

English court exercises jurisdiction in retrospective leave to remove case (Re X, Y and Z)

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Family analysis: Katherine Dunseath, a barrister at 3 Paper Buildings, and Katie Taft, a senior associate at Ellis Jones Solicitors, discuss a novel family case involving important issues of delay and settlement.

Original news

Re X, Y and Z (children) (Retrospective Leave to Remove from Jurisdiction) [2016] EWHC 2439 (Fam)

Briefly, what was the background to this case?

By application dated June 2016 the mother applied for retrospective leave to remove three of her (four) children aged ten, eight and six years old from the jurisdiction to Spain where they have all resided since approximately March 2013. The application only concerned the three biological children of the respondent father.

The father opposed the mother's application having previously issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) in Spain for the three children to be summarily returned to the UK. There were however a number of long delays in those proceedings including:

- o the father's application under the Hague Convention for summary return of his three biological children took approximately six months to issue
- o the decision to summarily return was then appealed by the mother which took another ten to eleven months for determination by the Spanish appeal court
- o a further six months later the Spanish court ordered enforcement of the return order (September 2015)
- o the collection was then delayed by approximately another three months

By the time the mother issued her application to the English court for retrospective leave to remove the children they had resided in Spain for approximately three years and three months.

What were the key issues in the current proceedings?

This was a preliminary hearing listed by the court in order to determine whether the court should exercise its jurisdiction to hear the mother's application in the circumstances where she was in breach of the order for summary return of the children.

It was argued on behalf of the mother that:

- o pursuant to art 10 of Council Regulation (EC) 2201/2003 (Brussels II bis) in a case of child abduction from England the English court retained jurisdiction
- o in the circumstances of this case the English court should not insist upon compliance with the orders made by the Spanish court as a precondition for the exercise of jurisdiction under the Children Act 1989. In the light of the delay and the settlement of the children in Spain it would not be in their interests to insist upon enforcement of the orders made in Spain without further investigation of their welfare needs, and to do so would be a disproportionate interference with their rights under art 8 of the European Convention on Human Rights which should be given primary weight (in accordance with the case of *Neulinger v Switzerland* (Application 41615/07) [2011] 1 FLR 122, [2010] ECHR 41615/07)
- o the effects of delay in this case, in particular the settlement of the children in Spain without contact with the father for three-and-a-half years, required there to be a proper assessment of what is now in the interests of the children. For the court to order a stay of the mother's application, albeit belated, would be unnecessarily harmful to the children
- o in exercising jurisdiction the court should obtain a report from CAFCASS which should not be limited to

evidence of the wishes and feelings of the children and their progress at school, but shall include a fuller general welfare assessment. Reference was made to the obligation of the court to hear the child from their perspective independently of the abducting parent (*Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961, per Lady Hale at paras [57]–[59] of the judgment). Relying on that case and on what was said in *Re M and another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 FLR 251 (per Lady Hale at para [57]) and in *Re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] 1 All ER 1181 (per Lord Wilson at paras [44]–[55]) in the unusual circumstances of this case the children should be joined as parties to the proceedings and a guardian appointed for them.

The father invited the court to ensure that the three children were returned to the UK in accordance with the Spanish orders under the Hague Convention and to stay the mother's application pending this. In the alternative he invited the court to list a hearing to determine her application requiring her to attend in person. He submitted that an abductor should not be able to rely on a situation of their own making to advance a welfare argument and seek orders allowing the unlawful abduction to continue. He also invited the court to order disclosure of the mother's address in Spain.

What did the court decide, and what facts did it have to take into consideration when reaching its decision?

The court decided to exercise its jurisdiction to hear the mother's application, directed that a guardian be appointed to represent the children and refused to disclose the mother's details to the father.

In coming to this decision the court balanced the various factors including:

- o the obligation to uphold the principles of the Hague Convention and to support orders for return which have been made by courts of competent jurisdiction
- o the right of the mother to access to the English court which alone has jurisdiction and her right to a hearing (albeit a right which may be curtailed or qualified so long as she is in breach of orders to return the children)
- o the rights of each of the children and of each parent, including the father as the 'left behind parent', to respect for their right to family life
- o the rights of the children to be heard and to have their views considered

Any final observations?

This is a novel case involving important issues of delay and settlement, which will now be listed for determination on the mother's application.

It is rare in abduction cases to have the children separately represented by a guardian. On the facts of this case where there are issues of delay and settlement this was the most appropriate way in which the voices of these children could be heard by the court.

Katherine Dunseath has a thriving practice encompassing all areas of family law. She has a particular interest in medical law, human rights arguments and jurisdictional cases. She regularly appears in the High Court and has appeared in the Court of Appeal on numerous occasions.

Katie Taft deals with all aspects of family law and has a particular specialism in the international movement of children including child abduction and international relocation. As well as practicing as a solicitor, Katie is a qualified mediator in family disputes.

In Re X, Y and Z Katherine (instructed by Ellis Jones Solicitors) represented the applicant mother.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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