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# Re W (A Child)

## [2017] EWCA 2152 (Civ)

12/12/2017

**Barristers**
Teertha Gupta KC

**Court**
Court of Appeal

**Practice Areas**
International Children Law
Judgment in an appeal against the decision to return a 15-month-old boy, Z, to America in proceedings under the Hague Child Abduction Convention. The parents of Z were married and had lived together in America since 2008.

Factual background
Z's Mother, who is English, had suffered for a long time with low-level depression, but her mental health had deteriorated after the birth of Z and her symptoms of depression became acute and complicated with the onset of post-natal depression. The Mother had also been diagnosed with obsessive compulsive disorder.

The Mother's difficulties were such that, in early February 2017, she returned to England with her sister. The hope was that the Mother would benefit from returning to her home country for a period of time; Z was left in the care of his Father, who is American, in America.

At the end of March 2017, the Father and Z travelled to England; there was a plan that the Mother, Father and Z would all return to America together on the 19th of April. Return tickets had been booked for this date. However, the circumstances and plans changed when the experts assessing the Mother's needs and mental health in the UK decided that she needed a more intensive intervention and formulated a plan to find a unit in which she could live as a voluntary patient, with Z. On 18th April 2017, the Mother and Z moved to an NHS mother and baby unit, and the Father returned to America alone on the 19th.

During the time that the Mother and Father were together in the UK, their second child was conceived. The trial judge found that, "the father … was anticipating that the mother and child would return to America once she was fit to do so, but he found that, by mid-May, with the discovery of her pregnancy and following the father's reaction to that, the mother concluded in her own mind that from that time her intention was to remain in England."

On 15 June, the Father wrote to the Mother saying, "then I will have to inform you that it's okay if YOU

stay there but I don't approve that our son (Z) stay any longer that he has stayed.  Z needs to be returned to Rochester NY".

The Father issued a petition for custody in the local court in America on 27 June. The Father also issued Hague Convention proceedings in England on 26 July. On 27 July, the Mother moved with Z to a family centre residential unit at Jamma Umoja.

First instance decision
At trial, the Mother's case was argued on the issues of habitual residence and whether or not the circumstances of the child fell within Article 13(b) of The Hague Convention. Article 13(b) provides that a return of a child can be avoided where "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

The judge rejected the Mother's case, finding that the key date was 15 June and that at the time, Z was habitually resident in America but wrongfully retained by the Mother in England. The judge did not consider that Article 13(b) was established and examined Z's circumstances if the Mother were to return to America with him, and those he faced if she did not retrun and he went to America in his father's sole care. The Mother appealed on an urgent basis to the Court of Appeal.

Grounds of appeal
The Mother ran four main points on appeal:

1) That the judge erred in failing to determine and properly consider the habitual residence of the Mother (with particular reference to her being in an institution) when assessing Z's habitual residence;

2) That, in considering whether or not there was a wrongful retention at all, a case where one parent unilaterally brings to an end a period of a stay in a country, which has previously been fluid, could never properly establish a breach of Article 3 of the Convention;

3) That a detailed welfare examination of Z's circumstances should have been conducted in this case when looking at Article 13(b). Mr Turner QC, for the Mother, argued that a detailed welfare analysis was not only permissible under the Convention, but (in some cases such as this) absolutely necessary; and

4) That the effect of the judge's order was to prematurely decide the overall "custody" issue between the parents.

Court of Appeal decision
The decision of the Court was given by Lord Justice McFarlane, with whom Lords Justice Moylan and Peter Jackson agreed.

In considering the ground of appeal relating to the analysis of habitual residence, the Court ultimately saw no reason to question the evaluation and conclusions of the trial judge. The judge correctly assessed the degree of integration that the Mother had achieved in the social and family environment in England, whilst taking careful consideration of the fact that,

"the mother's whole environment was sadly dictated by her condition, and she was not only in an institution, but in a frame of mind as a result of her illness that inhibited her ability to form a settled view and become integrated in social and family environment as would otherwise hopefully be the case" (paragraph 32).

The Court of Appeal felt that the submissions on behalf of the Mother in relation to wrongful retention

were “bold” as, if correct, the effect would essentially be that the Convention could never apply to circumstances such as these, where arrangements are fluid. Lord Justice McFarlane was firm in his conclusions on this ground saying (at paragraph 43):

“I go no further in my analysis of this area of the appeal.  In my view, it gets nowhere once habitual residence has been determined as the judge held that it was. The mother clearly formed her conclusion prior to 15 June not to return. The father, at all times, had been looking for the time when the mother and the child would return, but once, as it became, as it had increasingly so become, clear to him that she was going to stay put in England, he very clearly required the child to return. …”

More detailed consideration was given by the Court of Appeal to the third ground of appeal. The factors taken into account by the trial judge are set out in full (at paragraph 53) and the Court concluded that it was correct for both options (Z’s return with the Mother and Z’s return without her) to be evaluated in full. Ultimately, however, the Court dismissed this ground of appeal too, summarising their conclusions as follows:

“55. The thrust of Mr Turner’s submissions led the court to consider a great deal of information about the mother’s circumstances. She is in a difficult situation which generates a great deal of sympathy, from this court and no doubt from all who hear about it, but the court is not required to assess the intolerability of the mother’s predicament or the choice that she has to make; the focus must be on the impact on the child.  The judge found that for the child to go to America without the mother, despite the breach of the “close bond” that the judge held that the child had with the mother, would not expose the child to a situation sufficient to engage with the high level of intolerability required by Article 13(b).

56. In my view, it is impossible to hold that the judge was wrong in that evaluation. …”

The Court of Appeal felt that the fourth ground was wrapped up within the Mother’s case on Article 13(b) and that, given that it was not possible to predict what course either parent would take in relation to proceedings in America, or in relation to Z’s soon to be born younger sibling, this factor did not add to any “intolerability” for Z on return but was instead a mere future unknown.

The appeal was therefore dismissed.

To read the judgment, please click here.