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Case No Judgment No. HH-243-99

Court High Court, Harare

Judge Devittie J

Heard October 22, 1999

Judgment November 30, 1999

Counsel Mrs J Zindi, for the applicant

F Girach, for the respondent

Annotations None

Chamber application B

[zFNz]Flynote

Family law - application for return of abducted minor children - proceedings under Child Abduction Act [Chapter 5:05] C

[zHNz]Headnote

A Zimbabwean woman had married a Scottish man in England where they resided. They had two minor children. During the marriage, the man had been violent and intimidating towards the woman but had not physically harmed the children. Because of marital problems, the parties eventually separated. The children lived with their mother in England but the father enjoyed rights of custody together with the mother and he had frequent access to the children. The woman removed the children from England and brought them to Zimbabwe. At the time she D was removing the children the man was attempting to obtain a court order to prohibit her from taking the children out of England.

An application was made for the return of two minor children to England under the Convention on the Civil Aspects of International Child Abduction which has been given the force of law in Zimbabwe by the Child Abduction Act [Chapter 5:05].

Article 3 of the Convention provides that the removal of a minor child by one parent is wrongful where the child E has been removed from the place where it was habitually resident in breach of rights of custody which the other parent has in terms of the law of that country and those rights were actually being exercised.

Article 12 provides that where there has been such wrongful removal and proceedings for the child's return have been commenced less than one year from the date of removal, the court "shall order the return of the child forthwith". The present application satisfied these requirements.

However, article 13 stipulates that the court of the requested state is not bound to order the return of a child if the F parent opposing the return of the child establishes that there is a grave risk that the child's return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". The question in the present case was whether this provision applied.

Held, that the primary purpose of the Convention is to provide a mechanism to for the return of the child to the country where the child is habitually resident and from which it has been wrongfully removed. The principle G underlying the Convention is that it is in the best interests of the child for him or her to return to the county from which he or she has been wrongfully removed. It is normally to be expected that the courts in the country from which the child has been taken will assume the responsibility to look after the interests of the child and prevent harm to the child.

Held, further, that only in exceptional cases will the court have the discretion not to order the return of the child. There must be a grave risk of severe harm to the child on return or a situation entailing a high level of H intolerability.

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Held, further, that in the present case it was not established that the child would be exposed to a grave risk of A harm and the court was obliged to order the return of the child.

Held, however, that the court was entitled to order the father in England to make certain specified undertakings before finally ordering the return of the child to England.

[zCIz]Cases Considered

Cases cited:

A & Anor (minors: abduction: acquiescence), Re [1992] 1 All ER 929 (CA)

A (a minor: abduction), Re [1981] FLR 365 B

C v C (minor: abduction), [1989] 2 All ER 465 (CA)

F (minor: abduction: rights of custody abroad), Re [1995] 3 All ER 641 (CA)

[zCIz]Case Information

Mrs J Zindi, for the applicant

F Girach, for the respondent

[zJDz]Judgment

Devittie J: This is an application for the return to England of two minor children, Chays and Knol. It is brought C under the Convention on the Civil Aspects of International Child Abduction, which has force of law in Zimbabwe by virtue of the Child Abduction Act [Chapter 5:05].

The minor children, Chays and Knol were born on 13 July 1992 and 8 February 1994, respectively. Their mother is Zimbabwean aged 30 and their father is Scottish aged 37. They met in Newmarket, England, in 1990. At the D time, the mother had recently completed a degree in horse mastership in Natal, South Africa. She had then gone to Newmarket hoping to enrol for a course as a horse trainer. On arrival in England, she did not succeed in enrolling for the course in horse training. She obtained temporary employment as a stable hand. She intended to return to Zimbabwe soon. Then, she met the father of the minor children. Their relationship developed and they E married in 1993. Save for the occasional trip to Zimbabwe and a brief stay in Scotland, they lived in England with the minor children up to the time of the events that preceded this application. It is to these events that I must now turn.

It appears that the marriage was not a happy one. In late 1998, they separated. The mother moved out of the F matrimonial home and she obtained rented accommodation for herself, the minor children and her sister who was on a lengthy visit from Zimbabwe. In January 1999, the mother's sister decided to return to Zimbabwe. According to the mother, this placed her in a difficult situation. She states that she panicked because she did not know how she would cope with the children without her sister's assistance. She took the decision to return to G Zimbabwe. She explains that decision in these words:

"I knew that I could not find any support from George nor did I wish to have any. I realised that if I stayed in the United Kingdom, I would have to stop work and I would have to rely on full social benefits as I would be unable to work without the help of my sister. Accordingly, I decided to bring my plans to return to Zimbabwe forward." H

The father, it seems, sensed her mood. Fearful that she was about to leave England with the minor children, he A obtained an order ex parte from the Cambridge County Court on 3 February 1999. The order forbade the mother from removing the minor children from the jurisdiction of the Court. The order was not served on the mother. She had left England for Zimbabwe two days before the order was granted.

On 16 February 1999, the Lord Chancellor's Department in England, applied to the Secretary of Justice, Legal B and Parliamentary Affairs for the return of the minor children to England. No doubt, the father had sought relief under the Convention. For the purposes of the Convention, the Secretary is the central authority and it is

to him that such applications are addressed in the first instance. For reasons not immediately apparent, this application was not brought before me until late October 1999, several months after the arrival of the children in Zimbabwe. C

The Secretary for Justice, Legal and Parliamentary Affairs, as the Central Authority, seeks an order for the immediate return of the minor children to England. He avers in his founding affidavit that the children were wrongfully removed from the United Kingdom and that prior to their removal they were habitually resident in the D United Kingdom. He further avers that, prior to the removal of the children to Zimbabwe, both parents enjoyed custodial rights. These averments are necessary to bring the application within the ambit of article 3 of the Convention. Article 3 provides that the removal or retention of a child is to be considered wrongful where:

" (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either E jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

In substantiation of the allegation that the children were wrongfully removed, an affidavit, sworn to by the father, is F annexed to the application. He states that after the mother moved out of the matrimonial home in late 1998, he played an active role in the children's lives. He claims that, in January 1999, one of the children confided in him that his mother intended to take them to Africa. This was of real concern to him and he subsequently telephoned G the mother to advise her that he intended to bring a court action to prevent her taking the children out of the country.

The application for the return of the minors is opposed on several grounds. Mr Girach for the applicant, raised a point in limine. It is that as the application involves minors, r 249 of the Rules of Court applies. Rule 249 provides H that in any application in connection with a minor, a chamber

application shall first be made for the appointment of a curator ad litem. After his appointment, the curator ad A litem is required to conduct an investigation and submit a report for consideration in the substantive application. Mr Girach submitted that the application ought not to be entertained until there has been compliance with r 249. I do not agree that in applications under the Convention, a curator ad litem has first to be appointed. As will become apparent in the course of this judgment, I consider that the issues which arise for determination in this B case turn on an application of the principles of the Convention. In my judgment, a resolution of these issues does not require me to consider the interests of the minor

children, in the sense ascribed to that phrase in applications under r 249. I readily accept, though, that situations may arise in applications under the Convention, where the court may be assisted by a specialist's report touching on the health of a minor child and the harm that C may result if the child is returned to his place of habitual residence. This, however, is not such a case.

The next argument raised in opposition was that the removal was not wrongful because the father consented to their removal. In this regard, reliance was placed on the mother's claim, in her opposing affidavit, that the father D agreed in January 1999 that it would be in the best interests of the children to grow up in Zimbabwe. She stated that when she indicated that he could come with her to Zimbabwe, provided they lived separately, his anger flared up. It cannot in these circumstances be seriously contended that the father agreed to the removal of the children. Moreover, his subsequent actions in instructing his solicitors to obtain an order prohibiting her from E removing the children from Newmarket, and in promptly applying for relief under the Convention, are hardly consistent with his having consented.

No question arises as to the father not having enjoyed rights of custody in English law. Clearly, he did. This much is clear from the letter from the Lord Chancellor's Department, where reference is made to the relevant English F statute. I find therefore that, the removal of the minor children was wrongful in terms of article 3. In terms of article 12, where a child has been wrongfully removed in terms of article 3, and, at the date of commencement of proceedings for the return of the child, a period of less than one year has elapsed from the date of removal, the court "shall order the return of the child forthwith". This is the position that now obtains. G

It was submitted, however, that even if I do find that requirements of article 12 are met, I should not order the return of the minor children because there is a grave risk that the return of the children would "expose them to physical or psychological harm or otherwise place them in an intolerable situation". In making this submission, counsel seeks to bring the facts of this case within H

the exception in article 13 of the Convention. It provides that a judicial authority of the requested state is not A bound to order the return of the children if the person who opposes their return establishes that:

" (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological B harm or otherwise place the child in an intolerable situation."

I turn, therefore, to consider whether there is a grave risk that the return of the minors would expose them to physical or psychological harm or otherwise place them in an intolerable situation. The mother has set out, in great detail, the history of the marriage. She claims that throughout the marriage the father has subjected her to C physical and verbal abuse. He drank heavily and, when under the influence of alcohol, he hurled verbal abuse at her. At times he severely assaulted her. He was financially irresponsible and on one occasion, after a visit to Zimbabwe, she discovered that he had gambled away all the family's savings. At the time that she moved to Zimbabwe, she says that she was at the end of her tether and had moved out of the matrimonial home. She had D resolved to return to Zimbabwe. What precipitated her resolve was the realization that she would be unable to cope with the minor children when her sister returned to Zimbabwe.

She says that both children were affected by the father's conduct and developed emotional problems. Chays became truculent. She believes he was emulating his father's behaviour towards her. At times, he refused to go E to school. The other child developed a condition she described as alopecia areata which is caused by stress. The symptoms are loss of hair and a photograph she produced indicated a substantial loss of hair. She attributed all this to the stressful environment in which the children were growing up. The children have been in F Zimbabwe for about ten months. The mother says they have settled well into their new environment at their grandparents' home in Chiredzi. The younger child's hair has grown and the headmaster's reports are positive.

When considering applications under the Convention, it is important to pay heed to the purposes of the Convention and the principles subscribed to by the contracting states. G

The preamble to the Convention reads thus:

"Firmly convinced that the interests of the children are of paramount importance in matters relating to their custody; desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access." H

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In article 1, the objects of the Convention are stated as follows: A

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

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

The clear purpose of the Convention, as the preamble and article 1 indicate, is to provide a mechanism to deal with situations where children are wrongfully removed from a jurisdiction in which they are habitually resident. I B am bound therefore to endeavour to give maximum force to the purposes of the Convention. As Lord Donaldson MR said in Re A & Anor (minors: abduction: acquiescence) [1992] 1 All ER 929 at 942:

"In considering the first issue, the court of country B should approach the matter by giving the fullest force to the policy which clearly underlies the Convention and the Act, namely, that wrongful removal or retention shall not C confer any benefit or advantage on the person who has committed the wrongful act. It is only if the interests of the child render it appropriate that the court of country B rather than country A shall determine its future that there can be any exception to an order for its return. This is something quite different from a consideration of whether the best interests of the child will be served by its living in country B rather than country A. That is not the issue unless para (b) of article 13 applies. The issue is whether decisions in the best interests of the child shall be D taken by one court rather than another. If, as usually should be the case, the courts of country B decide to return the child to the jurisdiction of the courts in country A, the latter courts will be in no way inhibited from giving permission for the child to return to country B or indeed becoming settled there and so subject to the jurisdiction of the courts of that country. But that will be a matter for the courts of country A."

What clearly emerges from the above dictum is that I am not required to consider the interests of the minor child E as though this were a custody dispute. That is a matter for the English courts to decide.

As Nourse LJ said in Re A (a minor: abduction) [1981] FLR 365 at 368:

"These and other provisions of the Convention demonstrate that its primary purpose is to provide for the F summary return to the country of their habitual residence of children who are wrongfully removed or retained in another country, in breach of subsisting rights of custody or access. Except in specified circumstances, the judicial and administrative authorities in the country to which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise." G

The Convention, if it is to be effective, requires uniform application by the contracting states. Accordingly, it is proper that I have regard to decisions in other jurisdictions.

In C v C (minor: abduction) [1989] 2 All ER 465 at 473, Lord Donaldson MR considered the degree of psychological harm contemplated in article 13(b). He said: H

"We have to consider article 13, with reference to 'psychological harm'. I would only add that in a situation in A which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation', which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or B evidence that it is beyond the powers of the courts in the circumstances of the cases, the courts of the country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the court of the other country, Australia in this case, can resume their normal role in relation to the child."

In Re A & Anor (minors: abduction: acquiescence) [1992] 1 All ER 929, the submission was made that the minor C would be placed in an intolerable situation if they returned because on their arrival there would be no home and no financial support save for state benefits. Balcombe LJ rejected this submission in these words:

"The judge also rejected a submission on behalf of the mother that there was a grave risk that to return the boys to Australia would place them in an intolerable situation. If the judge had accepted that submission that would D have unlocked the door to the exercise of his discretion under article 13(b). 'The argument there is that on their arrival there is no home and there is no financial support forthcoming from the plaintiff who himself lives on state benefits. That is in contrast to the security that the mother has achieved since her arrival in this jurisdiction. Here she has the support of her parents. She is in a position to sign a lease immediately for the rent of a suitable home. There is a letter from the school sharing that the children have apparently settled in well to a Church of England primary school. Therefore, it is said that the situation on their return would be intolerable and pointless.' E The judge rejected this argument: 'I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently intolerable situation. The fact is that between July and September of this year the whole family was dependent on state benefits. In this jurisdiction, equally the mother and children are dependent on state benefits. On their return, they would again be entirely dependent on Australian state benefits. So that can hardly be said in itself to constitute an intolerable situation.' This submission was

revived before us. F Nevertheless, I am quite clear in my mind that the matters (largely financial) upon which the mother seeks to rely as constituting an intolerable situation in Australia came nowhere near to establishing what the Hague Convention requires by that phrase."

A useful illustration of the degree of psychological harm that would suffice is the case of Re F (minor: abduction: G rights of custody abroad) [1995] 3 All ER 641. The facts of that case are that the mother obtained an order from a Colorado court ousting the father from the matrimonial home. The order was based on allegations of the father's violent conduct and the adverse effect on the minor child. The mother, a British citizen, left the United States with the minor shortly after the order was granted. She returned to the United Kingdom. The father applied H to the English for the return of the child. The

judge ordered the return of the child. The mother appealed. She contended inter alia that, given the serious effect A on the minor of the father's violent behaviour, there was a grave risk that returning the child would expose him to "physical or psychological harm or otherwise place him in an intolerable situation".

The factual findings which led the court to conclude that the exceptionally high standard required by article 13(b) had been reached were summed up by the Court of Appeal at p 648: B

"This child was, like so many other children, present at acts of violence and displays of uncontrollable temper directed at his mother or elsewhere, and at occasions of violence between the parents. These included assaults on his mother and one on his grandmother on the 6th June, destruction of household items such as ripping the fridge door off its hinges. More important in my view was that the child was himself the recipient of the violence C by the father. The judge was in error in finding only one occasion which directly affected the child when he suffered a nosebleed caused by the father in a temper throwing a coolbox onto the backseat where the child was sitting which hit him in the face. There were other incidents. He destroyed the child's toys by stamping on them and smashing them when the child was present. This happened more than once. On several occasions, he pinched the child on the legs causing bruising. One occasion of pinching was witnessed by the maternal grandmother. On 6 June, C was thrown out of the house as well as his mother. On this occasion, which was D immediately before the mother made her ex parte application to the county court, the police were called and took his father away. His father in his presence threatened to kill him and his mother. In these incidences, the child was not a bystander to matrimonial discord but a victim of it. In addition, other aspects of the behaviour of the father towards the child were unusual and inappropriate, such as waking up the child aged under four in the early hours of the morning, wanting to get him to wash the jeep. In addition, after the temporary restraining order was made and the father left the

house, the father seems to have engaged in a campaign of intimidation or E harassment directed at the mother, including following her about in his car and threatening her with a gun. He also camped in the jeep several doors away from the matrimonial home, which had a very adverse effect upon the child as well as upon the mother.

The child is asthmatic and the effect upon him of this behaviour was serious. He was present when his grandmother, who was recovering from surgery, was forcibly pushed out of the house and thrown against the wall. The child's reaction was to scream and to cry. He started to bed wet regularly and to have nightmares F where he screamed out in his sleep. He became unusually aggressive at the child care centre as well as at home. The effect of the father camping nearby in the jeep made him scared and upset. He copied the tantrums, the yelling, the screaming and the bad language of his father.

The extent to which the child was himself drawn into the violence between his parents and the clear evidence of the adverse effect on him of his father's violent and intimidating behaviour would not, in my view, in themselves G be sufficient to meet the high standard required in article 13(b). The matters which I find most telling are (1) the actual effect upon the child of the knowledge that he may be returning to Colorado together with the unusual circumstances, (2) that he'll be returning to the very same surroundings and potentially the very same situation as that which has had such a serious effect upon him before he was removed. There has to be concern as to whether the father would take any notice of future orders of the court or comply with undertakings he has given to the judge. How is a child H

of four to have any security or stability or from his perception come to terms with a return to his former home? I A have come to the conclusion on the unusual facts of this case that the extreme reaction of the child to the marital discord and the requirement by article 12 to return him on the facts of this case to the same house with the same attendant risks would create a grave risk that his return would expose him both to psychological harm and place him in an intolerable situation."

One of the judges of appeal, Millett LJ, was not entirely persuaded that the evidence established that the return of B the child would expose him to physical or psychological harm or place him in an intolerable situation. The learned Lord Justice however stated at 649 that "I am not prepared to pressure doubts to a dissent".

The principle underlying the Convention is that the best interests of children dictate that they be return to the C country from which they have been wrongfully removed. As the English court law demonstrated, it is only in exceptional cases that a court will have a discretion to refuse to order the immediate return. A parent who

opposes the return must meet stringent requirements. The Convention has in mind a high degree of harm to the child. So, too, the level of intolerability has to be high.

The factors which lead me to the conclusion that the mother has failed to establish the requirements of article D 13(b) are these:

(a) the father's violent and intimidating conduct was directed at the mother and not the children. The stressful environment to which the mother says the children were exposed was caused by the strained relations between the parents. This is not, therefore, a situation where the risk of harm emanates from any conduct by the father E directed at the minors. Even in the increasingly strained relationship that now existed after the separation, the father had frequent access to the minor children. The mother made no objection to the father's demands for access. On the contrary, she seems to have encouraged the father have contact with the minor children. The mother has been in Zimbabwe since February 1999. She is living at her parents' farm in Chiredzi where the F minor children are attending school. It appears, from the reports of the teachers, that they have settled well into their new environment.

(b) Children are invariably affected by acrimony between their parents. When the children were removed, the G mother and father had separated. An order that the children return to the United Kingdom does not oblige the mother to resume co-habitation with the father. Consequently, the mother need have no fear that the children will be exposed to the stressful conditions that existed before she separated from the father.

(c) I accept that the mother will face some hardship upon her return. She has no relatives in England. If she H cannot engage a child minder at a

reasonable rate, it may mean that she will not be able to obtain full time employment and will be dependent on A State benefits. I do not consider that these financial hardships are sufficiently weighty matters to cause me to decline to order the return of the minors.

There are a number of undertakings the father should give as a prerequisite of the return of the children, failing which the children should not be expected to return. These are that: B

(a) he will not remove the children from the care and control of the mother until the question of custody has been determined by the English Courts.

(b) he will make suitable arrangements for separate accommodation for the mother and the children for a period of two months after their arrival. He must provide suitable and sufficient furniture. C

(c) he will provide air tickets and book seats for the mother and the minor children to travel to the United Kingdom on a day after 1st January 2000.

When the above undertakings are given on behalf of the father to this court and to the English Court, I shall order the return of the minor children to England.

Civil Division of the Attorney-General's Office, applicant's legal practitioners

Gollop & Blank, respondent's legal practitioners