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In Re K (A Minor) (Removal from Jurisdictiion: Practice) (1999)

(1999) 2 FLR 1084 : Times, July 29, 1999

15/07/1999

Barristers
Alistair G Perkins

Court
Court of Appeal

Summary
A court had to build in all practical safeguards when dealing with a parent's application for leave to take his child, who was the subject of a contact order with the other parent, on holiday to a country which was not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction.

Facts
An appeal against an order of HH Judge Hallon on 28 June 1999 granting leave for a father to take his child ('J') on holiday to Bangladesh between 8 August and 6 September 1999 with the undertaking to bring the child back. Shortly after J was born the parents came to reside in the United Kingdom. The parents separated in 1991 leaving J in care of her father. J had been the subject of numerous applications with regards to her care since the separation. In 1993 a residence order was made in favour of the father with contact for the mother. That position was confirmed on 2 June 1998 on the father's undertaking not to remove J from the jurisdiction without written consent of the mother. In February 1999 the father and J received written notice of indefinite leave to remain in the United Kingdom. The father then wrote to the mother asking for her permission to remove J from the jurisdiction for a holiday in Bangladesh. The mother refused. The decision on 28 June was made by a deputy of the division and based on written statements of the parties and submissions of their respective counsel's and it was found that it was more likely than not that the father would return with J from the holiday.

Held
HELD: (1) It was customary, if there was to be an evaluation of an applicant's trust, for oral evidence to be led so that a judge had an opportunity of assessing the credibility and reliability of the parties. A conventional disposal of cases such as the instant one was to require that all practicable safeguards were first put in place. Applications which involved the consideration of the legal system of a foreign State, ordinarily speaking, should be dealt with by judges of the Family Division. (2) It was for the trial judge to assess not only the magnitude of risk of breach of the contact order but also the magnitude of the consequences of breach of the contact order. In the instant case if the contact order was breached then it would be impossible to secure J's return to this jurisdiction. The father's impeccable record as a carer was highly relevant to an assessment of the risk of a breach, but it was irrelevant to an assessment of

the magnitude of the consequences of a breach. Where the consequences of a breach would be the irretrievable separation of the child from previous roots, then it was for the court to achieve the security that it could for the child by building in all practical safeguards. (3) The finding that it was more likely than not that the father would return with J was not an adequate foundation for making the order. (4) Although Bangladesh had a fully-developed legal system, it was not a signatory to the Hague Convention. It did not follow that the mother's relationship with J nor her roots in the United Kingdom would receive the same evaluation as they would in the legal system in the United Kingdom. (4) Re T (Staying Contact in Non-convention Country) (1999) 1 FLR 262 and Re A (Security for Return to Jusidiction (Note) (1999) 2 FLR 1 were authorities for the sort of mechanisms that could be put in place where the friendly foreign jurisdiction had its family justice system rooted in Islamic law. (5) In the instant case the possibility of notarised agreements and mirror orders should have been explored through expert evidence before the decison had been made.

Appeal allowed.