

S (Abduction – Hague Convention Or BIIa) (2018)

[2018] EWCA Civ 1226

25/05/2018

Barristers

Jacqueline Renton
Charlotte Baker

Court

Court of Appeal

Practice Areas

International Children Law

Judgment in which the Court of Appeal examines the interaction between the 1980 Hague Child Abduction Convention and BIIA.

The Court was concerned with two children who were habitually resident in England and Wales, having lived with their mother in the jurisdiction pursuant to a order of the English courts made in November 2010. The children's father lived in the Netherlands.

In 2017, it was agreed that the older child – M – would spend his summer holiday there. M was not, however, returned to England as planned in September 2017. His mother accordingly sought to enforce the November 2010 order by applying to the English central authority. She thereafter commenced proceedings in England seeking, amongst other things, an order for the summary return of M to England. This application was granted by Knowles J on 13 October 2017, who directed that M should be returned immediately to England.

Her Ladyship rejected the father's submission that the matter should have proceeded by way of an application in the Netherlands under the 1980 Convention. Due to various issues in relation to enforcement, the mother thereafter applied for the return of M under the 1980 Convention in February 2018.

The father appealed the making of the summary return order. The issues for the Court of Appeal were:

- (a) Whether the court had the power to make a return order summarily at the outset of proceedings in England and
- (b) If it had, whether it should do so or should wait before exercising its substantive jurisdiction under BIIA until the determination of proceedings under the 1980 Convention in the Netherlands.

Finding that the court did have the power to make a summary return order, Moylan LJ (giving the lead judgment):

- Confined his judgment to cases of unlawful retention or removal to another Member State of the EU (rather than a non-Member State or non-signatory to the 1980 Convention) (§37);
- Held that “it would be unwise to be unduly prescriptive” about how the courts were to deploy particular orders available to it given the variety of cases before it and the need to respond to child abduction cases expeditiously (§38);
- Did not accept that the a summary return order fell outwith the provisions of Article 1(1)(b) and 1(2) BIIA, such that (i) any application for return had to be made under the 1980 Convention in the second state and (ii) the English and Welsh courts did not have jurisdiction (§§41-43); and
- Found that the courts of England and Wales did have jurisdiction to make a summary order where they had substantive jurisdiction under BIIA. The summary nature of the hearing did not alter the nature of the order sought, which involved the exercise of parental responsibility (§44).

However, Moylan LJ went on to state that “absent a good reason to the contrary”, “the better course” for the courts in this jurisdiction would be to await the outcome of any proceedings abroad under the 1980 Convention before making a summary return order under BIIA (§47) - the former route, in any event, carrying a number of identified advantages (set out at §§48-49).

Permission

 Family Law Week