

Re Y (A Child) (2013)

AC9601636

22/01/2013

Barristers

Henry Setright KC
Private: David Williams QC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

Pursuant to the Hague Convention on Parental Responsibility and Child Protection 1996 art.23, undertakings given by a parent to facilitate the return of an abducted child, where a defence to returning under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13(b) had been raised by the abductor, amounted to “protective measures” within Regulation 2201/2003 art.11(4). Undertakings were capable of recognition and enforcement by other contracting states under the 1996 Convention: there was no requirement for protective measures to be in the form of a concrete court order.

Facts

The appellant mother (M) appealed against a decision that undertakings given by the respondent father (F) in child abduction proceedings amounted to “protective measures” pursuant to Regulation 2201/2003 art.11(4).

M and F were Cypriot and the parents of a four-year-old girl (X). When M removed her to Cyprus, F applied for a return order under the Hague Convention on the Civil Aspects of International Child Abduction 1980. M advanced a defence under art.13(b) of the Convention asserting that, if returned, she and X were at risk from domestic violence or abuse by F. The judge considered those allegations highly contentious and held that they should be investigated by a Cypriot court. She ordered X’s return subject to protective measures under art.11(4) of the Regulation. A raft of protective measures were expressed in an undertaking given by F. An issue arose between the parties as to the form of the order. F drafted an order on the basis that undertakings would effectively be as valid in Cyprus as in the United Kingdom, pursuant to the Hague Convention on Parental Responsibility and Child Protection 1996 art.23, which had come into force in the UK in November 2012, shortly before the hearing. The judge made an order in that form.

M submitted that protection by way of undertaking was ineffective. She contended that the useful

machinery of the 1996 Convention, by which measures taken in one contracting state were to be recognised and enforced in all contracting states, was only effective if the protective measures were expressed by the state ordering a child's return in the form of a concrete order.

Held

(1) The terms of art.23, art.24,art.26 and art.28 of the 1996 Convention identically referred to "the measures". That term was to be construed broadly, not narrowly, for the common law jurisdiction of the UK. To say that undertakings could not be classed as "measures" was erroneous and devoid of practical sense. Those who had negotiated the 1996 Convention would, by the date of its arrival, have been fully familiar with undertakings. (2) The whole purpose of the 1996 Convention was to support and supplement the effective operation of its parent, the 1980 Convention. Undertakings had been used widely for protective measures since the early years of the 1980 Convention. It was simply unthinkable that the 1996 Convention should intend or expect to diminish and not fortify the effect of undertakings and their use as one of a number of mechanisms available to provide protection to a returning abductor and child.

Permission

Lawtel 