LATEST DEVELOPMENTS IN THE FIELD OF CHILD ABDUCTION

7th June 2011

1. Re K (Abduction: Case Management) [2011] 1 FLR 1268 Court of Appeal; Thorpe and Munby LJ and Coleridge J

1.1 In this case the parents were Polish and lived in Poland together until, in order to escape continuing conflict with the Father, the Mother left Poland with the youngest child (aged 8) moving to England to reside with her elder daughter who was settled in the UK. The Mother then issued divorce proceedings in Poland. Around 7 months following the move the Father issued an application for a summary return of the child under the Hague Convention.

1.2 The Mother raised three defences: acquiescence under Article 13(a), grave risk of harm under Article 13(b) arguing as to the impact of marital conflict on the child and finally, the child's objections to a return under Article 13(c). By the time of the hearing, the Father was proposing that the Mother and child return to Poland to live with another daughter in a village adjoining the matrimonial home.

1.3 The CAFCASS Officer reported that the child had described constant conflict between the parents and strongly objected to a return to the matrimonial home, but did not object to a return to her sister's home in Poland, though on balance would much prefer to remain in England.

1.4 Jackson J refused to make a return order on the basis that the Mother had established both the defence of grave risk and that of the child's objections. The case went to the Court of Appeal.

1.5 Three important points came through from the Court of Appeal when they allowed the appeal and made the return order:

a. At the directions stage an order had been made for the parties to file and serve statements of evidence limited to acquiescence, and provided (unusually) for there to be oral evidence on the same topic. Thorpe LJ in a few paragraphs on *"cardinal case*

management rules" repeated the well known fact that in Hague cases oral evidence is seldom ordered:

"There should be no departure from the well-recognised proposition that Hague applications are for peremptory orders to be decided on written evidence amplified by oral submissions" **(para 13)**

It was further observed, that there would not be the same requirement for oral evidence in a case in which the defence is not consent but acquiescence.

b. There must be a clear distinction made between the objections of a child and the child's wishes and feelings:

"The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot tbe said to amount to an objection unless there is a strength, a conviction and a rationality that satisfies the proper interpretation of the Article." **(para 24)**

It was decided that in this case, the child's objections had not been made out as the child had objected specifically to a return to the matrimonial home and understood that she would not be required to do so.

c. The defence of grave risk was also found not to be made out on the basis that Brussels II Revised, Article 11(4) bound the courts in a European abduction case not to refuse to return a child on the basis of the Article 13(b) defence of grave risk or intolerable situation unless it was established that adequate arrangements could not be made to protect the child on return (emphasis added). In short, the Judge was not entitled to refuse the return of the child unless it was plain that adequate arrangements were not available to protect the child on her return. If the Judge had had misgivings he could also have put in place protective undertakings. The Mother had also initiated divorce proceedings in Poland and thus being seised of the matter that State could have provided protective measures.

2. Re O (children) (abduction: settlement) [2011] All ER (D) 179; 1 FCR 363 Court of Appeal, Wilson, Pitchford and Black LJ

2.1 This was an appeal from HHJ Wallwork sitting as a Deputy High Court Judge relating to his decision to return children to the USA. The parents, originally from Nigeria and who were Nigerian citizens, had 2 children together after meeting in the USA in 2000 where the family then made their home. The Father also had US citizenship. Whilst on a holiday to Nigeria in February 2009 the Mother decided that she could not return to reside in the USA due to the behaviour of the Father so she and the children decided to settle in Nigeria.

2.2 In July 2010 the Mother and the children came to the UK for a holiday and on learning of the trip the Father made an application under the Hague Convention. The Father gave very misleading information as to the circumstances in which the Mother had left Nigeria and orders were made in the English High Court which prevented the Mother and children leaving the UK pending a decision on the Hague Convention application. The Judge found that proceedings had been commenced more than 12 months after the wrongful retention and that the children had become settled in Nigeria within the terms of Article 12 of the Convention. However, he went on to conclude that the children nevertheless ought to be returned to the USA stating that they were of an age where they would be *"able to adapt more readily than older children who [might] have established deeper attachments and networks to family, friends and environments"*.

2.3 Not surprisingly the Mother appealed, arguing that the Judge had mistakenly believed there was a presumption in favour of the children being returned to the country of their habitual residence; that he gave to much weight to Hague Convention considerations and failed to examine the issue of welfare in the context of deciding if the children ought to be returned.

2.4 The Court of Appeal had little trouble in allowing the appeal stating that in exercising its discretion under the Hague Convention as to whether or not to return a child, the individual circumstances of the child had to be examined and weighed into the balance. The children themselves did not view the USA as their home and were well settled in Nigeria in comfortable circumstances for their welfare. In addition, and given the very poor conduct of

the Father, it would be much easier for the Mother to cope with such conduct in Nigeria where she had the support of her family.

3. Re G (Abduction: Children's Objections) [2011] 1 FLR 1645 Court of Appeal Thorpe and Smith LJ

3.1 This case involved a British family. The Father, after running into financial difficulties, moved to Canada to work. Two years later the rest of the family joined the Father in Canada but after a year the marriage came under strain and towards the second year in Canada, the Mother, on the pretext that she was taking the girls to the theatre, abducted them to England.

3.2 The Father waited for 6 months before issuing an originating summons for their return under the Hague Convention. The Mother raised the defences of acquiescence, grave risk of harm and the objections of the children. The Judge at first instance rejected the defence of acquiescence although it was not clear why the Father had so delayed in issuing proceedings and he also rejected that there was a grave risk of harm. The CAFCASS Officer reported that the children, now 13 and 9 had a real objection to returning to Canada and the Judge, although he did not meet with the children, did read a letter from the elder child expressing her clear opposition to returning to Canada.

3.3 The Judge accepted that both children objected to a return, not merely to a return to family life with the Father but nonetheless chose to exercise his discretion under Article 13 of the Hague convention to order their summary return. The Mother appealed and unusually, the Court heard fresh evidence by way of the elder girl meeting with the Judges.

3.4 The Court of Appeal allowed the appeal and set aside the return order. It was held that courts needed to be aware of the very real difficulty of implementing a return order which involved *"an articulate, naturally determined and courageous adolescent"*

3.5 The case also gave rise to observations by Thorpe LJ as to the real benefits of mediation in such cases:

"Another concern I have is that in cases such as this, where the abduction is simply a reaction to great stress within the family, the physical return of the children does nothing to address the underlying problems. Thus more and more emphasis is placed on the importance of mediation cases involving the wrongful removal of children" **(para 16)**

4. WF FJ, BF AND RF (Abduction: Child's Objections) [2011] 1 FLR 1153 Baker J

4.1 This case involved a British Mother and German Father, the Mother remained in Germany after the divorce and the Father enjoyed regular staying contact. The Mother remarried and had a child but that relationship broke down and the Mother left the country with all 3 children for England without informing the fathers. The first husband sought the summary return of his daughter and son, now 13 and 12. The Judge gave directions inter alia joining both children as parties before either had been seen by CAFCASS and providing that both ought be represented by a specific solicitor.

4.2 A summary return was refused on the basis of the objections of the children to a return finding that returning the son alone would place him in an intolerable situation. In respect to potential separation of the children Baker J quoted Ward LJ who in **Re T (Abduction: Objections to Return) [2000] 2 FLR 192** said that *"the exercise of discretion cannot. . . properly be made by treating each child in isolation. The child's place within the family, and the consequences of the exercise of discretion on that child, must be considered."* **(para 40)**

4.3 The court is to consider the sibling group together and exercise its discretion as to whether or not to return the children *"in the round"* rather than establishing whether or not the gateway to discretion was open in the case of each child before going on to consider the exercise of the discretion.

4.5 Two issues arose during the course of the hearing as to the status of B and R within the proceedings. The Judge made the following observations:

a. There is a "laucuna" in the Family Proceedings Rules in respect of the powers to permit B to directly instruct her own solicitor. The Judge expressed the hope that the Family Procedure Rule Committee would find time to review the matter.

b. It is preferable that a child should, time and resources permitting, be seen by the CAFCASS High Court team prior to any decision being taken as to party status.

5. Neulinger and Shuruk v Switzerland; Application No 41615/07, [2011] 1FLR 122

5.1 In this pivotal case, the Mother abducted the child from Israel to Switzerland in June 2005. In May 2006 the Israeli court declared the child's place of habitual residence to be Israel but on the 29th August the first instance Swiss court refused to order any return on the basis that the Mother had established an Article 13(b) harm defence and the court decided to use its discretion not to order a return.

5.2 The Swiss Appeal court subsequently dismissed the appeal of the Father but on the 16th August 2009 the Swiss federal court allowed Father's appeal and ordered a return to Israel pursuant to Article 12. The Mother then appealed to the European Court of Human Rights who dismissed her appeal on the basis that the child's rights, pursuant to Article 8 of the European Court of Human Rights 1950 had not been breached.

5.3 Finally, on the 10th September 2010, the Grand Chamber of the European Court of Human Rights overruled the decision of the first chamber and discharged the return order. The court found that the Mother's and the child's Article 8 ECHR rights would be disproportionately breached if a return was ordered, commenting that:

"It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences (see the UNHCR Guidelines, paragraph 52 above). For that reason, those best interests must be assessed in each individual case". **(para 138)**

and further observed that:

"It is not the Court's task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if he returned to Israel. However, the Court is competent to ascertain whether the domestic courts, in applying and interpreting the provisions of that convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests." **(para 141)**

5.4 [The UK courts must follow relevant decisions of the ECR to the extent that it represents the court's clear and consistent jurisprudence **R (Alconbury) v Secretary of State for the Environment [2003] 2 AC 295, HL**

6. Re T [2011] Fam Law 220 Jackson J

6.1 An Italian Father and a British Mother had 3 children aged 7, 4 and 2 known as D G and L. D had an autistic spectrum disorder. The parents married in the UK and the children were born there. In July 2009 the Mother and children moved to Rome to join the Father but in April 2010 the Mother abducted the children. The Father issued a summons under the Hague Convention seeking the return of the children to Italy whilst the Mother submitted that

(i) the children were not habitually resident in Italy on the date that she had brought them to England.

(ii) D objected to a return and had reached an age and degree of maturity where it was appropriate to take his views into account.

(iii) that any such return would expose the children to a grave risk of psychological harm or otherwise place them in an intolerable situation and that she would not be able to accompany them.

6.2 Jackson J made it clear that in hearing a summons under the Hague Convention the issue was not *"what is best for the child?"* but *"who should decide what is best for the child?"* The Judge went on to find that the children had been habitually resident in Italy and that though D did not wish to return to Italy his views did not amount to an objection.

6.3 He emphasised in respect of the *"grave risk of harm"* that there needed to be clear and compelling evidence; it was a high threshold. Of key importance, the Mother made it clear that she would not return and the Judge found that to return the children without her was not an acceptable option. To be separated from her would be to expose them to a grave risk of emotional harm. Even if she changed her mind however and were willing to return, it would be too heavy a burden on her own right to family life. This together with the very particular needs of D meant that circumstances combined so that an order to return would place the children in an intolerable situation. Crucially, the Judge was satisfied that protective measures in Italy could not mitigate the aforementioned harm.

6.4 In relation to **Neulinger** and its potential impact on the Article 13(b) harm threshold, the Judge commented that **Neulinger** is not a warrant for permitting the defences to be approached in a broad or liberal manner, and that **Neulinger** ought not be taken as a *"sea change"* or as representing a *"seismic shift"* in terms of how Hague Convention cases ought be approached.

6.5 In an obiter remark the Judge noted that **Neulinger** did not *require "the court to transform its approach to Hague Convention proceedings whether in terms of principle or procedure. The true effect of that decision did not require the court to carry out an in-depth examination of the entire family situation each and every case as to do so would defeat the very purpose of the Convention."*

6.6 Indeed, the Judge added that if he were wrong, **Neulinger** *"would conflict with established binding authority in this jurisdiction"* **(para 14-16)**

7. **Eliassen and Baldock v Eliassen and others [2011] EWCA Civ 361**

7.1 This case involved a Norwegian Father and a British Mother. The two children of the parties were married in May 2004 and April 2007 and the Mother has a daughter from a previous relationship who was joined as a party in the High Court.

7.3 In September 2010, unbeknown to the Father, the Mother and the children left Norway for England and consequently, later that month, the Father made his application to the Central Authority in Norway for the return of the children.

7.4 In November 2010 Pauffley J granted the Father's application for a return order.

7.2 This decision went to the Court of Appeal had to consider the recent decision of the European Court of Human Rights in **Neulinger** which had, to quote Thorpe LJ *"caused a considerable stir amongst practitioners in the field of international family law"*. Such was the nature of the hearing that Reunite and AIRE Centre intervened in the case to make submissions on the law. The crux of the matter coming before the Court was whether a defence under Article 13(b) of the Hague Convention requires the court to conduct a full welfare enquiry.

7.3 The Strasbourg jurisprudence was extensively reviewed by Thorpe LJ (including Maumousseaau, Raban and Van der Berg) so that the decisions could be considered together with the conclusion that there was "little support" for the contention that the decision in Leulinger requires the court to adopt a different approach in the application of the Convention defences, and of Article 13(b) in particular.

7.4 This case went on appeal to the Supreme Court on the 23rd and 24th May. Judgment is awaited.