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[18/12/1992; Full Court of the Family Court of Australia at Sydney; Appellate Court]
Gazi v. Gazi (1993) FLC 92-341, 16 Fam LR 18

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Ellis, Nygh and Ross Jones JJ.

15 and 18 December 1992

Appeal No. EA85 of 1992

File No. SY9127 of 1992; (1993) FLC 92 34; 16 Fam LR 180

IN THE MARRIAGE OF:

Wlliam Guillaume Gazi (previously known as Al Ghazi)

Appellant/Husband

-and-

Julia Ann Gazi (previously known as Al Ghazi)

Respondent/Wife

REASONS FOR JUDGMENT

APPEARANCES:

Mr W. G., appeared in person.

Mr Pertsinidis, Solicitor, appeared for the Central Authority.

There was no appearance by or on behalf of the respondent wife.

JUDGMENT:

This is an appeal from the refusal of Moore J to grant a stay of the operation of orders made by her on 14 December 1992. The thrust of those orders was that, pursuant to Article 12 of the Convention on the Civil Aspects of International Child Abduction, the children, P.G. and I.G., be returned forthwith to J.G. and that she be permitted to leave Australia with the said children for the purpose of returning with them to France. The appeal relates only to her Honour's refusal to grant a stay of the operation of her orders and is not an appeal from her Honour's substantive decision. Thus, the only question for our determination is whether her Honour erred in the appellate sense in the exercise of her discretion in refusing to grant the stay.

We do not have the benefit of the reasons of her Honour for arriving at the conclusion not to grant the stay but that absence does not of itself indicate that the discretion has been erroneously exercised. Because of that fact, however, this Court must examine the circumstances itself for the purposes of determining whether those circumstances show that the discretion was erroneously exercised. We do, however, have the reasons of her Honour in relation to the substantive decision. As appears from those reasons, the husband and the wife commenced living together in France in 1979. In 1981, the husband migrated to Australia where he was joined later that year by the wife. They married in Australia on 8 December 1984 but returned to France in June 1989 to enable the husband to participate there in a business venture.

Whilst in Australia, the two children, the subject of the orders, were born; P. on 29 June 1985 and I. on 17 December 1988. A third child was born on 20 January 1991 in France and has remained in the care of the wife. However, P. and I. travelled to Australia with the husband on 24 October 1992. Prior to that date, the wife approached the French Court in Montpellier seeking a separation order. On 19 October 1992, an order was made in that Court which permitted the wife to live separately from the husband and with the children.

Within one year of the removal of the children to Australia, the Director-General of the Department of Community Services, a State Central Authority appointed, pursuant to Regulation 8 of the Family Law (Child Abduction Convention) Regulations, brought proceedings seeking the return to France of P. and I. alleging that they were removed from France in contravention of the Convention on the Civil Aspects of International Child Abduction.

At the hearing of those proceedings before the learned trial Judge, there was an issue as to whether the children's mother consented to or acquiesced in the children's removal from France. In her reasons for judgment, the trial Judge referred to the evidence of both parties on this issue. In the ultimate, she rejected the husband's evidence that the wife so consented or acquiesced as being highly improbable and, at page 5 of her reasons, set out seven factors which, in her view, supported that conclusion. She thus found that the removal of the children from France by the husband on 24 October 1992 was wrongful and without the consent of the wife.

Whilst we have not had the benefit of a copy of a Notice of Appeal from the substantive decision of her Honour, the husband has submitted to us that, at the hearing before her Honour, he was denied natural justice in that he was given no opportunity to be heard or to cross-examine and that he did not consent to being deprived of those opportunities. He further alleges that he was denied an adjournment in circumstances which resulted in him not being legally represented as and from 11 December 1992. He further submitted that the trial Judge was in error in finding that there was an interim order for custody in favour of the wife and that the trial Judge was biased against him in the legal sense.

It would appear from an affidavit of the husband sworn on 14 December 1992 that he was originally represented by a solicitor, Sandra Maude, and Ms Andrea Cotter-Moroz of counsel. On or about 27 November 1992, he said that he terminated the services of both Ms Maude and Ms Cotter-Moroz and engaged another solicitor who instructed Mr Hodgson of counsel. The matter came on for hearing on 10 December 1992 on which day, it would appear that the proceedings were adjourned to enable the applicant to file additional material. That evening, the husband alleges he received for the first time, by facsimile transmission from his former solicitor, an account in the sum of $9500 including counsel's fees as opposed to an anticipated account of approximately $1500. As the account was not paid by the husband, on the basis of a ruling of the New South Wales' Bar Association, Mr Hodgson informed the husband and the Court on Friday, 11 December 1992, that he was not able to continue to act for him because of fees outstanding to counsel who had previously appeared for the husband. If those assertions are correct, it may well be that the Bar Association should re-examine the relevant rule in the light of injustices which its application may work. The proceedings were then adjourned to Monday, 14 December 1992 by which time the husband had received certain advice as to how to conduct his case. He has put to us that he desired to cross-examine the wife on a number of matters, including an allegation that she was ill and was undergoing psychiatric treatment. He believed, on the basis of the advice he

received, that he would be able to cross-examine the wife, give evidence himself and be afforded an opportunity to address the Court. He informed us that he was not able to cross-examine the wife, to give evidence himself or address the Court and submitted that as he was not represented, the trial Judge should have assisted him, at least in relation to procedural matters. In addition, he submitted that the application should have been further adjourned to enable him to obtain advice and legal representation.

It is apparent from a reading of the transcript of the proceedings on 14 December 1992, that the trial Judge first read all the relevant material. That material would have included the affidavits filed, including those of the husband and that handed up by him in Court on that day. She then invited the parties to address her, an invitation which was accepted by the husband who completed his address by submitting that the application should be dismissed.

The primary purpose of the Convention, the relevant Legislation and Regulations is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return to the country of their habitual residence of children who are wrongly removed or retained in another country in breach of rights of custody or access. See Convention, Articles 7 and 11, Family Law (Child Abduction Convention) Regulations, reg.19(1). Accordingly, whilst there may be cases in which it is appropriate to allow cross-examination of deponents of affidavits, such cases would be rare. The majority of proceedings for the return of children, pursuant to the Convention, should be dealt with in a summary manner and cross-examination of deponents of affidavits would not be appropriate. See: Re E (A Minor) (Abduction) (1989) 1 FLR 135 at 142 per Balcombe LJ; P v P (Minors) (Child Abduction) (1992) 1 FLR 155. The instant case falls into the latter category and the trial Judge properly adopted a summary form of procedure. In so doing, she did not deny the husband a proper hearing of his claim for custody of the children or an opportunity to cross-examine the wife on matters referred to by him. That cross-examination can take place at a hearing of his claim for custody of the children in the appropriate Court after the resolution of proceedings brought pursuant to the Convention. In this case, the appropriate Court is clearly the French Court.

No cogent reasons were advanced to satisfy us that these proceedings were, in any way, pre-judged as alleged by the husband, that the trial Judge was biased in the legal sense against him or that she erred in refusing his application for a further adjournment.

We have had the opportunity of perusing the order of the French Court which clearly permitted the wife to live separately from the husband with the children. That order was made on 19 October 1992 and although it may well be that her Honour was incorrect in describing the order as one for interim custody of the children, it gives her a right to determine the residence of the children and therefore confers upon the wife rights of custody within the meaning of Article 5(a) of the Convention.

It is not disputed that the wife approached the French Court in Montpellier in October 1992 to seek a separation order. In addition, it is clear that the wife had some fears that the husband would remove the children from France without her prior knowledge as evidenced by her correspondence prior to 24 October 1992 with the Law Society of New South Wales. That objective evidence, together with the other objective evidence referred to at page 5 of the trial Judge's reasons, clearly supports her rejection of the husband's evidence relating to the issue of the wife's consent to the children accompanying him to Australia as being highly improbable and her finding that the removal of the children from France by the husband was wrongful and without the consent of the wife.

Her Honour further found that irrespective of the relevant Regulations for the reasons set out by her at page 6 of her reasons, that the appropriate forum for any dispute relating to the custody of the children was France. That conclusion was clearly open to her Honour having regard to the residence of the family in France since 1989 and the commencement of proceedings in that country. Even if the defence of acquiescence or consent had been made out, the Court still has a

judicial discretion to order the return of the children to the country of residence as the more appropriate forum: In re A (Minors) (Abduction: Custody Rights) (No. 2) (1992) 3 WLR 538.

In determining whether the trial Judge erroneously exercised her discretion by refusing to grant the stay, it is appropriate to consider the husband's submissions to us on the basis that they outline the grounds which he would incorporate into a Notice of Appeal. On that basis, it would appear that the proposed appeal is not, however, based on substantial grounds and the appeal itself could be seen as a delaying tactic. Further, it is appropriate to take into account the summary nature of the proceedings and the purposes of the Convention. Accordingly, we are of the view that the circumstances demonstrate that the discretion was properly exercised and that the trial Judge did not err in refusing to grant the stay.

Having regard to the orders made by us on 15 December 1992, we now make the following orders:-

1. That the appeal be dismissed.

2. That orders numbered 2 and 3 made on 15 December 1992 be discharged.

3. That the Central Authority forthwith advise the Australian Federal Police of the discharge of the orders referred to in Order 2 hereof.

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