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[24/04/1991; High Court (England); First Instance]
Re R. (A Minor: Abduction) [1992] 1 FLR 105, [1991] Fam Law 475

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

24 April 1991

Bracewell J

In the Matter of R.

Mark Everall for the plaintiff

Shahid Rashid for the defendant

BRACEWELL J: In this case it has now been conceded that the objections of S have such force that it is appropriate for the court to exercise discretion in favour of those objections, and therefore not to grant an order which would have the effect of forcing an unwilling 14 1/2 year old to return to Germany.

This was an application by the plaintiff aunt and guardian of S for the child to be returned to Germany under the provisions of the Child Abduction and Custody Act 1985. S was born on 2 October 1976. She is the daughter of the defendant, who is the plaintiff's sister. The chronology set out the relevant history relating to S, and I do not propose to reiterate that now. It has been agreed that Germany is a Member State of the Convention, and the 1985 Act governs removal of children from Germany to this jurisdiction. The Convention has the force of law in both the relevant jurisdictions. It is important to remember that the objects of the Convention are to secure the prompt return of children wrongfully removed to, or retained in, any Contracting State; and to ensure that rights of custody and access under the law of the Contracting State are effectively respected in the other Contracting State. The Convention is not concerned with establishing the person to whom custody of the child will be granted at some point in the future. It seeks to prevent a later decision being influenced by a change in circumstances brought about through the unilateral action of one of the parties. The Convention aims to protect children internationally from the harmful effects of wrongful removal or retention, and establishes procedures to ensure their prompt return to the State of their habitual residence. Except in clearly specified circumstances, the court cannot refuse to order the return of children. Welfare is not the first and paramount consideration, and any criticisms or complaints about the quality or standard of care in Germany are essentially matters for a German court to resolve. It has not at any time been

argued in this case that any criticisms could be made of the approach of the German courts to children's cases. This case is essentially about jurisdiction.

Article 3 of the Convention states that the removal or retention of a child is to be considered wrongful where:

'(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'

It is conceded in this case that the removal of S by her mother from Germany was wrongful and in breach of art 3. It follows, therefore, that S has to be returned to Germany unless art 13 applies, in which case the court has a discretion whether or not to order her return. It has further been conceded that only art 13(b) was relevant to the case, and I am satisfied that the burden of proof is upon the defendant to bring the case within the terms of subpara (b).

I have considered all the evidence before me. I have considered the various authorities quoted (V v B (A Minor) (Abduction) [1991] 1 FLR 266; Re A (A Minor) (Abduction) [1988] 1 FLR 365; C v C (A Minor) (Abduction) [1989] 1 FLR 403), and I have not been satisfied on the evidence that the defendant has established that there is a grave risk that return to Germany would expose S to physical or psychological harm, or otherwise place her in an intolerable situation. It is plain from the decided authorities that it is not a trivial risk which is contemplated, and it is further established that the intolerable situation envisaged has to be something extreme and compelling.

In this case, the reliance upon complaints by S of sexual and physical abuse of her within the aunt's families are matters which can, in any event, be considered by a German court. There has been much evidence to contradict those statements of S, and there is evidence of her having enjoyed life in Germany. The welfare report from the German authority is relevant, and is a matter which the Convention requires the court to take into consideration. The German courts have been seized of the case throughout the years, able to adjudicate. The German welfare service had knowledge of the case. The Children's Bureau, the aunts and close friends, have all expressed interest; and the German court would be well able to decide upon contested and disputed issues.

The matters which have been raised, therefore, do not in my judgment amount to a grave risk or intolerable situation as envisaged by the Convention.

However, the court has a further discretion in that, under art 13, it states:

'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.'

The article then goes on:

'In considering the circumstances referred to in this Article, the judicial or administrative authority shall take into account the information relating to the social background of the child, provided by the central authority, or other competent authority of the child's habitual residence.'

The words are significant. The court has a discretion. It 'may' refuse to order the return of the child if it finds that the child objects. The word 'objects' is, in my view, significant. The wishes of children in relation to abduction proceedings have only been considered by the President, and the Court of Appeal, in *Re S (A Minor) (Abduction)* [1991] 2 FLR 1. The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute. Questions must also be addressed as to whether or not the views expressed by the child of appropriate age and maturity and understanding are expressed out of free will and choice, whether or not they are genuine views, or whether they have been influenced by some party or person in contact with the child. In this case, there has been a change of heart by S. It is apparent that while she was in Germany she did not find life too uncongenial, having regard to comments which she has made in letters and telephone calls, and conversations with various relatives and friends. The change of heart came about after she had been removed from Germany to England, and therefore questions arise as to whether or not she has been brainwashed by her mother and others in England in changing that view. I am conscious of the fact that one has to be careful, first in assessing the quality of the views expressed, and secondly the genuineness of the opinions advanced.

Having seen S, I am satisfied that she is of appropriate age and degree of maturity to be able to understand the circumstances and to be able to express strong views of her own. I have no doubt whatsoever that she has formed extremely strong views, even to the extent of contemplating suicide if she were forced to return to Germany. I am satisfied, too, that although undoubtedly she has been subject to many pressures on both sides, she has of her own volition come to the conclusion that she objects in the strongest terms to being returned to Germany. It is noteworthy that Mrs Verna Jones, the court welfare officer who interviewed S, also came to the same conclusion; and it is appropriate to note that the questions asked by the court welfare officer were within the terms of art 13, and were not merely inviting a preference as to where S might prefer to live. I have come to the conclusion that the views of S are so strong in her objection that it is appropriate for me to exercise my discretion in favour of her remaining within this jurisdiction. In coming to that conclusion, I have taken into account the practical effects of my decision regarding the uncertain status of the child as an immigrant. The evidence adduced is not clear as to whether she will be allowed to stay on a permanent basis, and equally there is no certainty of deportation. It seems more likely than not to me that she will be able to stay on the same basis as her mother, that is, until July 1992 when the matter will be further reviewed. This is an unusual case in that immigration problems do not generally arise in abduction cases. However, I am not persuaded that my decision should be affected by what is, at present, an uncertainty and no more. I express the hope that the Home Office will indeed allow her to remain within this jurisdiction.

I therefore refuse the application of the plaintiff.

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