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[04/04/2000; High Court (England); First Instance]
Re M (Abduction: Conflict of Jurisdiction) [2001] 1 FCR 81; [2000] 2 FLR 372; [2000] Fam Law 592

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

4 April 2000

Dame Elizabeth Butler-Sloss P.

In the Matter of re M. (Abduction: Conflict of Jurisdiction)

Counsel: Rosenblatt for the mother; Henry Setright for the father.

Solicitors: Osmond Gaunt & Rose; Dawson Cornwell.

DAME ELIZABETH BUTLER-SLOSS P: This is a case which has now assumed what in many ways are quite unnecessary complications. A decision has to be made whether or not the court which decides immediately what happens to C is the English court or the Spanish court. In the long term a decision may be made by the English court, but it seems to me that that would have to be at the request of, and by the decision of, the Spanish court. I will in a moment explain a little further.

The child concerned, C, was born on 10 February 1993. He was born in England. His parents are both from the UK, as far as I know. They were, however, married in Gibraltar where the father has been engaged in business, and shortly after the birth of the child in England they went to live in southern Spain in Malaga. The parties unfortunately did not stay together and in due course the child went with the father to England. There was a dispute between the parents as to whether or not the child was taken or went. It matters very little what the background to this is and I ought to say perhaps that when the parties separated in 1998 certainly for a period the child was in the care of the father. The mother consented to the child going with the father to England for holidays. They legally separated in January 1999 and at that time the mother was given temporary residence of the child while the child was in England. The mother then obtained another order in Spain that the child should be returned to her. The child was not returned to her by the father. The child remained in England. During the early part of 1999 the mother issued the first application under the Hague Convention on the Civil Aspects of International Child Abduction 1980.

On 15 March 1999 the parties came to an agreement before Bennett J whereby the mother's application under the Hague Convention was withdrawn. The mother was to have contact with C and it was accepted, without there being an order, that C would live with his father.

What happened since March 1999 is unclear, save to say that the father went back to Spain at some stage. The mother believed that he was back to live. The father has given short oral evidence to me and has indicated he went back for a few days to tidy up his affairs. Whatever may be the truth of that, the mother took proceedings in Spain within 3 months or so of the English consent order. Those proceedings came before a judge in Fuengerola on 1 and then 9 June 1999. The father was undoubtedly advised by a female Spanish lawyer and appears -- according to the copies of the court documents -- to have had a male Spanish lawyer act on his behalf in the proceedings. Mr Bermudas appears also to have acted for him in earlier proceedings in January 1999. He appears to have acted for him on 9 June 1999 and his name appears also on the court order which was handed down by the judge on 26 October 1999.

The father has told me in his oral evidence that he took the consent order of Bennett J to Spain. He gave it to his lawyer Mrs Cabrera, the female lawyer. She, it appears, took it, according to him, to the judge. The judge required this to be done in writing and according again to the evidence of the father, the female lawyer went back to the judge on the following day at the beginning of June 1999 and handed her written submissions and the copy of the court order to the judge. None the less, according to the father the police came for his son and

the son was taken from him and handed to his mother. The judge appears to have seen the little boy, who is aged 7, at the beginning of June 1999. The judge records, in his written judgment -- I am quoting from the English translation -- on findings of law, that:

'With regard to the custody of the minor, given the contradictions and lack of clarity of the pleadings, it is the opinion of the minor himself which is considered most relevant in reaching a decision with regard to custody. Following an interview with the minor, it became evident that he did not show a preference for either of his parents as both treat him very well, however he does show preference for his place of residence and would rather that be in Spain instead of England and as it is the mother who resides on a continuous basis in Spain and the father who works in England, it is decided that the custody of the minor should be given to [the mother].'

Then there was contact arranged by the judge. What is of significance in the court order and the findings of law is that no mention whatever is made of the consent order only some 3 months before the judge heard the case in June 1999 in which the father was, with the consent of the mother, to have the child to live with him in England. It is possible, as Mr Rosenblatt for the mother has said, that the judge was shown it and decided it was no longer relevant. It is equally possible that the judge was never shown it and by some error, either intentional or unintentional, the judge was left without what in this jurisdiction would have been thought to be an essential piece of information.

I have to say I am disturbed by the fact that the judge may have been deprived of important information when he came to the conclusion that 'contradictions and lack of clarity' pushed him back to the opinion of the minor; and that had he known of this order, he might have wanted to know why the mother agreed in March 1999 and what were the considerations that changed her mind so that she was then asking for custody as soon as June 1999. There may be significant changes in this case but I do not know what they are, because the contradictions and lack of clarity which it is clear the judge felt in Spain in June 1999 are almost equally felt by me in April 2000. I do not know where the truth lies. In particular there is an affidavit sworn by the father, in which he says, somewhat to my astonishment having heard him give evidence, that he had moved to Portugal for his work. That was the evidence that he gave in his affidavit to this court quite recently, and according to him that is an inaccurate account of what happened. He says he only went to Portugal to captain a boat from one place to another because that is one of his occupations (though not his primary occupation) and he would not have done that had he had the boy with him. In the absence of having the boy with him he had the opportunity, presumably, to earn some money and consequently to do something which, as a sailor, he would also enjoy. So there is a very marked conflict as to whether the father was returning to live in Spain and/or Portugal, or whether he was based, as he says he is now based, and now unemployed, in England. He says the loss of his job is largely due to the fact that he spent so much time in Spain trying to get his son back that he lost his previous employment.

These are all matters which are no doubt seriously in controversy and where the credibility of both the mother and father are obviously matters for some degree of investigation either in Spain or in England.

So we have a court order in England by consent. We have a court order in Spain where the parties were present at one stage, where there were lawyers on the record acting for both parties (although the father says he has no idea who Mr Bermudas is). He appears on the record to have been acting for him. The father's Spanish lawyers have appealed the order of 26 October 1999 to the Appellate Court in Spain. What they have not yet done is register the consent order of 15 March 1999 of Bennett J. That they would be able to do in the next few weeks. One is somewhat surprised that they did not do it long ago, but they can do that in the next few weeks.

I am told that a registration under the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children 1980 would take about 8 weeks for a senior court to consider, whereas the appeal from the judge in Spain might take a year or in excess of a year. There is a defence, Mr Setright reminds me, to the registration of the English order which would be a change of circumstance and the subsequent order of the Spanish court. So the Spanish court will be in the relatively near future seized of the question of the incompatibility of an English court order by consent with the parties here, and a Spanish court order where the parties appear to have been represented, which is diametrically opposed to the English order.

The Spanish Appeal Court has now been asked to look at the English order so that order (if it still exists) will be the subject of the appeal. Those facts are highly relevant to whichever Spanish court may deal with this case. It does not deal, however, with the issue before me because the mother issued her second Hague Convention application. The reason she has done so, quite simply, is that under the order of 26 October 1999, the father was given the opportunity to have the child for part of the school holidays and he exercised that right by taking the child from Spain to England. Then the child was expected to return to Spain for his new school term on 10 January 2000. On 9 January 2000 the father telephoned the mother and said he would not return C. Whatever may be the exact details of how this happened, since Christmas 1999 the boy has been in England with his

father. At one level that may be under the consent order; at another level it is in direct breach of the Spanish order.

Mr Setright, with his customary ingenuity, has suggested that the court might consider that since there is a danger at least that the Spanish court in October 1999 made an order in error of all the facts, the retention of the child in Spain under that court order could not be said to be the child acquiring an habitual residence in Spain pending the hearing of the appeal. That is an ingenious and attractive argument but on the face of it the Spanish order is perfectly correct. It is in order. Both sides attended. It appears to be exactly the sort of order which it is the duty of an English court to follow.

Within the confines of the Hague Convention it is absolutely clear to me that this child was retained in England by his father in breach of the rights of custody of the mother; indeed by our interpretation of the Convention, of the court. I have no option, since Art 13 patently does not apply and Mr Setright has not wasted his breath to suggest it does (although his client does) that I have no alternative but to return the child, under Art 12, to Spain. That is the order that I must make. I want it to be clearly understood, however, that I do not do so because I think the matter is easy because the Spanish court will have to grapple with the inconsistency and the incompatibility of the English decision and the Spanish decision. This child does appear to have acquired, from time to time, different habitual residences. But it seems clear to me that the habitual residence of the child since June 1999, and certainly since October 1999 (and the court order of the judge in southern Spain) is clearly Spanish. Consequently, there is an obligation on the English court to return this child to the jurisdiction of the State in which the child has habitual residence.

I have taken a little time to set this out, and to set out my concerns, because I think it proper that my judgment should be provided at public expense, and translated at public expense, for the benefit of whichever court will next be looking at this case in Spain. It is my duty as an English court to hand over the immediate responsibility for this child to the Spanish court and it is a matter for the Spanish court to investigate what the effect is of the English order and the subsequent Spanish order. I do not rule out the possibility (though I have no idea of the outcome of this) that the Spanish court, one of these days, may say, 'Yes, this child should come back to England', but that is a matter for the Spanish court to decide -- whether the English court should take over or should the Spanish court continue to deal with it. Under the Hague Convention I am not dealing with the merits of the case. I am most anxious that both the mother and the father understand that the merits of this case are irrelevant to me, because the merits of this case must be taken and dealt with by the appropriate Spanish court relating to the various steps which may be taken either by the father or by the mother in Spain.

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