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[11/06/1997; Court of Appeal (England and Wales); Appellate Court]
Re JA (Child Abduction: Non-Convention Country) [1998] 1 FLR 231

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

11 June 1997

Lord Woolf MR, Ward, Mummery LJJ

Re JA (Child Abduction: Non-Convention Country)

COUNSEL: Paul Focke QC and Sally Cahill for the father; Michael Harrison and Roger Bickerdike for the mother

WARD LJ: This is an appeal against the order of Singer J made on 20 February 1997 when he dismissed the appellant's application for a summary order for the return of his 2-year-old daughter to the United Arab Emirates. It is brought with the judge's leave.

The material facts are these. The father is a 32-year-old national of the United Arab Emirates. His background is Muslim and Arabic. The mother is also 32 years old but her background is English. She lived and worked in Kuwait for 2 years before the invasion of that country at which point she went to live and work in Dubai. It was there that she met the appellant in about 1991. Documents produced by the father suggest that in January 1994 she converted to Islam but she strongly denies knowingly having done so. They then began to live together and were married by the Shariate Court of Sharjah on 18 May 1994. Shortly afterwards they moved from Dubai to Sharjah. It was there that their daughter J was born on 15 February 1995. She has dual nationality.

They visited England in the summer of 1995, staying here, with the father's consent, longer than had initially been planned. By the summer of 1996 the marriage had become unhappy, the mother alleging that the father was more involved in his work and his family than with her; complaining of his being bad tempered and abusive, behaving imperiously towards her, and being unduly prescriptive of her social life.

Once again they came here for a holiday and again the father was agreeable to her staying beyond the anticipated return date fixed for 15 September 1996. The mother made known her unhappiness and there followed a succession of telephone calls and letters in which the painful breaking down of the marriage was explored and assimilated. By 1 October 1996 the mother had indicated, however tentatively, that she did not wish to return to live in Sharjah. This was deeply distressing news for the father who could not contemplate life without his wife and daughter and he made strenuous attempts to persuade her to agree to a reconciliation. She responded in a letter of 1 November 1996 that she needed more time, but

whether that entreaty was a genuine expression of her confusion born of guilt and misgiving or whether it was an attempt to palliate the pain of parting, or a mixture of motives, is not yet clear. Among his responses was terminating her use of his credit cards. Their relationship came under obvious great strain.

On 5 December 1996 he arrived for a 10-day visit but harmony between husband and wife was not improved. The judge rightly concluded that by the time the husband left on 15 December 1996 he had come to accept, however unwillingly, that the mother was not returning voluntarily with J to Sharjah. The vestige of hope he entertained that she might return after Christmas was utterly destroyed by her issue of divorce proceedings which were then served upon him.

He had during his short stay taken advice in England about his position and, in consequence of that advice, issued an originating summons in wardship seeking the peremptory return of the child to Sharjah, proffering undertakings to provide a home for the mother and the child in Sharjah or in Dubai, undertaking to permit the child to live with the defendant subject to his being allowed reasonable contact and offering to maintain them, these undertakings to continue until the matters were resolved by the appropriate courts in the United Arab Emirates. He undertook to register those undertakings in the appropriate courts in the Middle East. A hearing for directions was fixed for 19 February 1997, but with commendable expedition shown by all concerned, the judge was able to hear and determine the question the following day.

He approached the matter in this way. First he found that:

'J was habitually resident in the Emirates at the point when they came to England in July 1996. At the point in time when the mother decided to make her stay in England permanent, J was still habitually resident in the United Arab Emirates, so that if this were a Hague Convention case it would be appropriate to define her retention of the child in this country at that point as wrongful. But this is not a Hague Convention case, because the Emirates are not a party . . . I therefore approach this case on the basis that the mother was wrong to take matters into her own hands in October, or in the autumn and to make the unilateral decision without either the father's agreement or court authority to retain J in this jurisdiction. However justifiable from her own point of view, and however justifiable in terms of her own perception of J's interests, she was wrong to do that.'

Mild murmurs of doubting the correctness of the findings of habitual residence were soon stilled and no challenge was pursued in this court against any word of that approach which I endorse as plainly right in the circumstances of this case. It was also common ground that the judge correctly addressed the next 'important principle' as follows:

'In the ordinary case it is in the child's best interests for his or her welfare to be determined by the court of the country where the child habitually resides. The reasons for that have been so often stated that it would be superfluous for me to repeat them. It is an important component of the principle that the court should not assist or encourage transnational abductions, whether or not the Hague Convention applies, but as has most recently been pointed out by Ward LJ in his leading judgment in the case of Re E (A Minor) (Child Abduction: Non-Convention Country) [1997] 2 WLR 223, that and every other general principle in cases concerning children's welfare must give way to the overriding consideration of the child's welfare. That case made it clear that it is wrong slavishly, as it were, to follow by analogy the principles of Hague Convention cases and apply them to non-Convention cases such as this, nor is it appropriate to force into that format of a non-Convention case the terminology that is appropriate to Hague cases. So I start from the

proposition that unless there are good reasons for forming a different conclusion, J's future should be decided in Sharjah rather than in [England].'

For the sake of completeness of the analysis of the law which I must later undertake, I shall do what Singer J understandably chose not to do, namely spell out the reasons for this approach. The decision to return the child must be justified by more than an adoption by analogy of the Hague Convention approach because in a Convention case welfare is not the paramount consideration or a consideration at all (save in the different guise of Art 13), nor can it be justified as an adoption of principles of forum conveniens which concept, 'as the phrase is used in other kinds of litigation, has no place in the wardship jurisdiction', per Ormrod LJ in Re R (Minors) (Wardship: Jurisdiction) (1981) 2 FLR 416, 426H. True it is that the interests of the child may ordinarily be thought to be better served if the court having direct knowledge of the conditions prevailing in the place where the child has his or her home is charged with the decision whether a change of that home should be ordered where the parents cannot agree about the matter between themselves. The only proper reason for returning the child without investigating the merits is that the child's welfare demands it on a basis so well -- but not compendiously -- expressed by Buckley LJ in the locus classicus of Re L (Minors) [1974] 1 WLR 250, 264F-265C:

'To take a child from his native land, to remove him to another country where maybe his native tongue is not spoken, to divorce him from the social customs and contacts to which he has become accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for the adjudication here. Anyone who has experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he had been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.' [The reason for giving this emphasis will become apparent later.] '. . . Judges have more than once reprobated the acts of "kidnappers" in cases of this kind. I do not in any way dissent from those strictures, but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction, the court is in any way concerned with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account, but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration.'

I return to Singer J's judgment. He asked what factors could be advanced to give good reason for not leaving the Emirate court to decide J's future. He dealt with the mother's argument that:

'. . . for her to return to Sharjah unwillingly would subject her, the mother, to a number of very considerable disadvantages, which would inevitably take their toll on the child, and therefore be contrary to her welfare.'

He referred to the way the child had settled and improved in England. The judge noted the evidence, not very detailed nor satisfactory, about the mother's suffering from an anxiety state and a depressive illness. The judge referred to the mother being:

'. . . at the considerable personal disadvantage that she will be very vulnerable to the authority of the father, without whose active agreement her ability to do quite routine things may be prejudiced . . . The mother's ability to take the child outside the Emirates seems likely to depend entirely upon the father's grant or withholding of consent.'

Then the judge concluded:

'But consequences such as those I have outlined have to be looked at in the light of two considerations. The first is that the parties chose to get married and to live in the jurisdiction of Sharjah. If they were to marry, there may have been no very great practical alternatives, but the reality is that that is where they met each other, where they were living at the time, where they married and where they continued to live until the breakdown of their relationship, so that what from the mother's point of view will be personal disadvantages if an order for peremptory return is made, are no greater than what was inherent in her situation, in any event, before she retained J in this country. Secondly it has to be said that there must be many cases where the outline circumstances are very broadly comparable to those I have indicated, and I find it impossible as a matter of judgment to conclude that either any single element that I have described, or their combination in aggregate, amount to sufficient to take this case out of the ordinary. It seems to me that at this stage, therefore, I am in a position to balance two considerations of unequal weight. The first is the opening proposition that I identified, that it is generally in a child's best interests for welfare decisions to be taken in the country where the child is habitually resident or would have been but for inappropriate removal or retention. That, as I said, must give way to cogent welfare considerations if they can be identified. In this case, the welfare considerations do not seem to me on that balance to outweigh the impetus for return.'

That was his judgment of 'the welfare considerations'. Having made that judgment he immediately followed it by saying:

'There is another consideration, however, which has to be taken into account and assimilated into the decision-making process. It arises from the question whether the father has conducted himself in a way that is inconsistent with the order which he now seeks. In the context of Hague Convention cases it most usually arises when an acquiescence is considered under Art 13.'

He then referred to the latest decision available at the time of his judgment being that of the Court of Appeal in H v H (Abduction: Acquiescence) [1996] 2 FLR 570 and he quoted from the judgment of Waite LJ at 474C-G where in his summary Waite LJ said:

'In order to establish acquiescence by the aggrieved parent, the abducting parent must be able to point to some conduct on the part of the aggrieved parent which is inconsistent with the summary return of the child to the place of habitual residence.'

Of that Singer J said:

'It seems to me that it is a principle which may have, indeed to my mind does have, a place more generally than just in relation to acquiescence in Hague cases . . . It would, in my judgment, be open to the mother to argue successfully that whereas welfare principles might not prevent an order for summary return, nevertheless it would be inappropriate to make

that order in the light of the father's actions and motives. The question arises, therefore, whether this is such a case.'

He turned to the facts as they appeared to him. I gratefully adopt Mr Harrison QC's analysis of those facts:

(1) About 11 October 1996: the father told the mother he would never take J from her.

(2) October 1996: the father told the maternal grandmother to look after the mother for J and for him.

(3) November 1996: the father stopped credit card facilities and told the mother she had better start supporting herself and their daughter.

(4) At no stage had the father said J should be returned to the UAE with or without the mother (except in the context of his proposed reconciliation with the mother).

(5) December 1996: after taking legal advice the father told his landlady that his daughter was being well cared for by the mother and that there was no need for him to return to England.

(6) The judge plainly rejected the father's claim that he had only concluded that the mother had no intention of returning when he received divorce papers on 7 January 1997.

(7) The application was made one month after he had received the divorce papers.

The judge then reached this conclusion:

'I conclude that the motivation of the father in instituting these proceedings is primarily, if not exclusively, concerned with his position as husband of the mother rather than as father of their child. I conclude that the summons for summary return is to be regarded as motivated by tactical considerations in relation to the tempestuous breakdown of their relationship, which he has clearly found it so hard to come to terms with. I conclude that although he no doubt would prefer to have his child living in closer proximity to him, and in a situation where she is able to receive the benefits of his cultural values as well as the mother's, that is not the reason why this application has been made. I do not believe that it is in the interests of a child to make an order for the child's return to the country of habitual residence, where the objective of that is collateral to anything to do with the child's welfare. That is subject to the obvious proviso that were it possible for these parties to be reconciled and to resume living moderately happily in Sharjah, that would be in the interests of the child, but there is nothing to indicate in the last 6 months that that is likely to be so. I therefore reach the overall conclusion that the pattern of developing events since October 1996 indicates a sufficient degree of acceptance by the father that the child would live with the mother in England, for it to be now inappropriate to accede to a request made by him for summary return, when that request is motivated less by considerations of the child's welfare and best interests than by perfectly understandable tactical considerations in the context of marital breakdown. Accordingly I would reject the application for summary return.'

Mr Focke QC's submissions in support of the appeal against their judgment are simple and, therefore, attractive. His case was as follows:

(1) The judge correctly identified in the first part of his judgment that welfare was the only consideration which governed the court's decision.

(2) Applying the welfare test, the judge correctly found for the father.

(3) His findings of motivation were not relevant to any welfare consideration; indeed the judge treated it as 'another consideration', ie as a consideration other than a welfare consideration and in allowing that to prevail, he fatally misdirected himself for he failed to make welfare the paramount consideration.

(4) Through no fault of his own, the judge erred in following the Court of Appeal in H v H as a guide to the meaning of 'acquiescence' as that decision has since been overruled by the House of Lords in Re H and Others (Minors) (Abduction: Acquiescence) [1997] 2 WLR 563. The proper approach to a question of acquiescence is now settled by the speech of Lord Browne-Wilkinson to be this:

'Acquiescence is a question of actual subjective intention of the wronged parent, not the outside world's perception of his intentions (at 573G).

Judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child (at 574B).

There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return justice requires that the wronged parent be held to have acquiesced (at 576A).'

(5) The judge's findings of motivation, especially when judged with the assistance of Lord Browne-Wilkinson's speech, were against the weight of the untested evidence.

Mr Harrison counters by submitting that:

(1) Lack of bona fides on the applicant's part is a sufficient reason to refuse to exercise a judicial discretion in his favour.

(2) When the judge said he did not believe that it was in the interests of a child to make an order for the child's return where the object of that return was collateral to anything to do with the child's welfare, the judge was correctly viewing his conclusion broadly in a welfare context, not narrowly and slavishly in a Convention sense.

In my judgment there is force in Mr Focke's submission. It seems to me that the judgment was so structured as to be in separate parts, the first devoted to welfare, the second devoted by analogy to the Convention defence of acquiescence translated to a self-contained defence akin to estoppel. Read in that way, the link with welfare suggested by Mr Harrison is too tenuous. Although the judge had earlier warned himself against slavishly following by analogy the Convention concept, he did allow himself to be side-tracked down the Art 13 route and thus diverted from the straight and narrow path of welfare. The established authority of this court is that a decision for or against peremptory return can be informed by the spirit of the Convention but, in my judgment, it does not follow that adherence to the spirit, which is to achieve the quick return of children, imports the letter of the special Art 13 defences. When honoured by the courts of the contracting parties, the Convention is a powerful weapon to combat the scourge of cross-border abduction of children. Those benefits are available to many countries with whom we have friendly international relations but who have not, for whatever reason, acceded to the Convention. I see no reason why our courts should not be cautious and circumspect about offering close adherence to the

Convention and with it the benefits of the narrowly circumscribed Art 13 defences, to citizens of those countries who do not offer reciprocal enjoyment when our citizens appear in their courts.

I am sure that if the parties and the judge had had the benefit of the speech of Lord Browne-Wilkinson, they would not have embarked upon this particular inquiry at all or been led to the conclusions which were drawn by the judge. In his review of the background, the judge had found that the father's unwilling acceptance that the mother would not be returning voluntarily with J was only established by the time he left in December 1996. There is no reason to think that the husband did not desire a reconciliation up to that point: indeed he said that when he left he still harboured hopes that the mother would return after Christmas. I would, therefore, be slow to infer an intention to acquiesce. The delay thereafter is not clear and unequivocal evidence of acceptance of the child remaining in this country. Without hearing evidence it seems to me difficult to justify the drawing of an inference that the purpose of applying for the child's return was to apply unconscionable pressure upon the wife qua wife and to gain tactical advantages in the context of marital breakdown. An estoppel as such cannot operate if the applicant seeks to avail himself of the juridical advantages he will enjoy as father and the disadvantages the mother will suffer as mother if the child is returned to the jurisdiction of her habitual residence.

Even though this court is as well placed as the judge to draw the necessary inferences from the untested affidavit evidence, I would still be loathe to interfere with the conclusions of a judge with as wide an experience as Singer J has. He was, however, under the great disadvantage of not having his assessment of the facts shaped by the view of the House of Lords. Approaching it anew, I am driven to conclude that no clear and unequivocal adverse inference can be drawn against the father and that Mr Focke's submissions are well founded.

That, however, is not the end of the matter. The mother has filed a respondent's notice and, in the light of the fresh evidence which both parties have introduced with our leave, she invites us to find:

(1) because the best interests of the child is the court's paramount consideration, it is necessary that the court have regard to the way in which the issue is likely to be resolved in the competing jurisdiction so as to satisfy itself that the question will be decided along broadly similar welfare lines to the way we have to judge the issues which arise, and

(2) the stress imposed upon the mother were she to return with J to the United Arab Emirates would be so great that her care of the child would suffer to the detriment of the child.

To support his first proposition which, sharply focused as it is, raised a novel point which Singer J did not have the opportunity to address, Mr Harrison invited us to review the authorities in this court since the Child Abduction and Custody Act 1985 came into force. He referred us to the following cases:

G v G (Minors) Abduction)) [1991] 2 FLR 506, 514 where Balcombe LJ said:

'The question why certain countries are brought in and others are not may (I put it no higher) be because, in some cases, the appropriate authorities have not been satisfied about the efficacy of the legal arrangements in those countries. In the case of Kenya, I see no reason to believe that a custody hearing in Kenya, having regard to s 17 of the Guardianship of Infants Act to which I have already referred, would not be dealt with on the same basis and with the same fairness that it is dealt with in this country . . . From the evidence which

has been put before us in this case, there is no reason to believe that the courts in Kenya should not be able properly to deal with the questions that arise in this case.'

I was likewise under the impression that some investigation was made by the Foreign Office of the applicable foreign law before we entered into a reciprocal arrangement with that foreign country, but my inquiries of Mr Michael Nicholls, of the Official Solicitor's Office, who is now closely involved with this work, suggest that rigorous detailed comparative analysis may not always be undertaken. Whatever the position, the assumption made by the Court of Appeal in that case was that welfare was a common test.

In Re F (A Minor) (Abduction) (Jurisdiction) [1991] Fam 25, 31, [1991] 1 FLR 1, 4 Lord Donaldson of Lymington MR said:

'There is no evidence that the Israeli courts would adopt an approach to the problem of B's future which differs significantly from that of the English courts. It is not a case in which B or his father are escaping any form of persecution or ethnic, sex or any other discrimination. In a word, there is nothing to take it out of the normal rule that abducted children should be returned to their country of habitual residence.'

In D v D (Child Abduction: Non-Convention Country) [1994] 1 FLR 137, Butler-Sloss LJ said at 140:

'It is not in my experience usual to require certificates of the law of countries within the European Community and it is the practice to assume that the general principles of family law in those countries accord with ours. . . There is no evidence upon which a court could come to the conclusion that a Greek court would not try this family case within the general principles of family law to which this country adheres nor that the mother would be unduly disadvantaged in any future court proceedings. She has so far taken part in the Greek proceedings without apparent difficulty.'

Balcombe LJ at 144 said:

'. . . the general principles of the Hague Convention should apply in an appropriate non-Convention case, on the basis that the application of the welfare test normally required that decisions relating to the care of children are best decided in the jurisdiction in which they have hitherto been normally resident. (An appropriate non-Convention case is one where there is no reason to suppose that courts of the other jurisdiction will apply an approach to the question of the case of the child significant differently to that of the English court.)'

In Re M (Abduction: Non-Convention Country) [1995] 1 FLR 89, 90H,Waite LJ said:

'. . . in this area -- as in many others -- the principle of comity applies. It is assumed, particularly in the case of states which are fellow members of the European Union, that such facilities as rights of representation, means of collecting information through independent sources and welfare reports, and opportunities of giving evidence and of interrogating the other side, all of which are necessary to place the court in a position to determine the best interests of the child concerned, will be secured as well within one State's jurisdiction and within another.'

Accordingly, Mr Harrison submits that the thread linking these cases together is the common assumption that the foreign country will apply law and practice broadly comparable to ours. The only authority which may be inconsistent with that view is Re M (Abduction: Peremptory Return Order) [1996] 1 FLR 478 which was a case in many

respects on all fours with this in that both fathers hailed from Dubai (and both were represented by Miss Cahill). There Waite LJ dealt with the question in this way:

'The broad principle upon which counsel for the mother relies is, firstly, that stated by Lord Donaldson MR in Re F (above) at 31H . . . that in general there should be satisfaction that:

". . . the other court will apply principles which are acceptable to the English courts as being appropriate . . ."

Counsel founds upon that a submission that the judge was too cursory in making a return order. He says that he ought to have acceded to the application for an adjournment so that she could be satisfied, by something more than the one-sided account that was placed before the court at the last minute from the father's lawyer, that the principles that would be operated by the judicial system in the United Arab Emirates would be principles acceptable to an English court . . .

I would for my part reject his submission on two grounds, the first of which is general. Underlying the whole purpose of the peremptory return order is a principle of international comity under which judges in England will assume that facilities for a fair hearing will be provided in the court of the other jurisdiction, and that due account will be taken by overseas judges of what has been said, ordered and undertaken to be done within the English jurisdiction. That is of course reciprocal. It has to be presumed that judges in other countries will make similar assumptions about the workings of our own judicial system.

Very exceptional circumstances would be needed to show that in a particular case the English court would be justified in parting from that general principle. No such grounds have been established here.'

Singer J was to much the same effect, for he said:

'The English court must act with comity towards the courts of other jurisdictions, accepting the different traditions in different cultures have their own value and that it is wrong and unacceptable for a court to evaluate them comparatively in a way that would be critical.'

As the submission became clarified during the course of argument, it reduced to this:

(1) The duty of this court is to determine the question by the test which makes welfare the paramount, and therefore the dominant, consideration.

(2) The court cannot be satisfied that it is in the best interests of the child to return it to the court of habitual residence in order that that court may resolve the disputed question, unless this court is satisfied that the welfare test will apply in that foreign court.

(3) Consequently, this court cannot abdicate its responsibility simply by assuming that welfare will apply.

(4) The choice of residence in the foreign country may imply the voluntary assumption of disadvantage, personal and juridical by a parent but it does not justify the court in imposing any consequential detriment on the child.

(5) Whilst it may be necessary for the applicant for the peremptory order to show this comparability when inviting this court's assistance, nevertheless, since foreign law is presumed to be the same as the English law by virtue of the established rules of private

international law, the practical result is that it will be for the respondent to adduce evidence of dissimilarity.

(6) It is only when this court is satisfied that the child's welfare will be protected by the foreign court that this court can entrust the decision to that foreign court.

I find the logic of that submission compelling. Re M is an obstacle to my easy adoption of it. I have, therefore, looked at the matter before the advent of the Child Abduction and Custody Act 1985. In the earliest cases I have researched, Nugent v Vetzera (1866) LR 2 Eq 704 and Re Savini, Savini v Lousada (1870) 18 WR 425, the court declined on grounds of comity to act in opposition to the foreign court, although in the former case Page Wood V-C did guard himself 'against anything like an abdication of the jurisdiction of this court'.

In 1940 Morton J was more robust. In Re B's Settlement, B v B [1940] 1 Ch 54, he distinguished those earlier cases and said:

'I think that at the present time, whatever may have been the position before the Act of 1925, this court is always bound to exercise a judgment of its own when dealing with the custody of a ward. In my view, under Section 1 of Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant and to treat his welfare as being the paramount consideration. In so doing I ought to give due weight to any views formed by the courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country.'

That view was endorsed by the Privy Council in McKee v McKee [1951] AC 352, 365 where Lord Simonds said:

'To this paramount consideration (of welfare) all others yield. The order of a foreign court of competent jurisdiction is no exception.'

The next authority is well known but often neglected. It is J v C [1970] AC 668, the so-called blood tie case where the Spanish parents sought the return of their child who had an established home with English foster- parents. Lord MacDermott dealt at 714F with what was in essence a plea for comity and said:

'As we have here no order of a foreign court, this plea is not really open. It is plain from such authorities as in Re B's Settlement [1940] Ch 54 and McKee v McKee [1951] AC 352, that the existence of such an order will not oust the jurisdiction or preclude the application of Section 1 of the Act of 1925; and it is no less plain that where there is such an order its relevant provisions should be carefully assessed and taken into account, and that, foreign order or no foreign order, the law of a foreign home may have to be examined if relevant to the welfare of the child should he be returned there. But these considerations do not affect the present issue.'

Although this was obiter it is none the less persuasive.

In the passage from Re L which I highlighted, Buckley LJ set the expectation of a satisfactory resolution of the dispute as a necessary factor to which regard had to be paid.

Finally, in Re R (Minors) (Wardship: Jurisdiction) (1981) 2 FLR 416, 426 Ormrod LJ giving the judgment of the court with Dunn LJ and Eastham J said:

'The damage to a child's interest which may arise from not making a summary order is conveniently set out by Buckley LJ at p 264E-H of his judgment in Re L [1974] 1 WLR 250. In a sentence, they are alienation from background, home, schools, friends, relations and, ultimately, from his country and its society and culture. These dangers have to be weighed against the risk to the child of possible, perhaps probable, separation from the mother, of being entrusted to the care of a father whose capabilities and fitness to act as a single parent may be in doubt, in surroundings which may be unfavourable in themselves and of being subjected to a regime of law under which the protection of their interests may be open to question: (see per Lord MacDermott in the passage quoted above)' (my emphasis added).

These authorities seem to me clearly to establish that it is an abdication of the responsibility and an abrogation of the duty of this court to the ward under its protection to surrender the determination of its ward's future to a foreign court whose regime may be inimical to the child's welfare. If driven to it, I would reluctantly say that the decision of this court in Re M (Abduction: Peremptory Return Order) [1996] 1 FLR 478 was decided per incuriam. It is perhaps not necessary to suffer that embarrassment because in this case there is evidence of the law which will be applied in the Emirates. Here it is common ground that the child will reside ('Hadanah') with the mother but the guardianship ('Wilayah') remains with the father. After the age of 12 the Hadanah reverts automatically to the father. If the mother remarries the father has the right to request that the Hadanah return to him. The place of residence for the divorced mother is where the father of the child lives and the mother is restricted to living within 133 km of the father otherwise her right of residency is lost since the child needs the care and attention of the father as guardian. The court may give consent to the mother to accompany the child to spend her vacation in the mother's homeland on condition this is not permanent, otherwise the mother again loses Hadanah, the basis being that the child is always in need of the guardian, the father. I do not overlook that the father said in his evidence that:

'It would not be my intention to seek custody of J when she is 12 years old provided she was happy to continue to live with her mother even if her mother had remarried.'

Elsewhere, under the heading of his proposals for J's future, he had said:

'She knows full well that had she told me at any time prior to our departure that she was intending to return to the UK with J to live there permanently I would never have given my consent for them to do so.'

Nothing prevents the father changing his mind one way or the other.

From that review of the law to be applied in the UAE, it seems clear the court's powers are limited and there is no indication that welfare is the test. If the mother returns to Sharjah with the child, there is no power in the court to permit her to return to this country with the child if the father objects to that move, whatever the best interests of the child dictate. Once the mother and child return to the Emirates, they are effectively locked in there. Those facts are not disputed.

This leads me to consider Mr Harrison's second objection. He submits that the judge failed to give proper weight to the disadvantage to the child if the mother came under such stress in the Emirates that her care of the child was imperilled. The scant evidence before the judge has been supplemented by a report of a consultant psychiatrist and once again we are better placed than he was. On examination the psychiatrist found:

'Her affect was depressed and she displayed considerable anxiety. The anxiety was particularly evident when she talked about the possibility of return of J to UAE and to her

that meant her own return as well and the change in lifestyle to what it used to be. She was distressed at the interview and at times tearful.'

His opinion was that:

'[The mother] is suffering from an adjustment disorder. This is characterised by a lowness of mood and considerable anxiety accompanied by worry, disturbance in sleep and appetite and occasional bouts of crying. This adjustment disorder arises as a response to a stressful event and/or threat of a significant life change which may lead to unpleasant circumstances. The disorder is time-limited and if the stress or threat of it is removed, then the disorder resolves . . . She is currently depressed in her mood state and has considerable anxiety. Her sleep and appetite have been disturbed and she has had bouts of crying and mild panicky feelings. There would be considerable deterioration in her mental state if there was a return to UAE of J following the legal proceedings. She is sure that she would want to live with her daughter and that would mean [her] returning to UAE. The mental state would deteriorate and it is probable that she would suffer from a major depressive illness'.

There is no direct evidence that the breakdown of her health would adversely affect her care of the child but Mr Focke realistically acknowledges that that conclusion is inevitably to be drawn from that evidence. If the judge had had the benefit of this new material, I doubt whether he would have concluded that there was not a significant risk of harm to the child were she returned to the Emirates, even with the protection of the undertakings offered by the father. I doubt whether he would have held that the impetus for return outweighed this welfare consideration, a fortiori when the Emirates' court seems to have no discretion in the decisions that are to be taken and no power to permit the mother to leave the Emirates if that is necessary for the proper care of the child. When the judge observed that the 'personal disadvantages if an order for peremptory return is made are no greater than what was inherent in her situation, in any event, before she retained J in this country', he begged the question whether that entitled the court to ignore consequential harm to the child. In the light of the medical evidence, the risks to the mother's health and consequently the child's care by being locked into a life in the Emirates against her will, do take the case out of the ordinary: her health not merely her happiness is at risk. Furthermore, the lack of judicial remedy to alleviate that hardship does, in my judgment, make this case very different from those where this court knows that the foreign court will be guided by the best interests of the child.

Consequently, I am persuaded that the ordinary need for the court of habitual residence to decide the child's future is not of sufficient benefit to outweigh the other risks inherent in return. With advantages not available to the judge, I have difficulty with both strands upon which he based his judgment, but, for the reasons I have attempted to explain, I agree with the result that this child should not be peremptorily returned. That decision means no more than this, namely that the court in this jurisdiction must now undertake the inquiry into the merits of where the child's future lies. I agree that that should remain to be decided by a judge of the High Court and I am sure Singer J will be the first to agree that in the light of his findings about the father's motivation, it is now preferable that some other judge of the division decide those questions. I would therefore dismiss the appeal.

MUMMERY LJ: I agree.

LORD WOOLF MR: I also agree.

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