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[30/03/1999; Court of Appeal (England); Appellate Court]
Re M. (Abduction: Leave to Appeal) [1999] 2 FLR 550

IN THE SUPREME COURT OF JUDICATURE SLJ 99/5106

COURT OF APPEAL (CIVIL DIVISION)

Royal Court of Justice

30 March 1999

Butler-Sloss L.J.

In the Matter of M. (A Minor)

ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION

MR HENRY SETRIGHT (Instructed by Dawson Cornwell, 16 Red Lion Square, London, WC1R 4QT) appeared on behalf of the Applicant (Plaintiff).

The Respondent (Defendant) did not attend and was not represented.

J U D G M E N T

(As approved by the Court)

LADY JUSTICE BUTLER-SLOSS: This is a renewed application for leave to appeal under the new procedure of the Court of Appeal where I considered the papers and gave a provisional decision refusing leave in which I indicated I was minded to refuse the application. Mr Setright has renewed the application in open court and with his usual competence and discretion has produced an excellent skeleton argument and a short but, as always, powerful oral submission for which I am very grateful.

This is an application for leave to appeal against the refusal of the President, Sir Stephen Brown, to return a child under the Hague Convention to South Africa, the mother having acted unlawfully in removing the child from South Africa contrary to the Convention. As the President has pointed out, Article 12 would bite and the child would have to return unless any of the provisions of Article 13 were found to apply. The President found on the facts of this case that Article 13(b) did apply and consequently in the exercise of his discretion, having found the facts consistent with Article 13(b), he came to the conclusion that he ought not to order the return of the child to South Africa.

The child is a little boy aged 2½, being born on 22 September 1996, of mixed parentage - his mother being English and his father being a South African Zulu. It appears to be, according

to Mr Setright, the first case with these particular circumstances applying, that is to say between the United Kingdom and South Africa.

The evidence before the judge was unusual. It was unusual in this respect, that the judge heard oral evidence both from the mother and from the father. That unusual circumstance, which ought not to occur in the majority of cases, was the turning point for the judge because he heard the oral evidence of the mother, the oral evidence of the father and he also heard some evidence from a consultant psychiatrist. There was also a considerable bundle of supporting evidence from the mother. The President accepted that there was a considerable degree of violence by the father against the mother and in particular that evidence of the mother was corroborated by the affidavit evidence of other witnesses, including an independent witness, a social worker in South Africa. Perhaps the extreme example of that, which was found by the judge to be true, were the extensive bruise marks on the mother's back which were photographed. As far as I understand it, the President was shown a photograph which showed what the President called "quite horrifying marks on the back of the mother". There was further support for other incidents raised by the mother.

The President was satisfied that the child himself was not at risk from the father but that this was a child who at the age of 2½ was wholly dependent upon his mother and could not be parted from her. There were other aspects to this case which it is not necessary to ventilate today about the position of the father in South Africa and therefore the perhaps inverse power structure between the father and the mother, as is sometimes put in some of the feminist literature, but it does appear, according to the President, to exist in this case.

I have little doubt that if there had not been oral evidence this would have been one of those borderline cases in which a court might have been in some doubt whether or not this child should be returned to the country of his undoubted habitual residence, that is to say South Africa. On the papers, speaking for myself, I would have been inclined to send this child back and to say that on the face of the papers the Article 13(b) proviso might or might not apply but it would on balance be right to send the child back. I am not sitting as a judge hearing an application for leave in the same position as the trial judge - in this case the President - who unusually heard the oral evidence and formed a view on this specific case that it would be wrong to send the child back. Once oral evidence is given there is a wholly new dimension to the case and it takes it out of the normal Hague Convention application which is intended to be summary and swift and without oral evidence. I recognise and take on board the strong points made by Mr Setright that this may give the wrong message to the central authority in South Africa and I would not wish this case to be seen as typical of the cases coming before the English court. The English court as part of the United Kingdom is as anxious as any other court of any of the contracting states to obey not only the wording but the spirit of the Convention. I would say that this court, both at High Court level, at Court of Appeal level and indeed, of course, the House of Lords, is a good supporter of the underlying spirit of the Hague Convention that children should be returned to the country of habitual residence in order that the court of the habitual residence should decide where and with which parent the child should spend its future minority. But the Convention, which requires children to be returned to the country of habitual residence, has provided by Article 13 a certain number of instances where the specific welfare of the child predominates over the general welfare that the child should be returned to the country of its habitual residence. The President, with his enormous experience, has decided that this is such a case. He has made sufficient findings of fact, albeit with a broad brush, which Mr Setright has quite accurately pointed out. I have to consider in this application for leave: What are the prospects of success if I give leave? The Court of Appeal would be faced with this broad brush, with some criticisms that could be made of the failure of the President perhaps to deal with some of the details, but the underlying decision of the President on the facts and on

his assessment of risk and on the exercise of discretion to return the child are, in my view, unappealable when one looks at the entire case, even if Mr Setright, with his customary expertise, can chip away at the fringes of the President's judgment. Consequently, since I think that a full court would be most unlikely to upset this decision, I do not think that it is right for me to give leave and to give leave which would be for the sole purpose of exploring what I might call the relationship between South Africa and the United Kingdom. It would not be right to do that. Just occasionally we do give leave in order to ventilate issues. I do not believe this is one of these cases. However, I would like the South African Central Authority to know that this court is as anxious as the South African court is to comply with the spirit of the Convention and the unusual aspect of this case, particularly the oral evidence, is really what has put this case outside the way in which it would normally have been dealt with which would have been to send it back to South Africa.

So I do refuse leave on this renewed application for the reasons which I have given and I think it might be helpful if I direct that there should be copies made of my judgment refusing leave at public expense so that a copy could be sent to the South African authority with, I hope, the explanation that this is an unusual decision and is not representative of the English approach to the Hague Convention.

Order: Application refused; legal aid taxation; copies of the judgment to be provided at public expense to the applicant respondent and the central authority, that is to say our central authority, so that it can be transmitted to the Central Authority of South Africa. (This order does not form part of the approved judgment)

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