

CB v CB [2013]

[2014] 1FLR 663; [2013] EWHC 2092 (Fam)

10/04/2013

Barristers

Christopher Hames KC

Court

High Court (Family Division)

Practice Areas

International Children Law

Summary

Mother's application under the Hague Convention 1996 for the return of her 14 year old son who had remained in the UK following a contact visit to his Father – consideration of the defence under Art 13 of the child's objection to the return

Facts

The Father was British and lived in the West of England. The Mother had dual Australian and British nationality. She had spent the early years of her life in Australia before moving to England. The parents married in 1999 and the child, K was born that year.

The parents separated in 2002, since when, K had lived with the Mother; in England until 2010 and thereafter in Australia. Contact was maintained between K and his Father in Australia and over the Christmas period of 2012 he came to the UK to visit the father, being due to return to Australia on 16th January 2013. K did not return, however, his father stating that he did not wish to do so.

It was held that there was no doubt that the retention of K in the UK was a wrongful one for the purpose of Article 12 of the Convention. K had been habitually resident in Australia and his mother had been exercising a right of custody there. The father's one and only defence to an order for K's return lay under Article 13, which provides:

"The Judicial or Administrative Authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

Peter Jackson J set out that the Court needed firstly to consider whether the various "gateway" conditions for the application of the defence were made out, and secondly to consider whether it should exercise its discretion to refuse a return order. The "gateway" conditions were (a) that the child genuinely objected to returning, as opposed to having a preference or strong expression of view, and (b) that the child was of sufficient age and maturity to make it appropriate to take account of those views. The judge made

specific reference to the guidance contained at paragraph 46 of the opinion of Baroness Hale in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, and paragraph 66 of the judgment of the former President of the Family Division, Sir Mark Potter, in *DL v H* [2009] EWHC 3074. He summarised that the nub of the guidance is that the court must consider, not only the overall purposes of the Convention, but also the question of the child's welfare in the light of the strength, soundness and validity of the views that have been expressed.

K's Guardian had interviewed him twice during the proceedings. He considered him to be mature, perhaps slightly in advance of his chronological age, that he did not want to return and that his view came from the heart and in a balanced way. The judge received oral and written evidence from both parties as well as the Guardian, who opposed an order for K's return. He commented at paragraph 26 that the events of January 2013 were not "a naked abduction but something more complicated than that, which had its roots in K's earlier childhood and in the relationship between his parents."

Held

The judge held that K did indeed object to a return and that his views, whether or not they were right, were rational and he had sufficient insight for them to be given considerable weight. He concluded that the court should exercise its discretion not to return him to Australia. The difficulties to which that might give rise were in his view, obvious and the uncertainties and, quite probably, temporary nature of a return had also to be recognised.

The judge therefore dismissed the mother's summons. He directed that the parents should agree the arrangements for K's future residence and contact by a set date, in default of which there would be a supplemental report from the Guardian and a short hearing to determine those issues.

Permission

Family Law Week 