

Re F (A Child) (Abduction: Objections to Return) (2009)

[2009] EWCA Civ 416

19/03/2009

Barristers

Private: Marcus Scott-Manderson QC

Court

Civil Division

Summary

In cases under the Hague Convention on the Civil Aspects of International Child Abduction 1980 where there was an assertion that a party had not been exercising art.3 rights of custody at the relevant date, practitioners were to consider the possibility of making greater use of the European network of specialist family judges attached to the statutory European judicial network, who could offer pragmatic advice as to the best route to follow.

Facts

The applicant father (F) applied for permission to appeal against a judge's refusal to order the summary return of his son (P) to Poland under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.12. P, who was nine-and-a-half years old, had been born in Poland and had lived there with his mother (M) and F, who were Polish nationals. Following M and F's divorce, proceedings in Poland provided for contact between F and P. M had thereafter removed P to the United Kingdom. There were delays in the hearing of F's application for P's return to Poland, arising from M's assertion that he had not been exercising rights of custody under art.3 of the Convention. By the time the application was heard, P had been in the UK for some eighteen months and M's case was that he did not want to return to Poland. The judge found that while it might well be that P should return to Poland in the longer term, that would need to be done in a planned and orderly way, and that in the short and medium term his best interests required that he remain in the UK. F submitted that in giving insufficient weight to some, and undue weight to other, considerations, the judge had missed the obvious conclusion that P should swiftly be returned to Poland in order to enable the Polish court to make the necessary welfare decisions.

Held

HELD: (1) The weight that each consideration deserved was very much a matter for the judge, and where the judge had plainly factored-in and had not ignored any of those considerations it was extremely difficult to say that he had given undue or insufficient weight to certain ones. Moreover, the judge had only considered P's welfare in the context of whether to order a summary return. He was not taking any position in relation to his longer-term welfare or any properly managed and properly time-framed return to Poland, such as might result from a full enquiry undertaken either in the UK or in Poland. (2) The

refusal to order summary return triggered the provisions of art.11(6) to art.11(8) of the Convention. Under art.11(8), if the Polish court determined that, notwithstanding the non-return order, P had to be returned to Poland and issued an order to that effect, such an order was automatically enforceable within any member state. That raised the strategic question of whether, in a case governed by Regulation 2201/2003 where the left-behind parent failed to obtain a summary return order, and where the court in the requesting state had been seised prior to the abduction, the simpler course would be for the disappointed parent simply to engage the art.11 process and attain an order in the requesting state, which must automatically be enforced elsewhere. In the UK, where the Court of Appeal acted with extreme expedition in Hague Convention appeals, a summary order might be better, but in other jurisdictions where the process took longer, it might be strategically wiser to pursue the art.11 process. (3) The instant case provided an opportunity to draw to practitioners' attention the possibility of making greater use of the European network of specialist family judges attached to the statutory European judicial network in the resolution of assertions that art.3 rights of custody had not been exercised. Such judges could offer pragmatic advice as to which would be the best route to follow in a particular case: whether to go for a single joint expert; whether to go for an art.15 declaration; or whether to go for an opinion from the liaison judge as to the law of his own country. In practice, in the majority of cases, a definitive ruling from the court of the requesting state under art.15 would be determinative of the issue.

Permission

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