

F v M (2018)

[2018] EWHC 2106 (Fam)

03/08/2018

Barristers

Henry Setright KC
Teertha Gupta KC
Michael Gration KC
Michael Edwards

Court

Family Division

Practice Areas

International Children Law

Father's appeal to the High Court against a refusal to recognise an order of a Moscow District Court, the mother having successfully argued, and continued to maintain, that registration should be refused because the decision had been made without the child having had the opportunity to be heard, and that the decision was contrary to public policy.

This was an appeal by a father to the High Court against the decision of District Judge Gibson to refuse to recognise an order of the Zamoskvoretsky District Court in Moscow. The District Judge had primarily refused to recognise the order on the basis that the child's voice had not been heard. The case is noted to be unusual in that, typically, foreign orders are recognised at first instance and the registration is then challenged on appeal. In this case, recognition had been refused from the outset.

The father's appeal against that refusal was dismissed and the mother's objections to recognition under Article 23 (b) and (d) were expressly upheld by Mr Justice Cohen.

Background

The proceedings concerned a child, A, who was born in 2007. The parties had been married, but had separated some time ago, in 2009. The mother had since formed a relationship with C, a prominent critic of the Russian government. Both the mother and C are under investigation and have been charged with criminal offences in Russia.

In April 2014, the mother had travelled with A to England, to meet with C. In August 2014, the Father applied for the summary return of A to Russia. It was the father's case (found by the English court) that the mother had obtained his approval for a visit to England but that she had thereafter wrongfully retained A in England.

Originally, Mrs Justice Hogg made an order for A to be returned to Russia under the court's inherent jurisdiction. The mother appealed and the Court of Appeal allowed her appeal. The matter was remitted to the high court for a further hearing with the benefit of a CAFCASS report. The mother's appeal is reported as in *re S (A Child) (abduction; hearing the child)* [2014] EWCA Civ 1557.

At the re-hearing Mr Justice Moor determined that on an interim basis it would be wrong for A to be returned to Russia. He found that if she returned to Russia the mother would be likely to be put under pressure to influence C who was very unpopular with the government of the Russian Federation. He accepted that the mother had genuine fears of arrest if she returned to Russia.

Difficulties arose between the parents as to the arrangements for A, and the father applied in Russia for an order in relation to A. The lower court first ruled that A should live with the mother, taking into account a 2013 report and the English CAFCASS report. The father appealed this decision, ultimately to the Russian Supreme Court, and this decision was overturned and remitted. On 27th September 2017, the District Court in Moscow appears to have held that A should not continue to live with the mother. It was this order (upheld on yet another appeal) that the Father sought to register in England.

Appeal

The mother had successfully argued and continued to say that registration should be refused pursuant to Article 23 of The Hague 1996 Convention pursuant to paragraph (2) (b) and (d), namely that: the decision was made without the child having been provided the opportunity to be heard, and that the decision was manifestly contrary to public policy in England and Wales. The latter argument related to her asylum status.

The parties had agreed that the High Court should both determine the appeal and consider the Article 23 objections. As Mr Justice Cohen explained:

"After discussion both parties agreed to ask me to treat this hearing as a unitary hearing and to consider all the relevant matters under Article 23 as if this was the mother's appeal against registration. I considered that this was a wise decision as otherwise there would have been scope for me to remit the matter back to the district judge and for then there to be a further round of appeal which would be wasteful of both time and resources."

The High Court dismissed the appeal and did not accept criticisms of the District Judge's approach or judgment. Nonetheless and in addition to this, each of the Article 23 objections was upheld by Mr Justice Cohen, following a detailed assessment. Even with these objections made out, the Court still retains a discretion as to whether or not to register an order; Mr Justice Cohen again considered this but concluded that, because A's return to Russia would necessarily involve separation from her mother, this was "so contrary to her interests and so devastating that the court should not be contemplating recognition in the circumstances".

Permission

 Family Law Week