

C v D [2013]

[2013] EWHC 2989 (Fam)

30/09/2013

Barristers

Jacqueline Renton

Court

High Court (Family Division)

Practice Areas

International Children Law

Summary

Application by the father for the summary return of his son, brought to this jurisdiction from Spain by his mother. Defence under Art 13(b) of the Hague Convention raised. Application granted.

Facts

This was an application by a father for the summary return of the parties' child, E, to Spain, where the child had lived for the first three and a half years of his life. The parents had separated and, although there was a dispute as to the facts of how E came to be in the mother's care, the mother had brought the child to England apparently without the consent of the father.

Shortly after her arrival in England, the mother sought and later obtained a residence order in respect of E. In this judgment, Bodey J is critical of the county court for not having adhered to the obligation arising out of Article 16 of the Hague Convention to transfer proceedings to the High Court if there is evidence that the child was, or may have been, wrongfully removed or retained.

In these proceedings, the mother relied on the defence under Article 13(b), namely that:

"...there is a grave risk that [E's] return [to Spain] would expose him to physical or psychological harm or otherwise place him in an intolerable situation".

The mother contended that such harm would arise because she was at risk of prosecution in Spain for allegedly kidnapping E, which could render her unable to look after him, or because she would not be able to earn enough money in Spain to support herself and so E would be subjected to an intolerable situation.

As far as the alleged risk of prosecution was concerned, enquiries had confirmed that the previous criminal investigation of the mother in Spain had been 'archived'. Furthermore, the court was of the view that if there were any further investigation, the interests of the child would be taken into account in any decision-making by the prosecuting authorities.

The mother's claim that she would experience financial difficulties if she were to return to Spain was again the subject of some factual dispute. In any event, the father offered a number of undertakings to assist the mother to return to Spain, which included undertakings to provide financial assistance. Although the mother raised doubts as to whether the father would honour these undertakings, the court found no evidence to support an assertion that he would not.

In this case, it was submitted on behalf of the mother that if the court were minded to order a return of the child, it should make a suspended return order pending the resolution of relocation proceedings in Spain, which the mother would commence forthwith. However, Bodey J distinguished *F v M and N (Abduction: Acquiescence: Settlement)* [2008] 2 FLR 1270, a case in which a suspended order was made, because in that case the child, aged 6, had been in England for almost two years following a longer delay by the father in issuing his Hague Convention application. Therefore the Article 12 'settlement' defence was clearly established and the court had a discretion about making a return order. This was not an Article 12 case and there was no such discretion.

The mother also raised a concern about a potential delay in getting the case before the Spanish court. Bodey J therefore indicated that he would refer the case to the office of Lady Justice Black with a view to requesting judicial cooperation to obtain an inter partes hearing quickly in Spain.

Held

As the mother had not made out her Article 13(b) defence, the outcome of the case was an order for E to be returned to Spain.

Permission

Family Law Week 