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[03/04/2001; High Court at Wellington (New Zealand); Appellate Court]
Secretary for Justice v N., ex parte C., 4 April 2001, High Court at Wellington (New Zealand)

IN THE HIGH COURT OF NEW ZEALAND, WELLINGTON REGISTRY

CP79/01

BETWEEN M.N. (Mother, Plaintiff) and E.C. (First Defendant) and THE SECRETARY FOR JUSTICE as the New Zealand Authority ex parte E.C. (Second Defendant)

Hearing: 4 April 2001 (In Chambers)

Counsel: J.A. Dean for Plaintiff, C. Pidgeon QC with A.A. Hopkinson for Defendants

Judgment: 4 April 2001 (In Chambers)

JUDGMENT OF ELLIS J. (IN CHAMBERS)

Before me are various applications following the order made in the Family Court pursuant to the Guardianship Amendment Act 1991 that two young children be returned to Chile.

The brief facts are that the plaintiff arrived in New Zealand some little time before last Christmas with her two children I., who was born on 15 August 1997, and D., born on 12 August 1999. She came as part of a holiday visit and was followed by her husband, the first defendant. I understand that the wife's airfare was paid for by a friend and she was given a return ticket. This is relevant to the question of domicile. When it came for the family to return to Chile, the plaintiff refused to go and wished to keep the children with her in New Zealand where her mother and extended family live. The husband returned to Chile where he is a naval officer at Punta Arenas, which is a naval base at the southern extremity of Chile. It is a town I was told by the Chilean Consul of perhaps 50,000 people. It is the capital of the region and has full Court facilities which I shall refer to later.

The father applied for an order that the children be not removed from New Zealand and that was granted. He then applied for an order under the 1991 Act that the children be returned to Chile. That was made by consent on 16 March 2001. The father applied for a warrant to remove the children and air tickets were obtained for 30 March 2001. The Police were unable to execute the warrant and the mother instructed her present solicitors to take proceedings to overturn the order that the children return to Chile. On those instructions Mr Dean has applied for leave to proceed on short notice, which was granted by consent, and for a stay in the execution of the warrant. An urgent hearing was accordingly afforded the parties for today, and again by agreement, the hearing has proceeded as an appeal against the consent order. Because of the way the matter has developed, I am prepared to look at the matter afresh, because although orders made in the Family Court have an element of discretion involved, in this case the order was made by consent and so there was no reasoned decision in the Court below.

The first matter for consideration is the question as to what is the habitual residence of these two children, that being the jurisdictional basis for the operation of the Hague Convention set out as a schedule to the 1991 Act. This in turn is a question of fact and the facts are not really in dispute. The children were born in Chile, their parents have been residing together in Chile since 1993 and were subsequently married and the children born. They came to New Zealand on a visit and as I have said, return tickets were purchased. On that basis it is plain that the intention was to return the children to live in Chile after a relatively short visit to New Zealand. It is, however, necessary to look at the matter a little more closely. The plaintiff deposes:

"I knew that I could not survive by myself in Chile. And I knew that E. would not let me take the children to New Zealand where I would be able to look after them through the extended family support available to me. I discussed this with him in the context of trying to discuss us separating, and he agreed to separate and let me bring the children to New Zealand; but later he changed his mind. This was a continuing pattern. He

agreed to come and live in New Zealand. He considered jobs and accommodation; and then changed his mind. He just wanted to continue to control me."

It is plain from the affidavits filed by the parties both in the Family Court and in this Court that tensions had arisen between the parents of the two children, and that separation had been discussed, offers of reconciliation made, and as one would expect, the parties' intentions varied and changed as their relationship deteriorated. This is abundantly plain from the fact that the wife instructed a solicitor in Wellington to prepare two separation agreements, one of which dealt solely with the question of custody and access and the other dealt with a wider range of matrimonial matters including maintenance for the children and the mother should she stay in New Zealand. It seems that these agreements were prepared and sent to the plaintiff, but that agreement was never reached.

The first defendant's position is that he wishes his wife and children to return with him to Chile and to live with him. He has made offers involving his two parents coming to live at Punta Arenas to help care for the family, and there is also some suggestion that domestic help could also be provided. He has advised the Court through counsel that if his wife is not prepared to accept that offer, he will provide her with accommodation for herself and the two children, and appropriate maintenance, and he has indicated that he will put this in writing and lodge it with the Court.

On the other hand, the wife submits that he is not in a financial position to meet his obligations in Chile, let alone provide her with maintenance as he suggests. He denies that this is the position. It is not possible for me to determine the rights and wrongs of these allegations and what the true position really is.

What is certain to my mind in light of the above is that as at the present time the children's habitual residence must be viewed as being in Chile and that they are only here on holiday, although plainly the mother wishes to vary that unilaterally. It follows therefore that this Court must apply the Hague Convention and can only refuse the order sought by the husband on the grounds set out in s13 of the 1991 Act.

Mr Dean submits that in terms of s13(1)(c) there is grave risk that the children's return would expose them to psychological harm or would otherwise place the children in an intolerable situation. In the short time available he has been able to obtain an assessment from a psychologist, Judith McDougall, and her report is annexed to the mother's affidavit. Ms McDougall has only been able to interview the plaintiff and speak to the plaintiff's mother by telephone. She has given a careful report on the basis of this information and makes the following conclusions:

"There will be serious psychological consequences for these two children if they are removed from their mother at this age. The situation is a complex one, where it would be hoped that decisions would be able to be made as to what would be in the best interests of these children. It would be hoped that their needs would come before those of either parent. There are other solutions, such as delaying the children's return until the mother has completed her qualifications here, so that she can return to Chile and care for them herself, or delaying their return until they are older and would cope better with the psychological trauma of the loss of their mother.

In my professional opinion these children will be put in an intolerable position if they are returned now to Chile, because they could face financial destitution or at least extreme hardship. As well, their living conditions are more than likely to be less than suitable for their best interests and general welfare. I believe that separating these children from their mother would be emotionally abusive, and it is of serious concern that these children should face deprivation of their human rights in this way."

Plainly what Ms McDougall says involved a commonsense approach to the effect on two little children of their parents being separated, or at least on the verge of separation, and there being the difficulties created by agreeing to bring them to New Zealand under those circumstances. Nevertheless I am of the view that while there obviously will be trauma for the little children, the least trauma will be caused to them by them returning to Chile with their father and mother. The father must return to Chile this Friday to meet his work commitments, as he has expended already a substantial sum of money and taken leave from his employment as a naval officer well in advance. Nevertheless, he has also undertaken to provide the return fare for the plaintiff to Chile within a month and so the children will be able to be reunited with both parents, subject of course to their unhappy differences. I therefore conclude on the basis of all the above that the mother has not made out a case sufficient to resist an order in terms of s13(1)(c).

Another matter that must be considered before a final determination can be made is the legal situation the plaintiff will find herself in in Chile if the children are returned. I have already mentioned that I have had

the advantage of hearing the evidence of the Chilean Consul Mr Cordano. His evidence is that there is a system of specialist family courts in Chile and there is such a Court in Punta Arenas. He confirms that disputes between parents involving custody, access and maintenance of children are to be decided on the same essential basis as in New Zealand, namely that the interests of the children are paramount.

Not so easy an assessment are the matters raised by Mr Dean in his cross-examination of the Consul concerning separation, divorce and maintenance. Mr Dean produced a helpful document which is an official United States publication entitled "1999 Country Returns on Human Rights Practices" dated 25 February 2000. The Consul in effect confirmed that what is stated in this Report is a fair assessment of the situation in Chile. It appears that although there is a Bill before the Senate, there is no divorce available in Chile, but separations are recognised and husbands and fathers can be obliged to make maintenance payments. It appears that there is no equivalent of our welfare benefits that are available to a mother with children who is for one reason or another unable to receive support from her former husband or the father of the children. This does give me concern that the protections available to her in Chile are perhaps not as generous and secure as those available to her here. Nevertheless, I bear in mind the formal undertakings given by the first defendant regarding housing and maintenance.

Before parting with the matter I also mention the fact that the first defendant being a Lieutenant in the Chilean Navy is liable to be posted outside Chile in the relatively near future. This of course is a practical matter which bears on the welfare of the children, but again I consider his undertaking as to housing and maintenance adequately covers the contingency under all the circumstances.

For all the above reasons I consider that the mother has not made out a case under s13 for the quashing of the warrant or its suspension, nor for an order setting aside the consent order that gave rise to the warrant. Mr Dean asks that I grant a stay for perhaps a day or two so that he can seek further instructions from his client with a view to taking the offers made by the first defendant further.

It is appropriate to say that the mother's conduct leaves a lot to be desired in the way she has treated this Court. She has deliberately put herself in a position where she can not be contacted directly by counsel and she has taken the children with her. As a result, she has not been able to participate in negotiating with her husband. As I say, her conduct has been a disservice to her children. While I can view her situation with some sympathy in view of the situation she finds herself in, her conduct is entirely inappropriate.

Under the circumstances I can not see any advantage in suspending the warrant say until tomorrow evening, but what I can do is I can offer the Court's availability on the shortest notice and I do that by reserving leave to apply.

I conclude by saying that the plaintiff's applications for a stay and for judicial review are accordingly refused on the condition that the first defendant files in this Court his signed undertaking on the terms I have recorded before a fresh warrant is to be issued from the Family Court.

Finally, I express the hope that the mother will accept the position as being in the best interests of the children and will endeavour to resume some degree of relationship with the first defendant to settle the children's future. In all these cases it is stated that the real issue is which Court shall decide the future of the children. The choice in this case being the Family Court in New Zealand or the Family Court in Chile, and my decision is that it is the Family Court in Chile that must decide these questions in the absence of agreement between the mother and the father. There will be no order for costs.

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