

Re F (A Child) (2014)

[2014] EWCA Civ 275

13/03/2014

Barristers

Henry Setright KC
Christopher Hames KC
Michael Gration KC

Court

Court of Appeal Civil Decision

Practice Areas

International Children Law

Summary

A mother who had wrongfully removed her child from Italy, contrary to the Hague Convention on the Civil Aspects of International Child Abduction 1980, was refused permission to obtain psychiatric evidence of her mental health and well being because the material before the court failed to establish that the instruction of such an expert was “necessary” for the purposes of the Family Procedure Rules 2010 r.25.1. In light of that, the other material before the court was insufficient to support a defence under art.13(b).

Facts

The appellant mother (M) appealed against a decision ordering the return of her three-year-old child (R) to Italy following an application by the respondent father (F) under the Child Abduction and Custody Act 1985.

R had been born in Italy, where M and F had lived together. M asserted that following R’s birth, F had repeatedly behaved violently towards her and the relationship had therefore ended. M sought permission to relocate to Wales with R, but the Italian court refused. In September 2013, M took R to Wales without F’s consent. She accepted that her actions amounted to “wrongful removal” under the Hague Convention on the Civil Aspects of International Child Abduction 1980, but asserted that the circumstances were sufficient to trigger the court’s jurisdiction to avoid an order for summary return on the ground that art.13(b) of the Convention applied. M sought permission to obtain a psychiatric assessment of her mental health and well being, having provided oral instructions on the morning of her trial which outlined her history of mental health problems and suicide attempts. The judge refused to grant permission to obtain psychiatric evidence, holding that the burden of proof on the defending parent under art.13(b) was a heavy one which required clear and compelling evidence. The judge found that M’s case under art.13(b) was not made out because there was insufficient evidence of a grave risk to R. She therefore ordered R’s return to Italy, subject to a range of protective measures which had been agreed between

the parties.

M submitted that an expert opinion was required to determine whether a return to Italy would adversely affect her mental health and impact upon her ability to care for R. She argued that without a psychiatric report, the court could not apply para.34 of S (A Child) (Abduction: Rights of Custody), Re [2012] UKSC 10, [2012] 2 A.C. 257 and make a final determination of her art.13(b) defence.

Held

In order for Re S to apply, the evidence which M relied upon had to get to “first base”. Although, in the course of her statement, M had identified some psychological vulnerability whilst in Italy, there was no indication that the problem was serious. The focus of her statement was on her response to F’s conduct. In describing the test applicable to art.13(b), the judge might have inappropriately referred to the burden of proof being a “heavy one” which required “clear and compelling evidence”. That was unlikely to be compatible with the approach in E (Children) (Abduction: Custody Appeal), Re [2011] UKSC 27, [2012] 1 A.C. 144, Re E considered. However the judge’s description of the approach to be taken to art.13(b) was not relevant at that stage: her task had been to evaluate whether there were grounds making it “necessary” for the instruction of an expert for the purposes of the Family Procedure Rules 2010 r.25.1. The material which M was able to put before the English court was insufficient to establish that her health was, or might be, such as to trigger the circumstances described in Re S. In that respect, the judge’s observations about a heavy burden of proof and clear and compelling evidence were otiose. The judge had been entitled to express considerable scepticism about the manner in which at the eleventh hour M had produced the detailed account of her mental health history when, despite submitting a wealth of other material, that had not been mentioned at any previous stage. In addition, M’s account of her mental health difficulties did not correspond with the periods of supposed maximum stress during the time when she was living with F. The material before the court simply failed to establish that the instruction of an expert was “necessary”. In light of the refusal to sanction the instruction of an expert, the material before the court was insufficient to support a claim under art.13(b) or any outcome other than an order for R’s immediate return to Italy, Re S applied (see paras 34-45 of judgment).

Permission

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