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[19/12/1996; Court of Appeal (England); Appellate Court]
Re M. (Abduction: Psychological Harm) [1997] 2 FLR 690, [1997] Fam Law 780

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

19 December 1996

Butler-Sloss, Pill, Mummery LJJ

In the Matter of M.

James Munby QC and Indira Ramsahoye for the father

Henry Setright and J Herbert for the mother

BUTLER-SLOSS LJ: Before giving this judgment I should like to remind everyone that on the hearing of this appeal I gave a direction that there should be no identification of the children or of the parents or of the addresses of either the parents or any other members of the family so as to identify these children. I am aware of course that there has been Press publicity in the past. What I and my Lords are anxious to achieve is that there should be no further identification by name or address of the children. Subject to that of course, the judgments of this court are public property.

This is an appeal by a father from the order of Wilson J on 1 November 1996 refusing the application under the Hague Convention to direct the return of the children to Greece on the grounds that the relevant parts of Art 13 had been made out. The application of the father was made under the provisions of the Child Abduction and Custody Act 1985, which gave statutory force to the relevant provisions of the Hague Convention which are contained in Sch 1 to the Act.

This is a most unusual case for a number of reasons, principally that this is the second time the mother has wrongfully retained the children who were habitually resident in Greece in breach of the father's rights of custody which were actually being exercised since he had a custody order from a Greek court. There is no question but that the mother is clearly in breach of Art 3 of the Convention and unless the Art 13 threshold is crossed and the judge exercises his discretion to the contrary the children must be returned in accordance with the provisions of Art 12.

The case also involves unusually a wealth of evidence from two psychologists, one Greek and one English, and a child psychiatrist as to the present state of the children's mental health, which is highly relevant to the issue of their summary return.

The appeal from the decision of the judge was not made to the Court of Appeal until December 1996, partly for reasons of legal aid. This court heard it yesterday as a matter of urgency, principally for the sake of the children before the Christmas vacation.

We are particularly indebted to Mr Munby QC, for the father, and Mr Setright, for the mother, for their admirable skeleton arguments provided to us at very short notice and for their oral submissions. I hope Mr Munby will forgive me in that, due to the shortness of time of preparation of this judgment, I do not set out in greater detail his excellent arguments nor address in detail his submissions on the authorities which he provided to us.

The children concerned are E, born in Greece on 24 July 1987, now 9 1/2 and A, also born in Greece on 19 January 1989, nearly 8.

The background history to this case is that the parents met and married in Greece on 7 May 1986, the father being Greek and the mother being English. As it happens, each has a very good command of the other's language. The two children were born, as I have said, in Greece and on 1 September 1994 the mother brought the children to England on a family occasion of her family and the father agreed to her coming on the basis of some 15 days. The mother thereafter remained in breach of the Hague Convention. There were proceedings both in England and in Greece. There was an application under the Hague Convention by the father and on 28 June 1995 Bracewell J made an order under Art 12 that the children should be returned to Greece and that was what happened to them. On 11 July 1995 there was a report in Athens from the Greek psychologist, Miss Sofianopoulou, and on 19 July 1995 there was a hearing in the Greek court of first instance with custody applications by both parents. It was made clear what the outcome of that case was going to be and the mother returned alone to England. On 11 September 1995 the written judgment and order of the court was provided to the parties whereby what was called temporary and what we might call the interim custody was granted to the father with contact to the mother. That contact included staying arrangements between the mother and the children in England during the school holidays so that over Christmas 1995 the children came to England. While they were here the mother took them to see an English psychologist, a Miss Adams. In January 1996 the children returned to Greece at the conclusion of their contact visit to their mother. According to the judgment of Wilson J, she went with them to Greece and the judge has said that the father had to wrench them away from her at the airport.

On 4 March 1996 there was an application by the mother for custody in the Athens court of first instance and that application was dismissed as also was an application by the father. There was further evidence, but I am not certain whether it was written or oral, by the Greek psychologist, Miss Sofianopoulou. That evidence was supporting the mother as her earlier report had done. The children came back to England for the Easter holidays and again they saw the English psychologist, Miss Adams. They returned to Greece at the end of their Easter holiday with their mother and the judge said:

'. . . the mother returned the boys to the father at Heathrow Airport on the due date, 21 April. He took them, kicking and fighting, into the departure lounge.'

After the summer term in Greece, the children came back to stay for the summer holidays with their mother and in August 1996 the children saw a well-known child psychiatrist, Dr Benady. In September 1996 the mother made an application to the English court and she retained the children beyond the time when she should have returned them to Greece. The father made a second application under the Hague Convention. On 10 September 1996 the welfare officer children were brought to the Royal Courts of Justice where they saw one of the court welfare officers of the Royal Courts of Justice. On 13 September 1996 she made a

report to the court on what the children had said to her. On 1 November 1996 Wilson J refused the father's application under the Hague Convention.

At the hearing before the judge he had before him the statements of each of the parents, the friends and relatives of the father in Greece, two reports of Miss Adams, the psychologist, a report and an affidavit from Miss Sofianopoulou, the psychologist in Athens, a report from the consultant child psychiatrist, Dr Benady, a report of the interview with the children by the court welfare officer. In his judgment the judge found that the retention by the mother was wrongful and, as I understand it, that was not really disputed. He then found that Art 13 applied, both in respect of grave risk of psychological harm if the children were returned to Greece and also, listening to the wishes of the children, he found they were of a maturity sufficient for him to take their wishes into account and that he did, though with greater hesitation than he came to the conclusion on the grave risk of psychological harm. He said in his judgment:

'I have reached the conclusion, but with greater hesitation than that reached in Section D [which is grave risk of psychological harm] that the boys have attained an age and a degree of maturity at which it is appropriate to take account of their fierce objections to being returned to Greece, and indeed, for that matter, that effect should be given to their objections in the absence of countervailing factors.'

He therefore made the order to which I have already referred that the children should not be sent back summarily to Greece under the provisions of Art 12.

The grounds of appeal raise the issues whether the judge identified the correct questions under Art 13 and whether he misdirected himself in his approach to the resolution of the grounds set out in that Article.

I turn now to the Hague Convention. The underlying purpose of the Hague Convention is set out in the Preamble and Art 1 of the Convention. They are not Contained in Sch 1 but have frequently been referred to in earlier judgments. They are not therefore to be found in the 1985 Act, but I am taking them from the judgment of Nourse LJ in Re A (A Minor) (Abduction) [1988] 1 FLR 365. Nourse LJ said at 367:

'The preamble expresses the desire of the States signatory:

". . . to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."

Article 1 states that the objects of the Convention are:

"(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and access under the law of one contracting State are effectively respected in the other contracting state."'

The intention is that the country of the habitual residence of the children should make the decisions as to their future. The framework of the Convention is simple. On an application by the Central Authority of the requesting State, if the matters set out in Art 3 are proved, Art 12 requires the judicial or administrative authority of the requested State summarily to return the children to the requesting State. The part of Art 12 which is applicable reads as follows:

'Where a child has been wrongfully removed or retained in terms of Article 3 and at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'

Mr Munby has suggested that the approach of the court to the Convention was not based upon the welfare of the child but the importance of the international comity between the Member States. I agree however with the submission of Mr Setright that the approach of the Convention is directed to the welfare of the child but the welfare test generally is to be applied in such a way as to enable the courts of the habitual residence of the child to make the decisions as to what are the best interests of that child. In English family law that approach has become one of general application in non-Convention cases where our courts expect decisions as to a child's welfare normally to be made by the courts from whence the child came.

It is equally important to remember that, although the Convention is Draconian in its adherence to the summary return of children whose needs should be dealt with in another jurisdiction, the Convention none the less exceptionally makes provision for specific consideration of the welfare of the particular child with whom the requested State is concerned, where the threshold has been crossed and the needs of that child require the court to take another course than summary return under Art 12. That specific consideration of welfare is only to be found in Art 13. The relevant part of Art 13 is as follows:

'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 --

(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 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.'

There are two stages to a consideration by the court of Art 13. It is first necessary to show a prima facie case and secondly, if so shown, the court has to consider in the exercise of its discretion whether to send the child back. Because of the strict requirements, few cases in England have crossed the Art 13 threshold and it is clearly shown from decisions of this court that it is only in exceptional circumstances that a court should not order summary return. There is nothing therefore which is incompatible with our clear obligation to exercise comity with the other Member States in the consideration by Wilson J and by ourselves of the possibility that this case may come within Art 13. The Convention specifically provides for that eventuality.

In the present case two grounds raised in Art 13 were accepted by the judge, as I have already said: grave risk of psychological harm and the wishes of the children. I turn first to grave risk of psychological harm.

For my part, I am deeply disturbed by the evidence which Wilson J had to consider. That evidence was foretold by Miss Sofianopolou prior to the first hearing in the Greek court in July 1995. Understandably, at the hearing Judge Stefanopolous formed an adverse view of

the mother and the way in which she had kept the children and estranged the children from their father and his family. This view was reinforced by the behaviour of the children when the judge saw them. He made a robust decision, which I do not criticise at all, that the children should move to their father but with generous contact to the mother. That decision was reinforced by Judge Erotokritos in March 1996. On that occasion Miss Sofianopolou gave evidence in accordance with her earlier report and supported the conclusions in the report of Miss Adams in England, with whom she had been in touch. If I may respectfully say so, I can entirely understand and of course do not criticise the decision of Judge Erotokritos in March 1996.

At that stage however there had not been the report of the consultant child psychiatrist, Dr Benady, who did not see the children until August 1996. There had not either been the report of the court welfare officer, from the Royal Courts of Justice in September 1996.

The judge has set out in his judgment a precis of the reports of the psychologist and the child psychiatrist which Mr Munby does not challenge. It is not necessary therefore to go through them in detail. But the reports show a picture of two children cared for all their lives by their mother until July 1995 who moved to their father and for various reasons, including a particularly close attachment to their mother, did not settle with their father and in particular with his parents. Their reaction to the return to Athens after periods of contact have been unusually strong, not to say extreme. They appear, after the failed marriage of their parents, to have become embroiled as so often happens in the acrimony of the adults. In the event the views of the Greek psychologist appear to have been prophetic:

'My report [of 11 July 1995] was prepared after a lengthy meeting with the children. To prepare my report I took with the children numerous psychological tests which led me to the conclusions of my report. I was of the opinion they should remain with their mother, as I anticipated that there would be grave psychological harm suffered by the children if they were separated from their mother and the environment in which they had been living in England.'

That was at para 3. Then she went on in the second part of para 4, having discussed the matter with Miss Adams on the telephone, to say:

'It was quite apparent from our discussions that the psychological harm which I had feared in July 1995, was beginning to manifest itself by March 1996 . . . Dr Adams' report showed to me the concerns that I had for the psychological well-being of the children were well founded.'

In this case the effect of the marital situation, the emotional pull between countries and competing families appears to have been far more serious than usual. As Dr Benady has pointed out in his report, regarding the report of Jennifer Adams:

'Jennifer Adams in her very good reports demonstrates that [E] in particular is showing increasing levels of anxiety and that the enforced separation from their mother amounts to continuing trauma to the children . . . I do accept that they have a high level of anxiety.'

He then said about A:

'He has marked angry feelings towards his paternal grandparents . . . My assessment revealed two boys who had very good early childhood experiences with their parents and that the marital separation has helped to make them feel very anxious . . . I believe that there is a high risk of their developing serious personality problems and behavioural difficulties if they are returned against their will to Greece. I also believe that they would accept a solution

that was arrived at by both their parents and they would take this as a clear guideline. Unfortunately the initial Greek court ruling to try to get the boys to develop a better relationship with their paternal family has backfired badly and is only serving to alienate the boys.'

There is, in my view, from the evidence an ascending pattern of difficulties, anxiety and distress from the period of transfer of residence to the father and which is shown in the reports and in the instances of the handover after periods of contact, and this has continued over the last 12 to 18 months. The present situation is extremely worrying.

Mr Munby has argued that either Wilson J did not himself address the right question or if he did address it he did not have the evidence to support his conclusion. He has reminded us that it is not our function to be concerned with the long-term welfare of these children. We have a much narrower role to play and one which extends only until the Greek court is again seized of the issues relating to the children. He has made inquiries of the Greek court to see how soon a case could be heard. The Greek court would be in a position to set down and hear the case within 20 days of the children's return to Greece. This court is not concerned, however, with the offering of undertakings and the need to tailor them to a period until the court of the habitual residence takes over the case. No undertakings are sought or offered in this case. That is what happened last time. This time the mother is settled in England and does not have a home in Greece nor is the father offering her one. According to her statement, she has little money and is in debt from earlier litigation over the children. The reality of this case, despite Mr Munby's arguments to us that the mother refuses to return, is that the children, if they return, will be likely to return alone and inevitably go back to live with their father and paternal grandparents pending the hearing by the Greek court. As Nourse LJ wisely reminded us in Re A, (above) at 373 that in considering on the return to the country of the child's habitual residence whether remote as opposed to proximate practical consequences were to be considered he would expect it to be answered by an application of probabilities and common sense. The probabilities surrounding the proposed return are clear. No practical arrangements of any sort have been suggested by the father other than the unstated but obvious return to him. These children are old enough to be aware that a return to Greece would be a return to their father's family. Accepting as I do the practicalities of the position, the timing of the hearing of the Greek court is in my view irrelevant.

Mr Munby argued that the medical and psychological evidence was not focused on the right questions as to the short period between the return to Greece and the assumption of jurisdiction by the Greek court. Although the reports are comprehensive and more widely based than the immediate question whether the children should return to Greece, the judge and this court have had no difficulty in extracting the relevant information about the potential effect of the return on the children, particularly since in this case the return to the country and to the other parent is inextricably entwined. The situation today is very different from the first wrongful retention because of the evidence of the present state of mind of the two children. Their wishes and feelings and what might have been the short-term adverse effect of separation from their mother could properly be overridden in 1995. In my view it is far, far more difficult to do so now in the light of the reports before the court. An additional factor is that the father and his family do not accept that the children have any psychological problems. Consequently if the children do go back they would not receive any help in the undoubtedly difficult period of adjustment. There is cogent evidence supporting the assertion of grave risk of psychological harm if the children are returned at this stage.

I turn now to the wishes of the children. The second issue under Art 13 relates to the wishes of the children. The report of the court welfare officer as to the views and concerns of the children showed - she asked the children about why life was better in England that they did not like the school in Greece. They were antipathetic, very sadly, to their paternal grandparents. They expressed a view they wanted to be with their mother, but:

'[E] did not think life in Greece would be better if his mother was there as "I don't like school, my grandparents or dad", he then acknowledged he sometimes likes his dad. [A] said: "No, it wouldn't be better even if mum was there: I just don't want to be there. I hate it there".

Both children told me they frequently cry because they are so unhappy in Greece.

I asked the children how they would feel if the judge decided they should return to Greece and [A] said: "If they even tried to put me on a plane, I wouldn't go back. I'd feel angry. I'd feel mad and sad". [E] said: "I'd kill myself'. [A] said: "So would I".

Both children said they worried about having to return to Greece and sometimes they did not sleep very well.'

It goes on for a number of pages, but that gives the flavour of what the children were saying about their views. Mr Munby suggested that the objections of the children were not directed to Greece but to leaving their mother and returning to their father and should therefore be discounted. He reminded us that we had to be careful about what the children said since their allegations about the grandparents were on the face of them unfounded and found by the judge to be untrue. The accusations made against the grandparents gave the children's views little or no value. Mr Munby also sought to persuade us that they were too young for their views to be taken into account. But if any weight at all was to be given to them it should be slight and should not be sufficient for the judge properly to exercise his discretion not to return them.

The untrue allegations made against the grandparents must of course lead the court to view the children's answers to the court welfare officer with some reserve. It does not in this case, in my view, detract from the underlying anxieties revealed by the children in their approach to the court welfare officer's questions nor to the strength of their feelings. As it happens E did express views about schooling in Greece and a desire not to be brought up there. But they were secondary to his high state of anxiety and distress about the return to his paternal family. In the light of my conclusion on the question of grave risk that it is impossible in this case to separate the return to Greece from the return to the father, this distinction raised by Mr Munby on the exceptional facts of this case does not arise. There are situations where the objection of the child to the return to the country and to the parent are inextricably entwined. This in my view is one of those cases. Realistically, the boys know that if they go back they go to the paternal family. As I have already said, no other proposal has been made to us and the combination of Greece and the paternal family is one which at this time neither of these children, and primarily E, can tolerate. It has never been suggested that the boys be parted and therefore, in my view, E and A have to be considered together.

The children are very young and the judge was right to be hesitant to accept their views as of sufficient maturity within Art 13. He did have, however, evidence from a child psychiatrist and from an experienced court welfare officer about their degree of maturity. I have myself some hesitation about the younger boy, but the elder boy at least has, in my view, to be listened to. The objections of E in the context of his genuine psychological state are, in my view, well founded and should be given weight.

I turn now to the exercise of discretion. Having concluded that the judge was right on the issues of grave risk of psychological harm and on the wishes of the children, I find it difficult to see how this court can fault his exercise of discretion. He set out the relevant considerations. The children are habitually resident in Greece. They have been wrongfully retained by their mother for the second time. She is clearly in breach of the Convention. She litigated with the father in Greece and a competent Greek court made the decision that the children should live with the father in Greece and have generous staying contact with the mother in England. By her actions she has frustrated the purpose of that court order which is a matter which an English court takes very seriously. The judge was very critical of her and took carefully into account her reprehensible behaviour. He was right to do so. The behaviour of the offending parent is of crucial importance and the reliance by a mother on grave risk of psychological harm created by her, if accepted and relied on by the court, would drive a coach and four horses through the Convention (see Re C (A Minor) (Abduction) [1989] 1 FLR 403, 410). The conduct of the mother second time round is equally to be criticised and she cannot improve her position by doing the wrong thing twice. Indeed it makes it worse. Putting to one side for a moment the very real problems facing the children, the mother's actions require the deepest disapproval of the English court. If it were a matter of the conduct of the parents and not the situation of the children, these children would be sent back to Greece at the end of the Christmas contact order.

The conduct of the abducting parent is, as I have already said, crucial and in most cases determinative. It cannot however exclude the rare case where the court has to look past that conduct to the manifest needs of the child concerned. Article 13 gives the requested State this limited but none the less important opportunity to look at the specific welfare of these children at the time when the application for summary return is made. This is such a rare case. The grave risk to these children of psychological harm if they are directed to return at this stage to Greece is of greater consequence than the importance of the court marking its disapproval of the behaviour of the mother by refusing to allow her to benefit from it. Whatever may be the underlying causes, which ought to be investigated for the sake of the children, there is compelling evidence from several professional sources, both from Greece and from England, so far uncontradicted, as to the high state of anxiety of both children, especially E, and the grave risk of returning them to Greece to await the outcome of further Greek proceedings. This court has no grounds upon which to express any criticism whatever of the two decisions of the Greek courts nor any concern about the way in which this case might in the future be dealt with in Greece. We naturally assume that the children will be dealt with in an admirable way in the future. The issue is not how the Greek courts might deal with the case but the effect on the children of their return to Greece which on the present facts in practical terms means returning them to the paternal family. That is a risk which the judge felt could not be taken in this exceptional case at this stage and I agree with him.

On the first ground the judge had ample evidence before him upon which he was entitled to find that there was a grave risk that the return of E and A to Greece would expose each of them to psychological harm and in the exercise of his discretion to refuse to return them. He was also entitled, on the basis of the evidence before him, to refuse to order the return of the children on the basis of the views of the children, particularly E. I can see no error in the approach of the judge. I agree with his excellent judgment and I would therefore dismiss the appeal.

I should like to make one or two further observations however. It should be obvious from what I have already said that the decision of the judge and the upholding of his order by this court is no indication of approbation of the mother's conduct, indeed the contrary. It is also important that the father and his family understand that this is not the end of the matter.

There will be no order for summary return of the children to Greece. But there has been no decision on any question of residence or custody other than on a strictly interim basis. The court has only made a prima facie decision on the documents and arguments of the advocates that the children should not go back at once. The way forward is that the English High Court through the machinery of wardship will hear the case in depth and consider evidence supporting the competing claims of the parents, assess and evaluate the psychiatric and psychological evidence of the experts and the recommendations of the Official Solicitor who will act independently on behalf of the children. After hearing the evidence and the arguments the judge will decide whether the children should live in England or in Greece. In making that decision the judge will be keenly aware of the importance to be attached to the children's Greek heritage and how best it may be both preserved and fostered in the future.

Subject to any requirements by the Official Solicitor to obtain a report from any expert he may wish to instruct and to make the relevant inquiries in Greece, this case deserves a speedy hearing and should be given priority in listing in the Family Division. It clearly must be heard by a High Court Judge.

PILL LJ: I agree. Wilson J was under a duty to consider the provisions of Art 13 of the Hague Convention as incorporated into English law. That involved considering whether there was a grave risk that the return of the two boys to Greece would expose them to physical or psychological harm or otherwise place them in an intolerable situation. If he so found the judge had a discretion which enabled him, if he thought it right, to refuse to order the return of the children to Greece. Article 13 requires the judge in performing those tasks to consider the situation which actually exists in the light of events which have brought it about.

The case has, as the trial judge recognised, exceptional features. Butler-Sloss LJ has set out the background history. The children were at the time of their wrongful retention in the UK habitually resident in Greece within the meaning of that term in Art 3 of the Convention. The children have moved between England and Greece in the last 2 years and have spent substantial periods of time in each country in circumstances which Butler-Sloss LJ and Wilson J have described. The available expert evidence, Greek as well as English, has also been considered by the trial judge and by this court. The circumstances in which the children would be likely to return to Greece, if they do return, have also been considered and it is a feature of this case, though not in itself exceptional, that no practical proposals or suggestions have been made as to how their mother might sensibly go with them. Further, the father, in spite of the medical and psychological evidence, declines to recognise the children's problems. These factors are, against the background of events in this particular case, relevant to the consideration of the existence of the risk of psychological harm upon a return and what is likely to follow immediately upon the return by way of living arrangements. Considering the situation as it is, the judge was in my view entitled on the evidence to decline to order a return to Greece. He was entitled to hold that there is a grave risk that the return to Greece in itself and the immediate consequences of such a return would expose the children to psychological harm within the meaning of Art 13. The judge took account of the appropriate factors and I agree that in his discretion he was entitled to dismiss the father's summons.

I too would dismiss this appeal.

MUMMERY LJ: I would also dismiss the appeal for the reasons given by both my Lords.

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