

Re M (Abduction) (1996)

(1997) 2 FLR 690

19/12/1996

Barristers

Henry Setright KC

Court

Court of Appeal

Summary

The Court of Appeal upheld a judge's refusal of summary return to Greece of 2 boys who had been wrongfully retained in England by their mother, on the grounds that Art.13 of the Hague Convention applied.

Facts

Two boys aged 9 and 7 were habitually resident in Greece. The father was Greek and the mother English. The mother brought the children to England with the father's agreement but remained beyond the agreed time, in breach of the Hague Convention. Under the Convention the children were returned. The Greek court granted interim custody to the father with contact to the mother including staying arrangements over the school holidays. The mother retained the children a second time and the father applied under the Hague Convention for their return. The judge found that the retention by the mother was wrongful but that Art 13 applied, both in respect of grave risk of psychological harm if the children were returned to Greece and, with greater hesitation, that the children were of a maturity sufficient for him to take their wishes into account and he did so. He therefore ordered that the children should not be sent back summarily to Greece under the provisions of Art 12. The father appealed against the order. The issue was whether the judge identified the correct questions under Art 13 and whether he misdirected himself in his approach to the resolution of the grounds set out in that Article.

Held

(1) The approach of the Convention was directed to the welfare of the child but the welfare test generally was to be applied in such a way as to enable the courts of the habitual residence of the child to make the decisions as to what are the best interests of the child. (2) However, there was exceptional provision within the Convention to make provision for the welfare of the particular child with whom the requested State was concerned in Art 13. The relevant provisions in this case were the grave risk of psychological harm and the views of the child if of sufficient maturity. (3) There were two stages to a consideration by the court of Art.13. It was first necessary to show a prima facie case and secondly, if so shown, the court had to consider in the exercise of its discretion whether to send the child back. The requirements were strict and cases seldom passed the threshold. Only in exceptional cases would the court not order summary return. (4) The court agreed with the assessment of the evidence by the judge at first instance

in relation to the issues of grave psychological harm, backed up by compelling professional evidence, and the wishes of the children. (5) The objections of the elder boy, at least, in the context of his genuine psychological state were well-founded and should be given weight. (6) The exercise of the judge's discretion could not be faulted. He took the mother's reprehensible behaviour into account and was right to do so. The conduct of the abducting parent was crucial and, in most cases, determinative but it could not exclude the rare case where the court had to look past that conduct to the manifest needs of the child concerned and this was such a rare case. (7) The issue was not how the Greek courts might deal with the case but the effect on the children of the return to Greece which on the present facts meant returning them to the paternal family. (8) The appeal was dismissed but the court made it clear that this was only an interim prima facie decision that the children should not go back at once. The case would be heard by a High Court judge who would decide where the children should live.

Permission

Lawtel 