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Re NY (A Child) (2019)

[2019] EWCA Civ 1065

18/06/2019

Barristers
Teertha Gupta QC
Mark Jarman
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Michael Gration QC

Court
Court of Appeal

Practice Areas
International Children Law
A mother's unsuccessful appeal against an order for the summary return of a child to Israel

MacDonald J ordered the summary return of a two-year old child to Israel under the 1980 Hague Child Abduction Convention ("the 1980 Convention"), making it clear he would have made the same order under the inherent jurisdiction.

The appeal issues were: whether there had been a retention within the scope of the 1980 Convention; whether the judge had dealt with the issue of protective measures correctly; and whether the judge had been wrong to order the summary return under either the 1980 Convention or the inherent jurisdiction [2]. The mother submitted: the judge had failed to address the matter of retention under the 1980 Convention; if retention had been addressed then no retention would have been found; and had the 1980 Convention not applied then the judge was wrong to make a determination under the High Court's inherent jurisdiction [35].

The parties had been born and married in Israel and NY was born there in 2016. In The parties had secure employment in Israel and their close extended families and friends lived there. The parties and NY speak Hebrew, the mother also speaks English and it was said that NY speaks some French and English. On facing marital difficulties, the parties moved with NY to live in England. After six weeks in England, on 10th January 2019, the parties decided to divorce and the father said he wished the family to return to Israel to end their marriage. The father returned to Israel and began divorce and custody proceedings in the Rabbinical Court in Israel. The mother issued divorce proceedings in London's Rabbinical Court. ICACU received the application and proceedings began in England in February 2019.

The father's case was that a wrongful retention occurred on 10th January 2019; the mother alleged NY was habitually resident in England on that date and the father had consented to NY's removal from Israel

and retention in England; and that Article 13(b) was made out.

At the hearing below the judge determined: NY was not habitually resident in England at the relevant date; the father had consented to NY's 'removal' from Israel; the Article 13(b) defence was not made out; despite the father's consent the discretion to order summary removal to Israel would be exercised; and, regardless of the finding as to NY's habitual residence, it would be in NY's best interests to make the summary return order (under the inherent jurisdiction) for decisions about her welfare to be made in that jurisdiction.

The appeal court noted that the lower court judge did not address the issue of a retention that would fall within the ambit of the 1980 Convention.

The Court of Appeal found that the father's consent was relevant only in respect to the alleged retention (not the removal) and agreed with the mother's position that the judge needed to decide whether the retention on 10th January 2019 was wrongful (under Article 3) as this was the sole basis upon which the case came within the scope of the 1980 Convention. On this basis, the Court of Appeal found that the 1980 Convention "cannot bite" because of the court's findings on the basis of the family's move to England [59].

However, it was found that the judge had sufficiently set out his reasons for making a summary return order and that that a clear analysis of NY's best interests had been performed [71]-[72]. As to protective measures, the judge had assessed the risk of harm and determined that the proposed or identified protective measures would appropriately address the risk [70].

Moylan LJ gave the leading judgment, with which Flaux LJ and Haddon-Cave agreed, dismissing the appeal but substituting the judge's order with an order made under the inherent jurisdiction rather than the 1980 Convention.

To read the full judgment click here.