

Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015]

[2015] 2 FLR 1074; [2015] EWCA Civ 26

27/01/2015

Barristers

Christopher Hames KC
Ruth Kirby KC
Dorothea Gartland KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

Appeal in Hague Convention proceedings considering the children's objections exception and the joinder of children as parties to an appeal.

Facts

Background to the proceedings

The proceedings concerned three children: J (13), T (11) and I (6). On the application of their father ("F"), Roberts J ordered their return to the Republic of Ireland after they were brought to the UK by their mother ("M") on 12th March 2014. W resisted the return of the children under art 13b of the 1980 Convention and the child's objections exceptions.

There was an older brother, D, who was 16 at the time of the proceedings before Roberts J. Due to his age he was not subject to the Hague Convention proceedings, but after the event he and J consulted a solicitor and applications were made on their behalf to the Court of Appeal for permission to appeal which was granted to D and to M.

The issues in the case

There were two issues to be decided: (1) the substantive challenge to Roberts J's return order; and (2) the procedural question relating to the joinder of children as parties for the first time in the Court of Appeal.

The law

Black LJ, giving the lead judgment, considers in detail the proper approach to the children's objections exception at paragraphs 10 to 77. In particular she provides a comprehensive review of the domestic jurisprudence in the field stretching back over the past two decades. She states that in such cases speed

is of the essence.

The traditional approach to children's objection exception cases in England and Wales is to break the matter down into stages: the gateway stage (a. the child objects to being returned, and b. the child has attained an age and degree of maturity at which it is appropriate to take account of his/her views) and the discretion stage. This was not challenged before the Court of Appeal.

The leading case is *Re S (A Minor)(Abduction: Custody Rights)* [1993] 2 WLR 775. However Black LJ warns that the older case law should be read, keeping in mind later developments, particularly Art 11 of Brussels IIa, the House of Lords decision in *Re D (A Child)(Abduction: Rights of Custody)* [2007] 1 AC 619 and also *Re M and another (Children)(Abduction: Rights of Custody)* [2007] UKHL 55.

Re M has two particularly important features for these purposes: (1) that when it comes to the exercise of discretion once a ground for opposition to return had been made out, there was no additional test of exceptionality, and (2) the discretion that arises is at large.

In respect of the gateway stage of the children's objections exception, Black LJ sets out the following as "tolerably well" established principles:

- (1) Whether the child objects to being returned is a matter of fact.
- (2) There is no fixed age below which a child's objections will not be taken into accounts; however the younger the child is the less likely it is that he/she will have the necessary maturity.
- (3) It must be an objection and nothing less.
- (4) The objection must be to returning to the country of habitual residence as opposed to returning to particular circumstances in that country (this may be difficult to separate in practice).
- (5) The child's objections are not determinative.

Black LJ then considers a feature which require more discussion, namely the inconsistency in approaches to the gateway stage: the *Re T* approach (technical, structured, requiring the court to go into considerable detail as to the circumstances in which the children object) as against the more basic approach (a much simpler exercise at the gateway stage, with the detail of the case being considered if and when it comes to determining whether return should be ordered).

After consideration of the authorities, the judge disapproves the approach in *Re T*, calling it unhelpful. Instead, she states at paragraph 76 how the law should work in practice: the starting point is the wording of Article 13. Thereafter what is relevant to make the necessary decisions will vary from case to case. This is not intended to be prescriptive or to create a new test.

Held

The outcome in this case

F was Irish, M was British. They married in 1996 and lived their married life in Southern Ireland where the children were born and raised. By November 2013 the marriage was over but the family remained in the family home until 12th March 2014 when M brought the children to England without giving any notice to F. M alleged that there had been a significant history of domestic violence. The children reported to the CAFCASS officer that they were scared of F and did not want to go back to him, and that they were settling well in England.

Roberts J reminded herself that she should in such cases take allegations at face value, found that the children were frightened of returning to F, but found that M had failed to make out her Article 13b

defence (grave risk of harm to the children) particularly in light of the safeguards available. She was not satisfied that the children's objections were objections in Convention terms and therefore made a return order.

The Court of Appeal found that the judge at first instance was wrong, the children's objections were objections in Convention terms in light of the CAFCASS officer's evidence. This was one of those cases where the children were unable to separate their feelings about returning to Ireland from their feelings about F. Black LJ also found that the children had attained an age and maturity making it appropriate to take their views into account.

Moving then to discretion, Black LJ states that the judge at first instance's consideration was much too narrow and that in light of the material before it, the Court of Appeal could exercise its discretion. Weighing all the circumstances of the case and the relevant factors, the Court of Appeal allowed the appeal and dismissed F's application for the return of the children to Ireland.

Joinder of children as parties to an appeal

Black LJ sets out that it is imperative that consideration as to appropriate parties is given at the earliest possible stage.

There was no dispute that children could in principle bring their own appeal, despite not being parties in the court below, and that they could be joined as parties for the first time at the appeal stage. Where the question of the participation of a child appears for the first time at Court of Appeal stage, this is governed by the CPR 1998, although the welfare considerations and Practice Direction 16A are relevant. Litigation friends are likely to be required.

Permission

Family Law Week 