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In re M and another (Children) (Abduction:Rights of Custody)

[2007] 3 WLR 975

05/12/2007

Barristers
Private: Marcus Scott-Manderson QC
Private: David Williams QC

Court
House of Lords

Two girls who were born in Zimbabwe to Zimbabwean parents lived there with their father after their parents separated early in 2001. In March 2005 they were brought secretly to England by their mother who claimed asylum. The asylum claim was refused in April 2005 but she and the children remained in England because of a moratorium on the return of failed asylum seekers to Zimbabwe. The girls were not happy in England at first and in September 2005 they contacted their father asking him to come and take them home. However, it was not until a year later that the father commenced proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980[1] , as scheduled to the Child Abduction and Custody Act 1985, for their return. The English central authority did not receive notification from the Zimbabwean central authority until January 2007 and proceedings were finally issued in May 2007, more than two years after the children had been removed. By that time the girls, who were then 13 and 10 years old, felt settled in their new home and did not want to return. The judge found that the children were indeed settled in England and he was therefore under no duty to order their return under article 12 of the Convention. He also found that they genuinely objected to being returned to Zimbabwe and were of an age and maturity which made it appropriate for him to take account of their views under article 13. However, he decided that the case was not exceptional and he thus declined to exercise his discretion to refuse to order the girls' immediate return. The Court of Appeal upheld his decision.

On appeal by the mother, with the girls intervening-

Held , (1) (Lord Rodger of Earlsferry dissenting) that once a child had become settled for the purposes of article 12 the court still had a discretion to return him within the Convention procedures (post, paras 1 –5 ,30 –31 , 59).

(2) That, however, the difference between the discretion exercisable under the Convention and the discretion under any other jurisdiction was not as great as sometimes seemed; that in wrongful retention cases falling outside the Convention the child's welfare was the paramount consideration but the court still had power to order immediate return of a child to a foreign jurisdiction without conducting a full

investigation of the merits if the circumstances of the case so required; that under the Convention, in contrast, there were general policy considerations, such as the swift return of abducted children, comity between contracting states and the deterrence of abduction, which might be weighed against the interests of the child in the individual case; that the Convention discretion was at large and the court was entitled to take into account the various aspects of the Convention policy alongside the circumstances which gave the court a discretion in the first place, and the wider considerations of the child's rights and welfare; that the weight to be given to the Convention considerations and to the interests of the child would vary enormously, as would the extent to which it would be appropriate to investigate such other welfare considerations; that it did not necessarily follow that the Convention objectives should always be given any more weight than any other consideration; and that the further away one got from the speedy return envisaged by the Convention the less weighty those general Convention objectives must be, since the major objective of the Convention could not be met (post, paras 1 –2 ,7 –8 ,31 –32 ,38 –39 ,41 –44 ,47 –48 , 59).

In re J (A Child) (Custody Rights: Jurisdiction) [2006] 1 AC 80, HL(E) considered.

(3) That a judge did not need to find something exceptional in a case before he could refuse to order return under the Convention; that the circumstances in which the Convention itself provided that return might be refused were themselves exceptions to the general rule which amounted to sufficient exceptionality; and that it was neither necessary nor desirable to import an additional gloss into the Convention (post, paras 1 –2 ,8 , 34 –37 ,40 , 59).

Zaffino v Zaffino (Abduction: Children's Views) [2006] 1 FLR 410, CA and *Vigreux v Michel* [2006] 2 FLR 1180, CA disapproved.

(4) That in cases where the child objected to being returned the range of considerations might be even wider than those under the other exceptions to ordering immediate return; that taking account of a child's views did not mean that those views would always be determinative or even presumptively so, but that was far from saying that a child's objections should only prevail in the most exceptional circumstances; and that the older the child was the greater the weight her objections were likely to carry (post, paras1 –2 , 8 ,46 –47 , 57 ,59).

(5) Allowing the appeal, that, since the trial judge had erroneously regarded the case as needing to be exceptional before he should exercise his discretion to refuse return, it was open to the House to reach its own conclusion; that, having considered the facts and that the children felt fully settled in England and wanted to stay, the policy of the Convention could carry little weight; that the girls should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide; and that, accordingly, the father's Hague Convention proceedings would be dismissed (post, paras1 –2 , 8 ,34 –36 , 49 ,52 , 54 –56 ,58 –59).

Decision of the Court of Appeal [2007] EWCA Civ 992 reversed.