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[22/03/2000; High Court (England); First Instance Court]
Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

22 March 2000

Charles J.

In the Matter of re M. (Abduction: Intolerable Situation)

Counsel: Jeremy Rosenblatt for the father; Marcus Scott-Manderson for the mother.

Solicitors: Osmond, Gaunt & Rose for the father; Gillian Radford & Co for the mother.

CHARLES J: I have before me an application by a Mr M (the father) against Mrs H (the mother) under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980. The father seeks an order that the children of the marriage between the mother and the father, M, A and H, who were born respectively on 3 February 1993, 22 March 1994 and 4 April 1995 and are therefore 7, 6 and nearly 5, be returned forthwith to Norway. The mother and the father are both Somalian by birth. They are members of different tribes.

The mother's defence is set out in her statement of defence. In that document she admits that the conditions of Art 3 of the Hague Convention have been made out and she relies on Art 13 (b) and avers that there will be a grave risk of psychological harm to the children were they to be returned to Norway. She further avers that such a return would place the children in an intolerable situation. As to discretion, she alleges that the court should exercise its discretion not to return the children and therefore to permit the High Court to take jurisdiction over matters relating to the children's welfare,

In submission before me, in my judgment correctly, counsel for the mother emphasised that the thrust of the Art 13(b) defence in this case was that return would place the children in an intolerable situation rather than exposing them to a grave risk of psychological harm. The reason for this is that the basis of the defence alleged is risk of physical harm to the mother.

During the course of the hearing, undertakings have been offered by the father. These undertakings have actually been formulated during the course of the hearing before me. The undertakings offered by him are as follows:

(1)Not to institute or support any proceedings for the punishment of the defendant (the mother), whether by criminal prosecution or in civil process for any matter arising out of:

(i) any removal or retention of the children M, A and H from Norway in respect of these proceedings; and/or

(ii) any passport forgery in respect of the said children prior to their return.

(2) Not, pending an inter partes hearing in Norway, following the return provided for hereunder, to seek to remove the said children from the physical care of the defendant.

I pause to say that obviously these undertakings are given on the basis that an order for return is to be made.

(3) Not to use any violence against the mother, threaten any violence against the mother, pester or harass the mother, whether by himself or by encouraging any other person to do so.

(4) Not to communicate with or seek to communicate with the mother in any manner whatsoever save through her appointed attorney in Norway until the first inter partes hearing before the appropriate Family Court in Norway.

(5) Not to seek disclosure of any address or telephone number for the mother and the children's accommodation in Norway upon their return, save with the leave of the appropriate Family Court in Norway.

(6) Not to seek or exercise any further leave from Norwegian prison custody until the first inter partes hearing.

(7) To provide:

(i) the Norwegian Central Authority;

(ii) the prison governor of the Norwegian Prison Authority of the plaintiff's prison;

(iii) the appropriate Family Court in Norway; and

(iv) the Norwegian Ministry of Justice,

with a sealed official copy order of the High Court of Justice recording the undertakings herein prior to the return of the children to Norway. lso, there was an undertaking that the father would give mirror undertakings to the appropriate Norwegian court.

In addition, the position as to the funding of air fares was raised before me and the position reached, as I understood it, was that the relevant Norwegian public body equivalent to our social services would fund the tickets for the three children and the mother to return on the basis that the mother gave an undertaking that a sum presently lodged in Norway (it is thought in her sole name and it is thought representing part of the proceeds of her home) would be released to meet that payment. Counsel for the father indicated that the father was prepared to give an undertaking that he would consent to the release of that sum of money to cover the possibility that the father had a beneficial interest in those moneys.

Very briefly, the history of these proceedings is that the originating summons was issued on 13 January 2000. On 22 January 2000 the mother attended court for a final directions hearing. The impact of the orders then made was that the matter would simply be dealt with on the documents, together with oral submissions. On 1 March 2000 the mother made an application before Wilson J for an adult psychiatric assessment of herself which was refused by Wilson J. In refusing that application Wilson J left it to the trial judge to determine

whether or not there should be oral evidence from the parties. On that basis, the time for the hearing was extended to one day at risk, with a hearing date on 9 March 2000.

On 9 March 2000 the matter came before Hogg J, who I was told, and accept, was unable to deal with the matter fully on that day due to shortage of time. However, she did make an order. First, that order recites that the father would not be required to attend to give oral evidence. She adjourned the hearing to be at risk today with the same time estimate of one day and ordered that:

'The Norwegian Central Authority shall provide from Norwegian social services or any other such agencies:

(a) information as to how the mother and children could be protected from the father upon return to Norway, if the mother so requires,

(b) the criminal record of the father, if possible,

(c) further information regarding the rape allegation, if possible, including the father's allegation that the mother herself alleged the rape, and any results thereto, if available.'

Before going on, I say now that, having regard to the undertakings offered, I am going to make the order sought by the father.

The marriage between the parties

They married in an Islamic ceremony and a civil ceremony. I am not clear as to the dates, but they were certainly married, as I understand it, by 1992. They married in Norway. They were divorced according to Islamic tradition and Norwegian law in November 1998. All three children were born in Norway.

The father's conviction and imprisonment

On 10 March 1995 the father was convicted of murder and sent to prison for 10 years. He appealed but that appeal was unsuccessful. In the judgment of the appellate court, the circumstances of the killing are set out in the following terms:

'Both the convicted person and the victim are refugees from Somalia. There was antagonism between them in that the deceased suspected the convicted party of having sexual relations with his wife. At the beginning of June 1994 there was a fight between the two in which the deceased used a knife against the convicted party, who for his part appears to have been stabbed with a large knife. The deceased was held on remand for this for a part of June. It appears from the police request for remand prison that during the investigations the police wanted to clarify whether there were grounds for extending the charge to attempted intentional homicide. There is no further information on this matter. At the beginning of July, some of their compatriots mediated between the two, who thereafter were considered to be reconciled.

The homicide took place on 20 July 1994 at a cafe in a shopping centre, a cafe which appears to have been a meeting place for Somali refugees. Shortly before the deed took place the convicted party, had according to his own statement, met the victim in a general goods store in the centre and the victim appears to have threatened him with a knife there because he thought the convicted party had again had sexual contact with his wife. Regarding this confrontation and what happened afterwards the following is set out in the verdict of the Circuit Court:

"According to the evidence, it is not clear whether there had really been any such confrontation as mentioned between the accused and [E], the victim. But the Circuit Court considered it most likely that the two had a meeting where [E] behaved provocatively. It is difficult to find out anything definite about the details of this. During his first appearance in the cafe bar, the accused did not appear to be behaving in any particularly striking manner. It is difficult to explain the change in behaviour which occurred right up to the homicide by anything other than something particular had taken place in the meantime.

The accused has explained that, after the meeting with [E] he went in a state of panic back to his car and thought about buying a knife to defend himself with. But he found a kitchen knife which he had had lying in the boot and took it with him. At the same time he put on more clothes on the top half of his body in spite of the fact it was said to be a warm day. There was a great deal to indicate he put on his swimming top with a sweater on top.

The accused then went straight back to the cafe bar in Male centre. When he got in there, about 1.30, he went straight to the table whether [E] was sitting, after catching up the knife in his right hand and a key plate in his left-hand. The knife was over 20 centimetres long, with a blade 11 centimetres in length. The accused starting waving his arms with the knife in his hand, according to witnesses, and inflicted six stab wounds in the throat, neck and chest. The most serious stab wound was in the right side of the throat and was 7 centimetres long and 10 centimetres deep and caused a severing of the section of the large throat carotid artery. It must be assumed that [E] was stabbed without having got up. After he had fallen on the floor, the accused kicked him in the head and the upper half of his body with such force that blood spurted out, according to one of the witness's statements. He stamped on [E]'s head."'

Also in 1994 the father was convicted of threatening behaviour to a social worker, for which he was imprisoned for 24 days. The mother says that this was a social worker who was seeking to assist her in separating from the father at the time. The father has given no evidence as to this matter. This period of imprisonment pales into insignificance in comparison with the period of imprisonment for the conviction for murder. However, both incidents, and in particular the murder and its circumstances as described by the appellate court, show that the father has been and can be extremely and dangerously violent.

The father remains in prison. His release date is May 2001, but on his evidence, if the children were to be returned to Norway, and the social services in Norway advise that the father should have a more active role in the children's lives, he would (and I repeat on his evidence) have a good case for release in May 2000. During his time in prison, and particularly over a period beginning in 1998, the father has had leave or licence, during which periods he has been released into the community, and has had contact with the mother and the children. The extent, nature and quality of that contact is disputed in the documentary evidence before me. This licence or leave increased to 4 days a month from November 1998.

The allegation of rape

In early April 1999 the father was released on licence and he has been accused of raping a Somali woman during this period of release. This allegation has been investigated by the police but no charges have been brought. As I understand the evidence, the investigations have not been closed.

The father's position is that he accepts that he had sexual relations with the Somali woman during the licence period, but he alleges that the mother found out about this and paid that woman a sum of money to accuse him of rape. The mother denies this and says that she

discovered that the father had been accused of rape by reading about it in a newspaper. She was told by the police that the father had made this allegation against her. During the course of the hearing before me she gave instructions to her counsel that that information was given to her in August 1999. As will soon become apparent, that was on a trip back to Norway after she had taken the children from Norway.

The removal of the children from Norway

The mother applied for passports for the children on 15 February 1999 and accepts and has admitted to the Norwegian authorities that she forged the father's signature on those applications. The passports were issued on 23 April 1999. The mother came to this country with the children at the end of April 1999. She came without the father's consent and no issue of consent or acquiescence has been raised in this case. The mother told social services in Norway and her lawyer in Norway told the father's lawyer in Norway that she intended to return in August 1999. It was only when these proceedings were brought that the mother made the allegations upon which she relies to establish the Art 13(b) defence.

Article 13(b) is in the following terms:

'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:

. . .

(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.'

Guidance has recently been given by the Court of Appeal as to the approach to be adopted to the establishment of the Art 13(b) defence. That guidance has been given in two cases, both of which are called Re C. The first is Re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145, and I have had particular regard to the passages at 1148H, 1152E to 1154E, and in particular in that last passage to the statement at 1154A-B, where Ward LJ said:

'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.'

The other decision of the court called Re C is Re C (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478. As to that I have had particular regard to the passage in the judgment of Butler-Sloss LJ from 486H through to the end of that judgment and the passages in the judgment of Thorpe LJ at 487F-488C. In particular, in the middle of that passage Thorpe LJ says:

'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.'

I was also referred to the decision in Re S (Abduction: Return into Care) [1999] 1 FLR 843, 848H-849A. It is a decision of the President, Sir Stephen Brown. In that passage he said:

'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.'

That was a case where allegations of sexual abuse were raised.

Those cases show that the mother has the burden of establishing the Art 13(b) defence and that I am to take the approach set out in the passages I have referred to.

The mother's application today that she should give oral evidence

This application was made but, in my judgment rightly, was not pursued to the stage of me having to make a decision on it during the course of the hearing. As I have said, Hogg J decided that the father need not and should not attend to give evidence. The application was made today simply that I should see and hear the mother give evidence. In E v E (Child Abduction: Intolerable Situation) [1998] 2 FLR 980, 984E, Hughes J said:

'The father is said to be aggressive, abusive and irrational in his behaviour. This is not the occasion to investigate in any detail allegations and counter-allegations of the kind which unhappily are so often made when spouses come apart. These are summary proceedings.'

The basis of the application was not so much that I should be invited to determine the disputes which exist as to the history of the marriage and of the nature of the contact that has taken place from 1998 until April 1999 when the mother and children left Norway. There is considerable dispute between the parties as to those matters which I could not begin to resolve in these proceedings even if I was to hear both parents, but certainly I could not resolve them by simply hearing the mother's evidence.

The application was put on the basis that I should see the mother and when she gave oral evidence to me she would convince me that she was genuinely afraid. I indicated to Mr Scott-Manderson, her counsel, that my starting-point in this case was to consider the matter on the papers on the assumption, and thus hypothesis, that the mother genuinely is afraid at the moment. I say that is a hypothesis because it is disputed by the father.

I would add this in respect of the documentary evidence of both parties. An analysis of it, and part of that analysis was gone through during the course of the hearing, does not lead me to the conclusion that either of the parties in this case is telling the complete truth on the face of their documentary evidence or is volunteering a wholly accurate account of the history. Simply by way of example, if one looks at the mother's statement where she is commenting on the father's statement and she says this:

'The plaintiff knew I wanted to take the children away from Norway. I asked him to sign a form from the Immigration Department. He told me that he would complete the form next

week. After the rape incident I decided to forge his signature on the children's application so that I could leave.'

It can be seen that this statement does not accord with the documentary evidence that the passport applications were made in February 1999. The explanation of that could simply be a mistake in taking instructions or a misunderstanding, but it is an inaccuracy on the face of papers.

So far as the father is concerned, an issue arises between the parties as to an agreement which the father alleges was signed by the mother, dated 15 May 1998. When the father raised this the mother denied in her statement that she signed it. The father, through the solicitors acting for him today, has produced a document which is said to be signed by the mother. The signature on that document, however, does not bear any close resemblance to the other signatures of the mother on other documents that have been placed before me. It is also right to say that the mother's signatures on those documents do not all conform one with the other. Also, in making his initial application to this court the father did not mention the rape allegation which he must have been aware was a point that existed between him and the mother. As I have said, and adopting the statement made by Hughes J, it is simply not possible for this court in this type of proceedings to resolve those sorts of factual disputes.

I now turn to consider the way in which the mother puts her case. As I have said, I will assume for present purposes that she is genuinely putting forward a fear that she holds at present. Further, as my recital of the history shows, she has solid grounds for asserting that the father is capable of committing acts of severe violence. In para 30 of her affidavit she expresses her fear in this way. She says:

'I am very frightened about what will happen if I am ordered to return the children to Norway. If the children are returned, the plaintiff will get licence from prison to see them. If I am with them I truly fear for my safety. He will punish me for taking the children away and threaten me with serious violence or even death if I do not go along with him and cover up his criminal activities.'

After that statement had been made and, as I understood it, at either the hearing before Wilson J or Hogg J, counsel took further instructions and the fear was expressed slightly differently, namely one that she fears that she will be killed by the father.

The matters that she relies on as a foundation for that fear can be seen from paras 15-2 of her affidavit, which have to be read against the background of her account of the history of the marriage. Included within that account is the fact that after the incident between the father and his friend described by the criminal court in Norway which took place at the beginning of June 1994 and before the date when the father killed that gentleman, namely Mr E, the mother left Norway to go to Ethiopia, leaving the children in the care of the father's sister and I think probably also the father. She returned when she was informed by the Norwegian social services that the father was in prison and that the sister was looking after the children but could no longer cope with looking after them.

The essential points that she relies on as put to me by counsel show, he submits, escalating problems beginning in May 1998, which led to the mother feeling increasingly threatened when the father was released from prison on licence. She says that she was threatened by him verbally and physically. She also relies on a point that their home was searched by the police on the basis that they had received information that the father might be dealing in drugs. There is no further evidence that any drugs were found to support that allegation. Finally, the culmination of the escalation of pressure and fear which she alleges come from the father making the allegation against her in respect of the allegation of rape. It was said

that that was something that reflected personally on the mother and is something which could justifiably cause her to be fearful.

On the assumption I have taken that the mother is advancing a genuine fear and belief, in my judgment, in assessing Art 13(b) I have to look objectively at the reason she advances for that fear and thus to take an approach that is equivalent to the one that is taken by this court in considering the hostility of a mother to contact.

Closely linked to that analysis of the reasons is inevitably the protection that the Norwegian courts and authorities could give to the mother, not least because the father is in prison and only comes out on licence.

A surprising omission, to my mind, from the mother's evidence is that she does not appear to have approached the Norwegian authorities whilst she was in Norway up to April 1999, or given any explanation as to why she did not feel able to do so.

It is apparent from the undertakings that I have set out, which in part are based on information provided as a result of the order made by Hogg J, that, first, refuge accommodation equivalent to refuge accommodation in this jurisdiction is available in Norway. That is confirmed in a letter from the Royal Ministry of Justice and the police, dated 21 March 2000, sent in response to the request made pursuant to Hogg J's order. There is also a provision in Norwegian law which provides that:

'The prosecuting authority may ban a person from being present at a specific place or from pursuing visiting or in any other way contacting a person if, because of special circumstances, there is deemed to be a risk that the person who is to be the subject of the ban would otherwise commit an offence against, pursue or otherwise disturb the peace of the other person. The ban may be imposed at the request of the person who is to be protected thereby or when it is deemed necessary in the public interest. The ban shall apply for a specified period not exceeding one year at a time.'

The undertakings offered by the father also reflect the common understanding of the parties that as one would expect with a signatory to the Hague Convention and as a matter of comity that equivalent provisions to ours exist in the Norwegian family law jurisdiction to grant non-molestation orders.

One of the other pieces of information that was obtained as a result of the order made by Hogg J was that, according to the provisions of s 37 of the Norwegian National Register Act of 16 January 1970:

'It is possible to apply to the National Register to keep your address secret if there is a danger to life, body or health. An applicant can apply from a foreign country but it may take approximately 14 days to handle an application.'

Notwithstanding the offer of the undertakings, the position of the mother before me was put in alternative ways. First, it was put that the mother did not feel that the Norwegian authorities could give her proper protection and, therefore, that in her mind the Art 13(b) defence was established. Alternatively, and recognising the difficulties of a legally aided defendant, counsel said that the undertakings were not sufficient. But if I were to make a request of the requesting State, namely Norway, and thereby ascertain from them effectively, as I understood it, three things -- first, that refuge accommodation would be available upon the mother's return to Norway; secondly, that the prison authorities would take account of the undertaking given by the father as to seeking leave or licence and would simply as a practical matter not let him out of prison until the relevant condition or

conditions had been met; and, thirdly, that the requesting State would put in place the relevant application under the National Register Act to ensure that the mother retained confidentiality as to her address and the children's address -- counsel for the mother accepted that, if those additional matters were in place, then he would not realistically be in a position to advance an argument that the Art 13(b) defence was satisfied, because, whatever the subjective view of the mother, judged objectively her reasons for it simply would not establish that defence and she would be adequately protected in Norway.

In that respect I was referred to a US decision showing that, taking a purposive approach to the Treaty, inquiries can be made either between the two States or initiated by the court. I accept that that is a possibility in this type of proceedings. I was also referred to a short report of the approach taken by Singer J in Re M and J (Abduction: International Judicial Collaboration) [2000] 1 FLR 803 in which he took the, as I understand it, unusual approach of himself speaking to US judges and effectively 'sorting matters out'.

It seems to me that I should not go further in this case in the manner I was invited to by counsel on behalf of the mother. First and most importantly, it seems to me that, given the existence of the present undertakings, the points raised by counsel for the mother are in reality covered by the undertakings with one exception to which I will return. It seems to me that, given the undertakings and having regard to the fact that Norway is a signatory of the Treaty and the principle of comity, I should accept that the prison authorities would act upon the order of this court containing the undertakings and simply not release the father until the appropriate orders had been made in the Norwegian courts. Secondly, it seems to me that on those undertakings the confidentiality of the mother's address is preserved. She has no obligation to volunteer it to the father. She can make the relevant application under the relevant legislation in Norway and I would have every expectation that she would be assisted, so far as they considered it appropriate, by the Norwegian social services or other appropriate authorities in doing so.

The only area it seems to me as to which I am left in some doubt is as to where, and I say precisely where, the mother would be accommodated. However, in my judgment, having regard to the information obtained as a result of Hogg J's order and the general principle of comity, I can be confident that the requesting State, Norway, through its public bodies, would provide accommodation for this mother and the children following their arrival in Norway. Put another way, they would be received into their social services system. To provide more detailed information would have been difficult for the requesting State because it did not know what the mother was proposing to do, and in particular, to which part of Norway she was proposing to return. Indeed, at the time the request was made she was resisting return. It, therefore, seems to me that what I am being invited to do on behalf the mother is an excessive 'dotting of Is and crossing of Ts' in this jurisdiction, which is intended to be a summary one.

In support of that conclusion I add that it seems to me that the onus in establishing the Art 13(b) defence is on the mother. It was, therefore, it seems to me, having regard to that onus, a necessary and essential part of the preparation of the mother's case to consider in some detail why she was saying that sufficient protection could not be provided to her by the Norwegian authorities and to make specific requests or to carry out specific research as to those matters. No such specific requests were made, as I understand it, as to the nature of the accommodation that could be made available to her other than that made during the hearing before Hogg J which led to her order. In response to that information, which was hardly surprising, that there was a refuge system in Norway, an additional point was then raised on behalf of the mother as to where that accommodation would be and whether it is absolutely certain that it would be available to her. I have to say that, in my judgment, when

a defendant is legally aided and is running the Art 13(b) defence, these sorts of matters should be dealt with well in advance of the hearing. That may be thought to be overcritical because it is very easy when the matter has been addressed adversarially to think of additional points, but it does seem to me that in this case the detail of protection available to the mother in Norway was always going to be a central issue and one that should have been addressed with greater clarity by her in advancing the Art 13(b) defence.

More generally as to this, it also seems to me that in these cases perhaps I and other judges of the Family Division should consider on directions hearings including a direction that the parties are to identify (a) any undertakings that they seek, and (b) any undertakings that they are prepared to give to focus the attention of the parties to proceedings on the detail of such undertakings with a view to avoiding or reducing negotiation as to undertakings during the hearing. I have in mind that, as I have said, I may be being overcritical of the position as advanced by the mother, and it is easy to look at these matters with hindsight. But it seems to me that if everybody's attention had been focused by the court on the nature and extent of undertakings, the last-minute requests made on behalf of the mother may have been avoided.

For the reasons I have given, having regard to the existence of the undertakings I have read out and on the assumption I have made that the mother subjectively has a genuine fear, I have concluded that the mother has not made out the Art 13(b) defence to the required standard. It follows that I do not have to exercise a discretion pursuant to Art 13 and it necessarily follows that I make the order sought by the applicant.

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