4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re S (Children) (Child Abduction : Asylum Appeal) (2002)

(2002) 2 FLR 437 : [2002] EWHC 816 (Fam); Times, May 9, 2002

24/04/2002

Barristers
Henry Setright KC
Private: Marcus Scott-Manderson QC

Court
Family Division

Summary
Section 15 Immigration and Asylum Act 1999 did not prevent a family judge from returning a child to the country of his habitual residence where that was in his best interests where the child was the dependant of an asylum applicant.

Facts
Father's application for the summary return of his children to India, where the children were habitually resident. The whole family was Indian and in June 2001 the mother came to England for a holiday with the children with the father's consent and did not return. The mother unsuccessfully applied for asylum, giving the children as her dependants, but she and the children were granted exceptional leave to remain for four years. The mother appealed against the decision not to grant her asylum and argued, inter alia, that the court could not exercise its wardship jurisdiction to order the children's return before the asylum claim had been resolved because their removal during the appeal process was expressly prohibited by s.15 Immigration and Asylum Act 1999. The two overriding issues were: (i) whether this court should, in the exercise of its wardship jurisdiction, direct the summary return of the children to India and whether such a summary return would be contrary to their best interests and their rights under Arts.3 and 8 European Convention on Human Rights; and (ii) the effect of s.15 of the Act, which was expressed as concerning the protection of claimants from removal or deportation.

Held
HELD: (1) The mother's arguments under Arts.3 and 8 of the Convention added little to her case and raised matters to be considered in the balancing exercise to determine whether it was in the children's best interests to be returned to India for the Indian courts to adjudicate on the issues between the parties. (2) Leaving aside the question of s.15 of the Act, the balance clearly came down in favour of the children being returned to India. The children were Indian and until June 2001 had lived all their lives in India. The mother's evidence that the children's welfare would be put at risk was open to serious

question and the father had agreed to give undertakings to provide proper and adequate protection and support for the mother and the children. This court was confident that the Indian court would recognise that the purpose of the undertakings was to secure the children's welfare and that it would endeavour to promote their best interests. (3) The removal of a child to its country of habitual residence was not an act of state and the purpose of s.15 of the Act was to prevent the executive from removing or requiring to leave asylum seekers pending the determination of their claims. Therefore, s.15 did not prevent a family judge from carrying out his obligations or powers to return a child to its country of habitual residence regardless of whether the child was the dependant of an asylum applicant or had made an application in his own right. (4) In the event that s.15 did apply, it would not preclude a court from ordering a child's return where the child was not applying for asylum in its own right but was merely the dependant of an asylum seeker.

Application allowed.

Permission