

P F v E M

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| No Substantial Judicial Treatment |
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Court

Family Division

Judgment Date

6 February 2008

FD07P02644

High Court of Justice Family Division

[2008] EWHC 1467 (Fam), 2008 WL 2697018

Before: Mr. Justice Ryder (In Private)

6th February 2008

Representation

Mr. Edward Devereux (instructed by Dawson Cornwell) appeared on behalf of the Plaintiff.
Mrs. Nicola Martin (instructed by Allington Hughes) appeared on behalf of the Defendant.

Judgment

Mr. Justice Ryder:

1. This is the final hearing of the application made on 14th December 2007 by a plaintiff father, P F, who was born on 17th May 1971 and is now aged 36, pursuant to the [Child Abduction and Custody Act 1985](#) , which incorporates the Hague Convention on the Civil Aspects of International Child Abduction 1980. The application is for the summary return of the parties' two children, N, who was born on 29th May 2002 and is now aged five, and M, who was born on 22nd March 2005 and is now aged two, to the Republic of France where they were (and are) habitually resident.
2. The defendant mother is E M, who was born on 22nd September 1981 and is now aged 26. She has a further child, A, who was born on 22nd March 2007 and is now aged ten months, who is not subject to these proceedings and is a consequence of a relationship with a Mr. K J. The defendant concedes that she wrongfully removed the two children who are the subject of these proceedings on 12th November 2007 when she relocated from France to the jurisdiction of England and Wales. She defends the proceedings by seeking to rely on the exception under Article 13(b) of the Convention.
3. Father submits that the children should be summarily returned to France pursuant to Article 12 of the Convention on the basis that the mother is not able to meet the very high threshold required to make out an exception to return under Article 13(b) . Although father has an alternative case relating to recognition and enforcement of the existing French proceedings under Brussels II Revised, he does not seek to pursue that remedy today because of the procedural requirements which would need to be satisfied. It is clear in any event and it is common ground that the French court is already seised of the case, and welfare-based orders have been made in that jurisdiction.

The Brief Background to the Application

4. The father is a French national and has, until recently, lived at 9 R L'E, France, with his mother. He is now

cohabiting with a new partner. The mother is a UK national. The parties began a relationship in late 1999 and they began living together in or about January 2000. The children are the only children of the relationship between the parties, and that relationship broke down in or around early May of 2006. After the breakdown of the parties' relationship and by an application dated 6th March 2007, the mother sought various orders in France, settling the arrangements for the children.

5. Prior to March 2007, there had been some involvement between the mother and French social services. On 21st March 2007, an order was made in the French proceedings for there to be investigation into the children's upbringing by the ADSEAM agency. Thereafter, in the Tribunal de Grande Instance in France on 24th May 2007, the court confirmed joint parental responsibility for the children and it made orders that the children should reside with their mother and have contact with their father, pending a further hearing and completion of a welfare report. The matter was also listed for a further hearing. In a subsequent judgment of that tribunal, the residence order is described as temporary; that is pending further hearing before that court.

6. On 1st October 2007, the welfare report was completed and, on 22nd October 2007, the parties returned to court. The French court made a form of supervision order for one year. On a date unknown to this court, the parties accept that they were notified of a further hearing which took place on 22nd November 2007, when the mother did not attend, having by that time wrongfully removed the children to England. On that occasion, the French court made a residence order in favour of the father but made no provision for contact to mother. That order remains in force and the mother has taken no steps to appeal or vary it. I am told that mother was unrepresented at that hearing but that her advocate appeared briefly to explain that he had no instructions.

7. Within the welfare report, significant welfare concerns were raised about the mother's ability to parent the children, and her lifestyle. The report concluded that she was "a very disturbed personality". It is perhaps not surprising that the French court made the order which it did, having regard to the content of that report and mother's absence with the children.

The History of these Proceedings

8. These proceedings were first issued before Sumner J. on a without-notice basis on 14th December 2007. On that occasion, he made a location order and various disclosure orders. There were then various hearings which were used to trace the whereabouts of mother and the children. On 12th January 2008, the mother and the children were located in W. The mother was thereafter personally served on 14th January 2008 and, on 17th January 2008, Roderic Wood J. made case management directions leading up to this final hearing.

9. For the avoidance of doubt, this hearing was set up on the basis that disputed issues of fact would be for whichever court deals with the welfare issues and not this court. Accordingly, no provision was made for the hearing of oral evidence. Likewise, no application was made for the interview of the children by a CAFCASS practitioner; whether or not that would have been appropriate having regard to their young ages need not concern me. The suggestion that I must have regard to any objections they raise and hear them is readily accepted by me, and I propose to do that by taking as read the children's objections as reported by mother and the school. After I had announced the decision of the court, mother instructed her counsel to make an informal application that the elder child be seen by the CAFCASS unit at the PRFD. This was on the basis that N had said she would not return to France, she would run away and, in any event, mother believes there is no equivalent to CAFCASS in France.

10. I have considered these questions de bene esse and as if raised within the proceedings and I have decided it would add nothing to subject N to an interview. I have her clear views as a five-year-old and I take them into account. As it happens, I believe mother is wrong about the French welfare reporters' ability to speak with children and, indeed, the normal practice of the French judiciary, but the normal provision for the interview of children in the European jurisdictions is often more advanced than our own and I decline to accede to mother's request on that basis.

The Father's Case

11. The specific twin objects of the Convention are:

“(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.”

The locus classicus of the object and purpose of the Convention is the speech of Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence)* [1997] 1 F.L.R. 872 at 875F, which Ward L.J. called “the most authoritative statement of the purpose of the Convention” in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 F.L.R. 1145 at 1152, E to F:

“The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of the child to the state of his habitual residence.”

There is, further, an important deterrent aspect to the Convention:

“The Convention is there not only to secure the prompt return of abducted children but also to deter abduction, in the first place. The message should go out to potential abductors that there are no safe havens amongst contracting states [per Baroness Hale of Richmond at para.42 of *Re M (Abduction: Zimbabwe)* [2007] U.K.H.L. 55. [2008] 1 F.L.R. 251 .”

Indeed it is well established across all jurisdictions that the “limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated” (per Baroness Hale in *Re D (Abduction: Rights of Custody)* [2006] 1 W.L.R. 989 at para.51 at 1007 and Balcombe L.J. speaking generally about the policy of the Convention in *S v. S (Child Abduction)(Child’s Views)* [1992] 2 F.L.R. 492 at 501, B to D).

12. As to the Article 13(b) exception, father says, by *reference to In Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 F.L.R. 1145 in the judgment of Ward L.J. at 1154A that:

“There is therefore an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence”.

In *TB v. JB (Abduction: Grave Risk of Harm)* [2001] 2 F.L.R. 515 at para.110, Laws L.J. concluded that Article 13(b) “is there to relax the obligation to return under Article 12 in a very exceptional case”.

13. Before Brussels II Revised, or in a case outside the ambit of this regulation, if the court was (or is) satisfied that the child would be given adequate protection by the courts of the requesting state and/or the left-behind parent had provided sufficient protective undertakings, the abducting parent would usually not be able to rely on the Article 13(b) exception, especially in the cases where domestic violence has been raised (see, for example, *Re M (Abduction: Intolerable Situation)* [2000] 1 F.L.R. 930 and *TB v. JB* above). After Brussels II Revised, in a case bound by that regulation, the court is positively required to return the child “if it is established that adequate arrangements have been made to secure the protection of the child after his or her return” (see Article 11 thereof).

14. As to the facts, the father disputes the contents of mother’s affidavit, in particular as to domestic abuse. He says that any such dispute as to welfare concerns should be resolved in the French court by a detailed investigation, which has already been ongoing. He also says that it is noteworthy that mother did not raise much of the specific detail of her concerns in her statement to the welfare reporter in the French proceedings, where (at C.28 of the bundle) it can be seen that only general cross-allegations are recorded. Further, father says that he will withdraw his criminal complaint; that he will not pursue or assist in criminal or civil complaints in relation to the children’s abduction; that he will provide weekly contact and financial support for the return. He will also co-operate with any French proceedings and provide non molestation and harassment undertakings.

15. Mother’s case under Article 13(b) has two limbs: (1) grave risk of psychological or physical harm arising out of the alleged domestic abuse and (2) intolerability arising (it is said) out of her position vis-à-vis the French legal process. She accepts she must discharge the burden of establishing the Article 13(b) exception and says that, in that regard, she will not be able to obtain representation; that the courts and welfare advisers in France are against her; that she has not been able to get them to acknowledge or consider her detailed allegations; and that she is at risk, having regard to their view of her present cohabitee, of losing her third child into state

care. Further, she says that there are witnesses of fact who would support her in the allegations she makes, some of which are contained in the bundle of papers which I have read and considered.

16. Let me deal first of all with her factual case, reminding myself that this is not an appropriate venue for the determination of disputed facts. If I take her allegations set out at paras.6 to 21, inclusive, of her affidavit of 25th January 2008 at face value and ignore father's adverse commentary upon the same – namely that they are developed only to support her abduction – I must nevertheless assess whether they are, in themselves, capable of establishing the high threshold required. I acknowledge what Wall L.J. said in *Re W* [2005] F.L.R. 729 at para.49:

“The second proposition with which I find myself unable to agree is the judge's suggestion that an Article 13(b) defence, which in itself demands a high threshold as the law now stands, has no realistic chance of ever being established unless there has been violence or other specific abuse to the child himself/herself. In my judgment, this proposition is not an accurate statement of the law. The court in a Hague Convention case is entitled to recognise the interrelationship and important interdependence between a mother and child who have lived in an abusive situation over a period of time. In my experience, it is well recognised both in the domestic and international jurisdictions that, in the context of domestic violence, the position of the child is vitally affected by the position of a child's mother. If the effect on the mother of the father's conduct is severe, it is, in my judgment, no hindrance to the success of Article 13(b) defence that no specific abuse has been perpetrated by the father on the child.”

I have regard to that dicta in relation both to the allegations which mother makes as to father's violence upon her and also the effect of his behaviour upon the children. I would add that this court takes domestic violence allegations very seriously indeed. However, it is only if I am able to find that the potential effect of the alleged abuse is such that the grave risk of harm can be established that I should move to investigate that by psychological report.

17. I regret that, on the first limb of her defence, I am forced to adopt the submission urged on me by the father. The threshold to make out an Article 13(b) exception is a very high one. The evidence the mother produces falls short of the clear and compelling evidence which would be expected to make out the exception to the obligation to return. Not to return immediately would frustrate the policy of the Convention. The father, in any event, offers undertakings as to non molestation and non-prosecution of the mother. In my judgment, this serves to neutralise much of the mother's asserted Article 13(b) factual circumstances. Father is entitled to (and does) rely, in addition, on Article 11(4) of Brussels II Revised. The exception which the mother seeks to rely on is centred on the children's, not the parties', interests. Until she abducted the children, the mother allowed the father unsupervised overnight contact; indeed her original application before the French court was for residence with her and joint custody with the father.

18. So far as the second limb of her argument is concerned, it is near impossible to assert without a specific and detailed case that a Brussels' signatory's legal process is such that it, of itself, produces intolerability; in other words the actual circumstances of intolerability must be pleaded. Mother's affidavit evidence does not develop a case which is sufficient to satisfy the threshold in that regard.

19. The French judiciary have responded to mother's application; indeed her case was upheld by them, at least until she unlawfully removed the children. There were no apparent representational or linguistic difficulties until she chose to leave the jurisdiction and failed to appear before the French judge last November. The welfare report to which I have alluded is detailed and even handed in its condemnation, as are the French court's judgments. There is simply nothing sufficient to permit this court to interfere with the French process. Comity and respect for the policy of the Convention obliges this court, which is a harsh jurisdiction, I readily accept, unless there is the most persuasive compelling evidence to the contrary, to determine that the French courts are just as capable of fairly investigating and adjudicating on the competing claims of the parties. The mother's assertions as to the question of fairness of any proceedings in France cannot therefore be an Article 13(b) defence.

20. In all the circumstances, I hold that the Article 13(b) exception is not established and accordingly there must be an order for the return of both of the children to the jurisdiction of the Republic of France.

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