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[24/06/1999; Court of Appeal (England and Wales); Appellate Court]
Re E (Abduction: Non-Convention Country) [1999] 2 FLR 642

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

24 June 1999

Stuart-Smith, Pill, Thorpe LJJ

Re E (Abduction: Non-Convention Country)

COUNSEL: Geraldine More O'Ferrall for the mother; Nicholas Carden for the father.

SOLICITORS: Miles & Partners for the mother; Sally Morris for the father.

THORPE LJ: Last week Connell J ordered the peremptory return of three boys abducted by their mother from the Sudan. On Tuesday we granted her application for permission to appeal. Today we decide the appeal.

For the facts I take the words of Connell J from a note of the judgment below agreed by counsel and approved by him.

The father was born in 1956 and is now 43. The mother was born in June 1970 and is 29. On 19 December 1986 they married in the Sudan. The father lived in this jurisdiction previously and earlier had bought a property which he still owns. Having married in the Sudan, in February 1987 the mother and father came to the UK. In England on 1 April 1989 F was born. Also in England on 3 April 1991 M was born. In 1991 the mother, father and the two boys returned to the Sudan.

There is an issue between the parents that the mother at some time after August 1991 commenced a relationship with a Mr M. On 23 April 1993 a third boy was born in the Sudan. In May 1993 the father came to the UK. In December 1993 the mother followed and brought the three boys. In April 1994 she returned to the Sudan with the children. She has not lived in this jurisdiction since that time.

In 1995 the mother and father divorced in the Sudan. For a period the children ceased to live with the mother. On 15 June 1955 the mother married Mr M in the Sudan. On 17 September 1995 the mother went to the equivalent of the magistrates' court in Sudan. She applied for the children to be returned to her and that the father should not interfere with the custody of the children with her. On 20 November 1995 an order was made by the court which appears in terms to be a consent order. The mother said she did not in truth consent. It was not possible to decide the issue.

An order was made for the children to remain living with the father's family. The mother, as local law indicates, was disqualified from obtaining custody by reason of her remarriage. The children were looked after by the mother's family and in particular the maternal grandmother. However, the maternal grandmother had other difficulties which prevented this. The order therefore provided that the children live with the father's mother. The order also contained provision for contact Thursday and Friday alternating. It incorporated provision for the mother to visit the children at any time.

On 2 April 1996 the mother gave birth to K. In July 1997 the father remarried in the Sudan. His wife and daughter are in the Sudan.

In April 1999 the mother was enjoying contact to the three children. On 9 May 1999 the mother, together with the four children and her second husband, came to the UK. Upon arrival at Heathrow she sought asylum in this jurisdiction. She did not tell the father or his family of her intention to come to the UK. The mother's reason for taking this dramatic step was that she was deprived of seeing the children as and when she wanted. She was dissatisfied with the provisions of the order of 20 November 1995 and, accordingly, decided to come here and claim asylum. In those circumstances she was accommodated in temporary accommodation. Her claim for asylum will be considered on 4 October 1999.

On 21 May 1999 the mother filed a statement in support of her application for residence and to prevent the removal of the children from England and Wales. On the same day she obtained an ex parte order from Hale J. On 28 May 1999 Bodey J continued that order. On 4 June 1999 her Honour Judge Pearlman ordered that the children remain in the interim care and control of the mother and ordered the injunctions to continue.

In relation to those facts the judge made the following additional findings. He said:

'In relation to the parents, the mother's future is uncertain. Her background is in the Sudan -- only in this jurisdiction very recently, it is not known what is the basis of her asylum or the prospects of success. All that is known is that the application will not be considered until 4 October 1999. The father on the other hand has spent half his time in England and half his time in the Sudan. In his oral evidence he said in recent times he had given up his work, had bought a property in the Sudan -- his intention is or was until the issue of these proceedings -- to return to the Sudan and live there and live in the property -- intended to put this into practice later this year or sometime next year. I heard his evidence and accept this was his plan, only interrupted as a result of these proceedings. In my view it is clear that the children had habitually resided in the Sudan until 9 May 1999. They are Sudanese children removed by the mother from familiar surroundings to the UK. They speak a very limited amount of English. The children are now living in temporary accommodation. There is much doubt as to their future and that of the mother.'

Connell J recorded the submissions of the parents thus:

'The mother says, adjourn the residential application and grant her interim residence in the meantime for further consideration of her application at a later stage when the outcome of her application for asylum is either decided upon or when more is known about it . . .

The father says, these are Sudanese children, their whole background is Sudanese and the court should make a peremptory order for their return.'

He directed himself as to the law by adopting a recent judgment of Charles J in the case of Re Z (Abduction: Non-Convention Country) [1999] 1 FLR 1270. In that judgment Charles J

conducted a full and scholarly review of the modern case-law and distilled a number of propositions which Connell J rightly found to be of great assistance. He said:

'In the light of that case, which is a helpful guide, it is clear in this case and it is common ground, that the welfare of the children is the paramount consideration. Equally, as stated by Charles J, there is a presumption that the prima facie position is in favour of return of the children to the country from which they were wrongfully removed. Thirdly, the presumption can be displaced in certain circumstances. Fourthly, the application by the father was promptly made -- the children have been in the country for 6 weeks. The question is -- is the presumption displaced?'

Connell J turned then to the expert evidence which was not in dispute. A Miss Ragab told the judge that:

'The most important fact in Sudanese personal law, mainly Muslim Sharia law, [was that] once a divorced mother has remarried . . . the care of the children moves to the maternal grandmother. If the maternal grandmother is unable . . . to care for them, care moves to the paternal grandmother in all cases.'

That expert had filed a written report before giving oral evidence. In her written report she had said:

'. . . there is no welfare officer in Sudan. However, the court would have testimony of witnesses close to the families, because socially the Sudanese community is very close. The court normally takes full account of the social background of the children and their families, and the economic capacity of the custodian, the health of the carer and above all what would be the best interest of the children, according to the Sudanese culture. Despite the same principles, the concept is different from the British concept.'

Connell J then recorded the submission of the mother's counsel in these terms:

'Accordingly, it is submitted by Miss More O'Ferrall that it is contrary to the best interests of the children to order return to Sudan as in the present circumstances the mother has no chance of any order or opportunity of changing the contact arrangements . . .

Miss More O'Ferrall lays considerable stress upon Re JA (Abduction: Non-Convention Country) [1998] 1 FLR 231 which contains a consideration of United Arab Emirates and Muslim Sharia Law.'

The judge then cited at length from the judgment of Ward LJ in Re JA before concluding as follows:

'It can be seen from the consideration of that passage that in different cases the Court of Appeal has emphasised different aspects of matters re abduction from a non-Convention country -- different emphasis on different circumstances in the cases. Hence the apparent contradiction between Re JA and Re M.

Here the evidence of the expert is that the courts in the Sudan do take account of the best interests of the children but they do so in accordance with Sudanese law and culture, which involves different concepts from British concepts. With a Sudanese Muslim family habitually resident in the Sudan this is scarcely surprising.

I cannot conclude that Ward LJ's view was that the courts in this jurisdiction would never make an order for return when Sharia law applied, particularly if the children's best

interests required that solution. Each case must be decided on its own circumstances. The approach of the courts of the competing jurisdiction is an important feature but is not conclusive. In my view the courts in Sudan will apply Muslim law which is appropriate and acceptable to this Muslim family.'

Before us Miss More O'Ferrall renews her reliance on the case of Re JA and her submission that the absence of justice for her client in Sudan adversely affects the welfare of the children. She says that the judge has made an order that separates the children from both parents and returns them to a jurisdiction where there can be no discretionary review of all relevant facts and circumstances to determine child welfare but only the rigid application of Sharia rules that deprive the children of a natural upbringing. As in Re JA she says this court should overturn the peremptory order on the grounds that the Sudanese system is inimical to child welfare.

The ease of international and intercontinental air travel has created the evil of international child abduction. The response of the international community has been the negotiation of the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980. Its ratification by the UK was followed by its introduction into domestic law by the Child Abduction and Custody Act 1985. The Convention has been extremely successful. Since 1980 no less than 57 States have joined the club. For the purposes of this judgment I shall refer to States that have acceded as members and those that have not as non-members.

However, there has been an obvious limitation to this success. The member States by and large all derive their sense of law and justice from the Judaeo-Christian root. No State that settles civil and family disputes according to Islamic law has joined the club. The nearest approach is the making of bilateral treaties between France and Spain on the one hand and North African States on the other. There is also the prospect of accession by States with predominantly Muslim populations. For instance, Turkey has signed the Convention but not yet ratified it, and Turkmenistan is a full member. When a State accedes to the Convention existing members have the option to recognise the accession, thus creating binding treaty rights between the States, or to withhold recognition. The treaty is only effective between the acceding States and those existing members who have recognised accession.

It must be emphasised that the Convention is limited to the provision of regulation to ensure the swift return of abducted children. One of the underlying principles is that it is for the country of origin to determine the conflict between the parents that has culminated in flight. The Convention does not provide any regulation for the determination of that underlying dispute. That is for the lex fori.

Of course, the successful operation of the Convention depends upon mutual confidence that the family dispute will be determined in the country of origin according to standards and principles of justice broadly comparable to those available in the returning State. However, as the number of club members has increased it may be increasingly difficult to maintain that confidence. For instance, the breakup of the USSR and the former Yugoslav Republic has seen the accession of a number of individual jurisdictions. Besides Turkmenistan, Uzbekistan, has acceded, as have Moldavia and Belarus. The UK has recognised the accession of Turkmenistan and recognition of the other States is pending.

Before recognising accession, the Foreign and Commonwealth Office makes inquiries locally to satisfy itself that there is in place a Central Authority and a justice system capable of providing the reciprocal service that the Convention requires. However, I do not understand there to be any requirement of minimum standards of the family justice system in the

acceding State. Whilst consideration was given to setting such a requirement, it was decided that there was too obvious a risk of invidious comparisons and inflammatory exclusions. To this extent arrangements have developed since June 1997 when the Official Solicitor, as Central Authority, was directly involved with vetting, as noted by Ward LJ in Re JA at 240A. Of course the maintenance of mutual confidence within the member States is crucial to the practical operation of the Convention. But the promotion of that confidence is probably most effectively achieved by the development of channels for judicial communication such as the Seminar for Judges convened in 1998 in Holland by the Hague Conference on Private International Law.

The welfare principle as paramount has been the cornerstone of the family justice system in this jurisdiction for many years. We regard it as a touchstone in measuring the quality of other family justice systems. Article 3 of the United Nations Convention on the Rights of the Child 1989 requires no less. But what constitutes the welfare of the child must be subject to the cultural background and expectations of the jurisdiction striving to achieve it. It does not seem to me possible to regard it as an absolute standard. It would be quite unrealistic to suppose that the concept of child welfare is equally understood and applied throughout the 57 member States. The further development of international collaboration to combat child abduction may well depend upon the capacity of States to respect a variety of concepts of child welfare derived from differing cultures and traditions. A recognition of this reality must inform judicial policy with regard to the return of children abducted from non-member States.

The principles determining outcome of applications for the return of children abducted from non-member States have been considered in a line of cases in this court, culminating in the case of Re JA. In that case the leading judgment was given by Ward LJ, as it was in its immediate predecessor Re P (Abduction: Non-Convention Country) [1997] 1 FLR 780. In the earlier case this court allowed an appeal from the decision of Stuart-White J who had felt himself constrained by authority to determine the application as though notionally made under the Convention when his instincts suggested that the opposite outcome would be better for the child. After a full review of the authorities, Ward LJ emphasised that the welfare consideration is always paramount. In the later case of Re JA he had occasion to consider a point raised by a respondent's notice that had not been considered by Singer J. The point was defined thus:

'. . . 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.'

The expert evidence established that in the State of Sharjah the mother had care of the child, subject to the father's guardianship, until the age of 12, when care passed automatically to the father. The mother's care had to be exercised within about 100 miles of the father's home and the court had no discretion to entertain her application to relocate in the UK. Ward LJ, having reviewed the authorities, said:

'These authorities seem to me clearly to establish that it is an abdication of the responsibility and an abnegation 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.'

Whilst I am in agreement with the first sentence of the citation, I do not share his view that the decision in Re M was reached per incuriam. I believe that it holds a legitimate place in the stream of authority, bearing in mind that statements of judicial principle are always susceptible to the requirements of each individual family case.

In Re M Waite LJ had said at 480:

'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.'

As a general principle of private international law that seems to me to be properly stated. In support of the approach adopted by Waite LJ in Re M, I would also cite the decision of this court in Re S (Minors) (Abduction) [1994] 1 FLR 297, seemingly not cited in Re JA. There the appellant mother submitted that the question was:

'. . . whether or not the court should order a peremptory return to a jurisdiction which does not apply a similar system of law to that governing decisions over the welfare of children adopted in the courts of England.'

The country in question was Pakistan, which meant that 'Muslim law principles will be applied to the case unless there are overriding reasons to the contrary'. In deciding the issue Balcombe LJ adopted the approach of the Master of the Rolls in Re F (A Minor) (Abduction: Jurisdiction) [1991] Fam 25, [1991] 1 FLR 1 and held that it would not be appropriate to deny the Pakistan courts jurisdiction merely because they would try to give effect to what was the child's welfare from the Muslim point of view. In a concurring judgment Nolan LJ said:

'But it is implicit in s 1(1)(a) [of the Children Act 1989] that the paramountcy of the child's welfare is to be observed consistently with the law to which the child is subject.'

I am also attracted by a passage from the judgment of Brennan J in an Australian case, cited with approval by Ward LJ in the case of Re P. The sentence which I extract from the citation is this:

'In any event, when the Family Court is determining an application for the return of a child to the place of the child's ordinary residence, the capacity, sensitivity or procedures of the courts of that country are likely to be of minor importance unless the evidence shows that those courts are unlikely to make and to enforce orders deemed to be appropriate in that society to protect the child and to serve his or her best interests.'

That citation emphasises the importance of according to each State liberty to determine the family justice system and principles that it deems appropriate to protect the child and to serve his best interests. There is an obvious threat to comity if a State whose system derives from Judaeo-Christian foundations condemns a system derived from an Islamic foundation when that system is conceived by its originators and operators to promote and protect the interests of children within that society and according to its traditions and values.

What weighed with Ward LJ in Re JA was not so much that child welfare would not be considered as that the mother would have no right to apply in Sharjah to relocate to this jurisdiction. The relationship between the wrongful international abduction of children and

the rights of a parent to relocate on separation have always seemed to me to be intricately interconnected. In this jurisdiction we do not refuse the application of the parent with the residence order the right to exercise that responsibility in another jurisdiction, unless the decision is clearly shown to be incompatible with the paramount welfare consideration: see Chamberlain v de la Mare (1983) 4 FLR 434. Such an approach reinforces the obligation on the parent with the responsibility of providing the primary home to apply for permission to relocate and not to abduct. But the approach that we adopt is by no means universal or even commonplace even amongst the member States. Obviously the adoption of a more restrictive approach to relocation applications increases the pressure and temptation to abduct.

The Council of Europe has worked hard, and continues to work hard, for the harmonisation of family law amongst its membership. However, the number and diversity of the member States makes this a difficult if not impossible goal. Even the European Union has as yet made no endeavour to map out a common approach to family law, I have no doubt that the number and the diversity of the States that have joined the Hague club have made it impossible to formulate minimum standard requirements of other family justice systems before recognising accession. As a matter of logic, if we make no investigation and in litigation permit no criticism of the family justice systems operating in the member States, I am extremely doubtful of the wisdom of permitting the abducting parent to criticise the standards of the family justice system in the non-member State of habitual residence, save in exceptional circumstances, such as those therein defined by the Master of the Rolls in Re F [1991] Fam 25, 31, [1991] 1 FLR 1, 4, when he referred to persecution, or ethnic, sex, or any other discrimination, I am equally doubtful of the principle enabling a judge in this jurisdiction to criticise the standards or paramount principles applied by the family justice systems of a non-member State save in such exceptional circumstances.

In summary, there are three relatively recent decisions of this court on defences to peremptory return applications asserting that the system of justice in the foreign State threatened the paramount welfare principle. They are of course Re S, Re M and Re JA. Only in the last case did the defence succeed. But in my opinion that was not because this court was signalling a change of course but because expert evidence established that risk of harm to the child if return were ordered.

Of these three cases perhaps that which is nearest on the facts to this is the case of Re S. In neither case was there any specific evidence of harm or risk of harm. In each there was a generalised attack on the application of Muslim perceptions of child welfare. Both States had received systems of law during the brief flowering of the British Empire. Pakistan applied s 17 of the Guardians and Wards Act 1890 in these terms:

'In the event of a dispute involving the physical care of a child, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.'

Post independence, both States have chosen to move to an orthodox Islamification of family law. In such circumstances it would seem to me to be particularly insensitive of a court in London to hold that that move offended a concept of child welfare that we retain.

I agree with Connell J that the outcome in particular cases is particularly dependent on the factual matrix. His findings of fact cannot be challenged. Nor can his directions as to the law be faulted. In my opinion he was plainly right in his conclusions.

I would dismiss this appeal.

PILL LJ: I agree. The judge found the following facts at p 161:

'In my view it is clear that the children had habitually resided in the Sudan until 9 May 1999. They are Sudanese children removed from the mother from familiar surroundings to the UK. They speak a very limited amount of English. The children are now living in temporary accommodation, there is much doubt as to their future and that of the mother.'

At p 168:

'In relation to the welfare of the children: in May 1999 they were settled in the Sudan. They appear to be doing pretty well. The eldest boy won a prize for "ideal pupil". They saw the mother and had extended contact. The abduction took place when they were on extended contact. In this country they are strangers. Their future is uncertain. The father says and I accept, that he intends to return this year or next year to Khartoum when he has bought a house. The mother's broader family is in the Sudan -- has lived there for the last 5 years.'

As to the law which would be applied in the Sudan, the judge received evidence from an expert who set out the principles of law which apply in circumstances such as the present. The judge concluded at p 167:

'Here the evidence of the expert is that the courts in the Sudan do take account of the best interests of the children but they do so in accordance with Sudanese law and culture, which involves different concepts from British concepts. With a Sudanese Muslim family habitually resident in the Sudan this is scarcely surprising. In my view the courts in Sudan will apply Muslim law which is appropriate and acceptable to this Muslim family.'

It is not disputed that in the Sudan there is a judicial system which operates under the rule of law. What is submitted is that the operation of the Sudanese rule that in present circumstances the mother cannot obtain a residence order, is unacceptable and inconsistent with English law notions of child welfare even though substantial access by the mother to the children is provided.

I have no difficulty in accepting the judge's conclusion that the application of Muslim law to this Muslim family is appropriate and acceptable. It is submitted on behalf of the mother that the welfare of children, paramount in English law, must take priority over notions of international comity and respect for foreign courts in non-Convention States. In my judgment the two are not inevitably in conflict. These are Sudanese children. Their welfare may well be served by a decision in accordance with Sudanese law which may be taken to reflect the norms and values of the Sudanese society in which they live. That is a principle which the judge was entitled to take into account upon the facts of the case, thereby giving paramountcy to the welfare of the children. A solution in accordance with local law is capable of being in the best interests of the children.

In Re F (A Minor) (Abduction: Jurisdiction) [1991] Fam 25, [1991] 1 FLR 1 Lord Donaldson MR stated at 31H and 5 respectively:

'Which court should decide depends, as I have said, on whether the other court will apply principles which are acceptable to the English courts as being appropriate, subject always to any contra-indication such as those mentioned in Art 13 of the Hague Convention, or a risk of persecution or discrimination, but prima facie the court to decide is that of the State where the child was habitually resident immediately before its removal.'

Lord Donaldson also approved a statement made by Balcombe LJ in G v G (Minors: Abduction) [1991] 2 FLR 506. Balcombe LJ stated:

'. . . in enacting the 1985 Act, Parliament was not departing from the fundamental principle that the welfare of the child is paramount. Rather it was giving effect to a belief that in normal circumstances it is in the interests of children that parents or others should not abduct them from one jurisdiction to another, but that any decision relating to the custody of children is best decided in the jurisdiction in which they have hitherto normally been resident . . .'

Those statements of principle were repeated in this court in Re S (Minors) (Abduction) [1994] 1 FLR 297. Nolan LJ stated:

'It is settled law that although Pakistan is not a signatory to the Hague Convention, we must apply the philosophy of the Convention to the case before us; see G v G . . . and Re F . . . This philosophy is that in normal circumstances it is in the interests of the children that parents or others should not abduct them from one jurisdiction to another but that any decision relating to the custody of children is best decided in the jurisdiction in which they have hitherto been normally resident . . .'

Nolan LJ went on to consider the facts of that case which involved Pakistan. He added:

'In the present case the argument before us is that Sir Gervase Sheldon wrongly failed to appreciate or take sufficient account of the fact that the attitude of the Pakistani courts towards the welfare of the children would differ significantly from that of an English court.'

Having considered the facts Nolan LJ said:

'In my judgment, Sir Gervase Sheldon was fully entitled to take the view that, for Muslim children of Muslim parents whose home hitherto has been in Pakistan, the principles of Pakistani law are appropriate by English standards' -- my emphasis.

The principle I have identified will not of course be decisive in every case. There will be cases in which the links between the children and the foreign State are less strong than they are in the present case. There may also be cases, as Lord Donaldson MR contemplated, in which the notions of children's upbringing in the, foreign State are wholly repugnant to English notions of provision for the welfare of children. On the present facts, however, the conclusion of the judge was in my view unimpeachable. Like Thorpe LJ, I also do not agree with the suggestion that Re M (Abduction: Peremptory Return Order) [1996] 1 FLR 478 was decided per incuriam.

I agree that the appeal should be dismissed.

STUART-SMITH LJ: I also agree, for the reasons given by my Lords.

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