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[22/11/1993; Court of Appeal (England); Appellate Court]
Re M. (A Minor) (Child Abduction) [1994] 1 FLR 390, [1994] Fam Law 242

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

22 November 1993

Sir Thomas Bingham MR, Butler-Sloss, Simon Brown LJJ

In the Matter of M.

Allan Levy QC and Brian Jubb for the children

Ian Karsten QC and Stephen Bellamy for the fathers

Andrew Tidbury for the mother

BUTLER-SLOSS LJ: The issues in this case arise under the provisions of the Hague Convention ('the Convention'), and concern two boys aged 11 1/2 and nearly 10. On 11 November 1993 we heard two appeals, having granted leave to appeal to the mother in respect of a consent order made on 1 November 1993. We dismissed the appeal by the children against the refusal of Mr Hugh Bennett QC sitting as a deputy judge of the High Court to add them as parties to the proceedings. We allowed the appeal of the mother and directed that a court welfare officer do report to a High Court judge at a further hearing to enable the judge to consider Art 13 of the Convention.

The background to this case is that the parents, both English in origin, each settled as a child in Australia. They married in Sydney on 14 August 1976. S was born on 29 April 1982. C was born on 9 December 1983. The marriage broke down in 1986 and, without the knowledge or permission of the father, the mother removed the boys to England. In England she formed a relationship with B which has been sustained intermittently ever since. In 1987 their daughter P was born. In April 1987 the mother with the three children and B returned to Australia. In July 1987 the mother left the two boys with their father and returned to England. In May 1988 the Family Court of Australia in Brisbane granted custody of the two boys to their father with access to their mother who had returned to Australia. For the next 3 years the two boys saw their mother for very brief periods. The father was living in New South Wales and the mother with her new family in Queensland.

At Christmas 1991 the children visited their mother in Cairns and remained with her. The mother said that she assumed that they were to remain with her. The father issued proceedings for contempt and on 4 February 1992 the Family Court ordered their return to their father. During 1992 and 1993 the mother's relationship with B was volatile with

partings and reconciliations. On one occasion in early 1993 the boys ran away to try to visit their mother and were recovered by the police. They went to visit their mother for Easter. She, B and the three children left Australia in April 1993, without the knowledge or consent of the father, and travelled to Goa. They went on to England arriving in London on 8 October 1993.

The father invoked the Convention procedure and issued proceedings in London. The mother also issued applications. A holding order was made by Wilson J on 13 October 1993. After considerable negotiations between the solicitors for the parties, the mother decided that it was in the boys' best interests for them to go back to Australia. She was undecided whether to go with them or stay in England. Her relationship with B was fragile, but P was living with him and his mother and she was torn between her sons and her daughter. A consent order was approved by Kirkwood J that the boys be returned to Australia forthwith. The arrangements were for them to catch a Qantas flight on 4 November 1993. It was not certain whether the mother would travel with them. She went with B and P and the boys to Heathrow on 4 November 1993 and decided not to travel with them. This decision created certain administrative difficulties over travelling documents and who would meet them on arrival. The boys waited all day at Heathrow airport with their mother, B and P and eventually boarded a Qantas flight as unaccompanied minors. Both boys were very upset. S created a scene and as the aircraft was taxiing for take-off tried to open the aircraft door. The captain refused to fly with him on board and aborted the flight. The two boys were handed over to Hillingdon social services and detained by the police in a cell in the local police station.

Wilson J on 5 November 1993 made further holding orders that the children return to their mother on conditions pending the expected arrival on 10 November 1993 of the father from Australia. On 8 November 1993 Mr Bennett QC heard the application on behalf of the children who had obtained legal aid and instructed solicitors.

The Hague Convention

The Convention provides a summary procedure for the expeditious return to the country of their habitual residence of children who are wrongfully removed to or retained in another Contracting State in order that the courts of the country of habitual residence should determine their future. It is conceded by the mother that she wrongfully removed these two children from Australia. The interests of the child in each individual case are not paramount since it is presumed under the Convention that the welfare of children who have been abducted is best met by return to their habitual residence. In the Explanatory Report by Professor Elisa Perez-Vera (1980), the interaction between the principle of return of the child and the child's interests is explored and the philosophy of the Convention explained in para 23:

'. . . right from the start the signatory States declare themselves to be "firmly convinced that the interests of children are of paramount importance in matters relating to their custody"; it is precisely because of this conviction that they drew up the Convention, "desiring to protect children internationally from the harmful effects of their wrongful removal or retention".'

Provision is made by Art 13 for limited consideration of the welfare of the child which may be contrary to the general presumption. Art 13(b) which refers to establishing grave risk of harm does not arise on this appeal since it is a ground to be raised by the parent and not by the child. It is, however, a matter which the mother may wish to raise at the next hearing.

The relevant part of Art 13 states:

'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.'

Professor Perez-Vera said at para 30 of her Explanatory Report:

'In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and sufficient degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it was applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, ratione personae, to all children under the age of 16; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, 15 years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.'

At para 113 she said of Arts 13 and 20:

'. . . the very nature of these exceptions gives judges a discretion -- and does not impose upon them a duty -- to refuse to return a child in certain circumstances.'

This part of Art 13 puts the court on inquiry if the child's views are brought to its attention. There is nothing in Art 13 or the Child Abduction and Custody Act 1985 (which enacts the Convention), which provides for automatic inquiry into the views of older children or a specified procedure either to make them parties or for a court welfare officer or other person to ascertain their views. We are indebted to the Official Solicitor for providing a decision of the Family Court of Australia sitting in Brisbane on 27 June 1988. In Turner v Turner, Lambert J made the children parties. That appears to be the only reported decision known to our central authority and may be an indication that it would be exceptional within the Contracting States to have the children separately represented. Rule 6.5 of the Family Proceedings Rules 1991, which sets out the defendants to be served with a Convention application, does not include the child itself. However, the rules do not preclude the court from making a child a party on the rare occasion it might be necessary. We are urged to find that this is such an occasion.

The provision in Art 13 requires a court to find that the child objects to being returned. It is clear that S objects. C's position is less clear but on the facts before us he is likely to remain with his brother in either household. These children are of an age that the court is put on inquiry as to whether they are, or either is, of a sufficient degree of maturity for their views to be taken into account. How is that to be achieved? In this case the obvious person to assist the court in an assessment of the degree of maturity of each child is the court welfare officer. He is also able to provide the court with the views of the child he has interviewed. There is an advantage in the involvement of the court welfare officer over separate representation of the children in such cases since he can perform the dual role of assessment and conveying the children's views to the court. There might exceptionally be cases where either the court welfare officer was unable adequately to represent the views of the child concerned (see L v L (Minors) (Separate Representation) [1994] 1 FLR 156) or expert medical opinion was

needed (which would be wholly exceptional). I do not consider the facts of this case require the children to be separately represented. We dismissed the appeal on behalf of the children.

I turn now to the mother's appeal against the consent order. In the normal course a party who has consented to an order cannot thereafter set it aside and family law is as subject to that general principle as other branches of the law. There requires to be shown that a fundamental change of circumstances has occurred since the making of the consent order. In this case the premise upon which the consent order was made was that it was in the best interests of the children to return to Australia and that they would go whether or not their mother accompanied them. The views of the children, which were increasingly clearly expressed by S, were not communicated to the judge and on an application for a consent order he was not asked to consider the provision in Art 13 with which we are now concerned. For reasons which I shall set out below under the position of the children, I am satisfied that there has been a fundamental change and that it is proper to set the consent order aside and to reconsider the children's position having regard to the provisions of Art 13.

We have invited the court welfare service of the Family Division at extremely short notice to assist us in interviewing the children and to report to the High Court judge next week. We are most grateful to the court welfare officer, Mr Israel, for agreeing to take on the task.

Mr Karsten QC for the father, who opposed the involvement of the court welfare officer, argued that the children had no objection to returning to their own country, Australia. Their objection was to returning without their mother to their father. In his submission the wording of the Convention required an objection to the country and not to the person. Consequently the objections of S to returning to his father were irrelevant.

It is true that Art 12 requires the return of the child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I disagree with the contrary interpretation given by Johnson J in B v K (Child Abduction) [1993] 1 Fam Law 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into account Art 12 of the United Nations Convention on the Rights of the Child 1989. From the child's point of view the place and the person in those circumstances become the same. The decision of this court in Re C (A Minor) (Abduction) [1989] 1 FLR 403 related to an application under Art 13(b) and the attempt of the mother to create an intolerable situation for the child by refusing herself to return. I am satisfied that the wording of Art 13 does not inhibit a court from considering the objections of a child to returning to a parent.

The court has however to be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the State of habitual residence. If the only objection is his preference to be with the abducting parent who is unwilling to return, this will be a highly relevant factor in the exercise of discretion. Otherwise an abducting parent would be likely to encourage the older child to remain and frustrate the purpose of the Act. The court has to assess the ability of the child to understand the situation and whether he has valid reasons for not returning. The courts have accepted reasons from children in several cases and exercised their discretion not to return them (see Re R (A Minor) (Abduction) [1992] 1 FLR 105; Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S

(Child Abduction) (Child's Views) [1992] 2 FLR 492). In Re S a 9-year-old girl's objections based upon her speech impediment and the problems of returning to a French school were found by the trial judge to be valid and he exercised his discretion to refuse the application for her return to France. In upholding the judge, Balcombe LJ said at pp 251 and 500 respectively:

'The questions whether: (i) a child objects to being returned; and (ii) has attained an age and degree of maturity at which it is appropriate to take account of its views, are questions of fact which are peculiarly within the province of the trial judge.'

Waite J in P v P (Minors) (Child Abduction) [1992] 1 FLR 155 dismissed the argument that an absconding parent had the right to insist that the mandatory procedures for the child's return should be suspended while detailed investigation was made into the objections of the child. In his view instances where such investigation would be necessary would be rare. At pp 160-161 he said:

'It will, in every case, be a question of fact and degree for the judge in the requested State whether, on the evidence presented to him, a finding would be justified that the child objects to a return, and is of sufficient age and maturity to have its views taken into account. It will also, in every case, be a matter of discretion for the same court to decide, if the evidence presented to it appears insufficient to enable the court to make any finding one way or the other on the issue of objection, age and maturity, whether an investigation into that issue should be made or not.'

We were asked on this appeal to exercise our discretion and make the decision ourselves to return the children to Australia. In my view, on the facts which are now before us, we fall into that unusual category of case postulated by Waite J where it is necessary to inquire into the objections of the children and we do not have sufficient information upon which to exercise our discretion and ought not ourselves make the decision whether to take the objections into account.

The position of the children

The concerns of these children were not specifically brought to the attention of the court until the hearing on 8 November 1993. They have twice been wrongfully removed from Australia. Their life has been unsettled; in 1986-7 they were with their mother without contact with their father; between 1987 and 1993 they were with their father with very little contact with their mother and little sister other than the 6-week period when they were retained by their mother over Christmas 1991. Since April 1993 they have been in the care of their mother in India and in England without any contact with their father.

In the period leading up to the consent order of 1 November 1993, the mother was expressing the concerns of the children about a return to their father. S in particular has expressed himself clearly and forcefully in a letter in late October 1993. After the mother communicated the effect of the consent order to the boys, S's reaction was marked and violent. He assaulted his mother and bruised her. He drank part of a bottle of wine and tried to put his head in the oven. He threatened to run away, to put himself into foster care and to kill himself. His behaviour in the aeroplane was extreme and potentially very dangerous. At the age of 11 1/2 he has demonstrated very vividly that he objects to returning to his father and wants his point of view to be heard. He may or may not be entitled to have that view acted upon. Mr Karsten suggested that it was not necessary to ask the court welfare officer to obtain the children's views since the father was confident that he could take them back to Australia without incident. He ought to be given the opportunity to try to do so. Counsel

conceded, however, that it was arguable that S might again behave in an unacceptable way, if no one, particularly the court, listened to what he had to say.

The position of the mother

The mother has considerable problems which she is having great difficulty in resolving. She would like to return to live in Australia but would wish to do so with all three children living with her. At the time of the hearings in November 1993, her relationship with B - whether they would continue to live together - was changing almost daily. He was caring for P in his mother's house and was in a financial position to do so. The mother was living in bed and breakfast accommodation supported on State benefits. As the mother of an illegitimate child she has sole parental responsibility, but in order to assert it and take the child with her, it is almost certain she will have to take court proceedings to regain P which are likely to be opposed. Consequently, she remains undecided whether or not to return with the boys. Her behaviour towards them, both in the past and her recent decision not to return with them at the last moment does not encourage much sympathy towards her. If her application to set aside the order of 1 November 1993 was designed for her benefit alone I would not have wished to entertain it. But the fundamental change of circumstances upon which she relied related specifically to the welfare of the children which requires investigation and justified this court in remitting the case to a High Court judge for an urgent hearing and we allowed the appeal.

One other issue was raised as to whether Mr Bennett had jurisdiction to set aside the order of Kirkwood J and to make the children parties on 8 November 1993. A decision to return children made on an application under the Convention procedure is in my view a final order not capable of variation save as to implementation such as already happened earlier. In the absence of full argument on the point, an application to set aside an order to return the children under the provisions of the Convention should in my view be by way of appeal to the Court of Appeal and the deputy High Court judge was right not to entertain the application.

SIR THOMAS BINGHAM MR: I have had the benefit of reading the judgment of Butler-Sloss LJ in draft, and I fully agree with it.

The Convention is intended to provide a simple and summary procedure for returning to their country of habitual residence children who have been wrongfully removed from it. The courts would not be true to the letter or the spirit of the Convention if they allowed applications to become bogged down in protracted hearings and investigations. While I accept that there is jurisdiction to permit the children to be joined as parties it would very rarely be right to exercise it, and compelling grounds would be needed. It is for the judge in the country of habitual residence to decide what is best for the child in the medium and longer term. Ordinarily, therefore, appeals such as that of the mother in this case must be doomed to speedy failure.

I am persuaded that there are special features of this case, unlikely to be repeated, which require that that result should not follow. When asked to make a consent order, Kirkwood J was not alerted to the possible application of Art 13 and so had no occasion to consider the children's views or understanding. This meant that a matter potentially relevant to the operation of the Convention, and reflected in the UN Convention on the Rights of the Child, was (through no fault of his) ignored. With a daughter in this country, and likely to remain here for some time at least, the mother's position is one of acute difficulty, and this may no doubt have affected the behaviour of the children both before and during the abortive attempt to return them to Australia. I accordingly agree that there has here been a

fundamental change of circumstances since the matter was before the judge, requiring this court to make the order it did. It has, happily, been possible, with the most expeditious co-operation of the court welfare officer, to ensure that a final decision will be delayed for no more than 2 weeks.

SIMON BROWN LJ: I agree.

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