

RS v (1) KS (2) LS (By his Guardian) (2009)

[2009] EWHC 1494 (Fam)

26/06/2009

Barristers

Teertha Gupta KC

Court

Family Division

Summary

The court exercised its discretion not to order the immediate return to Lithuania of a four-year-old child who, since his mother's wrongful removal of him from Lithuania two years ago, had settled in the United Kingdom such that he would be at grave risk of suffering psychological harm if he was returned.

Facts

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The applicant father (F) applied for the summary return of his son (L) to Lithuania following L's removal to the United Kingdom by his mother (M). F and M were married in Lithuania before L's birth in April 2005. F agreed that M could take L on holiday to the UK from January 10 to February 1, 2007 and he provided written consent to that effect. However, M had consulted lawyers in order to divorce F and did not return L to Lithuania. M accepted that L remained in the jurisdiction since January 2007 without F's consent; that F had rights of custody and was exercising them prior to L's removal from Lithuania; and that L was habitually resident in Lithuania prior to the retention. She relied on the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.12 and Art.13(b) arguing that there was no adequate arrangement that could be made to secure L's protection on his return. F did not attend the instant hearing and there had been no recent contact between L and F. Evidence from L's guardian showed that he was settled at nursery and was a happy boy.

Held

Held

HELD: On the facts, M had no intention to honour the agreement reached with F as to L's return; at the time of her arrival she had no settled intention of remaining in the UK; she formed an intention to settle in the UK in or about June or July 2007; and she did not inform F of her plans prior to February 2007. Accordingly, it was a case of wrongful retention which subsumed wrongful removal. The relevant date for the purpose of assessing whether F commenced proceedings after the expiration of one year, for the purposes of Art.12, was February 2, 2007; that was the date upon which L should have been returned to Lithuania in accordance with the agreement. F had appeared before the court on January 31, 2007. Accordingly, F could legitimately claim to have negated M's recourse to Art.12. Nevertheless, the circumstances of the case required a review of the facts which would otherwise be relied upon by M to

establish settlement. That aspect of the case was approached with a view to assessing L's degree of integration into his physical and social environment entirely independent of his dependence upon and attachment to M as his primary carer, *N (Minors) (Child Abduction)*, Re (1991) 1 FLR 413 Fam Div applied. The evidence of the guardian showed that L was completely integrated within his new life and was settled. L would be devastated at his removal due to his age and development now and at the time he arrived in the UK. He had known no other life. It was recognised in *D (A Child) (Abduction: Rights of Custody)*, Re (2006) UKHL 51, (2007) 1 AC 619 that undue delay and settlement might, in appropriate cases, constitute the basis of an argument that a child would be exposed to an intolerable situation if summarily returned to their country of habitual residence prior to removal, *D (A Child)* applied. Accordingly, M had discharged the burden of establishing a defence under Art.13(b). It therefore fell to be considered whether it was established that adequate arrangements had been made to secure L's protection after his return under Art.11(4). There were no safeguards which would mitigate L's loss of his community, society and current lifestyle in the short or medium term and therefore, at his age, the grave risk of psychological harm or intolerability would go unabated. The court's discretion was exercised against ordering an immediate return of L to Lithuania.

Permission

Lawtel 