

## S v (1) B (2) Y (A Child) (2005)

**(2005) 2 FLR 878 : [2005] EWHC 733 (Fam); Times, May 17, 2005**

04/05/2005

### **Barristers**

Henry Setright KC

### **Court**

Family Division

### **Summary**

Although an order that a mother return a child to her place of habitual residence might interfere with the rights under the European Convention on Human Rights 1950 Art.8 of the mother and a half-sibling of the child, the Hague Convention on the Civil Aspects of International Child Abduction 1980, by its structure and terms, accorded paramount importance to the rights and freedom of the child subject to the application.

### **Facts**

The applicant father (F) sought an order under the Hague Convention on the Civil Aspects of International Child Abduction 1980 that the respondent mother (M) return their child (X) to New Zealand. Together with F and X, M and the second respondent (Y), her son, had lived as a family in New Zealand. After F left the family home, and with F's agreement, M took X and Y with her to England on holiday. M subsequently registered Y to attend school in England and contacted F in order for X to have telephone contact with him on a weekly basis. M also made arrangements for the house that she owned in New Zealand to be sold. There was no real dispute that evidence established a case of wrongful detention under the Hague Convention. However, M sought to rely on the exception under Art.13(b) of the Hague Convention. M submitted that (1) if she were to accompany X on her return, her likely emotional/psychological state and the consequences for her child caring abilities would be likely to cause psychological harm to X or otherwise place X in an intolerable situation; (2) the lack of a proper home in New Zealand would aggravate her state of anxiety and depression and create an intolerable situation for X; (3) since Y was now unwilling to return to New Zealand, an order for X's return would place her in an impossible situation in trying to balance and provide for the needs of her two children, which would lead to a depressive reaction on her part and create an intolerable situation for X. Y submitted that his right to respect for private and family life were engaged and the Hague Convention had to be interpreted so as to be compliant with the European Convention on Human Rights 1950.

### **Held**

HELD: (1) The judge accepted F's submissions that there was a lack of cogency in the evidence provided by M to discharge the burden of proof imposed by Art.13(b), B (Children) sub nom TB v JB (Abduction :

Grave risk of harm) (2001) 2 FLR 515 applied. Whilst M's psychological and emotional health were plainly matters of concern, the cogency of the evidence was not such to enable a finding of a grave risk of danger to the psychological health of X. (2) The judge also accepted F's submission that the lack of a proper home should M return to New Zealand was a problem well able to be overcome without grave risk of an intolerable situation arising. M had the means available at least to rent a property on her return and her parents, who lived in New Zealand, would be able to provide emergency accommodation until M found a place. (3) The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation that she had created by her own conduct was not a principle articulated in the Hague Convention or the Child Abduction and Custody Act 1985 and should not be applied to the effective exclusion of the Art.13(b) defence itself. It was necessary in the interests of child protection generally to provide a "longstop" defence under Art.13(b) in any case where it appeared that the risk of harm that the Convention assumed as a result of the wrongful removal would be intolerably compounded by an order for return. However, Art.13(b) set a high threshold and the court had to cede any decision on the broad welfare interests of the abducting parent and child to the court of the country of habitual residence. Only where a case of grave risk was established on the basis of cogent evidence should it do otherwise. (4) The court's obligation to have regard to Y's rights under the European Convention on Human Rights 1950 and to construe the Act in a manner compliant with the Human Rights Convention did not lead to a different result. Although an order for X's return might interfere with Y's and M's right to respect for family life under Art.8 of the Human Rights Convention, that order would be in accordance with the law and have a legitimate aim under Art.8(2). The order would be made for the protection of the rights and freedoms of others, namely X and F's corresponding rights, to which the Hague Convention, by its structure and terms, accorded paramount importance. Under the terms of the Hague Convention, the focus was on X, and Y's position was only relevant to the extent that it affected X's welfare in the sense of the risk of harm to X. (5) An order would be made that M return X to New Zealand.

## Permission

Lawtel 