

Re J (A Child) (Child Returned Abroad: Convention Rights) (2004)

(2004) 2 FLR 85 : [2004] EWCA Civ 417; Times, April 14, 2004

02/04/2004

Barristers

Henry Setright KC

Court

Court of Appeal

Summary

To make an order under the Children Act 1989 s.8 for the return of a child to Saudi Arabia as the country of his habitual residence in the care of his mother (if she chose to return) would not breach the rights of the child or mother under the European Convention on Human Rights 1950 Arts. 6, 8 or 14 even though the mother would not be able to apply to relocate back to England in Saudi Arabia.

Application for leave to appeal to the House of Lords successful.

Facts

The father (F) appealed against the refusal of his application under the Children Act 1989 s.8 for an order for the return of his son (J) to Saudi Arabia. F was a Saudi Arabian national. The mother (M) had an English domicile of origin but had dual Saudi Arabian and British nationality. F and M met at a Saudi hospital where they both worked. They were married in Saudi Arabia in 1999. J was born in 2000. F and M separated in 2001. In June 2001 M travelled from Saudi Arabia to England with J. Later that year M returned to Saudi Arabia with J. She brought proceedings in the Shariah court and F was persuaded to grant M a divorce. However, the parties were remarried in Saudi Arabia in January 2002 and bought a matrimonial home. In July 2002 M travelled to England with J with F's consent. M remained in England to do a one year course. F did not see J after October 2002. In May 2003 M issued a divorce petition in England. On F's application under s.8 of the 1989 Act the judge held that, in a case of return to a non-Hague Convention country, the paramount concern was the welfare of the child. He accepted that F's intention was to obtain the return of J to Saudi Arabia with M, if possible, rather than to remove J from M's care. However, there was a considerable risk that if W did return with J future disputes would arise. Balancing all relevant considerations going to J's welfare, the judge would have ordered J's return to Saudi Arabia were it not for the fact that he could not exclude the possibility that F would raise the allegation of M's misconduct in future litigation in Saudi Arabia if hostilities flared up between the parents. If he had ordered the return he would have made it conditional on F granting W a divorce in Saudi Arabia. On F's appeal, M, by respondent's notice, supported the judge's decision not to make an order returning J to Saudi Arabia on the ground that to do so would be contrary to the European Convention on Human Rights 1950 Arts.6, 8 and 14 because M would not be able to apply for relocation

back to the UK in Saudi Arabia.

Held

HELD: (1) The judge had erred in giving excessive weight to what he identified as the critical factor that F's allegation of sexual misconduct against M, which had been withdrawn in the English proceedings, would be deployed in the Saudi court to destroy the relationship between J and his mother. Apart from that the balance of welfare considerations favoured return. The judge had elevated that particular concern above the level that was justified by the evidence. (2) As the judge held, M's inability to apply in Saudi Arabia for permission to relocate was not a factor that was contrary to the welfare of J. (3) The inability of W to apply to apply for permission to relocate back to the UK in Saudi Arabia did not engage Arts.6, 8 and 14 of the Convention. The rights under those articles only applied to those within the jurisdiction. The fact that M might experience in Saudi Arabia what in England would be regarded as breaches of her rights under Arts.6, 8 and 14 of the Convention did not render the English court in breach of those articles if it returned J to Saudi Arabia (Ullah v Special Adjudicator; Thi Lien Do v Secretary of State for the Home Department (2002) EWCA Civ 1856, (2003) 3 All ER 1856 applied). (4) To return J to the country of his habitual residence in the care of his mother (if she chose to return) would not breach the Art.8 rights of J or M. (5) The judge's refusal of F's application was not justified. Return should be subject to the conditions which the judge would have imposed had he ordered return.

Permission

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