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TY v HY (Return Order) (2019)

[2019] EWHC 1310 (Fam)

17/04/2019

Barristers
Mark Jarman

Court
Family Division

Practice Areas
International Children Law
Application for the return of a child to Israel under the Child Abduction and Custody Act 1985.

A father applied for the return of the child NY to Israel following the parents' marriage breaking down while in England. The parents and child were Israeli. The marriage had been in trouble for some time. The parents decided to come to England for a fresh start in the hope that their marriage could be saved. After 6 weeks it became clear that the situation was worsening and the father proposed that they returned to Israel. The mother refused and the father went back to Israel. The mother and child stayed here.

The judge heard oral evidence from the parents and the mother's friend HR. There was evidence indicating that HR was advising the mother on the tactics she should adopt to secure a gett and to prevent NY having to go back to Israel including allegations of domestic abuse and fear of abduction by the father.

The judge reviewed and (usefully) summarised the law on the issues he had to decide:

(a) Habitual residence [paras 35-40]

(b) The High Court's power to order a return even if the child was habitually resident in England at the date of the Hague application [para 41]

(c) Consent to removal and retention for the purposes of Art 13 [paras 42-44]

(d) Intolerable harm [Paras 45-47]

(e) Discretion to order or refuse to return if a "defence" under Article 13 is established. Paras 48-51]

He then answered the questions concluding that:

• the child's situation never achieved the level of stability or integration which led to her acquiring

habitual residence in England [53-60];

• that the father had consented to a move to England and the parents had not agreed that it be limited in time or circumstance and that he had not been induced by misrepresentation or fraud to give his consent. He was not able to withdraw the consent once it had been acted upon. [61-64];

• that in examining the allegations of harm he should adopt "the methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. The court does not simply assume, without more, the maximum level of risk contended for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence" [para 64] and having done so the level of risk and the protective measures would be sufficient. [65-67]

• That the exercise of discretion required the child to be returned to Israel. [68-71]

To read the full judgment click here.