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Re S (A Child) (2002)

(2002) 1 WLR 3355 : (2002) 2 FLR 815 : [2002] EWCA Civ 908: Times, July 15, 2002

03/07/2002

Barristers
Henry Setright KC
Private: Marcus Scott-Manderson QC

Court
Court of Appeal

Summary
The political situation between Palestine and Israel did not prevent the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction 1980. A reactive illness that impaired the mother's ability fully and properly to cope with the child of whom she was the primary carer could amount to a defence under Art.13(b) of the Convention.

Facts
Appeal by the mother from the order of Hogg J of 14 March 2002 returning the child to Israel. The mother also sought permission to appeal out of time from the judgement of Bracewell J of 4 February 2002, the effect of which was to prevent the mother introducing fresh evidence of her psychological condition and raise a defence under Art.13(b) Hague Convention on the Civil Aspects of International Child Abduction 1980. The mother and father were both Israeli citizens. The child, their daughter was born in 2000. In August 2001 the mother and the child left Israel for the United Kingdom. On 15 October 2001 the father began proceedings under the Convention seeking an order for the return of the child to Israel. The mother did not dispute that the father was exercising rights of custody, that the child's habitual residence was in Israel or that her removal had been wrongful. Before this court the mother raised a defence under Art.13(b) of the Convention and alleged that there was a grave risk that the child's return to Israel would expose the child to physical and psychological harm and otherwise place her in an intolerable situation. Initially the mother had accepted Hogg J's decision however in April the mother informed the father that the worsening situation in Israel had effected a fundamental change and exacerbated her fears and anxieties. The mother then began this appeal. The mother submitted that: (i) the judge was wrong to return the child to a country at war; (ii) Art.13(b) required the court to address the question from the viewpoint of a protective parent without the motives of an abductor; and (iii) that the judge failed to give sufficient weight to her medical evidence.

Held
HELD: (1) The time for appeal was 14 days. The court had power under CPR 3.1 to extend that time. The test under CPR 52.3(6) was whether the prospects were realistic as opposed to fanciful. (2) In this case

where the interests of the child were engaged as were International Treaty obligations the court was not likely to refuse to admit fresh evidence. The approach of the court was to consider first whether or not the appeal should be allowed on the facts as they appeared to the judge, if the appeal would otherwise be dismissed then the court assessed whether the fresh evidence would allow the appeal. (3) The mother was not refusing to return. C v C (Abduction: Rights of Custody) (1989) 1 WLR 654 distinguished. (4) This mother was not demonstrating an unwillingness to take all reasonable steps to protect herself and her child, TB v JB (Abduction; Grave Risk of Harm) (2001) 2 FLR 515 distinguished in part. (5) A reactive illness that impaired the mother's ability fully and properly to cope with the child of whom she was the primary carer could amount to an Art.13(b) defence. (6) Article 13(b) named three risks, these were interlinked by the use of the world "otherwise". The proper course was to consider the grave risk of harm as a discrete question and then consider the Article in the round, asking if the risk of harm was established to the extent that led one to say that the child would be placed in an intolerable situation if returned. Matters had to be shown to be really serious before Art.13 could be enlivened. The civil standard of proof on a balance of probabilities was raised a notch commensurate with the gravity of the allegation. (7) Even though the return of the child seemed contrary to her welfare the court could not too freely allow this exceptional defence. (8) The issue was not whether there was a state of war in Israel but whether there was a grave risk of harm if the child were returned there. (9) The delicate process of adjudication was not aided by the incantation that the court was to approach the matter as a protective parent or of any rubric other than the words of Art.13(b) of the Convention. (10) The judge took all relevant information into account, this court was not persuaded that she was wrong in evaluating the risk of harm to the child. (11) In respect of the medical evidence the judge's hands were tied by Bracewell J's order. (12) The application to extend the time for appeal against Bracewell J's order was not made promptly, it was nearly nine weeks out of time. The effect of granting the extension would be to cause very substantial delay, this was out of the question. (13) The risk of physical harm in Israel was not unacceptably high for Convention purposes. It was not a grave risk. (14) The court accepted that the mother did suffer psychologically, however there was no evidence that she was not likely to receive satisfactory medical attention if she returned. The question was whether the child was at grave risk of harm from the breakdown in the mother's health and the mother had not satisfied the court that she would. Thus the Art.13(b) defence was not made out. (15) The court was not satisfied that the situation in Israel was "intolerable"

Permission to appeal out of time against the order of Hogg J granted. Appeal against the order of Hogg J dismissed. Application for an extension of time and for permission to appeal the order of Bracewell J dismissed.

Permission