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Re O (Children)

[2011] 2 FLR 1307 : [2011] 1 FCR 363 : [2011] Fam Law 452 : (2011) 108(9) LSG 19; [2011] EWCA Civ 128

16/02/2011

Barristers
Christopher Hames KC

Court
Civil Division

Practice Areas
International Children Law

Summary
In ordering the return of children to Nigeria, a judge had erred by giving overriding significance to the consideration of the policy of the Hague Convention on the Civil Aspects of International Child Abduction 1980 that it tended to be in the interests of children to be returned to their country of origin to have their future determined. That consideration should have been considered as part of the whole picture, alongside the factors laid down in M (Children) (Abduction: Rights of Custody), Re (2007) UKHL 55, (2008) 1 AC 1288.

Facts
The appellant mother (M) appealed against a decision in favour of the respondent father (F) ordering the return of their two daughters (D), aged seven and five, to the United States. M and F were Nigerian but had made their home in the US where D were born. In February 2009, M took the children on holiday to Nigeria but did not return. D were settled and well cared for in Nigeria and attended school there. Since the separation, F had visited Nigeria several times and had continued to have contact with D. However, his actions had often been immoderate. For example, on one occasion he intercepted the children on the way to school and retained them for a week without disclosing their whereabouts to M. F applied to the Nigerian court for custody of D but withdrew that application after the parties signed a letter recording that M should have custody. However, in July 2010, M and D travelled to England to visit M's brother and the instant application was made. As a result, M and D were unable to leave England and had remained for seven months by the time of the instant hearing. M relied on the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.12, arguing that D were settled in Nigeria. The judge agreed but decided not to exercise discretion to allow her to retain them there because D's young age meant that they would be able to adapt readily. M argued that the judge had placed too much weight on the Convention objective of securing a swift return of children to their country of origin and failed to give sufficient weight to the factors laid down in M (Children) (Abduction: Rights of Custody), Re (2007) UKHL 55, (2008) 1 AC 1288.

Held

The judge had been referred to M (Children) which should have guided his approach to deciding whether to order the return of D. However, he had not alluded to it at all, either by name or by restating the principles to be derived from it. He should have collected together the facts which he considered to be relevant to his decision and set out how he had balanced them. Only two considerations relevant to the proper exercise of his discretion could be extracted from his judgment, namely the Convention policy consideration that it tended to be in the interests of children to be returned to their country of origin to have their future determined and the judge's view that D were young enough to adjust. Even in relation to those two factors, there were problems with his approach. He appeared to have given overriding significance to the Convention policy consideration which was by no means irrelevant but should have been considered strictly as a part of the whole picture. As for his reliance on the adaptability of the children because of their young age, the individual circumstances of D should have been examined and weighed in the balance and there was no indication that he had engaged in that exercise. There were many other matters that should have been put in the balance. The judge had failed to apply the M (Children) principles and the exercise of his discretion could not be supported as valid, M (Children) followed. There were overwhelming reasons to decline to order summary return of D to the US. The case was very far from a hot pursuit case and, although not irrelevant, Convention policy considerations were not as prominent as they would otherwise be. The children did not view the US as their home. They were settled in Nigeria in comfortable circumstances, with appropriate arrangements in place for their welfare and were likely to continue to see Nigeria as their home. They could easily return to resume the life they had been living before they left Nigeria. Both parents were familiar with Nigeria and had relatives there. Both had lawyers there and the Nigerian court had already been seised of the matter. The immoderate and underhand activities of F since his separation from M could not be ignored and it would be much easier for M to cope with his behaviour if she remained in Nigeria with the support of her family than if she were to return to the comparative isolation of the US. Her sense of security would contribute to her ability to look after D (see paras 9, 21-26, 49 of judgment).

Permission