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C (A Child) [2013]

[2013] EWCA Civ 204

24/01/2014

Court
Court of Appeal Civil Division

□□□The application for return was brought by the father, left behind in Turkey by the mother who had brought the only child of the family to this jurisdiction. The mother raised an Article 13(1)(b) defence, but on the day of the hearing consented to a summary return order on the basis of protective measures being put in place by way of undertakings from the father.
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□□□In the event, however, the mother did not comply with the return order, as a result of which the father applied ex parte for a warrant requiring the mother to attend at court to justify her breach. The mother responded by arguing that she had only agreed to the consent order under duress from her counsel, Mr A. At the adjourned return date Mostyn J, observing the terms of FPR 2010 r4.1(6) (which provides for the court's powers to vary or revoke its orders), listed a hearing on the set aside issue.
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□□□By the time the matter came before Baron J at that hearing, the mother had filed two further statements, as had Mr A (who was also available on the date of the hearing before Baron J). Baron J dealt with the matter on oral submissions and on the basis of the principles set down in Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies) [2012] and Arif v Zar & Anor [2012]. In giving judgment, Her Ladyship granted the mother's application to set aside the consent order on the basis that the advice given to the mother by Mr A as to her prospects of success was "perhaps rather too dogmatic" and that the substance of her defence was not as "black and white" as Mr A's attendance note had suggested, as a result of which M's consent to the order had not been fully informed. Accordingly, Baron J directed a hearing to consider F's application for a summary return on the basis of M's original defence.
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□□□The father appealed, arguing that (i) the matter should not have been dealt with on submissions and that (ii) Mr A should have been fully informed of M's complaints against him in advance of that hearing. □□

□□□Thorpe LJ, giving the lead judgment, granted permission and allowed the appeal on the basis of the grounds advanced. His Lordship also directed that in advance of the hearing listed by Baron J, at which M's application to set aside the consent order could now be heard, Mr A should have sight of M's evidence. Mr A should also attend the hearing if he could be released from his professional commitments that day.
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□□□Longmore and Leveson LJJ both agreed with Thorpe LJ, making further observations as to the applicability of the principles set out in Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies) [2012 and Arif v Zar & Anor [2012] to consent orders, particularly in light of the judgment of Munby J in L v L [2008] regarding the effect of bad advice on the setting aside of a consent order. □□
□□□Appeal from the setting aside of a consent order for the summary return of a child pursuant to the provisions of the Hague Convention. □□

Permission
Lawtel