---

http://www.incadat.com/ ref.: HC/E/UKe 590
[28/05/2002; Court Of Appeal (England and Wales); Appellate Court]
Re S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843, [2002] 1 WLR 2548

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

28 May 2002

Thorpe, Laws, Rix LJJ

Re S (children) (abduction: asylum appeal)

COUNSEL: David Turner QC and Camille Habboo for the appellant; Henry Setright QC and Ian Lewis for the respondent; Khawar Querishi as the advocate to the court.

LAWS LJ:

[1] This is an appeal against an order of Bennett J made in the Family Division on 26 April 2002 when, on their father's application by way of originating summons issued on 5 October 2001, he ordered the return forthwith to India of two boys, J born on 11 September 1997 and V born on 23 February 1999. In making the application the father had invoked the wardship jurisdiction of the High Court. India had not, and has not, ratified the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention). As is well known the Hague Convention was given effect in English law by force of the Child Abduction and Custody Act 1985. The boys were made wards of court on 5 October 2001, and wardship was continued by order dated 12 October 2001.

[2] The appeal requires the court to consider the relationship, if any, between the exercise of the wardship jurisdiction and the effect of s 15 of the Immigration and Asylum Act 1999, which I will set out shortly. It is first convenient just to summarise the material facts. The boys' parents married in New Delhi on 19 January 1997. So their infancy was spent in India. On 11 June 2001 their mother, who is the appellant before us, arrived in the United Kingdom with the boys for a holiday, to stay with the paternal grandparents-the respondent's parents. The boys and their mother were due to return to India on or before 12 August 2001, but on 4 July, as I understand it without any warning, the mother left the grandparents' home taking the boys with her. Later she was to make serious allegations of ill treatment by her husband and by his parents.

[3] On 2 October 2001 the appellant applied to the Secretary of State for asylum. There was no separate claim as such on behalf of the boys, but the appellant named them as her dependants. The essence of her asylum claim was put thus:

'I am a victim of domestic abuse and marital rape in India. I also suffered abuse from my in-laws while visiting them in the UK. I know that I cannot obtain protection from my family or the Indian state.'

[4] On 9 January 2002 the Secretary of State issued a decision letter refusing the asylum claim. The letter indicated that in the Secretary of State's view the appellant had not established any ground for protection arising under the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmd 9171) (as amended by the 1967 Protocol relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmnd 3906)). However on 10 January 2002 the appellant was granted exceptional leave to remain in the United Kingdom for a period of four years. Exceptional leave for a like period was also granted to the boys. On 15 January 2002 solicitors instructed by the appellant lodged an appeal against the refusal of the asylum claim. On its face the appeal was launched solely on behalf of the appellant (and not the boys). It was contended that the decision to refuse asylum was 'wrong in law and contrary to the evidence'. In a statement of additional grounds in respect of each of the boys it was alleged that if returned to India they would be persecuted by their father.

[5] Meantime, of course, the father's application was progressing through the Family Division. One of the assertions made by way of defence in those proceedings by the appellant mother was as follows:

'The defendant submits that the court cannot exercise its wardship jurisdiction to order a return of the children in this case pending the outcome of the defendant's and the children's asylum claim.'

[6] At length the application came on for hearing before Bennett J. In his long and careful judgment he first addressed the merits of the application for the boys' return to India, irrespective of the impact, if any, of the asylum legislation. It is not necessary to travel into the detail of the evidence before the judge as to the merits. It is enough to set out para 92 of his judgment, in which his conclusions are expressed:

'In my judgment, the balance clearly comes down in favour of the children being returned to India. I find that it is in their best interests that they should be returned to India. These are Indian children who have lived all their lives in India until June 2001. I do not accept the mother's case that there is a grave risk that the children's welfare will be put at risk by her situation. Her evidence is open to serious question, as I have set out. This, in my judgment, inevitably undermines her evidence that she would be emotionally upset to return to India and/or that she would be ostracised in Indian society. It is astonishing, in my view, that she should have contemplated returning to India at all in July 2001 in the light of the picture she has painted of a turbulent marriage and of the father's treatment of the children. Further, the father has agreed to give certain undertakings. They are comprehensive and detailed. They provide, in my judgment, if adhered to, proper and adequate protection and support, including financial support for the mother and the children. I have to bear in mind that these undertakings are not enforceable in India unless the Indian court is able to, and does, make orders in similar terms or extract similar undertakings from the father. But I am confident that the appropriate Indian court will understand that one of the reasons that the children are being returned to India is the comprehensive nature of the undertakings that the father has given. I am confident that the Indian court will recognise that these undertakings have been given for the purposes of helping to secure the children's welfare. I have the fullest confidence that the Indian court, within the laws and the customs that it is called upon to administer, will endeavour at all times to promote the children's best interests. Accordingly, it will be seen that, absent the question of s 15 of the 1999 Act, it is my decision that they should be returned to India as quickly as possible.'

[7] It is convenient now to set out the relevant provisions of s 15 of the 1999 Act:

'(1) During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom.

(2) Subsection (1) does not prevent-(a) directions for his removal being given during that period; (b) a deportation order being made against him during that period.'

[8] It is convenient also to set out r 329 of the Immigration Rules (HC 395) current at the material time:

'Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under section 11 or section 12 of the Immigration and Asylum Act 1999, no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom.'

[9] Then r 349:

'A husband or wife or minor children accompanying a principal applicant may be included in an application for asylum. If the principal applicant is granted asylum any such dependants will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in his own right and who would otherwise be refused leave to enter or remain will be considered individually in accordance with paragraph 334 above. If the dependant has a claim in his own right, it should be made at the earliest opportunity. Any failure to do so will be taken into account and may damage credibility if no reasonable explanation for it is given. Where the principal applicant is refused asylum and the dependant has previously been refused asylum in his own right, the dependant may be removed forthwith, notwithstanding any outstanding right of appeal that may be available to the principal applicant. At the same time that asylum is refused the applicant may be notified of removal directions or served with a notice of the Secretary of State's intention to deport him, as appropriate. In this paragraph . . . a child means a person who is under 18 years of age or who, in the absence of documentary evidence, appears to be under that age.'

[10] The appellant submits by Mr Turner QC, as she submitted before Bennett J, that s 15 of the 1999 Act prohibits the removal of the boys to India pursuant to the learned judge's order. The issue as it has unfolded in the skeleton arguments-which include that of Mr Qureshi who has been appointed advocate to the court and for whose assistance in his skeleton argument I am grateful-has a number of ramifications. A major aspect of the respondent's riposte to the appellant's argument has been to submit that s 15 only binds the executive; that is to say the immigration authorities acting under the Secretary of State for the Home Department. I shall deal with this argument first. For that purpose it is necessary to set out certain other provisions in the corpus of immigration legislation. But I start with the observation that the language of s 15 has the expression 'he may not be removed or required to leave the United Kingdom'. The Immigration Act 1971, the first statute in the corpus of our modern immigration law, provides in part:

'. . . the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom . . .'

[11] Paragraph 8(1) of Sch 2 to the 1971 Act provided:

'Where a person arriving in the United Kingdom is refused leave to enter, an immigration officer may, subject to sub-paragraph (2) below: (a) give the captain of the ship or aircraft in which he arrives directions requiring the captain to remove him from the United Kingdom in that ship or aircraft . . .'

[12] The Asylum and Immigration Act 1993 contained a definition of the expression 'claim for asylum' as follows:

'. . . "claim for asylum" means a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom.'

[13] 'The Convention' is of course the 1951 United Nations Refugee Convention. Section 6 of the 1993 Act provided:

'During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom.'

[14] Section 6 was the precursor of s 15 with which we are concerned.

[15] Section 10(1) of the 1999 Act provides:

'A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if-(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; (b) he has obtained leave to remain by deception; or (c) directions ("the first directions") have been given for the removal, under this section, of a person ("the other person") to whose family he belongs.'

[16] Section 11 provides, so far as material:

'(1) In determining whether a person in relation to whom a certificate has been issued under subsection (2) may be removed from the United Kingdom, a member State is to be regarded as-(a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and (b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

(2) Nothing in section 15 prevents a person who has made a claim for asylum ("the claimant") from being removed from the United Kingdom to a member State if-(a) the Secretary of State has certified that-(i) the member State has accepted that, under standing arrangements, it is the responsible State in relation to the claimant's claim for asylum; and (ii) in his opinion, the claimant is not a national or citizen of the member State to which he is to be sent; (b) the certificate has not been set aside on an appeal under section 65.'

[17] Section 13 deals with proof of identity of a person who is to be removed from the United Kingdom but has no passport or other document which establishes his identity. Section 13(6) interestingly provides:

'"Removed" means removed as a result of directions given under section 10 or under Schedule 2 or 3 to the 1971 Act.'

[18] Then s 14(1):

'Directions for, or requiring arrangements to be made for, the removal of a person from the United Kingdom may include or be amended to include provision for the person who is to be removed to be accompanied by an escort consisting of one or more persons specified in the directions.'

[19] In R v Secretary of State for the Home Dept, ex p Sanusi [1999] Imm AR 334, Brooke LJ (with whom Evans and Ward LJJ agreed) said (at 339):

'There is in my judgment, no ambiguity at all in the words "required to leave" in the context of modern immigration legislation. The 1971 Act and the 1993 Act are so closely linked that it would not be proper to construe them in such a way that the same words bear one meaning in one Act and another meaning in the other. By section 5(1) of the 1971 Act a deportation order is quite unambiguously expressed to be an order requiring a person liable to deportation to leave the United Kingdom, and as soon as it is in force it invalidates any prior grant of leave.'

[20] That approach to what was then the language of s 6 of the 1993 Act as well as s 5(1) of the 1971 Act seems to me, with deference to a submission made in para 30 of Mr Qureshi's skeleton argument, to be entirely consistent with the reasoning of their Lordships' House in Chief Adjudication Officer v Wolke [1998] 1 FCR 85, [1998] 1 All ER 129.

[21] This review of the statutory materials shows in my judgment that the language of 'remove' and 'required to leave' are terms of art in the law of immigration. They are replicated throughout this part of the 1990 Act and are the very language of s 15 itself. Section 15(2) in particular tends to show, I think, that these terms are being used in what may be called an immigration sense. These materials seem to me powerfully to demonstrate that the prohibition in s 15 is directed to the immigration authorities-who are of course part of the executive-and imposes upon them a most important negative duty in the context of their administration of immigration law and practice in the United Kingdom. The section is not intended to occupy any wider canvas. It cannot I think sensibly be read as creating a substantial exception or any exception to the obligations arising under art 12 of the Hague Convention or be intended to circumscribe the duty and discretion of a judge exercising the wardship jurisdiction.

[22] Mr Turner's principal answer to these considerations is to point to the 1951 Refugee Convention itself, and in particular art 33(1). I will not set out the well-known definition of 'Refugee' in art 1A(2). Article 33(1) provides:

'No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

[23] Mr Turner submits that art 33 amounts to a general rule of law binding the contracting states. Citing Professor Goodwin-Gill The Refugee in International Law (2nd edn, 1996) p 122, he says that it affects any measure, whether judicial or administrative, which secures the departure of an alien. It has 'for all practical purposes been incorporated into United Kingdom law' in R v Secretary of State for the Home Dept, ex p Sivakumaran [1988] AC 958 at 990, [1988] 1 All ER 193 at 195 per Lord Keith (see also R v Uxbridge Magistrates Court, ex p Adimi [2001] QB 667, [1999] 4 All ER 520 in the Divisional Court). Moreover the term 'refugee' is to be taken as including a bona fide asylum seeker whose application has not yet been determined, otherwise the protection provided by the Convention would be undermined: Khaboka v Secretary of State for the Home Dept [1993] Imm AR 484, a case actually decided on art 31 of the 1951 Convention which I think it unnecessary to read.

[24] Since s 15 is the domestic statutory expression of art 33, it is submitted that it must have general effect and so have bound Bennett J in the present case. But this argument, with deference to Mr Turner's helpful submissions, contains a false premise. It is that the scope of s 15 must be as wide as the scope of art 33. The importance, or the generality, or the fundamental nature of art 33 cannot, in my judgment, afford a justification for a construction of s 15 of the 1999 Act which is wider than its terms or context will bear. There can be no suggestion that the scope of art 33 can be restricted or diminished by the scope of s 15 on the

latter's true construction. Accordingly, the proper scope of art 33 does not drive the construction of s 15. In those circumstances, there is as I see it no reason to suppose that s 15 should be interpreted otherwise than as I have suggested.

[25] There is potentially a separate question which, though I understood Mr Turner to suggest otherwise, is not in my judgment before us and was not, on a proper reading of his judgment, before the judge below. That separate question is: how far the family court, acting under the Hague Convention or the wardship jurisdiction, is obliged to take account or comply with art 33 seen as a freestanding instrument. That question raises issues as to the scope and the context of the incorporation of the 1951 Convention into our municipal law which are not without some sophistication. We are not required, and for my part I would not choose, to express anything like a concluded view on such issues. I would go only so far as this. Having regard to the rule as to the paramountcy of the child's interests arising under s 1 of the Children Act 1989, I would respectfully suppose that a family judge would at the least pay very careful attention to any credible suggestion that a child might be persecuted if he were returned to his country of origin or habitual residence before making any order that such a return should be effected.

[26] That, if my Lords agree, concludes the appeal against the appellant. But I will deal briefly with two further points. The first is as follows. Even if s 15 potentially constrained Bennett J, it cannot in my judgment avail the appellant on the facts. The protection afforded by s 15 ends 'when the Secretary of State gives him notice of the decision on the claim'. In this case that was on 9 January 2002. It is of course right that an asylum appellant will not be removed until after his appeal has been determined, but that is not the consequence of s 15. It is provided for by paras 10 and 11 of Pt II of Sch 4 to the 1999 Act. As it happens, none of those provisions apply to the appellant because she has been granted exceptional leave to remain. Her appeal was accordingly brought under s 69(3) of the 1999 Act, which it is not necessary to read. The suspensive provisions of Pt II of Sch 4 do not apply to s 69(3). There is no need for them to do so: the appellant's presence in the United Kingdom is protected by the grant of exceptional leave.

[27] The second point is this. Even if s 15 may apply to family court decisions, it would not in my judgment in any event serve to prevent the boys being sent to India. They are not themselves asylum applicants or appellants. They are not a 'person' within the meaning of s 15. Dependants are indeed protected by the law when a claim for asylum is made by mother or father. That is done by para 329 in the Immigration Rules, which I have read. As regards the position of such dependants pending an appeal by the principal asylum seeker, it is the practice of the Secretary of State not to remove them and that practice, absent some wholly exceptional justification for a departure from it, would no doubt be protected by the courts either under art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or as a matter of legitimate expectation or both.

[28] There is nothing to displace this conclusion in s 74 and 75 of the 1999 Act, which figured in Mr Turner's scholarly skeleton argument. It may be that the references in those sections to 'relevant members of the family' would be grist to the mill of any public law challenge to a decision to remove a dependant before the principal claimant's asylum appeal were heard, were such a decision ever to be made by the immigration authorities.

[29] I would dismiss this appeal for the reasons I have given. If, as one hopes, there is to be a practical comity between the administration of our immigration law and the administration of our family law, it is not, with respect to the arguments which we have heard, to be done by a strained construction of s 15 of the 1999 Act.

RIX LJ:

[30] I agree.

THORPE LJ:

[31] I also agree. I wish only to raise some questions as to practice, in particular directed to issues of communication and collaboration between the family justice system in international cases and the tribunal justice system in immigration.

[32] The chronology in this case shows that the mother initiated her claim within the tribunal justice system on 2 October, closely followed by the father's issue of his originating summons in wardship on 5 October. The mother lodged her statement of additional grounds in the immigration application on 11 October and, as Mr Turner points out, in para 5 she stated that her husband had lodged proceedings to obtain the return of his children to India. That sentence is necessarily terse, since the wardship proceedings were then only six days old.

[33] The father's originating summons was the subject of firm management directions given by Holman J on 14 December. His order of that day culminated in this provision:

'The final hearing of the Plaintiff's originating summons for summary return of the minors to India be set down to be heard by a High Court Judge of the Family Division (BEING A FINAL HEARING NON CONVENTION ABDUCTION CASE) at the Royal Courts of Justice . . . on Thursday 31st January 2002 and Friday 1st February 2002 . . .'

[34] That order ensured that the wardship proceedings would be completed within a period of four months from the date of issue.

[35] On 3 January 2002, and again on 7 January, the father's application for an entry visa to enable him to testify at the final hearing was refused by the British High Commission in New Delhi. We know that that was certainly not the anticipation of the Family Division judge, since Holman J's direction of 14 December had specifically drawn to the attention of the Clerk of the Rules that this was a case in which the claimant would be travelling from India for the purposes of giving oral evidence at the hearing.

[36] The mother's application for asylum having been rejected on 9 January 2002, she received on 10 January exceptional leave to remain. The letter granting her that leave contains the sentence:

'It has been decided, however, that it would be right, because of the particular circumstances of your case, to grant you exceptional leave to remain in the United Kingdom until 10/01/06.'

[37] As we know, the final hearing before Kirkwood J was not determinative of the father's summons, since he adjourned the matter over, requesting the Treasury Solicitor to appoint an advocate to the court and requiring other things to be done.

[38] But looking at this chronology on its face, obvious questions arise. Did the decision-taker in New Delhi on 3 and 7 January 2002 know of the terms of the order of the High Court judge of 14 December, specifically providing for oral evidence on the 31st of that month? Equally, the obvious question arises: did the decision-taker on 10 January appreciate within what he referred to as the particular circumstances of the mother's case that there was a highly-developed application pending in the Family Division which was due for final hearing in only 21 days' time?

[39] These two questions provoke in my mind a profound misgiving as to the level of communication and the available channels for the exchange of information between these two justice systems. Looking at the chronology as it stands, it might be observed that the father has

largely succeeded in achieving the sort of merit determinations he wanted in the family justice system. By contrast, although the mother did not succeed in her asylum claim she has largely secured relief in the tribunal justice system to the extent of establishing four years' exceptional leave, whilst the father was not even permitted an entry visa for the purpose of participation in the Family Division proceedings. I cannot help thinking that there would have been some concordance between outcomes in these independent proceedings had there been more sharing. Mr Turner of course says the important thing is that neither should jump the gun, and he suggests that effectively Bennett J jumped the gun when he decided the case as he did at trial. But it could equally well be suggested that the decision-taker on or approaching 10 January would have done better to have awaited the outcome of the fixture then only 21 days away. There are obviously different responsibilities cast upon these two systems, but at least within the family justice system one thing that can be guaranteed is swift outcome. In a case such as this where the matters raised by the applicant in the immigration proceedings were all matters lying within the bounds of the intimate relationship between her and her husband, there would be obvious advantages in prior investigation and determination by a judge of the Family Division.

[40] This situation is in my experience uncommon. I cannot remember having encountered another case in which there was any possible conflict between the two systems operating simultaneously but independently. If, however, this is likely to become more general, it seems to me that there would be great advantage in the President discussing issues of communication and collaboration with the Home Office, either directly or through her Family Law International Committee.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
