

## AT v SS

### [2015] EWHC 2703 (Fam)

29/09/2015

#### **Barristers**

Jacqueline Renton KC

#### **Court**

Family Division

#### **Practice Areas**

International Children Law

#### **Summary**

An order was made on a father's application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.12 for the return of his child to the Netherlands after a blatant wrongful removal by the mother. The mother was unable to establish under art.13(b) of the Convention that an order for return would expose the child to a grave risk of physical or psychological harm or otherwise place him in an intolerable situation, since it could be assumed that adequate protective measures would be put in place to address any psychological distress that the child would experience upon being returned to the Netherlands without his mother and placed in foster care pending determination of the substantive welfare issues.

#### **Facts**

A father applied under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the summary return of his son to the Netherlands.

The mother and father lived in the Netherlands. Their son was born in 2010. The Netherlands child protection services became involved in 2011 due to concerns about the child's welfare. The parties separated in late 2011 or 2012. In May 2012, the Netherlands court made a supervised contact order in favour of the father. The child was in foster care between June and October 2013 following a deterioration in the mother's mental health. The mother refused to co-operate with the contact order. There were concerns that the child had been a witness to domestic violence due to allegations made by the mother, which the father denied. Although the child was recorded as doing well in the mother's care in January 2014, she was still failing to co-operate with the contact order. In November 2014, the mother and child moved to the UK without the father's consent. Based on a report from the Netherlands child protection services, the mother relied on the fact that the child would be separated from her and placed in foster care if his return to the Netherlands were ordered as establishing a defence under art.13(b) of the Convention, namely that an order for return would expose him to a grave risk of physical or psychological harm or would otherwise place him in an intolerable situation.

## Held

(1) While separation of a child from his primary carer could form the basis of a defence under art.13(b), it was by no means inevitable that a plea of grave risk of harm or otherwise intolerable situation arising out of such separation would succeed, *D v D (Child Abduction: Non Convention Country)* [1994] 1 F.L.R. 137 and *C (A Child) (Abduction: Grave Risk of Physical or Psychological Harm) (No.1)*, Re [1999] 2 F.L.R. 478 followed, *S (Abduction: Return into Care)*, Re [1999] 1 F.L.R. 843 applied. It was unlikely that a parent would be able successfully to oppose a return on the basis that the child was being returned into temporary public care pending the making of a substantive welfare determination, *M (A Child) (Abduction: Intolerable Situation)*, Re [2000] 1 F.L.R. 930 applied. By her refusal to return the child to the Netherlands, the mother was the source of the situation the child would face on his return, and that circumstance was relevant to establishing whether he would be exposed to a risk of harm or an intolerable situation. The conscious refusal by a parent to return a child was of “the greatest importance” to the court’s assessment of the child’s situation on his return, *C v C (Abduction: Rights of Custody Abroad)* [1989] 1 W.L.R. 654 followed. However, in such cases the primary focus of the court had to remain on the question of risk of harm or intolerability to the child, evaluated in the context of the protective measures that could be put in place to mitigate their impact, rather than on the conduct of the abducting parent. In the instant case, the mother’s allegations of domestic abuse could not be said to found a conclusion that the child would be exposed to a grave risk of harm or an intolerable situation, not least because the last incident on which the mother could properly rely was in 2011. In any event, her allegations did not come close to satisfying the terms of art.13(b) (see paras 33-34, 37, 42, 44-47, 51 of judgment). (2) The mother’s wrongful removal of the child was blatant and had taken place only two weeks after the making of an order to enforce and promote contact with the father. She had not made out a defence under art.13(b), given the requirement that the risk of harm had to have reached such a level of seriousness as to be characterised as “grave”, *S (A Child) (Abduction: Rights of Custody)*, Re [2012] UKSC 10, [2012] 2 A.C. 257 followed. As there was ample evidence that the administrative, judicial and social services in the Netherlands were as adept at protecting children as those in the UK, it could be assumed that adequate protective measures would be put in place to address any psychological distress that the child would experience on being returned to the Netherlands without his mother and placed in foster care pending determination of the substantive welfare issues. Moreover, it would be wrong to allow the mother to frustrate the aims of the Convention by relying on a situation which she herself had brought about. Accordingly, an order was made for the child’s return pursuant to art.12 of the Convention (paras 39, 56-59, 62-64, 67).

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