Case No: B4/2012/2987

Neutral Citation Number: [2013] EWCA Civ 148
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(MRS JUSTICE MACUR)

Royal Courts of Justice
Strand, London, WC2A 2LL
Wednesday, 23rd January 2013

Before:

LORD JUSTICE THORPE
LORD JUSTICE LONGMORE
and
LORD JUSTICE McCOMBE

- -

IN THE MATTER OF H (a Child)

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Gupta QC & **Mr Khan** (instructed by Tayntons Solicitors LLP) appeared on behalf of the **Appellant Mother**.

Mr Edward Devereux (instructed by Dawson Cornwell) appeared on behalf of the **Respondent Father**.

Mr Henry Setright QC appears on behalf of **The Federal Republic of Mexico.**

- -

Judgment

(As Approved)

99

Lord Justice Thorpe:

1. Mr Gupta QC, leading Mr Hassan Khan, applies for permission to appeal the order and judgment of Macur J dated 19 October 2012, in which she dismissed the mother's application brought under the Hague Abduction Convention 1980 for the summary return of her daughter to Mexico.

2. The application is opposed by Mr Devereux, who appears for the father. He and his instructing solicitors appear Pro Bono, and I would like to express my appreciation for the contribution which they have made to this hearing. It would have been more difficult for this court without their service.

3. Unusually, the United States of Mexico also appear at this hearing, having been granted intervener status by Mr Stephen Cobb QC during the interlocutory stages and having appeared as intervener in the court below. Here, as below, they are represented by Mr Henry Setright QC.

4. The relevant history is set out in a helpful chronology, prepared on behalf of the respondent father. It establishes that the father is English and the mother Mexican. She came to this country in 2001. Their relationship began in 2002. They married in 2003. Their only child, Lydia, was born on 16 June 2006. The mother obtained a British passport in 2008, and on 18 April 2008 the family went to Mexico on what was intended to be a family holiday. Father returned to the United Kingdom on 4 May 2008 on the understanding and in the expectation that the mother and Lydia would return on 24 May 2008.

5. It seems that the mother had no such intention. She initiated proceedings in the Family Court in Mexico. The father was understandably bereft at this development, and took all possible steps to secure the return at least of his child. He contacted relevant charities and experts, including the central authority for this jurisdiction, and an application for a summary return order under the 1980 Convention was issued in Mexico on 16 October 2008. That of course resulted from a transmission from the central authority for this jurisdiction to the central authority in Mexico.

6. It is sufficient to say that the mother defeated all the efforts made by the father to secure the return of his daughter, whether they were efforts by way of court proceedings, whether they were efforts to enlist the active support of his Member of Parliament, whether they were efforts at a diplomatic level between the foreign ministries for the two jurisdictions involved. Whatever effort was made by whatever authority, they were effectively outmanoeuvred by the mother's duplicity and skill in going to ground in Mexico and utilising the support of her own family and of influential friends of the family to achieve her own ends by unlawful acts or wrongful acts and in disregard of her responsibility to engage in proper processes initiated by the father to achieve his daughter's return to the country of her habitual residence.

7. A step that the father took on 7 January was to issue an application in this jurisdiction in wardship and to obtain an order, a perfectly conventional order, without notice on

the same day from a circuit judge sitting as a deputy. The conventional order in these cases is to ward the child and to order return forthwith.

8. Now, that is a very important remedy that survives the introduction and development of the 1980 Child Abduction Convention, in those cases where the jurisdiction to which the child has been removed, or within which the child is retained, is not a party to the international treaty. However, I can see no useful purpose in the issue of such an application in any case where the two countries involved are both signatories to the Convention and the Convention proceedings are still live. The proceeding in wardship was in my judgment, on the facts of this case, plainly otiose. I mention it only because it figures in the extensive hearing before the judge, Macur J, and in her judgment.

9. The subterfuge and flight adopted by the mother proved uncomfortably successful. She evaded all process, and indeed location, over the course of almost four years until late March 2012. On 26 March the Mexican lawyer instructed by the father obtained an order from the ninth Family Court which seems to have had a two-fold purpose and effect. The first was effectively what we would call a tipstaff order to take possession of the child, whose location was now identified, and the second was to give directions for the trial of the outstanding Hague application for summary return. The directions for trial provide, on page 4 of the order, that there should be what I would call a mediation hearing to commence at 13 hours on 28 March, i.e. two days later. If that mediation appointment did not result in settlement -- and in a case like this settlement was very far from a probability -- then there would be a trial of the application, with a fixture at 10.00 on 18 April when the wishes and feelings of the child would be assessed and ascertained. Then the trial proper on evidence and leading to delivery of judgment would commence at 11.30 on the same day. In the event, and perhaps surprisingly, the mediation appointment resulted in a complicated deal which was achieved late in the evening of March 29.

10. The outcome of the mediation was very fully documented in the judgment and order of the court which recorded and approved the agreement. We have a certified translation of that judgment, which has been conveyed under the provisions of the Apostille Convention of 5 October 1961.

11. We also know from evidence that the mediation appointment was extraordinary in character. This case has achieved celebrity in part in this jurisdiction, and certainly in Mexico, for all the human drama that results from the flight and the process of investigative pursuit which ultimately resulted in the mother's arrest and the placement of Lydia into a social care institution, pending the resolution of the Hague proceedings.

12. So it was in that context that the mediation took place, and it seems that a great many people attended. Perhaps they were lawyers, perhaps they were social workers, perhaps they were relations of the child. All were relevant to the process of mediation, all had a contribution to make, and the essential nature of the deal that was struck is to be found in the clauses which are incorporated in the judicial order. They provide essentially for Lydia to remain in the primary care of her mother in Mexico, with frequent and generous contact to her father in this jurisdiction.

13. That is, I suppose, the classic result of successful mediation in the Hague proceedings. The left-behind parent recognises the irreversible consequence of the original removal or retention and contents himself with arrangements for generous contact.

14. Albeit that the long years of Lydia's residence in Mexico had been achieved by subterfuge, nonetheless that was all that was familiar to her, and finds expression in the first clause of the recorded agreement:

> "Both parties state their agreement so that their minor daughter, Lydia, has her legal residence in this country of United Mexican States, specifically in the Federal state of Querétaro, [and the address that follows]..."

And then continuing to specify the child's future address and that any change of residence to be notified, and then provisions as to contact.

15. So pursuant to that resolution the family travelled to this jurisdiction on 31 March, almost exactly 48 hours after the judge's order had been written. It was not long after the arrival of the family in this jurisdiction that the father resiled from the agreement incorporated in the Mexican order.

16. In reliance upon the historic wardship order made in the circumstances I have described, he initiated hearings before judges of the division, until on 3 August 2012 the mother issued the application pursuant to the 1980 Convention for a summary return order.

17. Unusually, five days were set aside for the hearing, and the judge at the hearing heard a good deal of oral evidence, not only from the parties but also from the father's Mexican lawyer and from other witnesses. Her judgment was handed down on 19 October. She dismissed the application. She extended time for the filing of an Appellant's Notice, which was duly filed on the last available date, 16 November.

18. The application was put before me on paper, and I directed an oral hearing on notice with appeal to follow and gave a one-day time estimate to reflect the fact that this was a highly unusual trial given the complexity of the history, the cross-border issues, the intervention of the Mexican state and the skilful skeleton argument drafted by Mr Gupta and Mr Khan in support of the application.

19. The father appeared in person below. However, for the purposes of the appeal, his case has been very fully and skilfully presented by Mr Devereux in his written skeleton. Mr Setright in his brief skeleton makes it plain that, as in the court below, the Mexican state do not wish to side with either parent but only to ensure that the court is assisted by full submissions as to the practice of authority, whether judicial or other, in Mexico, and as to the availability of protective measures should the London judge reject the father's reliance on the Article 13B exemption.

20. In presenting his appeal Mr Gupta accepts that his criticism of the judge is crystallised in paragraph 8 of his skeleton argument, which states that the judge below was plainly wrong in (a) failing to accept the inviolability and effect of the agreement enshrined in the order of 29 March, and (b) failing to scrutinise the protective measures set out by the applicant.

21. Mr Gupta has accepted that in order to succeed in this appeal he has to succeed on both these points. He has to succeed in the submission that the effect of the father's signature on the consent order, was effectively a retrospective recognition that the residence of the child within Mexico since the spring of 2008 was effectively habitual, since the consequence of his signature was to remove the degree of wrongfulness and to validate the *de facto* presence of his child. Alternatively, it is said that if the mere fact of signature was not effective to establish habitual residence, then the interval of 48 hours was sufficient to elevate presence to habitual residence. Unless he succeeds on that point then the application falls outwith the requirements of Article 3, of the 1980 Convention.

22. So if that fence is crossed, then Mr Gupta has to show that the judge was wrong to uphold the Article 13B exception, given the extent and the solidarity of the protective measures available upon return to Mexico. First there was the raft outlined by Mr Gupta in his submissions and then amplified by the information given to the judge by the Mexican government in response to her series of questions.

23. Mr Gupta has made the best that could have been made of a difficult case. In my judgment, he plainly fails to establish that Lydia was habitually resident in Mexico on 31 March 2012. I cannot see any attraction or force in his submission that the mere signature of the document was to legitimate a long period of residence that was clearly not habitual because it was based on deceit and wrongful conduct. Equally the suggestion that the passage of two days was sufficient to elevate her presence to habitual residence is quite unsupported by authority, and indeed is quite contrary to the effect of reported cases within our jurisprudence.

24. I am equally unimpressed by Mr Gupta's submissions on the second issue. The judge, by her judgment, demonstrates that she was fully conscious of the protective measures that would be available on return. In particular, paragraphs 47 to 49 demonstrate the judge's succinct consideration of the factors which led her to a discretionary conclusion. She said, and this is the essence of her decision on the point

> "I have weighed these available resources in the balance but am not satisfied that they would be sufficiently well established or adequate to justify a summary return in the circumstances of this case. That is, the mother's subterfuge to avoid the process of law in Mexico was sophisticated and planned, aided and abetted by members of her family and influential friends. I accept the evidence of Ms Rodriguez Macias that she heard the maternal grandfather's implicit threat to ensure that Lydia would not be found again. I consider a gamut of protective measures established on the ground and critically appraised after establishment in welfare proceedings will be necessary. These factors suggest that 'usual'

> safeguards imposed by the Court will be inadequate to prevent a further 'disappearance' in the short-term."

25. In my judgment, that demonstrates the careful conduct of a balance of the evidence that went in favour of protective measures and the evidence that went against the availability of adequate protection. The judge's acceptance of the evidence of Ms Macias was not general but specific to this case, and would almost of its own be a sufficient shield against Mr Gupta's criticism.

26. I wish to add one or two footnote points. The first is that in paragraphs 39 to 45 inclusive the judge explained a conclusion that the parties were not at liberty to enter into the consent order of 29 March 2012 in Mexico without the permission of the English court, as a consequence of the extant wardship order. The judge expressed that view conclusively in paragraph 45, when she said:

> "The Court must be rigorous to scrutinise the jurisdiction and merits of an application seeking wardship in respect of a minor or other vulnerable person. Conferring status of ward is not and should not be regarded of limited consequence and effect. The Court does not merely 'rubber stamp' the agreements of parents or other parties, however intelligent they may be and whether of full capacity once it has assumed the obligations of parens patriae. That it may have done so on an examination of this case after the event does not act as retrospective consent to fix Lydia's habitual residence in Mexico at the time of the parents' agreement."

I have already expressed the view that the perfunctory application for a standard form wardship order made some three and more years before the Mexican trial could not possibly be said to have the consequence that the judge gave it. In my judgment, it was no more than part of the history. It was of no continuing consequence to the crucial mediation in Mexico on 28 and 29 March. The parties were not negotiating welfare issues; they were negotiating only the question of whether or not there should be an order for summary return.

27. The second footnote is that this is a quite extraordinary case, and it is not surprising that it has risen to high levels of concern, both within and without the Family Justice systems in both jurisdictions. It is, on one view, a classic case of snatch and counter-snatch, and such cases are always particularly difficult to resolve, not just within the context of proceedings for summary return but in the wider context of the promotion of the future welfare and protection of the child in the climate of unilateral adult action.

28. That leads me to my third footnote, which is to emphasise that all that the judge was deciding in October was that this was not a case for summary return. All that we are

deciding is that the judge correctly arrived at that conclusion. The far more difficult questions lie ahead on an investigation of all the welfare and child protection issues that result from the failure of the summary return application.

29. It would appear that those proceedings will be here in London and the primary responsibility will be on a judge of the Family Division. But nothing that is decided in London is likely to be wide enough in extent for this child, whose heritage and future lie between two different jurisdictions, two different continents, and two different cultures.

30. Thus, it is essential that there should be close judicial collaboration, to ensure that her future is not abused by any unilateral wrongful action that either parent might be tempted to take. Fortunately, Mexico has appointed a judge to the Hague International Judicial Network. It has been my experience and the experience of my office that we have always received the most generous and swift assistance from the Mexican Network Judge whenever we have asked for it, so I have no doubt at all that, insofar as judicial collaboration can be needed, it is assured.

31. Although I do not consider that Mr Gupta's submissions come anywhere near establishing reasonable prospects of success, given the complexity of the case and its history, I would suggest the grant of permission, but that the consequent appeal be dismissed.

Lord Justice Longmore:

32. I agree. Speaking for myself, I have been much impressed in this case by the skill and care devoted by both the Mexican court system and the Mexican personnel from the Mexican Embassy in London who have attended the proceedings, both before Macur J and before this court. The fact that both this court and the judge have rejected the mother's case for summary return is no reflection of any kind on the Mexican procedures or the way the case has been dealt with by the Mexican court. The fact that it will be for the court in England to decide on Lydia's long-term welfare future, if the parents cannot themselves agree it, does not preclude the judge in England from reaching a decision which will take fully into account, as appropriate, the agreement reached between the parents in Mexico and the resulting court order.

33. In these circumstances, the judge's confidence expressed in paragraph 55 of her judgment that no undue offence will be caused to the Mexico court by her decision seems to me to be amply justified and to do him justice, Mr Setright QC, who appeared on Mexico's behalf, did not in any way suggest the contrary.

34. For the reasons given by my Lord, Lord Justice Thorpe, I agree that permission should be granted but that the appeal should be refused.

Lord Justice McCombe:

35. I also agree that permission to appeal should be granted and the appeal dismissed, and wish to associate myself also with remarks made by my Lord, Lord Justice Longmore, about the helpful assistance afforded to this court by the Mexican authorities and his remarks about the steps taken by the Mexican judiciary.

36. I only add a few more words to express some views as regards one of the footnotes entered by my Lord, Lord Justice Thorpe. With considerable hesitation and respect, I presently disagree with regard to the position concerning the effect of the outstanding wardship order in this country. I should say that the outstanding wardship order provided in paragraph 1 that the child be a ward during her minority or until further order of the court. I understand that, in traditional terms, the wardship order such as that made by HHJ Mayer in 2009 is capable of overriding the ability of a parent to take decisions affecting his or her child without the intervention of the court. If that is correct, on that face of that order it might therefore be capable of preventing the father as a matter of English law alone from consenting to the agreement enshrined in the order of 29 March 2012 in Mexico; I say "might".

37. The fact that the wardship proceedings have been dormant for some time does not, as a matter of ordinary procedure as I understand it, render that order ineffective without time. For my part, I would have wished that point to be rather further explored than was capable of being done today, before expressing a final view of the matter, had it been vital to our decision. However, the point made by the judge with regard to the wardship order was only very much an alternative to the two other grounds upon which she based her decision, and for the reasons given by my Lord I agree that the application for permission succeeds but the appeal fails on the habitual residence and Article 13B grounds. My decision, therefore, rests on those two grounds alone, and I express no concluded view as to the effect of the extant English wardship order upon the father's competence under the law of England and Wales to agree to the Mexican order of 29 March 2012.

Order: Appeal dismissed.