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Re M (Children) (2007)

[2007] EWCA Civ 992

12/09/2007

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

Court
Civil Division

Summary
In the circumstances a judge had been correct to exercise his discretion in favour of ordering the return of children wrongfully removed from Zimbabwe even though they had become settled in the United Kingdom and objected to being returned.

Facts
The appellant mother (M) appealed against a decision ((2007) EWHC 1820 (Fam)) that her children should return to their father (F) in Zimbabwe. M and F had two children, aged 10 and 13. M had left F and the children for several years. M re-married and then abducted the children and brought them to the United Kingdom, where she sought asylum. Her application for asylum was rejected and she appealed. F made an application for the return of the children under the Hague Convention on the Civil Aspects of International Child Abduction and at trial the judge ordered the return of the children, despite finding that M had established settlement in the UK and the children objected to the return. The judge found M to be devious and untrustworthy. M's immigration proceedings were still ongoing at the time of the instant appeal. M submitted that the judge had exercised his discretion incorrectly by applying the wrong test, namely that it would only be in an exceptional case that the court would exercise its discretion in favour of refusing to return a child, even if the child was settled and objected to his return. M argued that the judge had not sufficiently considered a number of contra-indications to return, particularly the chaotic state of affairs in Zimbabwe.

Held
HELD: (1) The recognised policy or purpose behind the Convention was to return children wrongfully removed from their state of habitual residence as quickly as possible. That policy could give way in some cases, for example where the child was well settled in the new country or where the child had substantial objections to being returned. However, in deciding whether there were sufficient grounds for not returning a child, the court must take account of the underlying policy of the Convention. In order to justify exercising its discretion against returning the child, it must be satisfied that, viewed overall, the case could properly be described as exceptional, S (A Minor) (Abduction: Custody Rights), Re (1993) Fam 242 CA (Civ Div) applied, Z v Z (Abduction: Children's Views) (2005) EWCA Civ 1012, (2006) 1 FLR 410, M

(A Child) (Abduction: Child's Objections), Re (2007) EWCA Civ 260, (2007) 2 FLR 72, C (Abduction: Settlement) (No2), Re (2005) 1 FLR 938 Fam Div and C (A Child) (Child Abduction: Settlement), Re (2006) EWHC 1229 (Fam), (2006) 2 FLR 797 considered. (2) Viewed as a whole the judge had exercised his residual discretion without misdirection and without attaching weight to immaterial factors or disregarding material factors. (3) Even if the instant court had been persuaded that the judge's decision was flawed, it would have arrived at the same conclusion in any event. It was the policy of the Convention to return children if possible to their country of origin. This was an important factor favouring return, to which was allied the nature of M's misconduct. The court should also take into account the fact that the children had a good relationship with F which had resumed without difficulty during recent contact. The wider family and cultural ties of the children were firmly in Zimbabwe. All of those factors favoured return. The most powerful factor pointing the other way was the fact that the children were settled in the UK, but the judge's finding to that effect was on its own terms finely balanced. The quality of that settlement was also marred by the fact that entry to the UK had been obtained spuriously and there were risks that it would not be permitted to continue. The instant case was not comparable to either of the Re C cases where the children had been in the UK for much longer periods of time and were much more firmly settled. The judge's findings in the instant case suggested that the children would be capable of re-settling in Zimbabwe without comparable difficulties. Despite the dire economic conditions the circumstances in Zimbabwe were not such as to expose the children to real personal danger and the children's objections to return were not found to be particularly strong or cogent.

Appeal dismissed

Permission