4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re W

[2018] EWCA Civ 664

27/03/2018

Barristers
Christopher Hames KC

Court
Court of Appeal

Practice Areas
International Children Law
Appeal by mother against an order that the parties' children should be summarily returned to the USA in accordance with the 1980 Hague Child Abduction Convention.

The mother (M) of 2 children, aged 5 and 3, is British. The father (F) is a national of Pakistan who resides in the USA having gone there with his parents at the age of 12. Since the age of 18 he is unlawfully present in the USA but has deferred action status (DACA – deferred action for childhood arrivals). The parents met online. M travelled to the USA initially under the 90 day visa waiver programme. She and F were married in the USA and the children were born there. The children are thus both USA citizens and British nationals. M left the USA briefly in 2011 and returned in 2012. She says this was under a further 90 day visa but the immigration expert instructed in the case considered that unlikely. Her passport contained a stamp indicating that she was refused entry. M lived with F and his family at their home in Texas until December 2016 when she returned with both children to the UK. F made an application under the 1980 Hague Child Abduction Convention in June 2017.

The decision of the High Court
At the hearing M opposed the summary return of the children to the USA on two grounds: consent/acquiescence and Art 13 (b). M gave evidence that the family had intended to relocate to the UK, but also that the relationship was abusive, and F had never been a primary carer for the children.

The expert evidence was that F's departure from the USA could be a bar to his readmission. In relation to M, the expert said that it was unclear how she had re-entered the USA, and that it was difficult to determine whether she was an overstayer and, if so, for how long. His evidence was clear that she had no right to re-enter and might be subject to a 10 year re-entry bar if she had overstayed by more than a year. His opinion was that it was highly unlikely M would be granted a business or pleasure/ visitor visa but that she could apply for "humanitarian parole" which would be temporary but might allow her to attend custody proceedings in the USA. This was however an extraordinary means for gaining entry and only 25 per cent of such applications were successful.

M did not establish delay/acquiescence. The judge also rejected M's Art 13(b) defence on the the basis that i) it was inconsistent with M's case on consent – that the parties' relationship was intact and that they both wished to continue as a family on relocation and ii) even if the DV allegations had substance, the return of the children would not place them in an intolerable situation given their return to a home familiar to them and the measures F had offered to put in place.

The judge ordered that the children were to return to the USA, with M if she could obtain a visa, or alone if she could not.

The appeal
M appealed the provision that the children be returned to the USA even if she was unable to obtain a visa to accompany them on the basis that the judge failed properly to apply the principles relating to Art 13(b) when determining whether the children would be placed in an intolerable situation if they returned without M.

The Court of Appeal allowed the appeal. In summary:

Art 13(b) is of restricted application in abduction cases. In general, where abduction has taken place, the object is to restore the children as soon as possible to their home country so that disputes can be determined there. "Intolerable"in the Art 13(b) context means something that it is not reasonable to expect a child to tolerate. The focus is on the child and not on the source of the risk.
The case of Re E (children) (abduction: custody appeal) [2012] 1AC 144 did not introduce a two-stage process to assessing a defence under Art 13(b).
The judge did not consider in sufficient detail what the situation would be from the children's perspective, and did not focus sufficiently on the impact on the children if they were to return alone to the USA. There was not sufficient consideration of what would be available in the USA to protect them from the effect of separation from the mother.
The CoA determined that if the children were to return to the USA without their mother, the court would be enforcing their separation from their primary carer for an indeterminate period of time. In the circumstances of this case, that situation was one which they should not be expected to tolerate.
The provision that the children be returned in the event that M's visa application being refused was discharged. If M was granted a visa by the USA then the children would return with her. A liberty to apply provision would allow F to return the matter to court for directions in the event that there was any indication that M was not pursuing her visa application.

To read the judgment, please click here.