

R v P (2017)

[2017] EWHC 1804 (Fam)

03/03/2017

Barristers

Alistair G Perkins

Court

Family Division

Practice Areas

International Children Law

Judgment of Theis J dismissing the father's application made pursuant to the Convention on the Civil Aspects of International Child Abduction 1980 for the return of X (aged 5) to Lithuania.

The mother opposed the father's application for X's summary return to Lithuania. She relied on the "settlement" Art.12 defence and "grave risk of harm" under Art.13 (b), namely that returning X to Lithuania would expose her to physical or psychological harm or otherwise place her in an intolerable situation. The father opposed both grounds. The mother sought to persuade the Court to use its discretion to allow X to remain in England whilst the father sought X's return to Lithuania.

Background

The parties were both born in Lithuania, where they married in 2010. X was born a year later, and the parties separated in 2012.

The mother removed X from Lithuania on 2nd October 2015, following which X lived in England with her mother, her mother's new partner and their child. The mother alleged abusive and harassing behaviour from the father towards her and X. She obtained an injunction against the father in 2014, which was subsequently found to be breached in Lithuanian proceedings.

The father accepted the content of text messages sent to the mother but denied the extent of the allegations and any deliberate breach of the injunction.

The Court had evidence of X's emotional difficulties, alleged to have arisen due to father's behaviour, which had necessitated therapeutic support. There had been short periods of supervised contact between X and her father, although this had ceased in September 2015.

The father took no active steps to reinstate this contact until May 2016, when he applied for enforcement in Lithuania. The mother made a without notice application in England in October 2016. Both applications were stayed pending the outcome of the father's Convention application, which was made in November 2016.

Law

The mother accepted that the removal was wrongful under Article 3 of the Hague Convention, having come to England without the agreement of X's father and in breach of the father's custody rights.

Cannon v Cannon [2004] EWCA Civ. 1330, was endorsed as the leading authority in settlement cases. The definition of settlement is more than mere adjustment to surroundings. The word should be given its ordinary meaning with two constituents: a physical element relating to being established in a community and environment, and an emotional constituent relating to security and stability. In cases where there has been concealment or subterfuge, 'the burden of demonstrating the necessary elements of emotional and psychological settlement are much increased'.

Depriving a child of a relationship with her father was an important factor but did not prevent a child from becoming settled in a new environment: each case must however be considered on its own facts and there should not be an unduly technical approach to the question of settlement (F v. M and N (Abduction) (Acquiescence: Settlement) [2008] EWHC 1525 (Fam)).

The provisions of Art.11 of Council Regulations (EC) No.2201/2003 of the 27th November 2003 concerning jurisdiction and the recognition of enforcement of judgements in matrimonial matters and the matters of parental responsibility (more commonly known as Brussels IIR) were considered, requiring the Court to consider proposed arrangements to secure the protection of a child after the child's return.

In relation to the Art.13(b) defence, the three step approach in Re E was reiterated, namely:

- (1) identify the risks;
- (2) consider the protective measures; and
- (3) in the absence of protective measures, the Court should do the best it can to resolve the disputed issues.

As per Re D [2006] UKHL 51, it was noted that it would not invariably be the case that protective measures were adequate to avoid the risk.

An abducting parent's refusal to return with the child if return is ordered was considered in the light of C v. C (Abduction: Rights of Custody) [1989] 1 WLR, S v. B (Abduction: Human Rights) [2005] EWHC 733 (Fam), [2005] 2 FLR 878 and S v. S [2015] EWHC 2703 (Fam). It was noted that the primary focus of the Court remains on the question of the grave risk of harm or intolerability to the child rather than the conduct of the abducting parent.

Art. 10(b)(i) and Art. 12 of Brussels II R were considered in relation to the question of the Court's discretion along with Re M (Abduction: Zimbabwe) [2008] 1 FLR 251 and Re O [2011] 2 FLR 1307. The definition of the term 'whereabouts' within Art. 10 were described as 'sufficient knowledge to launch an application for the child's return. In England, it would be sufficient to know the child is in this country in order for that claim to be advanced'.

Determination

It was determined that the mother intended the relocation to be permanent. The mother had specific requirements when locating a property in which to live, namely proximity to a school and police station. X was enrolled in that school shortly after arrival. She had become fully integrated in that school

following some therapeutic support and felt 'safe'. X had a close relationship with the mother's new partner and the new baby. It was acknowledged that the mother's sense of security was also likely to impact on X's sense of stability.

Given the above factors and the length of time that X had lived in England, it was accepted that X was settled in England. The Guardian supported this view but had concerns about the absence of a relationship with X's father and her views towards him. Mrs Justice Theis recognised those concerns but described the previous situation in Lithuania as a 'relatively limited and superficial relationship between X and her father', upon which basis the difference in relationship now was 'relatively limited'.

It was accepted that the mother's anxiety was such that she did not want her plans to be more widely known. However, the father was aware of her imminent wish to relocate to England and although he was not informed that she had done so, he had not taken steps to locate her and there was no 'active concealment'. The 'settlement clock' began to run from the lodging of an application with the Court that will decide the application. There were no settled authorities on this point.

It was deemed more likely than not that the mother would not return to Lithuania if an order was made for X's return. Doing so would result in a separation from her new baby, her partner having lived in England for some time and not consenting to the baby moving to Lithuania. When considering potential protective orders, Mrs Justice Theis noted the father's historical failures to comply with Court orders and his failure to recognise the subsequent harm caused to X.

Should X return without her mother, this would result in a grave risk of psychological harm and place her in an intolerable situation. This was particularly the case given the closeness of her relationship with her mother and her anxieties surrounding her father. A return to her father's care was unrealistic at the present time and it was difficult to imagine any protective measures that could be put in place to assist X with managing separation from her mother.

Mrs Justice Theis declined to exercise her jurisdiction to return X to Lithuania, having considered the longstanding involvement of the Lithuanian Courts with X, the interference with X and the father's Art.8 rights, and X's welfare. It was noted to be 'likely' that the Lithuanian Courts retained jurisdiction under Art. 10 and the continuation of proceedings in Lithuania was a matter for that Court to consider.

It was noted that the Court's conclusion should not be seen as condoning the mother's conduct in wrongfully removing X from Lithuania. The father's application was accordingly dismissed.