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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2022] EWHC 1193 (Fam)



No. FD22P00170

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 11 May 2022

Before:

MR JUSTICE HOLMAN

(In public)

B E T W E N :

JOSELIA FELIX DA SILVA

Applicant

- and -

ANTONIO DEUZINHO PEREIRA JUNIOR

Respondent

(Abduction: Article 13B and child's objections)

MR M. JARMAN (instructed by International Family Law Group LLP) appeared on behalf of the applicant mother.

MR T. GILCHRIST (instructed by J. Bensons Solicitors Limited) appeared on behalf of the respondent father.

J U D G M E N T

(AS APPROVED BY THE JUDGE)

MR JUSTICE HOLMAN:

1 This is an application made by a mother pursuant to the Hague Convention for the return of the parties' only child to Portugal. As I will shortly explain, this is, in my view, a very clearcut case of a wrongful retention within the meaning and scope of the Convention.

2 Both parties originate from Brazil, but have now lived for many years in Portugal. They are still married to each other although they have been separated for several years. They have one child, namely J, who was born on 2 October 2012 and is accordingly now aged 9.

3 There seems to be some divergence between the parties as to when exactly it was that they separated but it was certainly now several years ago. The father left the home and appears to have been content to leave J living in the care of his mother. I mention that the father states that it was in June 2020 that he took on his mobile phone a photograph of a stick, which is depicted in some text messages sent between the parties on 20 August 2021. At paragraph 9 of his witness statement dated 31 March 2022, the father makes reference to this stick and taking a photograph of it, and uses the word "torture" to describe the mother's treatment of the child as long ago as in or before June 2020. Notwithstanding that fact, the father appears to have been content to leave J in the actual care of his mother; and, indeed, in December 2020 the father himself moved to live permanently in England but leaving J in the care of his mother, whom the father says was in the habit of torturing J with the stick.

4 In August 2021, the father returned for a period to Portugal. He asked that J be permitted to spend some time staying with him, with which the mother agreed. As I understand it, it is common ground between the parents that J moved from living with his mother to staying with his father on 24 August 2021. As a matter of fact, J has now been in the continuous care of his father ever since that date, 24 August 2021.

5 The father wished to be able to bring J to England and asked the mother for her permission. As a result, both parties appear to have instructed lawyers in Portugal and to have attended upon a notary in Portugal on 31 August 2021. As I understand it, both parents were on that date in the same room together in the presence of the notary. The father produced a document, or asked the notary to prepare a document, which the mother was asked to sign. The original in the Portuguese language is now at bundle page 113. The translation is at bundle page 14. That document does record the consent of the mother to J travelling:

“From Portugal to the United Kingdom of Great Britain and Northern Ireland (and then to France) and return to Portugal, in the company of his father.”

It is right to say, and Mr Tom Gilchrist, on behalf of the father, places heavy reliance on this, that the document continues with the words:

“This consent is valid for one year, starting from today, August 31, 2021.”

6 Pausing there, it is important to note that even that document is clearly not contemplating a permanent removal or transfer of the child from Portugal to the United Kingdom. It clearly contains within it a reference to then going to France and there being “return to Portugal”. The document which the mother produced is in Portuguese in the bundle at page 109 and in translation at page 111. She required the father to sign this document and he did so. It clearly states:

“While travelling with the minor ... to London and Paris, I undertake to return until [which I read as meaning, by] September 12, 2021 except for any inevitable circumstance.”

7 Mr Gilchrist submits that there is a conflict between the document signed by the father and the document signed by the mother. In my view, one should strive to read these documents

together to make a coherent whole. It seems to me that the document signed by the mother was intended to permit a round trip from Portugal, to the UK and then to France, with a return to Portugal at some point in a period ending 31 August 2022. In any event, the very fact that the mother insisted upon the father signing the undertaking that he would return the child by 12 September 2021 is, in my view, completely inconsistent with any notion that the mother was consenting in any way to any longer term removal of J from Portugal to England or anywhere else. It is said by the father that the mother in some way coerced him into signing that document, although the nature of the coercion or pressure has not frankly been explained. However, and in any event, if it be the case that the mother coerced or pressurised him into signing that undertaking, that in no way strengthens his case that the mother consented to the removal. Rather, it undermines any idea that the mother was consenting to longer term removal.

8 For those short reasons, I reject the defence of consent which has been advanced on behalf of the father. In my view, this was and is a straightforward case of one parent (the mother) agreeing to a holiday period abroad, to end not later than 12 September 2021, which was on or about the date of the beginning of the new school term in Portugal. Having lawfully brought the child to England on 2 September 2021, the father then kept him here, and still keeps him here, without the agreement of the mother, and this is a very clear case of a wrongful retention under the Convention. There is no doubt, and it is not in issue, that immediately prior to that retention, the child was habitually resident in Portugal where he had lived throughout his life; that his mother had rights of custody; and that she was actually exercising those rights. So this is a clear and straightforward case in which I must order the return of the child forthwith to Portugal under Article 12 of the Convention unless one of the other defences that are relied upon under Article 13 of the Convention are established.

9 The first one relied upon by the father is that there is a grave risk that the return of the child would expose him to physical or psychological harm, or otherwise place the child in an

intolerable situation. That entire defence has been based, on the facts and in the circumstances of this case, on the allegation that the mother used frequently to hit the child with a branch or stick. Indeed, it is said (and has been said by the child himself to the Cafcass officer, Ms Helen Ashton) that she hit him with a stick on his legs as much as five times a day.

- 10 I am, frankly, sceptical as to the underlying facts and proof of that allegation, which the mother very strongly denies. In the first place, there is evidence from the school that the child was attending in Portugal in the form of a letter or statement from the teacher dated 18 March 2022, the translation of which is now at bundle page 148. That states that J was a regular and punctual attender at school, and that:

“He always presented himself clean and neat, not showing any signs of a possible dangerous situation and disclosing that he is fed at home...”

The letter goes on to speak positively of the mother and her engagement with the school, and ends:

“Up to the end of the school year, I did not observe any signs of a possible dangerous situation.”

- 11 It seems to me improbable (although possible) if the child was being regularly hit several times a day with a stick on his legs, particularly if it was such as to cause bruising, that the school at some point would not have noticed the marks and, indeed, picked up on the distress of the child. Further, when J was seen by the Cafcass officer, Ms Helen Ashton, last month, he, as she describes, immediately gave to her what she sensed to be an indoctrinated account that his mother hit him “five times per day with a piece of wood”. When Ms Ashton asked him whether this left any marks, he rolled up his trouser leg and pointed to what was evidently a minor fresh bruise, and told her that this was sustained as a result of

his mother hitting him with a stick (see paragraph 10 of her report). Since it was by then about eight months since J had even been in the presence of his mother, that assertion by him was patently objectively nonsense.

12 However, and in any event, even if, as to which I make no actual finding, the mother did abuse J by hitting him with a stick, there is no risk of her being able to do so consequent upon a return pursuant to the Convention. The reason for that is that the father has made it very clear, both at the aborted hearing on 3 May 2022 and again throughout this hearing today, that if the child is to be returned to Portugal, he, the father, will accompany the child and will continue to take care of him in Portugal until the first hearing before an appropriate court in Portugal. The mother would no doubt prefer the child to return immediately to her care, but she has not in any way resisted that, initially, the return should be with the father. One of the undertakings that she offers, and which will be recorded in the order, is that she will not seek to remove J from the father's care or, indeed, contact J in any way at all once he is back in Portugal, except for such contact as may be agreed between the parties in writing, until a first hearing in front of the appropriate Portuguese court.

13 So, frankly, there is not the slightest risk to this child from his mother if I order his return forthwith to Portugal in those circumstances that I have just described. For that reason, coupled, as I have said, with scepticism (I put it no higher than that) about the whole story of the beatings with the stick, I reject the defence of grave risk of harm that is relied on in this case under Article 13(b).

14 Secondly, and finally, the father relies upon the objection of the child to a return to Portugal. This defence also arises under Article 13 and it is important that I read out the actual words of the Convention:

“The judicial ... 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.”

15 Pausing there, it is only necessary to stress that the relevant word in Article 13 is “objects”, which is stronger than a mere wish or preference. Further, even if the court does find that the child objects to being returned and is of an age and degree of maturity at which it is appropriate to take account of the child’s views, that merely opens the door to the exercise of a discretion not to order the return of the child. It does not operate as an automatic bar to the return of the child. There is a huge overlay of jurisprudence that has arisen over many years in relation to the objections defence, but in the present case, frankly, it is not necessary to say more than I have just summarised.

16 It is important when considering this defence in this case to have firmly in mind that there is material from Portugal, pre-dating all these events, as to the psychological diagnosis of this child. This is best found at pages 59 - 60 of the present bundle, which are medical reports respectively dated 27 July 2021 and 8 September 2021. Reading from the later of those reports:

“...it is planned that J is being accompanied at the neuropaediatric consultation for three to four years for deficit of attention, perception, and motor coordination syndrome with hyperlaxity and limited cognitive state, and autism spectrum disorder. He presents, therefore, with learning difficulties ... and behavioural changes with low tolerance for frustration and some inappropriate attitudes in the classroom context and socialisation difficulties...”

17 There is a very full report in this case from the Cafcass officer, Ms Ashton, who met J, and she has also given some oral evidence this morning. It is absolutely clear from numerous

passages in that report that Ms Ashton had, as she still expressed this morning, considerable reservations as to the authenticity of what J stated to her. She explains why in her report, which includes how, whilst she was still trying to have some general introductory exchanges with J, he immediately interrupted to declare that his mother hit him five times a week with a piece of wood and that he did not want to return to Portugal. However, she describes in her report that this was said without any degree of conviction or emotional display.

18 Ms Ashton describes at paragraph 17 that J's speech had a rehearsed and artificial quality about it. She describes at paragraph 18 that he was unable to provide any contextual detail and she did not gain a sense that his accounts were being recalled from visceral memories; rather, that he was reciting from a scripted narrative. She describes that she found him to be quite suggestible and rather easily led, and says at paragraph 21 that:

“Regrettably, I am led to conclude that it is likely that J is displaying traits of a child who has been exposed to alienating behaviours. For this reason, I therefore hold reservations about the reliability of J wishes and feelings in respect of a return to Portugal...”

19 Very appropriately, Mr Gilchrist asked some questions of Ms Ashton to the effect that she might have been misinterpreting the presentation of J because of his DAMP syndrome and possible autism. It is, of course, possible that Ms Ashton was not making sufficient allowance for that, but that possibility cannot be converted into any probability about the authenticity of J views.

20 For the purposes of this hearing and my decision today, where I have not, of course, heard any oral evidence from either parent nor any expert psychological evidence, I must in the end proceed on the basis that it currently strikes the experienced child and family reporter that the expressed views of J have been influenced, if not indoctrinated, by alienation and things said to him by the adults around him.

21 Having said all that, Ms Ashton does clearly express the opinion, both in her report and in her oral evidence, that J is expressing an objection to return. However, it is much less clear whether that is an objection to return to Portugal as such, or an objection to having to leave his father and return to live with his mother. These analytical distinctions were (understandably) not fully explored or teased out by Ms Ashton; but, frankly, I am far from clear that J is really expressing an objection to return to Portugal as such. He does not seem to have appreciated that he could return to Portugal but remain, for the time being, living in the care of his father.

22 So far as J's degree of maturity is concerned, Ms Ashton states both in her written report and in her oral evidence that, in her view, his level of maturity is a little (although not significantly) below the degree of maturity that one would associate with a boy now aged 9.

23 On behalf of the mother, Mr Mark Jarman, who is immensely experienced in this field, expressly conceded that J does express an objection to return, although Mr Jarman emphasised that it is less clear whether it is an objection to abstract return to Portugal, or an objection to return to living with the mother. I am myself prepared to proceed on the basis that there is a level of objection by this child, certainly to returning to live with his mother, which, in his own mind, may be mixed up with return to Portugal itself. But assuming that that does open the door to the exercise of a discretion, I still have to take into account a whole range of factors. These include, as summarised by Williams J in the case of *Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) at paragraph 50(vi):

“...the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they

coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations..."

24 Those "general Convention considerations" include those referred to by Peter Jackson LJ at paragraph 41 of the authority of *G (Abduction: Consent/discretion)* [2021] EWCA Civ 139, where he said:

"...In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare."

25 There is, in this case, at least an abstract desirability of the "swift restorative return" of a plainly abducted child. There are undoubted benefits of decisions about this child being made in his home country, where he has always been habitually resident and of which he is a citizen. There are abstract considerations of comity; and it is important in this case, as in every case, to deter abduction without, of course, sacrificing the welfare of the individual child concerned upon the altar of deterrence.

26 In my view, the evidence of an objection in this case is not particularly strong. There is considerable reason, as explained so fully in the report of Ms Ashton, to doubt whether the views and objections of the child are "authentically his own" or are the influence of the abducting parent. It does not seem to me that there is any reason to suppose that there will be any, or any significant, welfare harm to this child if he now has to travel for a period to Portugal in the care and company of his father with whom he has been living for the last nine months or so. Sooner or later he will have to return to Portugal, if only for holiday periods. There are already proceedings in existence before an appropriate court in Portugal,

which can be very rapidly seized again of welfare considerations in relation to this child. In my view, this is a plain case in which, at this point and at this stage of his life, he must return to Portugal, and I will so order.

CERTIFICATE

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