or non-existent, then the circumstances in which an Art 13(b) defence would be upheld are difficult to hypothesise. In my opinion Art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation that is damaging the child's development. Of course, the judges of the Family Division have a highly trained instinct to protect children from the risk of harm. They meet the need and the opportunity for child protection daily, not only in public law proceedings but equally in private law proceedings. But that prime responsibility in the conduct of Children Act proceedings does

not extend to the very special field of child abduction. In that field the prime responsibility is to ensure the early return of the abducted child.

Sadly this case is not an illustration of good practice. The abduction took place on 9 June 1998. The father's application to the Cypriot central authority was made on 15 July 1998. Good practice would have ensured the determination of the issue and an order for the return of B before the expiration of the long summer school holidays. The trial did not take place until 6 months after the initiation of the proceedings. The Cypriot central authority is responsible for 2 of those months. But in a straightforward case with no evidence but the affidavits from the family the determination of the proceedings in this jurisdiction should not take 4 months. At least we have completed the appellate review within 2 months. The goal for which we should strive in this jurisdiction, both at first instance and on appeal, should be 6 weeks from initiation to conclusion. It cannot be too strongly emphasised that this is intended to be a hot pursuit remedy and if the courts permit it to linger into anything else they aid the creation of unnecessary litigation issues.

MUMMERY LJ: I agree with both judgments.

Appeal allowed. Copies of judgment to be provided at public expense to both parties and to judge who will be hearing case in Cyprus. Undertakings that have been offered are accepted, subject to any fine-tuning that may have to be done this afternoon. No order as to costs save legal aid taxation. Application for leave to appeal to House of Lords refused. Draft minute of order to be supplied by counsel.

COUNSEL: Henry Setright for the appellant; James Turner QC and Richard Harrison for the respondent

SOLICITORS: Bindman & Partners for the appellant; Craig Sweet & Lawton for the respondent

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