

MM v VM (AKA VRM) (2007)

[2007] UKHL 55 (2008); 1 AC 1288 : (2007) 3 WLR 975 : (2008) 1 All ER 1157 : (2008) 1 FLR 251 : Times, December 6, 2007

05/12/2007

Barristers

Henry Setright KC
Private: Marcus Scott-Manderson QC
Teertha Gupta KC
Private: David Williams QC

Court

House of Lords

Summary

The Hague Convention on the Civil Aspects of International Child Abduction Art.12 envisaged that even where children had settled into a new life, they might nevertheless be returned to their country of removal within the Convention procedures. The court considered how the discretion to return them should be exercised, both within and outside Convention policy and the proper approach to consideration of children's objections.

Facts

The appellant mother (M) appealed against the upholding ((2007) EWCA Civ 992) of a decision that her children should be returned to their father (F) in Zimbabwe. M and F, both Zimbabweans, had two children, aged 10 and 13, both of whom had been born in Zimbabwe. M had left F and the children for several years, then re-married and abducted the children and brought them to the United Kingdom, where she sought asylum. F made an application for the return of the children under the Hague Convention on the Civil Aspects of International Child Abduction and a judge had ordered their return, despite finding that M had established settlement in the UK and that the children objected to their return. The Court of Appeal had upheld the order for return, finding that the judge had properly exercised his discretion and had applied the correct test for deciding whether the case was exceptional. The issues for determination were (i) whether, once children were settled, there was a discretion to return them under the Convention or whether their return was to be sought under some other jurisdiction; (ii) if there was a discretion, on what principles it should be exercised; (iii) what was the proper approach to the consideration of children's objections under Art.13 of the Convention.

Held

HELD: (1) (Lord Rodger of Earlsferry dissenting in the reasoning but concurring in the result) Although there was a long line of authority holding that once one of the exceptions in Art.13 of the Convention had been made out, there remained a discretion under the Convention rather than under the ordinary law to

return the child, it could not be said, looking at previously decided cases, that there was a strong tide of international judicial opinion in favour of a discretion in settlement cases. On the other hand, only two judges had expressed a contrary view, Cannon v Cannon (2004) EWHC 1245 (Fam), (2005) 1 FLR 127, State Central Authority v Ayob Unreported January 1, 1996 and State Central Authority v CR Unreported January 1, 2005 considered. The favoured solution of the three theoretically possible solutions was to conclude that Art.12 of the Convention envisaged that a settled child might nevertheless be returned within the Convention procedures, Cannon v Cannon (2004) EWCA Civ 1330, (2005) 1 WLR 32 considered. (Per Lord Rodger of Earlsferry) Once a child became settled, precisely because the purpose of the Convention to promote speedy return could no longer be achieved, the Convention ceased to play a role and the court had to have resort to powers outside the Convention. (2) There remained a distinction between the exercise of discretion under the Convention and the exercise of discretion in non-Convention cases. In the former, there were general policy considerations to be weighed against the children's interests on a case-by-case basis. In non-Convention cases, children's welfare might well be better served by a prompt return to the country from which they were removed, L (Minors) (Wardship: Jurisdiction), Re (1974) 1 WLR 250 CA (Civ Div) considered. A view had undoubtedly developed that "exceptional" was not merely a description to be applied to the small number of exceptions in which the court had power to refuse to order a return, but also an additional test to be applied to the exercise of a court's discretion after a ground of opposition had been made out. The extreme positions outlined in some previous authorities were incorrect, Z v Z (Abduction: Children's Views) (2005) EWCA Civ 1012, (2006) 1 FLR 410, M (A Child) (Abduction: Brussels II Revised), Re (2006) EWCA Civ 630, (2006) 2 FLR 1180, K v K (2007) EWCA Civ 533, (2007) 2 FLR 996 and M (A Child) (Abduction: Child's Objections), Re (2007) EWCA Civ 260, (2007) 2 FLR 72 doubted. The correct approach to be adopted in wrongful removal or retention cases falling outside the Convention was that even though a child's welfare was the paramount consideration, a court had power to order the immediate return to a foreign jurisdiction without conducting a full investigation into the merits, J (A Child) (Custody Rights: Jurisdiction), Re (2005) UKHL 40, (2006) 1 AC 80 and R (Minors) (Wardship: Jurisdiction), Re (1981) 2 FLR 416 CA (Civ Div) applied. It was undoubtedly wrong to import any test of exceptionality into the exercise of discretion under the Convention because the circumstances in which return might be refused were themselves exceptions to the general rule. 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, D (A Child) (Abduction: Rights of Custody), Re (2006) UKHL 51, (2007) 1 AC 619 considered. (3) Taking account of a child's views did not mean that they were determinative. The older the child, the greater the weight the objections might carry, but that was not the same as saying that objections should only prevail in the most exceptional circumstances. (4) In the instant case, the trial judge had been wrong to regard the term "exceptional" as a test to be applied in the exercise of his discretion. The passage of time meant that the primary objective of the Convention could not be fulfilled. The instant court set aside the discretion of the trial judge and F's Convention proceedings were dismissed.

Appeal allowed

Permission

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